



## Supervised Independence and Post-Conflict Sovereignty: The Dynamics of Hybridity in Kosovo's New Constitutional Court

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### I. INTRODUCTION

In the years since the end of the Cold War, international and domestic actors have increasingly utilized internationalized or hybrid courts as mechanisms to administer justice in post-conflict contexts.<sup>1</sup> As judicial bodies that include both domestic and international or foreign judges, hybrid courts have been seen as sensible and practical ways to strengthen local institutions and to develop the rule of law at the local level. At the same time, these arrangements enable the international community to maintain some kind of link to the domestic judiciary through the presence of international judges. There is, nonetheless, a concern: the very links to the international community that are meant to foster stable and viable local judicial institutions may end up undermining local capacities and legitimacy. In many ways, these tensions lie at the heart of international law. Declaring its intent not only to internationalize but also to *universalize* the values it promotes, international law nonetheless contains within it a set of impulses that risk appearing to advance the particular interests of the international community's dominant members to the detriment of local development.<sup>2</sup>

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1. Variants on the concept of hybrid courts have been established in Sierra Leone, East Timor, Cambodia, Bosnia and Herzegovina, and Kosovo.
2. International law historically has adopted, on the one hand, an abstract, formal, and universal character, while simultaneously masking the aspirations of powerful states on the other. Indeed, international law's formalism is never merely formal; that is, it is never emptied fully of its substantive content. Rather, international law formalizes a particular substantive arrangement and transmits the values of those that direct it. *See generally* Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4 (1990).

Addressing this risk requires examining the practical interaction between local communities and hybrid courts. It also requires assessing any perceived democratic deficit resulting from this type of international involvement, as well as the impact of international involvement on local courts' long-term efficacy and development into legitimate judicial authorities. Several important questions arise from these arrangements, suggesting both their advantages and limitations. How effective are hybrid institutions as productive centers for international and multicultural collaboration? How do hybrid structures balance and interact with the other primary representatives of the international community in post-conflict areas? What are the pathways for the promotion of the rule of law in such frameworks?

This Essay addresses these questions by examining the early experience of the Constitutional Court of the Republic of Kosovo as a relevant and timely case study. Following Kosovo's declaration of independence on February 17, 2008, authorities began preparing for the establishment of the Constitutional Court of the Republic of Kosovo. Until the end of the international supervision period provided for in the Comprehensive Proposal for the Kosovo Status Settlement (CSP), the court's nine judges not only will reflect Kosovo's multiethnic society but also will include three international judges appointed by the International Civilian Representative in consultation with the President of the European Court of Human Rights.<sup>3</sup> The court began issuing decisions in late 2009. It has already been involved in a number of controversial and politically sensitive cases, including most recently a judgment that the President of the Republic of Kosovo, Dr. Fatmir Sejdiu, committed a "serious violation" of the constitution.<sup>4</sup> This judgment led to the President's resignation on September 27, 2010.<sup>5</sup>

Recent scholarship has offered a critical appraisal of the involvement of the Office of the High Representative in the establishment of the transitional Human Rights Chamber in Bosnia and Herzegovina, a previously established post-conflict hybrid body.<sup>6</sup> While recognizing the difficulties in ensuring an effective form of hybridity and the legitimate integration of international standards into domestic law, this Essay aims to show that the new example of Kosovo's Constitutional Court—and the engagement of the International Civilian Office as part of the CSP arrangement—can offer useful instruction on how international institutions can serve to consolidate, rather than undermine, democratic legitimacy in post-conflict contexts. Drawing on insights from both local and international actors involved in designing and establishing the Constitutional Court, this Essay re-examines the potential to reach beyond the

3. KOS. CONST. art. 152(4).

4. *Rrustemi v. Sejdiu*, Case No. KI 47/10 (Const. Ct. Kos. Sept. 28, 2010), [http://www.gjk-ks.org/repository/docs/ki\\_47\\_10\\_eng\\_2.pdf](http://www.gjk-ks.org/repository/docs/ki_47_10_eng_2.pdf).

5. The judgment indicates that it was made by majority vote and that there would be two dissenting opinions "which will be published by the Court in due course." *Id.* at 12. A joint dissenting opinion by Judges Almiro Rodrigues and Snezhana Botusharova was subsequently published. *See Rrustemi v. Sejdiu*, Case No. KI 47/10 (Const. Ct. Kos. Sept. 28, 2010) (Botusharova & Rodrigues, JJ., dissenting), [http://www.gjk-ks.org/repository/docs/ki\\_47\\_10\\_dissenting\\_opinion\\_judge\\_snezhana\\_botusharova\\_and\\_judge\\_almiro\\_rodrigues.pdf](http://www.gjk-ks.org/repository/docs/ki_47_10_dissenting_opinion_judge_snezhana_botusharova_and_judge_almiro_rodrigues.pdf).

6. *See, e.g.*, Elizabeth M. Bruch, *Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens*, 28 B.U. INT'L L. J. 1 (2010).

international-national dichotomy and to understand the foundations of sustainable and legitimate capacity-building in the implementation of hybrid arrangements.

Part I of this Essay advances a conceptual framework we use to consider the operational dimensions of hybridity, focusing on the interaction between *intentional* and *organic* hybridity. Part II discusses the early introduction of hybrid judicial panels in Kosovo beginning in 2000. These bodies largely failed to unite international and local expectations for post-conflict adjudication. Then, we turn our attention to the “supervised independence” stage of Kosovo’s transitional period. Part III outlines the post-2007 institutional and political context, including the CSP and the 2008 adoption of the Constitution of the Republic of Kosovo. Parts IV and V then examine and evaluate the efficacy of our main case study, the hybrid structure of Kosovo’s new Constitutional Court. We conclude by suggesting further lines of research in order to appraise the longer-term prospects of the hybrid arrangement and to guide the future course of Kosovo’s nascent institutions.

## II. HYBRID JUDICIAL STRUCTURES AND THE INTERSECTION OF ORGANIC AND INTENTIONAL HYBRIDITY

The concept of hybridity as applied to hybrid courts and tribunals applies not only to the composition of these bodies, incorporating both international and national members, but also to their functional mandate in the application of domestic and international law. At stake in hybrid arrangements are the internal relationships of collaboration and contestation that develop among judges and the external perceptions of legitimacy that these courts hold among the wider population. Both elements, the internal and the external, are essential. By virtue of their dual (or combined) nature as both domestic and international, hybrid courts play a critical role in strengthening the capacity of local institutions, increasing the legitimacy of post-conflict adjudication and the rule of law in the eyes of the public, and disseminating norms that lay the groundwork for long-term judicial and political stability.<sup>7</sup> It is along these intersecting axes that the success of hybrid judicial structures may be assessed.

In any assessment of hybrid tribunals, it is important to differentiate between two kinds of hybridity: organic and intentional. Post-colonial scholar Robert Young, drawing upon the work of philosopher Mikhail Bakhtin, notes the double character of hybridity: organic hybridity as a self-developing, internal process of combination that produces novel fusion, and intentional hybridity that actively “sets different points of view against each other” in contest.<sup>8</sup> Here, organic hybridity bridges different identities, creating the institutional space in which contestation can be fully productive and actors can engage as equal and respected participants. Intentional hybridity, on the other hand, fails to unite competing perspectives and instead establishes a permanent boundary of

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7. See generally Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295 (2003) (assessing the merits of hybrid tribunals).

8. ROBERT J.C. YOUNG, COLONIAL DESIRE: HYBRIDITY IN THEORY, CULTURE AND RACE 21-22 (1995); see also Bruch, *supra* note 6, at 7.

difference. Rather than communicating across differences, intentional hybridity reinscribes them, often in conditions of dependency. Indeed, the reason why scholars have been critical of hybrid arrangements in other jurisdictions is primarily the imposition of this latter *intentional* kind of markedly unequal hybridity. For example, commentators have noted that the introduction of the Human Rights Chamber in Bosnia and Herzegovina crystallized differences between international and national judges and staff and retained strict physical and linguistic divisions.<sup>9</sup>

Nonetheless, while all efforts at hybrid judicial institutions are in their initial phases constructed artificially and intentionally (usually by agreement among both domestic and international actors), hybridity is a dynamic phenomenon that incorporates both categories dialectically and therefore leaves conceptual room for evolution. While reinscribing ethnic or cultural divisions into the court's composition and mandate, hybridity also provides the context and generative capacity for their integration. In other words, *intentional* hybridity gradually can take on the characteristics of *organic* hybridity, if sufficient care is applied to the design and implementation of hybrid arrangements.<sup>10</sup> With these conceptual distinctions in mind, we shall see that there was insufficient attention to the design of the ad hoc intentional hybridity of Kosovo's early internationalized judicial arrangements, but that the new Constitutional Court has the potential to become more organically hybrid.

### III. EARLY DIFFICULTIES OF KOSOVO'S HYBRID ARRANGEMENTS: UNMIK REGULATION 2000/64

Hybrid judicial structures have been in place in Kosovo since the early stages of the international administration that began in 1999 under the framework of U.N. Security Council Resolution 1244 (1999), which established the United Nations Interim Administration Mission in Kosovo (UNMIK). UNMIK's accomplishments in this area were considerable, particularly in view of the state of the judiciary in Kosovo when the mission began its operations. Nonetheless, many commentators have noted problems with UNMIK's hybrid arrangements. The purpose of this Part is not to offer a full assessment of UNMIK's successes or shortcomings but rather to place the Constitutional Court hybridity arrangements in context of what had preceded them during the period of international administration. In that sense, this Part focuses on the challenges encountered and the lessons learned during this period.

In February of 2000, UNMIK established a minimal hybrid judicial arrangement in order to prosecute and try criminal cases, in particular those concerning alleged war crimes.<sup>11</sup> Due to the volume of such cases in the aftermath

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9. See Bruch, *supra* note 6, at 12-13.

10. For a thoughtful discussion of these concepts, see *id.* at 6-9.

11. See U.N. Mission in Kosovo, *On the Appointment and Removal from Office of International Judges and International Prosecutors*, Reg. 2000/6, U.N. Doc. UNMIK/2000/6 (Feb. 15, 2000), available at [http://www.unmikonline.org/regulations/2000/re2000\\_06.htm](http://www.unmikonline.org/regulations/2000/re2000_06.htm). The ICTY has primacy over serious violations of international human rights law committed since January 1, 1991 in the former Yugoslavia. While the ICTY's jurisdiction is concurrent with

of the disintegration of Yugoslavia, it was hoped that domestic courts would play a crucial role in providing accountability where the International Criminal Tribunal for the Former Yugoslavia was unable to exercise jurisdiction. However, by the time UNMIK entered the scene, the local judiciary in Kosovo had become splintered and all but ineffective. After more than a decade of marginalization of the Kosovo Albanian population by Belgrade, most judicial officials and practitioners were of Serb ethnicity. After the 1999 international intervention, many of these local judges, magistrates, and lawyers either left Kosovo or refused to cooperate with the U.N. structures. There were some notable exceptions of Kosovo Serbs who joined the system, and a number of non-Kosovo Serb minorities—such as Turks, Bosniaks, and Roma—participated as well. For reasons that are understandable given Serbian policies toward Kosovo Albanian participation in public institutions since the 1980s, UNMIK was faced with a dearth of Kosovo Albanian judges with appropriate experience.<sup>12</sup> One of the main challenges facing UNMIK was to ensure multiethnic participation in transitional administration structures.<sup>13</sup> There was a strong concern that a judiciary composed chiefly of only one ethnic group could not offer the kind of impartial justice that would be expected of UNMIK, either in practice or in terms of the perception of Kosovo's communities. Responding to these concerns and considerable pressure by Kosovo Serbs and others, UNMIK introduced international judges and prosecutors into the Kosovo judiciary.<sup>14</sup>

UNMIK's foray into hybridity began with minority international panels. Commentators have pointed out that this initial international infusion was essentially "crisis driven" and ad hoc, unaccompanied by long-term planning or systematic strategic thinking.<sup>15</sup> Hybrid panels were assigned not only war crimes cases but also other sensitive cases including ones involving organized crime and corruption, though often without consistency or uniformity. Constituting only a minority on judicial panels, the international jurists were routinely outvoted by their Kosovo Albanian colleagues.<sup>16</sup> In practical terms, this inability to determine outcomes prevented minority international panels from contributing much to changing perceptions of an ethnically biased judicial system.

In response to these deficiencies, in December of 2000 UNMIK issued Regulation 2000/64, introducing *majority* international panels and authorizing international prosecutors to reactivate and pursue cases that domestic authorities

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national courts, its primacy means it can request a national court's deferral. *See* Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, art. 9, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

12. MICHAEL E. HARTMANN, INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO: A NEW MODEL FOR POST-CONFLICT PEACEKEEPING 5-7 (2003), *available at* <http://www.usip.org/resources/international-judges-and-prosecutors-kosovo-new-model-post-conflict-peacekeeping>.

13. Of course, this challenge was not unique to the judiciary, but affected many of UNMIK's efforts.

14. *See* HARTMANN, *supra* note 12, at 7-10.

15. *Id.* at 13.

16. *See id.* at 10.

had discarded.<sup>17</sup> These new guidelines helped to address earlier concerns over bias, especially in particularly sensitive or divisive cases. Commentators have noted, however, that the majority international panels did not succeed to the extent hoped. One criticism is that UNMIK failed to integrate local actors sufficiently into the process of designing and implementing the new hybrid structures, thereby generating significant resistance from local (primarily Kosovo Albanian) judges.<sup>18</sup> According to one account, many simply refused to be recruited, and the Kosovo Supreme Court even protested to the Special Representative of the Secretary General<sup>19</sup> that the Regulation violated international law.<sup>20</sup>

The majority international panels helped address the most egregious miscarriages of justice by an ethnically monolithic judicial system. However, the incremental introduction of hybridity into the judicial system constantly faced challenges in terms of building the systemic capacity of local judicial institutions. There are many possible explanations for these shortcomings. For example, while a number of distinguished judges volunteered to go to Kosovo, observers have noted that others had little professional experience in relevant fields of law. Inherent linguistic and cultural barriers also made it more difficult for international judges to engage in the kind of mutual learning a hybrid system is meant to foster. The lack of a developed system of judicial training, professional feedback, and oversight contributed to the problem.<sup>21</sup> While mutually beneficial interaction between international and local judges certainly did take place, larger structural factors limited the impact of the hybrid arrangements on longer-term local capacity building.

In the end, the panels established before and through Regulation 2000/64 were examples of an imposed hybridity that failed to overcome its “intentional phase,” unable to bridge international and local expectations for post-conflict adjudication and transitional justice. Following this initial attempt, international actors worked to implement a longer-term strategy for Kosovo’s institutional stability, restructuring the international civilian presence and introducing new hybrid institutions. Given the challenging context of the initial UNMIK hybridity arrangements, it is not surprising that the results of a new phase of “supervised independence,” to which we now turn, have been decidedly more positive.

17. U.N. Mission in Kosovo, *On Assignment of International Judges/Prosecutors and/or Change of Venue*, Reg. 2000/64, U.N. Doc. UNMIK/REG/2000/64 (Dec. 15, 2000), available at [http://www.unmikonline.org/regulations/2000/re2000\\_64.htm](http://www.unmikonline.org/regulations/2000/re2000_64.htm).

18. David Marshall & Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 130 (2003).

19. The Special Representative, known by the acronym SRSG, is the head of UNMIK.

20. See Marshall & Inglis, *supra* note 18, at 130.

21. *Id.* at 129. (“Of the internationals that were appointed between 1999 and 2001, few had conducted trials involving serious criminal offenses and none had any practical experience in, or knowledge of, international humanitarian law. Indeed, one international judge's experience was exclusively in riparian rights. . . . In September 2000, the ICTY held a training session in Kosovo on humanitarian law for both judges and prosecutors. The majority of international judges and prosecutors did not attend.”).

#### IV. SUPERVISED INDEPENDENCE: REVIVED HYBRIDITY IN THE CSP AND THE 2008 CONSTITUTION

The concept of supervised independence under which Kosovo currently functions as a state developed in negotiations concerning Kosovo's final status. This Part briefly describes that process in general and then focuses on the arrangements for the Constitutional Court that emerged from that process.

As Kosovo's international administration continued after 1999, addressing Kosovo's status became increasingly urgent. From late 2005 to early 2007, former President Martti Ahtisaari of Finland served as Special Envoy of the U.N. Secretary-General on Kosovo's Final Status. In this capacity, he conducted intensive negotiations between Pristina and Belgrade on a final status arrangement.<sup>22</sup> At the conclusion of approximately one year of negotiations, he reported to the Secretary-General that no agreement would be possible. His report to the Secretary-General recommended that "the only viable option for Kosovo is independence . . . supervised by the international community."<sup>23</sup> The report was accompanied by a Comprehensive Proposal for the Kosovo Status Settlement (CSP), which constituted a blueprint for this "supervised independence."<sup>24</sup> The CSP contained detailed provisions on the rights of minority communities and their members,<sup>25</sup> the decentralization of government functions in favor of local self-government,<sup>26</sup> and the preservation of Serbian religious and cultural heritage.<sup>27</sup>

Kosovo's implementation of its CSP obligations would be supervised by an international civilian presence.<sup>28</sup> This presence was to be led by an International Civilian Representative (ICR), appointed by an International Steering Group (ISG), and supported by an International Civilian Office (ICO). The ICR would have extensive authority to ensure implementation of the CSP, and his mandate would have two aspects: support and supervision.<sup>29</sup> The ICR would "[b]e the final authority in Kosovo regarding interpretation of [the CSP's] civilian aspects."<sup>30</sup> The ICR would have extensive powers to intervene in Kosovo institutions, including the ability to take corrective measures to remedy breaches of the CSP and other acts inconsistent with its "terms or spirit." The scope of this

22. The process leading up to Kosovo's declaration of independence was extensively described in the recent advisory opinion of the International Court of Justice. It is also treated in considerable detail in two recent books by persons with some inside knowledge of the process. See HENRY PERRITT, *THE ROAD TO INDEPENDENCE FOR KOSOVO* (2010); MARC WELLER, *CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE* (2009).

23. U.N. Secretary-General, *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, ¶ 5, U.N. Doc. S/2007/168 (Mar. 27, 2010).

24. Comprehensive Proposal for the Kosovo Status Settlement, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007) [hereinafter CSP]. The main provisions of the CSP are contained in an addendum to the Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, *supra* note 23.

25. *E.g., id.*, Annex II.

26. *E.g., id.*, Annex III.

27. *E.g., id.*, Annex V.

28. There was also provision for an international military presence. *Id.*, Annex XI.

29. *See id.*, Annex IX, art. 1.1.

30. *Id.*, Annex IX, art. 2.1(a).

authority was to be very broad, including inter alia the annulment of legal acts of Kosovo institutions and the removal or sanction of public officials.<sup>31</sup> The ICR was also to appoint a variety of international officials in Kosovo institutions, including, as discussed below, three international judges on the Constitutional Court.

After the Special Envoy's report garnered no agreement at the level of the U.N. Security Council, a further round of consultations was launched under the auspices of the so-called "Troika" (composed of representatives of the United States, the European Union, and Russia). When it ultimately became clear that there would be no agreement with Belgrade, Kosovo declared independence on February 17, 2008. The new state's declaration of independence included the following proviso: "We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan."<sup>32</sup>

The recognition statement of the United States suggests that Kosovo's commitment in the Declaration is binding under international law.<sup>33</sup> The ISG<sup>34</sup> appointed the ICR on February 28, 2008, and the ICO was established the same day.<sup>35</sup> The independent state subsequently incorporated the CSP into its constitution, which in effect enshrined the ICR's mandate and authority to be the final interpreter of the CSP<sup>36</sup> and gave the CSP precedence over the constitution itself and over other legal acts of Kosovo.<sup>37</sup>

In general terms, the CSP's concept of supervised independence is in itself a form of hybridity. The ICR has the authority to intervene in the operation of the Kosovo political system in order to ensure the CSP's implementation, and the ICR appoints a wide range of international officials to Kosovo institutions. While these international officials benefit from enhanced status,<sup>38</sup> they serve as officials

31. *Id.*, Annex IX, art. 2.1(c) - (d).

32. Assembly of Kosovo, Kosovo Declaration of Independence, ¶ 12 (Feb. 17, 2008), *available at* <http://www.assembly-kosova.org/?cid=2,128,1635>.

33. Letter from the President of the United States to the President of Kosovo (Feb. 18, 2008), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080218-3.html> ("The United States relies upon Kosovo's assurances that it considers itself legally bound to comply with the provisions in Kosovo's Declaration of Independence."). To date, seventy-one states have recognized the Republic of Kosovo. *See Kiribati Recognizes Independence of Kosovo*, NEW KOSOVA REPORT (Oct. 25, 2010), <http://www.newkosovareport.com/201010252219/Politics/Kiribati-recognizes-independence-of-Kosovo.html>.

34. The Member States of the ISG at the time were Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Slovenia, Switzerland, Sweden, Turkey, the United Kingdom and the United States of America. There are currently twenty-five member states.

35. *See* Press Release, First Meeting of the International Steering Group for Kosovo (Feb. 28, 2008), <http://www.ico-kos.org/pdf/presseng28.pdf>.

36. KOS. CONST. arts. 146-147.

37. *Id.*, art. 143.

38. *See, e.g.*, CSP, *supra* note 24, Annex IX, art. 4.6(b) (providing that Kosovo shall accord privileges and immunities to ICR appointees).



of the Kosovo state within the Kosovo legal framework. In practice, while the ICR has appointed the international officials required by the CSP, he has carried out his mandate in a manner that has not relied on the actual use of his supervisory, executive powers. Indeed, to date there has been no formal use of those corrective powers; rather, the ICR has focused on executing the supervisory aspect of his mandate in a way that addresses and resolves potential issues before they rise to a level requiring the use of executive powers. This approach suggests a more nuanced and effective form of hybrid relationship, an attempt at organic functioning that rejects unilateral and contentious engagement by a dominant actor in favor of productive collaboration.

#### V. THE HYBRID STRUCTURE OF THE CONSTITUTIONAL COURT OF KOSOVO

We now turn to the specific hybridity arrangement of the Constitutional Court of the Republic of Kosovo as implemented under the CSP, the Kosovo Constitution, and subsequent legal acts.

The CSP focused largely on the composition of the court, mandating a hybrid institution composed of six national judges and three international judges.<sup>39</sup> This arrangement is to remain in effect until the end of the international supervision of Kosovo. Following the end of international supervision, the court is to be composed of nine national judges. While the main focus of the CSP provisions on the court is its composition, the CSP also mandates certain grounds of jurisdiction, which were subsequently expanded under the constitution.<sup>40</sup>

Under the CSP, the six national judges are to be appointed by the President of Kosovo “on the proposal of the Assembly.”<sup>41</sup> There are two different requirements for Assembly approval of this proposal. Four positions require a two-thirds majority, while “with respect to the other two positions, the consent of the majority of the members of the Assembly including the consent of the majority of the members of the Assembly holding seats reserved or guaranteed for representatives of Communities that are not in the majority in Kosovo, shall be required.”<sup>42</sup> Given the makeup of the Assembly and likely voting patterns, these

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39. The term “international” is used regularly in Kosovo to denote non-Kosovars. The constitution further specifies in the context of the court that “[t]he three (3) international judges shall not be citizens of Kosovo or any neighboring country.” KOS. CONST. art. 152(4).

40. Articles 6.2 and 6.3 of Annex I grant ten or more members of the Assembly and municipalities, respectively, access to the court under specified circumstances. CSP, *supra* note 24, Annex I, arts. 6.2 - 6.3. Article 2.4 of Annex I extends certain access to individuals, subject to the important limitation of exhaustion of all other remedies. *Id.* art. 2.4. The court access provisions in the CSP are non-exclusive. Article 113 of the constitution provides for additional means of access, such as by the Ombudsperson, the courts, and other institutions. KOS. CONST. art. 113. For additional explanation and analysis of the court’s jurisdiction, see Dren Doli & Fisnik Korenica, *Kosovar Constitutional Court’s Jurisdiction: Searching for Strengths and Weaknesses*, 11 GER. L. J. 803 (2010), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1268>.

41. *See* CSP, *supra* note 24, Annex I, art. 6.1.2.

42. *See id.*; *see also* KOS. CONST. art. 20.

provisions were designed to ensure that at least two judges would come from minority communities.

After a lengthy period of deliberation, on May 15, 2009, the Assembly proposed a slate of six judges. The slate included Altay Suroy, an attorney from the Kosovo Turkish community, and Ivan Čukalović, a law professor and Kosovo Serb. Kosovo President Fatmir Sejdiu appointed the six judges that same month.

Following consultation with the President of the European Court of Human Rights,<sup>43</sup> the ICR appointed the three international judges on June 12, 2009, for three-year terms of office.<sup>44</sup> All nine judges took their oaths of office shortly thereafter, and the court began its full-fledged operations.<sup>45</sup> As of September 2010, the court had made forty-three documents public on its website, including judgments, orders, decisions, and resolutions on admissibility.<sup>46</sup>

In addition to the formal appointment of the international judges, the ICR and ICO, along with other members of the international community, provided political support to the court in its efforts to establish its institutional status and legitimacy. The ICO and other supporters of the Kosovo state have also provided staffing and other administrative assistance to the court, including the provision of international legal advisors.<sup>47</sup> This is a type of informal hybridity: not something built specifically into the institutional design envisioned by the CSP, but nonetheless a significant form of support, especially in the early days of the court. The inclusion of international legal support staff offered an arrangement that cut across typical lines of hierarchy and expertise and encouraged creative productivity that obscured rather than reinforced international-national divisions.

The CSP contains no direct, specific explanation for the hybrid composition of the court, and certainly multiple explanations are possible.

43. There is a divergence between the text of the CSP and the constitution on the subject of who appoints the judges. The CSP provided appointment should be done by the President of the European Court of Human Rights (ECHR), upon consultation with the International Civilian Representative. CSP, *supra* note 24, Annex I, art. 6.1.3. Article 152(4) of the constitution in effect reverses the order, with the ICR appointing in consultation with the ECHR President. KOS. CONST. art. 152(4).

44. Int'l Civilian Office [hereinafter ICO], *Decision Appointing Almiro Simões Rodrigues as an International Judge of the Constitutional Court of the Republic of Kosovo*, ICO Decision No. 2009/11 (June 12, 2009), available at <http://www.ico-kos.org/d/Almiro%20Rodrigues%20ENG.pdf>; ICO, *Decision Appointing Robert Carolan as an International Judge of the Constitutional Court of the Republic of Kosovo*, ICO Decision No. 2009/09 (June 12, 2009), available at <http://www.ico-kos.org/d/Robert%20Carolan%20ENG.pdf>; ICO, *Decision Appointing Snezhana Botusharova-Doicheva as an International Judge of the Constitutional Court of the Republic of Kosovo*, ICO Doc. Decision No. 2009/10 (June 12, 2009), available at <http://www.ico-kos.org/d/Snezhana%20Botusharova%20ENG.pdf>.

45. A small judicial operation had been in place at the court since February 2009. Its function was focused on receiving petitions for eventual consideration for the court once the bench was appointed; there were no judges in place.

46. The differences between these documents are to some extent explained in the Rules of Procedure of the court, but practice on the precise nomenclature of court documents appears to be evolving.

47. See, e.g., Press Release, Dep't for Int'l Dev., DFID's Dedicated Support to Kosovo: Through Independence and Beyond (Feb. 17, 2010), <http://webarchive.nationalarchives.gov.uk/+/http://www.dfid.gov.uk/Media-Room/News-Stories/2010/kosovo-anniversary/> (describing U.K. international development agency support to court).

However, the effect of the arrangement is a form of balance of power between Kosovo Albanian and non-Kosovo Albanian judges. Indeed, the composition enables a structural majority of non-Kosovo Albanians: the three international judges and the two minority judges would always be able to unite to overrule the four Kosovo Albanian judges. Of course, this design is based on an assumption that the votes of minority and international judges will align. As we will see below, this assumption has not played out in practice. Nor have majority judges tended to vote *en bloc* in a manner inconsistent with minority rights. Nonetheless, in theory at least, the international judges could act as a foil against moves by the Kosovo Albanian judges, and an international-minority alliance could oppose effectively any anti-minority impulses.

## VI. EVALUATING THE FUNCTIONING OF HYBRIDITY THUS FAR

As discussed above, the success of Kosovo's hybrid arrangement must be assessed with regard to both internal collegiality among a diverse group of jurists (composition) and the external perceptions of the citizens of Kosovo (legitimacy). We shall take each in turn.

### A. *Analysis of Selected Cases Before the Court*

A total of forty-three court documents are currently reported on the website of the Constitutional Court.<sup>48</sup> In none of these documents did the international judges vote *en bloc* against the national judges, and in only three cases has there been a discernable difference of opinion between national judges on the one hand and one or more of the international judges on the other. This Section will consider these three decisions in chronological order.

#### 1. *Krasniqi vs. RTK*

The court's first published decision, dated October 16, 2009, related to interim measures in the matter of *Krasniqi vs. RTK* and involved a disagreement between an international judge and the national judges.<sup>49</sup> This petition challenged a mandatory fee of 3.5 Euros levied on all households and businesses in order to pay for Radio Television Kosovo (RTK) service, regardless of the reception of service or whether this fee represented an unreasonably high monthly charge—for pensioners or low-income individuals, for example. The court ordered, under its authority to grant interim measures, that the Kosovo Assembly in effect develop an alternate means of financing RTK. Judge Almiro Rodrigues disagreed with

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48. Although it appears that these documents include all of the court's decision output since the beginning of its operations, we cannot be sure that these are the only decisions of the court.

49. *Krasniqi v. RTK*, Case No. KI 11/09, Interim Measures (Const. Ct. Kos. Sept. 28, 2010), [http://www.gjk-ks.org/repository/docs/Decision\\_-\\_Interim\\_Measure\\_-\\_IM\\_-\\_Case\\_KI\\_11-09\\_Tome\\_Krasniqi\\_vs\\_RTK\\_et\\_Al.pdf](http://www.gjk-ks.org/repository/docs/Decision_-_Interim_Measure_-_IM_-_Case_KI_11-09_Tome_Krasniqi_vs_RTK_et_Al.pdf). Radio Television Kosovo is the state's public broadcaster.

procedural and substantive aspects of the decision and also considered the particular interim measures ordered to be an inappropriate use of the court's authority. He issued a dissenting opinion to this effect dated October 20, 2010.<sup>50</sup> The dissent took pains to emphasize Judge Rodrigues's respect for his colleagues and the process by which he reached his decision.<sup>51</sup> This was important not only because this was the court's first published decision but also because it maintained collegiality and positive working relationships on the court. The two other international judges did not issue opinions, while national Judge Gijlijeta Mushkolaj issued a separate opinion.

## 2. *Kurtisi v. The Municipal Assembly of Prizren*

The second case involving a difference of opinion between an international judge and the majority was *Kurtisi v. The Municipal Assembly of Prizren*.<sup>52</sup> This case involved the design of the emblem of the Municipality of Prizren, in particular the languages required to be incorporated. While Albanian and Serbian are Kosovo's official languages and are required for this type of public emblem throughout the state, the Prizren municipality is home to a considerable Kosovo Turkish minority, and the Turkish language is in official use. In response to a claim brought by the municipality's Deputy Mayor for Communities, the court ordered that the emblem be redesigned to address the language rights issues in an appropriate manner. The court made a particular suggestion as to how the emblem could be amended to satisfy the legal requirements, and Judge Rodrigues issued a concurring opinion that was limited in scope to the appropriateness of that particular suggestion. The result in the case was hailed by the international community as a positive development in ensuring minority rights in Kosovo and was seen as a victory for CSP implementation.<sup>53</sup>

## 3. *Rrustemi v. Sejdiu*

The third case is probably the most important considered by the court thus far: the recent judgment in *Rrustemi v. Sejdiu*.<sup>54</sup> As foreseen in Article 113.6 of the constitution, this judgment stemmed from a referral by a group of members of

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50. Krasniqi v. RTK, Case No. KI 11/09, Interim Measures (Const. Ct. Kos. Sept. 28, 2010) (Rodrigues, J., dissenting), [http://www.gjk-ks.org/repository/docs/DissentingopiniononInterimMeasuresCaseKI1109Tome\\_KrasniqivvsRTKetAlJudgeAlmiroRodrigues.pdf](http://www.gjk-ks.org/repository/docs/DissentingopiniononInterimMeasuresCaseKI1109Tome_KrasniqivvsRTKetAlJudgeAlmiroRodrigues.pdf).

51. *See id.* at 1 n.1.

52. *Kurtisi v. The Mun. Assembly of Prizren*, Case No. KO 01/09 (Const. Ct. Kos. Mar. 18, 2010), [http://www.gjk-ks.org/repository/docs/ko\\_01\\_09\\_Ven\\_ang.pdf](http://www.gjk-ks.org/repository/docs/ko_01_09_Ven_ang.pdf).

53. *See, e.g.*, Pieter Feith, International Civilian Representative, Remarks at the American University of Kosovo (Apr. 27, 2010), <http://www.ico-kos.org/?id=28&highlighting=constitutional+court> ("I note another healthy development where the Constitutional Court is fulfilling its responsibilities in its decision that the Prizren Municipality logo breached minority representation rights, and I look forward to action by Prizren to bring the logo into conformity.").

54. *Rrustemi v. Sejdiu*, Case No. KI 47/10 (Const. Ct. Kos. Sept. 28, 2010), [http://www.gjk-ks.org/repository/docs/ki\\_47\\_10\\_eng\\_2.pdf](http://www.gjk-ks.org/repository/docs/ki_47_10_eng_2.pdf).

the Assembly of Kosovo to the Constitutional Court on whether President Sejdiu had committed a “serious violation” of the constitution. The deputies claimed that the situation under which President Sejdiu served as Head of State while continuing to occupy the post of head of the Liberal Democratic Party of Kosovo (LDK) violated Article 88.2 of the constitution, and that this constituted a “serious violation.”<sup>55</sup> There were a number of issues raised in the judgment, and it is beyond the scope of this Essay to describe them in detail. Briefly put, some were procedural in nature, including whether the appropriate number of deputies had made the referral<sup>56</sup> and whether the statutory time limit for such a referral had passed.<sup>57</sup> Others went to the merits: whether the arrangement under which President Sejdiu continued to formally occupy the role of LDK chief, while keeping the actual exercise of these functions “frozen,” constituted the “exercise” of a political party function.<sup>58</sup>

By a majority vote, the court held that President Sejdiu’s situation did constitute a serious violation of the constitution. Although the judgment does not describe the votes in detail, it does note that two of the international judges, Judge Snezhana Botusharova-Doicheva and Judge Almiro Rodrigues, would be issuing dissenting opinions.<sup>59</sup> The other international judge, Judge Robert Carolan, evidently joined the majority opinion. The tone of the dissent—published on October 12, 2010—is professional and technical, and the dissenting judges took pains at the onset to note that they “welcome” the majority opinion.<sup>60</sup> Focusing largely on procedural matters, the dissent does not address the constitutional question of whether President Sejdiu was “exercising” a political party function directly on its merits.<sup>61</sup> However, the dissent does take the view that the Referral that made this claim was not sufficiently substantiated with evidence and legal arguments.<sup>62</sup> It also took issue with the court’s failure to consider the drafting history of the particular constitutional and legal provisions in question.

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55. KOS. CONST. art. 88 (“1. The President shall not exercise any other public function. 2. After election, the President cannot exercise any political party functions.”).

56. A certain number of deputies had purported to withdraw their signatures (or otherwise disassociate themselves) after the filing was made. The President claimed that these post hoc withdrawals brought the total number of Members of the Assembly involved below the statutory threshold required for a referral. The court disagreed, focusing on the number of signatories at the time of referral. *See* Rrustemi v. Sejdiu, Case No. KI 47/10, ¶¶ 36-47, [http://www.gjk-ks.org/repository/docs/ki\\_47\\_10\\_eng\\_2.pdf](http://www.gjk-ks.org/repository/docs/ki_47_10_eng_2.pdf).

57. On this point there was a discussion of whether the alleged violation was a continuing act. *See id.* ¶ 34.

58. *See id.* ¶¶ 49-70.

59. *See id.* at 12.

60. *See* Rrustemi v. Sejdiu, Case No. KI 47/10 at 1 (Botusharova & Rodrigues, JJ., dissenting), [http://www.gjk-ks.org/repository/docs/ki\\_47\\_10\\_dissenting\\_opinion\\_judge\\_snezhana\\_botusharova\\_and\\_judge\\_almiro\\_rodrigues.pdf](http://www.gjk-ks.org/repository/docs/ki_47_10_dissenting_opinion_judge_snezhana_botusharova_and_judge_almiro_rodrigues.pdf).

61. *See id.* ¶¶ 2-11 (discussing the authorized party issue); *id.* ¶¶ 12-27 (discussing the time limit issue).

62. *See id.* ¶¶ 30-31 (citing provisions of the Law on the Constitutional Court and court rules requiring that “[r]eferrals should be justified and necessary supporting information and documents should be attached,” while the referral shall [also] include ‘a procedural and substantive justification of the referral’ and ‘supporting information and documentation’”).

The court's judgment could have triggered a process of removal of the President by the Assembly, as provided by the constitution, but this was preempted by Sejdiu's resignation on September 27, 2010.<sup>63</sup> He stated that, while he disagreed with the court's judgment, he respected the ruling.<sup>64</sup> The episode certainly demonstrates the influence of the court and the extent to which it is respected and taken seriously in the Kosovo political scene.

### B. *Internal Dynamics and Voting Patterns*

A review of the voting patterns in the court's decisions to date, including those described above, reveals no discernable pattern of division between the international judges on the one hand and their national counterparts on the other. In none of the cases did the international judges vote unanimously in opposition to their national colleagues. Yet, as the latest decision regarding President Sejdiu shows, there has been a split among the international judges.

There are a number of possible explanations for the lack of a national-international split. It is significant that in its first year the court has not come across the kind of truly controversial case<sup>65</sup> in which the international judges might invoke the international-minority bloc voting mechanism. Of course, the Prizren municipality case might have generated ethnic divisions given its focus on minority language rights and the link to nationalistic symbols. Fortunately, it did not. This may be because the focus was language rights of the Turkish community and there was no immediate "Kosovo Albanian versus Kosovo Serb" dynamic.<sup>66</sup> Nonetheless, there remains the possibility that certain types of cases, such as ones presenting very stark ethnic fissures between Kosovo Albanians and Kosovo Serbs, might destabilize relations on the court. This might be the case if the matter becomes heavily politicized.

In the end, however, we do not believe that an absence of "tough cases" with ethnic fault lines accounts for the overwhelming consensus in voting patterns observed thus far. Contacts with judges and other senior individuals associated with the court suggest that the voting patterns can be explained by a strong sense

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(internal citations omitted). In the view of the dissenting judges, the failure to include this information should have rendered the referral inadmissible as a procedural matter.

63. The court issued a press release on September 24 stating that it had reached the decision that there had been a serious violation of the constitution, and the full text of this decision "would be delivered shortly." See Press Release, Kosovo Constitutional Court (Sept. 24, 2010), <http://www.gjk-ks.org/?cid=2,28,193>. The President's resignation came a day before the actual publication of the court's decision on September 28. In the lead-up to the September 24 press release, there were several media reports of an impending decision, and many of these reports cited sources from within the court apparatus. This practice of leaks does not seem to contribute to the development of public confidence in the institution.

64. See, e.g., *Kosovo President Resigns over Breach of Constitution*, BBC NEWS, Sept. 27, 2010, <http://www.bbc.co.uk/news/world-europe-11420795>.

65. Of course, the case involving President Sejdiu was extremely contentious, but it did not include an ethnic element.

66. It certainly could have taken on such a dynamic, particularly since the precedent that can be drawn from the Prizren case also would seem highly relevant for future cases to enforce the language rights of Kosovo Serbs.

of collegiality within the court. This culture has led to a practice of extensive internal deliberation before the court arrives at a decision; by all accounts, this practice has grown and deepened over the initial year of the court's operations. Rather than disrupting the court, the use of dissenting and concurring opinions thus far seems to have played a positive role in promoting constructive debate, and concerns about the divisive potential of dissents expressed during the process of drafting the law on the Constitutional Court<sup>67</sup> have not materialized in practice. In particular, the latest dissenting opinion in the case of President Sejdiu demonstrates the importance of such a debate and the role of dissenting opinions in furthering jurisprudential development while maintaining the court's internal cohesion. There have been no reports of a schism on the court following the dissent; on the contrary, the court appears to be focusing on its internal structures and capacity and on its considerable caseload in a professional manner. This is a fortunate development.

Aside from observations about the court's generally positive and high-quality judicial culture, those involved in the court tend to point to a variety of advantages of the hybrid arrangement. It is important to bear in mind that—unlike almost all other institutions of the new Republic of Kosovo, which were maintained from previous incarnations under UNMIK—the Constitutional Court is a newly established institution. While there is some precedent for the institution of the Constitutional Court in historical terms (under the former Yugoslav federation, the then-Socialist Autonomous Province of Kosovo had its own constitutional court since the early 1970s), no constitutional court existed under the period of UNMIK administration. As a result, the new Constitutional Court was forced to start from scratch. While the appointed national judges have very impressive backgrounds, none of them has any judicial experience. The three international appointees have extensive judicial experience in their home countries<sup>68</sup> and/or on the international level<sup>69</sup> and have served on hybrid courts in other jurisdictions.<sup>70</sup> According to those involved in the process, the quality of the judgments also has benefited from the influence of international judges and other forms of international support.<sup>71</sup> In evaluating the court's first year, operational

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67. See, e.g., Visar Morina, *The Newly Established Constitutional Court in Post-Status Kosovo: Selected Institutional and Procedural Concerns*, 35 REV. CEN. & E. EUR. L. 129 (2010).

68. Bulgaria, Portugal, and the United States.

69. Judge Botusharova-Doicheva, for example, served as a judge on the ECHR.

70. All three served in various capacities in Bosnia and Herzegovina, and Judge Carolan served in Kosovo under UNMIK.

71. One indicator of this increased quality is the thoroughness of the decisions published by the court. For example, the court's first published decision—the October 16, 2010 decision on interim measures in the RTK case—was only four pages long. See *Krasniqi v. RTK*, Case No. KI 11/09, Interim Measures (Const. Ct. Kos. Sept. 28, 2010), [http://www.gjk-ks.org/repository/docs/Decision\\_-\\_Interim\\_Measure\\_-\\_IM\\_-\\_Case\\_KI\\_11-09\\_Tome\\_Krasniqi\\_vs\\_RTK\\_et\\_Al.pdf](http://www.gjk-ks.org/repository/docs/Decision_-_Interim_Measure_-_IM_-_Case_KI_11-09_Tome_Krasniqi_vs_RTK_et_Al.pdf). While it included some legal analysis, it was relatively short in comparison to what observers might have expected for a debut decision. By contrast, the March 18, 2010, judgment in the Prizren logo case was more than three times as long and included extensive citation of European Court of Human Rights and other international jurisprudence. See *Kurtisi v. The Mun. Assembly of Prizren*, Case No. KO 01/09 (Const. Ct. Kos. Mar. 18, 2010), [http://www.gjk-ks.org/repository/docs/ko\\_01\\_09\\_Ven\\_ang.pdf](http://www.gjk-ks.org/repository/docs/ko_01_09_Ven_ang.pdf).

hybridity on the whole has fostered genuine efforts at mutual education, norm-sharing, and collaborative evaluation of the court's jurisprudence.

C. *Longer-term Factors: Popular Perceptions and Institutional Compliance*

The court has been successful in becoming operational and in discharging its mandate in an effective manner. Our experience shows that the organic hybridity introduced through the mixed national-international composition of the court has been instrumental in achieving this early functionality. In the long-term, however, the formal hybridity of the court's composition will come to an end: as is the case with other ICR appointees, international judges will not be appointed after the conclusion of international supervision, and their places will be filled by national successors. Accordingly, the long-term effectiveness of the court ultimately must depend on a different set of factors.

The first factor is popular perception of the court's legitimacy. In its short history, there have been no significant attacks on the court by local political actors, although we note that the implementation of decisions has not been forthcoming in all cases. Monitoring of the media and public opinion in the course of our work shows no particular indication that the Constitutional Court is perceived as a manifestly "foreign" institution. However, this perception may be because the court, as a new institution, has remained relatively obscure in its first year. This obscurity, however, is likely to be quite temporary; in particular, the judgment that led to President Sejdiu's resignation has raised the court's profile significantly. In this vein, popular acceptance may be forthcoming because the court is explicitly a creature of the Republic of Kosovo: its very existence is bound up with Kosovo's statehood and the active functioning of state institutions. In the end, it seems to us that the court continues to be highly regarded by local political and media actors.

In the longer-term, an important consideration with regard to perceived legitimacy is the effect of the Constitutional Court on the organic dissemination of legal norms: will the public have confidence in the ability of the court to deliver impartial justice and will the public sense that the sources of that justice are domestically legitimated principles? Kosovo's constitution directly incorporates international human rights instruments, including the European Convention on Human Rights, into domestic law.<sup>72</sup> This incorporation, coupled with its evolution under the hybrid court, points to an enduring element of hybridity in the court's jurisprudence: even as the court moves away from compositional hybridity, it will retain its hybrid character in terms of the substance of the law it applies. The question, then, will become whether and how the national judges of the Constitutional Court mediate this incorporation so as to gain a greater degree of endorsement from local structures. In other words, inasmuch as the process of

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72. KOS. CONST. art. 22 ("Human rights and fundamental freedoms guaranteed by . . . international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions . . .").



incorporation is not automatic but rather open to some degree of channeling and direction by the Constitutional Court (for example, through case prioritization), international legal norms have the potential to gain greater legitimacy through future court decisions. This transition would represent an archetypal move from intentional hybridity to organic hybridity, as discussed above, and should be encouraged.

A second, though related, factor is institutional compliance with court decisions at the domestic level. At least at this early stage, despite some exceptions, the court rulings have been largely respected. The most striking example of compliance is the judgment on President Sejdiu's serious violation of the constitution, which prompted his resignation.<sup>73</sup> The manner in which this case unfolded compellingly indicates the degree to which major political and institutional leaders respect the legitimacy of the court and abide by its decisions. The other two decisions that have attracted the most attention (the *RTK* and *Prizren* cases discussed above) have largely been welcomed but have yet to be fully implemented. In the *RTK* case, the Assembly has yet to finalize an alternative financing mechanism, although according to observers on the ground there has been largely satisfactory progress toward that goal thus far. On July 17, 2010, the court extended the deadline for Assembly action until January 1, 2011.<sup>74</sup> In the *Prizren* case, on June 17 2010, the Mayor of Prizren submitted a letter to the Constitutional Court stating that the Municipality of Prizren had undertaken preparatory measures for implementing the March 18 judgment, and the Mayor requested from the court an additional period of sixty days for completion of the execution of the judgment. In the end, the delay in implementation may be a result of the failures of other institutions rather than any shortcoming on the part of the court.<sup>75</sup> Even so, the fact that the Mayor addressed the court with an extension request itself indicates a degree of the institutional respect towards the court.<sup>76</sup>

## VII. CONCLUSION

In the brief record of the Constitutional Court, hybridity has clearly aided the court in strengthening its internal judicial performance and in establishing itself as a competent institution of a new state. However, it is too early to tell whether the hybrid arrangement will support and improve the long-term functioning of the court, including whether it will help garner broad public

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73. In another recent case that involved how to proceed after the putative resignation of the mayor of Rahovac/Orahovac Municipality, there was eventually compliance with the court's decision that elections for a new mayor be called. *See* Press Release, Kosovo Constitutional Court (Sept. 27, 2010), <http://www.gjk-ks.org/?cid=2,28,294>.

74. *Krasniqi v. RTK*, Case No. KI 11/09, Interim Measures (Const. Ct. Kos. Sept. 28, 2010), [http://www.gjk-ks.org/repository/docs/Decision\\_-\\_Interim\\_Measure\\_-\\_IM\\_-\\_Case\\_KI\\_11-09\\_Tome\\_Krasniqi\\_vs\\_RTK\\_et\\_Al.pdf](http://www.gjk-ks.org/repository/docs/Decision_-_Interim_Measure_-_IM_-_Case_KI_11-09_Tome_Krasniqi_vs_RTK_et_Al.pdf).

75. For example, for much of 2010, the Prizren Municipal Assembly had been mired in a broader dispute between the main political parties that has rendered the body largely dysfunctional.

76. To be sure, there remains a real danger of failure to implement the decision; continued attention by the court as well as by other domestic and international observers will be required.

support for the court's legitimacy and compliance with its judgments by domestic institutions.

In the final analysis, it must be noted that there is an inherent tension between the institutional design of the court during the period of international supervision and the court's more long-term function of upholding international values after that period ends. Success in the long-term depends on building a strong institution that is capable of handling difficult and controversial cases and having its decisions complied with. There are many elements that could factor into this success, and the national-international dynamic is one of them; while the presence of international judges can help assist the court in establishing itself as a new institution in the short term, there is a risk that their presence, however helpful and good-willed, could retard long-term development of the institution. For example, the court risks dependence on the international judges to deal with complex issues and make difficult decisions. Whether this risk will materialize is difficult to predict and depends largely on the way in which the court functions—and is perceived to function—in this crucial early period.

Given this constellation of factors, the international community should continue to closely monitor the work of the court. Although the court seems to have enjoyed widespread respect in its early judgments, an increase in the number of cases it hears will likely involve it in politically contentious matters and perhaps expose the court to fault lines, particularly in the field of minority rights. If such divisions have an impact on the popular perception of the court or the willingness of other parties to respect the court's institutional role and decisions, there is a danger that the institution will weaken in the long term, to the detriment of the values the CSP was meant to uphold.

Part of the overall exit strategy for international supervision will be an assessment of whether Kosovo's institutions are capable of continuing to implement its obligations under the CSP. The international judges were appointed for three-year terms, and we can infer that an assessment will be made as the end of that term draws near. Whether the court has achieved long-term viability should be taken into account in these decisions. At the same time, the international community should sustain the levels of support for the court it has provided thus far. This includes continued political support for the court as it develops as an institution within the Kosovo political system.

While its long-term effectiveness remains to be proven, the experience of the Kosovo Constitutional Court offers important lessons for transitional justice and institutional capacity-building. The structural design and careful planning of the Constitutional Court, its composition, and its mandate represent a concerted effort to empower local judges and to establish rule of law in a post-conflict context. As such, the court is poised to overcome the limitations of purely international or purely domestic institutions and to enjoy public confidence while offering citizens a greater stake in their state's judicial future—an ambition that its hybrid predecessors failed to achieve. While not without its limitations, Kosovo's hybrid experimentation provides tentative hope that prudent institutional design and implementation can forge a path of viability, collaboration, and legitimacy.