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# HYBRID COURTS: EXAMINING HYBRIDITY THROUGH A POST-COLONIAL LENS

Elizabeth M. Bruch\*

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## I. INTRODUCTION

The last two decades have seen the rise of ‘internationalized’ and hybrid courts, tribunals established by international and domestic authorities, typically in post-conflict situations where there is wide-scale international involvement. The most well-known of these tribunals are the *ad hoc* tribunals charged with adjudicating claims of war crimes, crimes against humanity and similar gross violations of human rights.<sup>1</sup> Hybrid

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\* Faculty Associate in Law and Social Policy, Valparaiso University School of Law. From 1997-1999, I served as the first Executive Officer of the Human Rights Chamber for Bosnia and Herzegovina. That experience, at both a personal and professional level, has influenced my questions, reflections, understandings and concerns about international interventions and hybrid courts as a feature of such interventions. I am grateful to my friends and colleagues there, from Bosnia and across Europe, for countless conversations that shaped my understanding of the war, law, human rights and so many other things. My thanks also to Renisa Mawani, Bonar Buffam, the Potomac Valley Writers Workshop, especially Johanna Bond, and as always, Dave Gage, for comments on drafts of this article. The views I express here are solely my own

<sup>1</sup> See generally William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia*

courts have been generally embraced by the international community as a pragmatic strategy to legitimate international involvement in post-conflict and other transitional situations and to develop local capacity; such tribunals have been proposed or created in Sierra Leone, East Timor, Cambodia, Kosovo and Bosnia and Herzegovina.<sup>2</sup> It is less clear how the ‘local’ communities affected by the tribunals view them. Although there has been some investigation of the success of these institutions in fulfilling their mandates, there has been limited critique of larger questions of the appropriateness of creating such institutions and endowing them with significant powers. Are hybrid tribunals a manifestation of effective international, transnational or cross-cultural collaboration? Are there risks of real or perceived neo-imperialism in these endeavours? What are the opportunities and pitfalls of a hybrid structure? What does it mean to develop the rule of law in such a context? With on-going international interventions occurring around the globe, it is important to begin to seriously consider these questions.

The international interventions in the former Yugoslavia, East Timor, Cambodia and Sierra Leone in recent years have been conducted under the auspices of United Nations and generally viewed as humanitarian

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*and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT'L L. 279 (2008); David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT'L L. 1 (2007) (evaluating hybrid tribunals in East Timor, Sierra Leone, and Cambodia); Laura A. Dickinson, *Transitional Justice in Afghanistan: The Promise of Mixed Tribunals*, 31 DENV. J. INT'L L. & POL'Y 23 (2002) (discussing hybrid tribunals in Kosovo and East Timor). The Cambodian tribunal received significant recent attention in the press. See, e.g., Seth Mydans, *Trial Begins for Khmer Rouge Leader*, N.Y. TIMES, Feb. 17, 2009, at A5 (noting that “trials are being held by a hybrid tribunal supported by the United Nations that includes Cambodian and foreign judges and prosecutors in an awkward legal compromise that has drawn criticism from human rights advocates and legal scholars”).

<sup>2</sup> See generally Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003) (discussing the merits of hybrid tribunals); Cohen, *supra* note 1 (evaluating hybrid tribunals in East Timor, Sierra Leone, and Cambodia); Dickinson, *supra* note 1 (discussing hybrid tribunals in Kosovo and East Timor); Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347 (2006) (assessing advantages and disadvantages of hybrid criminal tribunals and contrasting them to ad hoc tribunals in Yugoslavia and Rwanda); Michael Lieberman, *Salvaging The Remains: The Khmer Rouge Tribunal on Trial*, 186 MIL. L. REV. 164 (2005) (discussing proposed tribunal for Cambodia); Patricia M. Wald, *International Criminal Tribunals in the 21st Century: Iraq, Cambodia, and International Justice*, 21 AM. U. INT'L L. REV. 541 (2006) (discussing hybrid war crimes tribunals in Iraq and Cambodia); Chandra Lekha Sriram, *Wrong-sizing International Justice? The Hybrid Tribunal in Sierra Leone*, 29 FORDHAM INT'L L.J. 472 (2006) (discussing hybrid tribunal in Sierra Leone).

endeavours.<sup>3</sup> Yet, in some respects these interventions and the subsequent international involvement in nation-building bear traces of past colonial projects. According to conventional wisdom, the age of empire is over, and the global community exists now in an era of post-colonialism characterized in part by a nominal equality of nation-states and peoples. Scholars of post-colonial theory have suggested that this view, grounded in a wishful historicism, is incomplete, and perhaps dangerously misleading.<sup>4</sup> As social theorist Michel Foucault reminds us, power transitions from one form to another; it superimposes new technologies and instruments upon existing forms.<sup>5</sup> Therefore, it might be more accurate to say that remnants of colonialism pervade social, political and economic relationships in the current period, particularly along lines of race, ethnicity and religion and geopolitical axes of East and West, Global North and Global South.<sup>6</sup> These areas of imperial transformation, whereby old patterns of empire take on new forms, are entangled with current geopolitical dynamics of globalization, international development and, in the context of hybrid courts, even the human rights movement.<sup>7</sup>

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<sup>3</sup> See generally ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* (James Crawford & John S. Bell eds., Cambridge University Press 2003) (problematizing humanitarian interventions in East Timor, Bosnia, Rwanda and elsewhere). The U.S.-led intervention in Iraq is significantly more controversial, although humanitarian motives were cited at various points. Nonetheless, because of its differences from UN-sponsored interventions, it is outside the scope of this article. See Wald, *supra* note 2, at (discussing Iraqi Special Tribunal); see also John Dermody, *Beyond Good Intentions: Can Hybrid Tribunals Work After Unilateral Intervention?*, 30 HASTINGS INT'L & COMP. L. REV. 77 (2006) (discussing Iraq).

<sup>4</sup> See Generally, PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (Maureen Cain & Carol Smart eds., Routledge 1992); Barry Hindess, *Not at Home in the Empire*, 7 SOC. IDENTITIES 363 (2001); Colin Perrin, *Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples*, in *LAWS OF THE POSTCOLONIAL* 19 (Eve Darian-Smith & Peter Fitzpatrick, eds., University of Michigan Press 1999).

<sup>5</sup> MICHEL FOUCAULT, *Society Must Be Defended*, reprinted in *THE ESSENTIAL FOUCAULT: SELECTIONS FROM ESSENTIAL WORKS OF FOUCAULT, 1954-1984*, at 294-99 (Paul Rabinow & Nikolas Rose eds., 1994).

<sup>6</sup> See ORFORD, *supra* note 3, at 11 (noting modern humanitarian projects seem to “rehearse colonial fantasies about the need for benevolent tutelage of uncivilized people who were as yet unable to govern themselves”); see also SHERENE RAZACK, *DARK THREATS AND WHITE KNIGHTS: THE SOMALIA AFFAIR, PEACEKEEPING, AND THE NEW IMPERIALISM* 9 (University of Toronto Press 2004) (“When New World Order mythologies refer to the obligation of the First World, and the United States in particular, to teach the Third World about democracy, the underlying logic is the same as nineteenth-century colonialism and imperialism’s notion of a civilizing mission.”).

<sup>7</sup> See DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* 4 (Princeton University Press 2000) (noting the ways European thought and history have influenced modern concepts such as

Drawing insights from post-colonial theory, together with critical globalization studies and related social theory, this article re-examines one of the earliest and most expansive international humanitarian interventions in recent history, the intervention and on-going mission in Bosnia and Herzegovina. Given the temporal and geographic scope of both the conflicts in former Yugoslavia and the subsequent international interventions, there is tremendous complexity to address even in the more limited context of Bosnia and Herzegovina. This article will therefore use a hybrid tribunal created by the General Framework Agreement for Peace (the Dayton Peace Agreement) as a prism to focus and refract the larger issues at play.<sup>8</sup> The Human Rights Chamber for Bosnia and Herzegovina was a hybrid human rights tribunal created by the Dayton Peace Agreement as one part of the broader international presence. This article will begin by problematizing the ‘hybrid’ structure of the Human Rights Chamber using post-colonial elaborations of hybridity and mimesis. It will then examine the purported goal of establishing the rule of law, considering the substantive and procedural law developed and applied by the Chamber, in the larger context of the international presence. Then, it will (re)turn to questions of identity for Bosnia and Herzegovina, which is uniquely situated in and on the border of Europe. Throughout, it will seek to identify strands of empire threaded throughout the international mission and institutions in Bosnia and Herzegovina. It will also, however, note facets of the international presence in and experience with Bosnia and Herzegovina that diverge from imperialist traditions and constructs.

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human rights); *see also* PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* 146 (Cambridge University Press 2001) (linking imperialism with globalization); Gil Gott, *Imperial Humanitarianism: History of an Arrested Dialectic*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 19 (Berta Esperanza Hernandez-Truyol ed., New York University Press 2002) (discussing connections between colonialism and humanitarian intervention in the Victorian era and linking to present humanitarian projects); Hindess, *supra* note 4 at 374 (noting ‘development’ has replaced empire as a “great liberal project of improvement”).

<sup>8</sup> Other Human Rights Chamber [hereinafter Chamber] personnel have also written about their work with the Chamber. *See generally* Rona Aybay, *A New Institution in the Field: The Human Rights Chamber of Bosnia and Herzegovina*, 15 *NETH. Q. HUM. RTS.* 529, 529 (1997) (international judge at the Chamber); Manfred Nowak, *The Human Rights Chamber for Bosnia and Herzegovina Adopts its First Judgments*, 18 *HUM. RTS. L.J.* 174, 176 (1997) (international judge at the Chamber); Laura Palmer & Cristina Posa, *The Best-Laid Plans: Implementation of the Dayton Peace Accords in the Courtroom and on the Ground*, 12 *HARV. HUM. RTS. J.* 361 (1999) (Posa was a summer intern with the Chamber, and Palmer with the International Criminal Tribunal for Yugoslavia [hereinafter ICTY]); J. David Yeager, *The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transitional Justice*, 14 *INT’L LEGAL PERSP.* 44 (2004) (international lawyer at the Chamber).

It will conclude by raising important issues for further interrogation in the on-going assessment of hybrid institutions.

## II. CONSTRUCTED HYBRIDITY: OPPORTUNITIES AND INEQUITIES OF INTERNATIONALIZATION

The notion of hybridity is, for the most part, deployed unproblematically in the context of hybrid courts and tribunals. In this context, hybridity signifies the blended nature of such tribunals, which include national and international components. Typically, they comprise both foreign and domestic judges, and they may apply domestic law, international law or a combination of both.<sup>9</sup> Thus, both the structure and the function of these tribunals is purposively hybrid in nature. For most international legal scholars and practitioners, it has been enough to note this feature and move on to assessing the work of the tribunals in relation to their mandate.<sup>10</sup> Post-colonial theory, however, suggests that something more complex is at work in hybrid tribunals. Hybridity implicates process as well as structure; it is relational and dynamic. As such, it is imbued with the potential for relations of dominance, of contestation, and of creativity. A more nuanced understanding of hybrid institutions depends upon exploring those relationships.

### A. *Understanding Hybridity*

In its most literal sense, hybridity invokes its biological and botanical origins, describing the intermingling of two previously separate entities (or species), forming a new and distinct creation.<sup>11</sup> This is the sense most international lawyers and policymakers are adopting in references to

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<sup>9</sup> Dickinson, *supra* note 2, at 295 (“Such courts are ‘hybrid’ because both the institutional apparatus 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. The judges apply domestic law that has been reformed to accord with international standards.”); see Higonnet, *supra* note 2, at 356 (noting the range of definitions of hybrid tribunals but the common characteristic of a mixed nature of national and international components).

<sup>10</sup> See, e.g., Timothy Cornell & Lance Salisbury, *The Importance of Civil Law in the Transition to Peace: Lessons from the Human Rights Chamber for Bosnia and Herzegovina*, 35 CORNELL INT’L L.J. 389 (2002) (praising the work of the Chamber); Sriram, *supra* note 2, at 472 (critiquing hybrid tribunal in Sierra Leone); cf. Higonnet, *supra* note 2, at 347 (critiquing specific hybrid tribunals but also discussing hybrid tribunals more generally as a model for prosecuting war crimes).

<sup>11</sup> Despite its fairly straightforward appearance, however, this original sense of hybridity was extended problematically first to concerns of “race science” and later onto various cultural interactions. See ROBERT J.C. YOUNG, *COLONIAL DESIRE: HYBRIDITY IN THEORY, CULTURE AND RACE* 6, 6-19 (Routledge 1995); see also Tayyab Mahmud, *Colonialism and Modern Constructions of Race*, 53 U. MIAMI L. REV. 1219, 1226-27 (1999).

hybrid tribunals: a tribunal may be hybrid in its origins (created through domestic and international processes), its mandate (splicing together domestic and international law) or its composition (combining domestic and ‘international’ members). They are admired as a “step in [an] endless process of creative adaptation.”<sup>12</sup> As neither fully national, nor fully international, they avoid the disadvantages of each, and instead they offer the potential for increased legitimacy, domestic capacity-building, and norm dissemination because of their unique status as both international and domestic.<sup>13</sup> Most commentators see their limitations as primarily a function of inadequate funding, questions of overlap, or the vagaries of a particular context, rather than as connected in some sense to their hybrid nature.<sup>14</sup>

Post-colonial theorists have elaborated a more nuanced understanding of the concept of hybridity, deploying it in multiple, and at times contradictory, ways.<sup>15</sup> Language, as opposed to biology, is a common example and metaphor for discussing the “double-voiced” nature of hybridity.<sup>16</sup> Hybrid or ‘creolized’ language has a “fundamental ability to be simultaneously the same but different”;<sup>17</sup> other hybrids offer the same potential. Drawing on philosopher Mikhail Bakhtin’s distinction between “organic” hybridity and “intentional” hybridity in language, post-colonial scholar Robert Young suggests that hybridity itself may have a double nature “that both brings together, fuses, but also maintains separation.”<sup>18</sup> Organic hybridity reflects an unconscious and unintentional process of amalgamation that produces something new; intentional hybridity “sets different points of view against each other” in conflict and contestation.<sup>19</sup> As a result, hybridity offers a “dialectical model for cultural interaction: an organic hybridity, which will tend towards fusion, in conflict with

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<sup>12</sup> Dickinson, *supra* note 2, at 310.

<sup>13</sup> *Id.* at 310; see Dickinson, *supra* note 1, at 23 (discussing issues of legitimacy and capacity); see also Higonnet, *supra* note 2, at 347 (stressing the importance of including a local component for legitimacy, accessibility and capacity-building); Frederic Megret, *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice*, 38 CORNELL INT’L L.J. 725, 746-47 (2005) (urging hybridity in war crimes prosecutions because it collapses artificial distinctions between domestic and international).

<sup>14</sup> See Dickinson, *supra* note 2, at 307-308; see also Higonnet, *supra* note 2, at 372-99 (discussing difficulties with particular hybrid tribunals).

<sup>15</sup> John Hutnyk, *Hybridity*, 28 ETHNIC & RACIAL STUD. 79, 80 (2005) (noting “hybridity has come to mean all sorts of things to do with mixing and combination in the moment of cultural exchange”).

<sup>16</sup> YOUNG, *supra* note 11, at 20.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 22.

<sup>19</sup> *Id.* at 21-22.

intentional hybridity, which enables a contestatory activity, a politicized setting of cultural differences against each other dialogically.”<sup>20</sup>

In the context of cultural creativity in globalization, critical scholar John Hutnyk further elaborates the myriad understandings of hybridity and proposes that “hybridity is better conceived of as a process” or movement, rather than a fixed identity.<sup>21</sup> It is increasingly celebrated in the new globalism, and yet, there is concern that “a flattening of differences is secured at the very moment that celebrates difference and the creative productivity of new mixings.”<sup>22</sup> Hybridity may obscure histories of inequality and relations of dependency and imperialism.<sup>23</sup> Returning to the idea of language, Hutnyk notes that translation is another common metaphor to describe relations across various cultural and other boundaries; “the hybridizing moment is a communication across incommensurable polarities.”<sup>24</sup> The translator is in a powerful position, and that role is often “assumed by those who can enforce their way.”<sup>25</sup> Cultural theorist Homi Bhabha ties hybridity most directly to the imperial and finds it at work in the “*inbetween*” spaces of the relationships of colonizer and colonized.<sup>26</sup> He envisions a more transgressive hybridity, one that is ambivalent and political, “an active moment of challenge and resistance against a dominant cultural power.”<sup>27</sup>

In many senses, Bosnia and Herzegovina reflects the complexities and contradictions of hybrid identity, amalgamation and contestation. Questions of identity and relationship factored greatly in the disintegration of Yugoslavia and subsequent war in Bosnia and Herzegovina and the international intervention that followed.<sup>28</sup> Despite its uneven history, ‘modern’ Yugoslavia was hailed as an exemplary model of a multi-ethnic, cosmopolitan society.<sup>29</sup> Ethnic and corresponding religious identities, although present and historically significant, were subsumed into a unified national consciousness and obscured by inter-marriage among

<sup>20</sup> *Id.* at 22.

<sup>21</sup> Hutnyk, *supra* note 15, at 81.

<sup>22</sup> *Id.* at 96.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 86.

<sup>25</sup> *Id.* at 86-87.

<sup>26</sup> HOMI K. BHABHA, *THE LOCATION OF CULTURE* 56 (Routledge 2004) (1994).

<sup>27</sup> YOUNG, *supra* note 11, at 23.

<sup>28</sup> Much has been written about the fall of Yugoslavia after the death of strongman leader Josip Broz Tito, and in particular, about the downward spiral into ethnic and religious conflict after decades of living in a multi-ethnic society. *See generally* MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* (Penguin Books 1992); ALEKSANDAR PAVKOVIC, *THE FRAGMENTATION OF YUGOSLAVIA: NATIONALISM AND WAR IN THE BALKANS* (2d ed. 2000); LAURA SILBER & ALLAN LITTLE, *THE DEATH OF YUGOSLAVIA* (Penguin Books & BBC Books 1995).

<sup>29</sup> *See generally* GLENNY, *supra* note 28; PAVKOVIC, *supra* note 28; SILBER & LITTLE, *supra* note 28.

groups and peaceful co-existence in mixed communities.<sup>30</sup> When the federation that was Yugoslavia began to fall in the late 1980s and early 1990s, however, the fault lines were set along both republic border lines and ethnic and religious boundaries. These demarcations became entrenched and transformed through conflict, internally within the new national borders and subsequently in relationship to the international community.<sup>31</sup> In Bosnia, the fighting occurred along ethnic and corresponding religious lines, and with some shifting strategic alliances, the military groups and regions of the republic were divided accordingly; identities became fixed in ethnic and religious terms as Bosniak Muslim, Croatian Catholic, and Serbian Orthodox.

Upon these underlying layers of ethnic, national and religious identity and conflict in post-war Bosnia, the Dayton Peace Agreement imported and constructed another set of institutions and relationships – among the ethnic factions of Bosnia, between old and new domestic institutions, and between the national and the international components of the on-going international mission.<sup>32</sup> These institutions and relationships reflect an attempt by the international community (and, to some extent, domestic players) to create a modern set of hybrid identities, bridging old and new

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<sup>30</sup> Yugoslavia, though a Communist state, was a darling of the West – a sophisticated, cosmopolitan buffer state at the border between the regressive Soviet Bloc and progressive Western Europe. With the collapse of the Soviet Union, many expected that Yugoslavia (or its constituent republics) would make the successful transition to membership in the communities of Europe that has since been seen in the integration of many of the Central and Eastern European nations – first through membership in the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE), and ultimately through accession to the European Union. OSCE, About, Participating States, Bosnia and Herzegovina, <http://www.osce.org/about/13131.html#B> (“Admission to the OSCE: 30 April 1992”); European Commission, Enlargement, Bosnia and Herzegovina – Relations with the EU, [http://ec.europa.eu/enlargement/potential-candidates/bosnia\\_and\\_herzegovina/relation/index\\_en.htm](http://ec.europa.eu/enlargement/potential-candidates/bosnia_and_herzegovina/relation/index_en.htm) (“Bosnia and Herzegovina is a potential candidate country for EU accession following the Thessaloniki European Council of June 2003.”). However, the disintegration of and wars in the former Yugoslav republics have instead become a new cautionary tale of premature declarations of independence, ambitious self-determination and the instability produced by ethnic and religious identity conflicts. See FITZPATRICK, *supra* note 7, at 128.

<sup>31</sup> The war in Bosnia began in 1992 and ended only in late 1995 with the peace negotiations in Dayton, Ohio, and the resulting General Framework Agreement for Peace. See Report of the Security Council to the General Assembly (covering the period from 16 June 1995 to 15 June 1996), GAOR, 51st Session Supplement No. 2, at 72-76, U.N. Doc. A/51/21 (1996) (reporting Security Council Resolution 1031) [hereinafter UN Peace Agreement Report].

<sup>32</sup> See generally Fionnula Ni Aolain, *The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis*, 19 MICH. J. INT’L L. 957 (1998) (discussing the negotiation process and the ways in which the Agreement solidified existing divisions).



Bosnia and integrating international and domestic institutions. The Dayton Peace Agreement is actually a complex series of agreements that involve both a military component and a civilian component.<sup>33</sup> The military component involved a transition from the UN Protection Force (UNPROFOR) presence to a multi-national Implementation Force (IFOR) to oversee the military aspects of the peace;<sup>34</sup> and the civilian component created an Office of the High Representative (OHR), an *ad hoc* international institution, to oversee the civilian aspects of the peace.<sup>35</sup> The civilian aspects of the Peace Agreement included significant attention to human rights and the rule of law.<sup>36</sup>

The IFOR and the OHR were created as international institutions led by non-Bosnians or ‘internationals’ and staffed primarily by the same. As manifestations of external power exercised within the supposedly sovereign territory of Bosnia, they most obviously raise the spectre of imperialism.<sup>37</sup> In contrast, other institutions created by the Dayton Peace Agreement were created as deliberately hybrid national-international bodies, obscuring relations of power and offering at least the potential for a dialectical creativity. These institutions were not, of course, ‘organic’ hybrids, but it is less clear whether they attained some form of intentional or transgressive hybridity over time. In some respects, the constructed hybridities of the Dayton Peace Agreement reinscribed ethnic identities and reaffirmed the boundaries (and hierarchy) between international and national individuals and institutions. In other respects, these institutions engaged in the dialogue and contestation of hybridity along various lines of division. The Human Rights Chamber of Bosnia and Herzegovina, a

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<sup>33</sup> The full text of the General Framework Agreement for Peace, the Annexes to the Dayton Peace Agreement, and related documents are available from numerous sources, including the Office of the High Representative. The website of the Office of the High Representative is located at <http://www.ohr.int/>. See also UN Peace Agreement Report, *supra* note 31, at 72-76 (reporting adoption of Security Council Resolution 1031); Dayton Peace Agreement, 7 U.S. DEPT. OF STATE DISPATCH SUPP. 1 (1996), available at <http://www.state.gov/www/regions/eur/bosnia/bosagree.html> [hereinafter Dayton Peace Agreement].

<sup>34</sup> UN Peace Agreement Report, *supra* note 31, at 72-76. The military component of the Agreement is outside the scope of this article.

<sup>35</sup> *Id.* at 79 (reporting adoption of Security Council Resolution 1035).

<sup>36</sup> Annex 4 to the Agreement, setting forth the new Bosnian Constitution and providing for a new Constitutional Court, and Annex 6, creating a Human Rights Commission, work together to establish this new framework of institutions and law. Dayton Peace Accords, *supra* note 33, at 25, 34. The Human Rights Commission comprised a Human Rights Ombudsperson, and the Human Rights Chamber, a tribunal to hear cases involving human rights violations. *Id.* at 34.

<sup>37</sup> See ORFORD, *supra* note 3, at 26 (arguing that “the nature of post-conflict reconstruction in places such as Bosnia-Herzegovina and East Timor mirrors the way in which the international community supported colonialism in earlier periods”).

hybrid court created by the Peace Agreement, embodies and illustrates the contours of that deliberate hybridity in Bosnia.

### B. *The Mechanics of a Hybrid Court*

The Human Rights Chamber was created under Annex 6 of the Dayton Peace Agreement to “assist the Parties in honouring their obligations” to secure the highest level of international human rights protection for the people of Bosnia.<sup>38</sup> More broadly, it was conceived as an intentionally hybrid court with the teleology of achieving Europeanized protection of human rights and the rule of law in the specific context of post-war Bosnia. Most of the hybrid courts that have been created in the context of humanitarian intervention have focused on matters of international criminal law.<sup>39</sup> In Bosnia and Herzegovina, a hybrid tribunal, the Human Rights Chamber, was created to address more quotidian violations of human rights in the context of the post-war period; the parties before it were individual victims of human rights making claims against governmental entities in Bosnia.<sup>40</sup> In that sense, the Chamber presents a particularly interesting case for analysis; the international-national hybrid court issued judgement against domestic governmental entities rather than individuals.

As a creation of the Dayton Peace Agreement, the Human Rights Chamber was grafted onto an existing legal framework that had been devastated by years of war and that was itself being transformed by the peace process. The initial impetus for the Chamber was to fill a temporary need created by the devastation of local judicial institutions in the war and to address cases involving human rights violations that local courts were unable to address.<sup>41</sup> As a *sui generis* hybrid institution, the Human Rights Chamber was designed to frame domestic interests for resolution in accord with international interests and put domestic presence in dialogue with international presence. The OHR and other international players provided overarching support – financial and otherwise –

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<sup>38</sup> Dayton Peace Agreement, *supra* note 33, annex 6.

<sup>39</sup> They have adjudicated cases involving individuals charged with war crimes, crimes against humanity, and other gross violations of human rights. *See generally* Higonnet, *supra* note 2 (assessing advantages and disadvantages of hybrid criminal tribunals).

<sup>40</sup> An international criminal court, such as the ICTY, adjudicates cases brought by international prosecutors against individual defendants, whereas the Chamber adjudicated civil matters and heard claims against the State of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska. *See* Cornell & Salisbury, *supra* note 10, at 391 (suggesting it is equally, if not more, important to consider civil justice mechanisms).

<sup>41</sup> *See* Aolain, *supra* note 32, at 985-88 (discussing the Human Rights Commission’s role, including the Chamber’s role, as an ‘international’ guarantor of human rights but also the potential pitfalls in such an approach).

to the work of the Human Rights Chamber, including assistance with implementation and enforcement of decisions.<sup>42</sup> The domestic players – the national and local governments – primarily appeared before the Human Rights Chamber as a party in proceedings.<sup>43</sup> The national courts, particularly the Constitutional Court, the highest court in the country, became engaged in a sort of competition with the Chamber for prestige, resources and final authority on questions of law for the duration of the international mission.<sup>44</sup>

In structure, the Chamber both institutionalized existing ethnic divides and conflated them into a representation of ‘Bosnian’ (or ‘local’) in juxtaposition to ‘international.’<sup>45</sup> Of the fourteen judges on the court, a majority of eight were European, nominated and appointed by the Com-

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<sup>42</sup> HUM. RTS. CHAMBER FOR BOSN. & HERZ., Annual Report 8-9, 11-12 (1999) [hereinafter 1999 Chamber Report]; HUM. RTS. CHAMBER FOR BOSN. & HERZ., Annual Report 4, 12-13 (1998) [hereinafter 1998 Chamber Report].

<sup>43</sup> 1999 Chamber Report, *supra* note 42, at 10-11; 1998 Chamber Report, *supra* note 42, at 5-6.

<sup>44</sup> The subordination of these national institutions to the international presence was evident from their inception. First, Article II of the Bosnian Constitution, which is itself an Annex to the Dayton Peace Agreement, provides for the new Constitutional Court, the highest level national court. Dayton Peace Agreement, *supra* note 33, at 26. Although the Constitutional Court has appellate jurisdiction over any other court decision in the country, including decisions concerning human rights matters, it did not have jurisdiction to hear appeals of Human Rights Chamber decisions. *Id.* Article II, section one of the Constitution makes clear that while the state “shall ensure the highest level of internationally recognized human rights and fundamental freedoms,” the Human Rights Commission is created to that end. *Id.* (“To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina . . .”). Article II, section two also makes various international human rights treaties directly applicable in domestic law. *Id.* (“The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina.”).

Interestingly, the Constitutional Court is also an intentional hybrid of national and international judges. As opposed to the Human Rights Chamber, under Article VI of the new Constitution the national judges in the Constitutional Court are in the majority, with six of nine members selected by various national authorities. *Id.* at 30 (“The Constitutional Court . . . shall have nine members . . . . Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska.”). The remaining three members are selected by the President of the European Court of Human Rights, none of whom may be citizens of Bosnia or its neighbouring states. *Id.* at 30 (“The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency.”). Additional information on the Bosnian Constitutional Court is available at the English-language version of its website at <http://www.ccbh.ba/eng/>.

<sup>45</sup> See ORFORD, *supra* note 3, at 48 (noting in legal texts “the self of the ‘international community’ is created by defining that community against its others”).

mittee of Ministers of the Council of Europe.<sup>46</sup> The remaining six judges were Bosnian, with two members from each ethnic group – Serb, Croat and Bosniak – appointed by the Federation of Bosnia and Herzegovina (the predominantly Bosniak and Croat entity of the Bosnian state) and the Republika Srpska (the predominantly Serb entity of the Bosnian state).<sup>47</sup> The President of the Chamber, the presiding judge, was selected from among the European judges.<sup>48</sup> Despite the deliberate attempts to institutionalize hybridity in the structure of the Human Rights Chamber (and in the broader international mission) as a form of transition from international control to domestic control, there was little of the fusion or amalgamation imagined in the “organic” hybridity identified by Young and Bahktin.<sup>49</sup> Nor was there the dynamic contestation suggested by Hutnyk and Bhabha. Instead, individual identities became fixed within the Chamber, and the veneer of hybridity rested upon and reinforced existing divisions of Bosniak-Croat-Serb and binaries of national-international.<sup>50</sup>

The constructed hybridity, particularly along the binary line of international-national, was predictably an unequal hybridity.<sup>51</sup> It was a “tranquillising” and “banal” hybridity that occluded material inequities and resisted the possibility of a “theory of relational cultures.”<sup>52</sup> Within the Chamber, the differences between international judges and staff and national judges and staff were numerous. International judges resided elsewhere and flew into Bosnia once a month for a week-long session,

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<sup>46</sup> 1998 Chamber Report, *supra* note 42, at 1 (“The Human Rights Chamber has fourteen members . . . eight [nominated] by the Committee of Ministers of the Council of Europe.”).

<sup>47</sup> *Id.* (“four members were appointed by the Federation of BiH, two by the Republika Srpska”).

<sup>48</sup> *Id.* (“The President of the Chamber has been designated by the Committee of Ministers of the Council of Europe from among the international members.”). Annex B to the Annual Report includes a list and biographies for the Members of the Chamber.

<sup>49</sup> YOUNG, *supra* note 11, at 21.

<sup>50</sup> The need to establish and police identity boundaries is a common feature of imperial endeavours. *See generally* Perrin, *supra* note 4, at 19 (discussing the Declaration on the Rights of Indigenous Peoples as a neo-colonial encounter); Mahmud, *supra* note 11, at 1219 (discussing the deployment of shifting racial stereotypes to support colonial distinctions that are still present in “modern notions of citizenship, sovereignty, representation, and the rule of law”).

<sup>51</sup> *See* Higonnet, *supra* note 2, at 369 (noting the need for attention to power inequalities within hybrid tribunals); *see also* UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH CENTURY BRITISH LIBERAL THOUGHT* 20 (University of Chicago Press 1999) (noting “the language of those comparisons is not neutral and cannot avoid notions of superiority and inferiority, backward and progressive, and higher and lower”).

<sup>52</sup> Hutnyk, *supra* note 15, at 97-98.

whereas national judges lived and worked in Bosnia.<sup>53</sup> The idea that international judges and staff might use (or learn) the national language(s) was never suggested; English was the primary language of daily interaction – the “retaining wall” between groups – although in the formal procedures and publications of the Chamber simultaneous interpretation or multiple language versions were employed.<sup>54</sup> Similar distinctions were also reflected in the staff of the court.<sup>55</sup>

These distinctions are not uncommon in international or transnational work, but they are difficult to ignore in a hybrid institution, particularly in an institution designed to protect human rights and prohibit discrimination. The rationales that support them often rely on the idea of the differences in doing such work at “home” versus in the “field.”<sup>56</sup> Indeed, as critical geographer Allison Mountz suggests, where you are often defines who you are, as much as who you are defines where you are.<sup>57</sup> Globaliza-

<sup>53</sup> See 1999 Chamber Report, *supra* note 42, at 3.

<sup>54</sup> FRANTZ FANON, *BLACK SKIN WHITE MASKS* 38 (Charles L. Markmann, trans., Grove Press 1967) (stating that “there is a retaining-wall relation between language and group. To speak a language is to take on a world, a culture.”); see Higonnet, *supra* note 2, at 365 (suggesting changes in practices regarding language and translation in hybrid tribunals).

<sup>55</sup> See 1998 Chamber Report, *supra* note 42, Annex C. Annex C to the Report contains a list of Chamber staff. *Id.* The Executive Officer and Registrar, the most senior staff members, were both ‘international’ positions. *Id.* The remaining staff members, primarily administrative staff and interpreters, were Bosnian. *Id.* Over time, several lawyers were added to the staff, and they included both international and national lawyers. *Id.*

<sup>56</sup> Human rights workers, like anthropologists and other ethnographers, must grapple with the idea of doing work in the “field.” The idea of the field has been more effectively investigated by social theorists than by lawyers or human rights advocates thus far. See Akhil Gupta & James Ferguson, *Discipline and Practice: “The Field” as Site, Method, and Location in Anthropology*, in *ANTHROPOLOGICAL LOCATIONS: BOUNDARIES AND GROUNDS OF A FIELD SCIENCE* 32 (Akhil Gupta et al. eds., University of California Press 1996). Gupta and Ferguson, among others, have interrogated its significance as “the spatialization of difference” in anthropology. *Id.* Hyndman expands upon its significance in various forms of transnational work:

Just as there is tension between discourses of universality and particularity – the shared language and entitlements of human rights versus distinguishing cultural practices – a discursive distance between “here” and “there,” “us” and “them,” confounds any singular understanding of culture. “The field” is a diffuse and problematic term for geographers, anthropologists, and other researchers who travel in a privileged way across cultures. For some, “the field” is a place impossibly outside the power relations that organize “home.” Without home, there can be no field.

JENNIFER HYNDMAN 16, *MANAGING DISPLACEMENT: REFUGEES AND THE POLITICS OF HUMANITARIANISM* 88-89 (Minnesota University Press 2000).

<sup>57</sup> Allison Mountz, *Embodying the Nation-State: Canada’s Response to Human Smuggling*, 23 *POL. GEOGRAPHY* 323, 336 (2004) (“The shaping of migrant identities connected powerfully to their access to due process across time and space, the

tion scholars have problematized these distinctions as new forms of “global citizenship” that have risen with the increase in transnational projects. On one side of the spectrum, there are the “flexible citizens” or “supra-citizens” of the Global North.<sup>58</sup> Aiwa Ong’s flexible citizens are primarily those with significant social and economic capital who can “respond fluidly and opportunistically to changing political-economic conditions” and move freely across borders and within global flows.<sup>59</sup> More common in transnational work are Jennifer Hyndman’s “supra-citizens,” the “cadre of international professional[s]” working on humanitarian projects.<sup>60</sup> At the other end of the spectrum are the “sub-citizens” Hyndman juxtaposes to “supra-citizens;” these are the refugees, the internally displaced and others for whom the supra-citizens ostensibly work.<sup>61</sup> These distinctions are less about the nature of citizenship (although this may certainly be relevant) and more about hierarchy and status.<sup>62</sup>

In the context of the Chamber, there may not have been “sub-citizens,” but the structures of membership ensured that there were “supra-citizens.” These institutional differences shaped the contours of hybridity within the court. In a sense, the hybrid structure of the Chamber succeeded; the Chamber decided thousands of cases over its years of operation, many unanimously. International and national judges and staff worked successfully together for many years, and the various Bosnian governmental bodies increasingly participated in the Chamber’s processes.<sup>63</sup> Nonetheless, it was not a fully intentional and creative hybridity at work. Distinctions in status permeated the work and relationships of the institution, as well as the work and relationships of the larger international presence. Moreover, the ambivalent and unequal hybridity of the Chamber’s structure was also made visible in the practices and decisions of the court.

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narrative of *who* they were explained *where* they were, and vice versa.”) (emphasis in original).

<sup>58</sup> See generally Aiwa Ong, *Flexible Citizenship: The Cultural Logics of Transnationalism* (1999) (discussing flexible citizenship); HYNDMAN, *supra* note 56, at 110-11 (discussing supra-citizens and sub-citizens).

<sup>59</sup> Ong, *supra* note 58, at 6.

<sup>60</sup> HYNDMAN, *supra* note 56, at 111.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; see also ORFORD, *supra* note 3, at 198-99 (discussing income differentials between local and international staff in Rwanda and distinctions between ‘international’ and ‘local’ staff in providing evacuation or protection).

<sup>63</sup> In my experience, the interpersonal relationships within the court were cordial and professional. I do not mean to suggest that any individual or individuals within the Chamber acted in a discriminatory manner or otherwise intentionally manipulated power relations. My point is a more general one about the nature of institutional hierarchies in a hybrid institution in the current geo-political context. See Dickinson, *supra* note 2, at 306 (noting “such hybrid relationships can raise new questions about who is really controlling the process”).

### III. THE RULE OF LAW: HYBRIDITY AND MIMESIS IN PRACTICE

The ambivalent hybridity that is manifest in the institutional structures superimposed by the Dayton Peace Agreement becomes clearer and takes on new dimensions in their work to (re)establish the rule of law in Bosnia. The Bosnian Constitution, set forth in Annex 4 to the Dayton Peace Agreement, affirms in Article I that Bosnia “shall be a democratic state, which shall operate under the rule of law.”<sup>64</sup> One aspect of the international mission in Bosnia was to re-establish this “rule of law” – to translate the purportedly universal law of Europe to the particular context of Bosnia – and the human rights institutions created by Annex 6 were intended to play a significant role in this process.<sup>65</sup> Together the Constitution in Annex 4 and the Chamber’s mandate set out in Annex 6 constitute a sweeping importation of a new legal framework as formative of the new nation.<sup>66</sup> This legal framework displaces existing domestic law and replaces it with a European and international human rights legal regime.<sup>67</sup> In the case of the Human Rights Chamber (Chamber), the procedures and substantive law of the European human rights system were “received” wholesale. The scope of the rights adjudicated by the Chamber were framed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and the interpretation of that European Convention by the European Court

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<sup>64</sup> Dayton Peace Agreement, *supra* note 33, annex 4, art. I; see also David Theo Goldberg, *THE RACIAL STATE* 154 (Blackwell Publishers 2001) (articulating the significance of law as “a generalized and generalizing apparatus of power deeply implicated in establishing state sovereignty, consolidating and reifying lines of power in modern state formation”); FITZPATRICK, *supra* note 7, at 111 (discussing the ways in which law is formative of the nation).

<sup>65</sup> See Cornell & Salisbury, *supra* note 10, at 391 (suggesting “[b]y helping instill a sense of the rule of law, the Chamber has become a key instrument in the transition to a more peaceful nation”); see also Yeager, *supra* note 8, at 44 (discussing the Chamber’s role in establishing the rule of law). Peter Fitzpatrick suggests that “[a]dherence to ‘human’ rights is by now the pervasive criteria by which a nation’s proximity to the horizon of the universal may be gauged.” FITZPATRICK, *supra* note 7, at 126.

<sup>66</sup> Peter Fitzpatrick notes that “stories of the progression of society are intimately tied to and even told in terms of the progression of law.” FITZPATRICK, *supra* note 4. Fitzpatrick also suggests that in the imperial context, “law was pre-eminent amongst the ‘gifts’ of an expansive civilization, one which could extend in its abounding generosity to the entire globe.” FITZPATRICK, *supra* note 7, at 178; see generally ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* (expanded ed., Howard Greenfield trans., Beacon Press 1991) (discussing colonial relationships).

<sup>67</sup> See FITZPATRICK, *supra* note 4, at 107-11 (discussing the role of law in colonialism); see also H. RAZACK, *supra* note 6, at 9-10 (noting a shared feature of both nineteenth century and contemporary projects of empire is “a deeply held belief in the need to and the right to dominate others *for their own good*, others who are expected to be grateful”) (emphasis in original).

of Human Rights (European Court), the Strasbourg-based tribunal charged with hearing cases arising under the European Convention.<sup>68</sup> The practices and procedures of the Chamber were modeled on those of the European Court.<sup>69</sup>

In its work, then, the unequal hybridity of the Chamber shifted its balance further toward international or European dominance. International human rights law, and particularly European human rights law, displaced domestic law by (international) design. Even the procedures of the court were transformed as international practice was translated to the Bosnian context. All this occurred under the umbrella of a negotiated peace agreement after years of war, and yet seldom, if ever, was the violence supporting the initial incorporation of European/international human rights law and the circumvention of typical sovereign acceptance of these obligations critically examined.<sup>70</sup> Regardless of these circumstances, the international hegemony embedded in both the substance and procedures used raises important questions about the validity of the rule and role of this received law of Europe.<sup>71</sup>

#### A. *Importing Universal Law*

International law generally operates as a consent-based regime, and sovereign nation states become bound to international obligations by

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<sup>68</sup> Dayton Peace Agreement *supra* note 33, annex 6, art. I; see Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Restructuring the Control Machinery Established thereby (with Appendix) RESTRUCTURING THE CONTROL MACHINERY ESTABLISHED THEREBY, MAY 11, 1994, 2061 U.N.T.S. 7 [hereinafter Protocol No. 11], available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=155&CM=7&DF=10/08/2009&CL=ENG>.

<sup>69</sup> 1998 Chamber Report, *supra* note 42; 1999 Chamber Report, *supra* note 42 (noting “substantial adjustments have been made to provide for the special composition and circumstances of the Chamber”); see Cornell & Salisbury, *supra* note 10, at 397.

<sup>70</sup> See FITZPATRICK, *supra* note 7, at 178 (discussing the connection between law and force in empire, where “the violence of imperialism was legitimated in its being exercised through law”); FITZPATRICK, *supra*, note 4, at 108 (noting the paradox of imperialism in “the claim of a civilizing law to bring order through the constant infliction of violence”).

<sup>71</sup> See NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 2, 22-32 (Martha Minow et al. eds., University of Michigan Press 2003) (discussing “the extension of English law and constitutionality to the colonies: the haphazard introduction of a rule of law, its colonial mutations, and its enduring consequences”); see also ACHILLE MBEMBE, ON THE POSTCOLONY 25-35 (University of California Press 2001) (discussing the one-sided nature of law under colonialism); Gott, *supra* note 7, at 25, 30 (noting the importance of the “formation of an international law of empire” in support of early colonialism and its connection to transnational humanitarianism).



becoming party to a treaty or through the gradual emergence of customary international norms.<sup>72</sup> Although these means are sufficient to bind a state at the international level, nations generally also have their own internal processes that make international obligations effective at the domestic level, or as a matter of domestic law. Sometimes this occurs through a domestic ratification process or through the passage of implementing legislation, or it may even occur through the reorganization of mechanisms of the state. These are the common features – and often the challenges – of synthesizing parallel and intersecting international and domestic legal regimes. Sovereignty, as understood in international law, comprises the authority both to undertake international obligations and to determine how best to implement them at the domestic level.<sup>73</sup>

That process – and the sovereignty it represents – was significantly subverted in post-war Bosnia. Eliding the complicated processes of implementation and internalization, the Dayton Peace Agreement purports to make various European and international human rights instruments, metonymic representations of “Europe” and the “rule of law,” directly applicable as Bosnian law. In one sense, there was consent by the newly sovereign Bosnia through its involvement in the peace negotiations; yet it was a consent constrained by the context of negotiating an end to hostilities – not just among the warring parties, but under threat of continued bombardment by NATO forces. As a result, Bosnia became bound by the provisions of the European Convention on Human Rights without becoming party to the treaty; in fact, at that time, Bosnia was not eligible to become a party to the European Convention, which is limited to members of the Council of Europe.<sup>74</sup> Bosnia was bound to observe European and international human rights law internally as a matter of its domestic

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<sup>72</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (identifying sources of international law). The common language of undertaking in human rights treaties requires a state party to respect and ensure the rights of “all individuals within its territory and subject to its jurisdiction.” International Covenant on Civil and Political Rights art. 2, § 1, Dec. 19, 1966, 999 U.N.T.S. 171; *cf.* International Covenant on Economic, Social and Cultural Rights, art 2 § 1 Dec. 16, 1966, 993 U.N.T.S.53.

<sup>73</sup> See Abraham D. Sofaer et al. &, *Sovereignty, The Practitioners’ Perspective*, in PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES 24, 31-33 (Stephen D. Krasner ed., Columbia University Press 2001) (describing these international commitments as the exercise of sovereignty, rather than limitations upon sovereignty); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2645-46 (1997) (discussing the theory that internalized compliance and obedience increase comportment with international law).

<sup>74</sup> Bosnia and Herzegovina became a member of the Council of Europe and party to the European Convention for the Protection of Human Rights and Fundamental Freedoms in 2002. Council of Europe, Bosnia and Herzegovina and the Council of Europe, *available at* [http://www.coe.int/T/E/Com/About\\_Coe/Member\\_states/e\\_bo.asp](http://www.coe.int/T/E/Com/About_Coe/Member_states/e_bo.asp) (noting Bosnia joined the Council of Europe on Apr. 24, 2002); Convention

law at the same time it was prohibited from full membership and participation externally as a sovereign nation of Europe. To police those boundaries of internal compliance and external exclusion, the Dayton Peace Agreement created a new tribunal, the Human Right Chamber.

Under the new Bosnian Constitution, the European Convention on Human Rights is directly incorporated into the domestic law of Bosnia in Article II(2): "The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."<sup>75</sup> Later paragraphs of Article II enumerate specific rights that are protected, and clarify that "all courts, agencies, governmental organs, and instrumentalities . . . shall apply and conform to" those rights.<sup>76</sup> Article II also affirms that Bosnia shall be party to a range of international human rights agreements listed in an annex, further expanding the scope of international obligations domestically.<sup>77</sup> Annex 6, which creates the Human Rights Chamber, reinforces this direct incorporation in Article I where the parties agree to secure to all persons within their jurisdiction the rights enumerated in the European Convention and in other international human rights agreements listed in an appendix (which essentially parallel the list appended to the constitution).<sup>78</sup> Looking at the text of Annex 6, there seems to be nothing particularly noteworthy or problematic about this; the language is straightforward. Accounts of the peace negotiations rarely note it, and it does not appear to have been a point of serious contestation. This direct

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for the Protection of Human Rights and Fundamental Freedoms: Bosnia and Herzegovina, Nov. 4, 1950, 2246 U.N.T.S. 124.

<sup>75</sup> UN Peace Agreement Report *supra* note 31 annex 4, art. II.

<sup>76</sup> *Id.* at 119.

<sup>77</sup> *Id.* at 120. These agreements are: the Convention on the Prevention and Punishment of the Crime of Genocide; the Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II; the Convention Relating to the Status of Refugees and its 1966 Protocol; the Convention on the Nationality of Married Women; the Convention on the Reduction of Statelessness; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights and its 1966 and 1989 Optional Protocols; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the European Charter for Regional or Minority Languages; and the Framework Convention for the Protection of National Minorities.

<sup>78</sup> *Id.* at 130-31; UN Peace Agreement Report, *supra* note 31.

incorporation of international law into domestic law is remarkable and raises an unmistakable spectre of empire.

Perhaps this wholesale importation of international human rights law seems unproblematic given the ‘universal’ nature of human rights.<sup>79</sup> Most international human rights advocates – and many of the human rights instruments themselves – explicitly assert the universality of human rights standards.<sup>80</sup> This claim of universality of rights remains controversial within the human rights field.<sup>81</sup> Critiques of universalism(s) have become common-place within human rights discourse and across a range of fields, and they have much to offer. They have challenged the idea of the international/global as “more abstract, less institutionalized” and as “universal and impersonal”;<sup>82</sup> in the context of human rights, this purported universality is instead increasingly identified as a hegemonic,

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<sup>79</sup> See Cornell & Salisbury, *supra* note 10 (analyzing this power of the international community as a positive force in support of the rule of law). *But see* FITZPATRICK, *supra* note 4, at 117-18 (noting how the ‘rule of law’ has become a new “universal measure of appropriate behaviour” and as a marker of civilization in contrast to barbarism); FITZPATRICK, *supra* note 7, at 180 (pointing out that “the colonist claimed to bring law from the outside, a civilized law of universal valency free from polluting involvement with the particularity of the local scene”).

<sup>80</sup> This is evident from the foundational documents of the modern human rights movement, such as the documents of the International Bill of Rights – the Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights, and the International Covenant for Economic, Social and Cultural Rights. See Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. Doc. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, *supra* note 72; International Covenant on Economic, Social and Cultural Rights, *supra* note 72. More recently, the UN General Assembly stated in the Vienna Declaration and Programme of Action: “The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.” World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ I.1, U.N. Doc. A/CONF157/23 (July. 12, 1993).

<sup>81</sup> It is frequently resisted in the name of “culture” and cultural relativism – sometimes by governments that seek to avoid international human rights obligations, but increasingly by a wide spectrum of activists, policymakers, and scholars. In some senses, the claim for cultural relativism is an attempt to resist the universalizing global and reassert local perspective. See Gott, *supra* note 7, at 34 (“Contemporary human rights discontents share a healthy scepticism toward a postwar legal cosmopolitanism that codifies, and aspires to extend geographically, a Western conception of rights. Critics of the existing orthodoxy offer instead a variety of approaches that would privilege subaltern values in a regenerated human rights agenda.”).

<sup>82</sup> M. Kearney, *The Local and the Global: The Anthropology of Globalization and Transnationalism*, 24 ANN. REV. ANTHROPOLOGY. 547, 548-49 (1995).

Western view of human rights.<sup>83</sup> At times, the debate between universalism and cultural relativism in human rights has been polarizing and immobilizing. Nonetheless, universal claims retain their appeal and have undoubtedly improved the lives of many people in particular times and places.<sup>84</sup>

Globalization scholar Anna Tsing offers an alternative view of ‘universal’ claims that destabilizes the traditional opposition and more fully explicates the opportunities and limitations that may arise with such claims.<sup>85</sup> She does not shy away from the complicated history of universalisms, which are deeply implicated in colonial histories as well as in more recent colonial endeavours.<sup>86</sup> Tsing re-imagines universal claims “not as truths or lies but as sticky engagements.”<sup>87</sup> She argues for engagement as a means to counter the disciplinary ambitions of universalism:

Engaged universals travel across difference and are charged and changed by their travels. Through friction, universals become practically effective. Yet they can never fulfill their promises of universality. Even in transcending localities, they don’t take over the world. They are limited by the practical necessity of mobilizing adherents. Engaged universals must convince us to pay attention to them. *All* universals are engaged when considered as practical projects accomplished in a heterogeneous world.<sup>88</sup>

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<sup>83</sup> See Gott, *supra* note 7, at 34 (noting “human rights discourse and practice face intense scrutiny as potentially hegemonic legitimators of neoimperial relations”); see also Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321, 332-33 (1996) (discussing the ways European norms are presented as universal in colonial contexts); Abdullahi A. An-Na’im, *Problems of Universal Cultural Legitimacy for Human Rights*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, 331, 348-53 (Abdullahi Ahmed An-Na’im & Francis M. Deng eds., The Brookings Institution 1990) (discussing the exclusion of non-western participants and perspectives in the early development of the international human rights regime); HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 36-37 (Juris Publishing 2000) (identifying a “Southern” critique of the “Western origins, orientation and cultural bias” of the international legal order).

<sup>84</sup> The successes of the human rights movement in advancing legal protections for individuals at the international level of treaty development and at the grassroots level of public education and local law reform provide numerous examples.

<sup>85</sup> See generally ANNA LOWENHAUPT TSING, *FRICTION: AN ETHNOGRAPHY OF GLOBAL CONNECTION* (Princeton University Press 2005).

<sup>86</sup> *Id.* at 9; see CHAKRABARTY, *supra* note 7, at 5 (suggesting “[p]ostcolonial scholarship is committed, almost by definition, to engaging the universals . . . that were forged in eighteenth-century Europe” and that underlie the Enlightenment).

<sup>87</sup> TSING, *supra* note 85, at 6 (2005).

<sup>88</sup> *Id.* at 8 (emphasis in original).

Some would suggest that human rights work at its best – where universal rights claims are given traction at the local level by collaborative, grassroots involvement – may reflect this sort of engaged universalism. Hybrid courts, with their blend of the national (if not local) and the international, aspire to just this sort of engagement.

The work of the Human Rights Chamber shows signs of both productive ‘sticky’ engagement as well as the imperial tendencies of universalism. Following the mandates of the new Constitution and of Annex 6, the substantive law applied by the Human Rights Chamber was predominantly the European Convention and the case law developed by the European Court to interpret it. European Court doctrines – such as the ‘margin of appreciation,’ which gives latitude to nations in determining the most appropriate means of implementing their rights obligations<sup>89</sup> – provided some room for domestic development of the law; however, local law was ultimately evaluated for its compliance with European and international human rights standards.<sup>90</sup> For example, in one of the earliest cases decided on the merits, *Damjanovic v. the Federation of Bosnia and Herzegovina*,<sup>91</sup> the Human Rights Chamber unanimously overturned a death sentence pronounced during the war. Relying exclusively on the European Convention and the case law of the European Court, the Chamber overturned the provisions of domestic law supporting the sentence.<sup>92</sup>

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<sup>89</sup> The doctrine of “margin of appreciation” has been explained as follows:

Although the Commission and Court [now Court] invoke the principle of strict interpretation and thus the favourable balancing of individual rights against state interests, they in fact leave a certain amount of discretion for the states to decide whether a given course of action is compatible with Convention requirements. This state discretion is referred to as the ‘margin of appreciation.’

DONNA GOMIEN ET AL., *LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER* 215 (Council of Europe Publishing 1996). The doctrine reflects the view that “state authorities are in principle in a better position than the international judge” to assess the balance of rights in particular domestic contexts. *Id.*; see also Paul Mahoney, *Marvelous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUM. RTS. L. J. 1 (1998) (discussing the principle of subsidiarity and the margin of appreciation); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. L. STUD. 206 (2006) (discussing history and uses of the doctrine of margin of appreciation); see, e.g., *Medan v. Bosn. & Herz.*, CH/96/3, 8 & 9 ¶ 36 (Human Rights Chamber 1997), available at <http://www.hrc.ba/database/decisions/CH96-3&8&9%20Medan%20et%20al%20Merits%20E.pdf>.

<sup>90</sup> The decisions of the Human Rights Chamber are available in a searchable database at the Chamber website at <http://www.hrc.ba/>.

<sup>91</sup> *Damjanovic v. Bosn. & Herz.*, CH/96/30 (Human Rights Chamber 1997), available at <http://www.hrc.ba/database/decisions/CH96-30%20Damjanovic%20Merits%20E.pdf>.

<sup>92</sup> *Id.* at ¶¶ 26-44, 49.

This pattern of decision-making was repeated in many subsequent cases: the heavily ‘international’ Chamber found various domestic laws, particularly those enacted during the war or its immediate aftermath, in violation of the European standards reflected in the European Convention, now supreme Bosnian law by declaration of the Peace Agreement.<sup>93</sup> In a particularly telling analysis in the case of *Kevesevic v. the Federation of Bosnia and Herzegovina*,<sup>94</sup> the Chamber found that a domestic law on apartments ‘abandoned’ during the war did not meet the new (European) criteria of ‘law’:

The Chamber must decide whether the legal instruments in question can be regarded as “law” for the purposes of Article 8 paragraph 2 of the [European] Convention . . . .

The term “law” is related to certain qualitative criteria of a norm, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble of the [European] Convention. . . . It includes the following elements . . . .

Firstly, the law must be adequately accessible . . . . Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to allow the citizen to regulate his conduct . . . . Finally, it appears from the case-law of the European Court of Human Rights that the law must provide safeguards against abuse

. . . .

. . . .

. . . This Law does therefore not meet the requirements of the “rule of law” in a democratic society. . . .<sup>95</sup>

In this excerpt, the Chamber appears to deftly deploy the neutral, universal language of rights and the rule of law to reach a decision.<sup>96</sup> Universal/European conceptions of rights were directly imported into the domestic legal landscape, supplanting whatever conception of rights existed in Bosnia or would have developed through the Bosnian legal system.<sup>97</sup>

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<sup>93</sup> See ORFORD, *supra* note 3, at 78-79 (discussing the “forms of power exercised by international lawyers” in their role as experts in humanitarian interventions).

<sup>94</sup> *Kevesevic v. Bosn. & Herz.*, CH/97/46 (Human Rights Chamber 1998), available at <http://www.hrc.ba/database/decisions/CH97-46%20Kevesevic%20Merits%20E.pdf>.

<sup>95</sup> *Id.* at ¶¶ 51-53, 57 (citations to multiple decisions of the European Court and to the Chamber’s *Damjanovic* decision omitted).

<sup>96</sup> Interestingly, the only dissents to this decision were by two ‘international’ judges, who thought the decision did not go far enough. See *id.* at pp. 15-16 .

<sup>97</sup> There is a striking parallel to colonial practice. See FITZPATRICK, *supra* note 4, at 110 (“The European encompassed the very being of the colonized. Because of their higher position in the scale of progression, the colonists could know and represent the natives better than they could themselves. The most complex of resident legal cultures were taken over with an unquestioning confidence by colonial administrators

Although many of the issues considered by the Human Rights Chamber over the course of more than a decade of work reflected distinctly and specifically Bosnian concerns – for example, discrimination on the basis of ethnic group, loss of property rights in the massive displacements of the war, and lingering consequences of emergency rules enacted during the war – these were filtered through and assessed under the universalizing gaze of Europe.<sup>98</sup> At times, sticky engagement or dynamic hybridity appeared in the occasional dissenting opinions of the national judges.<sup>99</sup> Resistance also appeared in the initial reluctance of governmental bodies to participate in the Chamber processes; it was eventually channelled into the anticipation of the eventual demise of the Human Rights Chamber at the end of its transitional tenure.<sup>100</sup> Often, the possibilities of a dialectical hybridity were constrained by the structural dominance of the ‘international’ in the court, in its law and in its procedures, and in the broader international mission.

### B. *Mimicry as Method*

The rule of law exists not only in the substance of the received law, but also profoundly in the procedures established to address that substance.<sup>101</sup> While an intentional and dynamic hybridity may have been the aspiration for the work of the Chamber, the practice suggests instead the

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whence they were incidentally but radically transformed. Even when legal regulation remained in local hands . . . they were subject to scrutiny and rejection under so-called repugnancy clauses in colonial legislation. With these clauses, local law or custom could not be effective if found to be ‘repugnant to natural justice’ or to ‘the general principles of humanity’ and such – criteria intrinsic, of course, to a universal imperial project.”)

<sup>98</sup> See Cornell & Salisbury, *supra* note 10, at 403-08 (discussing Chamber’s cases).

<sup>99</sup> See, e.g., *Matanovic v. Republika Srpska*, CH/96/1 at pp. 17-18 (Human Rights Chamber 1997), available at <http://www.hrc.ba/database/decisions/CH96-1%20Matanovic%20Merits%20E.pdf>; *Grgic v. Republika Srpska*, CH/96/15 at pp. 6-8 (1997), available at <http://www.hrc.ba/database/decisions/CH96-15%20Grgic%20Merits%20E.pdf>; *Mitrovic v. Bosn. & Herz.*, CH/98/948 at pp. 12-13 (Human Rights Chamber 2002), available at <http://www.hrc.ba/database/decisions/CH98-948%20MITROVIC%20Merits%20E.pdf>.

<sup>100</sup> Note the Chamber was always envisioned as temporary as a creature of the Dayton Peace Agreement. Ultimately, it was decided that it would be merged into the Constitutional Court. See Cornell & Salisbury, *supra* note 10, at 405-06 (discussing early resistance to the Chamber by domestic authorities).

<sup>101</sup> See Yeager, *supra* note 8, at 45-47 (discussing the procedures of the Chamber); see generally Marie-Benedicte Dembour et al., *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT’L L. 151 (2004) (discussing impact of tribunal processes on victim-witness accounts before the ICTY); Samera Esmeir, *1948: Law, History, Memory*, 21 SOC. TEXT 75 (2003) (discussing how legal rules of evidence structure, produce and exclude memories and historical accounts).

“ironic compromise” of mimicry.<sup>102</sup> Post-colonial theorist Homi Bhabha has traced the emergence of mimicry in the colonial context as a strategy of “colonial power and knowledge.”<sup>103</sup> In that context, imperial power is ambivalent, seeking both to remake the colonized but also to maintain its difference. There is a “desire for a reformed, recognizable Other, as a subject of a difference that is almost the same, but not quite.”<sup>104</sup> Mimicry is “stricken by an indeterminacy” that ultimately undermines imperial authority because the process of ‘reform’ never quite succeeds.<sup>105</sup> In its indeterminacy, the imitation slides between the mimetic difference that is “almost nothing but not quite” and the menacing difference that is “almost total but not quite.”<sup>106</sup> The metaphor of language and translation is also useful here.<sup>107</sup> The mimics may serve as “a class of interpreters” between the governors and the governed.<sup>108</sup> The ability to translate culture, language, and process – either literally or figuratively – offers a conditional power, a form of “honorary citizenship” for those subject to imperial authority.<sup>109</sup>

In its practice, the Human Rights Chamber consciously imitated the European Court of Human Rights. The structure of the Annex 6 Human Rights Commission – an Ombudsperson and the Chamber – was modeled directly on the structure of the European Court and Commission as it existed at the time.<sup>110</sup> No similar institutions had existed as part of the domestic Bosnian legal system.<sup>111</sup> The Ombudsperson assumed a role similar to that of the European Commission, as initial investigator, medi-

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<sup>102</sup> BHABHA, *supra* note 26, at 122.

<sup>103</sup> *Id.* at 122.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 131; see CHAKRABARTY, *supra* note 7, at 40 (discussing Bhabha’s theorization of mimesis in the context of India, where “Indian history . . . remains a mimicry of a certain ‘modern’ subject of ‘European’ history and is bound to represent a sad figure of lack and failure”); see also ORFORD, *supra* note 3, at 182-84 (using Bhabha’s theoretical framework to discuss humanitarian interventions in Bosnia and elsewhere).

<sup>107</sup> See BHABHA, *supra* note 26, at 49-55 (using translation as a metaphor for imperial relationships); see also CHAKRABARTY, *supra* note 7, at 17 (discussing the “politics of translation”); FANON, *supra* note 54, at 38-40 (discussing the importance of language in colonial encounters); Hutnyk, *supra* note 15, at 86 (noting ‘translation’ has thrived as a metaphor in social theory).

<sup>108</sup> BHABHA, *supra* note 26, at 124-25 (citing T.B. Macaulay, *Minute on education*, in SOURCES OF INDIAN TRADITION: VOLUME TWO: MODERN INDIA AND PAKISTAN, vol. II at 49 (Stephen Hay ed., 2d ed., Columbia University Press 1988) (1958).

<sup>109</sup> FANON, *supra* note 54, at 38.

<sup>110</sup> The European Commission and Court have since been merged into a single European Human Rights Court. See Protocol No. 11, *supra* note 68.

<sup>111</sup> There was subsequently created a Bosnian Human Rights Ombudsperson, distinct from the Human Rights Commission Ombudsperson.



ator and advocate for the parties, and the Chamber emulated the European Court, as a tribunal to hear cases brought by individuals against government representatives for human rights violations committed by governmental actors at any level.<sup>112</sup> Both the organization of the Secretariat and, more significantly, the case processes followed the European model, with some logistical modifications to account for domestic factors.<sup>113</sup> As in the European Court (and most other international tribunals), cases were initially screened for ‘admissibility,’ a process used to eliminate many thousands of petitions before consideration of the merits. After written submissions and oral arguments by the parties, cases were then deliberated upon by the Chamber and decided on the merits. The significance of the procedures is in their mimicry of the European legal framework and occupation of the domestic legal framework.

By virtue of its formation through mimesis, the work of the Chamber retained its mark of difference. Regardless of the intrinsic value of the procedures, their fundamental character was purely European (and to that extent, international and universal); the Chamber’s work in this area was directed towards training Bosnians as “a class of interpreters” to use and participate appropriately in these procedures, rather than adapting the imported procedures to the Bosnian context.<sup>114</sup> It was a one-way translation. The Human Rights Chamber process was grafted onto the Bosnian legal system; it operated in parallel with the work of the Constitutional Court, but it was not subject to appeal to or oversight by that high court. The government of Bosnia was bound to implement the decisions of the Human Rights Chamber, but here too, ultimate oversight lay not with the domestic sovereign but with the international mission – at least for the duration of its presence.<sup>115</sup>

Translation and interpretation are useful metaphors here because they are ubiquitous in the daily work of an international mission. This was also true for the Human Rights Chamber – from communication within and among the staff and judges, to communication with petitioners and respondent governments, to the formal deliberations and proceedings of the court, to the published decisions of the court – language was a source of preoccupation, frustration, possibility, politics and diplomacy. Reflective of both European and North American involvement perhaps, English was the dominant language – uniting judges and staff from Iceland, France, Italy, Turkey, Hungary, Austria, Germany, England, the Netherlands, Finland, and the United States as the international pres-

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<sup>112</sup> Cornell & Salisbury, *supra* note 10, at 397; Palmer & Posa, *supra* note 8, at 366.

<sup>113</sup> 1998 Chamber Report, *supra* note 42, at 3; 1999 Chamber Report, *supra* note 42, at 1 (noting “substantial adjustments have been made to provide for the special composition and circumstances of the Chamber”).

<sup>114</sup> BHABHA, *supra* note 26, at 124-25.

<sup>115</sup> 1999 Chamber Report, *supra* note 42, at 1, 12; 1998 Chamber Report, *supra* note 42, at 8-9; Cornell & Salisbury, *supra* note 10, at 407.

ence; it also allowed some “honorary citizenship,” access to the informal work and relationships of the Chamber, for those members of the national staff who were fluent and excluded those who were not.<sup>116</sup> As for the national languages of Bosnia, they too had become politicized and transformed by the war and its aftermath – with the language formerly (and perhaps inaccurately) known as Serbo-Croatian now splintered into Serbian, Croatian and Bosnian.<sup>117</sup>

More figuratively, translation was also a constant project of the international mission, reflected in the relationship between the international and national participants, and in the work of the Human Rights Chamber as a powerful “broker between cultural forms.”<sup>118</sup> This translation of Europe, the ideas and contours of human rights, was effected in the substantive decisions of the Chamber and was also present in the procedures of the Chamber. The (re)establishment of the ‘rule of law’ in Bosnia – predominantly through the incorporation of European and international human rights law to supplant domestic law, and the development of hybrid institutions, displacing and transforming national decision-makers – was a central objective of the Dayton Peace Agreement and the international mission in Bosnia. Backed by both the direct force of the intervention and the force of the new law set forth in the Dayton Peace Agreement, this project succeeded in transforming the Bosnian legal landscape.

This translation of the law of Europe – through the work of the Human Rights Chamber and other institutions of the international mission – to the domestic legal system was uneven, contingent, and subject to misunderstandings and resistance. In its work, the unequal hybridity of the Chamber shifted the balance of power toward international or European dominance while simultaneously ensuring that Bosnia was always “not quite” Europe.<sup>119</sup> The message (and mission) of the Dayton Peace Agreement was to render Bosnia recognizable as (though not) European; the presence of the OHR and the Human Rights Chamber created familiar institutions and imported international staff, which facilitated this recognition. And yet, this process was always intended as a temporary, transitional endeavour. Now, almost fifteen years after the international intervention, the new Bosnia continues to revisit this contested and hybrid terrain as a part of an emerging new Europe.

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<sup>116</sup> FANON, *supra* note 54, at 38; see MEMMI, *supra* note 66, at 106-11 (discussing the required “linguistic dualism” of the colonized).

<sup>117</sup> Despite this separate self-identification and the official recognition of three languages, within the Chamber there was simply one interpretation provided in the national language (often called just that) with the accommodation of two print versions to reflect the two different alphabets in use (Latin and Cyrillic).

<sup>118</sup> Hutnyk, *supra* note 15, at 86.

<sup>119</sup> BHABHA, *supra* note 26, at 131.

#### IV. RE-IMAGINING IDENTITIES: THE POTENTIALS OF HYBRIDITY

The Dayton Peace Agreement ended the war in Bosnia and Herzegovina in 1995; now almost fifteen years later, it is possible to begin to assess the international intervention there, including its hybrid components. From this temporal distance, some threads of empire still weave through the current situation in Bosnia, but others have unravelled or faded away as Europe has begun to reconfigure itself with Bosnia, and the other nations of Central and Eastern Europe, as constituent parts. In one sense, there are stories of liberation and independence within a new Europe, and yet, there are also echoes of the imperial past of Old Europe and the disturbing sense of a neo-imperial present of the West. The international mission in Bosnia, and the experience of the Human Rights Chamber, reflects these contradictory impulses and effects. And it suggests some ideas for re-thinking hybrid tribunals as a feature of such missions.

##### A. *Identities in a New Europe*

Bosnia's identity as 'Europe' versus 'Other' has long been both contingent and contested.<sup>120</sup> Although any map of the region placed Yugoslavia within Europe, the notion of the Yugoslav republics existing at the threshold of Europe, or along a border of East and West, recurred throughout the discussions of the war in the rest of Europe and North America.<sup>121</sup> Discussions of Bosnia inevitably included rueful commentary about the 'internecine' and 'tribal' conflicts that had been occurring for years and the sad conclusion that modern Yugoslavia had only ever

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<sup>120</sup> Peter Fitzpatrick notes that Eastern Europe "has long occupied a wavering position on the spectrum with what is seen, in contrast to 'Western Europe,' as its more archaic, more culturally specific, more folkish, more reactive and less original nationalism . . . . It occupies an intermediate position, European but Eastern." FITZPATRICK, *supra* note 7, at 128.

<sup>121</sup> When it had hosted the 1984 Olympics, Sarajevo was glorified as an exotic European capital, cosmopolitan and sophisticated, secular but tolerant, with mosques, cathedrals and temples located within blocks of one another. As the world watched the devastating effects of the siege of Sarajevo during the war and reacted to the reports of concentration camps, there was collective mourning of that lost image and a rush to explain the disconnectivity. Orientalist notions quickly emerged and took on significant power as Europe and the West debated the merits of involvement. In the West, there was a renewed interest in the Ottoman empire and its role in Bosnia, and corresponding attempts to explain the conflict as a clash of civilizations, a battle between Christianity and Islam, East and West. *See generally* EDWARD W. SAID, *ORIENTALISM* (Vintage Books 1978) (discussing the long history in the West of discursively creating and enforcing boundaries between the West and the "Orient"); Stuart Hall, *The West and the Rest: Discourse and Power in FORMATIONS OF MODERNITY* 275-320 (Stuart Hall & Bram Gieben eds., Polity Press 1992) (examining the ways in which early colonization shaped and was shaped by discourses of West and Other).

been an illusion. The purported differences between the (Eastern) Bosnians and the (Western) Europeans at first served as a justification for staying out of the conflict.<sup>122</sup> Bosnia was arguably, maybe even clearly, not ‘Europe,’ given the violent conflict, and thus the responsibility for acting lay elsewhere.<sup>123</sup> With the endurance and severity of the conflict, and the growing threat to Europe proper – particularly its stability, economically if not militarily, on the march toward unification – Bosnia began to find its way back into Europe. The discursive re-transformation of Bosnia into a (contingent) part of Europe was so complete that its status as ‘Europe’ – and of the violence there as a ‘local’ phenomenon – became a rationale identified in criticism of the willingness of the international community to intervene there rather than in Rwanda with its more direct echoes of colonialism.<sup>124</sup>

The international presence in Bosnia also reflected an earlier colonial era, given the military nature of the intervention, the unequal hybrid structure of the international mission and new domestic institutions, and the wholesale incorporation of an external (universal) body of law. When intervention came to Bosnia, however, the military force was exercised by the international community – acting through the United Nations Security Council and the North Atlantic Treaty Organisation (NATO) – rather than a single nation.<sup>125</sup> Similarly, after the NATO-led bombing campaign, diplomatic and political pressure was exercised by the international community, and the parties to the conflict agreed to participate in peace negotiations in late 1995. The result of those negotiations was the Dayton Peace Agreement and the international military and civilian missions it established to implement the peace. With the end of the war and the implementation of the Peace Agreement, Bosnia now had a sovereign national government – as well as various local governments.

Nonetheless, real power within Bosnia lay with the Office of the High Representative as the primary representative of the international com-

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<sup>122</sup> FITZPATRICK, *supra* note 7, at 128 (Cambridge University Press 2001).

<sup>123</sup> See Mahmud, *supra* note 11, at 1221 (noting the “mutually constitutive role of colonialism and modern Europe; many foundational constructs of modernity – reason, man, progress, and the nation – were developed in contrast with a racialized ‘non-Europe,’ with the latter posited as pre-modern, not fully human, irrational, outside history”); see also ORFORD, *supra* note 3, at 119-20 (pointing out that ‘the international’ . . . becomes that which major powers wish to claim or own – peace, democracy, security, liberty – while ‘the local’ becomes that for which major powers do not wish to take responsibility”); RAZACK, *supra* note 6, at 45 (discussing the prevalence of such attitudes in the Canadian peace-keeping mission in Somalia, but also in other humanitarian interventions around the globe).

<sup>124</sup> See David Theo Goldberg, *Racial Europeanization*, 29 ETHNIC & RACIAL STUD. 331, 352 (2006) (noting both the particular and the general sense of Europe “as the place of and for Europeans historically conceived,” which “presumes Europeans to be white and Christian”).

<sup>125</sup> See UN Peace Agreement Report, *supra* note 31.

munity. The OHR served a general coordinating role, both over its own sub-parts and in connection with other aspects of the international presence.<sup>126</sup> The external presence in Bosnia has always been a multinational one – international in character, even if predominantly European. The civilizing mission has been a collective one – if sometimes contested among its collectivity – and this collective nature of the intervention avoids some of the more obvious overtones of imperialism.<sup>127</sup> While military security and economic interests undoubtedly played a role in the timing and nature of the international intervention in Bosnia, the overall mission was focused on the restoration of an independent national state. International involvement began with the recognition of Bosnian sovereignty, and one ultimate goal of that involvement appears to have been the incorporation (or restoration) of Bosnia into the European family. Although at times the international community may have acted as the “colonial mother protect[ing] her child from itself,” intervention was not intended to establish a permanent alteration of sovereign authority or relationship of subordination – of one metropolitan source of power, a colonizer, and a colonial subaltern, a colonized.<sup>128</sup>

Nonetheless, the international mission is still present in Bosnia; the Office of the High Representative still oversees the implementation of the peace. The OHR describes its current mandate as:

[W]orking with the people and institutions of Bosnia and Herzegovina and the international community to ensure that Bosnia and Herzegovina evolves into a peaceful and viable democracy on course for integration into Euro-Atlantic institutions. . . . [T]he OHR is working towards transition – the point when Bosnia and Herzegovina is able to take full responsibility for its own affairs.<sup>129</sup>

The characterization of the OHR mission closely resembles the rhetorical justifications of the earlier age of empire – caretaking as a new gov-

<sup>126</sup> Although the OHR was a dominant presence, other international actors included: the Organization of Security and Cooperation in Europe (“OSCE”), the Council of Europe, the European Union, the diplomatic missions of various nations (particularly the “donor” nations funding the post-conflict rebuilding), various international staff from development projects, non-governmental organizations, journalists and others.

<sup>127</sup> *But see* RAZACK, *supra* note 6, at 45 (problematizing the view that the “international epitomized by the United Nations becomes a space where there is no outright aggression or colonial domination”).

<sup>128</sup> FRANTZ FANON, *THE WRETCHED OF THE EARTH* 170 (Constance Farrington trans., 1966) (1963); *see generally* Memmi, *supra* note 66 (discussing relationships of colonialism); *see also* RAZACK, *supra* note 6, at 157 (noting “[t]he moral universe of imperialism, as in the moral universe of peacekeeping mythologies, is a universe of those who must be saved and those who must do the saving.”).

<sup>129</sup> Office of the High Representative, OHR Introduction, [http://www.ohr.int/ohr-info/gen-info/default.asp?content\\_id=38519](http://www.ohr.int/ohr-info/gen-info/default.asp?content_id=38519). (last visited Sept. 30, 2009).

ernment gradually develops capability for self-government.<sup>130</sup> Unlike in the past, however, the transition and capability-building may have occurred to some extent, and it appears that the external presence will finally depart without need for revolution or an overt independence campaign.<sup>131</sup> Over the years, the responsibilities of the OHR have gradually contracted, and more responsibility has devolved to the national government, although the OHR maintains ultimate authority in many respects. The OHR was slated to end its tenure in 2008 but at present still remains in Bosnia with the expectation of increased involvement by the European Union as Bosnia advances on the path to accession and membership in that “epitome[ ] of the universal and progressive.”<sup>132</sup>

While traces of imperial relationships are still suggested in the OHR presence and other ongoing international involvement, the relationships have been somewhat transformed from the early days of the international mission. Bosnia and Herzegovina acceded to the Council of Europe in 2002, which was acclaimed as an important step towards full membership in ‘Europe.’<sup>133</sup> It has not yet become a member state of the European Union although the early stages of that process have also begun. In a 2003 report of the European Commission, the executive body of the European Union, regarding Bosnia’s preparedness for negotiations on accession, the ‘progress’ enabled by the international intervention is presented as Bosnian progress. In a section entitled “Democracy and the Rule of Law,” the Commission affirms:

The constitution of [Bosnia] specifies (article I.2) that [Bosnia] is a democratic state operating under the rule of law with free and democratic elections. The constitution incorporates the European Convention on Human Rights. Democratic systems have begun to function. . . . The rule of law has been gradually re-established: the country is generally peaceful; there is freedom of expression and peaceful assembly. Freedom of movement is guaranteed and the

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<sup>130</sup> See ORFORD, *supra* note 3, at 141-42 (discussing the problem of finding “a legal category to capture the nature of the international personality” of territories such as Kosovo and East Timor “given that all the existing categories that intuitively seem to fit – protectorate, trust territory – must be dismissed because of their links to colonialism”).

<sup>131</sup> See generally FANON, *supra* note 128 (discussing violence in independence struggles); MEMMI, *supra* note 66 (discussing revolt as a response to colonialism).

<sup>132</sup> See FITZPATRICK, *supra* note 7, at 136-37 (discussing the role of the European Union in modern Europe where “the EU and its law are formed and exalted as epitomes of the universal and progressive”).

<sup>133</sup> See Cornell & Salisbury, *supra* note 10, at 422 (noting implementation of Chamber decisions was a condition for membership).

right to property has in most cases been enforced. Given recent history, these and other rights are no small achievement.<sup>134</sup>

Striking a similar tone, the section on “Human Rights” notes: “Formally, [Bosnian] citizens enjoy all the human rights and freedoms identified in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. According to the [Bosnia] constitution (Art. II.2), these apply directly in [Bosnia] and have priority over all other law.”<sup>135</sup> Although many areas for continued Bosnian ‘improvement’ are identified in the report, the satisfaction (and perhaps even self-congratulation) at the successful, though still somewhat menacing, mimicry of the West by the Bosnian institutions is transparent.

More recent reports have been less optimistic. For example, the 2007 “Progress Report” on Bosnia suggests less progress on establishing the rule of law; it summarizes:

On the basis of the Dayton/Paris Agreement, the international community continues to maintain a significant presence in Bosnia and Herzegovina. The Office of the High Representative and the EU Special Representative have been working closely with the European Commission on issues related to European integration. However, the authorities of Bosnia and Herzegovina have not demonstrated the capacity to take further political ownership and responsibility over reform. Due to the tense political situation and the lack of reform, the High Representative has continued to play an important role in facilitating reform and governance issues. Between 1 January and 30 September 2007, the High Representative used his executive powers on 31 occasions, which included the imposition of legislation and the removal of officials.<sup>136</sup>

The 2008 Progress Report is virtually identical except that it notes that the “High Representative’s use of his executive powers has remained low, and he has not enacted any new legislation in the reporting period.”<sup>137</sup> Regarding human rights, the more recent reports state:

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<sup>134</sup> *Commission of the European Communities, Report from the Commission to the Council on the Preparedness of Bosnia and Herzegovina to Negotiate a Stabilisation and Association Agreement with the European Union*, at 6, (Nov. 18, 2003) [hereinafter *Commission Report*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0692:FIN:EN:PDF>.

<sup>135</sup> *Id.* at 12.

<sup>136</sup> *Commission of the European Communities, Commission Staff Working Document, Bosnia and Herzegovina 2007 Progress Report*, at 8, (Nov. 6, 2007) [hereinafter *European Commission Working Document*], available at [http://www.europa.ba/files/docs/publications/en/Bosnia\\_and\\_Herzegovina\\_2007\\_Progress\\_Report.pdf](http://www.europa.ba/files/docs/publications/en/Bosnia_and_Herzegovina_2007_Progress_Report.pdf).

<sup>137</sup> *Id.* at 7; *Commission of the European Communities, Communication from the Commission to the Council and the European Parliament*, COM (2008) 674 final (Nov.

Overall, Bosnia and Herzegovina has made limited progress in improving the observance of international human rights law. It has achieved results in addressing the backlog of human rights-related cases, but there is room for improvement as regards the implementation of rulings. Implementation of international human rights conventions also needs to improve.<sup>138</sup>

Thus, over the years since the Dayton Peace Agreement, the transition from protectorate, even subaltern, to full sovereign, has been slow-moving and it remains incomplete. From the perspective of the West, while Bosnia does not yet act as an equal, it is also not considered a colony – it is a “probationary member of the West” that may gradually be permitted to move out of “the waiting room of history.”<sup>139</sup>

### B. *Rethinking Hybrid Courts*

The experience of the mission in Bosnia suggests ways for reconsidering hybrid courts as a form of international intervention. In keeping with the temporary nature of the international mission, the Human Rights Chamber was always conceived as a transitional measure. Under the Peace Agreement, its original mandate was intended to cease in 2000 at the end of a five-year transitional period.<sup>140</sup> Accordingly, discussions started in early 1999 on the process for winding down the work of the Chamber and merging it into the national court system. At that time, the predominant participants in the process and the decision-makers were international, rather than national.<sup>141</sup> The OHR requested that the European Commission for Democracy through Law, also known as the Venice Commission, begin consideration on the future of the Human Rights

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5, 2008) [hereinafter Commission Communication], available at <http://www.europa.ba/docs/progress2.pdf>.

<sup>138</sup> Commission Report, *supra* note 134, at 16. The 2008 Report contains nearly identical language. European Commission Working Document, *supra* note 136, at 16 (“Overall, Bosnia and Herzegovina has made limited additional progress on improving observance of international human rights law. Implementation of international human rights conventions needs to improve. Efforts to ensure proper enforcement of human rights need to increase.”).

<sup>139</sup> FITZPATRICK, *supra* note 4, at 117-18 (noting “Eastern Europe has recently emerged as an intermediate category [between civilized society and barbarism] and as a probationary member of the West, expected to progress rapidly towards full conformity with ‘the rule of law’; МЕНТА, *supra* note 51, at 97 (suggesting that a more ethical possibility “does not require being confined in the waiting room of history while some other agency has the key to that room”); see also CHAKRABARTY, *supra* note 7, at 8 (discussing the historicist argument that consigns “Indians, Africans, and other ‘rude’ nations to an imaginary waiting room of history”).

<sup>140</sup> Dayton Peace Agreement, *supra* note 33, art. XIV.

<sup>141</sup> Yeager, *supra* note 8, at 51-53 (discussing the end of the Chamber’s mandate).



Chamber.<sup>142</sup> The Venice Commission, an advisory arm of the Council of Europe, is a European body that describes itself as follows:

[T]he commission has played a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage. . . .

It contributes to the dissemination of the European constitutional heritage, based on the continent's fundamental legal values while continuing to provide "constitutional first-aid" to individual states. . . .

. . . .

The work of the European Commission for Democracy through Law aims at upholding the three underlying principles of Europe's constitutional heritage: democracy, human rights and the rule of law - the cornerstones of the Council of Europe.<sup>143</sup>

While the Bosnian government was involved as a participant in the discussions of its constitutional future, the Venice Commission made the recommendations as the voice of "European constitutional heritage."<sup>144</sup> The ultimate conclusion of that process was a new agreement adopted in September 2003 between the Bosnian state and its constituent entities providing for the merger of the Human Rights Chamber into the Bosnian Constitutional Court. The former hybrid tribunal of the Human Rights Chamber now exists as a solely national Human Rights Commission within the Bosnian Constitutional Court.<sup>145</sup> The Constitutional Court

<sup>142</sup> Additional information on the work of the Venice Commission is available at the Commission's website at [http://www.venice.coe.int/site/main/presentation\\_E.asp?MenuL=E](http://www.venice.coe.int/site/main/presentation_E.asp?MenuL=E).

<sup>143</sup> Council of Europe, The Venice Commission, [http://www.venice.coe.int/site/main/Presentation\\_E.asp](http://www.venice.coe.int/site/main/Presentation_E.asp) (last visited Sept. 30, 2009).

<sup>144</sup> *Id.*; see Mahmud, *supra* note 11, at 1221 (noting that the civilizing ambitions of Europe aspire to "a process whereby the geographically distant Other is supposed to, in time, become like oneself; Europe's present becomes all Others' future"); Hall, *supra* note 121, at 314 (suggesting "[w]ithout the Rest (or its own internal 'others'), the West would not have been able to recognize and represent itself as the summit of human history").

<sup>145</sup> The five original members of the Commission were all former Chamber judges, including two international judges and three national judges. Human Rights Commission Within the Constitutional Court of Bosnia and Herzegovina, <http://www.hrc.ba/commission/eng/default.htm>. (last visited Oct. 1, 2009). All members of the Commission were appointed by the President of the Constitutional Court, a Bosnian judge. The Human Rights Chamber officially ceased its existence at the end of 2003, and the Human Rights Commission began its work in 2004 with the mandate to complete by the end of 2004 the cases that were pending before the Chamber. *Id.* Under the new agreement, Bosnian authorities were charged with "mak[ing] possible the evolution of the current transition system into a sustainable system of protection of [ ] human rights." *Id.* At the end of 2004, with thousands of cases still pending, the Commission was transformed once again into a solely Bosnian institution within the

continues the Chamber's work in a more traditional form – with the lingering presence of the international mission in the remaining cases and precedent of the Chamber and in the continued role of international judges on the Constitutional Court itself. The human rights commitments of Bosnia – as defined by the European Convention and the other international agreements identified in and incorporated by the Constitution – also remain as a marker of the boundaries of Europe.

It is difficult to pierce the discursive hegemony of the West – particularly reflected in the official reports of the European and international bodies charged with assessing Bosnian progress – to determine Bosnian views on the international intervention.<sup>146</sup> The international presence has now shrunk, and the hybrid institutions have now become more fully national. It is possible that the originally constructed hybridity may be more organic now through that “imperceptible process whereby two or more cultures merge into a new mode.”<sup>147</sup> For better or worse (depending on one's perspective), the post-war, post-Dayton institutions exist now as a product of both Bosnian and international involvement; they continue as Bosnian institutions, transformed by the shared experiences of the intervention and the daily accretion of new identities.

As useful as post-colonial and other critical social theory is to explain the international mission in Bosnia, and more broadly, to raise questions about the new fascination with hybrid tribunals, the experiences in Bosnia may also reshape understandings of post-colonialism, neo-colonialism and the complex power relations at play. Bosnia has challenged the self-definitions of Europe and the West, and it continues to do so. A new form of civilizing mission and an attempt to affirm the rule of a universal international and European law may have motivated and structured the international mission, but in this new context, more autonomy was given to the national authorities, both initially and ultimately. Perhaps as a result, there are indications that there has been some success in “provincializing” Europe: discourse invokes Old Europe and New Europe now, in addition to and at times destabilizing the earlier (and differently problematic) tropes of Western Europe and Eastern Europe.<sup>148</sup> Questions about the role of empire in international interventions remain, but they offer opportunities for productive engagement – they should be renewed, re-examined, revised as the next steps in the international mission in Bos-

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Constitutional Court. Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, <http://www.hrc.ba/commission/eng/default.htm>. (last visited Oct. 1, 2009).

<sup>146</sup> See SAID, *supra* note 121, at 49 (describing the West's long history of shaping discourse regarding the East); Hall, *supra* note 121, at 318 (noting “the discourse of ‘the West and the Rest’ is alive and well in the modern world”).

<sup>147</sup> YOUNG, *supra* note 11, at 21.

<sup>148</sup> See CHAKRABARTY, *supra* note 7 (seeking to displace imaginary and hyper-real conceptions of Europe which conflate political modernity with Europe).

nia are undertaken, each time another international intervention is imagined, and whenever new hybrid tribunals and other mechanisms of transitional justice are considered.<sup>149</sup>

The intent of the critique in this article is to provide a foundation for challenging static and simplistic ideas of hybridity, particularly in the context of hybrid tribunals, and to encourage a deeper consideration of the opportunities and limitations of hybrid institutions. As other scholars have noted, hybrid tribunals offer real potential as a means to facilitate recovery in a post-conflict or transitional situation.<sup>150</sup> As the experiences in Bosnia and elsewhere illustrate, hybrid tribunals also risk reinscribing problematic power relations from the micro level of interpersonal relationships and case work to the macro level of geo-political relationships. In order to advance the discussion about the potential and future use of hybrid tribunals, the following issues at a minimum should be interrogated more thoroughly: the notion of hybridity based on an international-national dichotomy; the power relations within hybrid institutions and their work; and the complexities of transplanting or importing law, particularly in a post-conflict environment. Although these themes have been elaborated throughout, they are briefly reiterated here:

*The international-national dichotomy.* This distinction is pervasive in international law, and in the human rights field, but it is seldom problematized.<sup>151</sup> Of course, for individuals, such status is situational rather than immutable. A Bosnian in Bosnia is national (or even local), but a Bosnian in East Timor is international. Nonetheless, like all dualisms this one is too often an unequal and oppositional one, with power and status located primarily in the international. Hybrid institutions that incorporate these distinctions risk solidifying them, as well as over-valORIZING the international and under-valORIZING the national. Although it is common to bemoan political influences and conflicts of interests by national participants, little or no attention is given to the same possibilities among international participants.<sup>152</sup> The international becomes

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<sup>149</sup> See Cornell & Salisbury, *supra* note 10, at 391 (arguing that “the Human Rights Chamber has set an important precedent for future international interventions”); Yeager, *supra* note 8, at 53 (suggesting the Chamber provides an example to follow in future interventions); Dickinson, *supra* note 1, at 39-42 (discussing the possibility of a hybrid tribunal in Afghanistan).

<sup>150</sup> See generally Dickinson, *supra* note 2; Dickinson, *supra* note 1, at 33-37 (discussing issues of legitimacy and capacity); Higonnet, *supra* note 2 (stressing the importance of including a local component for legitimacy, accessibility and capacity-building); Megret, *supra* note 13 (urging hybridity in war crimes prosecutions because it collapses artificial distinctions between domestic and international).

<sup>151</sup> See ORFORD, *supra* note 3, at 204 (discussing how the international community constitutes itself in opposition to a chaotic local).

<sup>152</sup> See, e.g., Higonnet, *supra* note 2 (discussing problems of corruption and political influence in local courts and in local participation in hybrid courts); Cohen, *supra* note 1 (discussing problems of local participation in tribunals in East Timor,

stripped of personal and national affiliations, neutralized as expert, while the national is overly personalized and nationalized. Moreover, this oversimplification is also writ large. The international community as a whole is often absolved from any complicity or misconduct in the intervention or in the conditions that may have fostered or exacerbated the conflict; the locus for responsibility remains solely with the national.<sup>153</sup> Further thought should be given to the consequences of this international-national distinction and to ways to destabilize it. In crafting future hybrid tribunals, it may be time to consider other or multiple hybridities that are based on differing expertise or competencies or that splinter the ‘international’ into greater particularity.

*Power relations.* There is very little empirical data available about the everyday practices of hybrid tribunal structures, or even about the effectiveness of such institutions.<sup>154</sup> Based on the tribunals that have been created to date, however, it is clear that there are often distinctions between personnel from the host country and from outside. These may be based on the national-international dichotomy or upon outdated notions of working in the ‘field.’ These distinctions may profoundly structure the relationships and work of hybrid institutions. They may also have meaning and material consequences for the capabilities of the institutions and for their longer term credibility, both of which have been identified as important objectives for hybrid tribunals.<sup>155</sup> Further research should be done in this area with the goal of enriching the existing assessments of tribunal work and of minimizing problematic hier-

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Sierra Leone, and Cambodia); Sriram, *supra* note 2 (discussing corruption and related problems in the local courts in Sierra Leone).

<sup>153</sup> See generally ORFORD, *supra* note 3 (problematizing humanitarian interventions in East Timor, Bosnia, Rwanda and elsewhere); RAZACK, *supra* note 6 (examining the role of Canada and other Western nations in interventions in Somalia, Haiti, Bosnia, Rwanda and elsewhere); PATRICIA MARCHAK, *NO EASY FIX: GLOBAL RESPONSES TO INTERNAL WARS AND CRIMES AGAINST HUMANITY* (McGill-Queen’s University Press 2008) (discussing humanitarian interventions in Cambodia, Bosnia and Rwanda).

<sup>154</sup> For an example of this type of research in a different context, examining attitudes of Bosnian judges and prosecutors towards the International Criminal Tribunal for Former Yugoslavia, see Hum. Rts. Ctr., Int’l Hum. Rts. L. Clinic, Univ. of California, Berkeley et al., *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors* (2000), available at [http://www.law.berkeley.edu/files/JUDICIAL\\_REPORT\\_ENGLISH.pdf](http://www.law.berkeley.edu/files/JUDICIAL_REPORT_ENGLISH.pdf); see also Richard Ashby Wilson, *Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND LOCAL* 342, 366 (Mark Goodale & Sally E. Merry eds., Cambridge University Press 2007) (calling for researchers to “venture into the sites of production of international human rights laws and norms and to gain access to international criminal tribunals and examine their knowledge construction practices”).

<sup>155</sup> See Dickinson, *supra* note 2, at 296.

archies. Possible areas of inquiry include examination of differences in compensation and professional development opportunities, in status within and outside of the institution, in day-to-day institutional practices and procedures, and in the forms of expertise brought to the tribunal (including competencies in language, in domestic and international law, in local and regional history, and so forth).

*Transplanting or importing law.* Too often, human rights advocates and policymakers endorse the wholesale importation of international human rights law into a domestic context. This elides the important role of national authorities and their citizens in making domestic law, and it often undermines the credibility of the new legal regime. This can, of course, be counter-productive in numerous ways: it appears (and may be) undemocratic, it may consequently lack validity and legitimacy, and it ignores the valid critiques that have emerged about existing human rights law.<sup>156</sup> It also ignores both the long imperial history of taking such measures as well as the complexities of domestic systems which may have functioned successfully, if differently, in important respects. At a minimum, the international community should resist the temptation to require more from national authorities emerging from a conflict situation than they could reasonably expect in their own national contexts.<sup>157</sup> Increasing legal protection for human rights is still a worthy goal, but greater care should be taken in how that goal is achieved. In the case of hybrid tribunals, personnel should have knowledge of, if not expertise in, both the relevant domestic and international law. Given the potential power imbalances, it is insufficient to assume that domestic participants alone will provide the domestic expertise and that foreign participants alone will provide the international expertise. To the extent there is capacity building in this area, it should flow in both (or multiple) directions.

This list of issues is not meant to be exhaustive in identifying important facets of hybridity for further investigation, rather it is meant to be productive, even provocative, of deeper inquiry. These issues of power are central issues that are too often ignored in international interventions and in the creation and work of hybrid tribunals. Social theory, particularly post-colonial theory and critical globalization studies, has much to offer

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<sup>156</sup> See, e.g., An-Na'im, *supra* note 83, at 348-53 (discussing the exclusion of non-western participants and perspectives in the early development of the international human rights regime); CHARLESWORTH & CHINKIN, *supra* note 83 at 36-37 (identifying a "Southern" critique of the "Western origins, orientation and cultural bias" of the international legal order), 174-79 (noting "[b]oth the U.N.'s membership and its bureaucracy are dominated by men").

<sup>157</sup> See generally Elizabeth Bruch, *Whose Law Is It Anyway? The Cultural Legitimacy of International Human Rights in the United States*, 73 TENN. L. REV. 669 (2006) (critiquing U.S. reluctance to adopt international human rights standards).

to enhance the pragmatist approach often deployed in international interventions. It is time to turn a more critical lens on such projects.

## V. CONCLUSION

Hybrid tribunals have been hailed for their potential in post-conflict and other transitional situations. They seem to offer a 'best of both worlds' approach by bringing together national and international components in a productive new form. They are increasingly being established in various contexts around the globe and appear frequently in conjunction with broader international intervention. In the human rights literature and in practice, the optimism surrounding such tribunals has seldom been tempered by a serious consideration of what it means to operate as a hybrid institution, and as a result, neither the opportunities nor the limitations of such an approach have been fully explored. Post-colonial and critical globalization scholars have, however, been more active in considering both old and new forms of hybridity. Their insights have much to offer to advance the dialogue on hybrid tribunals and on the larger context of international interventions.

The international intervention and on-going presence in Bosnia and Herzegovina presents an illuminating case study. In many respects it appears as a neo-colonial undertaking by Europe and the West or a prototype of a new imperialism; subsequent interventions in Kosovo and East Timor have adopted similar practices and structures. It disrupted Bosnian sovereignty, after recognizing it as such, and embarked on a long-term mission of stabilizing and civilizing the post-conflict society. More than traditional colonial endeavours, it attempted to match its actions to its rhetoric of progress, capacity-building and independence. The Human Rights Chamber for Bosnia and Herzegovina, a hybrid human rights tribunal created by the Dayton Peace Agreement, provides particular insight into this modern articulation of empire, if it is imperialism at all, grounded not so much in national ambitions as in international community aspirations. It also foreshadowed the growing use of hybrid tribunals elsewhere, in places as diverse as Sierra Leone and Cambodia. As the international community imagines and experiments with new forms of intervention (and there appears to be no real end to this experimentation in sight), it must also acknowledge and engage with the many complexities of hybridity.