INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS

Sierra Leone, East Timor, Kosovo, and Cambodia

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12

The Judges and Prosecutors of Internationalized Criminal Courts and Tribunals

*Cesare P R Romano**

A. INTRODUCTION

In 1944, while the Allied troops were making gradual inroads towards Berlin and Tokyo, and the end of the Second World War was only a matter of time, the Brookings Institution and the Carnegie Endowment for International Peace gave the great US scholar and judge, Manley O Hudson, a grant to predict the future of international adjudication. The result of his study (which incidentally was facilitated by no less than Louis Sohn, then only a young research assistant) was published in an almost forgotten booklet entitled *International Tribunals: Past and Future*. In the section dedicated to the 'manning of international tribunals', he wrote:

> The selection of the members of international tribunals frequently presents problems of great difficulty, and in some instances the structure of the tribunal is made to depend upon the solution given to these problems. No group of men exists which can be said to form a profession of international judges, and but few individuals are so outstanding as to be repeatedly called upon to serve as members of different tribunals. The number of men actually serving in such positions at any one time is quite limited, and their selection is usually determined by a variety of considerations, some of them more or less fortuitous. The role is not one offering a career for which men are, or can be, specially trained.[1]

The world in which Hudson practised was rather different from the one we are living in today. In his time there were very few permanent international judicial bodies, and ad hoc arbitration dominated the scene. International criminal tribunals would have appeared only within a few years. Nowadays, the sheer number of international judicial and quasi-judicial bodies makes it possible to argue that an 'international judicial operator' profession has emerged. Be that as it may, it is remarkable that about 60 years ago Hudson

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[1] M Hudson *International Tribunals: Past and Future* (Carnegie Endowment Washington DC 1944) 32.

could pinpoint a serious of issues that were going to affect the development of the international judiciary, making his booklet transcend the epoch in which it was written.

This chapter will look at the question of staffing internationalized criminal courts and tribunals, and, specifically, it will analyse the judicial body's essential engine: judges and prosecutors. First, while all internationalized criminal courts and tribunals have the common feature of being staffed by a blend of international and local judges, prosecutors and staff, the mix can vary from case to case. This chapter will explain how and why. Secondly, we will look at what qualifications are required of judges and prosecutors, both local and international. Nationality, moral integrity, gender, and curriculum, meaning specific professional background and expertise, are factors that will be considered. Thirdly, the practical problem of identifying and recruiting outstanding individuals that match these criteria will be expounded. Finally, the question of the degree of independence of local and international judges and prosecutors serving in internationalized bodies will be tackled by concentrating on three particular aspects of this complex issue: procedures for appointment and dismissal of judges, length of service, and privileges and immunities.

However, before moving on to the analysis, it is necessary to introduce a few clarifications and some raw data. First, international judicial bodies other than criminal courts (eg the International Court of Justice, or the European Court of Justice) have two main components: judges and bureaucrats working in the Registry. International criminal tribunals differ from such 'ordinary' international judicial bodies in many regards, including the fact that they typically have a much larger staff, for, besides the two aforementioned components, there is also the personnel of the Office of the Prosecutor, and the ancillary services, such as the programmes for the protection of witnesses, detention facility, and security personnel.[2] Moreover, in the case of some internationalized criminal judicial bodies, besides adjudicating judges, there are also 'investigating judges'.[3] Thus, it should be

[2] This, incidentally, helps explain why the budget of international criminal courts and tribunals is much larger than that of 'ordinary' international judicial bodies. On the issue of the financing of internationalized criminal courts and tribunals, see, Chapter 13 (Ingadottir).

[3] The exact meaning of the term 'investigating judge' depends on the particular legal system. Thus, in civil law system traditions it indicates somebody who is half-magistrate and half-policeman. The Agreement of 6 June 2003 between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (hereafter 'United Nations/Cambodia Agreement'), provides for investigating judges (Art 5), who are responsible for the actual conduct of investigation (a task which, ordinarily, in international criminal tribunals is left to the prosecutor). The text of the Agreement can be found at http://genocidewatch.org/CambodiaDraftAgreement17-03-03.htm. On this issue, see Chapter 11 (Meijer). Sometimes, it is instead a judge who is empowered to ensure that the rights of suspects under investigation, and those of victims of the suspected crime are respected, particularly in pre-trial matters. On the investigating judge, in particular in the case of East Timor, see Chapter 15 (Friman).

made clear that in this chapter, the term 'staff', or 'personnel', or 'manpower', of internationalized courts and tribunals is used in a restrictive sense, indicating first of all the judges, and then the Prosecutor and Deputy Prosecutor. All other individuals that contribute to the functioning of internationalized criminal judicial bodies, although essential, will be dealt with only marginally.

Admittedly, defence lawyers, who can be retained directly by the indictee, or, in the case of indigent ones, can be assigned, and paid for, by the tribunal, either by drawing from the private sector or, when available, from the tribunal's own defence unit, are equally essential to the delivery of international criminal justice. Judges and prosecutors may be the essential engine propelling criminal judicial bodies, but without defence counsel (and adept ones for that matter) the machinery will inevitably lead to injustice.

However, defence will not be addressed in this chapter for several reasons. First of all, proper treatment of defence in these bodies warrants a specific chapter, and not just a few paragraphs. This is beyond the scope of this already long piece. Secondly, this chapter is dedicated to the staff of internationalized courts and tribunals (with the above mentioned exclusion of the Registry staff), and defence counsel are (generally) not part of it. Thirdly, in this book Håkan Friman deals with the fair trial aspects of defence issues, and therefore the reader will find it convenient to refer to his contribution.

There is a second general note of caution that must be introduced before moving on to the core of this piece. Indeed, there are several substantial differences between the internationalized criminal bodies created in East Timor and Kosovo, on the one hand, and those in Sierra Leone, and the one planned for Cambodia, on the other, up to the point that it is possible to talk about two distinct genera in the family of internationalized criminal bodies.[4] One of such dissimilarities is the scope of the undertaking. As has been well detailed elsewhere in this book, in Sierra Leone and Cambodia the goal is ensuring actual prosecution of political and military leaders most responsible for international crimes.[5] It is a limited, albeit crucial, mission. Conversely, the task undertaken by the United Nations in Kosovo and East Timor is wide-ranging, encompassing the reconstruction of a viable, fair, and credible court system, including both criminal and civil jurisdictions; a task, admittedly, much larger in scope than just the prosecution of war crimes and crimes against humanity committed by the 'top brass'.

From this substantial difference in goal descends a difference in the number of individuals staffing the various internationalized bodies. Thus, it should be no surprise that while the internationalized judiciary in Kosovo

[4] On this distinction, see C Romano 'Mixed Jurisdictions for East Timor, Kosovo, Sierra Leone and Cambodia: The Coming of Age of Internationalized Criminal Bodies?' (2002) 2 *YB International Law and Jurisprudence* 97.

[5] See Chapter 7 (Smith), and Chapter 10 (Etcheson).

and East Timor involve dozens of international judges and prosecutors and, at least in the case of Kosovo, hundreds or local judges, the numbers of the Special Court for Sierra Leone (and possibly the internationalized body to be created for Cambodia) are more in line with those of traditional international criminal tribunals, with about a dozen judges and prosecutors, both local and international.

In particular, in November 2002, in Kosovo's 55 judicial institutions (from the Supreme Court to minor offences courts) there were 341 Kosovan judges and prosecutors,[6] supported by about 1,300 local staff.[7] At about the same time, there were 26 international judges and prosecutors deployed (16 judges and 10 prosecutors), with nearly 100 headquarters and support staff helping them.[8]

Judges and prosecutors in East Timor are fewer in number. In March 2003, there were around 13 East Timorese judges serving, including one on the Court of Appeal, two on the Serious Crimes Panels, and others in the Dili and Baucau District Courts. At about the same time (ie, beginning of June 2003), there were six international judges and eight prosecutors.[9] For what concerns support staff to international judges and prosecutors,[10] the Serious Crimes Unit, which carries out investigations, has a total staff of 124, of which 72 are international, including United Nations Volunteers, interpreters, UNPOL investigators, security, and others.[11] The Serious Crimes Panels are helped by 19 people.[12]

[6] Of those 341, 319 were ethnic Albanian, nine Bosnian, seven Turkish, four Serbian, and two Roma. UNMIK Presentation Paper (*infra* n 7) 14.

[7] UNMIK 'Pillar I (Police and Justice)' Presentation Paper (November 2002) 14. Available at www.unmikonline.org/justice/documents/PillarI_Presentation_Paper.pdf (site last visited 1 August 2003); UNMIK website (Judicial Development Division) www.unmikonline.org/justice/jdd.htm (site last visited 1 August 2003).

[8] Email from UNMIK, 'Pillar 1, Police and Justice', on file with the author.

[9] Four international judges were working at the Special Panels for Serious Crimes in Dili, while two international judges worked at the Court of Appeal. The eight international prosecutors were all working at the Serious Crimes Unit based in Dili. For the purpose of prosecution the districts of East Timor have been divided and assigned to four different teams. Each team covers four districts, except one team that covers three. In addition to the 13 districts existing in East Timor, the Gender Team and the National Team have been included. Thus, Team one covers the Districts of Bobonaro, Ainaro, Ermera, and Aileu; Team two: Baucau, Viqueque, Lautem, plus it includes the National Team; Team 3: Covalima, Manufahi, Manatutu, plus it includes the Gender Team; Team 4: District of Liquica, Dili, and Oecussi.

[10] Figures regarding support staff to the courts in East Timor where no international personnel serve are not available, but considering the number of courts active and the difficulty in recruiting skilled local human resources, it is likely to be very small.

[11] Email from Judge Sylver Ntukamazina, on file with the author.

[12] To be precise, four international and two East Timorese interpreters; two international legal researchers; three international transcribers; one international and three East Timorese court clerks; one international administrative coordinator; one international administrative assistant; one East Timorese Registrar and a driver. Email from Judge Sylver Ntukamazina, on file with the author.

Finally, as has been said, the Special Court for Sierra Leone involves a smaller number of judges and prosecutors as compared to East Timor and Kosovo. That is, there are three judges serving in the Trial Chamber,[13] and five in the Appellate Chamber,[14] plus two alternate judges.[15] There is a Prosecutor,[16] as well as a Deputy Prosecutor,[17] a Registrar,[18] and a Deputy Registrar.[19] Altogether the staff of the Special Court for Sierra Leone, including support and gratis personnel, and excluding judges, comprises 114 individuals, plus 24 more who, in April 2003, were under recruitment.[20]

B. MIXED STAFFING

A feature common to all internationalized criminal bodies, which sets them apart not only from international criminal bodies, but also from all other international judicial bodies *tout court*, is that they are manned both by national and foreign, or better, 'international' staff. Indeed, in ICTY or ICTR there are no citizens of the former Yugoslavia or Rwanda serving as judges or prosecutors. And yet the presence of foreign judges on national benches is not, by itself, enough to characterize a judicial body as 'internationalized'. It is, indeed, common practice amongst Commonwealth countries, especially those of the same region, to exchange judges. To illustrate with a particularly relevant case, Judge Isaac Aboagye, from Ghana, one of the alternate judges of the Sierra Leone Special Court, before being appointed had been serving since 1988 as Justice of the High Court of Botswana.

[13] Respectively Judge Pierre Boutet, Judge Benjamin Mutanga Itoe, and Judge Bankole Thompson.

[14] Respectively, Judge Emmanuel Ayoola, Judge Alhaji Hassan B Jallow, Judge Renate Winter, Judge Gelaga King, and Judge Geoffrey Robertson (President).

[15] Judge Isaac Aboagye, and Judge Elizabeth Muyovwe.

[16] Mr David Crane.

[17] Mr Desmond de Silva, QC.

[18] Mr Robin Vincent.

[19] Mr Robert Kirkwood. It should be noted that the constitutive instruments of the Special Court do not provide for a Sierra Leonean Deputy Registrar.

[20] The breakdown of the staff of the Special Court for Sierra Leone is as follows: Professional staff: 52 (16 United States, 10 Sierra Leone, seven United Kingdom, three Canada, three Australia, two Italy, two Gambia, one Zimbabwe, one Uganda, one Trinidad, one Panama, one Pakistan, one Ireland, one Ghana, one Finland, one Cameroon), of which 25 staff the office of the Prosecutor and 27 the Registry. It is interesting to note that a large majority of US nationals work in the Prosecutor's Office (12 out of 16) and that all of the staff of that office are solely from common law countries. Support staff: 58 people, of which 24 are international (four United Kingdom, three United States, two Canada, two India, two South Africa, two Tanzania, one Austria, one Eritrea, one Ghana, one Ireland, one Norway, one Senegal, one Syria, one Gambia, one Trinidad), and 34 Sierra Leoneans. Gratis personnel: two from Canada and two from Switzerland.

The reasons for mixing both international and national judges and court personnel are multiple.[21] For instance, local judges and court personnel are necessary to instill in the local population a sense of 'ownership' of the justice which is made in their name. This is what distinguishes internationalized criminal tribunals from classical international criminal tribunals, such as the International Criminal Court (ICC), the International Criminal Court for the Former Yugoslavia (ICTY), and the International Criminal Court for Rwanda (ICTR), which sit in countries other than those where the crimes have been committed. Again, international personnel are foremost there to ensure, sometimes by their very presence, actual or perceived fairness and impartiality in proceedings. By adding international judges and staff to local judges, the international community gives its blessing to what would otherwise be a purely domestic affair. Justice is no longer done only in the name of the people of the given country, but becomes an international concern.

However, there are other practical reasons for coupling international and local judges and court personnel. Internationalized criminal bodies are typically established in countries which have been ravaged by civil war, where the state judicial machinery is unable to deliver because either it has been dismantled, or it has been crippled by years of interference and hands-on control by political authorities. Thus, the presence of foreign judges and judicial staff is intended to make available particular expertise in the prosecution of serious international crimes. This is all the more needed, considering that international criminal law is a branch of international law which has undergone deep transformations and development over the course of the past few years, at a pace that outstrips the training capacities of most countries, including developed ones.

There are undoubtedly positive synergies between local and international judges. In some cases, capacity-building of local personnel might also be an important end. International judges and court staff could act as tutors of their national colleagues, training them in more efficient judicial practices and showing how to deliver justice which conforms to international standards. Local judges can provide international judges with understanding of the local habits, legal or social.

While all internationalized criminal bodies are manned by a mix of local and foreign personnel, the exact balance between the national and international components might vary from case to case. For instance, in most of the cases analysed in this book international judges are the majority of the bench, but that is not always the case. Similarly, the Prosecutor or the Registrar of the court are usually foreign while the Deputy is local, but, again, there are exceptions.

[21] On this point, see Chapter 1 (Cassese) and Chapter 20 (Condorelli/Boutruche).

To illustrate, Serious Crimes Panels in East Timor consist of two international and one local judge.[22] Panels take decision by majority vote, and each judge has equal weight in the decision.[23] The binary structure 'international/national' also characterizes the staff of other relevant judicial apparatuses (ie, Public Prosecution and Legal Aid Services). Then again, the Transitional Judicial Service Commission, which will be discussed below,[24] is unusual as it gives local judges the majority. It is composed of five individuals: three of East Timorese origin and two international, and the Chair is East Timorese.[25] This is probably so because the Transitional Judicial Service Commission regulates the career of East Timorese judges and not that of the international judges, and thus it is natural to give local personnel control.

In the case of Kosovo, the issue is more complex. International judges can be either the minority or the majority of the bench. As has been detailed elsewhere in this book, there are currently two types of international panels in the judicial system of Kosovo.[26] In one international panel judges are the minority, and in the other the majority. The former is provided for in UNMIK Regulation 2000/34,[27] and it permits international judges, each of whom is assigned to a specific court, to pick and choose the cases in which he or she will participate. A typical panel in a Kosovo district court is composed of two professional and three lay judges. Verdicts are by majority vote, and each judge (international or national) has an equal voice. In such a situation, the international judge is easily out-voted. The latter model, which has become the standard in high-profile cases, was created by UNMIK Regulation 2000/64.[28] It allows the prosecutor, defence 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 panel with at least two international judges.

In the case of the Special Court for Sierra Leone, international judges are always the majority. In the Trial Chamber three judges serve, of whom one is appointed by the government of Sierra Leone, and two are appointed by the

[22] UNTAET Reg 2000/15 (On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences) s 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: s 22.2. UNTAET Regulations are available at www.un.org/peace/etimor/UntaetN.htm.

[23] UNTAET Reg 2000/11 (On the Organization of Courts in East Timor) as amended by Regs 2001/14 and 2001/25, s 9.2.

[24] See pp 263–4.

[25] UNTAET Reg 1999/3 (On the Establishment of the Transitional Judicial Services Commission) as amended by Reg 2001/26, s 2.

[26] See Chapter 3 (Cerone/Baldwin), and Chapter 4 (Cady/Booth).

[27] UNMIK Reg 2000/34 amending UNMIK Reg 2000/6 (On the Appointment and Removal from Office of International Judges and International Prosecutors). UNMIK Regulations are available at www.unmikonline.org/regulations/index.htm.

[28] UNMIK Reg 2000/64 (On Assignment of International Judges/Prosecutors and/or Change of Venue).

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.[29] Judgments are to be rendered by a majority of judges of the Trial Chamber or the Appeals Chamber.[30]

It should be noted that the Special Court Statute does not actually mandate a specific quota of Sierra Leonean or international judges. It regulates, instead, how and who is going to appoint them. Under the United Nations–Sierra Leone Agreement, the government of Sierra Leone and the Secretary General consult on the appointment of judges.[31] Once consultations have taken place, the Sierra Leone government is free to appoint foreign judges if it so wishes (which has actually happened),[32] or the UN Secretary General can appoint Sierra Leonean judges (which is, for obvious reasons, less likely to happen).

Finally, the Special Court 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. Unlike in the case of judges, the language of the Special Court Agreement and the Special Court Statute is very specific on this issue, saying that 'The Government of Sierra Leone ... shall appoint a Sierra Leonean Deputy Prosecutor',[33] and that 'the Prosecutor shall be assisted by a Sierra Leonean Deputy'.[34] Yet, in reality, the Deputy Prosecutor eventually appointed is Desmond de Silva, QC, a Sri Lankan citizen by birth, naturalized UK citizen (but who is member of the Sierra Leonean Bar). To circumvent those specific provisions of the Special Court Agreement and Statute, those instruments were modified on 8 November 2002 by way of an amendment to Sierra Leone's Special Court Agreement Ratification Act 2002,[35] and a subsequent exchange of letters with the UN Office of Legal Affairs.[36]

As sketched at the time of writing, the Extraordinary Chambers in the Courts of Cambodia will not follow the same pattern which gives international judges and staff de facto control of the body. Indeed, in the

[29] Statute of the Special Court for Sierra Leone (hereafter 'Special Court Statute') Art 12. The text of the Special Court Statute can be found at www.sc-sl.org (site last visited 1 August 2003).

[30] Special Court Statute Art 18.

[31] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002) (hereafter 'United Nations–Sierra Leone Agreement') Art 2.3. Text available at www.sc-sl.org (site last visited 1 August 2003).

[32] Sierra Leone appointed Mr Geoffrey Robertson, head of the Doughty Street Chambers, United Kingdom, who eventually became the President of the Court.

[33] Special Court Agreement Art 3.2.

[34] ibid Art 15.4.

[35] Special Court Agreement (Ratification) Act 2002 (2002) CXXX(II) *Sierra Leone Gazette* Supplement (7 March). The text is available at www.sc-sl.org (site last visited 1 August 2003).

[36] Email from Special Court Registry, on file with the author.

Cambodian case, international judges, instead of being the majority, are intended to be the minority.

The Cambodia–United Nations Agreement provides for a two-tier system, consisting of a Trial Chamber and a Supreme Court, acting both as appellate chamber and final instance.[37] The Trial Chambers are to be composed of five professional judges (three Cambodian, and two international); and the Supreme Court composed of seven judges (four Cambodian, and three international).[38] In both cases, the President of the Chamber is a Cambodian.

Yet, when it comes to taking decisions, Cambodian judges will still not be able to impose their will on international judges. According to the so-called 'Kerry compromise', first all decisions are to be approved by a super-majority vote (four out of five judges at the trial level; and five out of seven at the Supreme Court level).[39] The compromise gives international judges the possibility of blocking embarrassing decisions, provided that international judges could actually agree between themselves and team up against their Cambodian colleagues. Moreover, when there is no unanimity, decisions will contain both the views of the majority and minority.[40] Secondly, there will be two prosecutors: one Cambodian and one foreign. The co-prosecutors are supposed to work together to prepare indictments.[41] However, should disagreements arise between them, any of them can request 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.[42]

In sum, while all internationalized courts are by definition composed of a mix of national and international staff, the actual mix can vary to a large extent. The exact composition of the blend is ultimately dictated by the political and historical factors that influenced the establishment of the given body.

[37] United Nations/Cambodia Agreement Art 3.2

[38] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (hereafter 'Extraordinary Chambers Law') Art 9. An English text of the Extraordinary Chambers Law can be found at www.derechos.org/human-rights/seasia/doc/krlaw.html (site last visited 1 August 2003), however, in the website there is no statement as to its exact source and under the Cambodian Constitution the only official language is Khmer. Moreover, after the conclusion of the United Nations/Cambodia Agreement, the Extraordinary Chambers Law will have to be modified accordingly (United Nations/Cambodia Agreement Art 2)

[39] ibid Art 4.1.

[40] ibid Art 4.2.

[41] ibid Art 6.

[42] ibid Art 7. The Pre-Trial Chamber decides disputes between the Co-Prosecutors according to an inverted super-majority, that is to say a majority plus one international judge is required to block prosecution proposed by one of the Co-Prosecutors. If there is no majority, the investigation or prosecution will proceed: ibid Art 7.4, last line. Decisions of the Pre-Trial Chamber on these matters cannot be appealed: ibid Art 7.4, first line.

C. QUALIFICATIONS

Hudson listed as 'factors to be considered in selecting members of international tribunals (in order of importance): nationality, moral integrity, profession, command of languages, age, and economic and social outlook [ie political ideas]'.[43] By and large the items listed, and the order in which he put them, are still valid nowadays. Incidentally, the fact that nationality still matters the most, *ceteris paribus*, is perhaps a sign of the chronic immaturity of the international system. General muttering aside, one could add that there is a tendency towards also requiring specific knowledge of criminal law and procedure, and that gender balance is beginning to emerge as an issue. We will address first the issues of nationality, moral integrity, gender, and professional background and expertise, while other relevant points will be made in the next section on the recruitment of personnel.

1. Nationality

Nationality, of course, matters. As has just been said, the distinction between local and foreign judges is at the very heart of the notion of an internationalized criminal body. Nationality also matters when it comes to the question of the selection of international judges. For instance, nominations for appointment to the Sierra Leone Special Court are made by Member States of the Economic Community of West African States and the Commonwealth, at the invitation of the UN Secretary-General.[44] Thus, the Special Court's judges are mainly from Commonwealth countries (Canada, Cameroon, Sierra Leone, Nigeria, Gambia, United Kingdom, and Zambia), and the Registrar is from the United Kingdom. The exceptions are Judge Renate Winter, who is Austrian,[45] and the Prosecutor, who is a US national.[46]

[43] Hudson (*supra* n 1) 33.

[44] United Nations–Sierra Leone Agreement Art 2.2.a and 2.2.c.

[45] It is interesting to note that Judge Winter before being appointed to the Special Court for Sierra Leone was serving as an international judge in the Kosovo Supreme Court. Previously, she was a judge in the Vienna Youth Court and had worked for the United Nations in Africa on projects relating to juveniles and child soldiers. This particular feature of her curriculum might have weighed decisively in her favour.

[46] Nationality, however, seems to be the decisive factor in selecting a US national for the role of Prosecutor, considering the important role the United States played in the establishment of the Special Court. However, unlike most, if not all, international judges and prosecutors, who have as a background a career in national courts or diplomacy, David Crane is a soldier by career. He has served in the Department of Defense for 30 years, where he held numerous key positions, including Director of the Office of Intelligence Review, Assistant General Counsel of the Defense Intelligence Agency, and Professor of International Law at the US Army Judge Advocate General's School. The particular choice of this individual undoubtedly appears to reflect the balance of power between the Pentagon and the Department of Justice on the one hand, and the State Department, on the other, under the George W Bush administration, more than any particular needs of the Sierra Leone Special Court.

In the Cambodian case, under the Cambodia–United Nations Agreement, nominations for international judges of the Extraordinary Chambers are to be made by the UN Secretary General, who is to prepare a list of no more than seven individuals, from which the Supreme Council of the Magistracy will appoint five to serve in the Chambers (Trial and Supreme).[47] Provided that the Cambodian project ever becomes a reality, and provided it does so on the basis of the Cambodia–United Nations Agreement, it is clear that the Secretary-General has no particular restriction to his discretion in nominating international candidates. It is likely, however, that he will try to include in the list judges from countries which have supported the establishment of the Chambers (eg, Japan, Australia, France, to name a few), or that will contribute significantly to the expenses of the endeavour, but be careful not to involve stakeholders in the judicial process (eg, China or Vietnam).

In the case of East Timor and Kosovo, where internationalized panels are part of UN missions, most judges and prosecutors have been provided by those countries that provide financial support for the endeavours. International judges and prosecutors in Kosovo come from quite a diversified number of countries, although OECD Member States provide the majority of them. Thus, in March 2003, of the 16 international judges, four were from the United States, two from Germany, and the remainder from the United Kingdom, Moldova, Poland, Cameroon, Italy, Hungary, Uganda, Philippines, Mauritius, and Canada.[48] Of the prosecutors, two were from Canada and Philippines, and one each from the United States, United Kingdom, Australia, Malawi, Germany, and Ireland.[49] Moreover, since the introduction of international judges and prosecutors in Kosovo, besides those currently serving, 17 judges and seven prosecutors have been deployed. Of the judges, four were from France, three from Germany, two from Denmark and Finland, and one each from Romania, Belgium Spain,

[47] United Nations/Cambodia Agreement Art 5.

[48] Leonard Assira (Cameroon) Pristina District Court; Paul Chevalier (Canada) Gnjilane District Court; Dierk Helmken (Germany) Prizren District Court; Feilitzsch von Freiherr (Germany) Gnjilane District Court; Hajnalka Karpati (Hungary) Prizren District Court; Annunciata Ciuravolo (Italy) Pristina District Court; Vinod Boolell (Mauritius) Gnjilane District Court; Tudor Pandtiru (Moldova) Kosovo Supreme Court; Lolita Dumlao (Philippines) Mitrovica District Court; M Klonowiecka (Poland) Pristina District Court; F Egonda-Ntende (Uganda) Pec/Peja District Court; Timothy Clayson (United Kingdom) Kosovo Supreme Court; Daniel Mabley (United States) Pristina District Court; Edward Wilson (United States) Prizren District Court; Marilyn Kaman (United States) Pec/Peja District Court; Robert Carolan (United States) Mitrovica District Court.

[49] Philip Alcock (United Kingdom) Mitrovica District Court; Paul Flynn (Ireland) Mitrovica District Court; Tom Hickman (United States) Prizren District Court; Christopher Maxwell (Australia) Office of the Public Prosecutor; Gary McCuaig (Canada) Pristina District Court; Kamudoni Nyasulu (Malawi) Pec/Peja District Court; Elizabeth Rennie (Canada) Gnjilane District Court; Jude Romano (Philippines) Prizren District Court; Raimund Sauter (Germany)-Pec/Peja District Court; Cecilia Tillada (Philippines) Gnjilane District Court.

Austria, Sweden, and Canada. Of the prosecutors, three were from the United Kingdom, two from the United States, and one each from Germany and Finland.

In East Timor, Portuguese-speaking countries (Portugal, Brazil, and Cape Verde) have provided a significant share of judges, that is to say four out of nine (the remainder are from Uganda, Burundi, Austria, Germany, and Italy), while prosecutors come from a widely diversified number of regions, such as Europe (Portugal, Norway, United Kingdom, Poland), Africa (Tanzania, Kenya, Gambia, Burundi), North America (Canada, United States), and South East Asia and the Pacific (Australia and Malaysia). It is interesting to note, and difficult to explain, that in East Timor, a substantial number of judges and prosecutors come from Africa, while Japan, which is a major donor, has provided none.

In sum, in the case of internationalized criminal courts nationality matters, but much less than in the case of elections of judges to other international judicial bodies, such as the International Court of Justice (ICJ) or ICC, where political considerations ultimately dictate the composition of the bench. In internationalized international criminal bodies, the principle of equitable geographic representation plays a substantially lesser role than in the case of traditional international judicial bodies. More than geopolitical considerations, the provenance of the political and financial backing of the operation carries much weight, and seems to play a tangible role in determining whether a given candidate has the 'right' nationality to be appointed.

2. *Moral integrity*

Despite the vagueness of the expression, 'moral integrity' is undoubtedly the first and minimum requirement for judicial office, either internationally or nationally.[50] To Hudson, it embraces:

> more than ordinary fidelity and honesty, more than patent impartiality. It includes a measure of freedom from prepossessions, a willingness to face consequences of views which may not be shared, a devotion to judicial processes, a willingness to make the sacrifices which the performance of judicial duties may involve.[51]

[50] As Judge Elias, of the ICJ, once remarked, not without a certain wit, the requirement of moral integrity is 'probably the equivalent of an unimpeachable conduct as a public figure; in other words, the candidate need not to be an angel, though he must not be only a little better than a rascal'. TO Elias 'Does the International Court of Justice, as it is Presently Shaped, Correspond to the Requirements which Follow from its Functions as the Central Judicial Body of the International Community?' in Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht (ed) *Judicial Settlement of International Disputes* (Springer Berlin 1974) 21–2. The passage is quoted in E Valencia-Ospina, 'Editorial Comment' in *The Law and Practice of International Courts and Tribunals* (2002) vol 1 No 1, 8–9.

[51] Hudson (*supra* n 1) 34.

Invariably statutes of international judicial bodies require judges to be persons of 'high moral character'.[52] The same is true also in the case of internationalized criminal courts and tribunals.[53] Yet, in certain cases, their basic instruments do elaborate upon the concept. Thus, the Statute of the Sierra Leone Special Court, as well as the Cambodia–United Nations Agreement, add that judges, both national and international, 'shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source'.[54] Similarly, the East Timor Statute of Judicial Magistrates, which regulates the country's judiciary after the declaration of independence (19 May 2002),[55] provides that:

> [j]udicial magistrates shall adjudicate in accordance with the Constitution, the law and their conscience and they shall not be subject to orders, instructions or directions, except for the duty of lower courts to obey decisions awarded by higher courts on cases appealed against.[56]

UNMIK Regulation 2000/57 (On the Appointment of Local Judges and Prosecutors) adds to these boilerplate provisions, that they must not have participated in discriminatory measures, or applied any repressive law or have implemented dictatorial policies, and not be registered with any political party or otherwise engage in political activity.[57] While these two provisos can be considered inherent in the requirement of impartiality that should characterize any judge, UNMIK Regulation 2000/57, and also for that matter UNMIK Regulation 2000/34, which applies to international judges, prescribe also that candidates must not have criminal records. Criminal records seem to be hardly compatible with the requirement of 'high moral character', but, while making them a disqualifying factor for international judges is only logical, in the case of local judges it might unnecessarily penalize

[52] Article 2 of the Statute of the International Court of Justice provides, eg: 'The Court shall be composed of a body of independent judges, elected ... from among persons of high moral character'. Other tribunals use language similar to that of the ICJ Statute, calling for the nomination and election of persons of high moral character (eg Rome Statute Art 36.3.a; European Convention on Human Rights Art 21.1; American Convention on Human Rights Arts 34, and 52; African Charter on Human and People's Rights Art 31; ICTY Statute Art 13), 'highest reputation for fairness and integrity' (ITLOS Statute Art 2). The Statute of the African Court on Human and People's Rights Art 31, requires 'personalities of the highest reputation' and recognized competence in the field or subject matter of the court.

[53] UNMIK Reg 2000/34 s 2.c; UNMIK Reg 2000/57 s 6.1; UNTAET Reg 2000/15 s 23.2; UNTAET Reg 1999/3 s 3.c (incidentally, this provision adds also that local candidates must have 'standing within the community'); Extraordinary Chambers Law Art 10; United Nations/Cambodia Agreement Art 3.3; Special Court Statute Art 13; United Nations–Sierre Leone Agreement Art 3.3.

[54] Special Court Statute Art 13; United Nations/Cambodia Agreement Art 3.3.

[55] 'Statute of Judicial Magistrates'. Available at www.jsmp.minihub.org/Legislation/LegEng/JudMagFinalEngfeb03.pdf (site last visited 1 August 2003).

[56] ibid s 4. The Statute of Judicial Magistrates applies, *mutatis mutandis*, and on a transitional basis, both to local and international judges. ibid s 111.

[57] UNMIK Reg 2000/57 s 6.1.

persons who actively resisted oppression. Then again, those who resisted oppression might not be the most dispassionate judges in cases involving their former persecutors.

3. Gender

It is only recently that equitable gender representation has begun to emerge as an issue for international courts and tribunals. Traditionally very few women, or none at all, have sat on the bench of international judicial bodies. Just as few have pleaded before them.[58] Currently, only the basic instruments of very few international judicial bodies contain provisions where specific reference is made to women's participation either as judges, or high-level court personnel. Besides, these few cases are in the field of human rights and international criminal law.

Thus, to illustrate, the International Criminal Court, and the African Court on Human and People's Rights, which has not yet become operational, have rules that make specific reference to women's participation as judges.[59] The European Court of Human Rights has a similar rule for internal appointments, (ie, the appointment of Presidents, Vice-Presidents, Registrars, and Deputy Registrars).[60] Finally, the Statute of the International Criminal Court requires the Prosecutor and Registrar in appointing staff to take into account fair representation of men and women.[61]

The provision of the Rome Statute on equitable gender representation has been the object of an intense campaign by certain progressive governments, and like-minded NGOs, to ensure they were actually implemented. Largely thanks to these efforts, the election of the first bench of ICC will likely go down in history not only for being the first, but also because it achieved the highest ratio of women to men ever for an international judicial body (ie, seven out of 18).

In internationalized criminal tribunals, women are present, both as judges and prosecutors, but are still rare sightings. Thus, in East Timor, of seven judges, including those currently serving and those who served in the past, all are male, while there have been five female prosecutors (out of a total of 18). The situation is only slightly better in Kosovo where, at the time of writing, of the 16 international judges, 11 were male and five female (Italy, Poland, Hungary, United States, Philippines); of the 10 prosecutors, eight

[58] On this issue see the background paper prepared by Jan Linehan for the seminar held by the Project on International Courts and Tribunals and Matrix Chambers, London (13 July 2001) available at www.pict-pcti.org//activities/meetings/London_07_01/Women1.pdf (site last visited 1 August 2003).

[59] Respectively, Rome Statute Art 36.8.a.iii and ACHPR Statute Arts 12.2 and 14.3.

[60] European Court of Human Rights, Rules of Court, as in force on 1 November 1998, Rule 14.

[61] Rome Statute Art 44.

were male and two female (Philippines, Canada). In the case of those who served in the past, of the 17 judges, five were female (France, Germany, Spain, Austria, and Sweden), and of the seven prosecutors, two were female (both from the United Kingdom).

Finally, in the Special Court for Sierra Leone there are just two women out of 10 judges, including the two alternate judges (Renate Winter and Elizabeth Muyovwe), while both the office of Prosecutor and Deputy Prosecutor are occupied by men.

4. Curriculum

I. Background

Judges of international courts and tribunals come, by and large, from three different walks of life: either they are academics, teaching international law in universities, and being specialized in the relevant area of law (ie criminal law, trade law, law of the sea, human rights law, etc); or they are professional judges, usually serving at fairly high ranks of the national judiciary; or they are civil servants, having served their state either as diplomats, or in any other position relevant for the given tribunal. The mix of these three main professional groups can vary from court to court, but will invariably be found in all of them (and in certain cases, some of the judges might have worn two or all of those hats during their career). Internationalized criminal courts and tribunals differ from classical international tribunals in the fact that they rely more on professional judges than on any of the other two traditional pools of appointees.

Again, it should be kept in mind that there is a difference between internationalized bodies like those established in East Timor and Kosovo and the cases of Sierra Leone and Cambodia. As has been explained, in the case of East Timor and Kosovo, the United Nations had to reconstruct the whole national judiciary, at all levels, and including both civil and criminal matters. International judges and prosecutors had been injected into the reconstituted national judiciary ad hoc to ensure that certain key investigations' trials would be carried out in an effective, impartial, and ultimately just manner. Hence, stress is put less on the highest qualifications, but rather on legal training, and, whenever possible, actual trial experience. Also, the number of judges needed to staff internationalized panels in Kosovo and East Timor is higher than that for ad hoc mixed bodies like those for Sierra Leone and Cambodia, where only a handful of international judges is needed.[62]

Thus, in Kosovo all judges and prosecutors must have a degree in law,[63] while this is not necessarily so in most international courts and tribunals.

[62] See pp 238–9. [63] UNMIK Reg 2000/34 s 2.a; UNMIK Reg 2000/57 s 6.1.

Moreover, UNMIK Regulation 2000/34 requires that international judges and international prosecutors shall have been appointed and have served, for a minimum of five years, as a judge or prosecutor in their respective home country.[64] Local judges must have passed the examination for candidates for the judiciary, and have relevant work experience in the field of law, that is, three years for the position of a Municipal Court judge (or prosecutor) or of a judge of Minor Offences Appeals body, seven years for the position of a District Court judge (or prosecutor), and four years for the position of a Commercial Court judge.[65]

In East Timor, during the transitional phase, international judges merely needed to possess the qualifications required in their respective countries for appointment to judicial offices,[66] but no particular seniority was required. In the case of local judges, actual judicial experience was not required, as it is a fact that virtually no East Timorese could serve as a judge in East Timor during the long Indonesian occupation.[67] Candidates for judicial appointment simply needed to hold a university degree in law, from a recognized university, and have completed legal training. In addition to these minimal requirements, the Transitional Judicial Service Commission[68] could also take into account the following criteria: legal competence, taking into consideration academic qualifications, and relevant experience in a legal profession or as a civil servant.[69]

More than three years since the Indonesian withdrawal, the Statute of Judicial Magistrates has increased the threshold by requiring applicants, besides being nationals, and holding a university degree in law, to be older than 25 years of age; to be in full exercise of civil and political rights; to have completed a pre-entrance probationary period of two to three years, and have been rated 'good' on that; and to have taken and passed specific exams.[70]

In the case of Cambodia and Sierra Leone, the qualifications required from candidates to judicial and prosecutorial appointments are higher, and more akin to those required in classical international judicial bodies. Hence, judges of the Sierra Leone Special Court must 'possess the qualifications required in their respective countries for appointment to the *highest* judicial offices'.[71]

[64] UNMIK Reg 2000/34 s 2.b.

[65] UNMIK Reg 2000/57 s 6.1. In the case of applicants for the position of a judge in the Minor Offences Court, they must have passed the professional examination. For these judges, work experience is not required. ibid s 6.2.

[66] UNTAET Reg 2000/15 s 23.2.

[67] UNTAET Reg 1999/3 s 9.3.

[68] On the Transitional Judicial Service Commission, see pp 263–4.

[69] UNTAET Reg 1999/3 s 9.3.

[70] Statute of Judicial Magistrates s 25.

[71] Special Court Statute Art 13.1, emphasis added. Of the 10 judges appointed to the Sierra Leone Special Court, eight are Supreme or High Court judges (Judge Benjamin Mutanga Itoe, a Supreme Court justice from Cameroon; Judge Bankole Thompson, a former High Court justice from Sierra Leone; Judge Emmanuel Ayoola, a Supreme Court justice from Nigeria;

Similarly, 'The Prosecutor and the Deputy Prosecutor shall be of ... *extensive* experience in the conduct of investigations and prosecutions of criminal cases'.[72] The Law on Extraordinary Chambers as well as the Cambodia–United Nations Agreement do not explicitly require equally ponderous curricula from candidates (although they seem to be more demanding for the office of prosecutor than that of judge),[73] but, considering the high-profile cases that the judges and prosecutors of those Chambers might be called to handle, it is to be hoped that countries proposing candidates will put forward very experienced judicial operators.

II. Expertise

Among internationalized judicial bodies, particular expertise in a specialized area of law is generally considered a plus, but not a decisive requirement in selecting a particular candidate. That is surprising, considering the specialized nature of the cases they might eventually handle, involving intricate issues of criminal and international law. By comparison, the Rome Statute of the International Criminal Court requires that every candidate have established competence in *either* (i) criminal law and procedure, with relevant experience *or* (ii) relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity relevant to the judicial work of the Court.[74]

In Kosovo, no particular knowledge of any area of law is required, either for local or international judges. Article 10 of the Law on Extraordinary Chambers simply asks judges to be 'experienced, particularly in criminal law or international law', while Article 3.4 of the Cambodia–United Nations Agreement mandates that 'in the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law,

Judge Alhaji Hassan B Jallow, a Supreme Court justice from the Gambia; Judge Gelaga King, a former Supreme Court justice from Sierra Leone; Judge Isaac Aboagye, a Ghanaian national serving as a High Court justice in Botswana; and Judge Elizabeth Muyovwe, a High Court judge from Zambia).

[72] United Nations–Sierra Leone Agreement Art 3.3. Emphasis added.

[73] 'The judges of the Extraordinary Chambers shall be appointed from among the existing judges or from judges who are additionally appointed, in accordance with the existing procedures for appointment of judges': Extraordinary Chambers Law Art 10; 'The judges shall be persons ... who possess the qualifications required in their respective countries for appointment to judicial offices': United Nations/Cambodia Agreement Art 3.3. 'The co-prosecutors shall possess a high level of professional competence and extensive experience in the conduct of investigations and prosecution of criminal cases': ibid Art 6.2.

[74] Rome Statute Art 36.b. An intricate election mechanism is to ensure that the bench as a whole is balanced between competence in criminal law and competence in international law. Out of the first 18 judges elected for ICC in February 2003, 10 were experts in criminal law, and eight experts in international law: www.iccnow.org/buildingthecourt/iccjudges.html (site last visited 1 August 2003).

international law, including international humanitarian law and human rights law'. Virtually the same provision is contained in UNTAET Regulation 2000/15.[75] Finally, Article 13.2 of the Sierra Leone Special Court mandates likewise, although particular mention is made of expertise in juvenile justice because of the nature of the conflict that ravaged that country, where children were widely employed as combatants.[76] Still, these provisions, which are rather hortatory, refer to the overall composition of the bench and do not mandate any minimum qualifications for any particular judge.

D. RECRUITING PERSONNEL

Almost 60 years ago, when the number of international courts could be counted on one hand, Hudson wrote: 'The selection of the members of international tribunals frequently presents problems of great difficulty'.[77] The proliferation of international courts and tribunals experienced since the end of the Cold War has further heightened the question. Recruiting staff, both local and international, for internationalized criminal bodies is not easily done.

Currently, around the world there are more than 200 individuals sitting on the bench of an international court or tribunal.[78] About one-third of these is appointed or elected every three to four years, which means that for the international judicial machinery to be able to continue running effectively, every four to five years between 30 to 40 highly skilled, trained, and motivated individuals must be found. Besides, in order to ensure representativeness of these judicial bodies, between half and two-thirds of the judges should be nationals of developing countries, which traditionally have few law schools with adequate international legal programmes.[79]

[75] UNTAET Reg 2000/15 s 23.2.

[76] United Nations/Cambodia Agreement Art 3.4 [77] See p 235.

[78] This figure is the result of the sum of the benches of: ICJ (15); ITLOS (21); ICC (18); ICTY (14 excluding *ad litem* judges); ICTR (nine excluding *ad litem* judges); WTO Appellate Body (10, being the sum of three panellists plus the seven members of the Appellate Body); ECHR (41); IACHR (7); ECJ (15, plus 15 of the Court of First Instance); European Free Trade Agreement Court (three); Court of Justice of the Andean Community (five); Central American Court of Justice (six); Court of Justice of the Common Market for Eastern and Southern Africa (seven): www.pict-pcti.org/matrix/Matrix-main.html (site last visited 1 August 2003).

[79] The 1994 UNESCO *World Directory of Research and Training Institutions in International Law* lists 578 institutions, of which 25 are labelled 'International and Regional' (eg, the European University Institute, or the International Development Law Institute) and 553 are national institutions. Of these, 396 were located in the 30 OECD countries (a ratio of 13.6 institutions per country), and the remaining 157 were in the rest of the world (less than one per country). UNESCO, *World Directory of Research and Training Institutions in International Law* (Blackwell Oxford 1994).

The world described by Hudson, where 'no group of men exists which can be said to form a profession of international judges, and ... [t]he number of men actually serving in such positions at any one time is quite limited', is long gone by.[80] Yet, in this age, international justice is an area of the job market where demand for professionals seems to exceed supply. The result of this situation is that more often than desirable, high-profile international judicial positions are filled by individuals who, while having most of the time extensive judicial experience domestically, are disturbingly rather oblivious to international law.

With regard to international judges, once again the cases of Cambodia and Sierra Leone, which are more akin to ad hoc international criminal tribunals, should be differentiated from those of East Timor and Kosovo. As was explained, in the latter cases the number of international judges to be selected, the requirements and the conditions in which recruitment takes place, are substantially different, and more arduous, than in the former cases.

First of all, suitable candidates usually must be identified and deployed quite rapidly. To illustrate, in the case of Kosovo, as was explained elsewhere in this book,[81] the appointment of international judges to the courts of Kosovo was by and large an afterthought spurred by the riots in Mitrovica in early January 2000. The Special Representative of the Secretary-General (SRSG) passed Regulation 2000/6 on 15 February 2000, and the first international judge was appointed the same day. The whole process for establishing and appointing international judges and prosecutors lasted less than 10 days. A few weeks after that, an international prosecutor was appointed. The second international judge was appointed in June 2000.

The United Nations does not keep lists of potential candidates for judicial positions in internationalized bodies. Recruitment is mainly ad hoc.[82] Whenever needs arise, job vacancies are posted on the UN website, and in some cases, but not systematically and only for high-level positions, notice is given to the various Member States' missions at the United Nations, who forward this to the competent ministries back home. Similarly, there is no judicial *Médicins Sans Frontières*-like NGO that could help call up international judges for rapid deployment.

[80] See p 235. [81] See Chapter 3 (Cerone/Baldwin).

[82] Actually, the idea of keeping a list of potentially suitable candidates for appointment is as old as the international judiciary, as the Permanent Court of Arbitration (PCA), created in 1899, was in fact nothing more than a list of experts ready to be appointed to serve as ad hoc arbitrators. However, the list was not resorted to as often as envisaged. Until the end of the Second World War (ie the golden age of the PCA), some 500 individuals were included in the list, but only less than 30 were actually chosen. Of the 19 arbitrations held under the auspices of the PCA in the pre-1945 era, six were decided by arbitrators not chosen from the list. The PCA list still serves to elect judges of ICJ. National groups in the PCA (ie four individuals chosen by their country as members of the PCA) nominate candidates for ICJ. If a country is not a party to the Hague Conventions of 1899 or 1907 but party to the Statute of the ICJ, it will constitute a 'national group' ad hoc, along the lines of those at the PCA, to nominate candidates.

It goes without saying that this, combined with the need to ensure the swift beginning of operations of the judicial machinery, does neither invariably, nor necessarily, yield the most suitable appointees. As Hudson mildly put it: 'The ... selection [of people actually serving in international judicial bodies] is usually determined by a variety of considerations, some of them more or less fortuitous', such as stumbling upon a vacancy on the UN website, one might add today.

The ideal candidate for a position in an internationalized criminal court, either as judge or prosecutor, has extensive judicial and/or prosecutorial experience in criminal cases domestically, is well versed in international law, is able to work without problem in English and/or French, and, as far as possible, is familiar with the culture and traditions of the region where he or she will be posted, and is ready to endure the hardship of being posted in underdeveloped war-torn regions, and often having to live with substantial close protection, either for 24 hours per day and/or by living in the UN compound.

As remarked by Cady and Booth in this book, as contrasted to the large resources of professional peace-keepers from whom missions are able to draw their staff, there is only a very small international force of professional judges who match these requirements, and are willing and able to leave their domestic jurisdictions for extended mission service.[83] Besides, judges who can smoothly work in English, and at the same time are trained in civil law, are as rare as pandas.[84]

[83] See Chapter 4 (Cady/Booth).

[84] English is one of the languages used in internationalized courts in Kosovo, Sierra Leone, East Timor, and Cambodia. Of these, Kosovo, East Timor, and Cambodia have civil law legal systems, while only Sierra Leone is based on common law.

Despite the use of English as a modern *lingua franca*, internationalized courts rival the mythical Tower of Babel. 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 carried out in relay across three or more languages, in a situation of severe understaffing, casting doubts on the accuracy of interpretation.

Internationalized panels in the courts of Kosovo operate in three languages: Albanian, English, and Serbian, although the official language of 'Regulation 64' Panels is English (which helps international judges but creates problems for local ones). OSCE, Mission in Kosovo, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section *Report 9: On the Administration of Justice* (March 2002) 18. OSCE Reports on Kosovo are available at www.osce.org/kosovo/documents/reports/justice. See also UNMIK Reg 2000/46 (On the Use of Language in Court Proceedings in which an International Judge or International Prosecutor Participates).

The difficulty in striking a logical balance between the need to use the local language and that to allow internationals to work is better illustrated by the puzzling compromise contained in the United Nations/Cambodia Agreement, whereby 'The *official language* of the Extraordinary Chambers and the Pre-Trial Chamber is Khmer' (Art 26.1), but 'The official *working* languages

Of course, given the extremely varied kind of situations in which international judges and prosecutors might be called to operate, it would be impossible to have a reserve army of volunteers with these skills to cover all of them.[85] Before deployment, appointees could undergo an intensive training course in local language, criminal laws, and procedure,[86] but often the unavailability of translations in English or French of those texts, and the difficulty in preparing reliable translations within the extremely short time required, severely hinders the work of international judges. When the country where international judges are to be deployed has a legal system based on the common law, problems might be even greater, because not only basic legal texts but also precedents need to be made available to international judges in a language they can understand. Besides, even when case law is actually in English, as in many Caribbean and African countries, it might very well be that judgments of local courts have not been duly collected, indexed, and systematized for years, as is the case, for instance, of Sierra Leone.

As contrasted to this bleak picture, recruiting judges for internationalized courts like those in Sierra Leone, or that planned for Cambodia, might seem a somewhat easier task. Yet there are different pitfalls. To illustrate, in Sierra Leone, in appointing Sierra Leone's judges, the Sierra Leone government contacted directly individuals that it thought had both a good curriculum and reputation. In the case of international judges, first the Under-Secretary-General for Legal Affairs, Hans Corell, convened an informal meeting of the UN Member States on the Special Court and asked states for candidates. Then, the Office of Legal Affairs shortlisted and interviewed seven of them. Five were eventually selected. The prosecutor was identified through a similar process. On the same date, Corell announced that consultations on possible candidates would take place with the Group of Interested States. Only two names were put forward, and one was eventually selected.[87]

of the Extraordinary Chambers and the Pre-Trial Chamber shall be Khmer, English and French' (Art 26.2). To complicate the matter further 'Translations of public documents and interpretation at public hearings into Russian may be provided by the Royal Government of Cambodia at its discretion and expense on condition that such services do not hinder the Proceedings before Extraordinary Chambers' (Art 26.3).

Finally, 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.

[85] On this point, see Chapter 4 (Cady/Booth).

[86] On this point, see Chapter 4 (Cady/Booth). Mark Baskin, in his paper on lessons to be learned on UNMIK judiciary, remarked that in Kosovo, at least during the early stages, 'the typical international legal officer had little training or knowledge about the specific circumstances of the Kosovo legal system, although a few had worked on legal reform of a similar system in Bosnia-Herzegovina': Mark Baskin *Lessons Learned on UNMIK Judiciary* (Pearson Peacekeeping Centre 2002) s 20.a.

[87] The second candidate, besides David Crane, was Kenneth Fleming, from Australia, Acting Head of Prosecutions of ICTR.

The extreme difficulty of identifying anybody close to the ideal candidate in a short time, the lack of a selected reserve roster, and the need for expediency has resulted in personnel staffing international courts and tribunals sometimes having curricula which hardly seem to fit the bill. But, probably it is the best that could be found in the circumstances.[88]

Even when there is actually a choice of suitable candidates, and time to select, often extra-legal considerations, and political interests, play a determinant role in picking a particular individual.[89] Indeed, the question of the selection and appointment of the international staff of internationalized criminal bodies, at least as regards judges and prosecutors, is also a matter in which the governments of the country from which appointees come do have a say, as the Sierra Leone case illustrates.

First of all, very often appointees are serving in the state administration in the home country. Unlike ordinary international courts and tribunals, where any active affiliation with national governments is considered incompatible with the principle of independence, in the case of internationalized criminal bodies, international judges and prosecutors very often do maintain their positions back home. Tenures are often not such as to make it possible for someone whose career has fairly advanced nationally to leave it all to retire, and become an international judge.[90] Nor do internationalized criminal bodies, which are, by definition, transient entities, offer anybody a reliable alternative to secure employment in the state administration back home. Hence, appointment and re-appointment of international judges and prosecutors is contingent upon consent by the national ministries of justice, or other relevant departments or institutions, from where they come. A government might not be willing to grant a judge or prosecutor leave to serve on an internationalized tribunal, or, if it cannot block it, it can actively hinder him/her by slowing his/her future career.

[88] Writing about UNMIK, Baskin noted that 'Some lawyers confessed that, before deployment, they had no experience on peacekeeping, knew little about Kosovo's political and legal circumstances, and generally required a good deal of time on the ground to acquaint themselves with the existing state of affairs. Others report that many lawyers (although far from all of them) who assumed great responsibilities were young and without experience in the type of work required by UNMIK': Baskin (*supra* n 86) s 20.a. Also, 'Kosovar jurists add that the international judges and prosecutors are not necessarily experts on war crimes and several said that the international judges are "not very good jurists": Baskin (*supra* n 86) s 20. 'International personnel ... point out that it has been difficult to even find a sufficient number of well-qualified judges from civil law systems who speak English—and report that the second wave of recruitments was desperate in an effort to bring in any one who formally filled the bill and these are judges that often do not speak English well, have little prosecutorial experience, have little experience in criminal law or in war crimes. Even international judges and prosecutors emphasized that they are not well-versed in Kosovar or international war crimes and humanitarian law upon recruitment': Baskin (*supra* n 86) s 51.

[89] See *supra* n 46.

[90] See pp 265–7.

What if suitable international judges and prosecutors cannot be found at all, either because none is willing to take on the duty, or, more likely, because the respective governments do not want to cooperate with the internationalized judicial body? While this might sound a highly hypothetical question, seemingly in the Cambodian National Assembly's mind this was actually a distinct possibility, and, considering the travails of the creation of an internationalized criminal judicial body in that country to try Khmer Rouge leaders, something that should not be dismissed out of hand. Article 46 of the Law on the Establishment of Extraordinary Chambers provides that if any foreign judge or investigating judge or prosecutor fails or refuses to participate in the Extraordinary Chambers, the Supreme Council of the Magistracy shall replace that person by drawing from the lists from which the first list was drafted. If the lists are exhausted, vacancies are to be filled by the Supreme Council of the Magistracy from candidates recommended by the governments of Member States of the United Nations or from among other foreign legal personalities. If, following such procedures, there are still no foreign judges or foreign investigating judges or foreign prosecutors willing to go to Cambodia, then the Supreme Council of the Magistracy may choose Cambodian replacements.

Yet, in the negotiations culminating in the adoption of the Law on the Establishment of Extraordinary Chambers and leading to the Cambodia–United Nations Agreement, the United Nations strove in earnest to avoid the possibility that the Cambodian government might proceed to trials unilaterally, but still under the banner of the Extraordinary Chambers, by adding the provision whereby 'Appointment of international judges by the Supreme Council of the Magistracy shall be made only from the list submitted by the Secretary-General'.[91] It is thus likely that this provision will not make it into the revised Law on the Establishment of Extraordinary Chambers.

Recruiting personnel for internationalized courts is comparatively more complex than staffing international courts and tribunals because, besides the usual problems associated with finding suitable international personnel, competent local judges and prosecutors need to be found and enlisted. This is not an easy task. Often, the country where these courts are called to operate might have been wrecked by years of chaos and war. In other cases, minorities might have been long oppressed and persecuted, often denied an education, most of all in the legal profession. In this framework, when UN missions are deployed to rebuild the state administration and govern the territory, one of the most pressing problems is finding local personnel with adequate legal knowledge and experience.[92] The fact that UNTAET Regulation 2000/11 (On the

[91] United Nations/Cambodia Agreement Art 3.5.

[92] On the state of the local judiciary at the time of the deployment of UNTAET in East Timor, see, Chapter 3 (Cerone/Baldwin) and Chapter 4 (Cady/Booth). On the issues created by the ethnic divide between Kosovo-Albanian and Kosovo-Serb judges, see Chapter 3 (Cerone/Baldwin).

Organization of Courts in East Timor) needs to spell out the platitude that relatives cannot sit as judges on the same panel, is very telling as to how tiny the pool is of suitable local candidates for judicial positions.[93]

True, if few are to be found, more can be trained, but skilled judges are not created overnight, nor in one or two years if you have to teach somebody law in the first place. Besides, training is a lengthy and expensive process, and there is the risk that local people trained in law and judicial practice might later on join the ranks of the UN 'itinerant legal troops', thus bleeding the country of local legal talent.

Often training does not solve it all.[94] Local judges might lack the self-confidence which is the basis of independence and impartiality. Reliance on political authority is a bad habit that takes lengthy mental conditioning to be forgotten. For a local person, taking up office as a judge in a civil or criminal court is a politically-charged decision, one which might attract unwanted attention and serious threats. Finally, pay is often not such as to encourage suitable candidates to accept the position.[95] To that, one should add that local judges are usually prohibited by law from earning additional income besides the paltry salary.[96] While such a provision is reasonable per se, in the

[93] UNTAET Reg 2000/11 ss 9.3 and 15.3.

[94] In fact, sometimes it can create short-term problems. As the UN High Commissioner for Human Rights remarked in his report on East Timor 'compulsory training for Timor-Leste's judges, prosecutors and public defenders brought the court system to a virtual standstill between mid-September and mid-November 2002. No detention review hearings or other urgent matters were dealt with during this period, except on extremely ad hoc basis'. United Nations High Commissioner for Human Rights *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, Situation of Human Rights in Timor-Leste* (4 March 2003) UN Doc E/CN.4/2003/37 para 4.

[95] In Kosovo, in 2001, local judicial staff were paid a monthly salary of DM600 (judges) (about US$275 at conversion rates at that time), DM390 (staff—(*referenti*)) (about US$180), DM330 (beginners) (about US$150), and DM180 (secretaries) (about US$80): Baskin (*supra* n 86) s 66. In East Timor, judges and prosecutors are receiving a salary of US$360 per month. East Timorese judges of Special Panels are being paid US$650 per month: email from Judge Sylver Ntukamazina, on file with the author. International judges and prosecutors, in contrast, occupy UN positions ranging from P3 to P5, and are paid salaries and benefits corresponding to those of senior legal professionals in developed countries, which are many times higher than those of local judges. However, this is unavoidably so, as local judges could not be paid the salaries of international judges, making them extremely rich by local standards, while at the same time no one could ask international judges, who are already difficult to recruit, to work virtually pro bono. Lower salaries for local judges is not an issue in Sierra Leone, however, where both international and Sierra Leonean judges are paid the same salary, which is in line with that of high-level UN positions.

[96] eg, UNTAET Reg 2000/11 s 2.4 provides: 'While in office, judges and prosecutors shall be barred from accepting political or any other public office, or from accepting any employment, including for teaching law, participating in the drafting of law, or carrying out legal research on a part-time basis, unless for honorary unpaid purposes'. The wording of UNMIK Reg 2000/57 is less detailed, but the results are similar (s 7.2). It provides that 'A judge or prosecutor shall not hold any other public or administrative office or engage in any occupation of a professional nature, whether remunerative or not, or otherwise engage in any activity incompatible with his or her functions'.

particular context in which internationalized criminal tribunals operate, it exposes local judges to dangerous temptations.

In sum, in internationalized criminal courts and tribunals, staff shortages are a concrete possibility. Needless to say, this can cripple even the best-planned operations. As a matter of fact, understaffing, due to a lack of suitable candidates as well as insufficient budgets, is one of the major problems affecting the internationalized judiciary in Kosovo and East Timor.

In the case of East Timor, the UN High Commissioner for Human Rights reported in March 2003 that:

> a lack of personnel and training continue to result in delays in the administration of justice ... Since December 2001, Timor-Leste has been without a functioning Court of Appeal, due to the lack of international judges ... Prosecutions of serious crimes have suffered delays beyond the control of the Serious Crimes Unit and the Special Panel for Serious Crimes, attributable, inter alia, to the lack of sufficient number of international judges to allow two panels to function simultaneously.[97]

In Kosovo, in November 2002, UNMIK reported that:

> The current number of international judges and prosecutors has increased to 26. While this is a large increase from the mid-August 2001 number of 11, it is significantly less than the goal of 34. It must be noted, however, that the addition of each judge and prosecutor necessitates an increase in support staff including interpreters, court recorders, and legal officers. Thus far, the number of posts provided for this has been far short of what is needed. The allocation of posts for these functions is critical in order to ensure that international judges and prosecutors function effectively in Kosovo and deal with an ever-increasing workload.[98]

Understaffing is also an issue for local judges. In March 2002, in Kosovo there were 80 vacancies for judicial positions.[99]

E. INDEPENDENCE OF THE JUDICIARY

The principle of the independence of the judiciary seems to enjoy universal recognition at the level of national legal system. Independence of the judiciary is generally held to mean, inter alia, that judicial functions must be exercised by office holders who enjoy extensive and well-defined guarantees concerning appointment to and removal from office; disciplinary accountability according to a well-defined code of ethics; clear procedures for the assignment of cases; and freedom from interference from undue influence.

[97] UNHCR Report (*supra* n 94) paras 4, 6, and 49.
[98] UNMIK Presentation Paper (*supra* n 7) 13. See also OSCE *Report* 9 (*supra* n 84) at 13.
[99] ibid at 8.

At the international level, however, it is only recently that the issue has begun emerging.[100] The area is fraught with difficulties and few navigational tools are available. Principles of independence in national legal systems cannot be imported lock, stock, and barrel into the international sphere, because the international and national context are fundamentally different. For one, at the international level there is no actual separation of powers, a concept which is the bedrock of independence of the judiciary at the national level. Thus, appointments to international courts and tribunals—a crucial facet, albeit only one of many, of the issue of independence—cannot be entirely insulated from political processes, whether national or international. Indeed, in most cases, states require a close involvement in the appointment process as a condition of their participation in certain international adjudications (a point which is most starkly demonstrated by the institution of the ad hoc judge in the International Court of Justice).

Again, some practical features of international adjudication raise different issues than in the national context. For instance, it is more common for international judges to be appointed for a limited period only. In many cases they are expected to be able to return to the active practice of international law after their term of office, particularly if they come from countries with a smaller pool of potential candidates. In some cases, the caseload generated by the tribunal does not justify full-time appointments, and the judges must therefore be able to have alternative and parallel careers.

Once appointed, international judges are sometimes claimed to be less accountable in their conduct and decision-making than national judges. At the same time, the very sensitivity of the matters that are submitted to them, which can often involve judging upon states, or high state officials, and their increasing authority, power, and visibility, requires careful preservation of independence.

If the dictates of international politics chip away at the principle of independence when it is to be applied to international judicial bodies *tout court*, in the case of *internationalized* criminal bodies the principle is warped to such an extent that it bears little resemblance to the original national template.

1. Appointment and dismissal of judges

With regard to judicial selection procedures, at the national level a wide array of methods are employed, ranging from direct election, parliamentary or governmental appointment, or competitive exams. Regardless of the procedure used, the principle of independence dictates that judges remain

[100] On the issue of the independence of the international judiciary, see the special symposium issue (2003) 2(1) *Law and Practice of International Courts and Tribunals*.

independent from the body or person electing them. This applies both to hiring and firing practices.

A feature that sets internationalized criminal tribunals aside from international criminal tribunals (ie, ICC, ICTY, and ICTR) is that while the judges of the latter group are chosen by way of a more or less transparent electoral process, those of the former are simply appointed. This is a distinction that has considerable bearing not only on the question of the actual, or even only perceived, independence of judges sitting on the bench of internationalized criminal bodies, but also on the problem of ensuring that only competent and able justices serve in those positions.

Once again, it is necessary to divide internationalized criminal bodies analysed in this book into two distinct genres, comprising, on the one hand, the cases of East Timor and Kosovo, and, on the other, those of Sierra Leone and Cambodia.[101]

In the case of East Timor and Kosovo the personnel of internationalized panels, including judges and prosecutors, are selected by the Special Representative of the Secretary General (SRSG) top-down, in a manner which is not substantially different from that used for any other branch of the administration of the given territory. The SRSG, whose powers derive from the Security Council and not from the Secretary-General, as the name might suggest, has ultimate hiring and firing powers over not only both national and international judges, the personnel of the Registry and Office of the Prosecutor, and the defence unit, but also policemen, prison guards, customs officers, and so on throughout the whole of the reconstructed state machinery.[102] In other words, when it comes to appointment of civilian personnel to the bureaucracy of the territory which he/she has been called to administer, the SRSG is accountable to the Security Council and no one else.

Still, considering the sensitivity of the issue, particularly as regards judges, both in the case of Kosovo and East Timor mechanisms have been put in place to ensure a modicum of transparency to the appointment process,

[101] On the issue of the independence of the appointment and dismissal of international judges and prosecutors, see also, Chapter 15 (Friman), at E.3.a.

[102] 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* (20 September 1996) UN Doc A/C/.5/50/72m 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 United Nations 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 peace-keeping, peace enforcement, humanitarian, diplomatic, and other operations. On the Special Representative of the Secretary-General, see Cyrus R Vance and 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).

although this applies virtually only to local judges and prosecutors and not to international personnel. Indeed, both in Kosovo and East Timor, national and international judges and prosecutors are selected and appointed through fundamentally different procedures.

As described above, international judges and prosecutors are directly recruited and contracted by the United Nations, within the standard UN employment legal framework (ie, criteria, terms of contract, and procedures).[103] For the record, to date, no international judge or prosecutor has been dismissed from Kosovo's or East Timor's courts,[104] nor has anyone left before the end of their contract.[105]

Applying to judicial operators the same employment framework as for anyone else within an international organization (from typists at UN headquarters to humanitarian workers), by itself, is already hard to reconcile with the level of institutional independence that should be characteristic of any judiciary, be it national, international, or hybrid.

Conversely, local personnel are selected and appointed through special procedures, which nonetheless also fall short of minimum standards of independence. UNMIK Regulation 2001/8 established a nine-member Kosovo Judicial and Prosecutorial Council.[106] The Council is responsible, inter alia, for advising the SRSG on matters related to the appointment of judges, prosecutors, and lay judges, as required, and hearing complaints, if any, against any judge, prosecutor, or lay judge.[107] It invites, by public announcement, applications of legal professionals in Kosovo for service as judges and prosecutors, and makes recommendations to the SRSG about the hiring, sanctioning, and dismissal of judges, prosecutors, and lay judges. Moreover, 'Upon request of the Special Representative of the Secretary-General, the Council may render advice on other issues related to the judicial system'.[108] While the advice of the Council per se is not binding on the SRSG, in practice, the SRSG has invariably followed it.[109]

Another task of the Kosovo Judicial and Prosecutorial Council worth mentioning is the adoption (conditional upon the endorsement of the SRSG) of a code of ethics for judges, prosecutors, and lay judges.[110] The three codes were adopted on 31 July 2001, and endorsed by the SRSG in

[103] On recruiting at the United Nations, see pp 252–7.

[104] Email from Judge Sylver Ntukamazina, on file with the author; email from UNMIK, 'Pillar I, Police and Justice', on file with the author.

[105] Considering how short contracts for international personnel are, this is hardly surprising. See p 266. Yet, short contracts also make it possible for international judges and prosecutors not to seek renewal and depart from the region in haste, leaving behind all outstanding cases unfinished, with dire consequences for the length of proceedings.

[106] UNMIK Reg 2001/8.

[107] ibid s 1.2.

[108] ibid s 1.2.

[109] See Chapter 4 (Cady/Booth).

[110] UNMIK Reg 2001/8, s 1.3.

November 2001.[111] These codes are essential because they establish the benchmark according to which the behaviour of local judges and prosecutors is evaluated.

These minimal guarantees notwithstanding, the SRSG retains king-like powers over the judiciary. Indeed, as much as judges, the members of the Council themselves are appointed by the SRSG.[112] Admittedly, Regulation 2001/8 lays down the criteria that the SRSG should follow in making up the Council,[113] and members of the Council swear before him 'to discharge the functions entrusted ... by UNMIK Regulation No. 2001/8, and administrative directions issued thereunder, and not to seek or accept instructions from any other source'.[114]

When it comes to dismissing the members of the Council for failure to comply with their obligations, the SRSG has also virtually unlimited powers. All he or she needs to do is to refer allegations to the Council, which submits a report to the SRSG within 30 days. The final decision is for the SRSG him- or herself, and, pending the report, he or she may suspend the member and 'in exceptional circumstances take such action as he may deem appropriate in the exercise of ... discretion'.[115]

Again, the Council procedure applies only to local judges. International judges are subject only to the control of UNMIK (Department of Justice—(DOJ)) and the SRSG. Thus, if a motion is introduced to disqualify panels of international judges ('Regulation 64' judges), the Director of the DOJ appoints another international judge to rule on the matter.[116]

In East Timor, UNTAET Regulation 1999/3 established the Transitional Judicial Service Commission. Like the Kosovo Judicial and Prosecutorial Council, the Transitional Judicial Service Commission's task is, inter alia, to draft a code of ethics and conduct for judges and prosecutors;[117] to recommend to the SRSG candidates for provisional judicial or prosecutorial office;

[111] Email from UNMIK 'Pillar 1, Police and Justice', on file with the author.

[112] UNMIK Reg 2001/8 s 2.2.

[113] ibid s 2.1: '[th]e composition of the Council shall be multi-ethnic and reflect varied legal expertise. The Council shall include both local and international members. Members of the Council shall be distinguished legal professionals, such as but not limited to serving or former members of the judicial and prosecutorial bodies, members of the bar, professors of law, meeting the highest standards of efficiency, competence and integrity. They shall be independent and impartial. They shall not hold any position incompatible with their functions as members of the Council'.

[114] ibid s 3.1. The term of office of the members of the Council is one year, but this term may be extended by the SRSG *ad libitum*: ibid s 3.3.

[115] ibid s 3.2.

[116] OSCE, Mission in Kosovo, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section *Review of the Criminal Justice System (September 2001–February 2002)* 33. Actually, this procedure has not even been codified, but is merely a standing practice of the DOJ: ibid.

[117] To date, the code of ethics has not yet been adopted by the Transitional Judicial Service Commission.

and to provide advice on the promotion, re-assignment, or removal of judges or prosecutors.[118] Members of the Commission are appointed for six-month renewable terms by the SRSG 'after consultations with relevant East Timorese interlocutors and social groups'.[119]

It should be stressed that, as in the case of Kosovo, the Commission's work refers only to East Timorese judges, and it has no bearing on the selection, appointment, disciplining, and dismissal of international judges. Those are UN personnel, and, thus, remain subject only to UN regulations and practices.

As contrasted to UNMIK Regulation 2001/8, UNTAET Regulation 1999/3 is more elaborate, but the substance is the same, as ultimate authority about the hiring and firing of judges, and also of the members of the Commission, rests in the hands of the SRSG.

In sum, both in the case of Kosovo and East Timor, the SRSG has quasi-proconsular powers.[120] Challenging a decision of the SRSG concerning the appointment, sanctioning, or dismissal of judges and prosecutors would be extremely difficult, if not impossible, first because there is no forum competent to decide on the matter, and secondly, even if there was one, because it would raise the issue of the immunity of UNMIK and UNTAET and its structures and representatives.

In the case of Sierra Leone and Cambodia, conversely, decision-making powers on the selection, appointment, and dismissal of the bench, Prosecutor, and Registrar is not top-down, but partly horizontal, being equally split between the United Nations and the government of the country. In a way, it resembles the selection of judges of a classical arbitral tribunal. Of course, ultimately this significant difference between the East Timor/Kosovo case and the Sierra Leone/Cambodia case is the consequence of the fact that while in the case of the former group, the United Nations took over the administration of the territories, including the appointment of civil authorities, in the case of the latter the relevant internationalized criminal tribunal is constituted by agreement between the United Nations and the government in

[118] UNTAET Reg 1999/3 Art 1. [119] ibid Art 2.5.

[120] Both in the case of Kosovo and East Timor grounds for dismissal of judges are spelled out. Namely, Art. 13.3 of UNTAET Reg 1999/3 provides that: 'Judges and prosecutors shall not be removed from office unless in case of: (a) Mental illness or physical incapacity which makes the performance of judicial or prosecutorial duties permanently impossible; (b) Serious violation of professional responsibilities, including the principles enshrined in the oath received by the Transitional Administrator [ie the SRSG]; (c) Acceptance of bribes or other emoluments beyond the granted remuneration, as determined by the Transitional Administrator; (d) Acceptance of political or any other public office; (e) A determination of false information having been provided in the application for professional service in judicial or prosecutorial office.'

Article 7.3 of UNMIK Reg 2000/57 provides that: 'no judge may be removed from office except on the ground of: (a) physical or mental incapacity which is likely to be permanent or prolonged; (b) serious misconduct; (c) failure in the due execution of office; or (d) having been placed, by personal conduct or otherwise, in a position incompatible with the due execution of office.'

power. Still, between the Sierra Leone and the Cambodian case there are significant differences due to the dissimilar roles played by the United Nations in the shaping of those judicial bodies.

As stated above, in the Special Court, Sierra Leone judges are appointed by the Sierra Leone government, and international judges by the UN Secretary-General.[121] The Special Court constitutive instruments are silent as to the question of the sanctioning and removal of judges who have violated their mandate. Supposedly, international judges will have their mandate terminated by the United Nations, and Sierra Leonean ones by the government. However, explicit rules on this should have been provided for, as discretion in these matters hardly accords with independence.

In the case of Cambodia, however, the local government seems to have, at least on paper, a stronger hand in the appointment and dismissal of judges and prosecutors. Indeed, as stated above, both local and foreign judges and prosecutors are to be appointed by the Supreme Council of the Magistracy.[122] The relevant documents available at the time of writing, however, are silent on whether the Supreme Council of the Magistracy can also remove them, and whether the UN Secretary-General will legally have a say in this.[123]

2. Length of service

When it comes to the independence of the judiciary, the length of the term of appointment of judges is generally considered a sensitive issue. Usually, there is a direct relationship between the degree of independence and the length of terms. Short terms of service, coupled with the decision about the renewal of the appointment being placed in the hands of a political organ, might make judicial operators over-responsive to the dictates of politics rather than justice. The same holds true, in general, for internationalized criminal bodies, but, again, a distinction should be made between the East Timor/Kosovo and the Sierra Leone/Cambodia cases, and between local and international judges.

In the case of Sierra Leone and Cambodia, no distinction is made between the term of appointment of local and international judges. In the case of

[121] See pp 241–2. [122] See p 245.

[123] Yet, the United Nations/Cambodia Agreement provides that 'Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement [which arguably includes removing international judges and prosecutors against the will of the United Nations], the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present agreement' (Art 28). In case of dispute between the United Nations and Cambodia, settlement is to be sought by diplomatic means (negotiation), or any other means the parties may agree to. No unilateral resort to adjudication is provided (Art 29).

Cambodia it is simply said that judges and prosecutors, both local and international, will be appointed for the duration of the proceedings.[124] In Sierra Leone, judges, prosecutors, and the Registrar all have a three-year renewable tenure.[125] That is more or less in line with the term of appointment of judges at ICTY and ICTR (ie, four years),[126] which, like the Sierra Leone Special Court, are ad hoc international criminal tribunals, but shorter than those at ICC, which, however, is a permanent body (three, six, or nine years of tenure).[127]

Conversely, in East Timor and Kosovo, a distinction is actually made between local and international judges' tenures. In both cases, after an initial set up phase, local judges tend to be appointed for an indefinite term or for life, expressly in order to preserve their independence. In Kosovo, in the first years of operations local judges used to be appointed for one-year terms, but in December 2001 the Kosovo Department of Justice announced that local judges and prosecutors would begin to be nominated for an indefinite term that will terminate upon the completion of UNMIK's mission.[128]

In East Timor, there has been a similar move to appoint local judges for life. Section 28 of UNTAET Regulation 2000/11 provides that after an initial period of no less than two but no more than three years, judges shall be appointed for life. During the probation period the performance of judges is monitored by the Transitional Judicial Service Commission, and to preserve independence, the Commission's scrutiny is to be limited to the professional conduct of the judge (eg, the judge's integrity and dedication, regular attendance in court, ability to cope with the workload, impartiality shown in dealing with the cases) without touching upon the substantive decisions of the judge.

Conversely, in Kosovo and East Timor international judges serve an extremely short term (respectively six months and one year).[129] While this, combined with the fact that re-appointment is dependent on the decision of the SRSG, might cast some prima facie doubts as to the ultimate capacity of international judges of being really independent, it should also be considered that international judges in the end are part of a special international force of humanitarian assistance to enable the relevant UN mission to carry out its mandate (which is usually temporally limited). In many regards, they are not ultimately different from policemen, army personnel, humanitarian assistance specialists, and the like, who are deployed. As Cady and Booth in

[124] United Nations/Cambodia Agreement Arts 3.7, 5.7, 6.7.

[125] United Nations–Sierra Leone Agreement Arts 2.4, 3.1, 4.2; Special Court Statute Arts 13.3, 15.3, 16.3.

[126] ICTY Statute Art 13.4 and ICTR Statute Art 13.3*bis*.

[127] Rome Statute Art 36.

[128] OSCE *Review of the Criminal Justice System* (*supra* n 116) 26–7.

[129] Baskin reports that to date (end of 2001) no single international judge or prosecutor in the courts of Kosovo had been discontinued: Baskin (*supra* n 86) s 51.

this book aptly point out, while independence and security of tenure are essential for local judges and the eventual building of Kosovo's or East Timor's future, international judges are not part of that future.[130] The decision to deploy and withdraw international judges is a strategic function that should be in the hands of the United Nations (namely the SRSG), and free from restrictions.

3. Privileges and immunities

The issue of immunities of judges and prosecutors underscores the perhaps unavoidable disparity of treatment between local and international judges and prosecutors. Immunities of the latter are much wider in scope than those of the former.

Typically, in international courts and tribunals immunities are very detailed and substantial.[131] In the case of criminal bodies, such as ICTY, ICTR, or ICC, judges and prosecutors enjoy broad diplomatic privileges and immunities, similar to those of heads of diplomatic missions. In the case of internationalized criminal bodies, international judges and prosecutors largely benefit from similar standard immunities and privileges. Thus, for instance, in Cambodia, international judges and prosecutors, together with their families forming part of their household, will benefit from privileges and immunities, exemptions and facilities in accordance with the 1961 Vienna Convention of Diplomatic Relations, including immunity from arrest or detention; immunity from criminal, civil, or administrative jurisdiction; inviolability for all papers and documents; exemption from immigration restrictions and alien registration; immunities and facilities in respect of personal baggage; and exemption from taxation in Cambodia.[132]

Similar but less broad privileges and immunities are also granted to the rest of the court's international personnel[133] and counsel, whether Cambodian or foreign.[134] Cambodian judges and prosecutors and other Cambodian personnel are accorded immunity only from legal process in respect of words spoken or written and all acts performed in their official capacity, during and after the termination of employment.[135]

The same degree of protection is offered to international judicial operators in Kosovo and East Timor. Again, it should be recalled that internationals

[130] See Chapter 4 (Cady/Booth).

[131] On this point see D Shelton 'Legal Norms to Promote the Independence and Accountability of International Tribunals' in (2003) 2(1) *The Law and Practice of International Courts and Tribunals* 27–62.

[132] United Nations/Cambodia Agreement Art 19. Vienna Convention of Diplomatic Relations 1961 500 UNTS 95.

[133] United Nations/Cambodia Agreement Art 20.

[134] ibid Art 21.

[135] ibid Art 20.1.

are UN personnel, and as such they benefit from the usual privileges and immunities of the Organization.[136] Largely redundantly, UNMIK Regulation 2000/47 provides that the SRSG, the Principal Deputy, the other four Deputy SRSGs, the Police Commissioner, and other high-ranking officials designated by the SRSG 'from time to time' (hence arguably also judges and prosecutors) are immune from local jurisdiction in respect of any criminal or civil act committed in Kosovo,[137] as well as, of course, from local jurisdiction in respect of any civil or criminal act performed or committed by them in their official capacity in Kosovo.[138]

Local judges and prosecutors are not covered by these provisions. Thus, to illustrate, in East Timor they are subject to civil and criminal jurisdiction as regulated by the East Timor Constitution,[139] and, as regards disciplinary offences, to the Statute of Judicial Magistrates.[140]

However, the case of Sierra Leone is less straightforward. Part VIII of the Special Court Agreement Ratification Act 2002 regulates offences against administration of justice. Amongst these, the Act provides that:

> (a) ... a judge or official of the Special Court, [who] corruptly accepts, obtains, agrees to accept or attempts to obtain for himself or any other person any money, valuable consideration, office, place or employment—(i) in respect of anything done or omitted or to be done in his official capacity; or (ii) with intent to interfere in any other way with the administration of justice of the Special Court ... commits an offence and shall be liable on conviction to a fine not exceeding thirty millions leones or to a term of imprisonment not exceeding ten years, or ... both ... [141]

At the same time, as in the case of Cambodia, Article 12 of the Special Court Agreement, entitled 'Privileges and Immunities of the Judges, the Prosecutor, and the Registrar', provides that judges, Prosecutor, and Registrar, together with their families forming part of their household, enjoy the same privileges and immunities, exemptions and facilities accorded to diplomatic agents which have just been listed above.[142] Similar but less broad privileges and immunities are also granted to 'international and Sierra Leonean personnel'[143] and counsel.[144]

[136] UN privileges and immunities are provided for in Art 105 of the UN Charter, and have been elaborated upon, inter alia, by the Convention on the Privileges and Immunities of the United Nations, adopted by UNGA Res 22A (I) (13 February 1946) UN Doc A/43.Ann.I, 1 UNTS 15 (corrigendum in 90 UNTS 327).

[137] UNMIK Reg 2000/47 s 3.2.

[138] ibid s 3.

[139] East Timor Constitution Title V. The English text of the East Timor Constitution can be found at www.jsmp.minihub.org/engconst.pdf (site last visited 1 August 2003).

[140] Statute of Judicial Magistrates chs VI and VII.

[141] Special Court Agreement Ratification Act 2002 s 39.

[142] United Nations–Sierra Leone Agreement Art 12.

[143] ibid Art 13.

[144] ibid Art 14.

Still, the Special Court Agreement does not specify whether Article 12 applies both to international and local judges, Prosecutor and Deputy Prosecutor, Registrar and Deputy Registrar, or only to the former group. On the one hand, logic dictates that it applies to both, perhaps with the exception of immunity from taxation for Sierra Leoneans, for two main reasons. First, the Special Court Agreement does specify that Article 13 refers to 'privileges and immunities of international and Sierra Leonean personnel', while the negotiators evidently did not feel the need to do so in the previous Article 12. Secondly, the last paragraph of Article 12 provides that:

> the right and duty to waive immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the [UN] Secretary General, in consultation with the President [of Sierra Leone].[145]

On the other hand, if so, this would be a major departure form the principle that local judges are treated as their peers working in any other national court which has not been internationalized. Hopefully, this issue will be clarified in the United Nations–Sierra Leone Headquarters Agreement, which is still, at the time of writing, under negotiations.

F. CONCLUSION

The fate of institutions is determined by the people that work in them. Internationalized criminal courts and tribunals are no exception to this axiom. Whether they are here to stay or rather will pass down in history as a temporary measure pending the establishment of the International Criminal Court, and the expansion of its reach, ultimately depends on the qualities of those men and (few, alas) women.

Internationalized tribunals are a unique form of social experiment, where foreign and local judicial operators are put side by side, and pressed to work towards the achievement of a common goal. They are required to do so under rules that are fully familiar neither to the former nor to the latter, but a hurriedly concocted blend. To further complicate the exercise, they speak different languages. Often they work in highly precarious conditions, in tense environments, where they are united by common threats. Still, they have very different destinies, for the international personnel will eventually depart from the country leaving behind a legacy of trials and judgments, while local personnel remain to build upon those foundations laid together a hopefully peaceful and just future.

Foreign judges and prosecutors of internationalized courts are a new species in the international landscape: they are *homini novi*. They are partly

[145] ibid Art 13.3.

peace-keepers, as they are dispatched together with military troops, to the most unlikely places, to bring justice; partly diplomats, because they have to walk a very thin line between application of the law and reconciliation; partly pedagogues, because they have to instruct their national colleagues; partly scholars, because they are always aware that their decisions will be scrutinized with a magnifying glass in countless law schools for years to come; and, of course, judges and prosecutors, as they determine someone's freedom.

Unlike their counterparts back home, they do not have the luxury of time. They are asked to achieve a great deal with very little, and under political and administrative pressures that would be considered intolerable by their colleagues. Unlike judges and prosecutors of fully international courts, they are deeply embedded in the reality they are asked to judge. Pain, grief, and hatred is thrust before them daily. They do not sit in comfortable and fully equipped courtrooms in The Hague or Strasburg, but in hastily patched up buildings. To many they might seem ersatz and makeshift international judges, but their actions carry no less weight than those of their distinguished colleagues.

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