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Mixed Jurisdictions for East Timor, Kosovo, Sierra Leone and Cambodia: The Coming of Age of Internationalized Criminal Bodies?

*by Cesare P.R. Romano**

Abstract

Between 1999 and 2001, three new criminal jurisdictions were created in East-Timor, Kosovo and Sierra Leone. Negotiations for the creation of a fourth internationalized body to address crimes committed by the Khmer Rouge are underway.

Although these bodies are quite diverse, internationalized criminal bodies do form a family on their own. They all have *mixed* nature, incorporating at the same time international and national features: they are composed of international and local staff (both judges, prosecutor, support staff), and apply a compound of international and national substantial and procedural law; hence the term "internationalized" or "hybrid" criminal courts and tribunals.

This article, focusing on the fundamental features of internationalized criminal bodies, makes the case for their study as a single family, in its own right, within the class of international judicial organs.

Internationalized criminal bodies have a future. Indeed, the ICC jurisdiction has a number of limitations, and there are plenty of situations where international crimes have been, or will be, committed that might be addressed by way of ad hoc internationalized criminal bodies. Limits to the ICC jurisdiction aside, internationalized criminal bodies are likely to continue existing. First, whenever UN missions are entrusted with the task to restore peace and maintain order in territories where normal administration had ceased to exist (like in East Timor and Kosovo), they are critical pieces of the newly reconstituted state machinery. Second, they represent localized alternatives, which might be politically more desirable to victims and key-players, such as the U.S., than the ICC.

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I. Introduction

There is no question that one of the most remarkable consequences of the end of the Cold War on international law has been the rekindling of the idea of international criminal responsibility, and the flourishing of institutional mechanisms to try and sanction gross violations of humanitarian law and human rights.

Historically there are numerous examples of internationally based efforts to try perpetrators of crimes against humanity, ranging from the special mixed tribunals created in the nineteenth century for the suppression of the African slave trade,[1] to the Nuremberg and Tokyo trials in the wake of the Second World War.[2] However, the division of the world into two an-

1 In the nineteenth century, several treaties for the suppression of the African slave trade provided for the establishment of mixed tribunals to adjudicate upon seizures of vessels suspected of slave trading. Great Britain, which was the most pro-active country in trying to eradicate the slave trade (and had the naval power to do so) weaved a web of bilateral treaties with several countries engaged in the practice. To ensure enforcement of the abolitionist agreements, mixed courts, composed of an equal number of British and foreign officers, were to decide whether the vessel was actually engaged in slave trading and could therefore be rightfully seized. Usually, each treaty established at least two mixed tribunals: one of each to sit in the territory of each party, of which one at least had to be in Africa (in the case of Great Britain it was located in Sierra Leone). These mixed tribunals functioned with the cooperation of Argentina, Bolivia, Brazil, Chile, Ecuador, the Netherlands, Portugal, Spain and Uruguay. See for instance the treaties concluded with Portugal (July 28, 1817, 67 CONSOL.T.S. 373; July 3, 1842, 93 CONSOL.T.S. 255), Spain (Sept. 23, 1817 68 CONSOL.T.S. 45; June 28, 1835, 85 CONSOL.T.S. 177), the Netherlands (May 4, 1818, 68 CONSOL.T.S. 403), and Brazil (Nov. 23, 1826, 76 CONSOL.T.S. 491). The U.S. concluded a similar bilateral agreement with Great Britain on April 7, 1862 (125 CONSOL.T.S. 435). Article 4 provided for the creation of three mixed tribunals (in Sierra Leone, at Cape of Good Hope, in South Africa, and in New York), each composed of two judges, one appointed by each government, and two arbitrators similarly appointed as umpires. The mixed courts sitting in Sierra Leone adjudicated 535 cases in the period 1819-1866. BOLESLAW ADAM BOCZEK, HISTORICAL DICTIONARY OF INTERNATIONAL TRIBUNALS 18-19 (1994); HENRY DE MONTARDY, LA TRAITÉ ET LE DROIT INTERNATIONAL 75-98 (1899).

2 After the First World War there were attempts to create international criminal judicial bodies to try major violations of international humanitarian law. Pursuant to Articles 228-230 of the Treaty of Versailles, Germany agreed to turn over suspected war criminals to the Allies for trial by Allied tribunals. However, because the German government eventually refused to comply, the Allies agreed to accept an offer by Germany to try a select number of individuals before the Criminal Senate of the Imperial Court of Justice of Germany. Forty-five individuals were selected for prosecution. Of these only twelve were actually brought to trial. The trials resulted in six convictions and six acquittals. The Treaty of Versailles also contained a clause (Article 227) where the Kaiser, William II of Hohenzollern, was arraigned "... for a supreme offence against international morality and the sanctity of treaties." A special tribunal, composed of five judges (one appointed by the U.S., Great Britain, France, Italy and Japan) was to be constituted to carry out the trial. Article 227 specified that "... in its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed." The trial was never carried out as the Kaiser had sought refuge in the Netherlands, which during the war had remained neutral. Treaty of Peace between the British Empire, France, Italy, Japan and the United States (The Principal Allied and Associated Powers), and Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Siam, and Uruguay, and Germany, signed at Versailles, June 28, 1919, 225 CONSOL.T.S. 188.

tagonist blocks in the period 1945-1990, halted international cooperation in this area, while prosecution of violations of international humanitarian law and gross violations of human rights were mainly left to domestic courts, at best, or gone unpunished at worst.

More than forty years lapsed between the Nuremberg and Tokyo trials and the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The creation of those latter two judicial bodies by the Security Council (which can be referred to as "second-generation" criminal tribunals), in 1993 and 1994 respectively, opened the way for further promising developments, eventually leading to the establishment of the International Criminal Court (ICC).[3]

Limitations to the jurisdiction of the ICC have left plenty of room for the growth of a "third-generation" of criminal bodies, which are called, for lack of a better term, internationalized or hybrid criminal bodies.[4] Currently, the term is used to indicate three jurisdictions created, between 1999 and 2001, in East-Timor, Kosovo and Sierra Leone, that is to say the *Serious Crimes Panels of the District Court of Dili*; the *"Regulation 64" Panels in the Courts of Kosovo*; and the *Special Court for Sierra Leone*. During about the same period, negotiations between the UN and Cambodia took place for the creation of a fourth internationalized body to address crimes committed by the Khmer Rouge (the so called *Extraordinary Chambers in the Courts of Cambodia*). In February 2002, the UN withdrew from negotiations before the agreement could be signed, but not until after the Cambodian legislature had approved the act creating the Extraordinary Chambers.[5] The Cambodian case will be analyzed in this article, too.

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3 Rome Statute of the International Criminal Court [hereafter: Rome Statute], UN Doc. A/CONF.183/9 (July 17, 1998), entered into force July 1, 2002.

4 This point will be fully developed in the conclusions, see *infra*, p. 135.

5 On February 8, 2002, the UN Secretary General instructed his Legal Counsel, Hans Corell, to inform the Cambodian Government that the UN withdrew from the negotiations, thus putting a stop, at least for the time being, to the establishment of an internationalized criminal body in Cambodia. The UN gave two reasons for this decision. First, there is the overall concern that, as currently envisaged, the Cambodian internationalized criminal body would not guarantee independence, impartiality, objectivity, and international judicial standards (*e.g.*, the defendant would not be allowed to appoint counsel of their own choosing). Second, there is the question of the legal basis (which is ultimately a question of control). The UN insists creating the judicial body first by a treaty between the UN and Cambodia, which would lay out the body's jurisdiction, competence, composition, organizational structure and decision-making procedures, and then leave to the Cambodian legislature to pass implementing legislation (as it was done in the case of Sierra Leone). Conversely, Cambodia insisted maintaining control of the establishing process. During the summer of 2001, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of the Democratic Kampuchea [hereafter: Extraordinary Chambers Law], which includes the elements that the UN wanted to have incorporated in the agreement, was adopted, putting the UN in front of a fait accompli. When the Cambodian government stated that a national law, duly ratified and signed by the King, could not be subordinate to a treaty, the UN broke off negotiations. In short, the ultimate

Yet, before venturing on in the analysis of the nature and functioning of these new judicial bodies, it is necessary to properly classify them, and position them vis-à-vis other institutionalized forms of international cooperation and, more specifically, international judicial bodies.

Like all international judicial bodies, such as the International Court of Justice or the European Court of Human Rights to cite but two, internationalized criminal bodies are composed of independent judges, working on the basis of predetermined rules of procedure, and rendering binding decisions. They are subject to the same principles governing the work of all international judicial (e.g., due process, impartiality and independence).

Within the wider class of international judicial bodies, they belong to a specific order: that of international *criminal* bodies. Like the ICC, ICTY and ICTR, their goal is to sanction serious violations of international law (in particular international humanitarian law, and human rights law) committed by individuals, and, as a consequence, deter future violations and help reestablishing the rule of law. To do so, they impose criminal penalties and this is the critical feature that sets this group apart from all other international judicial bodies. Like the case of all other existing international criminal bodies, the UN played a key-role in their creation.[6] Moreover, like the ICTY and the ICTR, but unlike the ICC, they are ad hoc institutions, created to address particular situations, for a limited amount of time, and are the result of singular political and historical circumstances. Finally, like all other international criminal bodies, in order to carry out their mission, they need to rely on international cooperation and judicial assistance by states and in-

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concern of the UN is that of committing to an internationalized criminal body whose ultimate legal basis is a Cambodian law (which could be unilaterally amended) rather than a treaty. On August 20, 2002, the UN Secretary General took the initiative to reopen negotiations. A spokesman for Kofi Annan said that "...it is now for Cambodia and interested member states to pursue the matter in the General Assembly or the Security Council with a view to obtaining the appropriate mandate." UN WIRE, Aug. 21, 2002. An English text of the Law on the Establishment of Extraordinary Chambers can be found at http://www.derechos.org/human-rights/seasia/doc/krlaw.html (Site last visited Aug. 15, 2002), however, in the website there is no statement as to its exact source and under Cambodian Constitution the only official language is Khmer. The negotiating text of the UN-Cambodia agreement was leaked to the press by the Cambodian government when negotiations broke down. The text of the "Articles of Cooperation between the United Nations and the Royal Government of Cambodia [in/concerning] the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea" [hereafter: UN-Cambodia Articles of Cooperation], was published in the *Phnom Penh Post*, Issue 9/22, October 27 - November 9, 2000. The text can be found at: Http://www.yale.edu/cgp/tribunal/mou_v3.htm. (Site last visited Aug. 15, 2002). On the UN position, see the statement by Hans Corell of February 8, 2002 <http://www.un.org/News/dh/infocus/cambodia/corell-brief.htm>, and the transcript of the Press Conference held the same day (with Q&A), <http://www.un.org/News/briefings/docs/2002/db020802.doc.htm>. On the Cambodian position see the reply by Sok An (Senior Minister in Charge of the Office of the Council of Ministers) of February 12, 2002 <http://www.camnet.com.kh/ocm/government/government116.htm>. A detailed chronology of the UN-Cambodia negotiations (by the UN Office of Legal Affairs) can be found at: <http://www.embassy.org/cambodia/press/historyTHEnegotiation.pdf>.

6 However, it is not inconceivable that in the future internationalized criminal bodies might be established under the aegis of regional organizations, like the Organization for Security and Cooperation in Europe.

ternational organizations, although in the case of internationalized criminal bodies things are further complicated by their peculiar legal status.

Indeed, despite these important similarities, internationalized criminal bodies do form a family on their own, which sets them apart from all other cognate entities. In some cases they are part of the judiciary of a given country, while in others they have been grafted onto the local judicial system. But in all cases their nature is *mixed*, incorporating at the same time international and national features. Indeed, they all are composed of international and local staff (both judges, prosecutor, support staff), and apply a compound of international and national substantial and procedural law, hence the term "internationalized" or "hybrid" criminal courts and tribunals.

This article focuses on the fundamental features of internationalized criminal bodies and makes the case for their study as a single family in its own right within the class of international judicial organs. This means that, first, instead of discussing each body in turn, the four bodies concerned will be decussated. Second, only certain key issues will be raised. A systematic survey of internationalized criminal bodies is beyond the scope of this limited note, and for more detailed discussion there is a growing body of literature.[7]

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7 Internationalized criminal bodies have been the object of a conference co-organized by the University of Amsterdam, No Peace Without Justice and the Project on International Courts and Tribunals, that was held in Amsterdam on January 25-26, 2002. The papers presented at the conference will be published in an edited volume by André Nollkaemper, Cesare Romano & Jann Kleffner during 2003. On internationalized criminal bodies in general, see Cesare Romano & Théo Boutrouche, *Tribunaux Pénaux Internationalisés: Etat des Lieux d'Une Justice «Hybride»*, RÉVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC (2003), forthcoming; Théo Boutrouche, *Les Tribunaux Pénaux Internationalisés ou l'Emergence d'Un Modèle de Justice "Hybride"*, WEBLAW, April 2002, http://www.weblaw.ch/jusletter/Artikel.jsp?ArticleNr=1587&Language=1&Id=nul; Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT'L L. 934 (2001). On East Timor: 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); *id., Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25 FLETCHER F. WORLD AFF. 107 (2001); *id., Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor*, 24 U. NEW SOUTH WALES L. J. 171 (2001); Suzannah Linton, *Rising From the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELBOURNE U. L. REV. 122 (2001); *id., Prosecuting Atrocities at the District Court of Dili*, 2 MELBOURNE J. INT'L 414 (2001); *id., Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. FORUM 185 (2001); *id., New Approaches to International Justice in Cambodia and East Timor*, No. 845 INT'L REV. RED CROSS 93 (2002); Sarah Pritchard, *United Nations Involvement in Post-Conflict Reconstruction Efforts: New and Continuing Challenges in the Case of East Timor*, 24 U. NEW SOUTH WALES L. J. 183 (2001); Jessica Howard, *Invoking State Responsibility for Aiding the Commission of International Crimes -Australia, the United States and the Question of East Timor*, 2 MELBOURNE J. INT'L L. 1 (2001); Ben Saul, *Was The Conflict in East Timor 'Genocide' and Why Does It Matter?*, 2 MELBOURNE J. INT'L L. 477 (2001); Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT'L L. 952 (2001); Ralph Wilde, *International Law Weekend Proceedings: Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor*, 7 ILSA J. INT'L & COMP. L. 455 (2001); Mark Rothert, *U.N. Intervention in East Timor*, 39 COLUM. J. TRANSNAT'L L. 257 (2000-2001); Joel C. Beauvais, *Benevolent Despotism: A Critique Of U.N. State-Building in East Timor*, 33 N.Y. U. J. INT'L L. & POL. 1101 (2000-2001); Xavier Tracol, *Justice pour le Timor Oriental*, REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 291 (2001 - No. 2);

Moreover, for sake of brevity, mention of the political events that led up to the creation of these bodies will be kept to a minimum.[8] The conclusions

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James Dunn, *Crimes Against Humanity in East Timor, January to October 1999: Their Nature and Causes*, ("The Dunn Report") (2001) (available at http://www.etan.org/news/2001a/dunn1.htm); JUDICIAL SYSTEM MONITORING PROGRAM, Thematic Report Number 1: *Justice in Practice - Human Rights in Court Administration* (available at http://www.jsmp.minihub.org/Resources.htm). See also the contributions by De Bertodano, Othman and De Jesus Suarez in the forthcoming book of the Amsterdam Conference, *supra*. On Kosovo: Wendy S. Betts, Scott N. Carlson & Gregory Gisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371 (2000-2001); Michael J. Matheson, *United Nations Governance of Post-Conflict Societies*, 95 AM. J. INT'L L. 76 (2001); Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System, supra; id., Making Multilateral Interventions Work, supra*; Thierry Garcia, *La Mission d'Administration Intérimaire des Nations Unies au Kosovo*, 104 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 61 (2000); Edwin Villmoare, *Ethnic Crimes and UN Justice in Kosovo: The Trial of Igor Simic*, 37 Tex. Int'l L. J. 373 (2002); Wilde, *supra*; OSCE MISSION IN KOSOVO, Reports (available at http://www.osce.org/kosovo/documents/reports/justice). See also the contribution by Cerone in the forthcoming book of the Amsterdam Conference, *supra*. On Sierra Leone: Linton, *Cambodia, East Timor And Sierra Leone, supra*; Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EUROP. J. INT'L L. 857 (2000); Konstantinos D. Magliveras, *The Special Court for Sierra Leone: A New Type of Regional Criminal Court for the International Community?*, 17 INT. ENF. L. REP. 81 (2001); Nicole Fritz & Alison Smith, *Current Apathy For Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L.J. (2001); David Pratt, *Sierra Leone: Danger and Opportunity in a Regional Conflict, Report to Canada's Minister of Foreign Affairs* (July 27, 2001) (available at http://www.sierra-leone.org/pratt042399.html); Daniel J. Macaluso, *Absolute And Free Pardon: The Effect of the Amnesty Provision in the Lomè Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone*, 27 BROOKLYN J. INT'L L. 347 (2002); Michael A. Corriero, *The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone*, 18 N.Y. L. SCH. J. HUM. RTS. 337 (2002). See also the contributions by Tejan Cole/Samba, Smith, Tortora/Mochochoko in the forthcoming book of the Amsterdam Conference, *supra*. On Cambodia: Craig Etcheson, Accountability Beckons during a Year of Worries for the Khmer Rouge Leadership, 6 ILSA J INT'L & COMP. L 507 (2000); D. Boyle, *One More Step - Adoption of the Khmer Rouge Trial Law*, JUDICIAL DIPLOMACY, Aug. 5, 2001. (http://www.diplomatiejudiciaire.com/); Linton, *supra; id., New Approaches to International Justice in Cambodia and East Timor, supra*; STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW, BEYOND THE NUREMBERG LEGACY (1997); D. Boyle, *Quelle Justice pour les Khmers Rouges?*, REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 773 (1999); Shephen Marks, *Forgetting 'The Policies and Practices of the Past': Impunity in Cambodia*, 18 FLETCHER F. WLD AFF. 17 (1994); G. Stanton, Kampuchean Genocide and the World Court, CONN. J. INT'L L. 341-48 (1990); Stephen Heder & Brian D. Tittemore, *Seven Candidates for the Prosecution: Accountability for the Crimes of the Khmer Rouge*, WAR CRIMES OFFICE OF THE WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY AND THE COALITION FOR INTERNATIONAL JUSTICE (June 2001) (available at http://www.wcl.american.edu/pub/humright/wcrimes/khmerrouge.pdf); *Report of the UN Group of Experts on Cambodia to the Secretary-General*, UN Doc., A/53/850 (March 16, 1999).

8 For background into the conflicts that led to the establishment of internationalized criminal bodies, see, on East-Timor: LUIS CARDOSO, THE CROSSING: A STORY OF EAST TIMOR (2002); MATTHEW JARDINE, EAST TIMOR: GENOCIDE IN PARADISE (REAL STORY SERIES) (1999); IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR: THE UNITED NATIONS, THE BALLOT, AND INTERNATIONAL INTERVENTION (INTERNATIONAL PEACE ACADEMY OCCASIONAL PAPER SERIES) (2001); NOAM CHOMSKY, A NEW GENERATION DRAWS THE LINE: KOSOVO, EAST TIMOR AND THE STANDARDS OF THE WEST (2000). On Kosovo, see: THE KOSOVO CONFLICT: A DIPLOMATIC HISTORY THROUGH DOCUMENTS (Philip Auerswald, David Auerswald & Christian Duttweiler eds., 2000); TIM JUDAH, KOSOVO: WAR AND REVENGE (2000); CHOMSKY, A NEW GENERATION DRAWS THE LINE, *supra*. On Cambodia, see: DAVID CHANDLER, POL POT: BROTHER NUMBER ONE (1999); BEN KIERNAN, THE POL POT REGIME: RACE, POWER AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79 (2002); MARIE ALEXANDRINE MARTIN, LE MAL CAMBODGIEN, HISTOIRE D'UNE SOCIÉTÉ TRADITIONNELLE FACE À SES LEADERS POLITIQUES 1946-1987 (1989); FRANÇOIS PONCHAUD, CAMBODGE ANNÉE ZÉRO (1977); EVAN GOTTESMAN, CAMBODIA AFTER THE KHMER ROUGE: INSIDE THE POLITICS OF NATION BUILDING (2002); KEEPING THE PEACE: MULTIDIMENSIONAL UN OPERATIONS IN CAMBODIA AND EL SALVADOR (Michael W. Doyle, Ian Johnstone & Orr Robert eds., 1997); GENOCIDE AND DEMOCRACY IN CAMBODIA: THE KHMER ROUGE, THE U.N., AND THE INTERNATIONAL COMMUNITY (Ben Kiernan ed.,

will discuss whether, in the light of their features, there is a future for internationalized criminal bodies after the entry into force of the Rome Statute of the ICC.

A final caveat, each of the four bodies expounded in this article is the result of singular political circumstances and historical events, which ultimately determine their goals, structure, functioning and achievements. In this regard, internationalized criminal bodies are better understood if approached as two distinct genera, comprising, on the one hand, the cases of East Timor and Kosovo, and, on the other, those of Sierra Leone and Cambodia.

II. Goals, Scope and Legal Basis

A. East Timor and Kosovo

Borrowing terminology from natural sciences, it can be said that internationalized criminal bodies created in East Timor and Kosovo have similar genetic imprints and common ancestry. Both are the result of self-determination conflicts, and in both cases, after widespread violence and massacres, the international community took over the totality of sovereign activities in the relevant territories, including the administration of justice, both civil and criminal. In both cases, the United Nations ousted the local authorities, or stepped in the wake of their withdrawal, and became, although temporarily,[9] the sovereign.

To administer East Timor and Kosovo, the Security Council created respectively the United Nations Transitional Administration in East Timor (UNTAET), by Resolution 1272 of October 25, 1999, and the United Nations Mission in Kosovo (UNMIK), by Resolution 1244 of June 10, 1999.[10] The task given to these UN missions was wide-ranging, encompassing the reconstruction of a viable, fair and credible court system, including both criminal

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1993). On Sierra Leone, see: Abiodun Alao, *Sierra Leone: Tracing the Genesis of a Controversy, Briefing Paper No. 50, The Royal Institute of International Affairs*, Chatham House (June 1998) (available at http://www.riia.org/briefingpapers/bp50.html); Earl Conteh-Morgan & Mac Dixon-Fyle, Sierra Leone at The End of the Twentieth Century: History, Politics, and Society (1999); Thompson Bankole, The Criminal Law of Sierra Leone (1999).

9 East-Timor declared independence on May 20, 2002, and consequently UNTAET handed over authority to the transitional East-Timorese government, while in the case of Kosovo it is yet to be determined what the future of the territory will be (either independent, which is the less likely option, or part of a newly funded Federal Republic of Yugoslavia together with Serbia and Montenegro). For the time being, Kosovo remains under the authority of UNMIK. In his latest report to the Security Council, the Secretary General wrote: "It is understood that [UNMIK] will not stay in Kosovo indefinitively, but . . . continual political, technical and financial support will be necessary...It is clear that a political roadmap is needed, both for UNMIK and for the provisional institutions of self-government". S/2002/436, para. 54 (April 22, 2002).

10 SC Res. 1272 (Oct. 25, 1999); SC Res. 1244 (June 10, 1999).

and civil jurisdictions.[11] In both cases, the process of reconstruction of the local judiciary took place by way of regulations issued by the Special Representative of the Secretary General.[12]

The task given to UNTAET and UNMIK was, admittedly, much larger in scope than the "mere" prosecution of war crimes and crimes against humanity committed by top political and military leaders. A few facts might help comprehend the scope of the undertakings. When UNTAET arrived in East Timor, the country was in ruins. When Indonesian civilian and military authorities withdrew, together with their militia followers, the country was scorched. An estimated 60 to 80 percent of buildings in East Timor were burnt and destroyed, hundreds were murdered and some 200,000 people were forcibly removed to West Timor.[13] For the legal reconstruction effort, this meant that there were no courthouses, law texts or legal records to be found. There was a similar lack of personnel; there was literally no one left with any legal experience (also because during twenty-five years of occupation the people of East Timor were discouraged from studying and become lawyers).

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11 Resolution 1272 reads:

> "Acting under Chapter VII of the Charter of the United Nations, [the Security Council] 1. Decides to establish, in accordance with the report of the Secretary-General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice; 2. Decides also that the mandate of UNTAET shall consist of the following elements: (a) To provide security and maintain law and order throughout the territory of East Timor. . .".

Resolution 1244 reads:

> "10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo; 11. Decides that the main responsibilities of the international civil presence will include:. . . (b) Performing basic civilian administrative functions where and as long as required;. . . (I) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo; (j) Protecting and promoting human rights;. . ."

12 There are three categories of high-level appointments that the Secretary-General is allowed to make: a) Special Representatives; b) Envoys; c) Other special high level positions, including Special Advisors to the Secretary General. UNGA, Fifth Committee, *Special Representatives, Envoys and Related Positions. Report of the Secretary General*, A/C/.5/50/72m (Sept. 20, 1996), at 2. As a rule, Special Representatives have been authorized by the Security Council, and derive their powers from it. Since 1990, with the increased involvement of the UN in regional and local conflicts, Special Representatives have been given far-reaching mandates by the Security Council to oversee more than a dozen complex emergencies involving mixes of peacekeeping, peace enforcement, humanitarian, diplomatic, and other operations. On the Secretary General Special Representative, see Cyrus R. Vance & David A. Hamburg, *Pathfinders for Peace, A Report to the UN Secretary General on the Role of Special Representatives and Personal Envoys*, CARNEGIE COMMISSION ON PREVENTING DEADLY CONFLICT (1997).

13 UN Office of The High Commissioner For Human Rights, *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, January 2000, A/54/726, S/2000/59, paras. 123-42 (Jan. 31, 2000).

Similarly, when UNMIK took over administration of Kosovo, it faced a daunting task. Ten years of repressive rule had decimated the ranks of qualified lawyers and judges; almost all judicial powers had been taken over by the police. Like in East-Timor, there were no operable courts of law left, although the physical infrastructure was in somewhat better conditions.[14] However, unlike in East Timor, the greatest challenge the UN faced in Kosovo was not so much building a system from scratch, but rather ensuring the impartiality of the existing judicial system to reduce discriminations between Albanian and Serb Kosovars across the board, including both in criminal and civil matters.[15] When UNMIK was set up, there were only Albanian judges and prosecutors in Kosovo courts. The Serb judges and prosecutors had fled the region. Unsurprisingly, there was an expectation that Albanians would not be indicted or convicted for crimes against other ethnic groups in Kosovo or crimes against UN and NATO personnel. In addition, there were clear indications that Serbs, kept in prison, would not face a fair trial, if judged by Albanian judges.

Still, both in the case of East Timor and Kosovo there had been serious violations of international law that had to be addressed. In January 2000, an International Commission of Inquiry recommended to the Security Council the establishment of "... an international human rights tribunal consisting of judges appointed by the United Nations, preferably with the participation of members from East Timor and Indonesia. The tribunal would sit in Indonesia, East Timor, and any other relevant territory to receive the complaints and to try and sentence those accused... of serious violations of fundamental human rights and international humanitarian law which took place in East Timor since January 1999. . .[16]". The Security Council, with a mix of political realism and coyness, decided instead to develop a two-pronged strategy to bring perpetrators of crimes in East Timor to justice.

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14 On the state of courts in Kosovo in 1999, see Department of Human Rights and Rule of Law, Rule of Law Division, *Observations and Recommendations of the OSCE Legal System Monitoring Section: REPORT 1 - Material Needs of the Emergency Judicial System*, Pristina, November 7, 1999. Available at: http://www.osce.org/kosovo/documents/reports/justice/report1.htm.

15 Diversity and ethnic balance in the courts of Kosovo is still a problem. On December 7, 2000, there were 340 judges and prosecutors and 456 lay judges appointed to the 55 courts in Kosovo. Of the 340 judges and prosecutors, there were only 16 Kosovo Serbs (of which only 4 of them were working), seven Kosovo Turks, 12 Kosovo Muslims (of which only 10 working), and two Kosovo Roma. *See* OSCE, Mission in Kosovo, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *Report No. 9 - On the Administration of Justice*, (March 2002), at 5.

16 UN Office of the High Commissioner for Human Rights, *Report of the International Commission of Enquiry on East Timor to the Secretary General, January 31, 2000*, Recommendation 7, para. 153. The text of the Report can be found in the following document: *Identical Letters Dated 31 January 2000 From The Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, A/54/726, S/2000/59 (Jan. 31, 2000). See also the *Report of the Joint Mission to east Timor of the Special Rapporteur of the Commission on Human Rights on Extra-Judicial, 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*, A/54/660 (Dec. 10, 1999), paras. 74.5-74.6.

On the one hand, Regulation 2000/11, entitled "On the Organization of Courts in East Timor," created one Court of Appeal, in the capital, Dili, and eight District Courts, composed of panels of three judges, with jurisdiction over criminal and civil matters.[17] Concerning criminal matters, Regulation 2000/11 introduced the key distinction between "ordinary" and "serious" crimes. The Dili District Court has exclusive jurisdiction over serious crimes, and Regulation 2000/15 created the first *Serious Crimes Panel of the District Court of Dili.*[18] Serious Crimes Panels have exclusive jurisdiction over the crimes of genocide, war crimes, crimes against humanity; as well as on the crimes of murder, sexual offences and torture, but only insofar as they were committed between 1 January and 25 October 1999.[19] Again, it should be stressed that the serious crimes regime of prosecution is not a separate criminal law system, but rather a component of the overall justice system as reconstituted by UNTAET.

From the outset, it was evident that Serious Crimes Panels in East Timor were unlikely to prosecute any Indonesian top brass. All defendants currently within the jurisdiction of the Serious Crimes Panels are East Timorese citizens who are alleged to have been members of pro-autonomy militia groups in 1999. High ranking militia commanders and members of the Indonesian military remain at large in Indonesia. Since resort to force against Indonesia was never considered an option (unlike in the case of Kosovo, where it was used), the Security Council had to rely instead on promises made by Indonesia that it would try its own suspects in Jakarta.[20]

Indonesia's efforts to prosecute atrocities, however, have required the adoption of a long series of ad hoc legislations. In September-October 2000 the Attorney General of Indonesia named twenty-two persons as suspects (including military and police officers, civilian officials and militia members, but not General Wiranto, the military commander in the region), but actual prosecution could not start until the adoption of legislation establishing special courts (and it is proceeding ridiculously slowly). The Indonesian Human Rights Courts Act, of 23 November 2000, provides the juridical foundation for the prosecution of serious international humanitarian law violations in Indonesia.[21] A Human Rights Court is a special body, within a court of general jurisdiction in Indonesia, with the authority to hear and rule on cases of gross human rights, including genocide and crimes against humanity, perpetrated by a Indonesian citizen, over eigh-

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17 UNTAET/REG/2000/11, Sec. 5-7 and 14-15 (March 6, 2000).

18 UNTAET/REG/2000/15 (July 5, 2000).

19 UNTAET/REG/11, *supra* note 17, Sec. 10.

20 *Identical Letters dated January 31, 2000 from the Secretary-General to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, supra* note 16.

21 Law Establishing Human Rights Court (Law No. 26 of 2000), enacted November 23, 2000.

teen years, outside the territorial boundaries of the Republic of Indonesia. Five months later, on 23 April 2001, the Indonesian President, Abdurrahman Wahid, issued a decree establishing such a special body, the Ad Hoc Human Rights Court at the Central Jakarta District Court,[22] but, as it will be explained below, the efficacy of these ad hoc tribunals is greatly reduced by their very narrow jurisdiction *ratione temporis* and *loci*.[23] In August 2002, the Ad Hoc Human Rights Court issued its first verdicts. On August 14, 2002, the ex-governor of East-Timor, Abilio Jose Osorio Soares, was sentenced to just three years for not having stopped the massacres. On August 15, 2002, the former Regional Police Commander, Brigadier General Timbul Silaen, who was responsible for security around the 1999 referendum on independence, was acquitted. Five Indonesian military, police and government officials who are accused of failing to prevent a massacre in Suai on 6 September 1999, were also found not guilty.[24]

While it is easy to imagine from the foregoing why several international and Timorese NGOs have vocally argued for the establishment of a fully international criminal tribunal to try crimes committed during the Indonesian occupation, on the model of the ICTY and ICTR,[25] the case of Kosovo illustrates that even when fully international criminal tribunals are in place, complete prosecution can still be an elusive goal, and thirst for justice cannot be easily quenched. Indeed, the ICTY has ". . . the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,"[26] which does include Kosovo. Nonetheless, despite the fact that crimes committed in Kosovo can be, and actually are, prosecuted both at the international level (i.e., ICTY) and national (both in Kosovo by the UNMIK-reconstituted judiciary, and by any other state exercising criminal jurisdiction), in 2000 UNMIK considered the establishment of a Kosovo War and Ethnic Crimes Court (KWECC).[27] The KWECC would have been composed of both local and international judges, and would have had concurrent, pri-

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22 Presidential Decree No. 53/2001 Concerning Establishment of an ad hoc Human Rights Tribunal at the Central Jakarta District Court (April 23, 2001). State Gazette of the Republic of Indonesia, No. 38/2001.

23 *See infra* at 113-114.

24 For news on the Indonesian trials, see: http://www.jsmp.minihub.org/Indonesia/indonesia.htm.

25 For a discussion of the rationale of establishing an International Tribunal for East Timor, see JUSTICE AND ACCOUNTABILITY IN EAST TIMOR: INTERNATIONAL TRIBUNALS AND OTHER OPTIONS, Report of a One-Day Seminar in Dili, East Timor, 16 October 2001. Available at Http://www.jsmp.minihub.org/Reports/justicereport.pdf (Site last visited Aug. 15, 2002).

26 ICTY Statute, Art. 1. The Statute of the ICTY is contained in the Report of the UN Secretary General (S/25704 and Add.1) to the UN Security Council, 32 ILM 1159 (1993). It was adopted by SC Res. 827 (May 25, 1993), 32 ILM 1203 (1993) and it was revised by Resolution SC Res. 1166 (May 13, 1998); SC Res. 1329 (Nov. 30, 2000); and SC Res. 1411 (May 17, 2002).

27 The establishment of the Kosovo War and Ethnic Crimes Court was recommended by the Technical Advisory Commission on Judiciary and Prosecution Service, established pursuant to UNMIK Regulation No. 1999/6 (Sept. 7, 1999), and composed of both Kosovar and international experts.

mary jurisdiction with other courts in Kosovo over serious violations of international humanitarian law as well as other serious crimes committed on political, ethnic or religious grounds.[28] The proposal was eventually set aside, also in consideration of the costs involved.[29]

B. Sierra Leone and Cambodia

The cases of Sierra Leone and Cambodia are distinct from those of East Timor and Kosovo in some key issues. First, the conflicts that urged the creation of internationalized criminal bodies in Sierra Leone and Cambodia were not the result of self-determination struggles, but rather civil wars. Second, in neither case did the international community step in to exercise sovereign powers in lieu of local authorities (although in both cases the international community did intervene to contribute to, or monitor, the reestablishment of peace and security[30]), but power continued to be exercised by the victorious party (which potentially raises criticism for the one-sidedness of these efforts).

It follows that, while the task the UN faced in East Timor and Kosovo was materially and logistically much larger than the one faced in Sierra Leone and Cambodia, for it had to re-organize a whole state administration, in Sierra Leone and Cambodia it was politically slippery, and diplomatically more arduous. In the former cases, the UN could unilaterally create a judicial system, where the question of accountability for international crimes is only one aspect, albeit an important one, of the mission, while in the latter cases, the process had to be bilateral, necessitating a treaty freely negotiated and concluded between the relevant government and the UN. Thus, the Special Court for Sierra Leone was created by way of a treaty concluded between the UN and Sierra Leone on 16 January, 2002 [hereafter referred to

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28 UNMIK, Department of Reconstruction, *Kosovo: Reconstruction 2000*, Part 1, Sec. 8, paras. 9-13. Http://www.seerecon.org/Kosovo/UNMIK/Reconstruction2000/justice.htm. (Site last visited Aug. 15, 2002).

29 The start up cost for the KWECC for six months was estimated to be DM 12.59 million (about US $6.5 million). *Id.* As a comparison the budget of the Sierra Leone Court is $56.2 million for the first three years. The original budget proposal for the court was $114.6 million for the first three years. The Special Court is funded by voluntary contributions. *Letter dated July 12, 2001 from the Secretary General to the President of the Security Council*, S/2001/693 (http://www.un.org/Docs/sc/letters/2001/693e.pdf). The United Nations has funded international staff to the Serious Crimes Panels in East Timor and the internationalized panels in Kosovo through the peace-keeping budget of the UN.

30 In the case of Cambodia, the UN was involved from 1991 through the end of 1993, first with UNAMIC (UN Advance Mission in Cambodia, established with Resolution 717 (Oct. 16, 1991)), to monitor the cease-fire, and then with UNTAC (UN Transitional Authority in Cambodia, established with Resolution 745 (Feb. 28, 1992)) to carry out elections. UNITED NATIONS, UNITED NATIONS AND CAMBODIA 1991-1995 (1995). In the case of Sierra Leone, the Economic Community of West African States (ECOWAS), grouping together sixteen West African States, carried out peace-making operations in Sierra Leone through ECOMOG. ECOMOG (short for ECOWAS Monitoring Group) is a non-standing military force consisting of military forces of ECOWAS members (mainly Nigeria). It is deployed and operates under the directives of the authority of the heads of state of ECOWAS.

as UN-Sierra Leone Agreement],[31] while the fact that negotiations for the establishment of an internationalized body in Cambodia eventually broke down, graphically illustrates the point.

Formally, the initiative to create a special criminal jurisdiction to prosecute international crimes, in the case of Sierra Leone originated from the Security Council, which, in its Resolution 1315 (2000), requested the Secretary General to negotiate an agreement to that effect with the Government of Sierra Leone,[32] while in the case of Cambodia, the process was started by a joint letter to the Secretary General by the two Prime Ministers of Cambodia requesting the assistance of the UN in bringing to justice the Khmer Rouge.[33]

In Sierra Leone and Cambodia, the task is more limited than that faced by the UN in East Timor and Kosovo. It is focused on ensuring actual prosecution of international crimes (which otherwise could become a bargaining chip in the local political process), and guarantee the credibility, fairness, and impartiality of trials. The Special Court for Sierra Leone has been created to "prosecute persons who bear the *greatest responsibility* for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone. . . , including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."[34] The Extraordinary Chambers in the Courts of Cambodia should "bring to trial senior leaders of Democratic Kampuchea and those who were the *most responsible* for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia. . . "[35].

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31 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (Jan. 16, 2002) [hereafter: UN-Sierra Leone Agreement]. Text available at: http://www.sierra-leone.org/specialcourtagreement.html. (Site last visited Aug. 15, 2002).

32 SC Res. 1315 (Aug. 14, 2000).

33 *Identical Letters Dated 23 June 1997 from the Secretary-General Addressed to the President of the General Assembly and to the President of the Security Council*, S/1997/488 (June 24, 1997). Cambodia' request was probably the result of a mounting international campaign to ensure prosecution of Khmer Rouge. Two steps are particularly important. First, the enactment by the U.S. Congress of the Cambodian Genocide Justice Act stating that "... it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975, and January 7, 1979". 22 U.S.C. 2656, Part D, Sections 571 - 574. Second, Resolution 1997/49 of the UN Commission on Human Rights requesting the Secretary General, through his Special Representative, to ". . . examine any request for assistance in responding to past serious violations of Cambodian and International Law". E/CN.4/RES/1997/49, para. 12.

34 UN-Sierra Leone Agreement, *supra* note 31, Art. 1.1. Emphasis added. Special Court Statute, Art.1.1. The Text of the Special Court statute can be found at: http://www.specialcourt.org/documents/Statute.html.

35 Extraordinary Chambers Law, *supra* note 5, Article 1. Emphasis added.

Finally, the fact that the Special Court and the Extraordinary Chambers have (or should have had in the latter case) their legal basis in a treaty does not have a bearing on their status vis-à-vis the local judiciary. That ultimately depends on the national law that established the judicial body. Hence, on the one hand, the Special Court Agreement Ratification Act of 2002, provides that the Special Court is not part of the judiciary of Sierra Leone[36], and offences before the Court are not prosecuted in the name of the Republic of Sierra Leone.[37] On the other hand, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia provides that "Extraordinary Chambers shall be established in the existing court structure."[38]

III. *Ad Hoc* Nature and Limited Competence

Despite difference in goals, scope and legal basis between the four internationalized criminal bodies, they all share the ad hoc nature. Actually, this is a feature they share with most institutions and mechanisms created by the international community to address gross violations of humanitarian law and human rights—the ICC being the main and, to date, only exception. Their jurisdiction is typically both limited to a certain category of crimes (e.g., slave trade or piracy), or to a specific territory and a specific time, or both.

Limits to jurisdiction might reflect historical judgments, political claims, power structures, allegedly objective facts, political correctness, material considerations, or simple expediency. In other words, they are always arbitrary, and, thus, arguable. Of course, because of the political considerations that influenced their establishment, the issue is more acute in the cases of Sierra Leone and Cambodia.

A. Cambodia and Sierra Leone

A graphical illustration of how problematic limits to jurisdiction can be is provided by the case of Cambodia. Under Article 2 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, the Chambers' competence will be prosecution of " . . . senior leaders of Democratic Kampuchea, and those who were most responsible for crimes and serious violations of Cambodia penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, and which

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36 Special Court Agreement Ratification Act, Section 11(2). Special Court Agreement, 2002, (Ratification) Act (2002). Supplement to the Sierra Leone Gazette Vol. CXXX, No. II dated March 7, 2002. The text is available at: http://www.specialcourt.org/documents/SpecialCourtAct2002.pdf. (Site last visited Aug. 15, 2002).

37 *Id.*, Sec. 13.

38 Extraordinary Chambers Law, *supra* note 5, Art. 2.

were *committed during the period from 17 April 1975 to January 6, 1979.*"[39] These are respectively the dates when Lon Nol was overthrown and the Khmer Rouge occupied Phnom Penh, and when the Vietnamese Army entered Phnom Penh, on the heels of the fleeing Khmer Rouge.

Pol Pot's regime will probably pass down as one of the cruelest and most insane in the history of human kind. During the three years the Khmer Rouge controlled the country, Cambodia was brought back to pre-history. All urban dwellers were forcibly evacuated to the countryside to become agricultural workers, basic freedoms were curtailed, and religion banned. Hundreds of thousands of the educated middle-classes were tortured and executed in special centers. Others starved, or died from disease or exhaustion. The total death toll during the period is estimated to be at least 1.7 million, out of a population of 6.7 million in 1970.

While this period can be rightly regarded as the peak of the Cambodian tragedy, and crimes committed during that period must be prosecuted, it is a fact that Cambodia has been engulfed in violence, civil war and foreign interventions—including covert operations by the U.S.—for a much longer period, from 1965 through 1991, when a Peace agreement was signed in Paris and the UN assumed transitional authority.[40] More troubling yet, one of the key figures throughout this period is Norodom Sihanouk, who has been alternatively head of state of Cambodia, or leader of the guerrilla movement, depending on circumstances, and who is, since 1993, King of Cambodia, and thus, under whose authority Extraordinary Chambers were supposed to operate.[41]

Temporal limitations to jurisdiction is probably also one of the major flaws of the Special Court for Sierra Leone. In particular the choice of the start date of the Court's jurisdiction has been long negotiated between the Sierra Leone government and the UN, and epitomizes the intractability of the subject. The Sierra Leone conflict lasted approximately one decade (1991-2001), with many coups and counter-coups, sudden break outs of violence, military interventions (by regional organizations, the UN, the United Kingdom, and even mercenaries), and a series of short-lived negotiated agreements. Hence, when faced with the problem of determining the temporal jurisdiction of the Special Court, a series of options, each with its own practical problems and political overtones, was considered.

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39 *Id.* Emphasis added. It should be remarked that, unlike other cases, the Extraordinary Chambers Law does not contain limitations *ratione loci*.

40 Agreements on Comprehensive Political Settlement of the Cambodia Conflict (Oct. 23, 1991). The text of the agreements as well as a detailed time-line of modern Cambodian history can be found at http://www.c-r.org/accord/acc_cam/index.htm. (Site last visited Aug. 15, 2002).

41 During the negotiations between the UN and Cambodia, the UN Secretary General asked an extension of the temporal jurisdiction of the Extraordinary Chambers beginning in 1970, but the request was rejected. *Letter of the UN Secretary General to Prime Minister Hun Sen of April 25, 2000 and reply of April 27, 2000.* See the UN Office of Legal Affairs, *History of the Negotiations*, *supra* note 5.

In seeking a beginning date of the temporal jurisdiction the UN Secretary-General had three main considerations:[42] First, the period should be reasonably limited so that the workload of the Prosecutor and Court remains manageable. Second, the beginning date should correspond to an event, or to a new phase in the conflict, without necessarily having any political connotations. Third, it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country.

Given these desiderata, three alternative dates were considered:

(1) November 30, 1996: the date of the conclusion of the Abidjan Peace Agreement between the government of Sierra Leone and the Revolutionary United Front (RUF);[43]

(2) May 25, 1997: the date of the Armed Forces Revolutionary Council (AFRC) *coup d'état* against the Sierra Leone People's Party government, of President Ahmed Tejan Kabbah (the President currently in power);

(3) January 6, 1999: the date on which the rebels of Foday Sankoh took control of the capital, Freetown.

There were at least two other alternatives. First, although it is generally agreed that the Sierra Leone conflict began on 23 March 1991, when forces of the RUF entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party government (i.e., the All Peoples' Congress - APC), that date was discarded from the beginning as impractical, as it would have imposed a too onerous burden on the office of the Prosecutor. Moreover, it would have required large financial resources, which the international community was not willing to provide. Second, the date of the Lomè Peace Agreement (7 July 1999), which granted combatants amnesties for acts committed in the furtherance of their objectives, could have been considered.[44] However, the United Nations never took this date into con-

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42 *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*. S/2000/915 (Oct. 4, 2000).

43 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), signed in Abidjan, on November 30, 1996. Text available at: http://www.sierra-leone.org/abidjanaccord.html. (Site last visited Aug. 15, 2002). The accord called for the immediate cessation of all fighting, proclaimed an amnesty for RUF members, and the transformation of the RUF into a political movement. It stipulated the withdrawal of Executive Outcomes, a mercenary firm hired by the Sierra Leone Government, within five weeks and regional forces within three months. It also set out a process for the encampment, disarmament, demobilization and reintegration of RUF combatants. The agreement was short-lived. The ceasefire was never firmly established with the RUF, Kamajors and regional forces (mainly Nigerian and Guinean) skirmishing for control of territory and tactical advantage. The RUF leader Sankoh refused to allow the UN to deploy peacekeepers and monitors. By late January 1997, the RUF was accusing the government of waging all-out war against it.

44 Peace Agreement Between The Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, done in Lomè, on July 7, 1999. Text available at: http://www.sierra-leone.org/lomeaccord.html. (Site last visited Aug. 15, 2002).

sideration because that would have sabotaged its new stance against the granting of amnesties for international crimes.[45]

In the end, the UN picked November 30, 1996 as the most suitable starting date, as it represented the first time the fighting factions had attempted to reach a peaceful settlement of the conflict, and ensured that the most serious crimes committed by all warring parties would be encompassed within its jurisdiction. The date was incorporated in the Agreement Establishing the Special Court despite the serious doubts of the Sierra Leone Government.[46] The compromise, however, is not devoid of legal and moral problems. As it will be better explained below, the effect of the amnesty included in the Lomè Agreement of July 7, 1999 is a *de facto* dual start date of the Special Court's jurisdiction.[47]

B. East Timor and Kosovo

In the case of East Timor, no temporal limitation is placed on the jurisdiction of Serious Crimes Panels for crimes of genocide, war crimes, crimes against humanity. However, crimes of murder, sexual offences and torture, can only be prosecuted by Serious Crimes Panels if they have been committed between 1 January and 25 October 1999.[48] The Panels have jurisdiction *ratione loci* throughout the entire territory of East Timor. However, as it was said, most of the suspects for the atrocities committed in East Timor took refuge in Indonesia. [49]

Indonesian Ad Hoc Human Rights Tribunals have a very limited authority. At first, President Abdurrahman Wahid gave them power to investigate and try cases of serious human rights violations that occurred in East Timor only *after* 30 August 1999.[50] That is the date in which East Timorese voted for independence, and when the worst rampage took place, but that also means that all crimes committed during the occupation of the island, since 1975, and in the weeks and months leading to the referendum have been

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45 On the issue see Carsten Stahn, *United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?*, No. 845 INT. REV. RED CROSS 191 (2002).

46 Actually, on August 20, 2001, following consultations with the people of Sierra Leone, the Government of Sierra Leone did request that the temporal jurisdiction of the Special Court be extended back to 1991. *Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, S/2001/857 (Sept. 7, 2001). The perception in Sierra Leone is that the UN-Sierra Leone Agreement unjustly favors Freetown over the provinces, as the Novembr 1996 date corresponds to the time when the capital first became a target of attack. For the provinces, the conflict has generally been one long, continuous experience from the beginning of the 1990s, whereas Freetown witnessed intermittent episodes of violence only from the mid-1990s onwards.

47 *See infra* at 122-123.

48 It could be argued that prosecution of the crime of torture should have also benefited from the absence of temporal limitation, considering the importance that is attributed to its repression in various international treaties and states practice.

49 *Supra* at 106.

50 Presidential Decree No. 53/2001, *supra* note 22, Art. 2.

left out. Because of international pressure and outcry by NGOs, the jurisdiction of the Ad Hoc Human Rights Tribunal was slightly adjusted.[51] President Megawati Sukarnoputri, who replaced Wahid, overthrown by the Parliament, issued an amended decree conferring on the Ad Hoc Human Rights Tribunal the jurisdiction to prosecute cases of human rights violations committed in East Timor during the months of April and September 1999—thus including one of the hottest months in the campaign leading to the referendum on independence—but only in the jurisdictions of Liquia, Dili and Suai. Essentially prosecution was to be focused only on five egregious acts of violence.[52] There is no need to say that the amendment fell very short of what was needed, making it impossible to effectively prosecute the highest levels of the Indonesian security forces and politicians that are responsible for the deliberate disruption of the referendum, the campaign to terrorize the East Timorese people before the vote and punish them for voting overwhelmingly in favor of independence.

Finally, limitations *ratione temporis* and *loci* do not seem to be an issue in Kosovo. UNMIK Regulations did not establish any separate regime for prosecution of "serious" and "ordinary" crimes, and thus, there was no need to fix particular jurisdictional limits. Arguably, it is the legal codes of Yugoslavia, which can still be applied in Kosovo, that determine the extension of the jurisdiction of the courts in Kosovo. Yet, the questions of which codes to apply is the thorny issue, and on which more will be said below.[53]

IV. Mixed Composition

A feature common to all internationalized criminal bodies is that they have both national and foreign, or better "international," judges sitting on the bench. This feature, together with the fact that they apply a mix of procedural and substantial local and international law, which will be discussed below, sets them apart from all other international judicial bodies.

The reasons for mixed composition of internationalized judicial bodies are multiple and obvious. On the one hand the presence of international judges should ensure expertise in the prosecution of serious international humanitarian law violations, and fairness and impartiality in proceedings. Moreover, in some cases capacity building of locals might also be an important end. On the other hand, the presence of domestic judges is necessary

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51 Presidential Decree No. 90/2001 regarding Amendment on Presidential Decree No. 53/2001, State Gazette of the Rep. of Indonesia No. 2001/111.

52 These are the murders in the João Britto church in Liquiça; the killings in the house of Manuel Carrascalão (Dili); the attack on the residence of Bishop Calos Belo (Dili); the killing of the Dutch journalist Sander Thoenes (Dili); and the killings in the Ave Maria church in Suai.

53 On this issue see *infra* at 120-122.

to instill in the local population a sense of ownership of the justice which is made in their name.

A. East Timor and Kosovo

The mix of international and national judges might vary from case to case. Most of the time, international judges are the majority of the bench, in a few exceptions they are not. For instance, Serious Crimes Panels in East Timor consist of two international and one local judge.[54] The binary structure "international/national" characterize also the staff of all other judicial apparatuses in the East Timor judiciary (i.e., Public Prosecution and Legal Aid Services). Then again, UNTAET Regulation 1999/3 established the Transitional Judicial Service Commission to " . . . recommend to the Transitional Administrator [i.e., the Secretary General Special Representative] candidates for provisional judicial or prosecutorial office. . . ."[55] Interestingly, in the Commission, East Timorese are the majority, since it is composed of five individuals: three of East Timorese origin and two international.[56]

In the case of Kosovo, the issue is more complex. There are currently two types of international panels in the judicial system of Kosovo (under the so-called "Programme of International Judicial Support in Kosovo").[57] The first is provided for in UNMIK Regulation 2000/34.[58] It permits international judges, each of whom is assigned to a specific court, to pick and choose the cases in which he/she will participate. While such an arrangement might reduce the perception of bias, it has limited potential in practice. A typical panel in a district court is composed of two professional and three lay judges. Verdicts are by majority vote, and each judge (international or national) has equal voice.[59] In such a situation, the international judge is easily outvoted.[60] An alternative model was created by UNMIK Regulation 2000/64.[61] It allows the Prosecutor, defense counsel or defendant to request the appointment of an international judge or prosecutor to the case, a change of venue or, most importantly, the appointment of a three-judge

54 UNTAET Reg. 2000/15, *supra* note 18, Sec. 22.1. In cases of special importance or gravity a panel of five judges composed of three international and two East Timorese judges can be established. Sec. 22.2.

55 UNTAET/REG/1999/3, Art.1 (Dec. 3, 1999).

56 *Id.*, Art. 2.

57 To be precise, in Kosovo there are two parallel judicial systems. One under the authority of UNMIK, and another in the Kosovo-Serb dominated parts of northern Kosovo, which does not recognize UNMIK, and answers to Belgrade. OSCE Report, *supra* note 14, at 7.

58 UNMIK/REG/2000/64, *Amending UNMIK Regulation No. 2000/6 on the Appointment and Removal from Office of International Judges and International Prosecutors* (May 27, 2000).

59 Articles 23 and 116 or the Federal Republic of Yugoslavia's Criminal Procedure Code.

60 OSCE Report, *supra* note 14, at 6.

61 UNMIK/REG/2000/64, on *Assignment of International Judges/Prosecutors and/or Change of Venue* (Dec. 15, 2000).

panel with at least two international judges. No such request can be made once the trial or appeal has begun.[62]

As it can be imagined, this second procedure (Regulation 64 Panels) has been frequently invoked by defendants. Today, all major high profile cases are as a rule tried by Regulation 64 panels and are also frequently investigated and prosecuted by international teams.[63] However, to face this rising workload, there is a paltry international presence. Indeed, one of the major problems affecting the internationalized judiciary in Kosovo is understaffing. In December 2001, there were only eight international judges and eight international prosecutors in Kosovo, and in May 2002 it was decided to double that number.[64]

B. Sierra Leone and Cambodia

In the case of the Special Court for Sierra Leone, the Chambers are to be composed of not less than eight or more than eleven judges: Three serve in the Trial Chamber, of whom one is a judge appointed by the Government of Sierra Leone, and two are appointed by the UN Secretary General. Five judges serve in the Appeals Chamber, of whom two are appointed by the Government of Sierra Leone, and three are appointed by the UN Secretary General.[65] It should be stressed that the Special Court Statute fixes the number of judges to be appointed respectively by the UN Secretary-General and the Government of Sierra Leone, without prejudice for their actual nationality. That means that, in theory, the Sierra Leone Government could appoint foreign judges, which has actually happened, or the UN Secretary General could appoint Sierra Leonean judges—which is, for obvious reasons, less likely to happen.[66] The Prosecutor and the Registrar are to be appointed by the Secretary General, but the Prosecutor is to be assisted by a Sierra Leonean Deputy Prosecutor.[67]

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62 *Id.*, Sec. 2.4.

63 OSCE Report, *supra* note 14, at 7.

64 *Id.*, at 13. Understaffing is also an issue for local judges. Out of the 420 judges and prosecutors appointed and working in the 55 courts in Kosovo, in March 2002 there were 80 vacancies. *Id.*, at 8.

65 Special Court Statute, *supra* note 34, Art. 12.

66 Judges for Special Court were appointed on July 25, 2002. Kofi Annan appointed Pierre Boutet, a liaison officer in the Canadian Defense Department, and Benjamin Mutanga Itoe, a Supreme Court justice from Cameroon, to the Trial Chamber of the Special Court for Sierra Leone, while Bankole Thompson, a former High Court justice from Sierra Leone, was named by the Sierra Leone Government. As for the court's Appeals Chamber, Emmanuel Ayoola, a Supreme Court justice from Nigeria, Alhaji Hassan B. Jallow, a Supreme Court justice from the Gambia, and Renate Winter, an Austrian national serving as an international judge on the Supreme Court of Yugoslavia's Kosovo, were appointed by the Secretary-General. The Sierra Leone Government also named Gelaga King, a former Supreme Court justice from Sierra Leone, and Geoffrey Robertson, head of the Doughty Street Chambers of Britain. Two alternate judges have also been appointed: Isaac Aboagye, a Ghanaian national serving as a High Court justice in Botswana, and Elizabeth Muyovwe, a High Court judge from Zambia.

67 The Registrar appointed Robin Vincent of Britain, and the Prosecutor is David Crane of the United States.

Finally, one of the features that sets the Extraordinary Chambers in the Courts of Cambodia apart from all other internationalized criminal courts is that international judges, instead of being the majority (with the above mentioned exception of UNMIK Regulation 2000/34), they are the minority. Indeed, in the aborted plan, a three-layer system was to be built, consisting of Trial Chambers, Appeal Chambers and Supreme Court. The Trial Chambers should have been composed of five professional judges (three Cambodian, and two international); the Appeals Chambers of seven judges (four Cambodian, and three foreign); and the Supreme Court composed of nine judges (five Cambodian, and four foreign).[68] In all levels, the President of the court was supposed to be a Cambodian. Moreover, to reiterate the dominance that the Cambodia Government would have exercised in the functioning of the Court, foreign judges were supposed to be appointed by the Supreme Council of the Magistracy upon nomination by the UN Secretary General.[69]

To balance the aspiration of Cambodia to have crimes committed by the Khmer Rouge between 1975 and 1979 tried by a national court with international endorsement, and the UN's requirement for international standards of justice, the U.S., through Senator John Kerry, proposed a compromise. First, all decisions should have been approved by a super-majority vote (four out of five judges at the trial level, five out of seven at the appellate level, and six out of nine at the supreme court level).[70] The compromise should have given international judges the possibility of blocking embarrassing decisions, provided the international judges could actually agree between themselves and team up against the Cambodian colleagues. Second, there should have been two Prosecutors: one Cambodian and another foreign. The Co-Prosecutors should have worked together to prepare indictments.[71] However, should disagreements have arisen between them, one of them could have requested to have the dispute settled by a Pre-Trial Chamber of five judges (three Cambodian and two international) again voting with a super-majority of four out of five votes.[72]

V. Mixed Applicable Law (Substantial and Procedural)

Another feature common to all internationalized criminal courts, and which defines them as such, is that they all apply a mix of domestic and international criminal laws, both procedural and substantial. Mixing has cer-

68 Extraordinary Chambers Law, *supra* note 5, Art. 9.

69 *Id.*, Art. 11.

70 *Id.*, Art. 14.

71 *Id.*, Art. 16

72 *Id.*, Art. 20. It should be noted that, the Pre-Trial Chamber is supposed to take decisions on these matters according to an inverted super-majority, meaning that a majority plus the vote of one international judge is required to *block* prosecution proposed by one of the Co-Prosecutors.

tain obvious advantages. It reduces the likeliness of legal loops, it roots proceedings in the local legal culture, laws and customs, while it helps maintaining trials on an internationally acceptable level, coherent with international human rights standards. However, it also introduces sticky practical problems.

Before they can be applied, local laws must be accurately translated in a language understandable by international judges (typically English), and international laws must be accurately translated into local languages.[73] This kind of work requires time, if properly carried out, and time is often a luxury in the environment international judicial bodies are called to operate. Moreover, there is no need to stress that importance of adequate simultaneous translation during trials. Besides that fact that the right to be tried in a language the indictee understands is an internationally recognized human right, lack of decent translation in the courtroom can cast serious doubts about the trials' credibility.[74]

To illustrate, in Sierra Leone, English is the official language, but Krio, an English-based dialect, is widely used and will probably be spoken (sometimes solely) by several witnesses. Internationalized panels in the courts of Kosovo operate in three languages: Albanian, English and Serbian.[75] The extreme case is that of East Timor, where the Serious Crimes Panels work in four official languages: Tetum, and Portuguese (the two Timorese official languages), plus Indonesian, and English. Defendants tend to speak Indonesian and/or Tetum. National lawyers address the court in Indonesian. International lawyers speak predominantly English. Judges speak either English or Portuguese. Some defendants or witnesses speak none of these four languages but only a local dialect such as Fataluku or Bunak. Interpreting is therefore often done in relay across three or more languages, in a situation of severe understaffing, casting doubts on the accuracy of interpretation.

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73 The UN does not have a library containing an updated version of all criminal codes of the world, not to mention of those countries most likely to slip into unrest and conflict, and those few that it does have are not guaranteed translations. For that matter, it is unlikely there is any university library in the world endowed with such a collection.

74 In some cases the judges have attached substantial weight in their findings against an accused to inconsistencies in his statements. A report in November 2001 by the Judicial Systems Monitoring Programme (JSMP), whose observers have covered almost every trial hearing before the Special Panels, states that in one judgment:

> "...the defendant's credibility was impugned because of apparent inconsistencies in his testimony as to whether or not he had a gun on the night of 25 September 1999. The possibility cannot be discounted that the alleged inconsistencies were simply the product of language difficulties between the participants in court".

JUDICIAL SYSTEMS MONITORING PROGRAMME, *Justice in Practice: Human Rights in Court Administration* (November 2001), at 31. Http://www.jsmp.minihub.org/Reports/JSMP1.pdf. (Site last visited Aug. 15, 2002).

75 OSCE Report, *supra* note 14, at 18. *See* UNMIK/REG/2000/46, on the *Use of Language in Court Proceedings in which an International Judge or International Prosecutor Participate* (Aug. 15, 2000).

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A. East Timor and Kosovo

In the case of East Timor and Kosovo, where the UN has supplanted local authorities, which suppressed the local population for years with discriminatory laws and biased judicial systems, one of the greatest challenges was to strike a balance between existing laws that could be left in place, and repressive or discriminatory laws that had to be replaced. Moreover, it was essential to ensure that the newly reestablished judicial systems would conform to certain minimum international standards. It should be noted that the United Nations has still no model legal code for application in territories it has or might administer.[76] Solutions adopted, therefore, might vary greatly from situation to situation.

In the case of East Timor, for "ordinary" crimes, under Regulation 1999/1, "...until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to October 25 1999 [i.e., the date in which the UN Security Council established UNTAET] shall apply. . . insofar as they do not conflict with [internationally recognized human rights standards], the fulfillment of the mandate given to UNTAET. . . , or the present or any other regulation and directive issued by the Transitional Administrator."[77] The ". . .internationally recognized human rights standards. . . " to be followed are those reflected in the main international human rights treaties, including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights; and the conventions on the rights of the Child and those for the elimination of discrimination against women, racial discrimination, and torture.[78] Abolished Indonesian laws include the Law on Anti-Subversion; Social Organizations; National Security; National Protection and Defense; Mobilization and Demobilization; Defense and Security.[79] Moreover, in line with emerging international practice, capital punishment has also been abolished.[80]

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76 In 2000, a Panel of Experts handed the Secretary General their report on UN Peace Operations. Recommendation 6 reads: "The Panel recommends that the Secretary-General invite a panel of international legal experts, including individuals with experience in United Nations operations that have transitional administration mandates, to evaluate the feasibility and utility of developing an interim criminal code, including any regional adaptations potentially required, for use by such operations pending the re-establishment of local rule of law and local law enforcement capacity." *Report of the Panel on the United Nations Peace Operations, (Brahimi Report)*, A/55/305-S/2000/809, (Aug. 21, 2000).

77 UNTAET/REG/1999/1, Sec. 3.1 (Nov. 27, 1999).

78 *Id.*, Sec. 2.

79 *Id.*, Sec.2.

80 *Id.*, Sec. 3.3. However, it is worth noting that capital punishment is still recognized under the Penal

For what concerns "serious" crimes, under Regulation 2000/15 panels apply, besides the laws of East Timor as modified by Regulation 1999/1, a series of laws by and large cut and pasted from the ICC Statute (which, incidentally, at that time was not yet into force and had received few ratifications). In particular, the ICC Statute has been tapped for what concerns the definition of genocide, crimes against humanity, torture, and war crimes, and the grounds for individual criminal responsibility.[81] Moreover, the Serious Crimes Panel will resort to ". . . applicable treaties and recognized principles and norms of international law, including the established principle of international law of armed conflict." That arguably includes the jurisprudence of the Nuremberg and Tokyo military tribunals, the ICTY and ICTR that of national courts dealing with international crimes, and possibly other internationalized criminal bodies. Moreover, since the majority of cases are being dealt with under Indonesian law, recourse to the practice in that system is also important.[82]

Concerning procedural law, all criminal proceedings in East Timor are regulated by the Transitional Rules on Criminal Procedure (UNTAET Regulation 2000/30), which relies mainly on civil law tradition (which is, historically, the local one), with influence from the common law systems, as well as some procedural provisions drawn from the Statutes of the ICTY, ICTR and ICC. Although the Transitional Rules on Criminal Procedure apply equally to "serious" crimes and "ordinary" crimes trials, in the case of serious crimes there is a dedicated investigation unit (the Serious Crimes Unit), acting under the direction of the Office of the Deputy General Prosecutor for Serious Crimes. An investigating judge, specifically appointed to the Special Panel, ensures that the rights of the suspects are protected, and issues warrants or orders.[83]

In the case of Kosovo, at first UNMIK tried to rely as far as possible on the existing normative structure. Indeed, the legal codes of Yugoslavia could be considered as rather advanced and elaborated, and it should be recalled that prosecution of serious crimes was not intended to be the main task of the courts in Kosovo.[84] Thus, as to substantial and procedural laws, UNMIK Regulation 1999/1, provided that those laws in force before March 24, 1999

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der, extermination, enforced eviction or movement of civilians, arbitrary appropriation of independence or other physical freedoms in contravention of international law and the crimes of apartheid. Law Establishing Human Rights Courts, *supra* note 21, Ch. VI, (Penal Provisions), Art. 36-40.

81 On the point see Linton, *supra* note 7, at 206-212. Indeed, the reliance on those instruments in formulating Regulation 2000/15 was so clear that the Panel in the *Los Palos* case, seeking clarification of the definitions of forcible transfer of population and murder as a crime against humanity, turned to the ICC Statute and commentary and the *Rutaganda* case in the ICTR (ICTR-96-3).

82 Linton, *supra* note 7, at 207.

83 UNTAET/REG/2000/30, on *Transitional Rules of Criminal Procedure*, Sec. 9 (Sept. 25, 2000).

84 *Supra* note at 107.

(that is to say, before NATO started the bombing campaign), remained in force. Specifically, this meant that the criminal law in force was, on the federal level, the Federal Republic of Yugoslavia's Criminal Code and, where applicable, the Socialist Federal Republic of Yugoslavia's Criminal Code. On the regional level, the code to be applied was the Socialist Yugoslav Republic of Serbia Criminal Code, which had supplanted the Kosovo Criminal Code as the local law on 22 March 1989, when the break up of Socialist Federal Republic of Yugoslavia begun.

As in the case of East Timor, Regulation 1999/1 provided that these laws remained in force insofar as they did not conflict with "internationally recognized standards," the UNMIK mandate, or any other UNMIK Regulation. Regulation 1999/1 at first defined "internationally recognized standards" generically by saying that "In exercising their functions, all persons undertaking public duties or holding public offices in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, color, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or status."[85] Standards were specified with reference to certain key international treaties only by UNMIK Regulation 1999/24.[86] Again, as in the case of East Timor, capital punishment was abolished[87].

Notwithstanding Regulation 1999/1, unsurprisingly, many if not most Kosovo-Albanian judges applied the Kosovo Criminal Code, abolished back in 1989, rather than the Socialist Yugoslav Republic of Serbia Criminal Code as they should have.

Making the best of an embarrassing situation, at the end of 1999, UNMIK issued Regulation 1999/24, providing that the law applicable in Kosovo would be UNMIK regulations and the laws in force *before* March 22, 1989.[88] In case of conflict UNMIK regulations would prevail. In case a subject-matter or situation is not addressed neither by UNMIK regulations, nor the laws in force prior to March 22, 1989, laws in force after March 22, 1989 would apply, if not discriminatory. As a further guarantee against abuses, Regulation 1999/24 provided also that all officials in Kosovo, thus including judges, "shall observe internationally recognized human rights standards" in their official conduct, and also that criminal defendants would have the benefit of the most favorable provision.

85 UNMIK/REG/1999/1, on the *Authority of the Interim Administration in Kosovo*, Sec. 2 (July 25, 1999).

86 UNMIK/REG/1999/24, on the *Applicable Law in Kosovo*, Sec. 1.3 (Dec. 12, 1999). These are the same treaties specified by UNTAET/REG/1999/1.

87 UNMIK/ REG/1999/24, *id.*, Sec. 1.5.

88 *Id.*, Sec. 1.

Though this obviated the problem of judges applying repealed legislation, it failed to specify the precise relationship of international human rights law and domestic law. This led, in a number of situations, to the application of Yugoslav (federal) or Kosovo (regional) law in direct contravention of international standards. Recurring examples of such apparent violations included impermissibly long detentions before trial, interference with defense counsel and lack of judicial impartiality.[89]

B. Sierra Leone and Cambodia

In the case of Sierra Leone, reliance is made less on amended local law and more on international standards as codified in the statutes of the ICTY, ICTR and ICC. Hence, for what concerns procedure, the rules of the ICTR are to apply *mutatis mutandis* to proceedings of the Special Court, although the judges are given the power to adapt those rules to the specific needs of the Special Court and use Sierra Leone's 1965 Criminal Procedure Act.[90]

Regarding substantial law, Article 2 of the Statute of the Special Court adopts a definition of crimes against humanity that contains elements of the statutes of those three international courts.[91] The crime of genocide, which is usually prosecuted by international criminal bodies, is not included in the Statute of the Special Court, because, at least Sierra Leone seems to have been spared that plague.[92] Article 3 mirrors Article 4 of the Statute of the ICTR providing for prosecution of violations of common Article 3 of the Geneva Conventions and Additional Protocol II. In choosing these provisions, the drafters of the Statute have decided to characterize the conflict in Sierra Leone as domestic rather than an international one, despite the fact that the Revolutionary United Front launched its campaign in Sierra Leone from Liberia.[93] Finally, Article 4 is tailor-made on the Sierra Leone's situation. It deals with other serious violations of international humanitarian law that were of particular relevance in the Sierra Leonean conflict (i.e., attacks against civilians as such; against peacekeepers and personnel involved in humanitarian missions; and conscripting children under the age of fifteen). Provisions on individual criminal responsibility,

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89 See the reports of the OSCE Legal System Monitoring Section, available at http://www.osce.org/kosovo/documents/reports/justice/.

90 Special Court Statute, Art. 14.

91 For an analysis of in what the Special Court differs from that of the ICTY, ICTR and ICC, see Linton, *supra* note 7, at 234-38.

92 It might be argued, however, that including genocide in the Statute of the Special Court would have been a wiser choice, since it would have left open the possibility to prosecute it, should evidence of genocide emerge in the course of other proceedings. Taking it off the list of prosecutable crimes does not seem to have brought any major advantage.

93 Ditto. Indeed, it is generally accepted that the conflict in Sierra Leone began on March 23, 1991, when forces of the RUF entered Sierra Leone from Liberia. *See supra* at 112.

official capacity, command, superior orders, *ne bis in idem* and rights of the accused are copied *mutatis mutandis* from the ICTY and ICTR statutes.

However, the Special Court can also resort to Sierra Leonean law. In particular, under Article 5 of the Special Court Statute certain offences relating to the abuse of girls are to be addressed by applying the 1926 Prevention of Cruelty to Children Act (e.g. abusing a girl under 13 years of age; or abducting a girl for "immoral purposes"); and in cases of wanton destruction of property (basically setting fire to buildings, private and public) the Malicious Damage Act of 1861 is to be applied.[94]

Allegedly, the reason for including these two specific pieces of Sierra Leonean legislation into the list of laws applicable by the Special Court was to close loops in international criminal law.[95] However, their inclusion is likely to create more problems than it could solve. Besides the fact that it might be argued that both the abuse of girls and malicious damage to property arguably do fall within the ambit of international crimes included in the Special Court Statute,[96] Article 5 de facto created a dual start-date for the Court's temporal jurisdiction. Indeed, the Statute acknowledges that the amnesty contained in the Lomè Agreement of July 7, 1999 will be valid in respect of the those provisions of Sierra Leonean law within the Court's jurisdiction,[97] while the amnesty does not cover crimes under international law. In other words, the Special Court will be able to try violations of international humanitarian law committed since November 30, 1996, but only try violations of the Sierra Leonean laws included in the Court's Statute committed from July 7, 1999. The resulting effect of creating a dual start-date for the Special Court's temporal jurisdiction will not fail to raise serious questions about the legitimacy of the Court in the eyes of the Sierra Leone public.

Finally, the same mix of national and international criminal provisions can be found in the case of the Extraordinary Chambers. In particular, the Law on the Establishment of Extraordinary Chambers, empowers them to try crimes set forth in the 1956 Penal Code of Cambodia (i.e., homicide, torture

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94 Special Court Statute, *supra* note 34, Art. 5.

95 *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 31, para.19.

96 Article 2, concerning crimes against humanity, prohibits "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence." It also prohibits "persecution on political, racial, ethnic or religious grounds" and "other inhumane acts." Article 3, concerning violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, prohibits "acts of terrorism" and "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault." Special Court Statute, *supra* note 34.

97 Article 10 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." The omission of Article 5, which inscribes the provisions of Sierra Leone law, indicates that amnesties granted in respect of these crimes will be a bar to prosecution. *Id.*

and religious persecution);[98] crimes of genocide as defined by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;[99] crimes against humanity;[100] and grave breaches of the 1949 Geneva Convention.[101] Moreover, to adapt these cut-and-dried applicable laws to the peculiar situation of Cambodia under the Khmer Rouge, the Extraordinary Chambers was supposed to prosecute violations of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,[102] and crimes against internationally protected persons pursuant to the 1961 Vienna Convention on Diplomatic Relations.[103]

VI. International Cooperation and Judicial Assistance

There is no question that internationalized criminal bodies depend on actual and effective international cooperation and judicial assistance to carry out their mandate. They need support in three key-areas: arrest and surrender of suspects; securing and production of evidence, and enforcement of sentences, including forfeiture of proceeds of crime. Judicial assistance, in particular, is required from the authorities in control of the territory on which the internationalized judicial body has jurisdiction, be that a State or a UN mission, from third-states, and, where applicable, from other international criminal courts and tribunals.

International cooperation and judicial assistance are all the more crucial issues for international judicial bodies, and, a fortiori, internationalized criminal bodies, lack enforcement power on their own.[104] Such power must be explicitly conferred to them in the applicable legal instruments. Moreover, in case of lack of cooperation, under current international law States can only be the subject of countermeasures taken by other States, or of sanctions visited upon them by the organized international community, be that the United Nations or other intergovernmental organizations.[105]

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98 Art. 3. The statute of limitations provided in the 1956 Penal Code is extended for an additional 20 years. *Id.*

99 *Id.*, Art. 4.

100 *Id.*, Art. 5.

101 *Id.*, Art. 6.

102 *Id.*, Art. 7.

103 *Id.*, Art. 8.

104 As the Appeals Chamber of the ICTY in its judgment of October 29, 1997, in the Blaškić case remarked: "In the case of an international judicial body, this is not a power that can be regarded as inherent in its functions." Prosecutor v. Blaškić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 18 1997, Case No. IT-95-14-AR108*bis*, Judgement, (Oct. 29, 1997), para. 25. On the issue of internationalized criminal bodies and judicial cooperation, see the contribution by Sluiter in the forthcoming book of the Amsterdam Conference, *supra* note 7.

105 *Id.*

Before moving on to analyze the issue, it is necessary to recall one more time that the fundamental difference between the cases of Kosovo and East Timor, on the one hand, and Sierra Leone and Cambodia, on the other, is that in the former the governing authority is the UN and that internationalized panels are a built-in feature of the overall mission, while in the latter, internationalized bodies have been (or should have been, in the case of Cambodia) grafted onto or into the existing judiciary by way of bilateral agreements between the States concerned and the United Nations. This memento is necessary to properly place internationalized courts and tribunals with respect to two opposite models of judicial assistance: the "vertical" and the "horizontal" paradigm.[106]

Typically, judicial assistance between States is based on the principles of reciprocity and equality, and its legal foundations are to be found in a treaty. In an archetypal judicial assistance treaty the parties undertake to provide each other assistance on a reciprocal basis. Moreover, provision of assistance is not unconditional, but, usually, is limited to certain subject-matter areas and can be refused on various grounds. Finally, in case of disputes on the extent of the duty to cooperate, the matter is going to be settled through the usual means of international dispute settlement (diplomatic means or third-party adjudication).[107] This model emphasizes State sovereignty.

Conversely, the establishment of international criminal judicial bodies in the 1990s has brought about the emergence of an opposite "vertical" model, which is characterized by non-reciprocity, far-reaching duties on States to cooperate, and unilateral settlement of disputes.[108] In particular, the ICTY, ICTR and ICC, have no duty to provide judicial assistance to States, while States are almost unconditionally bound to cooperate; and disputes between the international judicial body and the state as to requests of cooperation are to be settled unilaterally by decision of the ICTY, ICTR or ICC, not through a third-party based mechanism.[109] This approach attaches a greater weight to the interest of the international community at large to ensure effective international criminal prosecution.

106 Philip B. Heyman, *Two Models of National Attitudes Toward International Cooperation in Law Enforcement*, 31 HARV. INT'L L. J. 99 (1990); Curt Markees, *The Difference in Concept between Civil and Common Law Countries as to Judicial Assistance and Cooperation in Criminal Matters*, *in* A TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. II: JURISDICTION AND COOPERATION 171 (M. Ch. Bassiouni & Ved P. Nanda eds., 1973).

107 See, for instance, the *UN Model Treaty on the Mutual Assistance in Criminal Matters*, GA Res. 45/117 (Dec. 14, 1990), annex, UN Doc. A/45/49 (1990) at 215; and the *UN Model Treaty on Extradition*, GA Res. 45/116 (Dec. 14, 1990), annex, UN Doc. A/45/49 (1990) at 212.

108 On this point, see the ICTY Appeals Chamber in the *Blaškić Subpoena* case, *supra* note 104, para. 47.

109 The existence of far-reaching duties to cooperate with international criminal tribunals appears from the absence of grounds for refusal in the Statutes of the ICTY and ICTR and only very few of such grounds in the ICC Statute.

Internationalized criminal bodies are to be situated somewhere in between these two extremes, the exact position of each in the spectrum being a function of the political and military events leading to their creation and, as a consequence, their legal basis.

A. East Timor and Kosovo

It is self-evident that courts in Kosovo (and in particular international prosecutors and internationalized panels) should receive the widest assistance from UNMIK, including arresting suspects and securing of evidence. These tasks have been carried out during the first stabilization phase (1999-2000) by the NATO-led international military presence (Kosovo Force - KFOR), currently by UNMIK Police, and in the future by the reconstituted Kosovo Police Service. Thus, Kosovo courts have the considerable advantage not only over the classical international criminal tribunals, such as the ICTY and the like, but also other internationalized courts, such as the Special Court, in that they have at their disposal a police force capable of using coercive measures, within a geographically limited area.[110]

For what concerns cooperation by state authorities beyond Kosovo, it should be reminded that, when establishing UNMIK, the Security Council "... demanded that all States in the region cooperate fully in the implementation of all aspects of the resolution".[111] Clearly, this provision was targeted mostly to the Federal Republic of Yugoslavia, where suspects of most crimes committed in 1999 in Kosovo sought refuge. Yet, prima facie cooperation by Yugoslavia should be implicit. At least for the time being, Kosovo is not a sovereign state, but a region of the Federal Republic of Yugoslavia.[112] In theory, requests for judicial assistance coming from Kosovo courts, including the special panels, should be formally treated by Yugoslav authorities as requests coming from their own courts. In practice, this has not been the case, as transfers of detainees and suspects, for instance, have been far from automatic, but rather the result of lengthy peer-to-peer negotiations between UNMIK and Yugoslav authorities.[113]

Zooming out to other states beyond the proximate region, it should be stressed that because UNMIK (and also UNTAET for that matter) was established by the Security Council acting under Chapter VII powers, all states have a duty to cooperate in the implementation of all aspects of the resolution establishing UNMIK (and UNTAET), including the reestablish-

110 Still, UNMIK security forces do not control the entirety of the territory of Kosovo. *See supra* note XXX.

111 SC Res. 1244 (1999), *supra* note 10, para. 18.

112 Note part of the preamble to Resolution 1244: "Reaffirming the commitment of all Member States to the sovereign and territorial integrity of the Federal Republic of Yugoslavia (...)".

113 On this point see the *Report of the UN Secretary General on the United Nations Interim Administration Mission in Kosovo*, S/2002/436, paras. 41-42 (April 22, 2002).

ment of the rule of law.[114] On top of that, because Kosovo is still formally part of the Federal Republic of Yugoslavia, any judicial cooperation treaties concluded by it (and also by the Socialist Federal Republic Yugoslavia, to which the Federal Republic of Yugoslavia might have succeeded),[115] will also be applicable.[116]

A unique feature of the case of internationalized panels in Kosovo, is that besides the issue of cooperation by local authorities (UNMIK) and States, the issue of cooperation with the ICTY must also be considered. The ICTY has jurisdiction over war crimes, crimes against humanity and genocide committed after January 1, 1991 on the territory of the former Yugoslavia, thus Kosovo included.[117] Article 9.2. of the ICTY Statute gives the Tribunal primacy over national courts. Again, the courts in Kosovo are not international courts, neither are Regulation 64 Panels, but part and parcel of the local judiciary, hence the ICTY enjoys primacy over them.

Yet, there are other elements to be considered. In Resolution 1244 establishing UNMIK, the Security Council, after recalling in the preamble "... the jurisdiction and the mandate of the ICTY..." demanded "... full cooperation by all concerned, including the international security presence, with the ICTY."[118] This should settle the matter of cooperation of the Kosovo courts with the ICTY, although it might be argued that Resolution 1244 concerned only KFOR and UNMIK and not the Kosovo judiciary. Be that as it may, it is not clear to what extent the ICTY has a duty to cooperate with the courts in Kosovo. Who is going to settle disputes between the ICTY and Kosovo courts (in particular internationalized panels) as to the issue of cooperation and judicial assistance? The Secretary General or the President of the ICTY might submit the matter to the Security Council, through their reports. However, it is not absurd to imag-

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114 However, the Security Council has not imposed an explicit obligation on UN members in this sense, as it did in the case of the ICTY and ICTR, with SC Res. 827 (May 25, 1993), para. 4 and SC Res. 955 (Nov 8, 1994), para. 2, although it is not excluded that it might do so in the future.

115 On the issue of State succession and recent praxis, see Hubert Beemelmans, *State Succession in International Law: Remarks on Recent Theory and State Praxis*, 15 BOSTON U. INT'L L. J. 71 (1997).

116 The Federal Republic of Yugoslavia is party to the following legal and judicial cooperation agreements: Treaty concerning legal relations in civil and criminal cases (with exchange of letters), Feb. 6 1960, (with Poland), 521 UNTS 37; Treaty concerning legal assistance in civil, family and criminal cases, Feb. 24, 1962, (with the U.S.S.R.), 471 UNTS 195; Convention concerning reciprocal legal assistance in criminal matters, Oct. 29, 1969, (with France), 760 UNTS 390; Extradition Treaty, Nov. 26, 1970, (with the Federal Republic of Germany), 994 UNTS 95; Convention concerning extradition and judicial assistance in criminal matters (with annex), June 4, 1971, (with Belgium), 872 UNTS 3; Treaty concerning judicial assistance in criminal matters, Oct. 1, 1971, (with the Federal Republic of Germany), 966 UNTS 153; Bilateral Extradition Treaty with the U.S., Oct. 25 1901 (entry into force: June 12, 1902), 32 Stat. 1890. Moreover, Yugoslavia succeeded to the Additional Protocol 1 of Geneva Conventions on 16 October 2001. Article 88 provides for mutual assistance in criminal matters. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, 1125 UNTS 3. However, the Federal Republic of Yugoslavia is not a party to important multilateral European instruments, such as the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters.

117 ICTY Statute, *supra* note 26, Art.1.

118 SC Res. 1244, *supra* note 10, para. 14.

ine that the Security Council might request the International Court of Justice, by way of an advisory opinion, to unravel the knot.[119]

In practice, cooperation between the Kosovo judiciary and the ICTY is likely to be asymmetric. First, it is unlikely the ICTY will ever transfer suspects or convicted persons to internationalized courts.[120] Second, even limiting cooperation to the investigative phase, the ICTY Prosecutor has repeatedly declared readiness to assist national authorities in the prosecution of crimes within the Tribunals' jurisdiction. In the case of Kosovo, to date, it has largely failed to do so.

As in the case of Kosovo, internationalized panels in East Timor have the considerable advantage of being part and parcel of the local judiciary. Hence, UNTAET Regulation 2000/11 obliges any district court to cooperate with requests for assistance issued by another district court on a broad number of matters, except, of course, in the case the requesting court lacks jurisdiction.[121]

Moreover, like in Kosovo, in East Timor internationalized panels operate under the authority of, and are integrated into, a UN mission. This makes a police force to carry out courts' orders and investigate cases to them. On May 20, 2002, East Timor declared independence with the blessing of the United Nations and became a sovereign State, joining the United Nations as such on September 27, 2002. Accordingly, UNTAET, which had hitherto given full support to courts in East Timor, was terminated. UNMISET (United Nations Mission of Support in East Timor) has taken over a considerable part of the mandate of UNTAET, including assistance in the conduct of serious crimes investigations and proceedings.[122]

Yet, as in the case of Kosovo, the snag is ensuring cooperation of neighboring countries, particularly Indonesia, where the overwhelming majority of suspects have taken refuge, and where most witnesses are still living

119 On the role the International Court of Justice might play see, in general: INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS (Laurence Boisson de Chazournes, Cesare Romano, Ruth Mackenzie, eds. 2002). See in particular the contributions of Romano, Dominicé, Boisson de Chazournes, and Gowlland-Debbas.

120 The ICTY and ICTR generally try all the accused within their custody and do not have the power to transfer for prosecution accused persons to States other than where they were arrested . *See* Prosecutor v. Ntuyhaga, Decision on the Prosecutor's Motion to Withdraw the Indictment, Case No. ICTR-98-40-T, (March 18, 1999). On February 21, 2003, the President of the ICTY, and the Office of Human Rights Senior Deputy High Representative and Head of the Rule of Law Pillar, signed a document entitled Joint Conclusions on the development of war-crimes trial capacities in Bosnia and Herzegovina. According to the Joint Conclusions, sometimes, at the end of 2003, early 2004, an internationalized three-panel chamber, within the newly established Court of Bosnia and Herzegovina will be established to try essentially three types of war crimes: a) cases deferred by the ICTY in accordance with Rule 11 bis of the Rules of Procedure and Evidence (approximately 15 accused); cases deferred by the ICTY Prosecutor's office, for which indictments have not yet been issued (approximately 45 suspects); and those "Rules of the Road" cases before domestic courts, which, due to their sensitivity, should be tried at the State Court level. Http://www.ohr.int/print/?content_id=29301 (Site last visited: February 22, 2003).

121 UNTAET/REG. 2000/11, *supra* note 17, Sec. 8.

122 UNMISET has been established by UN Security Council Resolution 1410 (May 17, 2002). Regarding the role to be played by the UN after independence of East Timor, see *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, S/2002/4332, paras. 62-98 (April 17, 2002).

(particularly in refugee camps in West Timor). Unlike the stern language utilized in Resolution 1244 establishing UNMIK (demand[ing] . . . full cooperation by all concerned),[123] Resolution 1272 establishing UNTAET simply ". . . stresses the importance of cooperation between Indonesia, Portugal and UNTAET in the implementation of this resolution."[124] Clearly (and cynically), the difference in language can be explained by the fact that while Yugoslavia was bent after an eleven-week bombing campaign and threat of land invasion by NATO, force was never used, nor threatened to be used, against Indonesia. Hence, in the former case the UN could demand cooperation, in the latter all it could do was stress its importance.

It follows that judicial cooperation between UNTAET and Indonesia is regulated by way of an ad hoc agreement: The Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights-Related Matters (Indonesia-UN Memorandum).[125] The resulting model is less "vertical" and more "horizontal" than the one applicable to Kosovo and Yugoslavia. Indeed, the Indonesia-UN Memorandum is based on reciprocity, includes rather far-reaching grounds for refusal, and does not contain a compulsory dispute settlement mechanism.[126]

Regarding the transfer of accused persons, which in the case of East Timor is crucial, the Indonesia-UN Memorandum has two important grounds for refusal. Section 9.2 contains the so-called "double criminality" requirement, whereby ". . . criminal offences for which a person may be transferred are offences that are punishable under the laws of both Parties by imprisonment . . . for a maximum period of at least two years, or by more severe penalty, as well as crimes against humanity." Considering the gravity of the crimes for which most suspects are sought, and the competence *ratione materiae* of Serious Crimes Panels, this should not be a significant hindrance. If transfer is refused, the refusing Party is obliged nonetheless to submit the case to its own authorities for prosecution.[127]

However, the Indonesia-UN Memorandum also contains open-ended grounds for refusal, which is highly susceptible to abuse. Under Section 9.3 ". . . Each Party shall have the right to refuse a request for . . . transfer if the carrying out of legal proceedings by authorities of the requesting Party would not be in the interest of justice." Disputes as to the interpretation or implementation of the Indonesia-UN Memorandum are to be settled ami-

123 *Supra* note 10.

124 SC Res. 1272, *supra* note 10, para. 7.

125 Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters, concluded in Jakarta, April 5, 2000. Http://www.jsmp.minihub.org/Reports/MOU.htm. (Site last visited Aug. 15, 2002).

126 "The parties shall . . .afford to each other the widest possible measure of mutual assistance in investigations or court proceedings . . .". *Id.*, Sec 1.1.

127 *Id.*, Sec 9.4.

cably through consultation or negotiation.[128] No third-party binding mechanism is provided. Considering that so far the implementation of the Indonesia-UN Memorandum by Indonesia has been largely unsatisfactory, this provision risks to frustrate all international efforts to earnestly do justice for what happened in East Timor.

Although the Indonesia-UN Memorandum is formally an agreement between UNTAET and Indonesia, it is reasonable to conclude that, after East Timor's independence, UNMISET has succeeded to it.[129] Nonetheless, it is to be hoped that East Timor, having now international legal personality, will soon enter into a new and possibly improved judicial assistance agreement with Indonesia, and also conclude in earnest judicial assistance treaties with other states in the region and beyond (possibly with the diplomatic assistance of the UN, and the backing of the Security Council). Indeed, East Timor, being a new state, has not succeeded to any agreement concluded by previous administrating authorities (unlike Kosovo, which, as it was explained, should be able to rely on the judicial assistance agreements entered into by Yugoslavia).[130]

B. Sierra Leone and Cambodia

Contrary to the case of East Timor and Kosovo, the Special Court for Sierra Leone is neither part of a UN mission—thus lacking its direct support—nor is part of local judiciary.[131] As a result, the Special Court cannot issue directly orders to the national authorities of Sierra Leone, as "ordinary" national courts in Sierra Leone can do. Cooperation by local authorities rests on a different legal basis.

Regarding the exercise of jurisdiction, Article 8 of the Special Court's Statute grants it primacy over national courts.[132] The provision is *mutatis mutan-*

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128 *Id.*, Sec. 15.2.

129 This appears at least to be the expectation of the Security Council, which in its resolution establishing UNMISET

> "... welcomes the progress made in resolving pending bilateral issues between Indonesia and East Timor, and stresses the critical importance of cooperation between these two Governments, as well as cooperation with UNMISET, in all aspects, including the implementation of the relevant elements of this and other resolutions, in particular ... by ensuring that those responsible for serious crimes committed in 1999 are brought to justice."

SC Res. 1410, *supra* note 122. In his 2002 Report on East Timor, the Secretary General stated that the Serious Crimes Unit of UNMISET "would continue to cooperate with Indonesian investigators in their efforts to make inquiries into the past crimes." *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, *supra* note 122, para. 78.

130 *See supra* at 126-128.

131 *See supra* at 126-130.

132 "1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.; 2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence." Special Court Statute, *supra* note 34, Art. 8.

dis the same contained in the ICTY and ICTR Statutes.[133] The relationship between the Special Court and the Sierra Leonean Government (in particular the Attorney-General and Minister of Justice) is regulated by the UN-Sierra Leone Agreement,[134] and the Special Court Agreement Ratification Act.[135]

Article 17 of the UN-Sierra Leone Agreement, entitled "Cooperation with the Special Court," reads as follows:

> "1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.
>
> 2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:
>
> Identification and location of persons;
>
> Service of documents;
>
> Arrest or detention of persons;
>
> Transfer of an indictee to the Court".

This bare-bone provision is, by and large, modeled on Article 28 of the ICTR Statute and Article 29 of the ICTY Statute,[136] instead of the much more elaborated judicial assistance regime contained in the ICC Statute.[137] Nonetheless, the Special Court Agreement Ratification Act filled the gap going above and beyond. Again, while the Agreement Ratification Act itself specifies that the Special Court is not part of the judiciary of Sierra Leone,[138] when it comes to judicial assistance it treats it as such. In particular, Part V on "Orders of the Special Court," reads: "For the purposes of execution, an order of the Special Court shall have the same force or effects as if it had been issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone Court."[139] The same is valid in the case of execution of warrants of arrest.[140]

The Agreement Ratification Act not only equates orders of the Special Court judges to those of national judges, but it also gives the Special Court quasi-primacy over the Attorney-General. Indeed, should the Attorney-

133 ICTY Statute, *supra* note 26, Art. 9; ICTR Statute, established by SC Res. 955, 33 ILM 1598 (1994), Art. 8.

134 *Supra* note 31.

135 *Supra* note 36.

136 However the ICTY and ICTR Statutes include also, in the list of possible items on which the Court might ask assistance, the taking of testimony and the production of evidence. ICTY Statute, *supra* note 26, Art. 29.2.b; ICTR Statute, *supra* note 133, Art. 28.2.b.

137 ICC Statute, *supra* note 3, Art. 86-102.

138 Special Court Agreement Ratification Act, *supra* note 36, Art. 11.2

139 *Id.*, Art. 20.

140 *Id.*, Art. 23.

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General decide to refuse or postpone the provision of the assistance requested by the Special Court, or should it be impossible to comply for any reason, he/she will have to state the reasons for the decision.[141] If the request for assistance relates to "... material that may be prejudicial to the national security of Sierra Leone. . . " the Attorney-General shall, without delay, notify the Special Court, but, if a Judge of the Special Court orders nevertheless disclosure of the material, the Attorney-General must comply with the order, and his act will be exempt from the Sierra Leone's Treason and State Offences Act of 1963.[142]

It is true that the UN-Sierra Leone Agreement does not contain any enforcement mechanism should disputes arise between Sierra Leone and the Court. Article 20 generically provides for negotiation as a way to settle disputes on the implementation of the Agreement. Moreover, neither under the Agreement nor under the Statute there is a possibility of referring violations of the duty to cooperate to the Security Council. However, the ICTR Rules may offer unexpected possibilities in this respect.[143] Under Rule 7 bis:

> "(A) . . . where a Trial Chamber or a Judge is satisfied that a State has failed to comply with an obligation under Article 28 of the Statute [i.e., judicial cooperation], the Chamber or Judge may request the President to report the matter to the Security Council.
>
> (B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 28 of the Statute. . . , the President shall notify the Security Council thereof."

Applying the ICTR Rules by analogy, the Judges and the Prosecutor of the Special Court could thus refer lack of cooperation by the Sierra Leone authorities to the Security Council. It will then be up to the Council to decide whether it wishes to respond.

Concerning judicial cooperation with states other than Sierra Leone, it can safely be said that at present there is no legal basis for a duty to cooperate with the Special Court *as such*. The Special Court was created by way of a bilateral agreement between the UN and Sierra Leone, and UN members are *per se* not bound by it, although one might expect that, given the role played by the Security Council in the establishment process, it might buttress the Court requests of assistance by third States.[144]

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141 *Id.*, Art. 18.2 and 18.3

142 *Id.*, Art. 18.4.-6.

143 On the fact that the Special Court will apply ICTR Rules of Procedure and Evidence, see *supra*, at 122.

144 In the case of Sierra Leone and Cambodia, cooperation by third-States, cannot be assumed, unless it was argued that, because those internationalized criminal courts deal with the repression of war crimes and crimes against humanity, and the repression of those crimes is functional to the maintenance of international peace and security, as stated in the Preamble of the Rome Statute, the Security Council can ask member states to cooperate. Yet, considering the lack of cooperation by Indonesia and Yugoslav authorities with UNTAET and UNMIK, and the reluctance of the Security Council to press the issue, the point is more theoretical than practical.

The question is then whether the Special Court may rely on international agreements to secure the needed judicial cooperation. On the one hand, as it has already been said, the Special Court is not part of the Sierra Leonean judiciary, and thus it cannot rely *ipso facto* on any international cooperation and judicial assistance agreement, both bilateral and multilateral, entered into by Sierra Leone.[145] On the other hand, the Special Court has international legal personality. The UN-Sierra Leone Agreement endows it explicitly with the capacity to "[e]nter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court."[146] These agreements could be open-ended, for example providing general cooperation and judicial assistance on any matter within the jurisdiction of the Special Court from a particular country (e.g., Liberia, to name a country where suspects might have sought refuge), or could be ad hoc and targeted about obtaining specific pieces of evidence or surrender of particular individuals.

Finally, for what concerns the Cambodian case, it remains to be seen whether an internationalized mechanism to punish crimes committed during the Pol Pot regime will be established and on which basis. However, let's assume, for the moment, that it will be established, and its legal basis will be the latest draft UN-Cambodia Agreement, and the Cambodian Law on the Establishment of Extraordinary Chambers (which is an even greater assumption).[147]

Unlike the Special Court for Sierra Leone, but like the case of East-Timor and Kosovo, the Extraordinary Chambers will be part of the Cambodian judiciary.[148] As such, one should expect the Cambodian authorities to cooperate fully with the Extraordinary Chambers. Yet, it is also true that the need for stronger guarantees is dictated both by political realism and legal issues.

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145 Sierra Leone is party only to a very limited number of judicial cooperation agreements. Among the few, one should cite the Bilateral Extradition Treaty with the United States signed on December 22, 1931, and entered into force on June 24, 1935. 47 Stat. 2122 (source: M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (2002), Appendix II at 925. Moreover, the Court of Appeal of Sierra Leone in *Lansana v. R* (70 INT'L L. REP. 2 (1971) found that Sierra Leone had succeeded to the Anglo-Liberian Extradition Treaty of 1894 due to a mutual exchange of letters between the two countries and Sierra Leone's domestic extradition legislation (source: GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW. EXTRADITION AND OTHER MECHANISMS (1998)). For what concerns multilateral arrangements, in 1974 Sierra Leone adopted the Extradition Act, subsequently amended by the Sierra Leone Extradition (Amendment) Act of 1978, The Act implemented the *Scheme Relating to the Rendition of Fugitive Offenders Within the Commonwealth* formulated at a meeting of Commonwealth Law Ministers, London, April 26-May 3, 1996, in: H.M.S.O., London, Cmnd. 3008; reproduced in I. A. SHEARER, EXTRADITION IN INTERNATIONAL LAW (1971), 251. (H.M.S.O. refers to 'Her Majesty's Stationary Office'; and Cmnd refers to 'Command Papers'). Sierra Leone is also party to the Convention (A/P1/7/92) on Mutual Assistance in Criminal Matters, 1992. *Reprinted in* MUTUAL ASSISTANCE IN CRIMINAL AND BUSINESS REGULATORY MATTERS 202 (W.C. Gilmore ed., 1995). Finally, Sierra Leone acceded to the Additional Protocol 1 of Geneva Convention on 21 October 1986. *Supra* note 166.

146 UN-Sierra Leone Agreement, *supra* note 31, Art. 11.d.

147 *Supra* note 5.

148 *Supra* at 110.

For instance, immunities might be granted de iure, under Cambodian law, or de facto to certain politicians and military figures, which the Extraordinary Chambers might want to prosecute.

For this reason, the UN-Cambodia Agreement contains a separate article on judicial assistance. Using the same words of Article 17.2 of the UN-Sierra Leone Agreement, Article 23 provides that:

> "The Government shall comply without undue delay with any request for assistance by the Court or an order issued by the chambers, including, but not limited to:
>
> 1. Identification and location of persons;
> 2. Service of documents;
> 3. Arrest or detention of persons;
> 4. Transfer of an indictee to the chambers."

Unlike the UN-Sierra Leone Agreement, the UN-Cambodia Agreement does not explicitly provide for an open-ended duty of cooperation with the Extraordinary Chambers, nor does it provide that the Cambodian Government will have to facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.[149] However, both obligations can be considered implicitly included.[150] Because the UN-Cambodia Agreement imposes a far reaching duty of cooperation on the Government of Cambodia, and does not take account of any limitations under national law, it provides a legal basis for judicial assistance more extensive that that Cambodian authorities are ordinarily supposed to provide to local courts.

In sum, the combination of Article 23 of the UN-Cambodia Agreement, and Article 2 of the Cambodian Law, incorporating the Extraordinary Chambers into the Cambodian judiciary, provides the Extraordinary Chambers the best of both worlds. As a "national court," they can issue direct orders to national authorities, while as an "internationalized court" they can rely on the UN-Cambodia Agreement to ensure their effective implementation.

Be that as it may, when in comes to securing judicial cooperation, the Extraordinary Chambers are in a weaker position than the Special Court. Indeed, like the UN-Sierra Leone Agreement, the UN-Cambodia Agreement does not contain any enforcement mechanism should disputes arise. Arti-

149 UN-Sierra Leone Agreement, *supra* note 31, Art. 17.1.

150 Article 17.1 of the UN-Sierra Leone Agreement reads: "The Government shall cooperate with all organs of the Special Court at all stages of the proceedings...", and it adds that:"... It shall, in particular, facilitate access for the Prosecutor to sites, persons and relevant documents required for the investigation." The former can be considered equivalent to "The Government shall comply without undue delay with any request for assistance by the Court or an order issued by the chambers..." of Article 23 of the UN-Cambodia Articles of Cooperation, *supra* note 5, while the latter can be considered included in the list ("...including, but not limited to...") of issues on which the Extraordinary Chambers might request assistance. *Id.*

cle 27 generically provides for negotiation as a way to settle disputes on the implementation of the Agreement. Nor is there in the UN-Cambodia Agreement the possibility of referring violations of the duty to cooperate to the Security Council. While the Special Court could eventually rely on Rule 7 bis of the ICTR Rules to refer matters of non-cooperation to the Security Council, the Extraordinary Chambers cannot do the same.

There is more. The Extraordinary Chambers are also sapped in their capacity to secure effective judicial cooperation by third states. As in the case of Sierra Leone, there is no legal basis for a duty of third states to cooperate with the Extraordinary Chambers *as such*, since they are to be established by way of an ad hoc agreement between Cambodia and the UN. Likewise, as in the case of Sierra Leone, Cambodia is not party to a significant number of international cooperation and judicial assistance agreements, on which the Chambers might rely. However, unlike the Special Court, the Extraordinary Chambers have no international legal personality, and therefore cannot enter into ad hoc judicial cooperation arrangements. It will be entirely in the hands of the Cambodian government to decide when, for what, and with whom it is prepared to seek the provision of assistance.

VII. Conclusions

Internationalized criminal bodies are the latest addition to the sprawling class of international judicial bodies. Each is the fruit of hardly comparable political and historical events, which took place at different times, in different contexts, and involving different states and powers. This article tried to detail the peculiarities of each one, while, at the same time, making a case for studying them as a single family in its own right within the class of international judicial organs.

The trait they all ultimately share is that they are the result of one of the most notable trends in the post Cold War era: the move of international law towards greater criminalization, and the quest for prosecution of gross violations of humanitarian law and human rights by individuals, both by national courts, and ad hoc international bodies.

The adoption of the Rome Statute of the International Criminal Court on June 17, 1998, and its rapid entry into force, on July 1, 2002,[151] can be aptly depicted as the apex of this trend. It is therefore necessary to wonder whether the birth of this international criminal jurisdiction, which aspires to universality, will leave room for internationalized criminal bodies, or are

151 The threshold of 60 ratifications mandated by Article 126 of the Rome Statute was passed on April 11, 2002, when 10 States (Bosnia-Herzegovina, Bulgaria, Cambodia, the Democratic Republic of Congo, Ireland, Jordan, Mongolia, Niger, Romania and Slovakia) deposited their ratifications simultaneously. The Statute entered into force "...the first day of the month after the 60th day following the deposit of the 60th instrument of ratification." Rome Statute, *supra* note 3, Art. 126.

they rather destined to pass down history as a temporary patch to avoid impunity for certain particularly heinous crimes while the ICC was set up.

Surely, not even its most ardent supporters could claim that the International Criminal Court will be a catchall for any international crime. Its jurisdiction, indeed, is limited by several factors. First, the Court's jurisdiction is not retroactive, but will cover only acts committed after the Statute's entry into force (July 1, 2002).[152] Second, acceptance of the Rome Statute is still far from universal. Less than half of the States of the world have ratified it. Most of Asia, large parts of Africa, the Pacific, Caribbean, and the United States are not party. The ICC's jurisdiction *ratione loci* and *personae* is consequently limited[153].

This leaves plenty of situations where international crimes have been, or will be, committed outside of the reach of the ICC, and which might be addressed by way of ad hoc internationalized criminal bodies. Indeed, the ICC could not exercise its jurisdiction on any of the events under the jurisdiction of the bodies analyzed in this article. In the future, however, there might be some potential overlaps, especially should hostilities resume and international crimes be perpetrated again in those regions. Sierra Leone, and Yugoslavia have ratified the Rome Statute (respectively on September 15, 2000; and September 6, 2001).[154] The Special Court's jurisdiction runs from November 30, 1996 onward, but it has no end date.[155] On January 19, 2002, Sierra Leone held a ceremony marking the end of disarmament, and thus the end of the conflict, simultaneously lifting the state of emergency the country had been under since 1999, but, should hostilities resume again, both the Special Court and the ICC would have jurisdiction. Kosovo is still a territory of the Federal Republic of Yugoslavia. Should any international crimes be committed there they would be under the jurisdiction not only of Kosovo Courts and the ICTY, but also of the ICC.

Having said that, once the ICC will have asserted itself, become fully operational, and enjoyed quasi-universal acceptance, will internationalized criminal bodies be of any use? The answer might vary depending on which of the two genera of internationalized bodies we consider.

152 *Id.*, Art. 11

153 To date, seventy-seven states have ratified the Rome Statute. The ICC has jurisdiction over crimes perpetrated in the territory of States party to the Rome Statute or in the territory of States that are not party, when crimes have been committed by States Party's nationals. *Id.*, Art. 12. Moreover, States which are not parties to the Rome Statute can accept the ad hoc exercise of jurisdiction. *Id.*, Art. 12.3.

154 Cambodia ratified on April 11, 2002, too, but there is no question of potential overlap between the Extraordinary Chambers and the ICC, for the jurisdiction of the former is limited to the period 1975-1979. See *supra* at 110-111. East Timor, which became a sovereign country just recently, has neither signed, nor ratified yet.

155 *Supra* note 112-113.

In the case of East Timor/Kosovo the answer is probably positive. In those cases, internationalized bodies have been set up as part of larger UN missions, entrusted with the task to restore peace and maintain order in territories where normal administration had ceased to exist. Internationalized bodies are thus the logical articulation of the taking over by the international community of sovereign competences of states. They are the response to legal and practical problems, such as replacing unacceptable local laws with laws in line with international human right standards, providing competent and unbiased judges, and training local judges. It is not far-fetched to imagine (and it is hoped) that internationalized judicial bodies will become eventually a regular feature of any future UN mission called to administer a given territory.

Moreover, because the jurisdiction of these internationalized bodies encompasses the whole gamut of judicial competences (civil, criminal and administrative), and is not necessarily only focused on international crimes, they will not necessarily compete with the ICC.

However, should internationalized bodies be called to adjudicate international crimes (as in the case of East Timor), conflict could be still avoided. Indeed, it could be argued that internationalized bodies created by the Special Representative of the Secretary General are part of the national court system,[156] and the ICC's jurisdiction is only complementary to that of national courts.[157] Conversely, the same cannot be argued in the case of internationalized bodies à-la Sierra Leone.[158]

If internationalized bodies like those created in East Timor/Kosovo have a clear future, the outlook is much more nuanced in the case of the Sierra Leone/Cambodia kind. The Special Court and the Extraordinary Chambers are the result of international outcry over the possibility that egregious international crimes could go unpunished. Unless jurisdictions were created with the direct or indirect support of the international community impunity would have triumphed, as it happened too many times in history. Internationalized criminal bodies filled a gap that could not be addressed by the ICC, because its jurisdiction is not retroactive. Yet, as the ICC expands its territorial reach, and as time goes by, pockets of impunity will inevitably shrink.

It is true that the ICC, will never be able to bring justice as close to those who suffered first-hand from the crimes as the Sierra Leone/Cambodia-like bodies do. It will always be a full international court, removed from the

156 On this point see *supra* at 103-108.

157 Rome Statute, *supra* note 3, Preamble and Art. 1.

158 *See supra* at XXX. However, the Extraordinary Chambers would be part of the Cambodian judiciary. *See supra* at 110.

"scene of the crime," composed entirely of "foreign" judges, and applying purely international law.[159]

Yet, this is not a reason valid enough to justify the creation of other internationalized criminal bodies once the ICC is up and running and it can exercise jurisdiction. That would go against any effort to rationalize the international judicial system. The ICC has been designed exactly to provide a permanent facility, with universal aspiration, to serve all situations that might arise. In other words, the ultimate logic is that if there is an ICC in place, there should have no more need of other ad hoc international or internationalized bodies. But this is a logic that seems to be shared only by those states that support the ICC. To the U.S. every internationalized criminal body is a good instrument to encroach on, and fight back, the ICC, and this will be even more true in the future.[160] For this reason alone, the Special Court and the Extraordinary Chambers are unlikely to be the last two species in their genus.

159 However, in the future the ICC might take full advantage of the provisions of its own statute that allow it to sit and exercise its functions and powers somewhere other than The Hague, if necessary and desirable. Rome Statute, *supra* note 3, Art. 3.3 and 4.

160 It is a fact that one of the main, if not *the* main power, behind the creation of the internationalized criminal bodies for Sierra Leone and Cambodia has been the U.S. On the Cambodian Genocide Justice Act, see *supra* note 33. The Clinton Administration has been a strong supporter of the creation of the Special Court. The Bush Administration, despite its stalwart opposition to the ICC, seems to have maintained its support. The U.S. has contributed a quarter of the funds for the first three years of the Special Courts' operations, and the Prosecutor is American.