

CONTENTS

PREFACE :	1
INTRODUCTION :	4
<u>PART ONE</u>	
CHAPTER ONE: THE ROLE OF THE UNITED NATIONS IN THE ESTABLISHMENT OF INTERNATIONALIZED TRIBUNALS	
1.1. Introduction.....	7
1.2. Negotiating the legal framework of the mixed courts	8
1.2.1. The Role of the UN Institutions	8
1.2.2 The Role of the civil society.....	11
1.3. Subject matter jurisdiction	13
1.4. Personal Jurisdiction	15
1.4.1. Prosecution of juveniles between 15 and 18 years old.....	17
1.4.2. Peace-keepers	18
1.5. Temporal Jurisdiction	19
1.6. The Organizational Structure of the mixed Tribunals	20
1.7. The relationship between the law of the mixed Tribunals and the law of the Seat	19
1.7.1. Cambodia: the amnesty to Ieng Sary.....	21
1.7.2. Sierra Leone: the amnesty to Foday Sankoh and the membership of the RUF	22
1.8 The UN Administrated courts in Kosovo and East Timor	23
1.8.1. The Special Panel of Judges in East Timor.....	24
1.8.2. Mixed composition of judges and prosecutors in the courts of Kosovo	25
1.9. The Organizational Structure of the mixed Tribunals	20

PART TWO

CHAPTER TWO: THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY

2.1. Brief history of the conflict.....29

2.2. Nature of the Atrocities.....33

2.3. Establishment of the Special Court for Sierra Leone.....34

2.4. Legal Framework 38

 2.4.1. Jurisdiction..... 38

 2.4.2. Rules of Procedure 40

 2.4.3. Jurisprudence..... 41

2.5. The Judges of the Special Court43

2.6. The Office of the Prosecutor.....46

2.7. The Registry49

2.8. The Defense and Fair Trial standards52

2.9. Prosecutorial Strategy..... 54

 2.9.1. Those bearing the greatest responsibility 54

 2.9.2. Perception of Prosecutorial Strategy..... 57

2.10. Issues of State Cooperation..... 58

 2.10.1. Host Country cooperation..... 58

 2.10.2. Cooperation by other States..... 59

2.11. Conclusions60

2.12. Last developments on the Special CourtConclusions62

CHAPTER THREE: THE SERIOUS CRIMES PROCESS IN TIMOR LESTE

3.1. Brief history of the conflict.....63

3.2. Nature of the Atrocities.....65

3.3. The Establishment of the Serious Crimes Process.....68

3.3.1.	Recommandations from Commissions of Experts.....	68
3.3.2.	Early UNTAET Investigations.....	71
3.3.3.	Locating Timorese Judicial Personnel	72
3.3.4.	Establishment of the Special Panels.....	73
3.3.5.	Establishment of the Serious Crimes Unit.....	74
3.4.	Analysis of the Special Panels	75
3.4.1.	Recruitment of International Judges	75
3.4.2.	Training for the Judges.....	78
3.5.	Analysis of the Serious Crimes Unit.....	80
3.5.1.	Prosecutorial Strategy.....	80
3.6.	Jurisdiction and Legal Framework	83
3.6.1.	Substantive Law	83
3.6.2.	Procedural Law.....	86
3.6.3.	Legal implications of Independence	87
3.7.	Relationship with the CAVR.....	88
3.8.	Conclusions	90

CHAPTER FOUR: THE DEPLOYMENT OF INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO

4.1.	Brief history of the conflict.....	93
4.2.	Establishment of UNMIK.....	97
4.3.	The Establishment of Internationalized Tribunals	99
4.3.1.	UNMIK's Approach on the Rule of Law	99
4.3.2.	The Proposed Kosovo War and Ethnic Crimes Court.....	102
4.4.	The Establishment of Internationalized Panels	104
4.5.	Prosecutorial strategy and issues of case selection.....	107
4.5.1.	Lack of criteria for referral	107
4.5.2.	Concerns regarding independence	108
4.5.3.	Lack of cooperation by Serbia	109
4.5.4.	Structural Adjustments to the IJP System.....	110
4.6.	Legal Framework	111
4.7.	Defense and issues of Fair Trial	114
4.8.	Relationship with ICTY and other Transitional Justice mechanisms	115
4.9.	Conclusions	116

**CHAPTER FIVE: PRELIMINARY FINDINGS ON THE
EXTRAORDINARY CHAMBERS OF CAMBODIA**

5.1. Brief history of the atrocities committed by the Khmer Rouge..... 118

5.2. The long road to the establishment of the Extraordinary Chambers.....121

5.3. Negotiating the Structure of the Extraordinary Chambers122

 5.3.1. The UN Group of Experts' Format for the Tribunal 122

 5.3.2. The UN Negotiating Strategy 123

 5.3.3. The Agreed outcome..... 127

5.4. Legal Framework 129

 5.4.1. Temporal Jurisdiction..... 129

 5.4.2. Subject matter jurisdiction 129

 5.4.3. Personal Jurisdiction..... 131

 5.4.4. Amnesty..... 132

5.5. General Principles of Criminal Law132

 5.5.1. Statute of limitations..... 132

 5.5.2. Individual responsibility 133

**5.6. The Organization of the EC and problems arising from the super-majority
Arrangement.....134**

5.7. Latest developments.....139

**CHAPTER SIX: INTERNATIONALIZED COURTS: ADVANTAGES
AND PITFALLS**

6.1. Potential advantages of Hybrid Courts.....140

6.2. The relationship between Hybrid Courts and International Courts143

6.2. Conclusions146

BIBLIOGRAPHY :..... 147

PREFACE

Over the past decade, issues of accountability and reconciliation in the aftermath of mass atrocities have increasingly dominated the field of international human rights. Indeed, the proliferation of international and domestic courts, truth commissions, civil compensation schemes, and other mechanisms for confronting the past has spawned its own scholarly field: transitional justice. And the sheer number and variety of institutional mechanisms suggests that questions of how peoples address gross human rights abuses and move forward into the future will continue to be a source of international interest as well as a site for innovation and creative adaptation.

Much of the transitional justice discussion has centered on four types of accountability mechanisms that have proven to be both significant and controversial. First, the promise and pitfalls of international criminal justice bodies - such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) - have taken on increased importance with the establishment of the International Criminal Court (ICC). Second, the growing use of truth commissions, pioneered in Latin America, developed famously in South Africa, and now being used around the globe from East Timor to Nigeria to Peru, has elicited enormous interest within policy, advocacy, and scholarly communities. Third, transnational accountability efforts - such as Spain's attempt to extradite Augusto Pinochet to stand trial for torture and other human rights abuses committed in Chile or Belgium's application of its relatively recent universal jurisdiction law - have sparked vigorous debate. Finally, the use of the Alien Tort Claims Act in the United States to allow civil tort claims brought by victims of human rights abuses continues to be controversial.

Comparatively little attention has been paid, however, to a fifth, newly emerging, form of accountability and reconciliation: hybrid domestic-international courts. 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. This hybrid model has developed in a range of settings, generally post-conflict situations where no politically viable full-fledged international tribunal exists, as in East Timor or Sierra Leone, or where an international tribunal exists but cannot cope with the sheer number of cases, as in Kosovo. Most recently, the agreement to create a hybrid court in Cambodia is being implemented and is bringing about its first achievement in terms of accountability with past crimes and fight against impunity.

Frequently, such courts have been conceived in an ad hoc way, the product of on the ground innovation rather than grand institutional design. As a result, hybrid courts have finally been the subject of analysis, both among scholars and policymakers who focus on transitional justice issues. This study seeks to identify possible lacks in previous analysis, focusing on concrete aspects of hybrid courts, how they work in practice and which role they can play in dealing with international crimes in the future, providing a preliminary assessment of their potential strengths and weaknesses. To do so, considerable information have been gathered directly from the source, and the availability of UN officials and colleagues of the International Center for Transitional Justice has been vital to this purpose.

Interestingly, one reason the hybrid courts have received comparatively little attention so far may be that their very hybridity has left them open to challenge both from those advocating increased use of formal international justice mechanisms and those who resist all reliance on international institutions. For example, many supporters of international justice seem to fear that hybrid tribunals may be used as an alternative to, and possibly as a means to undermine, the use of full-fledged international criminal courts. Indeed, it is striking that two government officials who played key roles in establishing hybrid tribunals in Kosovo and East Timor have resisted the notion that such courts could serve as a model for the future¹. Many within the human rights

¹ At a panel on hybrid courts that was part of the 2002 International Law Association Annual Conference, David Scheffer, former U.S. Ambassador at Large for War Crimes Issues, and Hansjorg Strohmeyer, Director of the Office of Humanitarian Affairs at the United Nations, both rejected the notion that such courts might be touted as a model for the future despite the fact that Scheffer had helped establish the special court for Sierra Leone and was deeply involved in the efforts to create a hybrid court in Cambodia, and Strohmeyer had worked to establish hybrid courts in Kosovo and East Timor as an assistant legal advisor to the UN transitional administrators there.

advocacy community have been critical of the hybrid courts as well. From the opposite end of the political spectrum, those who generally eschew international justice mechanisms - such as Bush Administration officials who have opposed the ICC - may see hybrid tribunals as carrying *too many* of the trappings of international courts. For example, administration officials have been wary of international involvement in efforts to establish courts to try those suspected of committing mass atrocities in Iraq, instead advocating an Iraqi led domestic process. In a sense, then, hybrid courts are being squeezed from both sides.

This dual resistance to hybrid courts is unfortunate. As I argue at the end of in this thesis and after analyzing the peculiar aspects of the mixed tribunals , such courts hold a good deal of promise and may even offer an approach to questions of accountability that addresses some of the concerns raised in both camps. Yet, such courts need further study and careful examination once their work will be accomplished. In this work, I look at four recent examples of hybrid courts, those established in Kosovo, East Timor, Sierra Leone and Cambodia to hear cases involving war crimes, crimes against humanity, genocide, and other mass atrocities in those countries. I briefly address some of the advantages and disadvantages of these courts, particularly with regard to their perceived legitimacy (among both international and domestic constituencies), their ability to catalyze local efforts to establish rule of law institutions, and their potential to foster the development of human rights norms within emerging legal systems. Finally, I discuss ways in which hybrid courts might fit into the ICC's complementarity regime. I argue that such courts are best seen not as an alternative to international or local justice, but rather as an important complement to both.

INTRODUCTION

Over the course of the last years, prosecution of international crimes has been often the task of international courts. This has happened in spite of the fact that it is widely recognized² that the best response to these atrocities should be resort to national criminal courts. Indeed, in principle national courts are the most appropriate forum for adjudicating international crimes since they have at their disposal the coercitive powers needed to ensure apprehension and prosecution of suspects, reparation for victims and enforcement of criminal sentences.

As a result, prosecution of crimes under international law by national courts has presented two major problems. The first is the national courts are often far from impartial, especially when they cope with international crimes that were directed against or committed on behalf of their own state. The second is that prosecuting international crimes can be a burdensome exercise, both politically and materially. So far, only few states have proved to be able or willing to carry out such prosecutions. These obstacles could lead to injustice against suspect or more frequently to impunity of international criminals.

On the face of it, the new international law has demolished one of the most powerful bulwarks of sovereign states, the doctrine of act of state or immunity of state officials from prosecution in case of international crimes perpetrated while in office. Another considerable step forward has been made by many treaties imposing the principle of universal jurisdiction of state courts for large-scale offences such as grave breaches of Geneva Conventions, torture, and serious acts of international terrorism.

The Nuremberg and Tokyo military tribunals, established in the wake of World War II to prosecute German and Japanese crimes are the first example of this new ground for international law. It took several more decades, however, until the idea of international prosecution found broad acceptance, first with the institution by the UN Security Council of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and finally in the establishment of the International Criminal Court (ICC).

² In the famous *Eichmann* judgment the Supreme Court of Israel stated that the territorial state, that is, the state where crimes have been committed, is the appropriate place for adjudication.

Nevertheless, while representing significant progress in the consolidation of universal jurisdiction, ICTY, ICTR, and to a certain extent ICC were and are still far to represent the ideal model of international jurisdiction. Indeed, these tribunals are removed from the societies affected by the crimes they are supposed to prosecute. Proceedings take place hundreds of miles away from where the crimes were committed. The reconciliation role that international tribunals should play seems considerably more difficult under these circumstances. Moreover, these courts are composed of judges who are not familiar with the historical context of the country in which crimes were committed, or even with the legal culture of the society concerned. Secondly, fully international criminal bodies tend to grow in size, employing hundreds if not thousands of personnel with significant costs and scarce ownership and accountability. They are therefore inclined to become organs with their own internal logic, momentum and agenda, that can be influenced little by their creators, least of all by individual states. Also, albeit this does not apply to ICC, purely international tribunals are established without relying on the (remaining) existing judicial system in the state where the crimes occurred, but starting from a *tabula rasa*, a process which is time -and resource- intensive. Finally, the experience with international criminal tribunals with primacy over national courts suggests that even if there are remnants of a domestic judicial system in the state where the crimes occurred, international tribunals operate in significant isolation from such remnants, with only a limited contribution to rebuild internal rule of law.

In the struggle against impunity within this new model proposed by the international community, there is no single option available. One of these options, which is becoming increasingly significant because it has addressed the weaknesses of both international and domestic criminal courts, is the subject of this study, the establishment of the so-called mixed or internationalized courts or tribunals. Yet, in order to make this option viable and more suitable, a set of factual or legal circumstances have to be present. First of all, it is necessary for the national judiciary to be available, or partly available, so that to some extent one may rely on national courts. This pre-condition is linked with the need to assuage the nationalistic demands of the local population. This happens when national authorities regard the administration of justice as an essential attribute of state sovereignty. On top of that, another set of circumstances are needed, namely the lack

of the political will within the international community, or in the United Nations, to deal with serious international crimes by setting up an international tribunal proper.

But what are the merits of internationalized courts and tribunals? Why they should become a model for bringing to trial the authors of serious crimes when the above mentioned pre-conditions are met? The first reason is that in providing justice, local prosecutors or local judges are familiar with the territory, the language, and the habits of the accused. The second major merit is that trials are held in the territory where crimes have been committed. The internationalized model expose the local population to past atrocities with the two-fold advantage of making everybody cognizant of those atrocities, including those who sided with perpetrators or alleged perpetrators, and bringing about a therapeutic process for the victims or their relatives through public stigmatization of the culprits and fair retribution. This may also contribute to the process of gradual reconciliation in the local community.

The third major advantage of internationalized courts is that they have the ambition to produce a significant spill-over effect in that they may contribute to gradually promoting the democratic legal training of local members of the prosecution and the judiciary. This was a crucial element in the case of East Timor and reflects the increased practice to ensure ownership and local capacity building promoted by the United Nations.

While this thesis was being drafted (2003-2007), there were four active jurisdictions of that kind whose aim has been to hear cases involving war crimes, crimes against humanity, genocide and other mass atrocities: the Serious Crimes Panels in the District Court of Dili (East Timor); the Regulation 64 Panels in the courts of Kosovo; the Special Court for Sierra Leone; and more recently the Extraordinary Chambers in the Courts of Cambodia.

Yet, the bodies considered in this study have not remained the only ones of their kind. Tribunals created in Bosnia-Herzegovina and Iraq constitute other significant developments suggesting that the phenomenon of internationalized criminal courts will remain a recurrent theme in international criminal and transitional justice.

CHAPTER ONE

THE ROLE OF THE UNITED NATIONS IN THE ESTABLISHMENT OF INTERNATIONALIZED TRIBUNALS

1.1 Introduction.

The establishment of the ad hoc international tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 brought about a proliferation of international criminal jurisdictions. Precursors of the International Criminal Court – an international, truly universal criminal jurisdiction – they have become the model upon which the second generation “mixed tribunals” were conceived. In the decade that followed their establishment, a number of countries emerging from civil wars typified by the perpetration of crimes against humanity, war crimes or genocide on a large scale, called upon the United Nations (UN) to set up similar jurisdictions in their own territories. With their administration of justice devastated, biased or otherwise lacking the necessary judicial and administrative capacity, these countries sought the technical and financial assistance of the UN in the conduct of complex prosecutions that they alone were unable or politically unwilling to undertake. In their wish to put an end to a historic cycle of impunity, they were also motivated by the interest to give the prosecution of the government’s political enemies a mark of international legitimacy.

The United Nations Security Council (UNSC), as the parent institution of the ad hoc tribunals, has proved to be reluctant to replicate the experience and establish additional judicial organs whose administrative structure and lengthy and costly proceedings would have further increased the heavy financial burden on Member States of the Organization. On the face of the UNSC reluctance, the focus of expectation shifted to the UN Secretariat to develop a model similar in form, substance and international legitimacy to the had hoc tribunals, but one which respects a nation’s vision of justice, its choice of means of bringing it about, and its ownership, at least in part, of the judicial process. Therefore, a model of an “internationalized tribunals” as a nation court of mixed jurisdiction and composition was firstly

developed for Cambodia. It was soon followed by a *sui generis*, treaty-based court of similar jurisdiction and composition for Sierra Leone.

Unlike the international criminal tribunals for the former Yugoslavia and Rwanda established as an enforcement measure under Chapter VII of the UN Charter, the legal basis for the establishment of tribunals for Sierra Leone and for Cambodia was consensual, and their legal status, applicable law, composition, and organizational structure had to be negotiated and agreed upon between the parties. It was in the nature of the negotiating process that political constraints imposed different legal choices on questions related to jurisdiction, organizational structure, and composition of the mixed tribunals.

The mixed tribunals for Sierra Leone and for Cambodia had a prominent role in the creation of mixed jurisdictions in East Timor and Kosovo. In analyzing the diversity of mixed jurisdictions from the UN standpoint, this chapter will focus on the Special Court for Sierra Leone and the Extraordinary Chambers for Cambodia, and conclude with a comparative analysis of the mixed composition panels in the UN-administrated territories of Kosovo and East Timor.

1.2 Negotiating the legal framework for the mixed courts.

1.2.1 The role of the UN Institutions.

The negotiating process for the establishment of the Extraordinary Chambers for Cambodia and the Special Court for Sierra Leone was conducted by the UN Secretariat for the most part in parallel and within the parameters determined by its political organs. It resulted, however, in the establishment of two very different mixed jurisdictions. A comparative analysis of the two legislative processes from the vantage point of the UN Secretariat is illustrative of the difficulties, both legal and political, of applying a single model of UN "internationalized jurisdiction" in countries and circumstances as diverse as Sierra Leone and Cambodia.

More than two decades after the collapse of the Khmer Rouge regime, a request for assistance in the establishment of an international tribunal for Cambodia to prosecute Khmer Rouge leaders was put before the UN's political organs in 1997 by a letter

addressed to the Secretary General from the co-Prime Minister of Cambodia³. A joint request for the establishment of a UN-based tribunal was possible in the political circumstances of Cambodia in June 1997 when a common position against Pol Pot would have secured, for a brief period of time, a delicate balance of power between the First and the Second Prime Ministers. It was soon, however, overtaken by events, both in Cambodia and in the United Nations. With the July 1997 coup d'état which restored Hun Sen to power as the sole Prime Minister, the death of Pol Pot in April 1998, and the defection that year to the government's ranks of other Khmer Rouge leaders, notably Ke Pauk, Khieu Samphan, and Nuon Chea, Cambodia was disinclined to risk a seemingly peaceful of the Khmer Rouge with the prospects of international criminal prosecution. In the United Nations, as a consequence of the Security Council's unwillingness to react to the request, the General Assembly took the lead.

In its resolution 52/135, the General Assembly asked the Secretary General to examine the Cambodian request for assistance, and if necessary, appoint a group of experts to evaluate the existing evidence and propose further measures as a means to bring about national reconciliation and address the question of individual accountability. The Group of Experts appointed by the Secretary General recommended the establishment of an UN-based international tribunal under Chapter VII or VI of the United Nations Charter to try Khmer Rouge officials for crimes against humanity and genocide committed in the period 1975 to 1979. As neither the General Assembly nor the Security Council acted upon the recommendation, it was for the Secretary General to take the initiative and offer his good offices in establishing a tribunal which, while international in character, would not necessarily be modeled after either of existing ad hoc tribunals or be linked to them institutionally, administratively or financially.

Negotiations between the UN Secretariat and the government on a "mixed jurisdiction" for Cambodia began in July 1999. They lasted for almost three years, until in February 2002 the Secretary General decided to withdraw from the negotiations. In the course of the negotiations many legal and institutional issues were contentious. They included the question of whether the majority of judges should be Cambodian or international; whether the Prosecutor and the Registrar should be internationally

³ UN Doc A/51/930-S/1997/448, Annex.

appointed; the validity of the amnesty previously granted; and the primacy of the Agreement between the United Nations and the government over the Law on the establishment of the Extraordinary Chambers. A conflict over the status, composition, and organizational structure of the mixed tribunal, it was in fact a conflict of two vision of justice: an independent tribunal meeting international standards of justice, objectivity, fairness, and due process of law, and a politically controlled judicial process.

In announcing his decision to withdraw from the negotiations the Secretary General explained that the Cambodian mixed tribunal did not measure up to international standards of justice and that "as currently envisaged...it would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have". The United Nations Secretariat also cited the lack of a clear mandate from either UN organ as inhibiting factor. A mandate was soon to be given; though not the one the Secretariat had expected.

By Resolution 57/228, the General Assembly requested the Secretary General to resume the negotiations with the government of Cambodia to conclude an agreement based on previous negotiations on the establishment of the Extraordinary Chambers, consistent with the provisions of the Resolution; consistent also with the subject matter and personal jurisdiction of the Chambers set forth in the Cambodian Law, provided that international standards of justice are maintained, and the arrangements are made for an appellate Chamber. In approving the Cambodian Law on the Extraordinary Chambers as the legal framework for an UN-operated Court, the General Assembly gave implicit international legitimacy to the Cambodian justice system as a whole. The apparent contradiction between this and Resolution 57/225 adopted on the same day, by which the General Assembly noted with concern "the functioning of the judiciary [in Cambodia] resulting from corruption and interference by the executive with the independence of the judiciary, was completely disregarded.

In the negotiation that followed, the Secretary General attempted unsuccessfully to reverse the ratio between the national and international components, renegotiate the composition of the Chambers and their voting system, as well s obtain the appointment of an international prosecutor and an international investigating judge. They resulted in few modifications relating mainly to the organizational structure of

the Chambers and their reduction from a three to a two-tiered court. In concluding his report on Khmer Rouge Trials, the Secretary General remained unconvinced that the Agreement, although improved upon its previous version, would ensure the credibility that the Extraordinary Chambers given the precarious state of the Cambodian Judiciary. The General Assembly, however, did not share his concerns, and in its resolution 57/228B of 13 May 2003 approved the draft Agreement between the United Nations and the Royal Government of Cambodia, and urged the Secretary General and the government to allow the draft Agreement to enter into force and implement it fully thereafter.

The negotiating process on the establishment of the Special Court for Sierra Leone was initiated by the Security Council at the request of the government. Disinclined to establish a Chapter VII Special Court as its own subsidiary organ, the Security Council, by resolution 1315 (2000), requested the Secretary General to negotiate an agreement with the government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes, and other serious violations of international humanitarian law. In the negotiations which ensued between the UN Secretariat and the government of Sierra Leone, there was little disagreement on the principles of international jurisdiction, the status of the Court and its constitutive instrument, its composition, including a majority of international judges and international Prosecutor, organizational structure, and the practical arrangements for its establishment. They culminated two years later in the Agreement between the United Nations and the government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002.

1.2.2 The role of the civil society.

The negotiating processes for the establishment of the Special Court for Sierra Leone and the Extraordinary Chambers for Cambodia were shaped by the political circumstances both in the countries concerned and at the United Nations, and their outcome was determined largely by the interaction between the various actors directly and indirectly involved.

In the case of Sierra Leone, Members of the Security Council acted jointly, unanimously and as coherent group in developing a common approach to the nature, jurisdiction, and organizational structure of the Special Court. The Security Council which in its Resolution 1315 (2000) initiated the negotiated process and determined its political and legal parameters, remained actively involved in it until its successful completion. In this context also, a small group of interested states composed of Members of the Security Council and major donors was formed almost from the beginning to assist the Secretary General in assessing the needs of the Special Court in funds and personnel. It would later be transformed into a Management Committee of the Special Court to oversee its efficient operation.

The role of the civil society representatives in Sierra Leone, a particularly vibrant group of local and international NGOs, was unique. In its negotiations with the government, it was the Secretariat's policy to engage in a parallel dialogue with representatives of civil society to seek their views and address their concerns within the legal and political limitations imposed. The single most important contribution of the NGO community to shaping the Statute of the Special Court was in balancing the principle of judicial accountability of juveniles and the protection of existing child care rehabilitation programs.

The constructive attitude of the government of Sierra Leone, its genuine will to see that justice is done and be seen to be done, at the risk of political instability, if necessary, is maybe the most important contributory factor to the successful outcome of the negotiations. In the establishment of the Special Court for Sierra Leone, the Security Council, Member States, the UN Secretariat, the government of Sierra Leone, and its civil society at large, formed a partnership. This was not to be the case in the negotiating process for the establishment of the Extraordinary Chambers of Cambodia.

An early attempt to engage the Security Council in the establishment of a Khmer Rouge tribunal failed for a number of reasons, and notably a threat by China to veto and Security Council resolution to that effect. In the negotiations between the UN Secretariat and the government of Cambodia, the Secretary General acted within his general good offices mandate, but without a specific mandate from any of the UN organs. When in 2002, the General Assembly intervened to revive the moribund

negotiating process, it mandated its resumption on conditions largely dictated by the government of Cambodia.

Interested Member States did not act as a coherent group with a common approach. With very little in common, they were loosely united by the desire to entrust the Secretariat with the establishment and operation of Extraordinary Chambers. In the negotiating process itself, however, they often intervened individually with the government of Cambodia to offer solutions which would then be imposed upon the Secretariat. In the political circumstances of Cambodia, the role played by civil society was marginal. While many in the NGO community questioned the credibility of a judicial process dominated by government appointed judges, prosecutors, investigators and support staff, they continued to believe that the UN engagement in the process was Cambodia's only hope to see justice done.

1.3 Subject matter jurisdiction.

The similarities in the nature of the conflicts and the crimes committed in the former Yugoslavia, Rwanda, Sierra Leone and Cambodia, imposed a similar choice of the applicable law in all jurisdictions whether national, international, or sui generis, in character. With few exceptions, therefore, they included the crime of genocide, crimes against humanity, and, depending on the nature of the conflict, war crimes and other serious violations of international humanitarian law.

The inclusion in the jurisdiction of the Cambodian Extraordinary Chambers of the crime of genocide within the restrictive definition of the Genocide Convention, presented legal and conceptual difficulties⁴. More perhaps than any other mass killing in the second half of the twentieth century, the massive scale and systematic character of the killing by execution, starvation, malnutrition, and disease of an estimated 2 million Cambodians during the Khmer Rouge regime, resembled the crime of genocide.

Perpetrated mostly, however, on political or social grounds by members of the same national, ethnic, religious, or racial group, the Cambodian so-called auto-genocide did not amount technically to genocide within the meaning of Article 2 of the Genocide

⁴ See Chapter 5.

Convention⁵. The Conventional crime of genocide was nevertheless retained in the Cambodian Law to the extent of its applicability to minority religious and ethnic groups, such as Muslim ‘Cham’ and ethnic Vietnamese, Chinese, and Thai minority groups.

In the Sierra Leone decade-long conflict that began in 1991, large-scale and systematic violations of humanitarian law, abduction, mass rape, forced recruitment of children and summary executions were committed by forces of the Revolutionary United Front (RUF)⁶. It was, however, the period following the joint invasion of Freetown by the RUF and the Armed Forces Revolutionary Council (AFRC) on 6 January 1999, which marked the most intensified, systematic and widespread violations of human rights and international humanitarian law against the population of the capital. For all of their brutality, however, the killings and mass executions were not committed on ethnic, religious, or racial grounds with intent to annihilate the group distinguished on any of these grounds, as such. They were not legally characterized, therefore, as genocide.

While the crime of genocide was omitted from the Statute of the Special Court, two additional crimes were included to address the specificity of the Sierra Leone Conflict: (1) attacks against peace-keeping personnel involved in a humanitarian assistance or peace keeping mission as long as they are entitled to the protection given to civilians under the international law of armed conflict⁷ (a reference to the hostage taking of 500 peace-keepers in May 2000 by the RUF); and (2) conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate

⁵ The crime of genocide is defined in Art 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide to mean any of the following: killing members of the group, causing bodily or mental harm, inflicting conditions of life likely to bring about the physical destruction of the group, imposing measures to prevent birth, or transferring children of the group, when committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. The Conventional definition of the crime of genocide was replicated in the Statute of the International Tribunal for the former Yugoslavia and in the Statute of the International Tribunal for Rwanda. At the Rome Conference, the definition of the crime of genocide engendered little controversy and was incorporated without change in Art 6 of the Statute of the ICC. In their reluctance to modify the definition and expand its scope 50 years after its adoption in the Genocide Convention and with the Cambodian killing fields present in their minds, Member States clearly, though implicitly, indicated their intention to maintain the definition of the ‘ultimate crime’ in its Conventional form and within the limitations established thereunder.

⁶ For a deeper analysis of the Special Court of Sierra Leone see Chapter 2.

⁷ The crime of attacks against peace-keepers in Art 4(b) of the Statute of the Special Court replicates Art 8(2)(b) of the ICC Statute, and is based on the distinction between peace-keepers as ‘civilians’ in traditional UN Chapter VI operations, and peace-keepers as ‘combatants’ when, pursuant to Chapter VII mandate, they are engaged in combat mission, or are otherwise acting in self-defence.

actively in hostilities, a practice prevalent among all armed groups involved in the conflict⁸.

As is warranted by nature of the mixed jurisdiction, both the Cambodian Law on the Extraordinary Chambers and the Statute of the Special Court for Sierra Leone include common crimes that in the circumstances were judged complementary to the international crimes, and of particular relevance.

1.4 Personal Jurisdiction

Personal jurisdiction of a limited scope is another distinctive feature of both international and mixed tribunals. A definition of personal jurisdiction by reference to the hierarchical level of these presumed responsible of their relatively heavier responsibility for crimes committed, was imperative and it is inherent almost in the nature of any international criminal jurisdiction that it be so limited. Limitation to the political and military leadership alone, however, would not have satisfied the sense of justice and the principle of accountability of relatively low-level perpetrators. In the case of Cambodia and Sierra Leone, it was the understanding of the parties that while restrictively defined, the personal jurisdiction of the Court should be interpreted to include the top military and political leadership, as well as others down the chain of command whose crimes were particularly singled out for their magnitude, brutality, or heinous nature.

A restrictive definition of the personal jurisdiction of the Extraordinary Chambers and Special Court was for either government a politically imposed necessity. In the realities of Cambodia and Sierra Leone, where political stability was achieved through reintegration of ex-combatants into the regular armed forces and the society at large, political power-sharing and the grant of amnesties of various scope, it would have been the government's preference to spare from prosecution those among the most responsible who had defected to its ranks, or have since participated in a coalition government. A selective choice of the accused, however, presented for the United Nations a dilemma of reconciling peace and justice, and applying uncompromising international standards of justice in circumstances of fragile peace.

⁸ Art 4(c) of the Statute of the Special Court.

The personal jurisdiction of Extraordinary Chambers in Cambodia extends to “senior leaders and those most responsible for the crimes committed in Democratic Kampuchea”. At the time the definition was adopted two persons had already been detained in connection with the Khmer Rouge regime: Chhit Chouen, known as ‘Ta Mok’ or ‘The Butcher’, a Khmer Rouge army commander and member of the Standing Committee, and Kaing Kek Ieu, more commonly known as ‘Duch’, the Director of the notorious Tuel Sleng Prison. With the recent arrest of Noun Chea⁹, Pol Pot’s former Deputy known as ‘Brother No 2’, they have so far been the only former Khmer Rouge members under provisional pre-emptive detention in connection with the crimes falling within the jurisdiction of the Chambers. Other senior surviving members of the Khmer Rouge leadership¹⁰ are still leaving freely in the semi-autonomous region of Pailin and in the capital Phnom Penh.

The personal jurisdiction of the Special Court for Sierra Leone extends to “persons who bear the greatest responsibility for serious violations of international humanitarian law (...), including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”¹¹ The latter limitation seemingly suggests that leaders of RUF who reneged on their engagement to peace under the Lomé Peace Agreement, were not to be prosecuted, or prosecuted first. The leaders of the AFRC, on the other hand, who may have committed no lesser crimes before the conclusion of the Lomé Peace Agreement, but who have since joined the government and are considered to have contributed to the establishment and implementation of the peace process, would be spared from prosecution, or be prosecuted last. It has been the understanding of the Secretary General, however, that the reference to leaders who threatened the establishment of and implementation of the peace process does not describe an element of the crime, but is a guidance for the Prosecutor in determining his prosecutorial strategy. The commission of any of the statutory crimes without necessarily “threatening the peace” within the meaning of the Resolution, would not, in his view, detract from the international criminal

⁹ Extraordinary Chambers provisional detention order No 002 of 19/09/2007.

¹⁰ Khieu Samphan, the Chairman of the Council of State of Democratic Kampuchea and the de facto Head of State since 1976, and Ieng Sary, the Deputy Prime Minister and Minister of Foreign Affairs of Democratic Kampuchea.

¹¹ Statute of the Special Court, Art 1.

responsibility otherwise entailed for the accused¹². When on 10 March 2003 the first list of indictees was released, it included leaders of RUF, AFRC, and CDF, some of whom were instrumental in the peace process both at Lomé in 1999, and in Freetown in 2002¹³.

For all the limitations imposed on the personal jurisdiction of the Special Court for Sierra Leone, two additional categories of persons never before prosecuted in an international criminal jurisdiction were included in the personal jurisdiction of the Court: persons between 15 and 18 years of age, “children” within the definition of the 1989 Convention on the Rights of the Child, and members of UN peace-keeping or other UN authorized operations.

1.4.1 Prosecution of juveniles between 15 and 18 years of age.

The acts of brutality and savagery committed by children on a large scale in the last phase of the conflict in Freetown in January 1999 required that this unique feature of Sierra Leone civil war be addressed in all its horrific aspects. Mindful of the moral dilemma of prosecuting child-victims who were transformed into perpetrators through abduction, drugs, physical and psychological abuse, and slavery of all kinds, the Secretary General proposed that a process of judicial accountability be, in principle, provided for¹⁴, but the Prosecutor be instructed that in exercising his discretionary power to prosecute juvenile offenders, he should “ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability¹⁵”.

In the course of the negotiations, few issues were as passionately debated as the prosecutions of juveniles. For representatives of civil society and childcare local and international NGOs, the prospects of prosecuting children posed a threat to the entire

¹² Letter from the Secretary General addressed to the President of the Security Council, UN Doc S/2001/40.

¹³ On 10th March 2003, seven persons were indicted by the Special Court for war crimes, crimes against humanity, and serious violations of international humanitarian law, and in particular murder, rape, extermination, acts of terror, sexual slavery, conscription of children into armed forces and attacks against UN peace-keepers. They included Foday Sankoh, the leader of the RUF (died of natural causes in detention).

¹⁴ Under Art 7(1) of the Statute all necessary guarantees of juvenile justice were to be afforded. Juveniles before the Special Court were accordingly to be treated “with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the right of the child”.

¹⁵ Statute of the Special Court, Art 15(5)

rehabilitation and reintegration programmes. For the Secretary General and the government of Sierra Leone, it was a question of striking a balance between justice to victims, accountability of perpetrators, and the risks that large scale prosecution of juveniles might entail for the ongoing rehabilitation and childcare programmes. For the Security Council, it was ultimately a question of finding a political compromise between the principle of judicial accountability for all, including juveniles, and its impracticality in the circumstances. In the letter of the President of the Security Council to the Secretary General, members of the Council opted for the Truth and Reconciliation Commission as the alternative non-judicial accountability mechanism to handle the plight of children, both as victims and perpetrators¹⁶.

While it was ultimately a prosecutorial choice not to indict children who committed crimes, but those who forced children to commit crimes, the statutory provision on prosecution of juveniles framed the issues of the debate on the role of children in the Sierra Leone conflict, and brought it to the fore of Sierra Leone national consciousness.

1.4.2 Peace-keepers

While in a number of peace keeping operations, and notably in the DRC, Somalia, Bosnia and Herzegovina and Mozambique peace-keepers are known to have committed violations of international humanitarian law, no member of a UN peace-keeping operation has ever been prosecuted for any of these crimes before an international criminal jurisdiction. In the realities of Sierra Leone conflict, however, where members of ECOMOG, the military wing of ECOWAS (Economic Community of West African States), allegedly committed summary executions, the possibility of prosecuting peace-keepers had to be addressed. In introducing, by analogy from the ICC Statute, the principle of complementarity, the Statute of the Special Court provides that peace-keepers who transgressed will first be subject to the primary jurisdiction of their sending state, and may be subject to the jurisdiction of the Special Court only if the sending state is unwilling or unable to investigate or prosecute, and if the Court is authorized by the Security Council to exercise such

¹⁶ UN Doc S/2001/95.

jurisdiction on the proposal of any state¹⁷. The authorization in itself, however, would not guarantee the prosecution of those presumed responsible, if, in the absence of a surrender agreement between the Special Court and the sending state, or a Chapter VII Resolution, the unwilling or unable state would refuse to surrender the accused to the jurisdiction of the Special Court.

1.5 Temporal Jurisdiction

A determination of the temporal jurisdiction of any UN-based tribunal, whether international or mixed, is a time-frame put on the subject matter, personal, and territorial jurisdiction of the tribunal. For the United Nations, such a determination required a choice inclusive of the most notorious crimes in scale or heinous nature, the persons most responsible for their commission, and most distinctive geographical areas. Within the limitations imposed, the choice was to be balanced, objective, and impartial to avoid the perception that the exclusion of any groups of crimes, persons, or geographical areas was intended as a political statement.

For the relevant government, however, the determination of the temporal jurisdiction was a question, primarily, of the historical truth. In the establishment of all UN-based tribunals, with the exception of ICTY, the governments concerned requested the extension of the temporal jurisdiction of the tribunal to put the events in historical perspective. For this reason, the government of Rwanda asked the Security Council that October 1990, rather than 1 January 1994, be determined as the commencement date of the temporal jurisdiction of International Criminal Tribunal for Rwanda (ICTR) to ensure that the massacres of 1991, 1992, and 1993 which preceded the 1994 genocide to be included in the temporal jurisdiction of the ICTR. For this reason also, the government of Cambodia proposed that the temporal jurisdiction of the Extraordinary Chambers commence at 1971 to encompass the period of the US bombing campaign in Cambodia, and the government of Sierra Leone requested that the temporal jurisdiction of the Special Court be backdated to 1991, the beginning of the Sierra Leone conflict.

In both Cambodia and Sierra Leone, the demands of the governments were put forward at a relatively late stage of the negotiations, and in the case of Cambodia as a

¹⁷ Statute of the Special Court, Art 1(2) and (3)

negotiating strategy. In both cases, the temporal jurisdictions remained as originally agreed: in Cambodia, from 17 April 1975 to 6 January 1979, the period of Khmer Rouge regime, and in Sierra Leone, beginning at 30 November 1996, the date of the Abidjan Peace Agreement¹⁸.

1.6 The Organizational Structure of the Mixed Tribunals.

Just as in the case of the ad hoc international tribunals, the mixed tribunals for Sierra Leone and Cambodia are conceived as "self-contained entities", with the Chambers, Prosecutor's Office, and the Registry forming part of one and the same structure. Unlike the former, however, they are distinguished by their mixed composition of national and international judges, prosecutors, and administrative support staff.

The organizational structure of the Special Court for Sierra Leone is simple and minimalist in nature. It is composed of a Trial Chamber of three judges, of whom two are international, an Appeals Chamber of five judges, of whom three are international, and an international Prosecutor and a Registrar. A Management Committee consisting of the major donors to the Special Court was formed, though not as part of the institutional structure of the Court, to "assist the Secretary General in obtaining adequate funding and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency".¹⁹

The Extraordinary Chambers, as conceived under the Agreement, is a two-tiered court composed of a Trial Chamber and a Supreme Court Chamber, with an additional Pre-Trial Chamber constituted ad hoc to deal with eventual disagreements between the co-prosecutors and the co-investigating judges. Both the Trial Chamber and the Pre-Trial Chamber are composed of five judges each, of whom two are international, and the Supreme Court Chamber is composed of seven judges, of whom three are international judges²⁰. The investigations are directed by two co-investigating judges:

¹⁸ The choice of the commencement date was justified by the Secretary General on the grounds that it would put the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court and creating a heavy burden for the prosecution.

¹⁹ Agreement between the United Nations and the Government of Sierra Leone, Art 7.

²⁰ The numerical majority of Cambodian judges in the two Chambers and the likelihood of a decision-making process along nationality lines, created a need for a qualified, so-called "super-majority" vote, in which at least one foreign judge should have participated. An affirmative vote of a majority of judges plus one was, accordingly, required for any decision of the Trial Chamber and the Supreme Court Chamber, with the result that decisions which acquire a simple majority only would not be conclusive. Decisions on conviction, in

one Cambodian and one international, and the prosecution, by two co-prosecutors similarly composed. The Registry, or the Office of the Administration, is headed by a Cambodian Director and an international Deputy Director.

In comparison to the skeletal structure of the Special Court for Sierra Leone, the Extraordinary Chambers for Cambodia, though less convoluted and heavily staffed than originally conceived, are layered with deadlock-breaking mechanisms designed to achieve an artificial balance between the national and international components, while maintaining the numerical majority of the former. With a majority of Cambodians judges and prosecutors, however, the Extraordinary Chambers are less credible, especially on the face of the weak and corrupted Cambodian justice system.

1.7 The Relationship between the Law of the Mixed Tribunals and the Law of the Seat.

With the establishment of the mixed tribunals in the state of the seat and the concurrent operation of an international and national jurisdictions, questions of conflict of laws were bound to arise. In Cambodia and Sierra Leone, the single most important question was the validity before the mixed tribunal of the amnesty granted under national law, and the extent of its applicability to the crime of genocide, crimes against humanity, and war crimes.²¹

1.7.1 Cambodia: the amnesty to Ieng Sary

By a 1996 Decree signed by King Sihanouk, Ieng Sary was granted amnesty in respect of his conviction in 1979 trial on the charge of genocide, and for the crime of membership in the Khmer Rouge in violation of the 1994 Law on the Outlawing of the Democratic Kampuchea Group.

particular, adopted by a simple majority would be insufficient to convict, yet not enough to acquit, and in the circumstances would require the release of the accused. In the Pre-Trial Chamber, however, the situation is reversed, and on decisions to "investigate or prosecute", a "super majority vote" would be required to block an investigation or prosecution. In other words, a decision by a simple majority would have the effect of allowing the investigation or prosecution to proceed.

²¹ In the case of Sierra Leone, the concurrent operation of both jurisdiction raised, also, the question of the relationship between the Special Court, an international law-created institution, and the Truth and Reconciliation Commission, a national law-created body.

Refusing to revoke the amnesty on grounds of its constitutionality,²² the Cambodian government has undertaken in the Law on the Establishment of the Extraordinary Chambers not to request any further amnesty or pardon for persons falling within the jurisdiction of the Chambers.²³ It thus implicitly sanctioned the validity of the amnesty already granted. For its part, the United Nations maintained that while the grant of amnesty is a matter of national sovereignty, its effects cannot expand to international crimes, such as genocide, crimes against humanity or war crimes. It proposed that in addition to the future-oriented undertaking, it be stipulated in the Law that amnesty granted in respect of any of the international crimes falling within the jurisdiction of the Extraordinary Chambers shall not pose an obstacle to prosecution. The Law, as promulgated, contained no such provision. In reproducing Art 14 of the Law, the language of Art 11 of the Agreement refers to the single amnesty granted to Ieng Sary and provides that “the United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers”. Amnesty was thus recognized, in principle, subject to the court determination of its scope, validity, and applicability in the circumstances.

1.7.2 Sierra Leone: the amnesty to Foday Sankoh and the membership of the RUF

Under the Lomé Peace Agreement of July 1999 concluded between the government of Sierra Leone and the RUF, “absolute and free pardon” was granted to Foday Sankoh in person, and to the collectivity of combatants and collaborators “in respect of anything done by them in pursuit of their objectives”. In that connection also, the government has undertaken not to take any legal action against any member of the rebel group “in respect of anything done by them in pursuit of their objectives” since March 1991 and until the signing of the Agreement²⁴. The Special Representative of the Secretary General who signed the Agreement as witness on behalf of the United Nations, appended a disclaimer to his signature which stated that the amnesty provision under the Agreement shall not apply to international crimes of genocide,

²² Arts 27 and 90 of the Constitution of the Kingdom of Cambodia state, respectively, that the King has the right to grant amnesties and the Assembly, the power to approve amnesty laws.

²³ Law on the Establishment of the Extraordinary Chambers.

²⁴ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lomé, 1999 UN Doc S/1999/777, Art IX.

crimes against humanity, war crimes and other serious violations of humanitarian international law²⁵. This position was later endorsed by the Security Council in its resolution 1315 of 2000.

With the incorporation of the Lomé Agreement in the Sierra Leone Special Court (Ratification) Act 1999, the amnesty clause it contained became part of the law of the land. In the Statute of the Special Court, however, it was explicitly invalidated in respect of the international crimes falling within the jurisdiction of the Court.²⁶ A dual approach was thus adopted to the question of amnesty and its validity depending on the nature of the crimes, the time of their commission, and the jurisdiction before which they would be prosecutable. Accordingly, amnesty would bar the prosecution of any crimes, whether national or international, before the national courts of Sierra Leone; it would also bar the prosecution of the Special Court of common crimes committed before 1999. Amnesty, however, would not bar the prosecution before the Special Court of international crimes committed at any time within its temporal jurisdiction, and of common crimes committed after 1999.

In the negotiations on the establishment of the Special Court and the Extraordinary Chambers, the United Nations sought to define in retrospect the lawful contours of the amnesty granted and limit its effect to common crimes and crimes against the state (e.g. insurrection and coup d'état). It sought above all to establish legal and moral standards for UN cooperation in the establishment of any UN-assisted mixed jurisdiction. Its success or otherwise, in any given case, would be a test of the strength of its negotiating position.

1.8 The UN-Administrated courts in Kosovo and East Timor.

At the time when the UN Secretariat was negotiating the establishment of the Special Court for Sierra Leone and the Extraordinary Chambers for Cambodia, the United Nations Transitional Administration in East Timor (UNTAET) established the "Panels with exclusive jurisdiction over serious criminal offences"²⁷, and the United

²⁵ Report of the Secretary General, S/2000/915.

²⁶ Art 10 of the Statute provides: "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution".

²⁷ On the Special Panels in East Timor, see Chapter (...)

Nations Interim Administration Mission in Kosovo (UNMIK) introduced throughout the courts of Kosovo a system of mixed composition of judges, prosecutors, and defense counsel.²⁸

Commonly associated with the mixed tribunals for Sierra Leone and for Cambodia because of the apparent similarities in their mixed jurisdiction and composition, the UN-administered courts in Kosovo and East Timor were significantly different in the circumstances of their establishment and the legislative process by which they were born.

The UN Administration for Kosovo and East Timor were established almost in parallel by Security Council Resolution 1244 and 1272 of 1999 to administer in circumstances of post-conflict societies, the territory of Kosovo pending a final determination of its status, and the territory of East Timor in transition to independence. The UN Administrations, entrusted with a comprehensive mandate for humanitarian, governance, economic reconstruction, and sustainable development, were endowed with all embracing legislative and administrative powers, including the administration of justice. In the case of East Timor, in particular, UNTAET was also required by Resolution 1272 to bring to justice those responsible for serious violations of human rights and international humanitarian law committed in East Timor in the aftermath of the 30 August 1999 popular consultation. The UN Transitional Administrations inherited in both territories a virtually non-existent, devastated administration of justice, left practically decapitated with the massive flight of core members of the legal profession, judges, prosecutors, defense lawyers, and court administrators of Serb and Indonesian origin, respectively.

1.8.1 The Special Panels of Judges in East Timor

Faced with the challenge and inspired by the model of the mixed tribunals for Cambodia and Sierra Leone, UNTAET promulgated Regulation 2000/15 ("On the Establishment of Panels with exclusive jurisdiction over serious offences"). The Regulation establishes mixed panels of judges within the District Court and the Court of Appeals in Dili, with exclusive jurisdiction over the crime of genocide, war crimes,

²⁸ On the internationalized courts in Kosovo, see Chapter 4.

and crimes against humanity²⁹, and a selected number of common crimes committed between 1 January and 25 October 1999. Each Panel is composed of three judges, of whom two are international and one are East Timorese, and a panel of five judges composed of three international and two East Timorese may be established in the Appeals Courts in cases of special importance or gravity. The prosecution is conducted by the Serious Crimes Unit – a mixed composition unit operating as part of UNTAET and its successor mission UNMISSET (United Nations Mission of Support in East Timor) under the authority of the General Prosecutor. No separate Registry was envisaged for the Special Panels, which like the District Court and the Court of Appeals are serviced by the existing court management. Established by UNTAET Regulation, the "Special Panels of Judges" were part of the existing court system of East Timor throughout the transitional period and post-independence.

1.8.2 Mixed composition of judges and prosecutors in the courts of Kosovo

The attempt by UNMIK to establish a Kosovo War and Ethnic Crimes Court ("KWECC") as a special court of mixed composition and exclusive jurisdiction over serious violations of international humanitarian law and other ethnically motivated crimes, failed for a number of reasons. However, the prospects of conducting complex prosecution or war crimes and crimes against humanity in a post-conflict Kosovar society before ethnic Albanian dominated courts - in an atmosphere of fear and intimidation threatening the impartiality and independence of the judiciary - compelled the introduction into the existing court system of an international component of judges and prosecutors. It would have been their task to train and monitor the local judges, enhance the existing standards of justice, and remedy a widely spread preoccupation of a biased judicial process.

International judges and prosecutors were, accordingly, appointed or assigned on an as-needed basis or at the request of the prosecutor, the defense, or the accused to take part in a judicial or prosecutorial process of serious violations of human rights and international humanitarian law under the applicable Kosovo Criminal Code. A mixed

²⁹ The definition of the crimes, with the exception of the crime of genocide, incorporates almost literally the definition of the crimes under the ICC Statute (Arts 7 and 8), not in force at the time of their alleged commission. It pays little relevance in the realities of East Timor, or their customary or conventional international law nature.

composition of international judges and prosecutors was first introduced through UNMIK Regulation 2000/6 in the district court of Mitrovicë/Mitrovica as a response to the ethnic violence in the divided city. It was further extended throughout the courts of Kosovo by Regulation 2000/34 on the Appointment and Removal from Office of International Judges and Prosecutors. Regulation 2000/64 on the assignment of International Judges and Prosecutors, empowers the Special Representative of the Secretary-General, upon a petition by a prosecutor, an accused, or defense counsel, to appoint an international prosecutor, an international judge on Assignment of International Judges and Prosecutors, empowers the Special Representative of the Secretary General, upon a petition by a prosecutor, an international judge, or a panel of three judges, of whom at least two are international (the so-called "Regulation 64 Panels").

The success of the Kosovo "mixed courts" was only partial. The limited number of international judges, their sporadic allocation to cases, and their marginal influence on decisions taken by a majority of local judges led in many cases to unequal treatment of defendants, and contributed little to the professional quality of the judicial process or its standards of justice. Their very presence in the courts of Kosovo, however, dispelled, in part at least, a perception of bias and judicial partiality.³⁰

1.9 The diversity of mixed tribunal: the search for a model of jurisdiction.

For all the similarities between the mixed tribunals in their subject matter jurisdiction, their mixed international and national composition, and their linkage to the United Nations, no single model of internationalized jurisdiction has yet emerged. Different in the historical-political circumstances of their establishment, the mixed tribunals differ mainly in their legal nature and the nature of their founding instrument.

The Special Court for Sierra Leone, by far the professed model of any UN-assisted mixed jurisdiction, was established by Agreement between the United Nations and the government of Sierra Leone, having the legal status of an international treaty-based organ. The Extraordinary Chambers were established by law, and although technically within the existing court system of Cambodia, they are, in fact, a self-contained court

³⁰ OSCE Mission in Kosovo, "Report 9 on the Administration of Justice" (March 2002); International Crisis Group, "Finding the balance: the scales of justice in Kosovo".

with a separate organizational structure of judges, prosecutors, and court managers, whose operation is conditioned in its entirety on the implementation of the Agreement between the United Nations and the government. The mixed composition panels in the UN-administered territories are established by law or Regulation having the same effect. Operating under national law and as part of the existing court system, their legal status is that of national courts, their mixed composition and jurisdiction notwithstanding.

The choice of the founding instrument, in the case of the Special Court for Sierra Leone and the Extraordinary Chambers for Cambodia, was political. In the negotiating process on the establishment of the Special Court for Sierra Leone, the Council Members, the Management Committee, the UN Secretariat and the government were united by a vision of an international law created mixed tribunal, of substantial international component, operating in full respect for international standards of justice. In the case of Cambodia, a divided approach made it possible for the government to impose a national-law created tribunal composed predominantly of Cambodian nationals having a majority vote in all organs of the court, yet funded in its entirety by international funds. In the case of the UN-administered territories, the choice of the founding instrument was imposed by the nature of the UN Administration acting as the de facto government. No negotiating process preceded the establishment of the mixed composition panels for East Timor and Kosovo, and no political constraints inhibited the sole judicial discretionary power of the UN Transitional Administrator.

The diversity of mixed jurisdictions imposed by the specificities of each post-conflict situation has shifted the focus on the discussion from a search for a model jurisdiction to setting the benchmarks for UN cooperation in the establishment of a mixed jurisdiction. While the terms of the UN mandate and the choice of the constitutive instrument is ultimately a political choice, it remains the Secretariat's preference that a UN-assisted mixed jurisdiction be established as a treaty-based organ, whose applicable law and rules of procedure and evidence are primarily international, whose organizational structure is substantial with a majority of international judges, an international component is substantial with a majority of international judges, an international Prosecutor, and a Registrar. Should a national law containing the same international features be chosen as the mixed-tribunal founding instrument, it should be annexed to

the Agreement and made an integral part thereof to ensure that it is not unilaterally amended by the government.

But whatever may have been the legal nature of its constitutive instrument, the success of any mixed tribunal will ultimately depend on the readiness of the government to comply with its orders and requests, and on the cooperation of third states their willingness to sustain its operation through funds and personnel. For the community of donors, however, to be willing to contribute, it must be convinced that the mixed tribunals is independent, free from political interference, and affords guarantees of fairness, objectivity, and impartiality of the legal process. For the United Nations, the success of any mixed tribunal established in partnership with the national administration of justice will be measured also by its legacy of enhanced international standards of justice and a generation of skilled judges and prosecutors trained in the principles and procedures of international criminal justice.

CHAPTER TWO

THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY

2.1 Brief history of the conflict

In 1991, a partly indigenous rebel group invaded Sierra Leone from Liberia and plunged the country into a decade-long civil war. When a cease-fire was finally declared at the end of January 2002, Sierra Leone had seen a bloodless and popular military coup in 1992, elections in 1996 with much of the country still in rebel hands, a violent and bloody military coup in 1997, a partial restoration of the government in 1998, and multi-faction violence until the end of disarmament and the official declaration of peace.

Several theories have attempted to explain the brutal conflict in Sierra Leone:

1. Some argue that Sierra Leone had become a “failed state,” or that the conflict was a crisis in government mainly driven by years of one-party rule and a small ruling elite’s exploitation of the country, widespread corruption and lack of accountability, and the disempowerment and militarization of youth.
2. Some believe that the conflict was driven by various internal factions wanting control of the country’s rich diamond mines.
3. Some postulate that the conflict was a proxy war driven by the personal political agendas of Charles Taylor, then-president of Liberia, and Mu’ammar al-Qadhafi, president of Libya.
4. Some feel that the war was a subtle ethnic conflict between the Mende-dominated Sierra Leone People’s Party (SLPP) and the Temne-dominated All People’s Congress (APC).

All of these factors likely contributed to the conflict.

Sierra Leone is a small West African nation that occupies 71,740 square kilometers between Guinea and Liberia. Although no census has been conducted recently, the population is approximately 5 million, with an under-five mortality rate of 284 per 1,000 and a life expectancy of merely 34 years. The country has exceptionally rich

diamond mines in the Eastern district of Kono, near the Liberian border. First named “Sierra Leone” by Portuguese explorers in the fifteenth century, the British subsequently designated Freetown, the area that became the nation’s capital, as a location for resettling freed slaves following the abolition of slavery in 1807. The main ethnic groups are descendants of the freed slaves - the Krios (10%), based largely in Freetown; the Temne (30%), based mostly in the North; and the Mende (30%), based primarily in the South. The country is predominantly Muslim (60%), but the Krios are mostly Christian, and many throughout the country also maintain traditional religious beliefs. While English is the official language, Temne and Mende are the main vernacular languages and nearly everyone understands Krio. The territory was held as a British colony until 1961, when independence was declared and power was transferred to the Sierra Leonean people.

On March 23, 1991, about 100 fighters calling themselves the Revolutionary United Front (RUF) crossed the border from Liberia into Sierra Leone. The RUF was led by Foday Sankoh and allegedly acted in concert with Charles Taylor, then warlord and later president of Liberia. It has been suggested that Taylor backed the RUF financially to gain access to Sierra Leone’s diamond reserves and destabilize the country. But some suggest that he was motivated by Sierra Leone’s support of the Nigerian-led ECOMOG offensive against his forces in 1990, which thwarted his claims on Monrovia. Taylor infamously declared in 1990 that “Sierra Leone would taste the bitterness of war”.

For the next decade, Sierra Leone was split into various faction alignments, all of which engaged in systematic war crimes. The National Provisional Ruling Council (NPRC) kept the RUF from reaching Freetown, but lost and failed to win back substantial regions of the country, including the diamond and mining areas. The war rarely involved pitched battles or traditional troop manoeuvres, but mainly consisted of factions trading off control over villages, which resulted in massive human rights abuses against civilians. On some occasions, individuals served as soldiers “fighting” the rebels during the day and looting with them at night. This phenomenon was common enough to make the term “sobel” (a combination of “soldier” and “rebel”) part of common parlance. The NPRC hired mercenaries from abroad who, with the help of citizens’ militias, managed to weaken much of the RUF’s military strength. In

1996, the country had its first multiparty elections in decades, but the occasion was marked by brutal violence, including forced amputation of limbs to deter voting. The SLPP won the elections and Ahmed Tejan Kabbah became president. In November 1996, Kabbah and the RUF signed the Abidjan Peace Accord. However, violence escalated almost immediately, and within a year the peace had collapsed completely. In May 1997, Kabbah was overthrown in an exceptionally violent coup by breakaway army officers who freed Corporal Johnny Paul Koroma (in prison for an attempted coup), installed him as the new leader, and made him head of the recently formed Armed Forces Revolutionary Council (AFRC). After years of blurring the distinction between soldier and rebel, the AFRC had close relationships with the RUF, and one of Koroma's first acts was to invite the RUF to come to Freetown and join his government. The new regime was deeply unpopular with the majority of the population, and the international community never recognized it. In February 1998, a combination of Nigerian-led ECOMOG troops and civilian militias restored Kabbah's government to power in the Western Area, even though much of the country remained in rebel hands. The government formalized the citizens' militias, based loosely on traditional hunting societies, into the Civilian Defense Forces (CDF), which was put under the charge of Chief Sam Hinga Norman. While the CDF committed fewer atrocities than the RUF and was less likely to resort to sexual violence, Human Rights Watch and other groups documented rising incidences of systematic abuses from all factions as the war continued.

The war went on as a standoff for much of 1998, but in January 1999 the rebels and ex-soldiers, led by the AFRC, returned to Freetown in "Operation No Living Thing," which became one of the bloodiest weeks of the decade, leaving 5,000 dead and much of the city destroyed. This invasion was turned back by Nigerian ECOMOG troops, who in turn committed atrocities. After six more months of fighting throughout the country, all factions agreed to a peace agreement in Lomé, Togo, in July 1999. The Lomé Peace Agreement remains a matter of controversy. Some feel it was a diplomatic failure in which international actors allowed Charles Taylor to dictate the terms of the peace, despite his close links to the RUF. Others argue that it was the only option in a desperate situation. In any case, the final agreement included an amnesty for all fighters from all factions for all crimes, as well as a power-sharing agreement in

which Foday Sankoh was made Chairman of the Strategic Mineral Resources Commission, granting him formal authority over the country's diamonds and other natural resources. The agreement also required that all Nigerian troops leave Sierra Leone, even though they had presented the key barrier to RUF advances. Within days of the last ECOMOG troop departures in May 2000, the RUF took hostage 500 UN peacekeepers and confiscated their weapons. Weeks later, rebels closed in on Freetown, and 800 British paratroopers were deployed to evacuate citizens and secure parts of the Western Area. The British eventually freed the hostages, and the last ones were released by August. The May 2000 incidents signalled the return to low-intensity conflict throughout the country, which lasted until a new cease-fire was reached in November, but human rights violations continued. The RUF controlled much of the country, including strategic diamond regions, and had their headquarters in Makeni, less than 200 kilometers from Freetown. However, by spring 2000, the United Nations Mission in Sierra Leone (UNAMSIL) had been established, and it was to become the largest peacekeeping force in the world, with 17,500 personnel at its height and an eventual budget of approximately US \$ 700 million per year. UNAMSIL's mandate included disarmament, demobilization, and reintegration (DDR). By the second half of 2001, UNAMSIL's DDR program had processed more than 45,000 combatants, and by January the war was officially declared over pursuant to a weapon-burning ceremony. Four months later, the country witnessed peaceful and relatively fair elections in which the Kabbah's SLPP captured 70 per cent of the vote, while the APC won 20 per cent.

While these developments raised hopes for lasting peace, security experts in the region noted that the root causes of the conflict remained. Charles Taylor retained power in Liberia with the same incentives to launch proxy wars, despite being hampered by international sanctions and an internal war. The army remained largely loyal to Johnny Paul Koroma, who received more than 90 per cent of the military personnel vote in the May 2002 elections. Chief Sam Hinga Norman retained the loyalty of the Kamajors (traditional hunters), the core group of the CDF, and was rumoured to be in close contact with President Conte of Guinea and a major recruiter for the Liberian rebel faction, Liberians United for Reconciliation and Democracy. At present, Sierra Leone has not fully stabilized, despite second presidential elections were held in (...)

2007. Large numbers of ex-combatant youth remain disempowered and without economic opportunity while becoming ever more militarized, and the SLPP shows few signs of progress on corruption or non-ethnic governance. As a result, foreign investment in Sierra Leone remains minimal. The economy, much of which had built up around donor assistance and an expatriate community in Freetown, is suffering significant difficulties and inflation.

2.2 Nature of the atrocities

A number of groups documented atrocities in Sierra Leone throughout the 1990s, including Human Rights Watch, the Campaign for Good Governance, and other non-governmental organizations. Although there is general agreement that the crimes in Sierra Leone do not amount to genocide, they did constitute serious violations of the laws and customs of war and crimes against humanity. During the war, more than two million people were forced to flee their homes, collecting in crowded internally displaced person camps around Freetown or in dangerous refugee camps along the volatile Guinean and Liberian borders. Forced displacement was the most prevalent violation during the war. Sexual and gender-based violence was the most reported form of human rights abuse in Sierra Leone. Even before the establishment of the Special Court, Human Rights Watch concluded that sexual violence in Sierra Leone amounted to crimes against humanity. Of more than 1,800 victims of sexual violence who sought medical attention from Médecins Sans Frontières (Doctors Without Borders) between 1997 and 1999, 55 per cent reported being gang raped and more than 200 were pregnant. Human Rights Watch has also documented patterns of abduction, molestation, sexual slavery, and insertion of foreign objects into genital openings. According to Physicians for Human Rights, more than half the women who came into contact with the RUF suffered some form of sexual violence. Charges against all factions, but particularly against the RUF and AFRC, include rape of girls and women of all ages, and sexual slavery where women were forced to travel with armed factions; suffered regular rape; and bore the euphemistic title “bush-wife.” The sexual violence was intended to keep the civilian population in fear and destroy traditional community norms and systems of order.

Killings were also widespread. It is estimated that perhaps up to 100,000 people were killed during the conflict. Execution was used to install terror and obedience among the civilian population and within the forces themselves. The Sierra Leone conflict is also known for the widespread use of child soldiers in the AFRC, RUF, and CDF. It is estimated that up to 7,000 children fought in this war. UNICEF estimates that more than 300,000 children were actively involved in armed conflict in sub-Saharan Africa during the late 1990s. Moreover, many of these children (and many adults) were forcibly conscripted. In the most common scenario, combatants stormed into a home, killed one family member, and forced a young male to kill another relative. The combatants were often drugged on a regular basis, particularly before going into battle, with a substance locally known as “brownbrown” that is thought to be a combination of heroin and cocaine or gun powder. The goal was to eradicate a sense of family or community to which young men could return, so that their only means of survival was with the faction and commanders, who became like surrogate parents or community elders. Another notorious atrocity in Sierra Leone was the intentional amputation of hands and feet or arms and legs. The RUF and the AFRC committed most of these crimes. Most of the victims, estimated by the International Coalition for the Red Cross (ICRC) at 4,000, died from their injuries, but approximately 1,000 survived. Other forms of mutilation, including cutting off noses, ears, and lips, were also common, and acts of cannibalism, particularly by the Kamajors, have been documented. The war also resulted in the large-scale destruction of property, including the RUF’s ransacking of Eastern Freetown in 1999. Kono and Kailahun suffered the most destruction.

2.3 Establishment of the Special Court for Sierra Leone

The Lomé Peace Agreement granted amnesty for crimes committed by all parties and referred to the establishment of a Truth and Reconciliation Commission (TRC). Although the UN Special Representative of the Secretary-General present at the signing was not a party to the Agreement, he later appended a handwritten reservation to the amnesty stating that the UN would not recognize amnesty for “international crimes of genocide, crimes against humanity, war crimes and other serious violations of international law.” For a while, it seemed as if the proposed TRC would be the only transitional justice mechanism available to address the human rights violations

committed during the conflict. Civil society activists strongly supported the Commission as a way to ensure a measure of accountability. Legislation governing its establishment was passed in February 2000. The TRC was mandated to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone; ... to address impunity, to respond to the needs of the victims, to promote healing and reconciliation, and to prevent a repetition of the violations and abuses suffered³¹. Preparatory activities began in March 2002, and commissioners were sworn in during July. The TRC worked for about two years and handed over its final report to the president in October 2004. However, shortly after the Lomé Peace Agreement, fighting re-erupted. In course of the attempted rescue of the UN peacekeepers taken hostage in May 2000, RUF leader Foday Sankoh was taken into custody. The government feared that a national trial of Sankoh and his co-conspirators would aggravate the conflict and fuel RUF desires to move on Freetown to disrupt the proceedings. Accordingly, on June 12, 2000, President Kabbah wrote to the Secretary-General requesting the assistance of the international community in creating a court to try senior RUF officers. The Security Council viewed the taking of the peacekeepers hostage as a direct attack on the UN and felt obliged to assist in the prosecution of the perpetrators. However, the Security Council and the Secretariat took strongly opposing views on how to accomplish this in light of the ICTY's and ICTR's financial drain on UN resources.

For example:

- The Secretariat supported assessed funding, arguing that voluntary contributions would be dangerously uncertain, while the Council insisted the opposite;
- The Secretariat argued in favour of granting the Special Court enforcement powers under Chapter VII of the UN Charter, while the Council did not;
- The Secretariat wanted personal jurisdiction over “those most responsible,” rather than the narrower “those who bear the greatest responsibility” proposed by the Council.

Negotiations came to a standstill, but eventually it was agreed that the Special Court would be established by treaty rather than by resolution so that it could proceed

³¹ Truth and Reconciliation Commission Act 2000, s. 6(1).

without committing UN members to funding. The Court would function independently from the UN bureaucracy, be subject to the oversight of a “Management Committee,” and have to raise its own funds. With this financial compromise, the Court’s operations were significantly scaled down and the Security Council prevailed on each of the above points of disagreement. In August, the Security Council passed Resolution 1315, requesting the “Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution [. . .].³²” While the Resolution “reiterate[s] that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region,” unlike the ICTY and ICTR, the Special Court was not established according to the Council’s Chapter VII authority, but by an international agreement whose negotiation was requested by the Security Council. After 17 months of negotiations, in January 2002, the UN and the Government of Sierra Leone finally signed the Agreement on the Establishment of a Special Court for Sierra Leone (Special Court Agreement), including as an annex the Statute of the Special Court for Sierra Leone. This signing took place two days before President Kabbah declared the official end of the war. In January 2002, the Secretary-General sent a planning mission to Sierra Leone to discuss with the government, non governmental organizations, and other groups arrangements for the creation and operation of the Special Court, including the selection of the premises; the structure, functions, and staffing; and the Court’s relationship with the TRC. In its report, released in March 2002, the mission concluded that the local resources needed for the Court’s operation were either “non-existent or extremely scarce.³³” The mission noted, however, that while “not experienced in the relevant fields of international criminal law,” the local members of the legal professions “could render an important contribution to the work and success of the Special Court” with training. The mission proposed that, according to the Statute, the Special Court would be staffed by international and Sierra Leonean judges and personnel. The report also argued that given the limited duration and budget and voluntary financing, the Court would need “an exceptionally clear and well-defined prosecutorial strategy.” Three months later, in accordance with the Statute, the

³² S/Res/1315 (2000).

Secretary-General appointed Robin Vincent from the United Kingdom as Registrar and David Crane of the United States as the Prosecutor. The Prosecutor and Registrar arrived separately in July and August 2002 with less than half a dozen staff to begin setting up the offices. On July 26, 2002, the Secretary-General announced the appointments for the three trial and five appellate judges, three of whom were nominated by the Government of Sierra Leone.

As a result, the Special Court emerged from a unique convergence of a government eager for justice in the wake of a failed amnesty, yet unable to conduct the trials itself, and an international community anxious to stabilize the region by removing those who threatened the peace. The international community also wanted to implement a new model that would serve as an alternative to the ad hoc tribunals. Despite these serendipitous factors, the Special Court faced challenges. The strong U.S. presence at the outset was difficult, as general anti-American sentiment around the world intensified due to foreign policy developments in Iraq and elsewhere. Concerns over this subsided with time and with a reduction of the U.S. role in the Office of the Prosecutor. In addition, some within the UN felt that the Court presented a challenge for UN oversight. Currently the Court is more likely to be evaluated on whether it delivers viable justice to the satisfaction of Sierra Leoneans and the international community. The criteria that will guide this evaluation are discussed below. It is worth noting that one of the main motivations behind the Special Court's establishment was a desire by the Government of Sierra Leone and the international community to stabilize the country. The government wanted the RUF leadership tried without the instability that would result from national trials. The international community wanted to prosecute those responsible for attacks on UN peacekeepers. While the evaluation criteria have since changed to encompass notions of legacy and promoting the rule of law, the Special Court was originally conceptualized as central to redressing security concerns.

³³ S/2002/246, March 8, 2002.

2.4 Legal framework

2.4.1 Jurisdiction

The Agreement on the Special Court for Sierra Leone, as concluded by the Sierra Leone Government and the UN, was formally signed by both parties at a ceremony in Freetown on January 16, 2002. The most notable feature of Court is a reference in its Statute to investigating and trying only “those who bear the greatest responsibility,” which has become a catch phrase of public discourse in Sierra Leone. As mentioned above, the Secretariat initially wanted the Court to have jurisdiction to prosecute “those most responsible,” but the Security Council wanted to limit the Court’s scope and demanded a change. This aims to focus the prosecution on the key players, rather than lesser actors. This phrase has not been more clearly defined and opens the door to considerable prosecutorial discretion. Under Article 6(2), no official position, including that of Head of State, exempts a person from criminal responsibility or punishment. The Special Court has jurisdiction over crimes against humanity³⁴, serious violations of Article 3 common to the Geneva Conventions³⁵, intentional direction of attacks against humanitarian or peacekeeping personnel³⁶, conscription of children into armed forces or groups³⁷, and a few select aspects of Sierra Leonean law relating to the abuse of girls and arson³⁸. The Report of the Secretary-General explains that genocide was not included because of lack of evidence that killing was perpetrated in Sierra Leone “against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such.”³⁹ Grave breaches of the Geneva Conventions of 1948 are also excluded, largely because the conflict was seen as domestic and grave breaches apply only to international conflicts. The inclusion of domestic crimes in the Statute has been attributed to various factors. In part it is an attempt to legitimize and

³⁴ Special Court Statute, Art 2.

³⁵ Special Court Statute, Art 3.

³⁶ Special Court Statute, Art 4(b), “Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as the yare entitled to the protection given to civilians or civilian objects under the international law of armed conflict.”

³⁷ Special Court Statute, Art. 4(c), “Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.”

³⁸ Special Court Statute, Art 5.

revitalize the existing domestic legal system, which many saw as complex and inaccessible⁴⁰. It has also been attributed to gaps in international criminal law regarding arson and crimes against girls and an attempt to ground the Court in the specific circumstances of the Sierra Leone conflict. Some suggest that including domestic crimes was a diplomatic gesture to the Sierra Leone legal profession. However, the decision not to include violations of domestic law in the indictments may be pragmatic in view of potential complications arising out of, for example, the Lomé Peace Agreement and adjustments to the rules of procedure and evidence that may have been necessary for prosecutions under domestic law.

The territorial jurisdiction of the Special Court is limited to trying “crimes committed in the territory of Sierra Leone,” but this has been interpreted to include acts planned or instigated outside Sierra Leone, the effects of which are felt within the territorial jurisdiction. The Special Court enjoys primacy over domestic Sierra Leonean courts, although, unlike the ICTY and ICTR, this primacy does not extend to courts of other states. The Court’s temporal jurisdiction is limited to crimes committed after November 30, 1996, the date of the Abidjan Peace Accord. Several dates were considered and this was the earliest, although most Sierra Leoneans find it strange that the jurisdiction does not stretch to 1991, when the war began. However, some policy-makers argued that going back to 1991 would make it difficult for the prosecution to produce solid evidence for decade-old crimes and impossible for the court to complete its work in three years. The truncated time frame leaves out the NPRC regime and the foundational period of the RUF, but most of the key individuals involved in the early 1990s remained criminally engaged after 1996. One problem is that most crimes were committed in the provinces, and the conflict reached Freetown only in 1997. The worst of the crimes in the provinces were committed earlier, and some have argued that it “sends the wrong signal” that the crimes under scrutiny affected the people of Freetown⁴¹. The temporal jurisdiction includes periods of time covered by the amnesty

³⁹ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, Oct. 4, 2000, at 3.

⁴⁰ See Daniel J. Macaluso, “Absolute and Free Pardon: the Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone,” *Brook. J. Int’l L.* 347, 2001– 2002, at 362.

⁴¹ See Abdul Tejan Cole, “The Special Court for Sierra Leone: Conceptual concerns and alternatives,” *1 African Human Rights Journal*, 2001, at 1.

of the Lomé Peace Agreement, namely crimes committed prior to July 1999. Moreover, there is an express provision in the Statute asserting that amnesty shall not be a bar to prosecution with respect to international crimes (Art 10). The prosecution of crimes under domestic law covered by the Lomé Peace Agreement is generally considered impossible, but to date this has not been tested (although a challenge to the amnesty under domestic law could be envisaged, none has been mounted to date). More generally, the Prosecutor has chosen not to exercise his power to prosecute under domestic law. The Special Court can prosecute any person “who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of the international crimes mentioned above⁴². The category of “aided and abetted,” coupled with public statements from the Prosecutor, fuelled early speculation that financiers, including diamond or arms dealers, could face indictments under the Special Court. For example, the indictment against Charles Taylor involved charges including profiting from the war and allegations of command responsibility⁴³. However, no one has been indicted only for financing the war.

2.4.2 *Rules of Procedure*

The applicable Rules of Procedure and Evidence are based on those of the ICTR, with amendments that were made over the judges’ subsequent plenaries. The Statute (Art 14) specifies that the judges may be guided in amendments by the Sierra Leone Criminal Procedure Act 1965, but most of the amendments seem to have been motivated by a desire to expedite the procedures of the ad hoc tribunals, rather than being based on domestic law. The system operable before the Special Court has cut out some of the civil law-oriented amendments that were made in the rules of the ad hoc tribunals; thus, it is essentially closer to the common law. Most of the judges have common law backgrounds and have resisted certain practices, such as reliance on

⁴² Special Court Statute, Art 6(1).

⁴³ The indictment reads, “25. The ACCUSED participated in this joint criminal enterprise as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone and to destabilize the Government of Sierra Leone.” See Prosecutor vs. Charles Ghankay Taylor, SCSL-03-01, Indictment, March 3, 2003.

written statements in lieu of oral testimony⁴⁴. In general, the emphasis has been on witness testimony rather than documentary evidence.

Major points of difference include allowing the Court to exercise its functions away from Sierra Leone, a rule used frequently by the Appeals Chamber (Rule 4); a rule that allows for closed sessions for national security or the security of the Special Court (Rule 79); the deletion of the prima facie standard of proof for confirmation of the indictment (Rule 47); a general reduction of time limits for filings (Rule 50 on preliminary motions, Rule 111 on appeals); a rule that allows the accused to be handcuffed in court (Rule 83); some differences in the rules of disclosure, such as less duty for the Prosecutor to disclose exculpatory evidence (Rule 68); abbreviated rules of evidence, without a Rule for the Chamber to call its own evidence; and more reliance on oral evidence.

One controversial change was to make the Appellate Chamber in effect the court of first and last resort on all preliminary motions raising serious jurisdictional issues⁴⁵. This provoked condemnation from human rights groups, including Amnesty International, on the grounds that it deprives the accused of their right to appeal (most other aspects of the rules have not provoked any serious criticism). The rules are more streamlined than those of the ICTY and ICTR and may become a reference point for future courts. They were initially relied on as the framework for Rules for the Iraqi Special Tribunal, although these subsequently took a different direction. On the other hand, the Special Court relies heavily on eyewitness testimony, and its rules are less elaborate than those of other tribunals in terms of how to deal with voluminous documentary evidence.

2.4.3 *Jurisprudence*

The Special Court has already confronted several significant legal questions, most of which relate to motions that challenge jurisdiction.

- *Relationship with domestic law.* Defence Counsel brought preliminary motions questioning whether the establishment of the Special Court violates the Sierra Leonean

⁴⁴ Under Rule 92 bis of the ICTY, such statements are admissible on issues other than those relating directly to the guilt or innocence of the accused, but the Rules of the Special Court originally did not allow for the admission of written statements.

Constitution. The Appeals Chamber dismissed the motions, holding that as its creation was based on a valid treaty, the Special Court is acting under international law and independent of Sierra Leonean domestic law, as made clear in the report of the Secretary General, and hence the Constitution does not apply. An important result was demonstrating that judges consider the Special Court to be entirely international. Nonetheless, a challenge to the Court's legality was subsequently filed before Sierra Leone's Supreme Court, but was dismissed.

- *Recruitment of child soldiers a crime under customary international law in 1996*. On May 31, 2004, the Appeals Chamber held that the recruitment or use of children under the age of 15 was a crime under international law in 1996 and that defendants are subject to individual criminal responsibility for this offence during the entire period covered by the court's jurisdiction⁴⁶. The Court relied on international instruments such as the 1990 African Charter on the Rights and Welfare of the Child. The Court noted that by 1996 Sierra Leone had ratified the 1949 Geneva Conventions, which call for the protection of children under 15 from the effects of war, as well as two Additional Protocols of 1977 and the Convention on the Rights of the Child (CRC), which prohibit the recruitment of child soldiers⁴⁷. It also held that violation of these fundamental guarantees leads to individual criminal liability. A dissenting judge argued that the prohibition on recruitment of child soldiers emerged later, when the Rome Statute of the ICC came into force.

- *Head of state immunity in Taylor case*. On May 31, 2004, the Appeals Chamber ruled that heads of state are not immune from prosecution before an international criminal tribunal or court, unanimously rejecting Charles Taylor's preliminary motion to challenge the validity of his indictment on the grounds that he was president of Liberia at the time it was issued. In reaching its decision, the Court concluded that the Special Court is an international criminal court because of the UN's role in its creation⁴⁸. This

⁴⁵ See Rules of Procedure and Evidence, 72(E), 72(F).

⁴⁶ Appeals Chamber, Prosecutor v. Norman, "Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)," May 31, 2004.

⁴⁷ Additional Protocol I, Art. 77.2, Additional Protocol II, Art. 4, and CRC, Art. 38.

⁴⁸ The Appeals Chamber observed that pursuant to Article 6(2) of the Court's Statute, which is similar to the provisions in the statutes of the ICTY (Art. 7(2)), ICTR (Art. 6(2)), and ICC (Art. 27(2)), the position as Head of State does not relieve that individual of criminal responsibility or mitigate punishment, noting that these

brought it within the exception to sovereign immunity laid out in *DRC v. Belgium (Yerodia)*⁴⁹.

- *Invalidity of the amnesty in respect of international crimes.* According to the Appeals Chamber, the amnesty granted under the Lomé Peace Agreement does not bar the Court from prosecuting international crimes and crimes against humanity committed before July 1999. The Appeals Chamber ruled that the amnesty applies only to national criminal jurisdiction and cannot cover international crimes, over which states may exercise universal jurisdiction⁵⁰.

It remains to be seen how far other courts will rely on these decisions, as the legal reasoning has not always been elaborate and has been criticized by some legal experts. So far the Appeals Chamber has often relied on common law precedent, as most of the judges derive from common law jurisdictions, but jurisprudence from the other international tribunals has also been used, as was anticipated in the Statute⁵¹. In its first year the Court's decisions were not widely available or posted on its website. Important decisions are now readily available, although motions from the parties, such as the pre-trial motions, are still not posted. It is also difficult to systematically track the development of certain legal issues. In this respect, the Special Court has not performed as well as the other ad hoc tribunals in terms of transparency.

2.4 The Judges of the Special Court

The Special Court was originally composed of two Chambers - a Trial Chamber of three judges and an Appeals Chamber of five judges. A second Trial Chamber has now been established, at the request of the President, in accordance with the Statute⁵². The Trial Chambers each comprise two judges appointed by the Secretary-General and one appointed by the Government of Sierra Leone. The Appellate Chamber contains three

provisions are traceable to the Charter of the International Military Tribunal (Nuremberg Charter) (Art. 7). The Court further found that Article 6(2) of its Statute is consistent with other norms of international law.

⁴⁹ Judgment by the International Court of Justice, Feb.14, 2002.

⁵⁰ The Court ruled that the Lomé Peace Agreement is not an international agreement because it created rights and obligations that are to be regulated by the domestic laws but not international law. It also noted that the RUF did not have treaty-making capacity. Therefore, the Court concluded that the Lomé Agreement does not affect the liability of the accused to be prosecuted in an international tribunal for international crimes and crimes against humanity.

⁵¹ Article 20(3), "The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda."

judges appointed by the Secretary-General and two by the Government of Sierra Leone⁵³.

The judges hail from Sri Lanka, the UK, Nigeria, Cameroon, Austria, Canada, Uganda, Samoa, Northern Ireland, and Sierra Leone. The national and international appointees were hired at the level of Under-Secretary-General of the UN for three-year terms and are provided with transportation and close protection officers. Currently three are women and five of the eleven judges are African, including two Sierra Leoneans. However, the Sierra Leonean government chose to nominate two internationals out of its four nominations. This has contributed to the perception that the Special Court is mostly international, rather than a true hybrid institution.

Recruitment via the Office of Legal Affairs in New York has often been slow. In fact, when the Special Court requested a second Trial Chamber in March 2003, it took a full year for the chamber to be established. It has also been difficult to get quality candidates to apply, despite the fact that the salaries in Sierra Leone are much higher than in Timor-Leste or Kosovo, where other hybrid courts are in operation.

Several legal motions have been filed regarding recusal of judges. For example, defense counsel in the RUF case brought a motion for the recusal of Judge Robertson on the basis of his book, *Crimes Against Humanity: The Struggle for Global Justice*. Counsel argued that Robertson had prejudged certain central issues in the case and that the book read like a verdict before trial⁵⁴. Moreover, it was argued there would be the appearance of bias if Robertson sat on RUF cases because he had an interest in finding them guilty, as determining otherwise would raise doubts about the accuracy of his book. Controversially, the Prosecution agreed with the Defence that there maybe a

⁵² Agreement on the establishment of the Special Court, Art 2(1).

⁵³ Hassan Jallow of The Gambia was formerly appointed a judge of the Appeals Chamber, but left the position upon being invited to become the Chief Prosecutor of the ICTR in September 2003. Other judges include Justice A. Raja N. Fernando (Sri Lanka) – President; Justice George Gelaga King (Sierra Leone) – Vice President; Justice Emmanuel Ayoola (Nigeria); Justice Renate Winter (Austria) Vice President; Justice Geoffrey Robertson (UK); Justice Pierre G. Boutet (Canada); Justice Benjamin Mutanga Itoe (Cameroon); Justice Rosolu John Bankole Thompson (Sierra Leone); Justice Richard Lussick (Samoa); Justice Teresa Doherty (Northern Ireland); Justice Julia Sebutinde (Uganda).

⁵⁴ Appeals Chamber, *Prosecutor v. Issa Sesay*, SCSL-04-15-PT-140, “Decision on Defence Motion Seeking the Disqualification of Judge Robertson from the Appeals Chamber,” 13 Mar. 2004. The motion cited phrases from the book on the “guilty of atrocities of a scale that amounts to a crime against humanity, must never again be forgiven sufficiently to be accorded a slice of power: on the contrary, its leaders deserve to be captured and put on trial.” See Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, New York: Penguin, 2002(2 nd ed.), at469.

perception of bias. After Judge Robertson had not recused himself, the remainder of the Appeals Chamber heard oral argument and decided to disqualify him from sitting in the RUF case. All of this occurred when the Court was about to open for the first trial, and the issue received considerable attention from the international media. The disqualification of Judge Robertson was detrimental to the Special Court, partly because the matter of his prior publications should have been elucidated at the time of his appointment.

The following issues have been raised by observers of the Chambers:

- (1) Efficiency. When the judges of Trial Chamber I began sitting, they averaged 1.5 hours per sitting day, which caused considerable concerns regarding their efficiency. However, gradually their sitting hours increased. Nonetheless, Trial Chamber still deferred the opening of the defense case in the CDF trial from the end of the summer break until January 2006. Certain motions were decided only after many months. Also controversial was the choice to start with the CDF, rather than the RUF, trial. Although this case may have been most trial ready, many Sierra Leoneans view CDF members as war heroes. Also, the same Trial Chamber is trying the two largest cases, RUF and CDF, whereas a second Chamber is trying the AFRC case, which is much smaller.
- (2) Control over the court room. There are concerns regarding the initial proceedings relating to confusion from the bench about rules and procedure. When the trials began, judges did not display sufficient experience in controlling the courtroom. Some gave too much leeway to the parties or individual defendants (particularly Chief Hinga Norman), or were not adequately sensitive to witnesses. Conversely, there were concerns that the Appeals Chamber was too interventionist and occasionally adopted an inquisitorial approach. Human Rights Watch has noted some improvements over time, but significant delays in two of the three trials remain a problem.
- (3) Insufficient legal support for the Chambers. For most of the first year the judges did not have any senior legal assistance, although this unit was subsequently augmented. Nonetheless, some still believe there are insufficient legal advisors to the judges.
- (4) President absent and inadequate Appeals Chamber time in Freetown. In order to reduce spending and attract high-quality candidates, the Appeals Chamber judges still do not sit permanently in Freetown. This also holds true for the President of the

Court, who does not reside in Freetown. Although this is a useful provision in terms of judicial economy, the time allocated for visits to Freetown has been too short. In particular, the absence of a President leaves a leadership vacuum in the Chambers.

- (5) Interaction with local judiciary. Given the mixed nationality of the panels, the Chambers could make a positive contribution to the legacy of the Special Court. The two Sierra Leonean judges are well-respected members of the local profession and connected authorities in the national legal community, and several judges have expressed an interest in working with Sierra Leone judges. Although some efforts were made to reach out to the Chief Justice of Sierra Leone, there was little response and few formal programs have connected the Special Court judges with the local judiciary, and this potential may not be fully realized. A complicating factor has been an application on the legality of the Special Court's jurisdiction pending before the Supreme Court of Sierra Leone.

2.5 The Office of the Prosecutor

The first Prosecutor of the Special Court, David Crane, was serving as a senior Inspector General in the U.S. Department of Defence, had taught international law and has a degree in West African studies. Backed aggressively by the United States, Crane's nomination was challenged by a candidate advanced by the UN, Ken Fleming, an Australian lawyer who had served as Acting Chief of Prosecutions for the ICTR. While many international law advocates had misgivings about an American adopting such a prominent position in the Court, a clear advantage would be continued political and financial support from the United States.

Crane quickly became one of the most recognized figures in Sierra Leone. Although opinions about him vary, he has received accolades for efficiency and producing quick results, including issuing the first seven indictments within nine months of his arrival. He placed great emphasis on making himself available to the general public throughout the country and did a lot of early outreach for the Court. However, his military background and rhetorical style, most apparent during his opening statements, also alienated some. The Deputy Prosecutor, appointed by the Government of Sierra Leone, was Desmondde Silva, a Queens Counsel currently of the United Kingdom and formerly of Sri Lanka. He practiced law in the United Kingdom for four decades

and was admitted to the Sierra Leone bar in 1968, when he acted as defense counsel in the country's first treason trial. In July 2005, Desmondde Silva took over the Chief Prosecutor's position.

De Silva's original appointment as Deputy Prosecutor triggered significant resentment from the Sierra Leone Bar Association, as the Statute required the government to "appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor." Whereas the Special Court Agreement allows the government to fill judicial positions with people of any nationality, the Deputy Prosecutor position was explicitly designated as national. The government amended the agreement through an exchange of letters and quietly had the Parliament amend the language of the implementing legislation in order to allow for their selection. The Sierra Leonean Bar Association objected to the implicit suggestion that its government deemed none of their members as qualified. In retrospect, the decision to exclude Sierra Leoneans from this post and as judges has been deleterious to the hybrid nature of the Court and resulted in the alienation of many Sierra Leonean legal professionals.

At the height of its operations, the Office of the Prosecutor (OTP) had a professional staff of approximately 65 Sierra Leoneans comprise more than one-third of the professional staff, the largest percentage by nationality. Nearly half the professional posts and almost everyone of the senior ones are occupied by people from the Global North (mostly Americans and Canadians). The OTP benefited greatly from hiring internationals that already had expertise on the ground. Also, a small cadre of Sierra Leone police officers joined the investigations team within the first two weeks of operations and have provided invaluable insights throughout the process. During particularly tense and delicate moments, such as the initial arrests, these senior officers were the essential bridge that helped those operations to succeed. The Prosecutor also hired a number of persons with extensive human rights experience in Sierra Leone to assist in investigations, including of gender crimes. This resulted in the inclusion of unique "forced marriage" charges in the indictments. The OTP has received praise for its attention to sexual crimes, including the creation of a specialized capacity on gender crimes, but women are under represented in its leadership.

The OTP's robust approach toward investigations has generated criticism. For example, there was much controversy around the unsealing of the indictment against

Charles Taylor while he was in Ghana in June 2003 to attend UN-sponsored peace negotiations on Liberia. Many international policy makers viewed this action as taken in isolation of other objectives that the international community was seeking to accomplish. The Ghanaians, who claimed they did not have adequate notice of the indictment, provided a plane for Taylor to fly back to Liberia. This incident sparked much international debate about whether the indictment constituted an inappropriate interference in internationally supported efforts to secure peace in Liberia. Nonetheless, in August 2003, an agreement was brokered that enabled Taylor to leave Liberia for asylum in Nigeria. Subsequently, the Office of the Prosecutor has been able to mount considerable pressure on Nigeria to reconsider, including issuing an INTERPOL red notice, but there has yet to be a reversal in Nigeria's position.

Another controversial incident involved impounding the plane of the Secretary-General's Special Representative to Liberia in Togo. The Chief of Investigations had borrowed the plane to interview a high-profile, insider Liberian potential witness, Benjamin Yetan, and did not log a flight plan. When he showed up in Togo to interview the witness, accompanied by police, the witness fled. Observers have also expressed concern that evidence was insufficient at the time of confirmation and that additional investigations were needed. There is a reduced level of judicial review over this process because unlike in indictments before the ICTY and ICTR, there is no requirement for a case to meet the prima facie standard at the confirmation stage. Finally, a controversy arose at trial, where the defense alleged that OTP payments to witnesses and offers of witness relocation were incentives that rendered witness testimony unreliable. This motion was dismissed, but similar issues may arise in other poverty-stricken contexts.

In terms of national-international intra-office dynamics, reports have been mixed. The top-down approach taken in most substantive decisions usually excludes national voices because few Sierra Leoneans hold senior positions. A number of senior Sierra Leonean lawyers have left the Office of the Prosecutor in discontent.

Nevertheless, an exemplary model of national-international teamwork was found in the investigations unit. Investigators from the domestic Sierra Leone system have been involved in planning some of the most important operations to date, and they serve in key roles in almost every team that goes into the field. In addition to long-term

secondments, the OTP has set up a system of rotating Sierra Leone police officers on 90-day assignments, exposing them to complex criminal investigations and evidence handling. Some human rights observers have expressed concern privately about police involvement, given the negative track record of the police during the conflict, but in general the officers conducted themselves well and generated no complaints. Two of the officers who spent extended time working with the OTP have returned to top positions in the police, one as the third-highest ranking member of the office and another as director for the Eastern District.

As with all sections of the Court, the OTP has seen a high rate of turnover, although this may not be a negative reflection of the office. However, burn out (as well as staff illness) has taken a toll, and toward the end of the Court's life a number of senior departures are beginning to pose a serious challenge, particularly for the OTP, where in-depth knowledge of particular cases can be accumulated only over time. The Special Court has the most extensive practice among international tribunals in dealing with children as potential witnesses. A consultant with a background in juvenile justice was hired to draft guiding principles that would secure the collaboration of child protection agencies in the provision of psychosocial support and identification of potential witnesses. This led to the adoption of a protocol that included a vulnerability test and provided for confidentiality and security measures. Potential witnesses were interviewed by a specialized investigator, and about 20 were selected to testify at trial, although only a handful eventually did so. Although these witnesses were both over 18, they continued to benefit from special measures for children. This included granting pseudonyms and other measures to protect their identity. Closed circuit television was used to avoid confrontation in the courtroom and risks of re-traumatization (although some preferred to testify in the courtroom).

2.7 The Registry

The Registry's scope of work is broad and made even more challenging by the Court's short anticipated life span and the general lack of infrastructure. The Registry is responsible for managing the budget, personnel, infrastructure, and all non-judicial operations. In addition, it has set up the Defence Office, supported Chambers, and run the Court's outreach and press sections. The Registry remained under staffed for

much of the first year but expanded its presence in the second. The first Registrar, Robin Vincent of the UK, had 40 years of experience of working in Court Management in the domestic English legal system and has been praised for his leadership style and ability to support the Court efficiently and basically within tight time frames and budgets. His appointment illustrates the benefit of having a senior administrator in the post of Registrar, rather than a lawyer or judge, as has been common with the other Tribunals. However, the Office of Legal Affairs was not able to find a replacement within six months of Vincent's departure and appointed an Interim Registrar while recruiting for a permanent replacement. Most recently, Lovemore Munlow, formerly Deputy Registrar at ICTR, has been appointed to the post.

The Registry experienced some diplomatic setbacks in the first year. For example, there were considerable efforts to secure an agreement with the ICTY to hold certain accused in the tribunal's custody after arrest to avoid political instability and security difficulties in Sierra Leone. However, at the last minute the Dutch government determined that it could not extend this cooperation. In the confusion of this potentially volatile situation, the location of Hinga Norman's detention was withheld from the public until after his initial hearing. This fuelled rumours that Hinga Norman had not been treated well. Another major setback was Ghana's decision not to accept former RUF leader Foday Sankoh for medical treatment and examination. Negotiations over his transfer faltered after the unsealing of the Charles Taylor indictment, and Sankoh died in a hospital in Sierra Leone. Although there were no public suggestions of an unnatural death, this was problematic for the Court. In general, negotiations over medical care have faltered due to third-party states' concern that the accused may try to claim political asylum. Negotiations over the enforcement of sentences have likewise been difficult to conclude. Finally, the controversy surrounding the unsealing of the indictment against Taylor involved the Registry, as Ghana alleged that it had not been properly notified.

All of these incidents speak for the need for posts in the Registry and other parts of the Court for individuals with experience interacting with international and regional organizations, as well as foreign governments. More recently, the Registry has made considerable progress on securing funding and negotiating international agreements,

such as international arrangements to host protected witnesses abroad⁵⁵. It is currently working on agreements with other states on the location of prisoners upon conviction. Building the Court on time and within budget was also a considerable challenge. The planning mission had determined that there was no suitable site for the Court, so it was built on a rocky patch of ground, donated by the government of Sierra Leone, in the center of Freetown. The Court building has run beyond the anticipated time table and costs exceeded early budgetary estimates. However, Sierra Leone will inherit \$6million worth of real estate and a state-of-the-art court with two courtrooms after the Special Court finishes its work. The unique architectural design of the court itself, which is built exclusively from local materials, has also been praised but questions remain as to the sustainability of maintaining the facility over the long term.

Those accused in Special Court proceedings are detained in a special Detention Centre, located within the Special Court compound. Complaints about treatment voiced by family members of the accused were responded to by inviting inspections by human rights organizations. Prison conditions have come under some local public criticism for lenience, as they include satellite television, a well-balanced diet regularly tested and approved by the ICRC, a basketball court, and free medical care (as required by international norms), most of which are unattainable luxuries for most Sierra Leoneans. These issues present a key challenge for running a Court up to international standards in one of the world's poorest countries.

Although the security section is affected by the withdrawal of UNAMSIL in late 2005, a continued security presence in the form of a limited number of troops (currently from Mongolia) has been negotiated for the Court through UN Department of Peacekeeping Operations (DPKO). Security has been a particular concern during the presidential elections of 2007, because of the risk of an upsurge of instability.

The Special Court operates a witness-protection program that seeks to meet victims' and witnesses' needs, including psychological assistance, before, during, and after trial. Most witnesses before the Court benefit from protective measures. There is currently at least one contempt proceeding pending for disclosure of the identity of a protected witness. Some witnesses have required relocation, either to neighbouring countries

⁵⁵ Co-operation Agreement Between the International Police Organization–Interpol and the Special Court for Sierra Leone, Nov.3, 2003, available at www.sc-sl.org.

(usually under informal arrangements) or overseas. It has been difficult to find countries willing to conclude formal arrangements to host witnesses and their relatives, particularly so-called “insiders.” Also unclear is what will happen to such discretionary arrangements in the long term.

Virtually all of the leadership positions in the Registry are occupied by internationals, including all chiefs of sections, with the exception of Outreach and Information Technology. The Court has established some policies to encourage Sierra Leonean applications for professional positions, including a system that classifies posts, rather than individuals, as national or international. There is also a policy of short-listing Sierra Leonean applicants for interviews. Although the Court has a majority of Sierra Leoneans, at about 60 percent, many national staff members are in non professional posts (drivers, close protection officers, cleaners, etc.). On occasion, behaviour of some Special Court employees has caused tensions with the local population, and eventually a Code of Conduct was passed to regulate such issues. Such Codes should form part of any future hybrid tribunal and should be passed at the outset. In the case of the Special Court, a senior member of the OTP was charged with sexual misconduct before a domestic court. He voluntarily submitted to the domestic jurisdiction and was detained in Pademba Road prison. He was later acquitted on appeal.

2.8 The Defence and Fair Trial standards

One of the most innovative aspects of the Special Court for Sierra Leone is its Defence Office, which may be a promising new model for defence services in international tribunals. The system combines a core group of in-house defence counsel with the traditional system of a listing of individual lawyers who can be assigned to each defendant. The Defence Office is intended to provide a degree of institutional support to the Defence as a whole, while still allowing for qualified teams of lawyers, often comprising both internationals and nationals, to represent individual defendants. Under this system, as soon as someone is arrested, the Defence Office provides legal advice through Duty Counsel, which is always available at the Detention Facility. The defendant can subsequently choose his own counsel, who must file a power of attorney with the Registrar; otherwise, a Duty Counsel will “advise and assist the

defendant, as well as provide initial legal representation if the defendant so chooses.⁵⁶ The Defence Office also ensures that a list of eligible defence counsel is available and, on request, can assist defendants in choosing from this list⁵⁷.

The Defence Office attempts to impart to the Defence some of the “repeat player” benefits normally confined to the Prosecution. The office has developed expertise and experience on motions filed to date, background to the conflict, and patterns of atrocities, all of which it can share with assigned Defence Counsel. The Registry has committed substantial resources to this new arrangement, including a Chief and Advisor position, three Defence Associations, and financial and administrative support staff.

Indigent defendants are provided with assigned counsel. A capping system ensures that counsel can spend only a certain amount on each stage of the defense, but the cap can be exceeded if justified by the complexity of the case. This is a departure from the rules of the ICTY and ICTR and has proven popular. It has ensured that defense teams, including nationals and internationals, have chosen diverse structures to maximize efficiency. A number of international counsels are experienced in international criminal law, having taken cases before the ICTY or ICTR. There are also provisions to prevent fee-splitting - the cause of several scandals at the ad hoc tribunals - that have been successful.

One controversial issue that arose in the first year was that of communication with counsel. Many Defence counsel, at least before the start of trials, were based in Europe and did not have ready access to their clients. This was a problem when detainees were being kept in Bonthe, where, according to reports, the telephones were positioned (albeit unintentionally) so that conversations could be overheard, raising confidentiality issues. To remedy this, detainees were given mobile phones. This raised

⁵⁶ See www.sc-sl.org

⁵⁷ Rules of Procedure and Evidence, Rule 45 (A), “The Defence Office shall, in accordance with the Statute and Rules, provide advice, assistance and representation to [“suspects being questioned” and “accused persons”].” Rule 45(B), “The Defence Office shall fulfil its functions by providing, inter alia:

- (i) initial legal advice and assistance by duty counsel who shall be situated within a reasonable proximity to the Detention Facility...;
- (ii) legal assistance as ordered by the Special Court in accordance with Rule 61, if the accused does not have sufficient means to pay for it, as the interests of justice may so require;
- (iii) adequate facilities for counsel in the preparation of the defence.”

considerable concern, as there were rumors that Chief Hinga Norman was using his phone to stir up trouble involving the Kamajors. Mobiles have since been withdrawn. Sierra Leonean nationals are well represented in both the Defence Office and the Defence teams. Three out of the 10 teams are led by Sierra Leoneans. The Defence Office has made a considerable effort to include local lawyers on the teams, whether as co-counsel or legal assistants. In one case, a single counsel represented two clients. Although the Defence Office attempted to have him removed from representing one client, the judges upheld counsel's motion and he continued to represent both clients. The Defence Office represents a considerable improvement over approaches in other criminal courts, where the defense has typically suffered a lack of institutional support and the trials have been plagued with issues of inequality of arms. Current international observers agree that in general terms, the trials before the Special Court are in compliance with fair-trial standards, which is largely due to the Defence Office's role. Although there have been valid complaints regarding late disclosure of materials by the Prosecutor (including revealing the identity of a witness 21 days before he was called), insufficient funding for investigators and experts, and problems of performance by individual Defence counsel⁵⁸, steps have been taken to address some of these concerns.

2.9 Prosecutorial Strategy

2.9.1 "Those bearing the greatest responsibility"

The governing standard of prosecutorial discretion at the Special Court has been "those bearing the greatest responsibility." This has enabled the Prosecutor to focus his attention on only a few select cases, which has been crucial to the goal of "delivering justice within a politically acceptable time frame." Thirteen accused are currently indicted. Although it is not widely known how this issue was approached, the following may have played a role in focusing the investigations.

1. Much time went into planning the investigations and deployment of the office, even before the Prosecutor came to Sierra Leone. While this contributed to efficiency, it

⁵⁸ See Human Rights Watch, "Justice in Motion: The Trial Phase of the Special Court for Sierra Leone," Oct.2005.

may have detracted from local ownership. It also gave rise to rumors that a “list” existed from the outset.

2. There was pre-existing documentation, including a mapping exercise of violations that the Office of the High Commissioner for Human Rights carried out for the TRC, and a further mapping project carried out by No Peace Without Justice.

3. Consultations were held to discern which names were parts of the public discourse on who bears responsibility. When members of the public were asked who was responsible, the responses were fairly consistent. Consultations were also held on the concept of “forced marriage.” However, the Prosecutor has been discreet in elaborating his investigations strategy, much of which has rested on demonstrating that the various accused participated in a joint criminal enterprise, be it the RUF, CDF, or AFRC.

A first round of indictments was issued in March 2003 and included the chief-in-command of all three major factions in the war, the RUF (Foday Sankoh and Issa Sesay), the AFRC (Johnny Paul Koroma), and the CDF (Sam Hinga Norman). This batch of indictments also included the indictment of Charles Taylor, although it was kept under seal. These arrests were known within the OTP as “Operation Justice.” Further arrests were made in June and September 2003.

The indictments largely matched predictions and expectations of most national and international experts. Even those defending Hinga Norman recognized that his indictment as a senior commander of the CDF was likely, given the Special Court’s mandate. Also, many in Sierra Leone see Charles Taylor as the person most responsible for the war and violations of international law.

The 13 indictments have resulted in 11 arrests. Two indictments have been withdrawn because of the deaths of Foday Sankoh and Sam Bockarie. With the recent arrest of Charles Taylor⁵⁹ only Johnny Paul Koroma, stay at large from justice since he allegedly took refuge in Liberia.

- Each of the indictments includes charges under international law, including inter alia serious violations of Common Article 3 of the Geneva Conventions and crimes against humanity. All include charges relating to the recruitment of child soldiers.

- The indictments include fewer than 20 charges each. The Prosecutor has noted that the ICTY Prosecutor and her staff strongly advised him to focus his indictments rather than follow their tradition of including numerous cumulative charges.
- In January 2004 the Prosecution filed amended indictments in all cases. These expanded the time frames of crimes charged and added a new charge of forced marriage. This charge has been criticized by gender advocates, who argue that it contributes to stigmatization of victims and that it could be adequately subsumed by existing legal concepts such as enslavement and rape. They believe that this constitutes bad precedent. The OTP argues that the decision was taken pursuant to consultation with women's groups in Sierra Leone and is sensitive to the particular cultural context, and that the charges form part of its vigorous approach in investigating and prosecuting gender violations. The Trial Chamber deemed the changes permissible for the RUF and AFRC cases in a decision issued in May 2004 but denied permission to amend the CDF indictment on the ground that this was filed too late⁶⁰.
- The Trial Chamber also upheld a Prosecution motion to join various cases in January 2004, with the result that the cases of the nine defendants currently held in detention were grouped into three trials of three defendants each⁶¹. Accordingly, the Court's case load is grouped into one trial each for the RUF, AFRC, and CDF.

Throughout, the OTP has refused to estimate the number of indictments it will issue. As of 2007, it is presumed that the Prosecutor will not bring additional indictments after Charles Taylor came into the Court's custody. Although the original indictments were expeditious, periods of pre-trial detention were longer than initially anticipated, and the first trial (of the CDF) got under way 15 months after the indictments were issued. The intervening time was taken up by a variety of motions, including jurisdictional issues and allowing the Defence to conduct its investigations.

Original predictions of numbers of witnesses that the OTP would call ranged in the hundreds; however, these numbers were cut back. In the CDF trial, for example, the Prosecutor has called 78 witnesses. Since the start of trials in June 2004, considerable progress has been made in at least two of the cases (CDF and RUF), but these trials

⁶⁰ Prosecutor v. Issa Sesay et al., SCSL-04-15, and Prosecutor v. Alex Tamba Brima et al., SCSL-04-16, "Decision on Prosecution Request for Leave to Amend the Indictment," May 6, 2004.

are not necessarily being conducted at a faster pace than those before the ICTY. The Prosecution has concluded presenting its case in the CDF trial and has finished its cases in the RUF and AFRC by early 2006. The Court will likely need at least five years to finish its work.

2.9.2 Perceptions of Prosecutorial Strategy

Several concerns have emerged about the exercise of prosecutorial discretion in Sierra Leone.

Some fear that the Special Court is prosecuting only few perpetrators. There is a widespread public perception that the “greatest responsibility” standard will allow too many key actors to remain at large and, of particular concern, in the army. Court officials have noted repeatedly that many are eager to see more individuals held accountable for the suffering. Civil society groups have also questioned the amount of effort and expense that is going into the prosecution of a handful of individuals. Also, the Prosecutor has discussed the role of those who financed the war, and some are eager to see the Special Court test the limits of liability for profiting from commodity conflicts. However, indictments are likely to come from the Special Court itself. While Charles Taylor has been charged with financing the war, he is not charged with profiting from it. But the Prosecutor has assisted the Dutch authorities in the prosecution of Gus van Kouwenhoven, the Dutch businessman accused of breaching the arms embargo in Liberia.

A related concern is that given the limited number of accused, a significant number will never be tried, including the most notorious perpetrators, such as Foday Sankoh, Sam Bockarie, and Johnny Paul Koroma. Some would argue that the Court is rendering symbolic justice to the figure heads of factions without regard to their post-war conductor whether they continue to pose an ongoing threat.

Some have complained that some potential indictees may be shielded for political reasons. For example, some have questioned why President Kabbah has not been indicted, given that he acted as Minister of Defence during the war while Hinga

⁶¹ See, e.g., Prosecutor v. Sam Hinga Norman, Case No.SCSL-03-08, “Decision and Order on Prosecution Motions for Joinder,” Jan. 27, 2004.

Norman was only Deputy Minister of Defence⁶². President Kabbah fueled debate on this issue during an appearance before the TRC when he refused to take responsibility for any of the crimes committed by the CDF or the Army that helped restore him to power. Others have wondered why Blaise Compaore, president of Burkina Faso, was not indicted for his alleged links to the violence, and some have speculated that he was spared in part because of his allegiance to the United States in the war on terror.

2.10 Issues of State Cooperation

2.10.1 Host Country Cooperation

Sierra Leone is often cited as an example of positive political will in terms of government support for the Court. The Sierra Leonean government compares favourably to a number of other governments that have interacted with hybrid or international tribunals. However, the government has been careful to distance itself from the Special Court's work. The government is represented on the Management Committee in the form of Ambassador Kanu, but other senior government officials often decline to comment on the Court, arguing that doing so would have implications for its independence. However, while it would be inappropriate for political leaders to comment on the particularities of cases or ongoing trials, the government's "hands-off" attitude has contributed to the perception that the Special Court is imposed and run by internationals, which has diminished its relevance.

On the other hand, in certain crucial matters, such as executing its warrants of arrest, the Special Court has benefited greatly from close cooperation with the Sierra Leonean police, including the arrest of five suspects within a matter of hours in March 2003. This cooperation stems from the Special Court Ratification Act, which incorporates into domestic law the obligation to assist the Special Court wherever possible⁶³.

⁶² See, e.g., his remarks at the opening of the TRC public hearings and interviews on Radio UNAMSIL.

⁶³ See in particular Part IV, "Mutual assistance between Sierra Leone and Special Court", which sets out the obligation of the Attorney General to assist the Court or give reasons for his inability to do so, and also establishes a reciprocal procedure whereby the Attorney General can request the assistance of the Special Court. Part V asserts that orders issued by the Special Court will have the same force as those issued by a domestic court. Part VI specifies that arrest warrants issued by the Special Court will have the same force as those by domestic courts. Section 29 specifies that any immunity attaching to the position of the person against whom an arrest warrant has been issued shall not be a bar to arrest.

UNAMSIL peacekeepers have also been vital in facilitating arrests, such as those in July 2003.

2.10.2 Cooperation by Other States

One of the central issues relating to State Cooperation has been the Court's lack of Chapter VII powers. While Chapter VII powers alone do not secure state cooperation (and the early experiences of the ICTY attest to this), having such powers would allow the Court to use legal, in addition to political, grounds to rally support for enforcement of indictments.

Before his definitive arrest and transfer to the Hague for custody in March 2006⁶⁴, the most dramatic lack of state cooperation with the Special Court was the failure of Ghana, and then Nigeria, to surrender Charles Taylor. Taylor accepted asylum in Nigeria on August 11, 2003, under the condition that he was to leave Liberian politics forever. Although INTERPOL has issued a red notice, this has to be considered more a political instrument than a legal measure to force Nigeria to hand him over, as such notices do not have powers to require enforcement. Moreover, unlike the ICTY, which has a procedure that allows for evidence to be given in public in the course of review of an indictment, the Special Court's rules of procedure do not enabled the Court to try him in absentia or to hear evidence in the absence of the accused⁶⁵. Some feel this is unfortunate: the open airing of such evidence could have put political pressure on authorities to hand Taylor (or another indictee) over to the Court before. Other circumstances in which the absence of Chapter VII powers was detrimental to the Court include attempts to secure medical treatment abroad for ailing rebel leader Foday Sankoh, and attempts to create an agreement with the ad hoc tribunals to temporarily house detainees.

⁶⁴ The decision to the transfer of Taylor's trial venue to The Hague was conceived as a last resort measure to ensure the security of the trial.

⁶⁵ Rule 61 of the ICTY Rules of Procedure and Evidence provides that if within areas on able time an arrest warrant has not been executed and all reason able steps have been taken to cause arrest, the Prosecutor can submit evidence to the Trial Chamber and examine witnesses in open court. If the Chamber is satisfied that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, "it shall so determine."

2.11 Conclusions

Questions will linger about whether limiting the number of accused renders justice that is pragmatic and satisfactory, or whether it is ultimately incomplete. The Special Court's narrow mandate is widely hailed as a new model for international justice and has been followed by the ICC. Within Sierra Leone however, many feel that the Court's mandate is too narrow and that many lower-level perpetrators remain free in the communities. The fact that many argue that the Court should have prosecuted more people may in a sense be seen as an endorsement of its work. However, others argue that the low number of accused does not justify the cost and that funds should have been allocated elsewhere.

In terms of legitimacy, a reduced Sierra Leonean role has meant that the Court is perceived predominantly as international. This has posed questions regarding its local relevance and leaves the Court in danger of being perceived as a "spaceship phenomenon"; i.e., a Court that is perceived as an anomaly but not as a feature of permanent change on the domestic level. All these factors have implications for longer-term restoration of the rule of law, and establishment of trust in judicial mechanisms in Sierra Leone. On the other hand, a proactive approach to outreach and civil society interaction have ensured visibility for the Court, and civil society has generally interacted more with the Special Court than with domestic courts. This may lead to indirect benefits in terms of a "demonstration effect", which may still positively impact on the long-term legacy of the Special Court.

Internationally the Court's credibility hinges on its ability to complete its core mission in a focused and efficient manner. So far it has succeeded in keeping down the costs through a more focussed approach in the numbers and scope of indictments, although trials have not moved significantly faster than elsewhere. Some may argue too much deference has been given to the international policy makers who wanted to avoid high costs, and that there has to be an acceptance of what is realistically involved in conducting trials of mass crimes up to international standards.

The question of cost and efficiency is predominating at the UN, and the Special Court has been called a "victim of the experience" of ad hoc tribunals. But the Special Court should not be included in that category, as its overall annual costs remain at a fraction of those of the ICTY and ICTR.

The Special Court has enjoyed certain advantages by being outside of the UN system, but there have also been disadvantages to that arrangement. The disadvantages of the absence of Chapter VII powers or a link to the Security Council has on occasion been acutely felt by the Special Court, which continues to receive its main financial and political support from a few select member States.

The system of voluntary contributions for funding has placed the Special Court in a difficult position for most of its life. Although voluntary contributions were sufficient in the first two years, pledges were not redeemed, and in the second year the Court had to borrow against third year pledges and approach the UN for a subvention grant. All of these issues have complicated planning and tied up senior officials in fundraising. On the other hand, freedom from UN rules has given the Court flexibility, particularly in recruitment.

The Special Court has had the advantage of largely existing as a microcosm that is insulated from problems affecting Sierra Leone's legal system. As a result, it has been able to enforce its own standards and is generally considered to have conducted proceedings that comply with international standards of fairness. Defense counsel have generally enjoyed a higher level of institutional support than at any of the other tribunals, although they still point to certain shortfalls.

While the Special Court is still underway, the question of creating similar stand-alone tribunals has been held in a beyance. The current tendency is to encompass rule of law issues within the peacekeeping mandate, which has been the approach taken in places such as Liberia and DRC, and not to create further tribunals. However, this has to date not resulted in an alternative approach to prosecuting mass crime in countries that are not otherwise under UN administration. While it is probably too early to be able to determine the impact of the Sierra Leone model, this chapter suggests that overall the model should not be dismissed prematurely, and still has much promise for the future. While there certainly are areas that could be improved in implementation, particularly in terms of ownership and legacy, ultimately the Special Court has proved able to fulfill many of its objectives.

2.12 Last developments of the Special Court

(...)

CHAPTER THREE

THE SERIOUS CRIMES PROCESS IN TIMOR LESTE

3.1 Brief history of the conflict

Timor-Leste was a Portuguese colony for almost 500 years, albeit a relatively neglected one in terms of development and colonial presence. In the 1960s the United Nations rejected Portugal's claim on Timor-Leste and placed it on the list of non-self-governing territories under Chapter XI of the UN Charter. The Portuguese Government, following political shifts in its own territory in 1974, accepted this situation and preparations began for a process of self-determination. Newly formed political parties split over preferences for full independence, continued relations with Portugal, or integration with neighboring Indonesia. The two major parties took opposing views, with UDT (Democratic Union of Timor) favoring progressive autonomy within Portugal, and FRETILIN (Revolutionary Front of Independent Timor-Leste) favoring immediate independence. The much smaller APODETI (Timorese Popular Democratic Association) supported integration with Indonesia.

Fighting soon erupted between the political parties, and the Portuguese administration withdrew. This was followed by the Indonesian invasion of the territory on December 7, 1975. The UN never recognized Indonesia's purported annexation of Timor-Leste as its "27th Province" in July 1976, and continued to regard Timor-Leste as a non-self-governing territory of Portugal. Indonesia's occupation was the beginning of almost a quarter-century of immense atrocities and human rights abuses, during which almost one-third of the population of Timor-Leste, some 200,000 people, lost their lives.

In the five years immediately following the invasion, the Indonesian armed forces (TNI) conducted a series of intensive military offensives against FALINTIL (Armed Liberation Forces of Timor-Leste), the military wing of FRETILIN. It is estimated that 100,000 people died in the resulting violence. A significant proportion of these deaths is attributed not only to the massive military assaults against unarmed civilians, but also to forced starvation and disease. Much of the population fled to the harsh

mountainous interior to escape the invading forces and the widespread use of napalm and other defoliants. FALINTIL continued a small but irrepressible guerilla resistance for more than two decades. In addition, in the face of the extreme military repression inflicted by the Indonesians, a clandestine popular resistance movement developed and was increasingly supported by an international solidarity network, despite the severe restrictions imposed on external communications and freedom of movement.

The continuous human rights violations perpetrated in Timor-Leste ranged from torture of suspected resistance members and suspected FRETILIN supporters, disappearances, confiscation of land for migrant settlers from other parts of Indonesia, rapes, forced marriages and forced sterilizations, and general intimidation of the population⁶⁶. Periodic massacres continued, such as the killing of hundreds of unarmed protesters during a funeral procession to Santa Cruz Cemetery in the capital city of Dili in November 1991, which increased both state oppression and further clandestine resistance. The cruelty of Indonesian policies such as “encirclement and annihilation” spared none. Particularly illustrative was the “fence of legs” operation in 1981, in which 80,000 men and boys were forced to form human chains, scouring the country for pockets of resistance. Those caught in their path were slaughtered.

During these years the international community largely turned a blind eye to the plight of Timor-Leste. Many nations voted with Indonesia against General Assembly Resolutions on Timorese self-determination. Others sold arms or gave military equipment to Indonesia. However, dramatic changes occurred in late 1998, during the economic crisis in South East Asia and when increased support for democratization saw the fall of Indonesia’s long-standing President Soeharto. The resulting political instability in Indonesia created a brief window of opportunity for Timorese self-determination. The new President, BJ Habibie, agreed in late January 1999 to hold a popular consultation on an autonomy package for the territory, to be supervised by the UN in August of that year.

⁶⁶ For more background on the nature of the occupation and details of long-term violations, see e.g., “A People Betrayed,” Budiardjo; Miranda Sissons, “From One Day to Another: Violation of Women’s Reproductive and Sexual Rights in East Timor,” East Timor Human Rights Centre, 1997.

However, the Indonesian military did not support this policy, and during the months leading up to the popular consultation, the Indonesian military (a.k.a. the TNI) and civilian administrations in Timor-Leste stepped up their attempts to control the civilian population through increased persecution of pro-independence organizations and intimidation of the general populace. Central to this strategy was the creation of Timorese militias, largely composed of young men who were trained, armed, paid, and supervised by the regional commands and often incorporated as village or district-level civil administrators. These local paramilitaries were not a new invention, as they were used at varying stages during the preceding years.

3.2 Nature of the Atrocities

The campaign of intimidation included a range of human rights abuses, many of which were an intensification of violations that occurred throughout the occupation. These crimes were perpetrated despite the presence of (unarmed) UN civilian police accompanying the UN mission to organize the vote. Many of the worst mass killings occurred before the UN's arrival, while the negotiations between Indonesia, Portugal, and the UN were still under way. Mass abuses included the massacres of dozens of civilians taking shelter in churches in Liquiça and the attack after a large militia rally on the house of independence leader Manuel Carrascalao in Dili, where many people fleeing the militias had sought refuge. Local militias carried out these acts under the clear direction and with overt support of the Indonesian military and police⁶⁷.

Despite the widespread violence, by virtue of an agreement with the UN concluded on May 5, 1999, responsibility for security during the process remained with the Indonesian police and military authorities, many of whom were vehemently opposed to the radical change in policy toward Timor-Leste.

On August 30, 1999, an estimated 98 per cent of the Timorese voting population turned out to cast their ballots in the popular consultation. Their experience of two

⁶⁷ For a full description of the violations and the extensive involvement of the Indonesian military during 1999, see Indonesian Commission of Investigation into Human Rights Violations in East Timor ("KPP-HAM Report)," Jan.31, 2000, available at www.jsmp.minihub.org; James Dunn, "Crimes Against Humanity in East Timor, January to October 1999: Their Nature and Causes," Feb. 2001, available at www.etan.org; Report of the International Commission of Inquiry on East Timor to the Secretary General, UN Doc. A/54/726-S/2000/59, Jan. 31, 2000 ("ICIRreport"); Report of the Security Council Mission to Jakarta and Dili 8 to 12 September 1999, UN Doc.S/1999/976, Sept.14, 1999.

decades of Indonesian occupation had taught many to foresee what was to come, and large numbers fled straight to the mountains after voting. When it became clear on September 4 with the results of the ballot that most Timorese were overwhelmingly opposed to an ongoing autonomy arrangement within the Indonesian republic, the Indonesian military began a campaign of vengeance against those who supported independence. As almost 80 per cent of the population had rejected autonomy within Indonesia, few were exempted.

In the days following the referendum, the TNI and Timorese militias embarked on a scorched-earth policy, burning down Dili and other towns and killing hundreds, in addition to committing many other types of atrocities. This was a well-planned attack, involving all levels of civil and military administration, that resulted in the displacement of more than 50 per cent of the population (at least 400,000 people), many of whom were expelled to Indonesian West Timor. The violence left at least 1,300 people dead and many more raped or seriously injured, and resulted in a near total devastation of the territory's property and infrastructure. FRETILIN forces under the leadership of Xanana Gusmão remained cantoned so that it would be clear that the TNI was the sole source of the violence.

Particularly notorious massacres included the killing of a group of nuns near Los Palos and the mass murders of large groups of civilians sheltering in the Suai Church compound, the Maliana police station, and the attack on the house of Nobel Peace Laureate Bishop Carlos Ximenes Belo. At least 70 per cent of all buildings were burned or destroyed and property completely looted. The intimidation extended to foreign media covering the ballot, who - together with almost all UN staff - were evacuated when the violence reached its crescendo, allowing the rampage to continue unchecked and out of sight of the international community, while the departing forces deliberately destroyed crucial evidence. Among those killed were UN national staff members.

However, some international media witnessed the extreme violence, which provoked an outcry and calls for an intervention. In response, the UN sent an Australian-led military force (INTERFET) to Timor-Leste on September 21 to restore order. Under increasing international pressure, including the threat of economic sanctions, Indonesia ceded control of Timor-Leste to the UN on September 27, 1999. After the

Indonesian withdrawal, the UN Security Council placed Timor-Leste under the control of the UN Transitional Administration for East Timor (UNTAET), with the objective of preparing the territory for independence⁶⁸. UNTAET was endowed with a mandate of almost unprecedented breadth, the only comparable mission being the UN Mission in Kosovo (UNMIK), from which many UNTAET staff had come. The Special Representative of the Secretary General (SRSG) and Transitional Administrator, Sergio Vieira de Mello, was given full legislative and executive control. As such, UNTAET's task included managing the initial post-conflict humanitarian emergency of a largely homeless population; establishing the groundwork for developing basic state infrastructure, including governance institutions and a public administration; disarming FALINTIL and managing relations with Indonesia; and facilitating the return of the large numbers of displaced people still in camps in West Timor under the control of militias⁶⁹. The UN was therefore acting as the government of Timor Leste until elections.

Prior to full independence, the next two years saw the political transition progressed from early informal consultation with CNRT (National Council of Timor-Leste Resistance), to a council of national representatives appointed by the Transitional Administrator to advise on major policy decisions, to a Transitional Government in which some portfolios (including justice) were handed over to appointed Timorese "ministers." A constitution was drafted by a popularly-elected Constituent Assembly, and on May 20, 2002, the first President of the Republic of Timor-Leste, former FALINTIL leader Xanana Gusmão, declared the new nation's independence. FRETILIN has an overwhelming majority in the new parliament. Portuguese has been adopted as the new national language and there is a strong political preference for links with other Lusophone (Portuguese-speaking) nations, a position that is much criticized by the younger, Bahasa Indonesia-speaking population. The nation remains heavily dependent on international donors, both financially and in terms of technical expertise, and there is frustration with the slow pace of reconstruction and development since

⁶⁸ UNTAET was created by Security Council Resolution 1272, UN Doc. S/RES/1272, Oct. 25, 1999.

⁶⁹ For further discussion of the breadth of UNTAET's mandate, see Joel Beauvais, "Benevolent Despotism: A Critique of UN State-Building in East Timor," *New York Uni. J. Of Int'l L. & Pol.* 33: 1101, 2001; Simon Chesterman, "East Timor in Transition: Self-Determination, State-Building and the United Nations,"

independence. While a proportion of former FALINTIL fighters were recruited into the newly established armed forces of Timor-Leste, many former veterans of the conflict have become vocal critics of the new administration. The transfer of sovereignty to Timor-Leste on May 20, 2002, initially had few practical implications for the operation of the serious crimes process. The personnel essentially remained unchanged, as did the balance between nationals and internationals. Formally, however, the relationship with the UN altered significantly. The UN mission established after independence was formally responsible only for assisting the Timorese government and continually downsized. As a matter of law, judicial matters were under the authority of Timor-Leste. UNTAET was transformed into the smaller (but still sizeable) UN Mission of Support for East Timor (UNMISSET) which had a mandate until May 2005, and which in turn has been succeeded by the much smaller UN Office in Timor-Leste (UNOTIL)⁷⁰. Another factor that has had more serious implications for the serious crimes process is that since independence, the political emphasis of the Timor-Leste government has increasingly shifted to restoring relationships with Indonesia. As a result, a bilateral Commission on Truth and Friendship was formed, which is discussed below.

3.3 The establishment of the Serious Crimes Process

3.3.1 Recommendations from Commissions of Experts

Immediately after Indonesia's withdrawal from the territory, Timorese demands for justice focused on the establishment of an ad hoc international criminal tribunal, such as those created for the former Yugoslavia and Rwanda. A UN fact-finding mission conducted by three Special Rapporteurs appointed by the UN Human Rights Commission in November 1999 echoed these calls⁷¹. Although the matter had been discussed informally in the Security Council after it sent an emergency delegation to

International Peacekeeping 9: 45–76, 2002; Boris Kondocho, “The United Nations Administration of East Timor,” *J. Of Conflict & Sec. L.* 6: 245, 2001.

⁷⁰ UNMISSET was established by Security Council Resolution 1410, UN Doc. S/RES/1410/2002. UNOTIL was established by Security Council Resolution 1599, UN Doc. S/RES/1599/2005, April 28, 2005.

⁷¹ See “Report on the Joint Mission to East Timor Undertaken by the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur of the Commission on the Question of Torture and the Special Rapporteur of the Commission on Violence against Women, Its Causes and Consequences, in Accordance with Commission Resolution 1999/S4/1 of 27 September 1999,” UN Doc. A/54/660, Dec.1999 (“SpecialRapporteurs’Report”), para.20.

visit the destroyed territory in mid September 1999, the question of an international tribunal was not pursued further. This was partly the result of donor fatigue and sustained criticism of the ICTY and ICTR over the lengthy duration of trials and the tribunals' perceived lack of results.

With the creation of UNTAET, the implication was that a preferable approach would be a "twin-track" of national action in Indonesia and under UNTAET, given the still-fragile state of post-Soeharto Indonesian democracy. This position was reflected in the resolution adopted by the Commission on Human Rights on September 27, 1999, in a Special Session convened to address the situation. The Commission requested that the Secretary General establish an International Commission of Inquiry, which he did shortly thereafter⁷². The establishment of a parallel commission of inquiry (KPP HAM) by the Indonesian Human Rights Commission (Komnas HAM) was seen as a particularly encouraging sign.

The release on January 31, 2000, of the reports of both the UN and Indonesian commissions of inquiry into the violence of 1999 confirmed the need for specific prosecutions of those responsible. Both reports found that the TNI was responsible for serious human rights violations. The Indonesian report named 33 individual perpetrators, including several high ranking military officials. But whereas the Indonesian report called for national prosecutions within Indonesia, the report of the International Commission of Inquiry proposed an international mechanism.

The suggestion that the perpetrators identified in the reports should be the subject of further investigation and prosecution in Indonesia evoked considerable skepticism among human rights observers, both internationally and within Timor-Leste. Many did not believe that relying on Indonesia to provide accountability was a feasible solution, particularly due to the power that the Indonesian military still exercised. As the three UN Special Rapporteurs noted in December 1999: *"The record of impunity for human rights crimes committed by Indonesia's armed forces in East Timor over almost a quarter of a century cannot instill confidence in their ability to ensure a proper accounting. Nor, given the formal and informal influence wielded by the armed forces in Indonesia's political structure, can there, at this stage,*

⁷² Commission on Human Rights Resolution 1999/S-4/1, Sept.1999.

be confidence that the new Government, acting in the best of faith, will be able to render that accounting”.

Neither did the Special Rapporteurs believe that a national process within Timor-Leste offered a viable alternative: *“The questions of the full documentation of the crimes and human rights violations and the definitive establishment of the scope and level of TNI responsibility will need to be answered by a sustained investigative process. The East Timorese judicial system, which still needs to be created and tested, could not hope to cope with a project of this scale”.*

The UN Rapporteurs therefore recommended that unless the Government of Indonesia’s seeds of action quickly bore fruit, *“the Security Council should consider the establishment of an international criminal tribunal for the purpose.”* The UN International Commission of Inquiry likewise concluded that accountability was a matter of international collective responsibility because the violations during 1999 constituted crimes against humanity directed against the Security Council’s decision. In its report, the Commission stated that: *“The United Nations, as an organization, has a vested interest in participating in the entire process of investigation, establishing responsibility and punishing those responsible and in promoting reconciliation. Effectively dealing with this issue will be important for ensuring that future Security Council decisions are respected.*

Nevertheless, Indonesia indicated that it would not cooperate with an international tribunal and that it was willing to institute domestic prosecutions. According to anecdotal reports, the political environment in the Security Council gave considerable weight to Indonesia’s undertaking to deal with the question of accountability at a national level, and other Asian nations also supported this stance⁷³. The UN agreed to this course of action, but the Secretary General stated that the Security Council would reserve the right to pursue the matter further in the event that Indonesian trials did not satisfy international standards⁷⁴.

The trials that were eventually held before Indonesia’s Ad Hoc Human Rights Court for crimes committed in Timor-Leste have been widely denounced by international commentators, including the recent further UN Commission of Experts in early 2005. In general, the trials were perceived to shield perpetrators, rather than seek genuine

⁷³ Indonesia’s position is reflected in its Letter dated 26 January 2000 from the Minister for Foreign Affairs to the Secretary General, UN Doc. A/54/727, S/2000/65, January 31, 2000.

⁷⁴ Letter of Secretary General to General Assembly, Jan. 31, 2000, A/54/726.

accountability. Although the details are beyond the scope of this study, 18 defendants were tried, some of whom were high ranking within the TNI. The Court's jurisdiction was delimited to cover only three of Timor-Leste's 13 districts, and followed upon only three of the 13 cases mentioned in the KPP HAM report. The prosecution did not pursue a coherent strategy and failed to present relevant and available evidence, and the judges were consistently intimidated by a large presence of TNI in the courtroom. Judgments misapplied legal principles and standards. Eventually, only six accused were convicted in the first instance and five had their convictions overturned on appeal⁷⁵.

3.3.2 *Early UNTAET Investigations*

UNTAET was deployed to Timor-Leste with a number of urgent tasks. Among these was the task of preserving evidence of the serious crimes, detaining those suspected of participating, and setting up a justice system from scratch that would also handle current crime and general law and order⁷⁶. To fulfill these disparate and ambitious aims, UNTAET had a civilian staff of more than 1,000 backed up by a large peacekeeping force. The Mission's structure included a Judicial Affairs Office and a Human Rights Unit (HRU).

Despite the breadth of the UNTAET mandate to govern the territory and prepare it for independence, the resolution covering its mandate did not contain any specific reference to creating an accountability mechanism for those responsible for the serious human rights violations that occurred⁷⁷. Nevertheless, the key decision-makers within UNTAET saw a clear "moral imperative" for the UN to make some arrangements to this end. In October 1999, INTERFET forces began gathering evidence, such as securing mass graves and detaining those accused of participating in the violence. Furthermore, the Secretary General told the General Assembly in late 1999 that

⁷⁵ The Indonesian Human Rights Court received some assistance from the Serious Crimes Unit (SCU), visiting Timor-Leste on two occasions to gather evidence.

⁷⁶ See Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor," *American J. of Int'l L.* 95:46–63, 2001; Bruce Oswald, "Interfet Detainee Management Unit in East Timor," *Yearbook of Int'l Humanitarian L.* 3: 347, 2000, and the East Timor section of the International Policy Institute, "A Review of Peace Operations: A Case for Change," King's College: London, March 2003, available at ipi.spp.kcl.ac.uk/index.html.

⁷⁷ See SC Res.1246, Oct. 25, 1999.

“accounting for the violations of human rights which occurred in the aftermath of the consultation process is vital to ensure a lasting resolution of the conflict and the establishment of the rule of law in East Timor.”⁷⁸ Investigations into recent atrocities were commenced by the HRU during late 1999.

3.3.3 Locating Timorese Judicial Personnel

Simultaneously, UNTAET began to turn its attention to re-establishing the justice system in general, particularly given the pressing number of people held in detention on suspicion of committing atrocities and ongoing crimes. This required building a new judiciary and legal system almost entirely from scratch. All physical infrastructure, such as court and prison buildings, books, and records, was completely destroyed during the “scorched-earth” campaign during the withdrawal of the TNI and militias.

A far greater problem was the lack of human resources. Judges, prosecutors, and the majority of lawyers and court staff mainly comprised Indonesians who had fled the territory. During the Indonesian occupation a small number of Timorese gained legal qualifications, generally from Indonesian universities, but they had been systematically discriminated against for judicial appointments or were reluctant to participate in a judicial system that was an instrumental arm of state oppression, particularly in relation to arbitrary detentions and show trials for political offences.

Despite creative efforts, such as dropping leaflets by air to seek legal personnel, UNTAET was able to identify only a limited number of qualified Timorese lawyers, few of whom had any relevant practical experience⁷⁹. Several had trained as lawyers but had never practiced. Others were recent law graduates without any work experience or minimal paralegal experience in human rights organizations or legal aid in Indonesia. Although there were a small number of the returning Timorese diaspora who did have legal or judicial experience, from countries such as Portugal or Mozambique, these people were mostly assuming the developing political leadership of the country.

UNTAET appointed a small group of Timorese judges and prosecutors on a provisional basis in early 2000, although it was several more months before a

⁷⁸ Progress Report of the Secretary General on the Question of East Timor, UN Doc. A/54/654, Dec. 13, 1999, para.42.

regulation was promulgated to create a transitional court system within which these judges could operate⁸⁰. Initially the appointment of international judges was rejected on the basis that it would undermine local ownership of the justice system, whereas using Timorese professionals would minimize the need for translation, facilitate the transition process, and - most importantly - encourage the participation of local jurists, which would have political and symbolic significance.

While this decision was subsequently criticized, at the time there was no difference in process between appointing judicial personnel to deal with current or past crimes, nor was there consideration for whether different political issues might apply. The newly appointed Timorese judges felt it was their responsibility to deal with past crimes. However, the key UNTAET judicial policymaker at the time has since noted that the lawyers were “so inexperienced as to be unequal to the task of serving in a new Timorese justice system,” and that the “prosecution and trial of legally and factually complex criminal offences such as crimes against humanity...should not be left solely to largely inexperienced lawyers, however committed they may be”.

3.3.4 Establishment of the Special Panels

While the national judges were left to deal with ongoing ordinary crimes on their own, in mid-2000 UNTAET took steps to establish Special Panels of the Dili District Court to try cases of “serious criminal offences” that had occurred in 1999. The panels were composed of one national and two international judges⁸¹. International judges were also appointed to the Court of Appeal, which as the superior court in the transitional system heard appeals from both the ordinary and serious crimes jurisdictions.

The creation of the hybrid Special Panels was entirely the initiative of the international staff within the UN administration, and Timorese judges, who were expecting to

⁷⁹ Hansjörg Strohmeyer, “Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor,” University of New South Wales L.J.24:171–182, 2001, at175.

⁸⁰ UNTAET Reg. 2000/11, March 6, 2000, initially established eight district courts, although this was soon revised by Reg. 2000/14, May 10, 2000, to just four, with a single Court of Appeal. For further detail, see Suzannah Linton, “Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor,” Melbourne U. L.R. 25: 122–180, 2001; Sarah Pritchard, “United Nations Involvement in Post-Conflict Reconstruction Efforts: New and Continuing Challenges in the Case of East Timor,” University of New South Wales L.J. 24:183–190, 2001.

⁸¹ Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, June 6, 2000, UNTAET/REG/2000/15.

handle such cases themselves, reacted with some hostility. Local NGOs and judicial personnel reported that there was no real consultation prior to the establishment of the Special Panels. Members of the legal and human rights organization, Yayasan HAK, which was instrumental in documenting human rights abuses during 1999, noted that UNTAET informed them after the decision was made and tried to sell it as a “back-door” international tribunal.

The inspiration for the Special Panels was drawn from UNMIK, which at the time was planning to establish a specialized mixed War and Ethnic Crimes Court, although the proposal did not proceed. As was the case in Kosovo and unlike Sierra Leone, the possibility of creating a hybrid court by treaty did not arise, as there was no independent national government with whom to contract. Therefore, the creation of the Panels was simply accomplished by “national legislative action,” i.e., by means of a Regulation issued by UNTAET.

While the lack of consultation seems inexcusable, given the well-organized civil society that developed out of the clandestine independence movement, many local NGO leaders were dealing with the ongoing humanitarian crisis that enveloped Timor-Leste or had not yet returned to the territory. The absence of any meaningful consultation between UNTAET and the Timorese authorities - namely CNRT - at the time probably contributed to the Transitional Government’s lukewarm support for the Special Panels.

3.3.5 Establishment of the Serious Crimes Unit

When the Special Panels were established in mid-2000, UNTAET also created a Public Prosecution Service that included a specialized unit to prosecute serious crimes. At this point, the Serious Crimes Unit (SCU) was transferred from the HRU to the Prosecutor-General of Timor-Leste and became a sub unit of the general prosecution service.

The creation of the Special Panels and what became the SCU was not an integrated process based on any prior planning; it was a series of ad hoc responses to a crisis situation. The two developed separately and never functioned as a single institution. UNTAET approached funding and staffing of each in very different ways, and they were eventually accorded differing levels of resources. To this extent, the SCU was not

simply an organ of the court, such as the Office of the Prosecutor at the Special Court for Sierra Leone, as it basically operated as a quasi-separate institution. In contrast to the HRU, the initial personnel brought in to staff the SCU have been widely criticized for their failure to involve Timorese individuals and groups in their work, in particular some of the national human rights organizations that had extensive documentation and information about the violations. Unlike the new SCU staff, which was largely composed of police investigators, many HRU officers had both local language skills and long standing connections with local NGOs, advantages which were lost once the responsibility for the investigations was transferred. The new investigators were either unaware of the level of expertise available within the community or were suspicious of offers of assistance. Yet this lack of early consultation and respect led to these organizations refusing to cooperate when approached later, a situation that severely hampered community relations and the progress of investigations.

Although this caused many difficulties, it also brought certain benefits, such as closer cooperation with peacekeepers in securing evidence and assistance from the UN civilian police in investigation and arrests. These may not have been forthcoming if the SCU had been part of the fledgling national institutions. The Special Panels, on the other hand, formed a part of the national structure of the Dili District Court. As discussed in more detail below, this disjuncture and lack of cohesion had significant implications for the varying perceptions accorded the two institutions, as well as their mixed levels of success.

3.4 Analysis of the Special Panels

3.4.1 Recruitment of International Judges

The Special Panels for Serious Crimes and the Court of Appeal were each composed of one Timorese judge and two international judges. Prior to independence, the means of appointment for the Timorese judges was by the UN Transitional Administrator on the recommendation of the Transitional Judicial Services Commission⁸². Appointments were problematic, and for a significant amount of time only one Panel was functioning. The Court of Appeal, staffed by two UNMISSET-funded international

⁸² This Commission was established by UNTAET to provide some independence in the appointment of the judiciary from the exercise of executive power. UNTAET/Reg/1999/3, Dec.3, 1999.

judges and one national judge, became operational in July 2000 and handed down its first appeal decision in October 2000. The Court of Appeal dealt with a number of cases in the early life of the serious crimes regime. However, as a result of departures of international judges from the Court of Appeal and a subsequent shortage of international judges, there was a substantial period during which appeals could not be heard.

The international judges were appointed through the standard UN recruitment process for peacekeeping a mission, which does not involve targeted advertising of vacancy notices. As a result, there was a lack of qualified candidates. Furthermore, the political relationship between UNTAET and the Timorese authorities prioritized approval of international candidates by the Timor-Leste Minister of Justice, who reduced the available pool even further by insisting on considering only candidates who spoke Portuguese and were from civil law jurisdictions. The Special Panel Judges' posts were rated between P3 and P5 level on the UN salary scale, which is substantially less pay and prestige than the Under-Secretary General level posts in the ICTY, ICTR, and the Special Court for Sierra Leone. UNTAET had already hired the first international judges to serve as judicial affairs officers, and then appointed them to the new courts.

Throughout the years, the international judges who sat on the Special Panel came from a variety of national jurisdictions, including Burundi, Uganda, Italy, Portugal, Brazil, Cape Verde, Germany, and the United States. Only two came from superior courts in their home countries. The remainder of judges were from courts of lower jurisdiction or even non criminal jurisdiction. None had specific prior experience in the application of international criminal or humanitarian law, despite the requirement set out in UNTAET Regulation 2000/15⁸³. UNTAET initially recruited the President of the Court of Appeal, a Timorese judge who has spent most of his life in Portugal, as an international judge.

Except for a brief period in late 2001, until mid-2003 there were only enough judges to constitute one panel at a time, although a second and a third started functioning subsequently. Delays in recruitment of international judges, combined with high turnover of staff, poor management of recreational leave, and an average contract

⁸³ Section 23.3 refers to experience in criminal law and international law, including international humanitarian and human rights law.

length of 6 to 12 months, caused repeated delays in the Special Panels' operation. As mentioned above, the Court of Appeal was unable to function for more than a year. In 2003, several partly heard trials had to be restarted because of the departure of a judge on the Panel. Gender balance has not been ideal. While two of the three Timorese judges have been women, only one of the 11 international judges has been female.

The difficulties in appointing judges hampered the Panels' work, but it is not clear who was responsible for the inexplicable delays. UN officials have pointed to government obstruction, including requirements on language issues that did not seem strictly necessary. Government sources, on the other hand, have accused the UN processes of being unwieldy and slow. Lack of flexibility within the UN peacekeeping recruitment procedures, as well as a lack of awareness of what skills are required, also hindered the process. Better targeting of candidates could have helped, but would also require an improvement in conditions of service in order to successfully attract candidates from other tribunals. Alternatively, longer-term seconding from other institutions or governments could have alleviated some of the problems.

None of the Timorese judges had any prior judicial experience, except the President of the Court of Appeal, who was a judge in Portugal. Generally, the interaction between the international judges and their three Timorese colleagues reportedly functioned relatively well and the Timorese judges report that they have learned a great deal from the experience. Nevertheless, language barriers were a significant problem, with no interpreters available for judicial discussions. There was also some frustration among the Timorese judges, who felt they were not treated as equals, highlighted by the vast differential in salaries, as well as the fact that the international judges are UN employees with administrative support and leave entitlements.

Independent observers noted early occasions where international judges demonstrated patronizing attitudes to their national colleagues, citing instances where a national judge's questions of an accused were cut short by the Presiding Judge, despite the fact that they related to specific details of the context that may not have been apparent to internationals, such as Indonesian military structures. On another occasion, the dissenting opinion of the national judge was not published.

There were also occasions in which a Timorese judge dissented on the basis of particular national experiences, although this did not rise to the level of suggesting any

political bias. For example, in the only case to date against a member of the pro-independence guerrilla force, FALINTIL, the Timorese judge argued for both a lesser conviction and sentence⁸⁴. In 2003, the Timorese judge on the Court of Appeal published a strong dissent on a controversial decision on whether Portuguese or Indonesian law was still applicable, in which she confirmed the general understanding that Indonesian law could be applied.

Integration of international judges into the national context was allegedly less than satisfactory. International judges sometimes demonstrated a lack of awareness of Timorese cultural behaviors and historical background, particularly in the questioning of witnesses. With the exception of a general induction provided by the UN mission, no specific cultural awareness training was ever provided. One public defender described the international judges as operating in a professional, social, and cultural vacuum. A UN report published in 2003 noted that international advisors' reluctance to learn local languages contributed to the poor rate of skill transfer from internationals to nationals⁸⁵.

In addition, beyond the three Timorese judges who were involved in hearing serious crimes cases at either trial or appellate hearings, there was virtually no social or professional interaction between the international and national judges in the courts of ordinary jurisdiction.

3.4.2 Training for the Judges

Training provided to Special Panel judges, although well-intentioned, was haphazard and poorly coordinated⁸⁶. Judicial training sessions were generally conducted only for national judges, despite a demonstrated lack of consistency between the decisions of international judges, further exacerbated by the absence of a functioning superior

⁸⁴ See the Judgment in the case of Julio Fernandes Case Number 2/2000, March 1, 2000. It should be noted that this was also one of the first cases to be heard by the Special Panel. Furthermore, there was no such national/international split when both the sentence and conviction were lowered subsequently by the Court of Appeal. On that occasion, though, one of the international judges was Portuguese of Timorese ethnicity.

⁸⁵ UNMISSET, "Strategic Plan for East Timor Justice Sector: Post UNMISSET Continuing Requirements and Suggested Mechanisms," Dili, Sept.24, 2003.

⁸⁶ The International Development Law Institute provided some courses, which were supplemented by occasional seminars from Australian Legal Resources International and the International Commission of Jurists. From 2001 there was a policy decision by the UNTAET Minister for Justice to accept training programs only from Portuguese-speaking nations.

court to standardize jurisprudence. Lack of adequate translation was also an ongoing issue, with early training conducted in English and later in Portuguese, despite the fact that most of the judges' legal education was in Bahasa Indonesia. Many of the training programs, including the major ones run by the UN Development Program and the International Development Law Institute reflected a lack of proper needs assessment from the outset. These programs often presumed a level of basic legal knowledge that did not necessarily exist. Although training occurred while the judges assumed new professional responsibilities, it was not designed to ensure smooth functioning of the new court system, and many judges resented the interference with their work. For example, a training program instituted during 2001 involved taking all Timorese judges to Portugal for two months, and most described the exercise as poorly organized and administered.

It would have been more effective to precede seminars on highly specialized areas of law with skill-development programs on more basic legal fundamentals. Areas that could have benefited from such an approach include legal reasoning and decision-writing, as well as more detailed and practically focused education on the applicable law that the judges were expected to use in the cases before them, rather than the courses on comparative education on family law in Portugal or contract law in Macau. Although those judges working in the Special Panels were expected to apply international criminal law, they received minimal training in this area, especially at the outset. During 2003, Washington University's War Crimes Research Office conducted seminars with both international and national judges. A few Timorese judges have also been increasingly exposed to international programs, such as the Justice in Times of Transition Project at Harvard University, and a project held in September 2004 and organized by the UN High Commissioner for Human Rights on developing tools for transitional justice.

Much of the training funded and conducted by the UN was not effective, due to poor communication between trainers and trainees, as well as inadequate funding resources⁸⁷. Moreover, the official training programs did not reach many recipients, as

⁸⁷ Report to the Secretary General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (the then East Timor) in 1999, 26 May 2005 (hereafter COE Report), at 26, para.116.

they were mainly conducted in Portuguese at the insistence of the Timorese government. Some will undoubtedly point to the failure of all 22 judges, both from the Special Panels and the ordinary courts, in recent legal examinations, as an indication that capacity-building efforts among the local judges have failed. Training provided to local SCU staff by other organizations was also criticized for poor coordination, which resulted in overlap.

3.5 Analysis of the Serious Crimes Unit

Throughout its existence, the SCU was dominated by internationals. Recruitment took place through UNTAET and the post of Deputy General Prosecutor was not permanently filled until early 2002. Before that, a series of short-term acting appointments affected the early strategic direction of the office. From 2002 until the closing of the SCU in May 2005, the unit was headed by a Deputy General Prosecutor for Serious Crimes, who reported to the Timorese General Prosecutor and Attorney-General.

While initially there was little coordination between investigations and prosecutions, the SCU was subsequently divided into four integrated teams, each of which focused on cases from two districts of Timor-Leste, with an additional team dedicated to “national” and “historical” crimes. Throughout, the unit lacked criminal analysis capacity, and the CIVPOL investigators seconded to the unit were insufficient in number and lacked experience in investigating complex crimes such as crimes against humanity. The unit was also lacking in forensic capacity.

3.5.1 Prosecutorial strategy

Many view the initial period of the SCU operations as inefficient and badly organized⁸⁸. The Commission of Experts notes that at the early stages of its operation the SCU decided to focus on the events of 1999 (although it did conduct some investigations into pre-1999 incidents). Early SCU investigations were criticized for failing to focus on the systematic nature of the violations that had occurred during 1999 and the role played by the Indonesian military apparatus, focusing instead on

⁸⁸ UN Secretariat sources and ICTJ.

treating them as individual criminal cases, which was reflected in the fact that initial indictments included only ordinary domestic charges of murder, rather than crimes against humanity⁸⁹.

When the SCU was established in mid-2000, the international General Prosecutor identified 10 “priority cases” involving 202 accused, at least 183 of whom remained at large⁹⁰. The decision was made to focus the investigations and prosecutions on those cases involving murder (there were approximately 1400 such cases), selected based on the following criteria: the number and type of victims, the seriousness of the crimes and their political significance, and the availability of evidence⁹¹. Five further cases were identified that involved widespread national patterns of atrocities.

However, due to resource and management constraints, as well as the limited progress of the major investigations, the first cases selected for indictment and trial related to individuals already held in custody. Most of the early indictees - including some Timorese TNI members - were indicted alone and often only on ordinary murder charges. One or two of these cases even related to murders from 1999 that were most likely unrelated to the broader violence.

The determination of what should have been prioritized was not as difficult a challenge as it might appear. The Indonesian Human Rights Commission (Komnas HAM) had already presented its report outlining the main incidents of violence throughout 1999 as a result of a mandate from the Indonesian Government. The UN International Commission of Inquiry had likewise reported on the major crimes that took place. Furthermore, local human rights groups carried out a number of less comprehensive but reliable studies. Also, the HRU developed a significant investigation into the violence that followed the same conclusions of the other

⁸⁹ See Suzannah Linton, “Cambodia, East Timor and Sierra Leone: Experiments in International Justice,” (2001) *Criminal Law Forum* 12:185-246 at 206, quoting the East Timor Action Network.

⁹⁰ For more detail, see “Fact Sheet on Serious Crimes and Justice for Victims of 1999 Violence,” Feb. 15, 2001, Dili: UNTAET Office of Communication and Public Information.

⁹¹ These 10 priority cases were: the Liquiça Church massacre (April 6, 1999); the murders at the house of Manuel Carrascalão (April 17, 1999); the Maliana Police Station (Sept. 2–8, 1999); the Los Palos case (April 21–Sept. 25, 1999); the Lolotoe case (May 2–Sept. 16, 1999); the Suai Church massacre (Sept. 6, 1999); the attack on Bishop Belo’s compound (Sept. 6, 1999); the Passabe and Makaleb massacres (Sept.–Oct. 1999); a second case in Los Palos (April–Sept. 1999); and other sexual violence cases carried out in various districts (March–Sept. 1999).

principal investigations. The general universe of cases, therefore, was established with a fair degree of precision by the time the SCU began its work.

Yet, despite improvements with the arrival of Norwegian Siri Frigaard as Deputy General Prosecutor for Serious Crimes, the Commission of Experts' Report concluded that the SCU did not "function with a prosecution strategy designed to maximize limited resources"⁹²; and that "the lack of an effective prosecution strategy and policy from the outset supports to some extent the criticism that the SCU and [Special Panels] have only succeeded in prosecuting low-level Timorese perpetrators." The report also commented that: "*Since the focus of the SCU was on murder cases, other serious crimes such as destruction of property, deportation and unlawful transfer cases were not investigated thoroughly. Investigations into cases involving rape and torture remain incomplete. For this reason, the SCU is not able to establish a comprehensive and complete documentation of the diverse nature of the crimes committed during 1999.*"

However, the majority of the later indictments for crimes against humanity included charges of murder as well as persecution, unlawful population transfer, and torture. In terms of the historical record, more stark is the fact that the crimes between 1975 and 1998 remained uninvestigated. While some within SCU saw this period as outside its temporal mandate, it is probably more accurate to recognize that these cases were not prioritized because of limited resources.

Another factor of the difficulty faced by the SCU in its investigations was the lack of cooperation ensured by the Indonesian authorities. The majority of the suspects were beyond SCU jurisdiction in Indonesia. In order to overcome this obstacle, UNTAET and the Indonesian Government agreed on a Memorandum of Understanding on 5 and 6 April 2000, for cooperation in legal, judicial, and human rights-related matters. This stated, among other things, that the parties would ensure that warrants of arrest would be enforced and that accused persons would be transferred. The MOU never had any practical effect because the Indonesian authorities later claimed that it had to go through national procedures to be ratified, and thus no assistance was forthcoming. The MOU was also temporally limited to the period of the UN administration of Timor-Leste. The net result of the lack of cooperation with Indonesia has been

⁹² See COE Report.

devastating. Out of 391 persons indicted, 309 accused remained outside the jurisdiction of Timor-Leste.

3.6 Jurisdiction and Legal Framework

3.6.1 Substantive Law

The end of Indonesia's occupation of Timor-Leste left a vacuum in terms of a legal framework. The first regulation promulgated by the Transitional Administrator declared that the transitional applicable law in Timor-Leste would be that previously in force (i.e., Indonesian law), subject to any inconsistency with international human rights law and any laws subsequently made by UNTAET⁹³. Several Indonesian laws were deemed inapplicable from the outset, such as the notorious anti-subversion laws and the death penalty, yet there was no comprehensive review of which laws were inconsistent with international human rights law. Although this decision was later criticized, at the time it was not seen as especially controversial, as all Timorese lawyers had trained in Indonesia.

UNTAET Regulation No.2000/15 provided the Special Panels of the Dili District Court with exclusive jurisdiction in relation to "serious crimes"; i.e., war crimes, genocide, and crimes against humanity, regardless of when or where the crimes were committed or the nationality of the victim (based on universal jurisdiction)⁹⁴. Torture was later added. In respect of murder and sexual offenses, the court was provided with exclusive jurisdiction only insofar as the crimes were committed between January 1, 1999 and October 25, 1999⁹⁵. The Special Panels enjoyed primacy over the ordinary national courts for offenses within their exclusive jurisdiction. In practice, genocide and war crimes were not charged before the Special Panels; hence, all the charges involved either crimes against humanity or domestic law. The reasons for this are not entirely known, but may lie in the fact that prosecutors preferred to charge the crimes

⁹³ Regulation on the Establishment of the United Nations Transitional Administration in East Timor, Nov. 27, 1999, UNTAET/REG/1999/1, Section 3.

⁹⁴ Section 2.2 of Regulation 2000/15 provides: For the purposes of the present regulation, "universal jurisdiction" means jurisdiction irrespective of whether: (a) the serious criminal offence at issue was committed within the territory of East Timor; (b) the serious criminal offence was committed by an East Timorese citizen; or (c) the victim of the serious criminal offence was an East Timorese citizen.

⁹⁵ Section 10 of UNTAET Regulation 2000/11. There were originally eight district courts, but this was reduced to four, with only the Court in Dili having the powers to deal with these specified cases.

of 1999 as a widespread campaign against a civilian population than as crimes in the context of an armed conflict.

The applicable law for the Special Panels essentially incorporated the international law provisions in respect of war crimes and genocide and used the definitions for crimes against humanity found in the Rome Statute for the International Criminal Court (ICC)⁹⁶. While it is doubtful that another approach would have been deemed legitimate in the circumstances, the importation of such laws was extremely ambitious. Even though the quality of the decisions coming from the court improved over time, on some occasions the judges demonstrated a lack of comprehension of these laws. The lack of training and support to the judges and defense lawyers led to inaccurate application of the elements of crimes in cases dealing with crimes against humanity⁹⁷. Although in the early years, there was limited reliance on substantive jurisprudence or procedure from the ICTY or ICTR⁹⁸, the Special Panels came to rely at least to some extent on international human rights standards and on the jurisprudence of the international tribunals over the years.

Nonetheless, the quality of the jurisprudence remained subject to criticism. Detailed analyses can be found elsewhere, but a few examples illustrate some of the difficulties. As mentioned, the exclusive jurisdiction of the Special Panels also included murder and sexual offenses if such crimes were committed between January 1, 1999 and October 25, 1999. The limitation was temporal, but there was no specific territorial restriction on the jurisdiction over murder and sexual offenses. However, unlike the international crimes, these national crimes were not the subject of universal jurisdiction, and if committed before January 1, 1999, would have to come before the Indonesian courts. If committed after October 25, 1999, the date of the Indonesian pullout, these cases could be brought before ordinary Timorese courts. Furthermore, by implication the Special Panels held that such crimes fell within their jurisdiction only if committed within the territory of Timor-Leste. Crimes committed by

⁹⁶ A notable exception is the ICC defence of superior orders. UNTAET Regulation 2000/15, Section 21.

⁹⁷ For example, in the first major crimes against humanity judgment, the Special Panel erroneously demanded proof of the existence of an armed conflict, which is not required by the applicable definition of crimes against humanity: see *Prosecutor v. Joni Marques and Others (Los Palos)* Case No. 9/2000, Special Panel of the Dili District Court, judgment, Dec. 11, 2001.

⁹⁸ *Prosecutor v. Damaioda Costa Nunes*, Case No. 1/2003, dissenting opinion of Judge Blunk, Dec. 10, 2003, in which eight years' imprisonment was imposed for two counts of murder as a crime against humanity.

Timorese in West Timor, including rapes and murders in the camps, were held to be outside the jurisdiction of the Special Panels⁹⁹. Neither could these crimes be tried by the ordinary courts, as their jurisdiction was only deemed to have commenced on October 25, 1999, when UNTAET was established. Moreover, the definitions of the national crimes did not comply with international standards, as a number originate from the Indonesian Penal Code, which includes problematic concepts in relation to sexual offenses, such as the criminalization of adultery, limiting the definition of rape to female victims, and making rape inapplicable in the context of marriage.

The national dimension of the Special Panels' legal framework caused the greatest confusion in application. For example, in the decision in July 2003 of the Court of Appeal in the case against Armando dos Santos, rendered more than two years after the Special Panels began functioning, a majority of the Court held that Portuguese – and not Indonesian – law is the default subsidiary law to be applied in the absence of applicable UNTAET regulations or new national legislation¹⁰⁰. The decision, which caused widespread confusion and protest within the Timorese legal community, most of whom were trained in Indonesia, also held that the application of international crimes under UNTAET Regulation 2000/15 violated the new constitution's prohibition on retroactivity. As a result, the Court of Appeal, in deciding on the prosecution's appeal against an acquittal relating to crimes against humanity charges, instead convicted Dos Santos of genocide under Portuguese law. This called into question a number of verdicts from the Special Panels.

The National Parliament has since clarified that Indonesian law continues to apply as the default subsidiary law, but the Dos Santos conviction for a crime under Portuguese law has not been overturned¹⁰¹. Throughout this confusion, the Special Panels continued to apply Indonesian law where appropriate, thereby declaring that they were not bound by the decision of the Court of Appeal. Subsequently, the Court of Appeal has reverted to the application of Indonesian law but has not revisited the question of

⁹⁹ See Prosecutor v. Leonardus Kasa, Case No.11/2001, May 9, 2001.

¹⁰⁰ Prosecutor v. Armando dos Santos, Case No. 16/2001, July 15, 2003. A strong dissent was filed by Timorese Judge Jacinta Correia da Costa.

¹⁰¹ The new law was passed on October 8, 2003. For further discussion of the Court of Appeal decision, see JSMP, "Report on the Court of Appeal Decision in the Case of Armando dos Santos," Dili, Aug. 2003, available at <http://www.jsmp.minihub.org>.

how this impacts serious crimes cases, including the potential implications for those already convicted.

3.6.2 Procedural Law

In terms of criminal procedure, in September 2001 Transitional Rules of Criminal Procedure were introduced by UNTAET, which apply to both serious and ordinary criminal proceedings. The Rules constituted a combination of civil and common law practices as well as elements from the ICC Statute¹⁰². They were only replaced by a new criminal procedure code in January 2006.

The application of these relatively complex and unfamiliar procedures caused major difficulties in practice. First, they were generally considered incomplete. While amendments to provide greater detail were contemplated, they were never created. In particular, the Rules provided little guidance on the role of the Investigating Judge, an office that did not exist under the Indonesian criminal justice system. As a result, there have been ongoing difficulties of procedure affecting both ordinary and serious crimes suspects. A common problem involved excessive use of pretrial detention ordered by investigating judges, even on occasions where the prosecution indicated that it would not be proceeding with charges. (The Special Panels ruled against such practice in a habeas corpus motion.)

Second, there were major problems in the Special Panels' application of the Rules. Section 29 follows the ICC statutory safeguards for the admission of confessions, although this provision experienced problems in its application, particularly in relation to guilty pleas¹⁰³. Similarly, while rights to a public trial and access to interpretation facilities were guaranteed under the Rules, these were regularly violated through a lack of public accessibility to information about the processes and inadequate translation services¹⁰⁴. In other areas, there has also been a notable lack of consistency in how the

¹⁰² See UNTAET Regulation 2000/30, Sept.25, 2000, and UNTAET Reg. 2001/22, Aug.10, 2001.

¹⁰³ See Suzannah Linton and Caitlin Reiger, "The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admissions of Guilt, Duress, and Superior Orders," *Yearbook of International Humanitarian Law* 4, 2001.

¹⁰⁴ This has been an ongoing problem throughout the life of the Special Panels. See JSMP, "Justice in Practice: Human Rights in Court Administration," Thematic Report No. 1, Nov. 2001, available at www.jsmp.minihub.org/Reports/JSMP1.pdf, and JSMP, "Special Panels for East Timor ignores importance of public participation in court proceedings," Nov.19, 2003.

Rules were interpreted. Both SCU and defense lawyers have complained of this in relation to such issues as admission of witness statements, issuing of arrest warrants, and illegal detention. The absence of a functioning Court of Appeal for more than a year meant that appeals from interlocutory decisions to resolve many of these inconsistencies did not proceed.

It is also unclear whether the Special Panels have been able to add to the development of law at the national level, particularly given the limited interaction between the Special Panels and judges of the ordinary national courts. It remains to be seen how the ordinary courts will deal with serious crimes cases, but indications are that suspects simply will be processed under domestic criminal law. Although the heavy reliance on international standards and practices had the potential to introduce such concepts at a national level, such standards are predicated on the existence of fully functioning justice systems and assume a certain skill level within the legal profession. The absence of these elements, together with the absence of any staged handover plan, seems to indicate that this potential has not been realized. In retrospect, it may have been preferable to devise a simpler procedural code for both the Special Panels and the ordinary courts, coupled with dedicated practical training for Timorese judges and lawyers in how to apply the code.

3.6.3 Legal Implications of Independence

The Constitution of Timor-Leste, which became applicable at independence on May 20, 2002, contains transitional provisions that allowed for the continued application of these UNTAET regulations, including the Transitional Rules of Criminal Procedure, until replaced by new legislation. The Constitution further provides that: “The collective judicial instance existing in Timor-Leste, composed of national and international judges with competencies to judge serious crimes committed between the 1st of January and the 25th October 1999, shall remain operational for the time deemed strictly necessary to conclude the cases under investigation”¹⁰⁵.

The provisions also suggested that once the work of the Special Panels is concluded, serious crimes will be dealt with by the ordinary courts, or any international court that

¹⁰⁵ The Constitution of the Democratic Republic of Timor-Leste, Section 163(1).

may be created with appropriate jurisdiction: “Acts committed between the 25 of April 1974 and the 31 of December 1999 that can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts”.

There is also a potential discrepancy between this provision and the unrestricted temporal jurisdiction of the Special Panels in relation to international crimes, although all cases focused on crimes committed during 1999, so the issue did not arise.

In short, the Special Panels did not produce jurisprudence of a standard likely to have significant impact on the development of international law. One prosecutor lamented missed opportunities, such as the chance to clarify the law on command responsibility for non-state actors and the ICC definition of rape, neither of which has been explored. On the other hand, another prosecutor has pointed to the following achievements in the jurisprudence: (1) the establishment of an historical record of what happened in Timor-Leste in 1999, with a focus on murder cases; (2) the demonstration of an orchestrated campaign between the militia and Indonesia’s civilian administration; (3) the setting of precedent, such as legal precedent in decisions on persecutory intent; and (4) taking judicial notice of the International Commission of Inquiry report.

3.7 Relationship with the CAVR

The Serious Crimes Regime co-existed with another transitional justice mechanism, the Commission for Reception Truth and Reconciliation (in Portuguese, the Comissão de Acolhimento, Verdade, e Reconciliação, or CAVR) established by UNTAET Regulation 2001/10 of 13 July 2001. The CAVR, which completed its report in November 2005, had a broad mandate to establish the truth regarding human rights violations in Timor-Leste between 1974 and October 1999, but it also included a novel provision for the establishment of Community Reconciliation Procedures (CRP). This envisaged a process where by people accused of relatively less serious crimes, such as theft, minor assault, arson (other than resulting in death or injury), and the killing of livestock or destruction of crops could seek to take part in a local hearing, modeled to some extent on traditional justice lines, known as *adat*. This part of the truth

commission's procedure was intended to complement the functioning of the serious crimes regime.

In order to take part in the CRP, a candidate was required to submit a statement disclosing his involvement in crimes. The statement went to the SCU, which reserved the right to prosecute if the crimes disclosed fell within its subject-matter jurisdiction. If the SCU did not deem the crimes to be serious, the individual could be referred to the CRP.

The process was a matter of concern to the SCU since the wording of Regulation 2001/10 originally stipulated that no serious crime could form the subject matter for a CRP. The SCU felt that this wording effectively fettered its discretion, as their determination on receiving the statements was not whether they were likely to prosecute, but simply whether the facts could be viewed to constitute a serious crime; i.e., war crimes, genocide, crimes against humanity, and murder, torture, or sexual offenses committed between January 1, 1999, and October 25, 1999. Many forms of involvement in the widespread violence could technically be classified as persecution as a crime against humanity, which added to the difficulty.

The SCU insisted that, regardless of the likelihood that none or few of those making statements would be prosecuted, they were nonetheless bound to prevent these cases from being referred to the CRP. Consequently, although Regulation 2001/10 originally provided that "in no circumstances shall a serious criminal offence be dealt with in a Community Reconciliation Process" it was since been amended by UNTAET Directive on Serious Crimes No. 2002/9 of May 18, 2002, to read "in principle, serious criminal offences, in particular, murder, torture and sexual offences shall not be dealt with" by a CRP. This language was more acceptable to the SCU.

However, in practice the SCU was not able to investigate or prosecute the vast majority of perpetrators, even those who had participated in the 1999 violence. As a result, (1) less persons reported to the CRP than otherwise might have been the case in the absence of a credible threat of prosecutions and (2) those who did submit to the CRP felt resentful because perpetrators of more serious crimes remained outside the scope of either process. In essence, this created an "impunity gap" that should have been foreseen from the outset and avoided by better planning.

On the other hand, a relatively good relationship developed between the CAVR and the SCU in terms of cooperation. There was an open relationship between the DGPSC and CAVR staff, as well as UNTAET officials, to resolve the initial issues concerning the CAVR mandate and to establish operational procedures to make the process work as smoothly as possible. However, it is doubtful that the CRP made a significant contribution to the SCU investigations. The SCU was not always able to process all applications as quickly as would have been ideal¹⁰⁶. Also, although the relevant regulations allowed for the SCU to request information from the CAVR, no equal access was granted to the defense.

3.8 Conclusions

When the serious crimes process was established on June 6, 2000, at least part of the attraction in establishing this model was that it would not be another ad hoc tribunal. However, despite the outrage expressed internationally as the fires raged in Timor-Leste in September 1999, the appetite for justice was short-lived. The regional significance of Indonesia compared to Timor-Leste made the prospects of international insistence on justice unlikely. Part of the lessons from Timor-Leste may be to do with the inadequacy of hybrid tribunals in terms of dealing with international conflict. In retrospect it is rather difficult to discern precisely what the UN expected the serious crimes regime to deliver. Effective prosecutions hinged on the cooperation of Indonesia. To have developed a structure based on such a hope was on any view of it optimistic. In the event of the relatively predictable failure of the MOU with Indonesia, a clear opportunity was presented to revisit the whole scheme. This was not taken. Instead it was decided to wait for the results of the so-called “human rights trials” in Jakarta. This too turned out to be a failure. It is clear that stark choices had to be made, but the situation raises the difficult issue of whether it is worth embarking on something that is likely to deliver very poor results in all the circumstances.

Had nothing at all been done, it is true that it would have been viewed as entirely unacceptable by human rights organizations. At the same time, around \$20 millions

¹⁰⁶ The UNTAET regulation stipulated that the SCU would process such referrals within 14 days, an unrealistic deadline given its caseload. In reality, it depended on individual prosecutors and often was reduced to simply running a CRP applicant’s name through the SCU investigation database.

have been spent on a venture that no one in retrospect could seriously have expected to deliver meaningful results, and nor has it had much of a lasting legacy in terms of the domestic justice system.

Whether or not the UN is willing to fully acknowledge these shortcomings for future action remains in doubt. In the Commission of Experts Report, the final analysis states: “[T]he serious crimes process in Timor-Leste has ensured a notable degree of accountability for those responsible for the crimes committed in 1999. Investigations and prosecutions by SCU have generally conformed to international standards. The Special Panels have provided an effective forum for victims and witnesses to give evidence. The number and quality of some of the judgments rendered is also testimony to the ability of the Special Panels to establish an accurate historical record of the facts and events of 1999 during the short duration of its work. In general, the decisions of the Special Panels will assist in establishing a clear jurisprudence and practice for other district courts dealing with serious crimes in the future. In addition, the Special Panels have developed their own jurisprudence, departing from the law of other international criminal tribunals whenever appropriate. The serious crimes process has also significantly contributed to strengthening respect for the rule of law in Timor-Leste and has encouraged the community to participate in the process of reconciliation and justice. The existence of an effective and credible judicial process, such as the Special Panels, has also discouraged private retributive and vengeful attacks¹⁰⁷”.

Although the Report goes on to acknowledge that the lack of ability to gain custody over indictees in Indonesia; lack of resources; and lack of independence on behalf of the Office of the General Prosecutor vis-à-vis the government have all been problems, this assessment still seems overly positive and fails to recognize problems that the UN itself could have rectified earlier. If the UN is not willing to recognize these failures openly, it will be doubtful if the political momentum can be gathered to initiate another mechanism for Timor-Leste.

The main failures in Timor-Leste relate to the fundamental choices made at the political level (internationally and in Indonesia) rather than to the strategic choices or technical abilities on the ground in Dili. It would be wrong, however, to trace the difficulties only to the political decisions made at the UN level. Indonesia bears state responsibility for what occurred and Indonesians bear individual criminal

¹⁰⁷ COE Report, para. 8

responsibility. Its failure to cooperate and the flawed trials held in Jakarta represent nothing more than adding insult to a most grievous injury inflicted not only in 1999, but for the previous 25 years as well.

Nevertheless, one should not underestimate the results of the trials that resulted in 70 convictions and their impact on the family members of the victims. Moreover, the indictments increasingly reflected a historical record of the systematic nature of the violence during 1999. This in itself should be considered an achievement. Notwithstanding these achievements, the disaffection caused by the perception that primarily the wrong people were bearing the responsibility of 25 years of brutal occupation, including its final months, must be taken seriously. The serious crime regime, in the final analysis, will not have contributed to a real sense of justice or in building the confidence of the people of Timor-Leste in the institutions of justice. An important opportunity – to substantially correct the lack of public trust in the rule of law that persisted through the Indonesian occupation – may ultimately have been lost.

CHAPTER FOUR

THE DEPLOYMENT OF INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO

4.1 Brief History of the Conflict

Kosovo is a small, landlocked territory in center of the former Federal Republic of Yugoslavia, bordering Macedonia (FYROM), Albania, and Serbia and Montenegro. Since the conflict, according to UN Security Council Resolution 1244 of June 10, 1999, Kosovo has been designated an autonomous part of Serbia and Montenegro (within the state of Serbia) under the administration of the United Nations. Kosovo has a population of approximately 1.9 million, of which an estimated 90 percent are ethnic Albanians¹⁰⁸. An additional 550,000 Kosovars are estimated to live in the diaspora, mostly concentrated in Germany, Switzerland, and Serbia proper¹⁰⁹. Residents are 60 percent rural, with an estimated population of 400,000 in the capital city of Prishtinë/Prishtina. Kosovo has the youngest population in Europe, with a median age of 22.5. Moreover, it is one of the poorest territories in Europe. The economy was virtually destroyed during the war. The Gross National Disposable Income is estimated to be Euro 1000 per capita.

Kosovo's ethnic tension is symbolized in Serbian myths surrounding the Battle of Kosovo in 1389, during which Serb forces allegedly fought nobly and lost to Turkish forces, with whom the Albanians chose to align. While historians generally conclude that various Serb and Albanian factions fought on both sides of the conflict, the Serb legend has remained a rallying cry for nationalists ever since¹¹⁰. In the centuries between the Battle of Kosovo and the late 1980s, most Serbs migrated north into Serbia, and an increasing number of Muslim Albanians emigrated from the mountains of Albania. When Serbia gained independence in 1878, Kosovo remained under the

¹⁰⁸ Statistical Office of Kosovo, "Kosovo and its Population," revised version (June 5, 2003), available at www.sok-kosovo.org/pdf/population/Kosovo_and_its_population.pdf.

¹⁰⁹ The UN estimates that there are 110,000 Kosovar Serb internally displaced persons (IDPs) in Serbia proper, while Belgrade claims that the figure is more like 250,000. (On the number of IDPs according to Belgrade, see www.kc.gov.yu/C-ingleski/aktuelno/program_povratka.html.)

¹¹⁰ Noel Malcolm, "The Battle and the Myth," *Kosovo: A Short History*, New York: Harper Perennial, 1999, at 58–80.

Ottoman Empire. In 1912, Serbs and other European forces forced out the Turks, liberating many Serbs within Kosovo but also massacring many Albanian “collaborators.” For the next four decades, Kosovo repeatedly changed hands, and with each new regime, the ethnic group coming into power usually exacted vicious retaliation against other groups.

In 1974, Tito granted Kosovo a form of autonomy similar to – but distinct from – that enjoyed by the six states comprising the federation of the former Yugoslavia. The ambiguity of this sovereignty created increasing tension after Tito’s death. Kosovo was approximately 90 percent Kosovar Albanian, but minority Kosovar Serb populations claimed strong historic ties. Kosovar Serb populations are concentrated in a few key communities (mainly enclaves), including for instance the northern section of Mitrovica, and they claim certain religious sites within Kosovo, such as the Serbian Orthodox monastery in the western province of Pec/Peje, as historically vital.

Slobodan Milosevic became the leader of the Serbian Communist Party in 1987 and was elected President of Serbia in 1989 on a nationalist platform that deemed control over Kosovo a central tenet¹¹¹. In June 1989 and on the 600th anniversary of the Battle of Kosovo, Milosevic held a massive rally near Pristina to celebrate Serbia’s control over Kosovo, a process that he had initiated years earlier. Milosevic spoke of battles won and yet to come, his first attempt to consolidate control over Yugoslavia and encompass Serbian minorities within a “Greater Serbia.” In essence, it heralded the reverse of Kosovo’s autonomous status.

During the 1990s, Serbian authorities ruled Kosovo with repression and abuse. Discrimination was widespread and many Albanians were summarily dismissed from their jobs. The Albanian leaders forced out of power in 1989 initially resisted peacefully by setting up a parallel government in exile. However, other Kosovar Albanians banded together to form the Kosovo Liberation Army (KLA), and by the summer of 1998, tensions between the KLA and Serb authorities had escalated into a full-scale armed conflict.

¹¹¹ Before a Belgrade crowd of 300,000 in November 1988, Milosevic said, “Every nation has a love which eternally warms its heart. For Serbia, it is Kosovo.” Prosecutor v. Milosevic et al., Prosecution’s Pre-Trial Brief, ICTY Case IT-99-37-PT, n.14.

Serbian forces repeatedly responded to small-scale KLA attacks on Serbian targets with excessive force, launching a government offensive to crush civilian support for the rebels. Government forces attacked civilians, systemically destroyed towns, and forced hundreds of thousands of people to flee their homes. In return, Serb civilians were victims of abductions, beatings, and executions at the hands of ethnic Albanian paramilitary forces such as the KLA, which also targeted ethnic Albanians suspected of collaborating with Serbs¹¹².

For the first eight months of 1998, the internal armed conflict between government and KLA forces resulted in an estimated 2,000 Albanian civilian deaths¹¹³. The October cease-fire brought Organization for Security and Co-operation in Europe (OSCE) monitors as part of the Kosovo Verification Mission, but violent incidents continued. Then, on January 15, 1999, Serbian paramilitaries attacked the village of Racak, killing 45 persons. Human Rights Watch reported that although the attack might have been provoked by a KLA ambush of three Serbian policeman a few days earlier, government forces responded by indiscriminately shooting civilians, torturing detainees, and committing summary executions. After the Racak massacre, the international community began to increase pressure on Serbia.

Talks in February and March 1999 in Rambouillet failed to resolve the status of Kosovo through means of diplomacy. Subsequently, Serbian paramilitary forces engaged in a full-fledged campaign of ethnic cleansing against civilians, killing many and causing massive displacement that forced some 850,000 Kosovar Albanians to flee the province. On March 24, NATO began an air campaign against Serbian forces that would last 11 weeks. During the bombing, the ethnic cleansing intensified.

On May 27, 1999, in the midst of the fighting and to the chagrin of members of the diplomatic corps, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), Justice Louise Arbour, announced the indictment of Slobodan

¹¹² See generally Amnesty International, Annual Report 2000, Federal Republic of Yugoslavia, available at www.web.amnesty.org/web/; Human Rights Watch, World Report 1999, Federal Republic of Yugoslavia, available at www.hrw.org/worldreport99/europe/yugoslavia.html; Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor," 95 Am. J. Int'l L. 46, 2001; Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, Country Reports on Human Rights Practices 1999, Serbia and Montenegro, Feb.23, 2000.

¹¹³ Human Rights Watch, "Federal Republic of Yugoslavia: Human Rights Developments 1999," available at www.hrw.org/wr2k/Eca-26.htm.

Milosevic and others on charges of crimes against humanity and violations of the laws of war¹¹⁴. The indictment dealt exclusively with crimes committed in Kosovo from January through late May 1999¹¹⁵.

The NATO bombing campaign ended with an agreement calling for the withdrawal of Serbian military and police from Kosovo within 11 days. On June 10, 1999, one day after the suspension of NATO's air strikes, the UN Security Council adopted Resolution 1244 (1999), which established the United Nations Mission in Kosovo (UNMIK) and turned Kosovo into a UN protectorate¹¹⁶. In the spirit of Rambouillet and in the light of international concerns about setting a precedent for ethnic self-determination, Resolution 1244 deferred the question of Kosovo's status by reaffirming the existing territorial boundaries of the Federal Republic of Yugoslavia (FRY) and calling for "substantial autonomy" and "meaningful self-administration of Kosovo."¹¹⁷ In the six years since the end of the conflict, Kosovo has been under UN administration. UNMIK has engaged in building state institutions, including the legislative, executive, and judicial bodies, both at national and local levels. However, Kosovar Serbs maintain their own parallel structures, particularly for health and education, and refuse to participate in political structures that have been established while maintaining close links with Belgrade. Significant concerns still exist regarding the ability of national authorities to protect minorities, specifically in the aftermath of widespread violent riots in March 2004.

The economy remains bleak, and nationalist politics are rife in Kosovo. The slogan "no to negotiations, yes to self-determination" is found on many walls. The ICTY has indicted Kosovo's erstwhile Prime Minister and former KLA commander, Ramush Haradinaj. Many former KLA leaders continue to be very powerful, and politics between powerful clans combined with organized crime and corruption create a sense of impunity and put pressure on the local judiciary. All these factors combine to create an inhospitable environment for Kosovo's fledgling legal system.

¹¹⁴ "President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo," Press Release JL/PIU/403-E, The Hague, May 27, 1999.

¹¹⁵ Although the ICTY was created in 1993, Milosevic had not yet been indicted over events in Bosnia and Herzegovina or Croatia.

¹¹⁶ SC Res.1244, UN SCOR, 54th Sess.4011th mtg., UN Doc. S/RES/1244(1999).

¹¹⁷ 17 UN Resolution 1244

In October 2005, a report prepared by Special Envoy to the Secretary-General Kai Eide was released that recommended commencing the process to determine the future status of Kosovo¹¹⁸. Martti Ahtisaari was appointed Chief Negotiator for the UN, and in late November he made his first visit to the region to open talks. The status question will be difficult to resolve. While the vast majority of Kosovar Albanians believe they deserve independence, most Serbs inside and outside Kosovo vehemently oppose it.

4.2 Establishment of UNMIK

UNMIK was entrusted with a broad mandate, including promotion of the rule of law and human rights¹¹⁹. The mission comprises four components (Pillars), each led by a Deputy Special Representative of the Secretary-General (DSRSG). Three international organizations operate under the four pillars. Pillar I, “Police and Justice,”¹²⁰ was set up in May 2001 to establish the rule of law, encompassing the police force and the establishment of the judiciary and penal system. This work is directed by the UN. (For the first year of UNMIK’s mandate, Pillar I, was focused on Humanitarian Assistance under the auspices of the UN High Commissioner for Refugees.) Pillar II, “Civil Administration,” is also directed by the UN¹²¹. Pillar III, “Democratization and Institution Building,” aims at developing civil society and human rights institutions, media, and political parties. It is led by the OSCE. Pillar IV, “Economic Reconstruction,” is led by the European Union (EU).

The Special Representative of the UN Secretary-General (SRSG) is head of UNMIK and is vested with “maximum civilian execution powers”¹²² that involve sole executive

¹¹⁸ UN Doc. S/2005/635, with Annex, “A comprehensive review of the situation in Kosovo.”

¹¹⁹ SC Res.1244/1999, *supra* note 11, at para.11.

¹²⁰ The Police and Justice Pillar (PillarI) was established in May 2001 as a new Pillar I. At the end of the emergency stage, Pillar I (humanitarian assistance) intended to provide humanitarian aid and facilitating the return of refugees and internally displaced persons, which was led by the Office of the United Nations High Commissioner for Refugees, was phased out in June 2000. The new Pillar I also incorporated the two departments of law enforcement and judicial affairs, which had been part of UNMIK’s Pillar II, Civil Administration.

¹²¹ The police and judicial components, the Departments of Police and Judicial Affairs (later redesignated as Department of Justice) of the civil administration under Pillar II were transferred to the new Pillar I, Police and Justice, on May 24, 2001.

¹²² Report of the Secretary-General to the Security Council of June 12, 1999, UN Doc. S/1999/779, at para. 44.

and legislative authority to “change, repeal, or suspend existing laws to the extent necessary” and “issue legislative acts in the form of regulations.” The SRSG also has the authority to appoint and remove any person to the interim civil administration in Kosovo, including the judiciary.

Besides establishing a civilian administration, Resolution 1244 also established the Kosovo Force (KFOR), a multinational peacekeeping force under NATO command that was charged with ensuring “public safety and order until the international civil presence can take responsibility for this task.” KFOR operates within a unified military control and command structure separate from UNMIK¹²³. As the UN started to take control of the region, retaliation by Albanians against remaining Serbs and perceived Albanian collaborators was widespread. For example, there was a wave of arson against Serb homes throughout the country and widespread harassment by Albanians, with strong indications of KLA involvement¹²⁴. The situation in the divided northern city of Mitrovica was particularly tense.

Most of the police, prosecutors, and judges in Kosovo were Kosovar Serbs, as Kosovar Albanians had been purged from these positions during the late 1980s and early 1990s. Albanians who remained in their positions under Milosevic after the war were seen as collaborators. The withdrawal created a power vacuum with regards to law enforcement¹²⁵. Resolution 1244 offers explicit authority to ensure “public safety and order” and establish “local police forces”, but makes no mention of judicial authority. However, re-establishing law and order in the province has been a priority for UNMIK.

In March 2004, Kosovo experienced a violent anti-Serbian riot, the worst inter ethnic violence since 1999. Instigated by misleading information that Serbs were responsible

¹²³ The multinational brigades (which initially included NATO forces as well as Russians) fall under a single chain of command under the authority of the KFOR Commander.

¹²⁴ Human Rights Watch, World Report 1999. An international human rights officer in Pec/Pejes aid that 100 percent of Serb homes in that area were destroyed during this period. Others report that 250,000 Serbs and other minorities were displaced after June 1999. See International Crisis Group, “Finding the Balance,” Sept.12, 2002, at 3.

¹²⁵ See Michael E.Hartmann, “International Judges and Prosecutors in Kosovo: A New Model for Post Conflict Peacekeeping,” United States Institute of Peace, Oct. 2003. See also David Marshall and Shelley Inglis, “The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo,” Harvard Human Rights J., Spring 2003, at 101.

for the drowning of three young Albanian children¹²⁶, the riot was initiated to drive Serb, Roma, and Ashkali communities out of Mitrovica. The violence resulted in 21 deaths (split almost equally between Serb and Albanian communities); more than 900 injured (more than 20 gravely); over 700 Serb, Ashkali, and Roma homes; up to 10 public buildings, 30 Serbian churches, and two monasteries damaged or destroyed; and 4,500 Kosovar Serbs displaced. The disturbance revealed the continued precarious situation in Kosovo, including its deep-rooted ethnic divisions and continued vulnerability of minority populations, as well as the frustration at lack of progress of the majority population.

4.3 The establishment of Internationalized Tribunals

4.3.1 UNMIK's Approach on the Rule of Law

The creation of hybrid judicial panels in Kosovo was largely a response to urgent needs on the ground. UNMIK's mandate to maintain peace and security in the territory included a directive to maintain "civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo." While UN officials interpreted this as a mandate to re-establish the justice sector in general and, in particular, to seek accountability for war crimes and other atrocities committed during and after the conflict, the resolution's language was vague on this point. The task of re-establishing rule of law and criminal justice in Kosovo is shared by the UN and the OSCE. Under the UNMIK structure of Pillar I (Police and Justice), the Department of Justice (DOJ) and UNMIK police have been brought into one administration to maximize coordination of criminal investigations. Mandated primarily to build and oversee the functioning of an independent, impartial, and multi-ethnic judiciary, the DOJ is also responsible for administering the correctional system in Kosovo, ensuring access to justice for all communities and providing assistance and advocacy services for victims. For example, Kosovo's new police force, the Kosovo Police Service (KPS), has specialized units to

¹²⁶ The investigation into the drowning deaths of two Albanian children in Cabra, led by an international prosecutor, concluded that there was no evidence showing that Serb youths had played part in this accident, although it did not find the cause that led to the children's drowning. BBC Monitoring Europe, "Probe into drowning of Albanian children in Kosovo completed," April 28, 2004.

provide protection to vulnerable witnesses, to counter human trafficking, and to fight other forms of organized crime.

The work with the local legal community to promote human rights, develop legal capacity, and build legal institutions falls under OSCE's efforts as Pillar III. In particular, the OSCE established or supported a range of programs and institutions for monitoring and capacity building, particularly the Legal System Monitoring Section (LSMS). It also monitors the justice system. Furthermore, the Criminal Defence Resource Centre (CDRC), a non governmental organization (NGO), was established to support the defense; support has been provided for the Kosovo Chamber of Advocates (KCA); the Kosovo Judicial Institute (KJI) was created to train local judges and prosecutors; and the Department of Human Rights and Rule of Law provides assistance in the reform of a variety of legal issues. Responsibility for rebuilding the justice sector and building the capacity of local actors therefore lies with different actors. Pillar I managers did not consider capacity building part of their mandate.

Rebuilding the justice sector is an enormous challenge that is not easily fulfilled¹²⁷. Much of the physical infrastructure of the judicial system - court buildings, law libraries, and equipment - was destroyed or severely damaged during the conflict. Local lawyers and judges were hard to find; most fled as the Serb forces withdrew, and those who remained generally refused to serve under UNMIK. In addition, few Kosovar Albanians had legal experience, as many were forced out of the judiciary a decade earlier, although some kept their practice as defense counsel. In addition, law classes were offered only in the Serbian language and the bar exam was offered only in Belgrade, so the better part of a generation of Albanian lawyers had been lost.

Another major issue was the lack of a legal framework. One of the first UNMIK Regulations, 1999/1, declared that the pre-1989 FRY laws, as well as some laws

¹²⁷ For an overview of efforts to establish the rule of law in post-conflict Kosovo, see Wendy S. Betts, Scott N. Carlson, and Gregory Gisvold, "The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law," 22 Mich. J. Int'l L. 371, 2001; Jean-Christian Cady and Nicholas Booth, "Internationalized Courts in Kosovo: An UNMIK Perspective," Internationalized Courts and Tribunals, PICT, 2004; Hansjörg Strohmeyer, "Making Multilateral Interventions Work: the United Nations and the Creation of Transitional Justice Systems in Kosovo and East Timor," Fletcher For. World Aff., 2001; Strohmeyer, "Collapse,".

introduced between 1989 and 1999, continued to be applicable¹²⁸, unless they contained an element of ethnic discrimination or otherwise violated standards of international law. The decision to revive the Serbian laws imposed by Milosevic since 1989 offended much of the Albanian population and alienated members of the Albanian legal community, many of whom were familiar only with pre Milosevic-era legal codes. UNMIK was also under pressure because detainees suspected of committing atrocities were crowding prison facilities, with little prospect of a speedy trial. Devastated by the conflict and years of discrimination against the ethnic Albanian minority, the local judicial system did not have the capacity to conduct such trials, nor were they perceived as able to be independent vis-à-vis Serbs accused of crimes. The ICTY Prosecutor made it clear that the tribunal could try only those who had committed the worst atrocities on the widest scale¹²⁹. As the detainees continued to languish in prison, many argued that the continued detention violated international human rights standards. Frustration among the Kosovar Serb population regarding the failure of the judicial process may have contributed to increased ethnic violence¹³⁰. A combination of the above factors ultimately led to a hunger strike by Serb detainees. This began to reach a crisis point in December 1999, when the six-month deadline for pre-trial detention was approaching for many of the detainees. The SRSG initially responded by amending the law to allow for one year of pre-trial detention, but this did nothing to depopulate the prisons. Other measures KFOR used included the so-called “COMKFOR hold,” a procedure for extra-judicial detentions used when KFOR authorities believed that the detainee posed a danger to public safety and security. The SRSG also commenced using so-called “Executive Detentions” that he ordered. Both measures were decried by the OSCE’s LSMS and others as unjustified and in violation of international norms.

¹²⁸ The applicable law before 1989, when Albanians could still practice, was the Criminal Law of the Socialist Autonomy Province of Kosova (from 1977), the Criminal Code of the Socialist Federal Republic of Yugoslavia (July 1, 1977), and the Yugoslav Law on Criminal Procedure (June 30, 1977).

¹²⁹ See Carla Del Ponte, Prosecutor of the ICTY, “Statement on the Investigation and Prosecution of Crimes Committed in Kosovo,” The Hague, Sept. 29, 1999.

¹³⁰ See Strohmeier, “Collapse”, at 49. When the UNMIK issued a regulation allowing for longer pre-trial detention of suspects, the OSCE’s Legal System Monitoring Section concluded that the new regulation was a “clear breach” of the European Convention on Human Rights (ECHR) and the International Covenant on

4.3.2 *The Proposed Kosovo War and Ethnic Crimes Court*

To address what was rapidly becoming a crisis of justice and accountability, in late 1999 UN and member state officials, as well as the national judiciary, began negotiations for the creation of a stand alone criminal court in Kosovo¹³¹. The proposed court, referred to as the Kosovo War and Ethnic Crimes Court (KWECC)¹³², was to be an international-led, ad hoc tribunal sitting in Kosovo, but largely modeled on the ICTY. Planning for KWECC, which was never realized, reached an advanced stage. KWECC was to have concurrent, primary jurisdiction with domestic courts of Kosovo over serious violations of international humanitarian law as well as other serious crimes committed on political, ethnic, or religious grounds since January 1, 1998, including: war crimes, genocide, crimes against humanity, and other serious crimes committed on the basis of race, ethnicity, religion, nationality, or association to a minority ethnic or political group. It had no termination date. This means that any serious crime involving any ethnic minority could be included in its subject matter jurisdiction. While KWECC would have simultaneous jurisdiction with the ICTY, the tribunal would have primacy and KWECC was to focus on the lower-profile offenders that the ICTY lacked the capacity to try.

According to the proposal, KWECC would have panels composed of international and local judges¹³³. KWECC was to be staffed by multi-ethnic national and international judges, prosecutors, and staff. The president was to be an international judge. Local staff, including judges, prosecutors, and other personnel, were to be provided by the Department of Judicial Affairs. It was assumed that international judicial personnel, such as judges and prosecutors, would be seconded by donor countries or organizations. In addition, a Witness Protection Unit and an Office for

Civil and Political Rights (ICCPR). OSCE/LSMs, “Kosovo: Report No. 6: Extension of Time Limits and the Rights of Detainees: the Unlawfulness of Regulation 1999/26,” April 29, 2000.

¹³¹ In its first report of December 13, 1999, the Technical Advisory Commission (TAC) on Judiciary and Prosecution Service, which was established pursuant to UNMIK Regulation No 1999/6 of September 7, 1999, and composed of both Kosovar and international experts, recommended the establishment of such a tribunal. The international and local Kosovar legal members of the TAC voted unanimously to create such a court. US Mission to Kosovo, “Kosovo Judicial Assessment Mission Report,” April 2000, at 20, available at pristina.usmission.gov/jud.pdf.

¹³² The name originally proposed was Kosovo Tribunal for War Crimes and Crimes Against Humanity, but it was later renamed KWECC.

¹³³ UNMIK, “Kosovo: Reconstruction 2000,” April 2000, available at www.seerecon.org/kosovo/documents/reconstruction2000/index.html.

the Defence were to be established. KWECC was expected to be functional in the summer of 2000, and an appointed chief, Fernando Castanon, had already arrived in Kosovo. After SRSG Bernard Kouchner signed the regulation, the process of appointing the president and other international and local judges began.

The concept of KWECC gave rise to some concerns among the Kosovar Albanian legal community about the potential drain it might cause to the fledging Kosovar judicial system, and the potential complications of having an additional judicial layer between the domestic system and the ICTY¹³⁴. Conversely, the Kosovar Bar was skeptical of an international tribunal that might be less likely to employ local lawyers. Some of those with ties to the political parties feared a system that was “too independent” and thus more likely to pursue Albanians for war crimes. There were also fears that KWECC would exacerbate ethnic tensions¹³⁵.

In September 2000, the idea of KWECC was abandoned. Member states had become increasingly concerned about the cost of a free standing court¹³⁶ and feared that it would be impossible to provide the necessary security. One American diplomat called this a “classic clash between UN idealism and U.S. cynicism,” as the UN refused to provide projected costs and the United States refused to house the court within its high-security base. Some of those involved believe that an additional, if not primary, hurdle was U.S. concern that an independent court might investigate war crimes committed by NATO forces, a controversial subject during the time of these negotiations. In retrospect, Albanian lawyers regret that a more independent court did not emerge, because of concerns about the SRSG’s influence over the system that did develop. Ultimately, the international judges and prosecutors program, once it started to function in September 2000, was the final “nail in the coffin” that led to the abandonment of KWECC.

¹³⁴ John Cerone and Clive Baldwin, “Explaining and Evaluating the UNMIK Court System,” in André Nollkaemper Romano and Jann K. Kleffner et al., *Internationalized Criminal Courts*, December 2004.

¹³⁵ Michael A. Newton, “War Crimes Research Symposium: ‘The Role of Justice in Building Peace’: ‘A View from the Trenches’: The Military Role in the Pursuit of Justice,” *Case Western Reserve J. Int’l L.*, Spring 2003, n.100.

¹³⁶ The start-up cost of the court for six months was estimated to be DM 12.59 million. The cost of establishing the detention facility and operating it for six months was estimated at DM 1.17 million.

4.4 The establishment of the Internationalized Panels

Simultaneously to planning for KWECC, UN authorities also set up an interim program to bolster trust in the judiciary by taking controversial cases out of the hands of Serb or Albanian judges without building a new international court. A wave of violence in Mitrovica in February 2000, sparked by the bombing of a local café and a rocket attack against a UNHCR bus carrying Serbs, prompted this action. UNMIK police arrested several Kosovar Albanian suspects for brandishing weapons, but a Kosovar Albanian judge released them. The outbreak of violence led the SRSG to re-evaluate the judiciary situation.

In part as a result of this event, the UN recognized the need for ethnically neutral judges and prosecutors to hear cases. With virtually no consultation with the local population on February 15, 2000, the UN issued UNMIK Regulation 2000/6. This provided for the appointment of an international judge and an international prosecutor to work within the existing domestic judiciary along with their local counterparts. The Regulation gave the SRSG the power to make such appointments, and by February 17, 2000, the first IJ and IP were in place¹³⁷.

Initially, this arrangement was meant only for the Mitrovica District Court and other courts within its territorial jurisdiction (e.g., Municipal and Minor Offences Courts in Mitrovica). However, a number of Serb and other minority (mostly Roma) detainees initiated hunger strikes to protest their prolonged pre-trial detention¹³⁸. In addition, UNMIK realized that the problem of Kosovar Albanian judges' lack of perceived impartiality was a general issue. As a result, the introduction of IJPs was subsequently extended to cover courts throughout Kosovo, including the Supreme Court, by means of Regulation 2000/34 in May 2000¹³⁹. By the summer of 2000, six IJs and two IPs were appointed to serve in mixed panels in the courts of Mitrovica, Pristina, Gnjilane, and Prizren.

¹³⁷ UNMIK Regulation 2000/6, on the Appointment and Removal from Office of International Judges and Prosecutors, Feb.15, 2000; see OSCELSMS, "Kosovo's War Crimes Trials:A Review," Sept. 2002, at 11; Press Releases UNMIK PR/159 and UNMIK/PR/161, available at www.unmilonline.org.

¹³⁸ UNMIK, "Pillar I: Police and Justice," June 2004, available at www.unmikonline.org/justice/documents/PillarI_Report_June04.pdf

¹³⁹ UNMIK Regulation 2000/34, Amending UNMIK Regulation 2000/6, On the Appointment and Removal from Office of International Judges and Prosecutors, May 27, 2000.

While KWECC was conceived as an independent transitional justice mechanism to boost the rule of law, the temporary introduction of IJs was motivated primarily by pragmatic and immediate security needs. The hope was that the infusion of foreign experts would jump-start the judicial reform process, providing badly needed capacity and independence. Despite the lack of consultation with the local population, many welcomed the appointment of IJs because it made it possible for trials to proceed in the Kosovo courts without a grave risk of bias or “violent blow back.”

At the end of 2000, UN authorities made further revisions to the regulations allowing for the appointment of IJs and IPs. The OSCE and NGOs had criticized Regulations 2000/6 and 2000/34 because, while they did assure a measure of impartiality, they did not go far enough. Specifically, they did not ensure a majority of IJs in a given case (e.g., one international judge on a panel of three) and thus were “insufficient to remedy the lack of an objective appearance of impartiality in trials involving allegations of serious war crimes.” Indeed, in practice IJs were often outvoted by the lay and professional Kosovar judges, leading to unsubstantiated verdicts of guilt against some Serbian defendants and questionable verdicts of acquittal against some ethnic Albanian defendants. In addition, Kosovar Albanian prosecutors were accused of initiating criminal investigations and proposing detentions of Serbs based on insufficient evidence, while abandoning cases and refusing to investigate ethnic Albanians. In addition, because of the large volume of cases, IJs were spread too thin. As a result, cases were often tried before panels of varying composition, some with no IJs. Ultimately, many of these early verdicts in war crimes cases were overturned on appeal and sent for retrial.

Responding to these concerns, the UN in December 2000 promulgated UNMIK Regulation 2000/64¹⁴⁰. This grants the SRSG the authority to appoint a special panel of three judges with international majority, the so-called “Reg. 64 panel,” as well as the authority to assign IPs¹⁴¹. Consequently, a special section, the International Judicial

¹⁴⁰ UNMIK Regulation 2000/64, On the Assignment of International Judges/Prosecutors and/or Change of Venue, Dec. 15, 2000. The Regulation was initially enacted for a 12-month period, but was subsequently extended by UNMIK Regulations 2001/34 and 2002/20. For a further discussion regarding UNMIK Regulation 2000/64, see the OSCE LSMS, “Review of the Criminal Justice System,”

¹⁴¹ It is worth noting that UNMIK Regulation 2000/6 gives IPs and IJs the right to select and take responsibility for cases they deem appropriate for the international judiciary. The difference is that when the SRSG appoints a Reg. 64 judicial panel, the entire panel can be international, while in practice, a Regulation 6

Support Section (IJSS), was established within the DOJ¹⁴² in order to support this initiative. Although the IJSS initially supported both IJs and IPs, subsequently the IPs were supported by a newly created Criminal Division. With the advent of the “Reg. 64 panels,” which are international only, the mixed panel formation of Regulation 6 was virtually abandoned.

Regulation 2000/64 continues in force in Kosovo today. Trigger mechanisms for a so-called “Reg. 64 panel” include appointment by the SRSG on his own motion, or upon the request of prosecutors, the accused, or defense counsel where “necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.” Although no clear criteria have been laid out in the Regulation, in practice the primary reasons for relying on IJs are either fears about perception of bias or concerns about intimidation of local judges. As a result, IJPs were used mainly in cases involving inter-ethnic conflict. In such cases, the DOJ makes a recommendation to the SRSG, who takes the formal decision to assign a prosecutor or a panel of majority of IJs to a specific case. Parties who request a Reg. 64 panel therefore make their request to the DOJ, which forwards it to the SRSG. International prosecutors and judges may also take cases at their own discretion. (The March 2004 riots ushered in a new period in which local judges also heard cases involving ethnic conflict.)

Appointing a Reg. 64 panel may take place at any stage in the proceedings, except where the trial is in session or if an appeal has already commenced. It was felt that this would be unduly disruptive to the conduct of proceedings, and that any bias emerging at this stage could be cured by the assignment of an international panel to hear an appeal or an extraordinary legal remedy against appeal. Even so, it is a far-reaching power that has led to some resentment from the local professionals whose cases have been removed, sometimes in an overtly demonstrative manner. IJs sit as judges on the regular courts of Kosovo and IPs work as national prosecutors, both applying the same domestic law as their local counterparts. However, IJs do not receive case assignments from the president of the court in which they sit. Rather, they receive

panel is either one or two international judges out of three. With respect to IPs, Reg. 64 hardly ever is used, as IPs routinely take over cases under Regulation 2000/6.

¹⁴² DOJ comprises five sections: the Judicial Development Division (JDD), the International Judicial Support Division (IJS), the Criminal Division (CD), the Penal Management Division (PMD), and Office for Missing Persons and Forensics (OMPF).

assignments from the DOJ or can petition to take the case under Regulation 2000/6 or 2000/64. In practice, the IJPs function de facto as a parallel judicial process for cases that the DOJ or IJPs themselves deem inappropriate for their national counterparts.

4.5 Prosecutorial strategy and issues of case selection¹⁴³

4.5.1 Lack of Criteria for Referral

What distinguishes Reg. 64 panels from other systems involving international judges and prosecutors is their broad discretion to take on any national pending cases. The lack of clear direction in terms of where to concentrate internationals remains an issue of great controversy and criticism. As mentioned, the SRSG can approve a Reg. 64 panel for any case - from war crimes to petty theft - if it is deemed “necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.”¹⁴⁴ Using this rationale, the IJPs initially focused on indictments of war crimes against Serbs, partly because of the large number of Serbs in detention when internationals arrived. They inherited 43 such cases that had commenced before local panels of Albanian judges. The IJPs also took on war crimes cases against Kosovar Albanians, most notably the Llapi case, which involved high-profile former KLA leaders.

However, gradually the focus shifted from cases deemed inappropriate for local judges and prosecutors to cases that local judges and prosecutors did not want to try because of security concerns or other political pressures. The IJPs’ primary focus is now organized crime and corruption cases. For their particular nature, these categories of cases are often interrelated, because criminal power structures, including organized crime, are also involved in terrorism and inter-ethnic violence. On the other hand, organized crime is a regular feature not only of many other post-conflict contexts, but also of other Eastern European States. Some complain that the shift in focus represents European and American, rather than local, priorities (The IJPs have also handled a number of cases involving UN personnel).

¹⁴³ Many of the information reported below have been the object of interviews at UN/UNMIK Staff and ICTJ level.

4.5.2 *Concerns regarding independence*

A major criticism of the IJP system has been that its structure gives the SRSG the ultimate executive power to appoint international judges and prosecutors and choose cases in which they are to be involved. Moreover, UNMIK's DOJ is the supervising authority over international judges and prosecutors, extending their contracts. International judges are not subject to the Kosovo Judicial and Prosecutorial Council (KJPC), the body that appoints and disciplines local judges, and there is no local involvement in the oversight of IJPs. In its Review of the Criminal Justice System, the OSCE LSMS stated, "the very short contractual periods for international judges and prosecutors, and the fact that each extension of these contracts is solely dependent on UNMIK's executive branches – DOJ and, ultimately, SRSG - create an appearance of executive control over these officials."¹⁴⁵ The LSMS recommended that, to ensure independence, decisions on hiring an extension of IJPs should be under the auspices of an empowered KJPC. This recommendation was never implemented, and international judges and prosecutors are seen as subject to the UN supervising executive power. This appearance of lack of independence has led many to question the impartiality of the hybrid process.

Among the war crimes and inter-ethnic cases that constitute the bulk of the IJP caseload to date, the primary controversy has been whether the SRSG's and DOJ's selection of cases has been politically biased. Many observers, including both Kosovars and internationals, believe the UNMIK executive exerts too much influence on the criminal justice process. Regardless of whether it is justified, there is a local perception that political interference has disproportionately protected potential Serb defendants, and many allege that UNMIK has a pattern of "caving in" to Serb demands. Some argue that many cases initially brought against Serbs before local panels resulted in dramatically reduced charges, sentences, or acquittals when the IJPs took over. Furthermore, some Kosovar Albanians perceive a systemic bias on two fronts.¹⁴⁶ First,

¹⁴⁴ UNMIK/Reg/2000/64 at 1.2, "On Assignment Of International Judges/Prosecutors And/Or Change Of Venue," Dec.15, 2000.

¹⁴⁵ OSCE LSMS, "Review of the Justice System," at 26.

¹⁴⁶ A smaller number of Albanians charged UNMIK and DOJ without right ethnic bias, citing the disrespect with which internationals treat them.

Serbia is a nation, while Kosovo is not, and Albanians fear that UN officials feel more comfortable in the diplomacy with Serbia. Second, some Albanians believe that UNMIK's a version to threats against stability has given radical Serbs an effective veto over UN policies, including prosecutions.¹⁴⁷

DOJ officials have asserted that case selection is not political. As one put it, "We would never consider ethnic balance in deciding which cases to pursue or how the decisions are handed down. The only question is whether there is a prosecutable case. The SRSG exerts no influence." The DOJ identifies the limiting factors in prosecutions not as political, but as the lack of support for witness protection and weak extradition options.

4.5.3 Lack of Cooperation by Serbia

Many of those who had committed atrocities in 1999, including Serbs and Kosovar Serbs, retreated into Serbia when the conflict was over. Many remain at large in Serbia and Montenegro as well as other countries in Europe. As one IP noted, "We have not been able to convict some key people - those who escaped, those we indicted and could not arrest, and those we have not indicted. These matter to people here, particularly because there are so few successful prosecutions of Serbs that we can point to." Moreover, the general perception is that more is done to bring Albanians to trial than Serbs.

Extradition has been difficult to negotiate, partly because Kosovo is a UN protectorate and not an independent state. UNMIK, in accordance with its sui generis status, negotiates and enters into bilateral agreement with states on the two-way transfer (extradition) of foreign nationals and Kosovo residents. These negotiations are complicated by internal Serbian politics, including the recent success of more nationalistic candidates and the continuing problem of missing Kosovar Albanians believed to be held in Serbia. Presumably some of these issues will form part of Kosovo's final status determination.

¹⁴⁷ The examples most often cited are the escapes of large number of Serb detainees under what are considered dubious circumstances, the low number of successful war crimes prosecutions against Serbs, the failure to prosecute the "Bridge Watchers" (at least until they injured internationals), and the inability or unwillingness to push for extradition of key Serb suspects hiding in Serbia. These examples, along with perceived discrepancies in sentencing (see below) are reported continually in the local news.

4.5.4 Structural Adjustments to the IJP System

There have been some attempts to put a more deliberate and centralized structure into the IJP program to allow for more strategic deployment. In March 2003, a Criminal Division was established. A Chief International Judge and Prosecutor were put in place, all answerable to the DOJ.¹⁴⁸ The Head of the Criminal Division monitors developments of all cases, determines the importance of each case, and devises proceeding measures with the IP. The Criminal Division, which was composed exclusively of IPs and international lawyers supporting the prosecutors, worked in parallel to domestic prosecutorial services. Further steps were taken in 2005 to establish the Kosovo Special Prosecutor's Office (KSPO). As of September 2005, funding had been secured from the European Agency for Reconstruction, vacancy notices had been drafted, and a draft Regulation establishing the KSPC was being revised by UNMIK's Office of Legal Affairs (OLA) and the DOJ in late 2005. The KSPC will fall within the Office of the Public Prosecutor. The proposal is that the KSPO's mandate will include taking over the high-profile cases that the Criminal Division currently covers. It will begin with two or three local prosecutors and will expand until it reaches full strength. Initially there will be a number of IPs assigned to the KSPO, which will provide on-the-job training. As the KSPO increases in size and ability, local prosecutors in the unit will begin to train other local prosecutors in other offices throughout Kosovo. Simultaneously, international judges have relocated to Pristina but will be allowed to try cases from around the country from there (the so called "single jurisdiction" approach). It remains to be seen what the impact of these measures will be in terms of refocusing strategic direction and capacity building.

¹⁴⁸ The IP must obtain the consent of the division's head prior to filing an indictment or appeal.

4.6 Legal Framework

The applicable law in Kosovo constitutes a blend of UNMIK regulations, including the Constitutional Framework¹⁴⁹ and domestic laws. As mentioned above, initially the UNMIK authorities declared the applicable law in Kosovo to be Federal Republic of Yugoslavia Serbian law, modified to conform to international human rights standards.¹⁵⁰ This decision outraged many Kosovar Albanians, who refused to apply the law, resulting in widespread confusion. In response, UNMIK issued new resolutions describing the applicable law to be the law in force in Kosovo prior to March 22, 1989, insofar as it is not in conflict with international human rights standards.¹⁵¹ The European Convention on Human Rights is directly applicable in Kosovo and is applied increasingly both by IJs and local judges (although some international practitioners have commented that the local practitioners will simply reference such provisions rather than reason their citation).

The jurisdiction of the internationalized panels in Kosovo is that of the domestic courts. The crimes that have been tried are therefore encompassed in domestic law. Only genocide and war crimes have been encompassed in domestic law through the FRY Code, and in practice only war crimes have been tried. War crimes constitute approximately 10 percent of the cases initiated by international prosecutors since March 2003. Recently there have been fewer prosecutions for war crimes and post-war inter-ethnic violence, especially abuses committed during the period of late 1999 and 2001. The ability to pursue further war crimes was severely limited by “the difficulty in collecting evidence in the immediate aftermath of the conflict in 2000-01.”¹⁵² Nonetheless, there has been some notable progress in prosecuting war crimes and ethnically motivated violence.¹⁵³ In late 2003, a verdict was delivered in the first

¹⁴⁹ The Constitutional Framework incorporates by reference and makes directly applicable in Kosovo several international human rights instruments, including Universal Declaration on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms (with protocols), International Covenant on Civil and Political Rights (with protocols), Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, European Charter for Regional or Minority Languages, and Council of Europe Framework Convention for the Protection of National Minorities.

¹⁵⁰ UNMIK Resolution 1999/1.

¹⁵¹ UNMIK Resolutions 1999/24 and 1999/25.

¹⁵² UNMIK, “Focus Kosovo,” Feb. 2004, at 10.

¹⁵³ SG Report, S/2004/907, para. 17.

domestic war crimes trial to charge Kosovar Albanians for war crimes within Kosovo itself - the so-called Llapi case. The trial attracted widespread public attention.¹⁵⁴

In practice, judges (IJ and local alike) have often failed to refer to any legal sources outside the FRY criminal and criminal procedure statutes and the UNMIK Regulations. These sources, such as the ICTY's relevant decisions, do not constitute precedent, but could be used as persuasive jurisprudence. They are rarely cited.¹⁵⁵ In 2002 the OSCE characterized Supreme Court judgments as being marked by "brevity (the average length of decisions is three to four pages), poor legal reasoning, absence of citations to legal authority, and lack of interpretation concerning the applicable law on war crimes and human rights issues."¹⁵⁶ As a result, the OSCE concluded that the international judges' decisions "are not useful tools for providing guidance to the local legal community in the complex field of war crimes and international humanitarian law." Moreover, the decisions are generally not published or otherwise made available beyond the parties, so their reach will likely be very limited.

Some have commented that on occasion IJs and IPs are too wedded to their own traditions to adequately adapt to legal processes in Kosovo. For example, common law prosecutors may draft indictments that are considered too brief for civil law standards. Verdicts have been criticized for brevity, but also praised for being concise. Furthermore, the differences in IPs' backgrounds can lead to a lack of congruency in charges and sentencing.

On April 6, 2004, the new Provisional Criminal Code¹⁵⁷ and Provisional Criminal Procedure Code of Kosovo,¹⁵⁸ which had been promulgated on July 6, 2003, came into

¹⁵⁴ *The Public Prosecutor's Office v. Latif Gashi, Rustem Mustafa, Naim Kadriu and Nazif Mehmeti*. It was the first time that the UN-administered court convicted anyone from the Albanian side of war crimes. The accused were indicted for war crimes under domestic applicable law for acts perpetrated against predominantly Kosovar Albanian victims; of 26 victims listed in the indictment, one victim was a Kosovar Serb. The four accused were charged for allegedly participating in the unlawful detention, torture, and murder of civilians from August 1998 to June 1999. For a summary of the Llapi case, see OSCE LSMS, "Case Report: The Public Prosecutor's Office vs Latif Gashi, Rustem Mustafa, Naim Kadriu and Nazif Mehmeti, The 'Llapi Case,'" Dec. 2003.

¹⁵⁵ The case against Momcilo Trajkovic (Kosovar Serb) "Trajkovic." The decision was made by international majority. The case against Cedomir Jovanovic and Andjelko Kolasinac "Jovanovic/Kolasinac." Both defendants are Kosovar Serbs. The trial verdict was made with a panel of international majority.

¹⁵⁶ OSCE Report Sept. 2002, at 48.

¹⁵⁷ UNMIK Reg. No. 2003/26, On the Provisional Criminal Code of Kosovo, amended by UNMIK Reg. No. 2004/19, June 16, 2004.

effect,¹⁵⁹ effectively replacing the domestic applicable criminal laws. These codes were drafted by a working group of a wide variety of legal practitioners and were consolidated by UNMIK's Office of Legal Affairs. These new codes have the basis of criminal law in Kosovo, along with subsequently promulgated Regulations. The Juvenile Justice Code was promulgated on April 20, 2004, and entered into force on the same date.¹⁶⁰

This crucial milestone brings the law in Kosovo into conformity with regional and European standards and ensures[s] consistency with modern principles of international law, in particular international human rights law. The new codes introduce substantial reforms to Kosovo's procedural law, for example, incorporating criminal offenses under international law and sexual offenses, increasing the efficiency of the proceedings (by reallocating responsibilities at the pre-trial stage), enhancing the protection of the right of accused, particularly during detention, and strengthening prosecutorial power. Despite some complaints about draftsmanship and lacunae, the Codes have been universally welcomed as an improvement on the old system, under which provisions were applied from numerous different instruments.¹⁶¹

The new codes transform the criminal structure into a system more adversarial in nature, and many local Albanian lawyers express pride at a new, "more European" code that has no link to Serbia. As mentioned, the Codes contain a number of new features, including guilty pleas and cross-examination at trial. However, there is widespread concern about insufficient training for this dramatic shift within the national courts. Features such as guilty pleas and cross-examination are foreign to lawyers in Kosovo, who have been trained in a civil law tradition, as well as to IJs from civil law systems.

¹⁵⁸ UNMIK Reg. No. 2003/25, On the Provisional Criminal Code and the Provisional Criminal Procedure Code for Kosovo.

¹⁵⁹ UNMIK Reg. No. 2003/26, and UNMIK Reg. No. 2003/25. Both were promulgated on July 6, 2003.

¹⁶⁰ UNMIK Press Release, UNMIK/PR/1161, "Speech of DSRSG/Pillar I Jean-Christian Cady in the Seminar 'On Combating Crime with the New Provisional Criminal Code,'" at the Kosovo Judicial Institute, April 5, 2004, available at www.unmikonline.org/press/2004/pressr/pr1161.pdf.

¹⁶¹ 23 OSCE LSMS, "Review of the Criminal Justice System," states: After years of drafting and re-drafting, a completely revised set of criminal codes entered into force on April 6, 2004. The codes have their own problems in terms of drafting style, inconsistencies, and lacunae, but are nonetheless a very welcome development. Certainly the codes' emphasis on the applicability of international human rights standards sends an important message. With the help of bold judicial decisions interpreting and applying the law, it is hoped that the new codes will develop into a more refined judicial instrument (13).

In addition, the new Criminal Procedure Code also introduced the use of video and audio recording at the pre-trial and trial stages. The code also provides for the transfer of Kosovo residents who are wanted in foreign jurisdictions, although this provision should be supplemented by a bilateral agreement with the requesting country. Thus far, UNMIK has signed specific ad hoc transfer agreements of Kosovo residents to the UK and Norway.

4.7 Defense and issues of Fair Trial

The defense teams in cases involving IJPs comprise mostly local lawyers. They are paid by the Department of the Judicial Administration (DJA) under the Ministry of Public Services (MPS). For certain high-profile cases, such as those against senior KLA officers, private funds have been raised to hire leading defense lawyers. Dozens of Albanian and Serb lawyers have been retained as counsel for such defendants. A notable feature of the Kosovo system has been that national lawyers have had to “raise their game” to face off in these situations. Many observers speak of improvements in the skills of local lawyers, who are adjusting to the adversarial nature of the trials, both in facing IJs and practicing under the new code.

The quality of defense counsel has also been improved through assistance by the CDRC, an NGO staffed by national and international lawyers with support from the OSCE. The CDRC provided direct legal assistance in war crimes cases, including advice and case assistance by international lawyers. Almost all Serb and Albanian lawyers commented on the value of trainings and resources for their efforts. However, although the CDRC was originally meant to significantly bolster the local Bar, it has reduced its programs due to lack of funding.

Defense lawyers may be paid privately by their clients, but when they are court-appointed or ex officio, counsels receive a maximum of around 250 Euros a month, regardless of hours worked. Payments for ex officio lawyers are also often delayed. Moreover, because the payment has a maximum ceiling, there is little incentive for defense lawyers to devote more than a few hours to their cases.

4.8 Relationship with ICTY and other Transitional Justice mechanisms¹⁶²

The ICTY retains the authority to take any case involving genocide, war crimes, or crimes against humanity that took place within the former Yugoslavia after 1991,¹⁶³ and its jurisdiction is concurrent with that of the national courts. ICTY prosecutors have made it clear, however, that they are focusing on the most senior perpetrators, and UNMIK authorities early on concurred in this division of labor. In addition to the case against Slobodan Milosevic, the ICTY has initiated several cases involving atrocities committed in Kosovo, against both Serbs and former KLA.¹⁶⁴ The ICTY eventually charged Ramush Haradinaj, then Prime Minister in Kosovo, who was immensely popular as head of one of the leading political parties. He was indicted along with two other former KLA members, Idriz Balaj and Lah Ibrahim, for crimes against humanity committed against Serbs, Roma, and suspected Serb collaborators during the conflict. Haradinaj was granted provisional release by the ICTY and was also allowed to engage in public political activities in so far as allowed by UNMIK, for the sake of “peace and reconciliation.”

UNMIK justice sector officials have described the relationship with the ICTY as collaborative and “complementary,” noting that UNMIK regularly assists the ICTY with its investigations. The Limaj case, for example, began within the Kosovo courts, pushed by local lawyers, and was eventually handed over to the ICTY. For the most part, UNMIK officials have not viewed the ICTY as interference, but rather welcome any help they can receive from the tribunal and note that the ICTY is focused on only the highest level of cases.

Furthermore, Kosovar Albanians complain that the tribunal’s sentences for Serbs are too light, particularly in comparison to local sentences, and they contend that the ICTY has not taken on the biggest crimes that have occurred in Kosovo. Periodically policy makers in Kosovo have also discussed the potential utility of a truth commission for Kosovo. They often point to the lack of a forum for public acknowledgement and reconciliation, both in terms of political leadership and at the

¹⁶² Many of the information reported in this paragraph have been collected during with interviews with UN officials.

¹⁶³ Statute of the International Criminal Tribunal for the Former Yugoslavia, Arts.1–5.

¹⁶⁴ See indictments in Pavkovic et al., IT-03-70; Milutinovic et al., IT-99-37; and Limaj et al., IT-03-66, available at www.un.org/icty/cases/indictindex-e.htm.

community level. The historical aspects of the conflict make it difficult to determine the period that a truth commission should address. International prosecutors have pointed to the need for an alternative mechanism to fill the “impunity gap” in terms of cases they are not able to try. The issue of missing persons features prominently in transitional justice issues in Kosovo. Unlike Bosnia, which has a Human Rights Chamber, Kosovo has lacked strong human rights institutions that can be used for transitional justice questions, including property return and reparations.

4.9 Conclusions

Kosovo is entering its eighth year in the aftermath of intensive ethnic conflict and longstanding systematic discrimination and it has been five years since the deployment of internationals into its legal system. The creation of the various aspects of the Kosovo system of international judges (IJs) and international prosecutors (IPs) has to be understood as a series of reactive developments to the needs and political reality of the immediate post-conflict situation, as opposed to any planned or strategic transitional justice initiative to deal with past crimes. The system has made halting steps forward, although its contributions have been limited by continuing security concerns, concerns regarding independence, ad hoc planning, and poor implementation including the absence of any concrete plans for hand-over.

While many expected that infusing the legal system in Kosovo with international capacity through the IJP program would have had a more widespread impact, its effect has been limited mainly to substituting for, rather than bolstering, domestic capacity. A key factor has been the exclusion of local actors from policy issues relating to justice. In effect, the IJP program functions very much as a parallel system with a particular focus on sensitive cases, including organized crime, drug trafficking or corruption, perpetrated by networks supported through Kosovo’s powerful clans, which local judges are reluctant to try themselves.

In addition, although the IJP system has inspired a certain level of trust in the legal system, this is mainly in the international handling of cases, rather than in the domestic system in general terms. It has to be noted that nationals have been excluded from the design of the program and key decisions made in the course of its implementation. As a result, while the IJP program itself and the efforts of individual internationals have

enjoyed a measure of credibility in Kosovo, the wide discretion of UNMIK's executive over judicial matters has clouded perceptions of independence and been a stumbling block to establishing respect for the law. A proper framework elucidating the boundaries of these powers would have assisted in diminishing perceptions of arbitrariness and inappropriate interference.

To conclude, inadequate resources and finding suitably qualified (and trained) international staff are significant obstacles, although this is perhaps a product of the manner in which the IJP evolved and developed. Some would argue that a more centralized system of international capacity could have avoided some of those problems by improving conditions of service and making internationals feel less isolated. On the other hand, the Kosovo hybrid model of jurisdiction is another example of how the internationalization of the national legal system may bring about benefits in terms of capacity-building, despite the fact that interaction between internationals and nationals could have been more strategic and effective.

CHAPTER FIVE

PRELIMINARY FINDINGS ON THE EXTRAORDINARY CHAMBERS OF CAMBODIA

5.1 Brief history of the atrocities committed by the Khmer Rouge

On 17 April 1975, Cambodia's capital Phnom Penh fell to the forces of the Communist Party of Kampuchea, popularly known as the Khmer Rouge. From then until 1979, the Cambodian people endured horrific abuses of international humanitarian and human rights laws. These atrocities were generally not the isolated acts of individual officials, but rather resulted from the policies of the Khmer Rouge and its leaders. A shadowy group of persons functioned as Angkar ("the Organization") and the victory over the pro-US Lon Nol regime was trumpeted as ending thousands of years of subjugation of the Khmer peasantry at the hands of foreign and class enemies. The exact nature of the Khmer Rouge movement has been controversial — there has been much debate over whether this was a "complete peasant revolution", a Marxist-Leninist experiment or a uniquely Cambodian phenomenon driven by a perverse concept of a superior race¹⁶⁵. What is clear is that the movement brought unspeakable horror and suffering to millions of Cambodians. Having finally seized power, the new leaders of Cambodia directed their energies towards eliminating those regarded as internal enemies, who threatened the vision of a fully independent, socially and ethnically homogeneous Cambodia. Within days of the Khmer Rouge seizure of power, hundreds of thousands of urban dwellers were forcibly deported from the cities. Those that did not die or get murdered along the way were dispatched to work camps in the rural areas to be re-educated through enslavement. Countless persons were murdered or died of starvation, overwork or sickness and disease. Purges of urban dwellers (who became known as "New People") continued throughout the reign of the Khmer Rouge and there were also waves of internal purges of Khmer Rouge cadre considered to have become threats to the system. Entire villages suspected of harbouring enemies of Democratic Kampuchea

¹⁶⁵ See, for example, Michael Vickery, *Cambodia 1975-1982*, Boston 1984; Ben Kiernan, *The Pol Pot Regime*, Yale University Press, 1996; David Chandler, *Voices from S-21*, Silkworm Books, 1999.

were decimated. “To counter the perceived threat and build a ‘clean social system’, the regime launched a uniquely thorough revolution whereby all pre-existing economic, social and cultural institutions were abolished, all foreign influences were expunged and the entire population was transformed into a collective workforce, required to work at breakneck speed to build up the country’s economic strength.”¹⁶⁶ On 6 January 1979, an invading Vietnamese Army liberated Cambodia from the Khmer Rouge but did not leave until 1989.

In percentage terms, Cambodia had endured one of the worst genocides in history: between a quarter and a third of the population (estimated in 1975 at almost 8 million people) died in less than four years¹⁶⁷. About three-quarters of the survivors were women.¹⁶⁸ This has led many to describe the acts of the Khmer Rouge as genocidal. Within months of the fall of Democratic Kampuchea, many Khmer Rouge cadres fled to the jungles and abroad. Others remained in Cambodia, moved to other parts of the country, and changed their names. The new Vietnamese—and Russian-backed government—the People’s Republic of Kampuchea, headed by former Khmer Rouge official Heng Samrin—held trials of Democratic Kampuchea’s Prime Minister Pol Pot, Deputy Prime Minister Leng Sary, and President Khieu Samphan, among others, and sentenced them in absentia. A few lower-level cadres were jailed.

For their part, the unrepentant Khmer Rouge leaders were able to elude the Vietnamese-led forces and established bases in Thai territory, aided by China and Thailand. Funded by smuggled gemstones and timber, they continued to terrorize local populations throughout Cambodia, who they often forced to march into camps in the

¹⁶⁶ Report of the Group of Experts for Cambodia established pursuant to UNGA Res. 52/135 (Group of Experts Report), transmitted by the Secretary-General along with his own report, UN Doc. A/53/850, S/199/231, paras 15 and 16.

¹⁶⁷ Estimates of the number of people who died during the Democratic Kampuchea regime vary. The People’s Republic of Kampuchea (1979–1989) conducted a national survey and claimed that 3.3 million people died. In his book *The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975–1979* (New Haven and London: Yale University Press, 1996), historian Ben Kiernan estimated the death toll at around 1.5 million. The US Central Intelligence Agency gives an estimate of 1.4 million (*‘Kampuchea: A Demographic Catastrophe,’* May 1980). The most commonly accepted estimates today are between 1.7 and 2 million.

¹⁶⁸ There are several reasons why this might be so. For example, in a male-dominated society such as Cambodia, men hold higher social and professional positions than women and were thus viewed as direct threats to the regime’s authority. Also, the men in the Khmer Rouge army sustained a large number of casualties in battles with the Vietnamese (while the regime claimed equality between men and women, most of the women combatants carried supplies).

jungle. The campaign of destabilization by the Khmer Rouge ensured that Cambodia's civil war continued throughout the 1980s.

In the meantime, the political situation in Cambodia began to take a convoluted and politically expedient shape when three factions aligned to form the Coalition Government of Democratic Kampuchea (CGDK) in 1982. They were the royalist FUNCINPEC party under Prince Sihanouk; the KPNLF under Son Sann, who had served as Cambodia's prime minister from 1955 to 1979; and the Khmer Rouge Army, which made up the largest fraction of the coalition. In light of increasing public resentment over the Vietnamese occupation of Cambodia, the CGDK put forth its platform: 'to mobilize all efforts in the common struggle to liberate Kampuchea from the Vietnamese aggressors.'

The United Nations continued to allow Democratic Kampuchea's representative (through the CGDK) to occupy Cambodia's seat in the General Assembly until 1990, a year after Vietnamese troops had withdrawn from the country. By recognizing this government as the only legitimate representative of Cambodia, the world bestowed a measure of credibility on the Khmer Rouge and bolstered its political strength.

After years of negotiations, all of the parties to the ongoing conflict in Cambodia signed a peace agreement in Paris on 23 October 1991 and agreed to organize a national election under the supervision of the United Nations Transitional Authority in Cambodia (UNTAC). But later, the Khmer Rouge boycotted the UN organized election and refused to demobilize their forces. For several years, Khmer Rouge soldiers continued to fight against the troops of the government formed as a result of the 1993 elections: the Royal Government of Cambodia, which is still in power today. This coalition government was headed by Prince Norodom Ranariddh of FUNCINPEC as first prime minister and Samdech Hun Sen of the Cambodian People's Party (CPP) as second prime minister¹⁶⁹.

By 1996, the power of the Khmer Rouge was clearly on the wane¹⁷⁰, despite its continued military activity in the north and northwest of the country. Both

¹⁶⁹ The CPP was the renamed Kampuchean People's Revolutionary Party, which was the sole ruling party of the 1979–1990 People's Republic of Kampuchea.

¹⁷⁰ The Khmer Rouge had been 'outlawed' by a 1994 law. This law also laid the foundation for future prosecutions in that it stated that 'The crime of genocide has no statute of limitations.' ('Law Outlawing the

FUNCINPEC and the CPP, in an effort to stem the guerilla war the Khmer Rouge was waging in rural areas and bring a measure of stability to the country, made tentative contacts with members of the movement, offering them a generous package of concessions if they would ‘join the government.’ These included ranks in the Cambodian military, continued control over some of the territory held by the Khmer Rouge, natural resources concessions, and even villas in Phnom Penh. The government also offered something that proved irresistible to the former leaders of Democratic Kampuchea: *de facto* amnesties.

The first to accept the offer of amnesty was former Deputy Prime Minister Leng Sary, who defected with a few thousand of his followers in August 1996. As a reward, he was pardoned and his 1979 *in absentia* death sentence revoked¹⁷¹. While this defection split an already weakened Khmer Rouge movement, it also created a huge outcry from survivors of Democratic Kampuchea and forced the issue of justice for the regime’s crimes to the fore.

The pursuit of political agendas during this time worked against the pursuit of justice. Both the CPP and FUNCINPEC were competing to attract Khmer Rouge defectors into their ranks and thus increase their political capital. The CPP, in particular, which held the upper hand, was reluctant to push for trials, fearing that defecting troops would join the ranks of FUNCINPEC and shift the balance of power.

5.1 The long road to the establishment of the Extraordinary Chambers

The first official movement toward trials was a tentative one: in April 1997, the UN Commission on Human Rights adopted Resolution 1997/49. It allowed the Secretary-General to examine any request for assistance in responding to past serious violations of Cambodian and international law. In June of the same year, First Prime Minister Norodom Ranariddh and Second Prime Minister Hun Sen requested assistance from the UN and the international community ‘in bringing to justice those persons

“Democratic Kampuchea Group”, English translation based on the text published in the Phnom Penh Post, vol.3, No.14, 15–28 July 1994).

¹⁷¹ Leng Sary and other Khmer Rouge from the strongholds of Pailin, Malai, and Sisophon formed the Democratic National Union Movement (DNUM) in August 1996, with Leng Sary as its president. In a bid for power, he wrote to the Royal Government of Cambodia (RGC) to announce the movement’s establishment and purpose: ‘Reconciliation, Unity, and Stop Fighting.’ ‘The Democratic National Union Movement

responsible for the genocide and crimes against humanity’ during the Khmer Rouge regime. Their letter to the Secretary-General laid a potential foundation for an international-style tribunal: “*Cambodia does not have the resources or expertise to conduct this very important procedure. Thus, we believe it is necessary to ask for the assistance of the United Nations. We are aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia*”.¹⁷²

According to Ambassador Thomas Hammarberg, who was instrumental in negotiating for the Tribunal from 1997 to 2000, the letter was circulated to the Security Council, but the response from member states and the secretariat was less than enthusiastic, in particular from the Chinese delegation who made clear that they did not want the topic on the Security Council agenda.¹⁷³

During this period, the Khmer Rouge movement continued to disintegrate: in 1997, Pol Pot ordered the execution of former Democratic Kampuchea Minister of Defense Son Sen and his wife Minister of Culture and Information Yum Yat. In July of that same year, Pol Pot himself was tried by a Khmer Rouge ‘people’s court’ and sentenced to life detention. He died on 15 April 1998 in the jungle near the Thai border, of unknown causes.

Two weeks later, the US delegation to the United Nations presented a draft resolution to establish an ad hoc tribunal to try the Khmer Rouge leaders in the Netherlands, similar to the Tribunal on former Yugoslavia. It too faced stiff opposition from the international community.

5.2 Negotiating the Structure of the Extraordinary Chambers

5.2.1 The UN Group of Experts’ Format for the Tribunal

Little progress was made in moving towards a tribunal until November 1998, when the UN sent a Group of Experts to assess the feasibility of bringing Khmer Rouge leaders to justice. Their February 1999 report recommended the creation of an international tribunal to judge the crimes of the Khmer Rouge period. They noted that ‘the

Decision,’ confidential document submitted by Leng Sary to the RGC, 30 August, 1996, held at the Documentation Center of Cambodia..

¹⁷² Thomas Hammarberg, ‘How the Khmer Rouge Tribunal was Agreed: Discussions between the Cambodian Government and the UN,’ http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm.

¹⁷³ Ibid.

Cambodian judiciary presently lacks three key criteria for a fair and effective judiciary: a trained cadre of judges, lawyers, and investigators; adequate infrastructure; and a culture of respect for due process.¹⁷⁴ It continued: “Cambodia still lacks a culture of respect for an impartial criminal justice system. Criminal justice receives only a fraction of a per cent of the national budget, with judges paid as little as \$20 per month. As a result, despite the presence of persons of character in parts of the judiciary, it is widely believed that judges can easily be bought by defendants or victims. The vast majority of judges are also closely associated with the Cambodian People's Party. Powerful elements in the Government such as important political figures, the security apparatus and the Ministry of Justice are widely believed to exert overt and covert influence over the decisions of investigating judges and trial courts. These include threats and physical attacks on judges; or simply the realization among judges that their tenure, and often their prospect of future livelihood, depends upon the approval of political elements”.¹⁷⁵ It was partly as a result of these concerns that the Group of Experts strongly recommended the establishment of an international ad hoc tribunal following the models of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). This was flatly rejected by the Cambodian Government, and it is difficult to imagine that, after experiencing the spiralling budgets and lengthy delays associated with the two existing ad hoc tribunals, the member states of the UN would have been prepared to agree to such a course. The Group's position that trials be held in the Asia-Pacific region, but not Cambodia, was also clear.

5.2.2 The UN Negotiating strategy

Prime Minister Hun Sen, meanwhile, began speaking of the inclusion of other crimes in the UN ‘package,’ including the American bombings of the 1970s and Chinese support for the Khmer Rouge. While there was no denying this historical context, Hammarberg repeatedly stressed the need for the Tribunal to stick to the Khmer

¹⁷⁴ *Report of the Group of Experts for Cambodia established pursuant to GA resolution 52/135*, UN Doc. A/53/850-S/1999/231, Annex (18 February 1999), 126, available online at <http://www1.umn.edu/humanrts/cambodia-1999.html>

Rouge atrocities. Both of Cambodia's major political parties were also battling with accusations that they had collaborated with the Khmer Rouge. This impression was not dispelled with the December 1998 defections of Khieu Samphan (who had officially succeeded Pol Pot as the leader of the Khmer Rouge in 1985) and Nuon Chea (the deputy secretary of the Communist Party of Kampuchea, who is widely believed to have been Pol Pot's right-hand man). Hun Sen received the two men in his private residence, a gesture that indicated that the Prime Minister was moving toward reconciliation, rather than justice. His now-infamous quote on the occasion – that 'the time had come to dig a hole and bury the past' – certainly seemed to contradict his earlier support for the Tribunal.

In March 1999, Cambodia's foreign minister flew to New York to meet with the UN Secretary-General. He delivered an aide-memoire reminding the UN that Democratic Kampuchea was allowed to occupy Cambodia's seat at the UN until the 1991 Paris Peace accords, which gave the movement legitimacy. But the government was not quite finished, and added a statement that did not bode well for the future of a tribunal, noting that: with the total military and political collapse of the Khmer Rouge, Cambodia would now 'focus on other priorities, primarily on economic development and poverty alleviation.' In what appeared to be a final blow later that month, Hun Sen announced in a meeting with Hammarberg that there would be no international tribunal, either within or outside Cambodia because Cambodian law did not allow for the participation of foreigners either as judges or prosecutors. A statement by the foreign minister gave emotional force to this position: "The international community talks about finding justice for the Cambodian people. Cambodia agrees to find justice for Cambodians and for humanity. But what has the international community been doing vis-à-vis the Khmer Rouge lately? Once the genocidal Khmer Rouge regime was toppled, the so-called international community continued to support the Khmer Rouge. The so-called international community forced Cambodia to accept the Khmer Rouge as partners in the Paris peace talks and in the Supreme National Council (SNC). It said nothing about responsibility of the Khmer Rouge, let alone prosecution of them. But now that Cambodia has achieved peace and reconciliation, they call for an international tribunal. Can we trust them?"

Negotiations followed, but were not concluded when the Law was promulgated by the Cambodian Government on 10 August 2001. At this stage, final agreement had not been reached between the UN and the Cambodian Government on the matter of the structure and composition of the CEC.

The Law provided for a three-tiered structure of Trial Court, Appeal Court and Supreme Court, composed of five, seven and nine judges, respectively, with a Cambodian majority and a Cambodian President in each Chamber. It also included the provision that there should be a super-majority required for any decision in any Chamber — i.e. a simple majority plus one. The intention was that this would mean that no decision could be taken without the agreement of at least one international judge. This unusual provision was intended to be a compromise between the UN's strong preference for a majority of international judges, and the Cambodian insistence on a majority of national judges. The compromise appears to have surfaced in the course of negotiations in the summer of 1999. In an internal UN memorandum written about that time, Ambassador Thomas Hammarberg, Special Representative of the Secretary-General for Human Rights in Cambodia, wrote: It would of course be safer to have a foreign majority among both prosecutors or judges. This will probably be difficult for the Cambodian side to accept (this is why the point about decision-making rules might be important). *The essential point is that it should not be possible for the Cambodians — even if appointed from outside — to outvote the foreigners.* There is of course a dynamic aspect here — the awareness that the Cambodian judges themselves cannot alone decide will reduce the risk of pressure¹⁷⁶.

In February 2002, the UN abandoned negotiations with the Cambodian Government. The principal area of disagreement was over the legal status of the proposed agreement between the Cambodian Government and the UN on the establishment of the CEC. However, as the statement by the UN Legal Counsel Hans Corell at the time of the pullout makes clear, the UN was also concerned that 'the Extraordinary Chambers, as

¹⁷⁶ T. Hammarberg, *How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN, Part II: March 1999 – January 2001: The 'mixed' tribunal idea*, available online at http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm.

currently envisaged, would not guarantee the independence, impartiality and objectivity that a court established with the support of the UN must have¹⁷⁷.

Over the following year, at the urging of member states, a rapprochement was effected, and in March 2003 the Secretary-General was able to report to the UN General Assembly that an acceptable draft agreement had been negotiated, and to invite the General Assembly to adopt it. He noted in his report that '[t]here still remains doubt in some quarters about the credibility of the Extraordinary Chambers, given the precarious state of the judiciary in Cambodia'¹⁷⁸. As far as the structure of the courts was concerned, the Secretary-General had advanced a number of proposals in renewed negotiations with the Cambodian Government, with the aim of simplifying and expediting the trial process, and ensuring fair and independent trials. These proposals included a simpler two-tier structure, with a Trial Chamber composed of three judges, and an Appeals Chamber composed of five judges; one prosecutor and one investigating judge, both of whom would be 'internationals', instead of two co-prosecutors and two co-investigating judges; a majority of international judges in each chamber; and the use of a simple majority voting system.

With the exception of the reduction of the number of instances from three to two, the Cambodian Government was not prepared to contemplate any changes to the structure and composition of the courts as set out in its Law of 2001. This was made clear in a statement by the Cambodian Delegation to the UN at the resumption of negotiations in January 2003: "Several years of negotiation have formulated the personal, temporal and material jurisdiction for the Extraordinary Chambers. We should resist any proposal to change the nature of this jurisdiction by altering the balance in the relationship of the number of judges, prosecutors and investigating judges, the super-majority, or the Pre-Trial Chamber to settle any differences between them. When we commenced these negotiations in 1999 our two positions were far

¹⁷⁷ *Negotiations between the UN and Cambodia regarding the establishment of the court to try Khmer Rouge leaders*, Statement by UN Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York, 8 February 2002, available online at <http://www.un.org/News/dh/infocus/cambodia/corell-brief.htm>

¹⁷⁸ *Report of the Secretary General on the Khmer Rouge Trials*, UN Doc. A/57/761, 31 March 2003, at 1

apart. It would be unthinkable now to return to these positions and abandon our hard-won gains in the jurisdiction¹⁷⁹”.

The Secretary-General expressed concern in his report that there had been no movement with regard to these provisions, echoing the sentiments originally voiced by the Group of Experts in February 1999: “... in view of the clear finding of the General Assembly in its Resolution 57/225 that there are continued problems related to the rule of law and the functioning of the judiciary in Cambodia resulting from the interference of the executive in the independence of the judiciary, I would very much have preferred that the draft agreement provide for both of the Extraordinary Chambers to be composed of a majority of international judges. I was, and continue to be, of the view that international judges, who would not be dependent in any way on the executive authorities of Cambodia, would be much less likely to be influenced by, or to yield to, any interference from that quarter. In addition, it would not have been necessary to apply the problematic ‘super-majority’ formula, which was introduced into the negotiations by member states, and not by the United Nations Delegation. ... Doubts might therefore still remain as to whether the provisions of the draft agreement relating to the structure and organization of the Extraordinary Chambers would fully ensure their credibility, given the precarious state of the judiciary in Cambodia.

5.2.3 The Agreed Outcome

The Agreement which was approved on 13 May 2003 reflects the UN's acceptance of the Cambodian Government's refusal to agree to significant changes to the structure and composition of the Chambers¹⁸⁰. Article 3 provides for two Chambers, a Trial Chamber and a Supreme Court Chamber, consisting of five and seven judges, respectively. The Supreme Court Chamber serves as both an appellate chamber and a court of final instance. In all other significant respects, the

¹⁷⁹ Statement of the Cambodian Delegation to the United Nations regarding the establishment of Extraordinary Chambers within the Courts of Cambodia, 12 January 2003, available online at <http://www.cambodia.gov.kh/krt/pdfs/Sok%20An%20Statement%20in%20NY.pdf>

¹⁸⁰ Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea, 6 June

composition and structure of the Chambers is as provided in the Law of January 2001. The Law, with Amendments promulgated on 27 October 2004, also reflects this¹⁸¹. The weakness of the UN's position is shown by the fact that only one of the Secretary-General's proposed modifications to the structure and composition of the courts — one which did not affect the Cambodian dominance of the system — was accepted¹⁸². So keen were the member states to conclude an agreement that the UN was prepared to concede all these points rather than risk a further breakdown in negotiations. It is a reflection of doubts on the part of the UN that the Agreement which was approved on 13 May 2003 included the provision in Article 28 that: *Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement.*

The negotiations had been conducted in an atmosphere of suspicion and mistrust that the conclusion of the Agreement did not end. Article 28 reflects a queasy lack of confidence with which the Agreement is viewed by the UN. Doubts as to whether these trials will really produce any measure of justice are widespread.

2003 (hereafter 'CEC Agreement'), entered into force 29 April 2005, UN Doc. A/RES57/228B (Annex) (13 May 2003), available online at <http://www.cambodia.gov.kh>

¹⁸¹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea, 10 August 2001, with inclusion of Amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) (hereafter 'CEC Law'), available online at <http://www.cambodia.gov.kh>.

5.3 Legal Framework

5.3.1 Temporal Jurisdiction

Under the Agreement and the Law, the temporal jurisdiction of the Extraordinary Chambers, extends from 17 April 1975 to 6 January 1979. The period covered is the height of the reign of the Khmer Rouge. It is not unusual for an internationalized judicial body to have jurisdiction only in respect of crimes committed during a specific period of time. Yet it needs to be kept in mind that crimes such as the ones within the subject matter jurisdiction of the Extraordinary Chambers have been committed before and after this period. The Cambodian conflict, in reality, engulfed the country in violence from at least the end of the 1960s to the early 1990s and if a more expansive approach were to be taken to the conflict, similar events in Laos, Thailand and Vietnam would also have to be considered.

The choice to limit the temporal jurisdiction to the period from 17 April 1975 to 6 January 1979 was, at least in part, a pragmatic one, founded on the wish not to overburden the Extraordinary Chambers, the wish to enable the Extraordinary Chambers after their establishment to start their work promptly and the wish to limit the financial and the human resources needed.

5.3.2 Subject matter Jurisdiction

The Agreement repeatedly and in different levels of detail enumerates the crimes that are within the subject matter jurisdiction of the Extraordinary Chambers. In the third preambular paragraph it is stated in a general way that these are: “crimes and serious violation of Cambodian penal law, international humanitarian law and custom and international conventions recognised by Cambodia”. This is repeated in Article 1 of the Agreement, while Article 2, paragraph 1, provides that Extraordinary Chambers have subject matter jurisdiction consistent with that set forth “in the Law on the Establishment of the Extraordinary Chambers...” as adopted and amended by the Cambodian Legislature under the Constitution of Cambodia.

¹⁸² It should be noted that the Agreement does not stipulate that the President of each Chamber should be Cambodian; however, this is stipulated in Art. 9 of the Law, and since the Law is not contrary to the Agreement in this respect, it therefore applies.

The reference to the Law in Article 2 notwithstanding, Article 9 of the Agreement gives a more detailed description of the crimes in question and lists:

the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the ICC and graves breaches of the 1949 Geneva Conventions and such other crimes defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001.

The international crimes mentioned in the Agreement (genocide, crimes against humanity and graves breaches of the 1949 Geneva Conventions) can also be found in the law. However, the definitions used in the Law are not identical to the definitions referred to in the Agreement.

The definition of genocide in the Law duplicates the definition of Article 2 of the 1948 Genocide Convention. However, when the Law tries to duplicate Article 3 of the Genocide Convention, it is not identical. Contrary of the Article 3 of the Genocide Convention, the Law does not allow for acts of “direct and public incitement to commit genocie” and “complicity in genocide” to fall under the subject matter jurisdiction of the Extraordinary Chambers. On the other hand “participation in acts of genocide” in not mentioned in Article 3 of the Genocide Convention, but it does fall within the subject matter jurisdiction of the Extraordinary Chambers.

As to crimes against humanity, the Law is somewhat more limited the the Statute of the ICC, referred to in Article 9 of the Agreement. More specifically, the Statute inter alia states as crimes againts humanity:

- imprisonment or other serious deprivation of physical liberty in violation of funadamental rules of international law;
- rape, sexual slavery, forced prostitution, forced pregnancy, enforces sterilization or any other form of sexual violence of comparable gravity, and
- persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender..., or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jursidiction of the Court.

The Law, on the other hand, refers to, respectively:

- imprisonment;
- rape, and
- persecution on political and religious grounds.

Moreover, the crime against humanity of enforced disappearance of persons is not in the Law at all. However the use of the word of “crimes against humanity...such as” in the next of the Law indicates that its enumeration of crimes is only indicative and therefore not exhaustive.

When the more detailed description of the subject matter jurisdiction in Article 9 of the Agreement is compared with the subject matter jurisdiction as formulated in the Law (Chapter II), it is possible to argue that the two are not identical. In respect of two of the three categories of international crimes (genocide and crimes against humanity) the Law lacks of clarity. The enumeration of crimes in the Law does not match with the international legal instruments referred to in the Agreement.

In order to make the Law consistent with Article 9 of the Agreement, either the enumeration in the Law should be eliminated and replaced by a rule of reference or the enumeration should be made fully consistent with the international legal instruments specified in Article 9 of the Agreement. The former approach was adopted in the Law with regard to the other remaining crimes under international law, namely the destruction of cultural property and crimes against internationally protected persons: these are not defined separately in the Law, but the Law relies on the international definition of these crimes instead.

5.3.3 Personal Jurisdiction

The Agreement and the Law are identical as to which persons should be brought to justice, namely “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations”. This formulation of the Chambers’ personal jurisdiction is open to different interpretations and shows the high political and practical decisions that had to be made to get support within Cambodia for the Extraordinary Chambers.

Questions that arised when reading this definition are how seniority shall be defined and how it can be established that a person is “most responsible” (as opposed to, for example, “more responsible” or “substantially responsible”). These delicate issues have to be decided by the Extraordinary Chambers on a case by case interpretation. A comparative analysis of the Extraordinary Chambers judges on how the Special Court for Sierra Leone has dealt with this specific issue (for Sierra Leone the approach was based on ‘those who bear the greatest responsibility) is desirable and might pave the way to the consolidation of a principle of international law.

5.3.4 Amnesty

In 1979 a trial *in absentia* was held in Cambodia in which Ieng Sary and Pol Pot were convicted for genocide. In August 1996 the Cambodian king granted Ieng Sary amnesty, not only from his 1979 conviction for genocide, but also from prosecution under a 1994 Cambodian Law which outlawed the Khmer Rouge.

The United Nations at fist held the position that an amnesty decreed on a national level could not apply to international crimes such as genocide. The Cambodian governmet, however, refused to repeal the amnesty for Ieng Sary. It had therefore included in the law that it would not request any further amnesty or pardon for persons investigated or convicted of one or more of the crimes under the jurisdiction of the Extraordinary Chambers. This implied that the existing amnesty for Ieng Sary would be maintaned. A compromise was found for the text of the Agreement, with the effect that is would have been a matter for the Extraordinary Chambers to decide to what extent Ieng Sary’s amnesty will serve to bar his prosecution or conviction. On November 12, 2007, Ieng Sary has been arrested and charged with crimes against humanity and war crimes after a warrant was issued by the co-investigatong judges of the Extraordinary Chambers and the Law changed accordingly.

5.4 General Principles of Criminal Law

5.4.1 Statute of limitations

The Agreement does not contain any provisions on a statute of limitations for the crimes within the jurisdiction of the Extraordinary Chambers, not does it claim the non-applicability of a statute of limitations. The drafters presumably took the position

that for crimes against humanity, as well as other international crimes, no statute of limitations applies. However, for the crimes under national criminal law of homicide, torture and religious persecution, the situation is different. The 1956 Cambodian Criminal Code has a statute of limitations of 10 years and the Law on the Establishment of the Extraordinary Chambers has extended the limitation period for these crimes with 20 more years.

This extension of the statute of limitations raises two questions, to which the legal available instruments do not provide an answer. First, can the law have any effect on crimes for which the limitation period had already ended before the Law came into effect (under the 1956 Criminal Code the possibility to judge these crimes ended between 17 April 1985 and 6 January 1989)? Has the possibility of trying these crimes simply revived by the entry into force of the Law? It is questionable whether affirmative answers to these questions are in conformity with the criminal law principle of non-retroactivity.

Secondly, it appears to be the intention of the Law that the extension of the limitation period only applies in respect of the crimes of homicide, torture and religious persecution when they are tried by the Extraordinary Chambers, since the Law extends the statute of limitations for the crimes of homicide, torture and religious persecution “which are within the jurisdiction of the Extraordinary Chambers”. If this is true, it means that a person falling within the personal jurisdiction of the Extraordinary Chambers can be tried for homicide, torture and religious persecution for 20 more years than any other person who committed such crimes during the same period (who cannot be brought before the Extraordinary Chambers). One could argue that this is not consistent with the principle of equality before the law.

5.4.2 Individual responsibility

The Agreement implies that acts within the jurisdiction of the Extraordinary Chambers engage the individual responsibility of the perpetrators but it does not detail the conditions and modalities of such responsibility. Article 29 of the Law does elaborate on the individual responsibility of those who fall under the jurisdiction of the Extraordinary Chambers.

Those who plan, instigate, order, aid, abet or commit the crimes are individually responsible. This provision is comparable to Article 25 of the Statute of the ICC, but is less elaborate. To name just two differences: the Law does not explicitly make punishable the act of providing the *means* for the commission of a crime and the Law does not make punishable the *attempt* to commit a crime.

Position or rank in the Khmer Rouge organization will not per se relieve a person of criminal responsibility and does not preclude that a relatively low-ranking officer can be most responsible. The responsibility of a low-ranking officer does not dissolve because of the fact that he or she committed a crime while following an order, and a high-ranking officer has full criminal responsibility if a subordinate committed a crime under his or her effective command and control and his or her authority and control, if the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent or punish such acts.

The provision in the law that the fact that a low ranking officer was following an order does not take away his or her responsibility, introduce a standard that is more strict than, for example, the Statute of the ICC, and somehow more strict than the Regulation on the Special Panels in East Timor.

5.5 The Organization of the Extraordinary Chambers and problems arising from the Super-majority Arrangement

As described above, a recurring source of conflict between the United Nations and the Cambodian Government has been the organization of the Extraordinary Chambers. At the end, the structure and composition that has been finally agreed for is unique and may pose some problems.

The Sierra Leone and Timor model of hybrid tribunals have used chambers consisting of national and international judges with a majority of international judges and a simple majority voting system. International judges have been used in a minority within the existing legal structure in Kosovo, without significantly improving the standards of justice, but the situation is too different to afford any real comparison. As a result, the super-majority requirement is unique to the CEC. It is therefore difficult to argue with

reference to parallel situations, because no real comparisons exist. However, it is clear that there are inherent problems in the structure as provided.

The super-majority provision is drafted under Article 14 of the Law as follows:

- 1) The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:
 - a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges;
 - a decision by the Extraordinary Chamber of the Supreme Court shall require the affirmative vote of at least five judges.
- 2) When there is no unanimity, the decision of the Extraordinary Chamber shall contain the opinions of the majority and the minority.

It is in this provision that the real problems lie. Ambassador Hammarberg writes:

The ‘super majority’ notion is clearly a compromise and not without problems. It carries an implicit notion of there being two categories of judges — which would be an unfortunate perception even in more normal circumstances. Such a notion of two ‘sides’ seems to be based on a lack of trust which ought to be handled more directly. Also, the model could in real life lead to stalemate situations in which there would be a majority, but not a large enough one for a decision¹⁸³.

This possibility is a very real one. Whilst in most court systems in which issues of fact are determined by a panel of professional judges, a decision is guaranteed, as in cases of disagreement a simple majority will prevail; however, under the system in the CEC, if the Trial Chamber is split 3-2, or the Appeals Chamber 4-3, no decision is possible. Trials may therefore end in an unsatisfactory limbo, where there is neither a conviction nor an acquittal, and in such cases, accused persons will presumably have to be freed without any decision being made.

¹⁸³ T. Hammarberg, *How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN, Part II: March 1999 – January 2001: The ‘mixed’ tribunal idea*, available online at http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm

This situation is an unhappy one, and the fear of many commentators is that it may lead to the release of defendants who, on evidence and in the view of the international judges, should be convicted. This would result in the process being seen as a costly and time-consuming charade.

It should be noted that, undesirable as this may be, such uncertain conclusions to trials are not without parallel — for example, in some court systems (such as Scotland), a verdict of ‘not proven’ has a similar effect. So too does the situation in jury systems where a jury has been unable to reach the required majority for a decision, and a ‘hung’ jury results in the defendant being freed without a verdict¹⁸⁴.

But the CEC have an even greater potential problem, which may surface long before the stage at which verdicts are considered. The super-majority voting system applies to all decisions, not simply to decisions as to guilt or innocence. There will, therefore, be many decisions that are required on motions filed by the parties during the course of the trial which may be impossible to resolve. The problem, arising from the fact that this rule must apply to all decisions, and not simply to the final one, is acknowledged by the existence of a special rule concerning proceedings in the Pre-Trial Chamber. Here the Agreement stipulates at Article 7 that ‘[i]f there is no majority, as required for a decision, the investigation or prosecution shall proceed’¹⁸⁵.

It would not be possible to formulate a simple rule like this in respect of the many varied matters on which the Trial Chamber or the Supreme Court Chamber may have to decide, and no attempt has been made to do so. Such issues include, for example, the protection of witnesses, the disclosure of documents, and the admissibility of evidence. These issues can be matters of fundamental importance to both parties. If there is no decision, for example on whether a piece of evidence should or should not be admitted, it may be effectively impossible for a trial to continue.

Two simple examples illustrate the point: suppose the prosecution wants to produce as part of its case documents — e.g. the notes of meetings at which it alleges the

¹⁸⁴ For example in England and Wales, a verdict of Not Guilty will be entered in the court record at the direction of the judge if the prosecution decides, or the judge rules, that a defendant shall not be proceeded against again after one or more trials resulting in ‘hung’ juries.

defendant was present — which provide evidence of the defendant's guilt. The defence argues that the evidence is inadmissible. The judges are unable to reach a decision, as they are split 3-2. How then can the trial continue? There is no decision, so the evidence is neither in, nor out. The prosecution does not know whether it can rely on it, or not. The defence does not know whether it needs to counter it, or not. Most importantly, the judges cannot get to the stage of making a final decision, as there is no preliminary rule as to whether or not the evidence in question can form a part of the evidence on which they must give their judgment.

Similarly, there may be arguments with regard to disclosure. The defence may request the judges to order that the prosecution disclose a certain document — e.g. the record of a conversation between prosecution lawyers and a witness. The prosecution argues that the defence has no right to it. Again, the judges are split 3-2, and there is no decision. What happens then to the document? Should the prosecution be entitled to retain it, despite the fact that there is an outstanding request for its disclosure on which there has been no decision? How does this impact on the rights of the defendant? If the defence considers the document may be vital to its case, how then can it continue, without a decision?

The continuation of the trial in such cases is, therefore, left in limbo. The system is likely to be seriously debilitated, leading to a process that is at best slow and cumbersome, at worst inoperable. If proceedings suffer breakdown in the early stages due to this provision, the question of unsatisfactory conclusions to trials may never even arise.

It should also be noted that, where there is no unanimous or super-majority decision, there is no provision under which the opinions of the judges shall be published; Article 14.2 of the Law¹⁸⁶ provides only for the publication of the opinion of the majority and the minority where there is a decision, in the event of a Chamber being split 3-2, there

¹⁸⁵ CEC Agreement, Art 8.4. See also CEC Law, Arts 20 and 23.

¹⁸⁶ CEC Law, Art 14.2. See also CEC Agreement, Art 4.

is no decision, and therefore no provision for the conflicting opinions to be published¹⁸⁷.

So, if super-majority decisions are not reached, there may be no official information as to the division of opinions among the judges. Given that such divisions may cripple the court process, the omission is a serious one for the openness of justice.

There is one further serious problem. Under Article 36 of the Law:

The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court ...¹⁸⁸

There is no provision under which non-decisions can be appealed; if the trial court fails to reach a decision, that is the end of the matter. Therefore, issues of fundamental importance (including the issue of guilt) which have caused division, but not decision, in the trial court, will never reach the Supreme Court at all. It is difficult to believe that such an outcome was intended by the drafters of the legislation. Its effect is to deal a devastating blow to the effectiveness of the Appeals System, and therefore the system of the CEC as a whole.

The disagreements between the UN and the Cambodian Government concerning the structure and composition of the Chambers were, from the beginning, fundamental. It is clear from the final 'compromise' that these disagreements have been resolved almost entirely in line with the position taken by the Cambodian Government. Without this capitulation on the part of the UN, there would have been no agreement, as the Cambodian Government was unwavering in its refusal to countenance a court in which its nationals were not in the majority.

The answer to the question as to whether the Secretary-General's preferred course involving international dominance of the Chambers would have been better is, therefore, both obvious and otiose, as this scenario would never have arisen. The only real question is, whether the Agreement as it stands is better than a breakdown in

¹⁸⁷ Of course, there is no clause which makes this explicit, but given that the situation where there is a decision but no unanimity is specifically provided for, one must assume that had the drafters intended to make non-decisions come under the same rule, they would have included words to that effect.

negotiations which would have led to there being no international support for the CEC at all. The UN's answer to this question is contained in its signature of the Agreement on 13 May 2002; its reservations are contained in the 'get out' clause it included in Article 28 of that Agreement.

The answer given by history may be a different one. The view that any form of justice, however unsatisfactory, is better than nothing is not one that is likely to stand the test of time. It seems certain that the structure and composition of the CEC is such that their operation will be under constant threat of incapacitation and breakdown. It is a cheerless prospect for what may well turn out to be a thoroughly unsatisfactory experiment in justice.

5.6 Latest developments

(...)

¹⁸⁸ CEC Law, Art 36.

CHAPTER SIX

INTERNATIONALIZED COURTS: ADVANTAGES AND PITFALLS

6.1 Potential Advantages of Hybrid Courts

The success of any effort to confront past atrocities, whether through criminal trials, truth commissions, civil compensation schemes, vetting of public officials, or some combination thereof, will depend on the particular social, political, and cultural context. The need for such an effort to confront the past, and the role it might play in establishing peace and democratic institutions of governance, likewise varies considerably depending on the unique circumstances of each case: there are no cookie-cutter solutions to these highly complex problems. The Kosovo, East Timor, Sierra Leone and Cambodia cases share enough similarities, however, that one can use them to draw a few tentative conclusions about the promise that hybrid courts hold in other settings. In particular, hybrid courts may offer at least partial responses to the problems of legitimacy, capacity, and norm--penetration discussed previously.

In Kosovo and East Timor, for example, the addition of international judges and prosecutors to cases involving serious human rights abuses may have enhanced the perceived legitimacy of the process, at least to some degree. In both contexts, the initial failure of UN authorities to consult with the local population in making governance decisions generally, and decisions about the judiciary specifically sparked public outcry. Without normal political processes in place, of course, such consultation is inherently difficult. When no elected officials exist to give advice, and civil society is badly damaged by years of oppression and conflict, it is not at all clear precisely which people should be consulted without creating impressions of bias. Thus, in both Kosovo and East Timor the appointment of foreign judges to domestic courts to sit alongside local judges and the appointment of foreign prosecutors to team up with local prosecutors helped to create a framework for consultation that may have enhanced the general perception of the institution's legitimacy. By working together and sharing responsibilities, international and local officials necessarily consulted with each other.

The appointment of international judges to the local courts in these highly sensitive cases may also have helped to enhance the perception of the independence of the judiciary and

therefore its legitimacy within a broad cross-section of the local population. In Kosovo this was most apparent, as the previous attempts at domestic justice had failed to win any support among Serbs. Indeed, Serbian judges refused to cooperate in the administration of justice and the verdicts in the cases tried by ethnic Albanians were regarded by the ethnic Serbian population as tainted. In contrast, the verdicts of the hybrid tribunals garnered considerable support, even among Serbs.

The sharing of responsibilities among local and international officials is not a complete cure for legitimacy problems, of course. Indeed, such hybrid relationships can raise new questions about who is really controlling the process. When international actors wield more power than local officials - when the majority of judges on a given panel is international, for example, or when the local prosecutors merely serve as deputies to international prosecutors - some may charge that the international actors control the process and that such control smacks of imperialism. In East Timor, some local actors involved in the criminal justice process criticized the hybrid court on these grounds. On the other hand, too little international control may lead to concerns about the independence and impartiality of overly locally controlled processes. And the devil is, of course, often in these details. Nonetheless, the shared arrangement does offer more promise of working out these difficulties than a purely international or a purely domestic process.

The hybrid process offers advantages in the arena of capacity-building as well. The side-by-side working arrangements allow for on-the-job training that is likely to be more effective than abstract classroom discussions of formal legal rules and principles. And the teamwork can allow for sharing of experiences and knowledge in both directions. International actors have the opportunity to gain greater sensitivity to local issues, local culture, and local approaches to justice at the same time that local actors can learn from international actors. In addition, hybrid courts can serve as a locus for international funding efforts, thereby pumping needed funds into the rebuilding of local infrastructure.

To be sure, hybrid courts also face difficulties in capacity-building. A lack of resources has proven to be the most serious problem so far. For example, in both Kosovo and East Timor, the hybrid courts have been given an enormous mandate without receiving sufficient funding. Court personnel lack even the most basic equipment necessary for them to do their jobs; translators and other administrative personnel are in short supply; and, perhaps most significantly, the courts have had trouble attracting and retaining qualified international

personnel to fill posts as judges, prosecutors, and defense counsel. To the extent that hybrid courts are touted as a means of doing justice on the cheap and are then deprived of even the most basic resources, they cannot fulfill their potential. Nonetheless, such concerns about funding are issues more of implementation than conception. And, of course, lack of resources can be a problem regardless of the legal framework adopted.

With respect to the penetration and development of the norms of international humanitarian law, hybrid courts potentially offer still further benefits. Because the personnel of such institutions include both international and domestic judges, the opportunities are much greater for the cross--fertilization of international and domestic norms regarding accountability for mass atrocity. In a sense, the hybrid courts themselves create a network of international and domestic legal professionals, providing a setting in which they can interact, share experiences, and discuss the relevant norms, both in and out of the courtroom. Of course, the argument that this network will result in the better use and richer development of international norms (and of domestic ones) assumes that the foreign judges will be experts in the jurisprudence of the international tribunals, an assumption that has not been borne out in the Kosovo case, where the hybrid courts often have failed even to cite relevant cases from the ICTY. In East Timor, the difficulty in attracting qualified international personnel has led to similar problems.

Yet again, these problems stem more from resource constraints than from structural problems with the hybrid model. Because international and local legal professionals can work together in the hybrid court setting, there is at the very least an opportunity for the kinds of interactions that can result in the local application of existing international humanitarian law as well as the local development of mass atrocity norms. In Sierra Leone, for example, the Secretary—General has emphasized that the hybrid court should be guided by the jurisprudence of the ICTR and ICTY. To the extent that some of the judges appointed to the court are aware of this jurisprudence, they are more likely to apply it and share their knowledge with the others. In turn, the Sierra Leonean legal professionals involved in the work of the court will be more likely to use and develop these principles, not only within the hybrid court but perhaps in future cases in domestic Sierra Leonean courts as well. The international humanitarian law norms are thus more likely to penetrate into Sierra Leonean legal culture than norms applied in a remote tribunal by foreigners.

Indeed, the establishment of hybrid courts may not only aid in the penetration of norms within the transitional countries affected, but in the growth of regional human rights norms as well. For example, it is significant that many of the judges on both the ICTR and the Sierra Leonean hybrid court are African. Because the hybrid court will be applying norms from the ICTR, the interaction among the various judges will create a cadre of African jurists who have become familiar with international humanitarian and human rights law as well as international legal procedures. Ultimately, these judges will return to their various countries, bringing their experience and knowledge with them. Moreover, the hybrid court in Sierra Leone may well develop and apply these norms in an African context and perhaps contribute to regional mass atrocity jurisprudence.

6.2 The Relationship between Hybrid Courts and International Courts

Some critics have suggested that hybrid courts are mere second best alternative to international courts. So, for example, it could be argued that the hybrid courts established in East Timor and Sierra Leone arose only because of "tribunal fatigue" and that the existence of an international tribunal with applicable jurisdiction would have made these courts unnecessary. On the other hand, the experience in Kosovo demonstrates that hybrid courts need not be a replacement for international justice (or for local justice either). Rather, the hybrid courts in Kosovo were a necessary complement to international tribunals. Indeed, the use of hybrid courts in Kosovo, in the shadow of the ICTY, may have implications for the relationship of such courts to the newly established ICC. The ICC's complementarity regime ensures that, in general, the ICC can only assume jurisdiction if national courts are unwilling or unable to investigate. Yet, it is precisely in these circumstances that large numbers of cases cannot adequately be resolved by local courts, and the volume of these cases is likely to far outstrip the ability of the ICC to adjudicate them. In these circumstances, hybrid courts can play a useful role by addressing the less high profile cases, thereby providing a forum to try those accused of committing mass atrocities, who might otherwise languish in prison for many years awaiting trial or escape accountability altogether. Indeed, as noted previously, the United Nations established hybrid courts in Kosovo precisely because the ICTY could not handle the volume of atrocities cases from the region.

In addition to serving simply as a supplemental adjudicatory body, the potential advantages of hybrid courts that have already been discussed - fostering broader public acceptance,

building local capacity, and helping to disseminate norms - may also help the ICC to function. Hybrid courts may help the international court gain legitimacy among local populations because, operating in tandem with the ICC, hybrid courts can ground the pursuit of individual accountability for atrocities more squarely within local legal and popular culture. Of course, reciprocity can work in both ways: if a hybrid court were plagued with problems - such as perceived bias toward specific political or ethnic groups or excessive delay due to lack of resources - those problems might taint the entire international justice effort. And turf battles between

the two types of institutions, including disputes about evidence sharing and the appropriate division of cases among the two institutions, might lead to difficulties. Nonetheless, it is easy to envision ways in which both institutions might help to reinforce the legitimacy of the other. Likewise, the interaction between the ICC and a hybrid court could help in the development of the local justice sector. Finally, with respect to norm penetration, the existence of a hybrid court is more likely to foster the regional and domestic implementation of the norms articulated and interpreted in the jurisprudence of the international court.

One difficult question is whether the successful operation of hybrid courts might strip the ICC of jurisdiction because of the complementarity regime. As mentioned previously, the ICC's complementarity principle generally deprives the court of jurisdiction unless domestic courts are "unwilling" or "unable" to prosecute a given case. This presents a dilemma with regard to hybrid courts. After all, if a domestic court system otherwise without the ability to prosecute a case is able to do so only because of the creation of a hybrid court within that system, as in Kosovo or East Timor, does the establishment of the hybrid court strip the international court of jurisdiction? If so, then we might worry that the creation of hybrid courts could endanger the effective deployment of the ICC.

Nevertheless, while the answer to this question is not obvious, I believe the existence of hybrid courts need not divest the ICC of jurisdiction under the complementarity regime for several reasons. First, the existence of hybrid panels might render the domestic court system capable of handling some cases but not others. For example, the existence of a hybrid court might make it possible for the local justice system to handle the trials of lower level subordinates, but even a hybrid court might have difficulty trying the leaders most responsible for mass atrocities. Admittedly, this is not the model of the Sierra Leonean

Special Court, which was created specifically to try those bearing the "greatest responsibility."

However, in the Sierra Leonean case, no international forum existed with which to share cases. In contrast, once the ICC is in operation, an international forum would be available, and a hybrid court would not need to try the high level leaders. Thus, a more likely model of coexistence with international tribunals is the Kosovo example, where the hybrid court and the ICTY have divided cases in this way.

Second, even apart from the argument about ability, a state that does not *wish* to prosecute a given case and would prefer ICC involvement might well be deemed "unwilling" to prosecute. Thus, a state could choose to leave some cases for the international forum to resolve, even if a hybrid court existed.

Third, it could be argued that the ICC jurisdictional test must be applied based on the capacity of the domestic court system *prior to* international involvement. Thus, even if a hybrid court had been established, with international judges and prosecutors playing key roles, such activity would not necessarily alter the inquiry regarding whether the *domestic* court system was willing and able to prosecute. This is because, regardless of the formal label, the hybrid court is not truly part of the domestic court system; by definition, it is a hybrid domestic/international court.

Finally, as a practical matter, the decision to establish a hybrid court will most likely be made at the same time that the ICC is considering its jurisdiction, rather than at some prior point. Thus, one would expect that, after order is established in the wake of a series of human rights violations, various actors both domestically and internationally would consider how best to ensure accountability. At that point, the ICC would evaluate its jurisdiction, while the possibility of a hybrid court would also be considered. Accordingly, it seems unlikely that a hybrid court option would supplant ICC jurisdiction. Rather, from the very start, they could be viewed as complementary processes.

6.3 Conclusion

A hybrid court is not a panacea, of course. Indeed, one of the important lessons of the scholarship on transitional justice is that no mechanism is perfect, and none is appropriate in all contexts. Moreover, many accountability and reconciliation processes can operate in tandem and complement one another. Thus, the use of one approach almost never excludes other possibilities. This ecumenical perspective may be one of the primary reasons that the field of transitional justice continues to be a font of on--the--ground creativity and innovation.

Hybrid courts are merely the most recent step in this endless process of creative adaptation. Responding to significant shortcomings in both purely international and purely domestic approaches, hybrid courts have been devised in at least four settings and are under consideration elsewhere. These courts, though often hampered by underfunding and other logistical difficulties, at least have the potential to address three serious drawbacks of both international and domestic tribunals. First, they may be more likely to be perceived as legitimate by local and international populations because both have representation on the court. Second, the existence of the hybrid court may help to train local judges and funnel money into local infrastructure, thereby increasing the capacity of domestic legal institutions. Third, the functioning of hybrid courts in the local community, along with the necessary interaction---both formal and informal---among local and international legal actors may contribute to the broader dissemination (and adaptation) of the norms and processes of international human rights law.

Moreover, any fears (or hopes) that these hybrid courts will serve as a complete substitute for purely international or purely domestic courts are misplaced because the hybrid courts are best viewed as a complement to both. Indeed, there is no reason to believe that hybrid courts will divest the ICC of jurisdiction. Rather, because the ICC will never be able to try more than a few cases in any given setting, the hybrid courts may continue to be a necessary part of any transitional justice process.

In any event, simply by highlighting hybrid courts as a new transitional justice mechanism to be recognized and considered, I hope to encourage further study of their strengths and weaknesses both in theory and in practice. While the heartbreaking reality of this field is that atrocities continue to occur, the saving grace is that people continue to innovate and create new models to address the brutality of the past and help to build a more peaceful future.

Hybrid domestic/international courts are merely the most recent creative adaptation, and those who work in this area should soberly assess the promise and pitfalls of hybrid courts, while celebrating the innovative spirit that has led to their creation.