
**EXPERIENCES AND LESSONS FROM “HYBRID”
TRIBUNALS: SIERRA LEONE, EAST TIMOR AND
CAMBODIA**

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SIERRA LEONE, EAST TIMOR AND CAMBODIA**

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Experiences and Lessons from “Hybrid” Tribunals: Sierra Leone, East Timor and Cambodia

By Eileen Skinnider*

I. Introduction

This paper explores the question of the need for the International Criminal Court in light of the fact that “hybrid” or mixed tribunals are being established in some countries to address the serious human rights and international humanitarian law violations that have taken place there. “Hybrid” or mixed tribunals or “internationalized” courts are terms used to describe those courts that involve both national and international elements in the organization, structure and functioning of the court systems and in the application of laws and criminal procedure.¹ Or in other words “both the institutional apparatus and the applicable law consists of a blend of the international and domestic”.² The hybrid model was first established in East Timor and then variations on the hybrid model have been proposed for Cambodia and are being implemented in Sierra Leone and most recently in Kosovo. There has also been discussion to set up such internationalized courts in Bosnia Herzegovina and Burundi. This paper will limit its focus to the first three situations: East Timor, Sierra Leone and Cambodia.

The obvious response of why the International Criminal Court was not seen as an appropriate institution to address the violations of human rights and humanitarian law occurring in East Timor, Sierra Leone or Cambodia is that the crimes in question occurred before the entry into force of the Rome Statute establishing the International Criminal Court (ICC) and therefore the ICC does not have jurisdiction over these situations.³ However, this does not mean that with the ICC now in place, there is no longer any need for hybrid or mixed tribunals. Given the principle of complementarity articulated in the Rome Statute, which is designed to permit national courts to take precedence and envisions the ICC as a court of last resort, the ICC’s jurisdiction was never meant to be exclusive. Furthermore, given the reality that the ICC will likely not be able to deal with all situations that require an international criminal justice response nor be able to prosecute all alleged perpetrators involved, there continues to be a place for hybrid tribunals in the overall scheme of combating impunity for the worst crimes.⁴ As

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¹ From Kai Ambos and Mohamed Othman (Eds) *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (Freiburg: 2003) at page 2.

² Sarah Williams “*Genocide: The Cambodian Experience*” (2005) 5 *International Criminal Law Review* 447.

³ According to Article 11 of the Rome Statute, the ICC has jurisdiction only with respect to ‘crimes committed’ after the entry into force of the Statute and only after the entry into force of the Statute for the State in question, unless that State has made a declaration accepting the exercise of jurisdiction by the ICC with respect to the crime in question.

⁴ As explained by the ICC Prosecutor, Luis Moreno-Ocampo, “In selecting situations to investigate, once the requirements of temporal and subject-matter jurisdiction are met, the Office is guided by the standard of gravity. Although any crime falling within the jurisdiction of the Court is a serious matter, the Rome Statute clearly requires an additional consideration of “gravity” whereby the Office must determine that a situation is sufficiently grave to justify further action by the Court. In deciding whether this additional consideration of gravity is met the Office considers the following factors, amongst others, to be relevant: the scale of the crimes; the

described by Ambos and Othman, “these arrangements represent a complementary scheme to either national or international criminal tribunals as they operate today”.⁵ Or as Knowles puts it, these hybrid tribunals can fill the cavity between wholly local courts, which may be destroyed or weakened by armed conflict or corrupt and politicized and wholly international justice and therefore provide a “cost efficient, high impact alternative”.⁶

East Timor, Sierra Leone and Cambodia represent distinctive and differing examples of criminal accountability for serious human rights violations. East Timor was an area under a UN transitional administration with full executive, legislative and judicial authority when the Special Panel was created. Sierra Leone and Cambodia are countries where a special agreement with the UN established the judicial mechanism for the prosecution of certain serious offences. This paper will briefly examine the different hybrid models that have been established in East Timor, Sierra Leone and Cambodia and explore some of the experiences and lessons arising from those tribunals. It will also consider why there was and may still be a need for hybrid tribunals before addressing the need for and importance of the permanent international criminal court.

II. Evolution of Approaches in International Criminal Justice

The idea of setting up an international criminal court to bring to justice individuals allegedly responsible for serious international crimes goes back to the aftermath of World War I.⁷ While the attempts to establish international criminal institutions after World War I failed, the Nuremberg and Tokyo Tribunals established after the horrors of World War II were seen as significant in the development of international criminal law. The Nuremberg Charter establishing the International Military Tribunal had jurisdiction over individuals charged with “crimes against peace”, “war crimes” and “crimes against humanity” in Europe. This was done concurrent with domestic prosecutions of the same crimes in occupied Germany pursuant to the Control Council Law No. 10.⁸ The Tokyo Charter set up a similar tribunal, the International Military Tribunal for the Far East. Whatever the criticisms, and there have been some, towards these Tribunals, they did break the “monopoly” over criminal jurisdiction concerning international crimes which had been until that moment firmly held by States.⁹ For the first time, non-national and quasi-international institutions were set up to prosecute new crimes with international

nature of the crimes; the manner of commission of the crimes; and the impact of the crimes.” Luis Moreno-Ocampo “*Instruments of Justice: The ICC Prosecutor Reflects*” JURIST Forum (January 24, 2007).

⁵ Ambos and Othman, *supra* note 1, at page 2.

⁶ Phoebe Knowles “*The Power to Prosecute: The Special Court for Sierra Leone from a Defence Perspective*” (2006) International Criminal Law Review, Volume 6 at page 387.

⁷ There are many excellent books and articles that review the evolution and history of international criminal law. For more information see Antonio Cassese “*From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*” in Antonio Cassese, Paola Gaeta and John Jones, Editors, *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford University Press: 2002) at page 1.

⁸ In occupied Germany, the four major Allies, pursuant to Control Council Law No. 10, prosecuted, in their respective zones of occupation, the same crimes as the IMT: Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, 31 January 1946.

⁹ Antonio Cassese, *supra* note 7 at page 8.

dimensions that gradually became customary international law and developed new legal standards in international criminal law.

Over the next few decades, efforts at the United Nations to establish a more permanent and impartial international criminal court and codify international crimes moved slowly.¹⁰ Some reflect that one of the reasons for this slow progress was due to the lack of political will caused by the division of UN Member States into Cold War lines.¹¹ However with the end of the Cold War in the late 1980s and early 1990s, the UN once again focused on the issue of a permanent international court.¹² At this same time, there was unprecedented agreement in the Security Council of the importance of international criminal justice and as such an agreement on how to respond to the atrocities that were occurring in the Former Yugoslavia and Rwanda. Under its Chapter VII powers to decide on measures necessary to maintain or restore international peace and security, the Security Council adopted resolutions to establish ad hoc criminal tribunals: the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994.¹³ While some argued that these ad hoc Tribunals reflected selective justice, others responded that without an international criminal court endowed with universal jurisdiction, these ad hoc tribunals were necessary.¹⁴

During the same time period as the establishment of these ad hoc Tribunals, renewed efforts were being made to establish a permanent international criminal court. This movement was enhanced by the lessons learned by the ad hoc Tribunals and the growing acceptance of the need to be able to prosecute those who commit international crimes whenever and wherever they occur. The Rome Statute establishing the International Criminal Court was passed in July 1998 and entered into force on July 1, 2002. The Preamble affirms that the most serious crimes of concern to the international community as a whole must not go unpunished. It also emphasizes that the ICC shall be complementary to national criminal jurisdictions.

Following the establishment of the ICTY and ICTR and prior to the entry into force of the Rome Statute, the search for other suitable modes of criminal justice has been a concern of many nation States that have experienced mass atrocities. Some cite “tribunal fatigue” of the Security Council as one of the reasons why hybrid models were developed.¹⁵ The amount of logistics, resources and time spent by the UN and the Security Council on the ad hoc Tribunals were seen to cause a heavy strain on the capacity of the organization. The next part of this paper reviews three of the hybrid models: the Special Panel for Serious Crimes in East Timor, the Special Court for Sierra Leone and the Extraordinary Chambers in Cambodia.

¹⁰ General Assembly Resolution 174 (1947) requested the International Law Commission to formulate the principles recognized in the Charter of the Nuremberg Tribunal and prepare a draft code of the offences against peace and security of mankind and a draft statute for the establishment of an international criminal court.

¹¹ Antonio Cassese, *supra* note 7 at page 10.

¹² The International Law Commission adopted a draft statute in 1994: Report of the International Law Commission, 46th Session, 2 May-22 July 1994, UN GAOR 49th Session, Supp. No. 10, UN Doc. A/49/10 (1994).

¹³ S.C. res. 827 of 25 May 1993 and SC res. 955 of 8 November 1994.

¹⁴ Antonio Cassese, *supra* note 7 at page 14.

¹⁵ The term “tribunal fatigue” was coined by David Scheffer, when he was Senior Counsel and Advisor to the United States Permanent Representative to the United Nations, as cited in Antonio Cassese, *supra* note 7 at page 15.

III. Hybrid Models

1. East Timor

Background

East Timor became an independent country in May 2002. This came after centuries of Portuguese colonial rule, twenty four years of Indonesian occupation and then two and a half years of transitional administration by the United Nations.¹⁶ Reports indicate that approximately 200,000 people, one third of the population, died during the Indonesian occupation as a result of serious human rights and humanitarian law violations.¹⁷ Throughout this prolonged conflict, the United Nations response was weak.¹⁸ Some of the worse violence took place during and after the referendum process for self determination in 1999, which was being monitored by the UN Mission in East Timor (UNAMET).¹⁹ Violence against the population and UN personnel reached such levels to shock the international community. Some 200,000 people were deported to West Timor and another 80,000 fled to Indonesia voluntarily looking for safe haven. Reported human rights violations documented during this time included abduction, deportation, torture, rape, ill treatment and murder.²⁰ Finally, after increased international pressure, the government of Indonesia allowed the intervention of international peacekeepers (INTERFET) on 20 September 1999 which finally stopped the violence.²¹ In October 1999, the Security Council established the UN Transitional Administration in East Timor (UNTAET) which was responsible for the reconstruction of the country, the coordination of the humanitarian assistance and the organization of free elections.²² It administered the territory and exercised legislative, executive and judicial authority.

¹⁶ The summary of the history of the situation in East Timor is from a number of sources: Monika Schlicher and Alex Flor "East Timor: Historical and Political Background to the Conflict in East Timor" in Ambos and Othman, *supra* note 1 at page 73; Stefanie Frease "Playing Hide and Seek with International Justice: What Went Wrong in Indonesia and East Timor" (2004) 10 ILSA J. Int'l & Comp. L. 283; Suzanne Katzenstein "Hybrid Tribunals: Searching for Justice in East Timor" (2003) 16 Harv. Hum. Rts. J. 245.

¹⁷ Human Rights Watch reports found at http://hrw.org/doc/?t=asia_pub&c=eastti; UNOHCHR, Report of the International Commission of Inquiry on East Timor to the Secretary General, UN Doc. A/54/726. The Santa Cruz Massacre in November 1991 was one incident that made world news since foreign journalists were present. The allegations were that 270 students were killed and many still missing.

¹⁸ Between 1975 and 1982, the United Nations adopted 10 resolutions on the situation of East Timor. Mediation was tried but failed. The UN Human Rights Commission sent the Special Rapporteur on extra judicial executions in 1994 to East Timor.

¹⁹ With the resignation of Suharto in 1998, this cleared the way for a political solution of the conflict. The then President Habibie declared a referendum in which the population could choose between autonomy within Indonesia or independence. In the meantime, in East Timor, the Indonesian military created and armed pro-Indonesian militias. On May 5, 1999 Indonesia and Portugal signed a UN brokered agreement on a referendum in which the UNAMET, made up of civilian staff, not military or armed UN security forces, was established to monitor the process. The militias continued their acts of terror without being disarmed and the UN had to postpone the referendum twice but finally happened August 1999. (99% of the population turned up to vote wherein 78.5% voted for independence). After the referendum, violence against the population and the UN personnel reached terrible proportions. The Indonesia government finally agreed to an international armed intervention force and admitted that it had lost control over the situation, only after increased international pressure. For more details see, Schlicher and Flor, *supra* note 16.

²⁰ Report of the International Commission of Inquiry on East Timor, *supra* note 17.

²¹ 70 % of East Timor's infrastructure (private and public buildings, power and water supply) were systematically destroyed, Schlicher and Flor, *supra* note 16.

²² SC Res. 1272 (1999). UNTAET created ETTA, the East Timor Transitional Administration, made up of East Timorese and internationals. Two years after the referendum, August 2001, elections to the East Timor Constitutional Assembly were held. A second transitional government with only East Timorese members was put in place. Presidential elections were held in April 2002 and Xanana Gusmao was elected. UN established a successor mission, UNMISSET to provide technical assistance to East Timor over a period of 2 years, responsibilities included exercise of interim law enforcement and public security, *ibid*.

The UN Commission of Inquiry on East Timor concluded that crimes against humanity and serious violations of human rights had taken place in the territory between January and August 1999, as part of a planned and systematic campaign to intimidate the local population.²³ The Indonesian Inquiry Commission KPP-HAM of the national human rights commission Komnas HAM came to the conclusion that the Indonesian military leadership had at least tolerated the intimidations and the destruction of East Timor, that militia were armed, trained and financed by the military and that soldiers took part in the murders and lootings.²⁴

Legal Framework for the Special Panel

With the Security Council establishing UNTAET, this effectively gave the UN full sovereignty over the territory of East Timor for a limited time pending the creation of a new sovereign State. As part of its mandate to bring to justice those responsible for the egregious violence that occurred in East Timor in 1999, UNTAET set up the Special Panel within the domestic courts. In part this was due to the fact that the Security Council and the Secretary General did not consider as appropriate the establishment of an international ad hoc tribunal similar to the ICTY and ICTR.²⁵

It should be noted that after the prolonged conflict and the extreme destruction in 1999, the judiciary and court system were practically non-existent. This meant that UNTAET had to establish a completely new judiciary in East Timor. As such, it created a single prosecution service and two main departments, one for ordinary crimes and the other for serious crimes. The district courts are composed of East Timorese judges and international judges. It is the District Court in Dili that has the Special Panel that deals exclusively with serious crimes, covering serious human rights and international humanitarian law violations. A panel of three judges, two international and one East Timorese must conduct all trials of serious crime. Notwithstanding the international composition of the structure of the Special Panel, it remains an integral part of the transitional and post independence domestic judicial system. Given that the time required to investigate and prosecute such crimes will outlive the UN transitional administration, the new East Timor constitution provides for the continuation of the Special Panel.²⁶

Rationae materiae (subject matter jurisdiction)

The Special Panel has exclusive jurisdiction over serious criminal offences, namely genocide, war crimes, crimes against humanity, torture, murder and sexual offences. The Special Panel is bound by two sources of substantive law over serious crimes: the Indonesian Penal Code and UNTAET Regulation 2000/15 which incorporates into the domestic law of East Timor certain provisions of the ICC Statute.²⁷ The definitions of genocide, crimes against humanity and war crimes are identical to the Rome Statute. Regarding the crime of torture, the Regulation provides for it in three different sections,

²³ Report of the International Commission of Inquiry on East Timor, *supra* note 17.

²⁴ Schlicher and Flor, *supra* note 16.

²⁵ As stated by Katzenstein, *supra* note 16, despite overwhelming support for an ad hoc tribunal on East Timor among the East Timorese, the UN was not convinced that an ad hoc tribunal would be worth the cost.

²⁶ The new East Timor Constitution provides for the existing collective judicial institutions, comprising of national and international judges with competence to judge serious crimes committed between 1 January and 25 October 1999 shall remain operational for the time necessary to conclude cases under investigation.

²⁷ According to UNTAET Regulation 1999/1.

based on international law.²⁸ Also the Regulation adopts the identical language of the Rome Statute as regards the essential principles of criminal law, such as *ne bis in idem*, *nulla poena sine lege*, mistake of fact or law, the mental element for crimes, the grounds for exclusion of criminal responsibility, and the irrelevancy of official position in the commission of these crimes. The criminal procedure applied by the Special Panel for Serious Crimes is governed by the Transitional Rules of Criminal Procedure, which borrows heavily from the Rules of Procedure and Evidence of ICTY and ICTR.²⁹ Therefore the applicable law is a mixture of international and domestic law.

Jurisdiction *rationae personae* (persons who are covered)

The regulation specifies that the Special Panels shall have jurisdiction over natural persons only, and that a person who commits a crime within the jurisdiction of the Panel, shall be individually responsible. With regard to genocide, war crimes, crimes against humanity and torture, the Special Panel exercises universal jurisdiction. This is defined as jurisdiction irrespective of whether the serious criminal offence at issue were committed within the territory of East Timor, or committed by an East Timorese citizen or the victim of the serious criminal offence was an East Timorese.

Jurisdiction *rationae temporis* (temporal jurisdiction)

As concerns murder and sexual offences, the Special Panel has exclusive jurisdiction only in so far as the offence was committed between 1 January and 25 October 1999. The Special Panel also has jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only so far as the law on which the serious offence is based is consistent with international human rights standards as set out in International Human Rights Conventions. The Special Panel for Serious Crimes has jurisdiction (*ratione loci*) throughout the territory of East Timor.³⁰

Legal framework in Indonesia

The trend of seeking accountability for the atrocities committed in East and West Timor, which is part of Indonesia, was that of domestic prosecutions.³¹ This trend to some extent

²⁸ Regarding the crime of torture, the Regulation provides for it in three different sections: (i) same as the ICC statute for war crime; (ii) same as the ICC statute for crime against humanity; and (iii) as defined by the CAT. Ambos and Othman compared these provisions with the definition and jurisprudence of the ICTY/R. The ICTY/R have developed an extensive jurisprudence on torture as a crime against humanity and as a war crime and have given it a relatively strict interpretation, in requiring that the perpetrator's acts be in the pursuit of a certain purpose or objective, such as obtaining an information or confession, punishing, intimidating, coercing or discriminating the victim. For the ICTY/R, torture as a criminal offence under International Humanitarian Law is much narrower than that defined under international human rights law, as the two bodies of law address two different subjects, the former to individuals, the latter to States. The Special Panel in considering torture as a crime against humanity under the regulation was of the view that the section embodied words, contained in article 7 of the ICC Elements of Crime. The Panel has followed the jurisprudence of the ICTY/R, by taking into account the unlawful purpose pursued by the accused and thus indirectly limited the scope of application of section 5. In requiring the added element of a purpose for the crime of torture, the Special Panel crossed the distinctive line drawn by the legislator between these sections of the Regulation and took into consideration the purpose requirement of torture specified in section 7. The inevitable result of this is a jigsaw prescription of torture as a serious crime.

²⁹ However it departs as regards to trials in absentia. In East Timor, such trials can take place under special and limited circumstances. Where the accused is initially present at the hearing and subsequently flees or is otherwise voluntarily absent, trial proceedings may continue until conclusion.

³⁰ A jurisdictional issue involving the crime of rape committed in West Timor was considered by the Special Panel and the Panel ruled that it could not exercise jurisdiction over crimes committed outside the territory of East Timor as this would contravene the mandate conferred to UNTAET by the Security Council (P.V. Leonardus Kasa, UNTAET, Special Panel for Serious Crimes, Case No. 2/pid.c.g/2000.) The prosecution has appealed and argues that such a crime is prosecutable in East Timor, due to the application of the Indonesian Penal Code in both West and East Timor, the recognition of the active nationality principle in that Code, and that trial would not offend UNTAET's duty to administer East Timor under SC res. 1272 (1999).

³¹ UN SC res 1272 (1999) and UN SC res 1319 (2000).

is reflected in the ICC Statute, which lays down the principle of complementarity, that State judicial authorities have the primary responsibility for prosecuting and punishing international crimes. Therefore while East Timor was establishing the Special Panel, Indonesia passed the Human Rights Court Act which established a special Human Rights Court within a court of general jurisdiction, with authority to hear and rule on cases of gross human rights perpetrated by Indonesian citizens outside the territorial boundaries of the Republic of Indonesia. The Indonesian National Commission on Human Rights is the sole body recognized as having competence to trigger the judicial process. Jurisdiction is limited to events occurring in Liquica, Dili and Saeo Districts and occurring in the month of April and September 1999.³²

There has been much criticism of this process: laws riddled with loopholes, inadequate temporal and territorial jurisdictions and prosecutors making half-hearted use of the evidence collected by the Indonesia Human Rights inquiry, UNTAET, or any other independent reports on the violence. Some of the thematic Special Rapporteurs of the UN Commission on Human Rights advocate the establishment of an international tribunal, if Indonesia failed to take steps within “a matter of months” to clarify facts and bring the perpetrators of war crimes to justice.

Current status of the hybrid court

In May 2005 the Special Panels were shut down by a decision of the UN to end the UN Mission in East Timor. Fifty-five trials were completed in the 4 years of operation. Eighty-four individuals were convicted and three were acquitted.³³ A criticism raised has been that these trials involved mostly relatively low level defendants. The indictments of Indonesian military officers could not go forward because the Indonesian government did not recognize the Special Panels and refused to extradite nationals.³⁴

In January 2006, the Independent Commission for Reception, Truth and Reconciliation submitted a report to the UN Secretary General.³⁵ This Report provides a history of colonialism and occupation in East Timor and details the human rights abused in the period of 1975 to 1999. The Commission was accepted by the government of Indonesia as a compromise when it rejected the recommendation of a UN panel for an ad hoc international tribunal for East Timor. The Commission’s Report recommends renewing the mandates of the UN backed Serious Crime Unit and the Special Panels and extend their jurisdiction to allow for the investigation and prosecution of cases from 1975 to 1999. It also suggests that Indonesia and members of the Security Council who gave backing to Indonesia pay reparations to East Timor. The government of Indonesia continues to hold the position that its domestic trials are adequate. Some view these

³² As stated by Ambos and Othman, this incorporates further temporal and territorial jurisdiction limitations, which fall short of full accountability for serious IHL: atrocities not just committed in 3 of the 13 districts nor just in the months of April and September.

³³ War Crimes Study Centre at University of California Berkeley, see <http://socrates.berkeley.edu/~warcrime/ET.htm>.

³⁴ See Global Policy Forum on the Ad Hoc Tribunal for East Timor, found at <http://www.globalpolicy.org/intljustice/etimorindx.htm>.

³⁵ The UN sponsored Commission for Reception, Truth and Reconciliation was established in 2002 to investigate the human rights violations and make recommendations for legal proceedings. The Commission’s Report (2500 pages) is published on the International Centre for Transitional Justice website. See <http://www.ictj.org/en/news/features/846.html>.

recommendations are unlikely to be taken up both by Indonesia and East Timor given the fact that East Timor is reluctant to damage its relationship with its largest neighbor.³⁶

2. Sierra Leone

Background

After 153 years of colonial rule, Sierra Leone became independent in 1961.³⁷ The first three decades following independence were marked by a number of military coups and one-party control, corruption and self-enrichment by politicians. In 1991, civil war broke out between a number of factions and from 1991 to 2002, four different governments held power. The armed conflict in Sierra Leone has become synonymous with civilians with amputated limbs, with the use of child soldiers and with the exploitation of blood diamonds. After various attempts by the international community to negotiate, the Lome Peace Accord was signed in July 1999.³⁸ Lome granted amnesty to many of the perpetrators of human rights and humanitarian law violations. The UN established a peacekeeping mission later in 1999 with a mandate to monitor the implementation of Lome Peace Accord and oversee the disarmament and demobilization of the rebels. However this all collapsed in 2000. This situation led to the military intervention of ECOWAS, the deployment of the largest UN peacekeeping operational force as well as the involvement of military forces from the UK in Sierra Leone. Eventually, elections were held in March 2001.

The people of Sierra Leone have suffered more than a decade of atrocities and massive human rights deprivations at the hands of various actors. Successive military interventions, civil wars, the extensive use of child soldiers and mercenaries have all contributed to mass murder, extra judicial killings, sexual assaults and abuse, amputations on a large scale, looting, pillage and wanton destruction of property.

Legal Framework for the Special Court for Sierra Leone

The Special Court's founding document is a treaty between the Government of Sierra Leone and the UN. The Security Council requested the Secretary General to negotiate an agreement with the Government of Sierra Leone "to create an independent Special Court" for the country.³⁹ The Sierra Leone President had sent a letter to the Secretary General supporting such an establishment in June 2000.⁴⁰ The Report of the Secretary General on the Establishment of a Special Court for Sierra Leone was prepared following the visit of a UN team in October 2000. This Report included specific recommendations to the Security Council. The negotiated Agreement between the UN and the Government of

³⁶ Tiarma Siboro "Crimes will go to trial, Timor Leste Prosecutor" Jakarta Post, February 22, 2006; Jeff Kingston "The search for truth divides East Timor" International Herald Tribune, December 21, 2005.

³⁷ The summary of the history of the situation in Sierra Leone is taken from a number of sources: Claudia Anthony "Historical and Political Background to the Conflict in Sierra Leone" in Ambos and Othman, *supra* note 1 at page 131; Nancy Kaymar Stafford "A Model War Crimes Court: Sierra Leone" (2004) 10 ILSA J. Int'l & Comp. L. 117; Allieu Kanu and Giorgia Tortora "The Legal Basis of the Special Court for Sierra Leone" (2004) 3 Chinese J. Int'l L. 515; John Morss and Mirko Bagaric "The Banality of Justice: Reflections on Sierra Leone's Special Court" (2006) 8 Oregon Review of International Law 1; Vincent Nmehielle and Charles Chernor Jalloh "The Legacy of the Special Court for Sierra Leone" (2006) 30 Fletcher F. World Aff. 107.

³⁸ For more details of the armed conflict, see Anthony, *ibid*.

³⁹ Security Council Resolution 1315 (14 August 2000).

⁴⁰ President Kabbah said that the purpose was to try and bring to credible justice those members of the RUF (Revolutionary United Front) and their accomplices responsible for committing crimes against the people of Sierra Leone and for taking the UN peacekeepers as hostages. Knowles, *supra* note 6.

Sierra Leone on the establishment of the Special Court together with a Statute of the Special Court was approved by the Security Council and the Government of Sierra Leone and then signed by both parties in January 2002.

Therefore, the Special Court for Sierra Leone is a creation of a treaty between the UN and the Government of Sierra Leone, not of the Security Council, as the ICTY and ICTR were. The Special Court is not an organ, subsidiary or otherwise of the United Nations. Because the Special Court is the creation of a *sui generis* treaty, the Court is independent in its judicial functions of both the UN and the Government of Sierra Leone. The Agreement and the Statute has been incorporated into the Law of Sierra Leone, formally providing legal recognition of the court in the jurisdiction within which it is based. However, as stated above, the Court is independent of the government or the legal system of Sierra Leone, subject to it being guided on points of local law by the decisions of the Supreme Court of Sierra Leone and applying certain aspects of that Law. Nor is the Court part of the UN system. While it is neither one nor the other, it has the support of both of them for the discharge of its functions. The Special Court enjoys primacy over other courts of Sierra Leone and may formally request such courts to defer to its competence.⁴¹ It does not enjoy any position of supremacy over courts outside Sierra Leone.

The Special Court of Sierra Leone has three organs, the Chambers, Office of the Prosecutor and the Registry. The Trial Chambers is made up of a panel of three judges, one appointed by the Government of Sierra Leone and the other two appointed by the UN Secretary General. The Appeals Chambers has a panel of five judges. The Agreement provides that preference for judges are to be from the West African Subregion and the Commonwealth. While the Special Court is not subordinated to the *ad hoc* tribunals, it is to be guided by the decisions of the Appeal Chambers of the ICTY and ICTR.⁴² The Prosecutor is appointed by the Secretary General and is independent of both the Government of Sierra Leone and the UN. The funding for the Court comes from voluntary contributions from UN Member States and the donor community, not from the regular budget of the UN.

Rationae materiae (subject matter jurisdiction)

The Agreement and Statute provides for the competence of the Special Court over serious violations of international humanitarian law and Sierra Leone law, thereby encompassing both national and international law. The Statute defines in articles 2 to 5: crimes against humanity; violations of the Common Article 3 of the Geneva Convention and of Additional Protocol II; other serious violations of International Humanitarian Law. Crimes under Sierra Leone law specifically include offences under the Prevention of Cruelty to Children Act 1926 and offences under the Malicious Damage Act 1861.

The Special Court in the case of the *Prosecutor v Norman*, had to determine for the first time whether the recruitment and use of children in hostilities, as defined in Article 4(c) of the Statute was part of customary international law at the relevant time in the

⁴¹ Article 8 of the Statute.

⁴² Article 20 of the Statute.

indictment.⁴³ The Appeals Chamber decided in the affirmative. They found that the “principle of legality and the principle of specificity are both upheld”. However Judge Robertson dissented and was in no doubt that the crime of non-forcible enlistment did not enter international criminal law until the Rome Statute in 1998.⁴⁴

Jurisdiction *rationae personae* (persons who are covered)

The Agreement and the Statute both provide that the targets of prosecution are to be those “persons who bear the greatest responsibility for serious violations”. The Statute specifically defines such persons as “including those leaders who committing such crimes, have threatened the establishment and implementation of the peace process in Sierra Leone”. However, this does not limit the competence of the Court to persons who held leadership positions. As explained by Jallow:

“It is not envisaged that every offender should be brought before the Court but that the prosecutor would exercise judgement and discretion based on inter alia on the leadership position of the accused and the gravity of the acts alleged in order to determine whether to institute criminal proceedings”.⁴⁵

Furthermore, the Statute provides that only persons who had attained the age of 15 years at the time of the alleged offence could be the subject of investigation and prosecution.⁴⁶ The amnesties granted by the Lome Peace Accord will not block prosecution.⁴⁷

In March 2003, the Office of the Prosecutor issued indictments which included top commanders and prominent cabinet ministers from Revolutionary United Front (RUF), Civil Defence forces (CDF) and Armed Forces Ruling Council (AFRC).⁴⁸ The Trial Chamber considered the phrase “the greatest responsibility” as providing a jurisdictional limitation finding “that the issue of personal jurisdiction is a jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion, as the prosecution has submitted”.⁴⁹

Jurisdiction *rationae temporis* (temporal jurisdiction)

The Special Court’s temporal jurisdiction commences 30 November 1996. It was felt that the temporal jurisdiction had to be limited in time to avoid the situation where the Court could be overwhelmed and overloaded with cases. While some suggested that the temporal jurisdiction should go back to 1991 when the civil war started, others suggested that the date of November 30, 1996 be chosen as it was the date of the conclusion of the Abidjan Peace Agreement, the first comprehensive Peace Agreement between the parties

⁴³ The crime of conscripting, enlisting and using children to participate in hostilities – all accused persons at the Special Court have been charged with child recruitment under art 4(c) of the statute under the heading “other serious violation of IHL”. See Phoebe Knowles, *supra* note 6.

⁴⁴ The defence accepted that the requirements of customary international law may have been satisfied with respect to a prohibition on child recruitment at the relevant time, as evidenced for example by wide ratification of the Child’s Convention 1990 but they asserted that the Prosecution failed to prove that there was any intention to criminalize this prohibition. See Knowles, *supra* note 6.

⁴⁵ Hassan Jallow “*The Legal Framework of the Special Court for Sierra Leone*” in Ambos and Othman, *supra* note 1 at page 149.

⁴⁶ This is reported to be the first occasion of an international tribunal assuming criminal jurisdiction over juveniles. In all trials of persons below the age of 18 years, the Court is essentially required by article 7 of the Statute to be guided by the need for promoting rehabilitation and reintegration of the young offender into the society and to act in accordance with international human rights standards in particular to the rights of the child.

⁴⁷ Article 10 Statute.

⁴⁸ Phoebe Knowles, *supra* note 6.

⁴⁹ Phoebe Knowles, *supra* note 6.

to the conflict, the collapse of which led to large scale hostilities. The Statute also limited jurisdiction to crimes committed “in the territory of Sierra Leone”.

Current status of the hybrid court

As of the date of this paper, there are four cases before the Special Court of Sierra Leone. All together twelve people have been indicted, two have since died. There is one case called the RUF case wherein five leaders of the RUF were indicted separately on 17 counts, which was later amended to 18 counts, of war crimes, crimes against humanity and other serious violations of International Humanitarian Law.⁵⁰ Foday Sankoh and Samuel Bockarie indictments were withdrawn in December 2003 due to their deaths. The consolidated trial began July 2004. The prosecutor concluded its case in August 2006 and the defence case is to open in May 2007.

Another case called the CDF case has three alleged leaders of the former Civil Defence Forces indicted on 8 counts.⁵¹ The trial began June 2004. The prosecutor concluded its case July 2005 and final arguments were heard November 2006. Decision of the Court remains pending. The AFRC case has three alleged leaders of the Armed Forces Revolutionary Council indicated.⁵² The Prosecutor closed its case November 2005 and the defence rested in October 2006. Final arguments took place December 2006. The last case deals with Charles Taylor who was taken into custody in March 2006. Following a Security Council resolution and an order by the president of the Special Court, the change of venue was made from Freetown to The Hague.⁵³

3. Cambodia

Background

The people of Cambodia have suffered through numerous years of armed conflict. First there was the conflict for independence up to 1954, then Pol Pot’s Khmer Rouge regime and the genocide in 1975 to 1979, and then the Vietnamese invaded, which ended the genocide but turned into another phase of conflict from 1979 to 1999.⁵⁴ When the Khmer Rouge entered the capital in April 1975, they deported 2 million residents to the countryside, subjected the Cambodians to forced labor, torture and death. The genocide is alleged to have resulted in the deaths of approximately 1.7 million people from 1975 to 1979 out of a total population of 7.0 million, one fifth of the population.⁵⁵

⁵⁰ *Prosecutor v Sesay, Kallon and Gbao (RUF case)*, for more details see the official website of the Special Court of Sierra Leone at <http://www.sc-sl.org/>.

⁵¹ *Prosecutor v Norman, Fofana and Kondewa (the CDF case)*, *ibid.*

⁵² *Prosecutor v Brima, Kamara and Kanu (the AFRC case)*, *ibid.*

⁵³ Lansana Fofana, “Mixed feelings over Charles Taylor’s transfer to The Hague” Inter Press Service, June 20, 2006.

⁵⁴ With international assistance, Khmer Rouge and allied opposition forces fought Vietnamese and Cambodian forces until Hanoi’s withdrawal in 1989. The war continued against Cambodian troops for another decade until the collapse of the Khmer Rouge in 1999, when the UN proposed the establishment of a tribunal to judge the crimes of the surviving Khmer Rouge leaders. For further detail of the history of Cambodia see Ben Kiernan “*Historical and Political Background to the Conflict in Cambodia, 1945-2002*” in Ambos and Othman, *supra* note 1 at page 173.

⁵⁵ For more details of the history of Cambodia see Kathryn Klein “*Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*” (2006) 4 Northwestern University School of Law 549; Scott Luftglass “*Crossroads in Cambodia: The United Nation’s Responsibility to Withdraw Involvement From the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*” (2004) 90 Virginia Law Review 893; Daniel Kemper Donovan “*Joint UN-Cambodia Efforts to Establish a Khmer Rouge Tribunal*” (2003) 44 Harvard International Legal Journal 551; Sarah Williams “*Genocide: The Cambodian Experience*” (2005) 5 International Criminal Law Review 447.

When Vietnam ousted Pol Pot and the Khmer Rouge, due to the cold war, many countries, such as the USA and China supported Pol Pot's regime and opposed attempts to bring them to justice. The Khmer Rouge held onto the UN seat for another 14 years.⁵⁶ Pol Pot died in his sleep near the Thai border in 1998. In 1988, international negotiations on Cambodia began but moved slowly. It was only in 1991 that there was a reference to the genocide in a resolution in the UN Sub-Commission on Human Rights. The Paris Agreement on Cambodia was signed in 1991 which set up the UN Transitional Authority in Cambodia (UNTAC). There was no reference to the Genocide Convention in this Agreement, rather it allowed the Khmer Rouge to return to Phnom Penh. However the Khmer Rouge chose not to abide by the Paris Agreement and in 1994, the Cambodian National Assembly outlawed the Khmer Rouge.⁵⁷ In 1996 and 1997 there were defections by Khmer Rouge leaders and units to government, who in return received pardons.

In July 1997, a joint appeal to the UN by the two Cambodian Prime Ministers, Hun Sen and Prince Norodom Ranariddh called for the establishment of an international tribunal to judge the Khmer Rouge, stating that Cambodia does not have the resources or expertise to conduct this very important procedure and that crimes of this magnitude are of concern to all persons in the world.⁵⁸ This led to a General Assembly resolution in 1998 condemning the Khmer Rouge genocide. Then in 1998-99 the UN sent a Group of Experts to conduct and examine the evidence. Their Report recommended the creation of an international tribunal for Cambodia.⁵⁹ However this was not acceptable by the Government of Cambodia. In order to avoid halting negotiations, other countries tried to negotiate a compromise. For example, the United States government suggested the supermajority formula, which meant that while there would be a majority of Cambodian judges, the agreement of at least one international judge would be required on all decisions.⁶⁰

In July 2001 the Cambodia's National Assembly and Senate enacted a law which established the Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea. However the law did not satisfy the UN who ended negotiations in February 2002. In June 2002, the Government of Cambodia again requested UN assistance. In December 2002, the General Assembly passed a resolution requesting the Secretary General to renew talks with Cambodia. In

⁵⁶ The Khmer Rouge held the UN seat from 1979 to 1982 and thereafter until 1992 with coalition with Sihanouk and another small party, neither were in Cambodia.

⁵⁷ The Khmer Rouge refused to cease-fire, disarm or demobilize. They refused any UN presence in the zones they controlled. They boycotted the 1993 UN organised elections, they then continued their military campaign against the newly elected government, a coalition of the royalists headed by Sihanouk's son and former communists under Hun Sen. See Kiernan, *supra* note 54.

⁵⁸ This was one of their last joint acts before their coalition government ended. See Klein, *supra* note 55.

⁵⁹ Their report concluded that crimes committed by the Khmer Rouge regime did indeed include crimes against humanity, war crimes, genocide and forced labor, that were in violation of Cambodian as well as international law. The experts concluded that the judicial system in Cambodia had virtually collapsed and was not sufficiently apt to meet the international standards of justice. The Group of Experts analyzed various options of judicial mechanism: (i) a tribunal established under Cambodian Law; (ii) a UN tribunal; (iii) a Cambodian tribunal under UN administration through a bilateral agreement between the UN and the Government of Cambodia; (iv) an international tribunal established by a multilateral treaty; (v) trials in states other than Cambodia. They recommended, given "the precarious state of the Cambodian domestic judicial system, the risks of political influence on the domestic courts, and the contentious international law issues involved" that there should be the "establishment of an ad hoc United Nations tribunal seated in an Asia-Pacific nation state other than Cambodia". They also recommended an independent prosecutor appointed by the UN. Russia, France, Britain and the US favored this but China threatened veto, therefore this matter was not put for a vote at the Security Council. See Kiernan, *supra* note 46 and Klein, *supra* note 55.

⁶⁰ Klein, *supra* note 55.

March 2003, finally there was an agreement regarding the judicial mechanism with the signing of the March Agreement by the UN and the Government of Cambodia.⁶¹ The March Agreement essentially supports the Special Chamber within the Cambodian court structure. The General Assembly approved the March Agreement despite expressed concerns raised by the Secretary General.⁶² The March Agreement was officially passed by the Cambodian National Assembly in October 2004.

Legal Framework for the Extraordinary Chamber in Cambodia

The law on the establishment of Extraordinary Chambers in the courts of Cambodia was passed on 10 August 2001, for the prosecution of crimes committed during the period of the regime of Democratic Kampuchea from 17 April 1975 to 6 January 1979.⁶³ This law determines the jurisdiction of the Courts, their organizational structure and composition and the rights of the accused. A Memorandum of Understanding between the UN and Government of Cambodia sets out how the UN will support the Extraordinary Chambers.

The Chamber is established within the framework of the existing Cambodian court structure. It is to be functionally independent, not being obliged to accept or seek any instructions from any government or any other sources. The expenses of the Extraordinary Chambers are to be shared by the Government of Cambodia and the UN Trust Fund. So while there is approval by the UN through a General Assembly resolution, that resolution does not form the legal basis of the Extraordinary Chambers. The Agreement only provides for the terms of the assistance and cooperation of the UN in the operation of the tribunal.

All levels of the Extraordinary Chamber will include both Cambodian and foreign judges, with the majority at each level being held by Cambodian judges. The judges will be appointed by the Supreme Council of Magistracy that is created by the Constitution of Cambodia. While the international judges are also appointed by the Supreme Council, they will be nominated by UN Secretary General. Therefore all judges, foreign and Cambodian, are appointed by a national institution under the domestic law. The Courts have been set up within and under the Constitution and the existing court structure in Cambodia without in anyway compromising basic national sovereignty. There are also two co-investigating judges, one Cambodian and other foreigner and two co-prosecutors, one Cambodian and other foreign.

Rationae materiae (subject matter jurisdiction)

The Chambers have limited jurisdiction over the following crimes:

- (i) crimes stipulated in the 1956 Penal Code (homicide, torture, religious presentation – the law related to the period of limitation is extended for 20 years);
- (ii) crimes of genocide as defined by the 1948 Genocide Convention;

⁶¹ *ibid.*

⁶² GA/10135 (13 May 2003).

⁶³ Earlier trials set up in 1979 and 1997 in Cambodia turned out to be shams as they did not respond to any of the conditions of effective judicial response conducive to justice for the victims of Khmer Rouge. Another tribunal, "People's Tribunal of Anlon Veng" instituted in July 1997 by the Khmer Rouge to try its former leader Pol Pot was precipitated by political maneuvering within the Khmer Rouge and among the other Cambodian parties. Pol Pot was put on trial but the charges leveled against him were related to his efforts to purge his own movement. It ruled out the possibility of handing over Pol Pot to an international tribunal to stand trial for crimes against humanity. See Kiernan, *supra* note 54.

- (iii) crimes against humanity;
- (iv) crimes of serious violation of the 1949 Geneva Convention;
- (v) crimes of destruction of cultural property during armed conflicts, pursuant to 1954 Hague Convention on protection of Cultural Property during Armed Conflicts; and
- (vi) crimes against the internationally protected persons, pursuant to the 1961 Vienna Convention on Diplomatic Relations.

Therefore, the crimes covered include both domestic and international crimes.

Jurisdiction rationae personae (persons who are covered)

The persons covered by this law are limited to the senior leaders of Democratic Kampuchea and persons most responsible for crimes and violence of the Cambodian criminal laws, international humanitarian laws, international customs and international conventions recognized by Cambodia.

Jurisdiction rationae temporis (temporal jurisdiction)

The temporal jurisdiction of the Chambers is for the period from 17 April 1975 to January 6, 1979 and is limited to crimes that have been committed during this period by the regime of Democratic Kampuchea.

Current status of the hybrid court

The national and international judges of the Extraordinary Chambers were sworn in July 2006. The prosecutors have taken up their positions. Trials are expected to take place in 2007. However, the most recent news reports as of writing this paper was the delay caused by the fact that the international and national judges have not been able to agree on the Rules of Procedure.⁶⁴

IV. Analysis

1. Why the Need for Hybrid Tribunals

Each of these tribunals was created in particular circumstances with the need to operate also in different circumstances. Therefore there is not a uniform “hybrid” model. These tribunals were established to investigate and prosecute crimes that occurred in a time prior to the existence of the permanent international court. The ICC has jurisdiction only with respect to “crimes committed” after the entry into force of the Rome Statute on July 1, 2002 and only after the entry into force of the Statute for the State in question. The temporal jurisdiction of the hybrid tribunals are: (i) East Timor – 1 January and 25 October 1999; (ii) Sierra Leone – starts 30 November 1996; and (iii) Cambodia – 17 April 1975 to 6 January 1979.

⁶⁴ Agence France presses “*Row over Foreign lawyers threatens Khmer Rouge Tribunal*” November 24, 2006; Raoul Marc Jennar “*Khmer Rouge in Court*” Le Monde, October 2006; “*ECCC Review Committee on Internal Rules concludes meeting*” January 26, 2007.

These tribunals were also established during a period where the UN was experiencing “tribunal fatigue” after creating the ad hoc tribunals for the Former Yugoslavia and Rwanda. These hybrid tribunals are therefore unique attempts by the international community to respond to the atrocities committed in these conflicts. The crimes in question in these cases were of such a magnitude as to be of concern to all persons in the world, not only to the victims and citizens of the State where the crimes took place. While in some of these circumstances, such as in Cambodia and East Timor, ad hoc tribunals similar to the ICTY and ICTR were recommended, there was not the political will by both the government of the State where the crimes were committed and the Security Council to go that route. It should also be noted that the Security Council might not have been able to set up international ad hoc tribunals in all these cases. For instance in the situation of Cambodia it might have proven difficult for the Security Council in the 1990s to argue that the Khmer Rouge crimes threatened international peace and security to initiate Chapter VII powers.

All of these hybrid tribunals operate in an environment where the basic infrastructure has collapsed or been badly damaged, including the legal system. The domestic systems were not operational to address the serious human rights and international humanitarian violations that occurred during the armed conflicts in their countries. Therefore hybrid tribunals are used in these situations where the international community can assist the domestic jurisdiction in prosecuting these crimes. It ensures local participation and influence while at the same time recognizing that the domestic court structure requires assistance from the UN. Generally it was the States themselves initiating the request for UN assistance. In the case of Cambodia and Sierra Leone, the Secretary General received written requests while in the situation of East Timor, the administration in place was that of the UN.

In some of these situations, there was a need also to recognize the international characteristic of these hybrid tribunals. For example, in the case of Charles Taylor as the then President of Liberia, the Special Court’s jurisdiction over Taylor depended on a finding that the Court’s character was international. At the time, only international courts had jurisdiction over heads of state under international law.⁶⁵ The Special Court declared itself an international court and thus able to try Charles Taylor.⁶⁶ However, now article 27 of the Rome Statute provides that being an official head of state is not a bar to prosecution.

2. Experiences and Lessons So Far

A number of positive and negative aspects of the hybrid or “mixed” tribunals have been cited by a number of scholars. As Katzenstein states “the hybrid model endeavors to combine the strengths of the ad hoc tribunals with the benefits of local prosecutions”.⁶⁷ However, she also worries, “the hybrid model’s greatest risk is that rather than

⁶⁵ Reference made to *DRC v Belgium ICJ 2002 (The Arrest Warrant Case)* where it was held that domestic courts may not try heads of states in that state, see Knowles, *supra* note 6.

⁶⁶ *Prosecutor v Charles Taylor*, SCSL-2003-01-I, decision on Immunity from Jurisdiction, 31 May 2004, as cited in Knowles, *supra* note 6.

⁶⁷ Katzenstein, *supra* note 16.

incorporate the best of the international and local judicial systems, it may reflect the worst of both”.⁶⁸ One noted advantage is with regards to the composition of the judiciary, which include both international and national judges. It must be remembered that the administration of justice in these countries is often very precarious and therefore there are enormous challenges to respond to such serious crimes. The appointment of international judges is seen as increasing public confidence in the trial process and enhancing the perception of the independence of the judiciary and thus its legitimacy. Furthermore, the presence of national judges adds to the tribunals understanding of local cultures, languages and law. It has been suggested, in the case of East Timor that the participation of East Timorese judges in the Special Panel has the added value of facilitating a better understanding of socio-cultural factors, the interpretation of the demeanor of witnesses and the evaluation of the credibility of the evidence.⁶⁹

International presence in hybrid tribunals accommodates the shortcomings of domestic judges by usually requiring a majority of international judges. However this is not the case in Cambodia. This has been a point of concern to some. Luftglass argues that the domestic controlled mixed tribunals will likely fail to be impartial and independent, fail to conform to international standards of justice and fail to have a majority of competent, qualified judges well versed in international law.⁷⁰ This carries with it unique risks for both the modern interpretation of international law, as well as the precedent established for the ICC.

Another positive aspect claimed on behalf of the hybrid tribunals is the fact that they are located in the very States in which the crimes they were established to adjudicate were committed. They are seen to be more proximate and, in a sense, locally rooted.⁷¹ These tribunals are in close proximity to the victims, witnesses and the community most affected by the violence. This can have positive consequences for the logistics of proceeding with the trial but more importantly it is argued that for the community, they feel more part of the justice process which can assist in the rehabilitation of a traumatized population.

The fact that the tribunals are located in the country where the atrocities occurred allows for greater interaction between the process of asserting justice and the local population for whom this justice was instituted. However, the other side of having the trials located in situ in the territory where the crimes occurred may raise concerns of protection for the witnesses or have negative consequences to a fragile stability after years of armed conflict. For instance, the venue of the trial for Charles Taylor has been changed from

⁶⁸ Katzenstein, *supra* note 16.

⁶⁹ Mohamed Othman “*The Framework of Prosecutions and the Court System in East Timor*” in Ambos and Othman, *supra* note 1 at page 85.

⁷⁰ As discussed in Scott Luftglass’ article, *supra* note 55, there are several contentious issues of international law, specifically human rights law, that the Cambodian tribunal would need to resolve. These include, but are not limited to: whether a “nexus to armed conflict” is required for a finding of crimes against humanity, the appropriate meaning of “state action” for crimes against humanity, the effect of command orders on a defense, and the effect of a prior domestic grant of amnesty on an international prosecution. The ICTY/R have made substantial progress in resolving certain principles of international criminal law, particularly the components of crimes against humanity, the defence of duress and the effect of superior orders. It would be irresponsible for the international community to establish a tribunal that could reverse this progress. The feeling is that the proceedings in Cambodia will greatly affect the precedent applied by the ICC.

⁷¹ Ambos and Othman, *supra* note 1.

Sierra Leone to The Hague, primarily due to the concern that a local trial could destabilize the region.⁷²

A further cited advantage with internationalized courts is the opportunity to build capacity in the country where the court is situated, specifically the rebuilding of the local judicial system. As seen from the examples of hybrid tribunals in East Timor, Sierra Leone and Cambodia, these tribunals are being established in countries where there has been substantial collapse of infrastructure and often governance, after years of armed conflict and serious violations of human rights and humanitarian law. The hybrid tribunals assist in entrenching the international criminal justice standards in the reforms of the legal system in these countries.

Some suggest that the risk of UN ad hoc tribunals is that they might be perceived by the State and the peoples concerned as an external imposition and thus as an unwanted intervention in internal affairs. Mind you, in cases such as East Timor, the tribunals have been established by the UN Transitional Administration so may be still viewed as imposed externally. Generally these hybrid tribunals reflect greater political will by governments as there may be more of a feeling of ownership of these judicial processes by the States concerned. The governments of Sierra Leone and Cambodia instigated the request to the UN for assistance in establishing these internationalized courts. The tribunals are either part of the national judiciary, or somewhat linked thereto. Some of the experiences of the Special Court of Sierra Leone, as a treaty based institution, include greater involvement by the Government of Sierra Leone in the decision making process of the administrative aspect of the Court.⁷³

These tribunals are a mix of international and domestic laws. They have jurisdiction over core crimes of genocide, crimes against humanity and war crimes and have incorporated the essential elements of these crimes that are reflected in the Statutes of the ICTY and ICTR as well as the Rome Statute. In addition, these tribunals have jurisdiction over additional crimes, depending on the specific circumstances of each conflict situation. So for example, the subject matter jurisdiction for the East Timor tribunal includes the crime of torture; in Sierra Leone the tribunal can hear crimes under the national laws such as the Prevention of Cruelty to Children and the Malicious Damages Act; and in Cambodia, the subject matter jurisdiction includes destruction of cultural property during armed conflict. The advantages of including both international and domestic law elements is summarized by Ambos and Othman:

“Basically, these Tribunals not only have jurisdiction over crimes of immediate concern to the international community but also have jurisdiction over crimes that have directly affected the particular situation of the State concerned and that have been a visible and an unfortunate part of the conflict. The molding of the tribunals

⁷² The President of the Special Court of Sierra Leone made the request for change of venue and this was followed by a Security Council resolution which approved this change of venue, see Lansana Fofana “*Mixed feelings over Charles Taylor’s transfer to The Hague*” *supra* note 53.

⁷³ Such as appointments to senior offices, the reporting mechanism to the UN on activities of the court as well as the relationship between the court and judicial authorities of other states. Unlike the ICTY and ICTR whose presidents submit annual reports to the UNGA, in the case of SL the president of the Court submits his report on the operation and activities of the Court to the UN Secretary General and to the Government of Sierra Leone, Ambos and Othman, *supra* note 1.

to accommodate local circumstances adds to their relevancy in the national context in which they are meant to function”.⁷⁴

Regarding the issue of financial costs, some argue that unlike the UN ad hoc tribunals which were established under Chapter VII of the UN Charter, these hybrid tribunals do not enjoy the direct authoritative backing of the Security Council. Therefore there will likely be financial challenges for these specific tribunals. However because of the UN involvement, the UN still remains responsible for providing the hybrid court with funding, resources, judges and prosecutors. As is the case with national courts, the hybrid model is cheaper to operate than the ad hoc tribunals. Also with the UN funding the presence of the international judges and prosecutors, it lends the court some degree of legitimacy as a fair mechanism for holding perpetrators responsible for their crimes.

One concern raised is that by their very nature, any ad hoc tribunals are perceived to be promoting selective justice, undermining universal criminal accountability and having questionable impartiality against particular individuals. These tribunals are established for limited tenure and specific temporal and geographical or territorial jurisdiction. Unlike the United Nations ad hoc tribunals which have at least 15 years to deliver justice, the duration for these hybrid tribunals are much shorter. For example, the Special Court of Sierra Leone is to operate for three years.⁷⁵ The Cambodian tribunal expects to try only a dozen or so high-level leaders and to terminate within three years.⁷⁶ The reality of the ICC in determining how to use its limited resources will likely limit its focus on the “most responsible” of the crimes and foresee that domestic courts will be required to step up and address the need for justice at a broader level. In some of these examples, such as East Timor and Sierra Leone, truth and reconciliation commissions have also been set up with broader mandates.⁷⁷ As yet it is unclear how these Commissions will work with the hybrid tribunals and whether there will be any conflict between their mandates.

International cooperation is imperative for the success of international criminal prosecutions. In the case of ICTY and ICTR, the Security Council in its resolution creating these tribunals explicitly sets out the primacy of the tribunals over all national courts and requires all member states of the UN to assist and cooperate with the tribunals. The Rome Statute requires cooperation from all States Parties, currently amounting to 104 States. With the hybrid courts, this is not the case. Any cooperation with these hybrid courts would have to proceed on a bilateral basis, if there is extradition or mutual legal assistance treaties between the respective countries. Therefore one advantage of the ICC, as we have seen with the ICTY and ICTR, is that there is no requirement of using cumbersome and sometimes lengthy process of extradition.

⁷⁴ Ambos and Othman, *supra* note 1.

⁷⁵ *ibid.*

⁷⁶ Patricia Wald “*Iraq, Cambodia and International Justice*” (2006) 21 Am. U. Int’l. Rev. 541.

⁷⁷ In East Timor, the Commission, which has investigative but not prosecutorial authority, deals with minor offences committed during the conflict by means of a community reconciliation process involving victim-accused dialogue. See Ambos and Othman, *supra* note 1. The Truth and Reconciliation Commission, established by an Act of the Sierra Leone Parliament in 2000, has a mandate to create an impartial historical record of violations of human rights and International Humanitarian Law related to the armed conflict in Sierra Leone from 1991 to 1999. The Commission is empowered to investigate and report on the causes, nature and extent of the violations and abuses including making a determination as to whether such violations and abuses were the result of deliberate planning, policy or authorization by government or individuals.

The Special Court in Sierra Leone provides an example of the consequences of being treaty-based institution and not being able to exercise primacy over courts in States not party to the treaty.⁷⁸ As raised by Jallow:

“Should the court of any other State decide to exercise criminal jurisdiction over persons suspected to have been involved in the atrocities committed in Sierra Leone, it appears that the Special Court may have little competence to ensure that those proceedings are effectively handled or that they are transferred to the court for determination. Given the fluidity of movement within the subregion and the apparent linkages between the conflicts in Sierra Leone and the instability in the other parts of the subregion, there is a widely held view that the absence of an express international legal obligation on neighboring States generally to cooperate with the Court and particularly the lack of primacy of the court over other national courts may impede the effective functioning of the Court”.⁷⁹

However, as the Government of Sierra Leone is a party to the treaty, the Government of Sierra Leone must “cooperate with all organs of the Special Court at all stages of the proceedings” particularly with regard to facilitating access by the prosecutor to “sites, persons and relevant documents required for the investigation” and impliedly for the prosecution as well.⁸⁰ Orders or requests of the Court are to be complied by the Government of Sierra Leone without undue delay on matters such as identification and location of persons, service of documents, arrest or detention of persons or transfer of indictees to the Court. Such assistance by the government is crucial if the Court is to succeed.

The issue of how these hybrid tribunals will deal with amnesties or pardons is unclear. In the situation of Cambodia, the March Agreement says that the scope of previous pardons will be a matter for the Extraordinary Chamber.⁸¹ This differs from the Sierra Leone Special Court which clearly states that amnesty granted to any person falling within the jurisdiction of the Special Court shall not be a bar to prosecution.

Some of the specific concerns arising from the experiences of the East Timor approach include minimizing local participation and failing to uphold due process standards. According to Ambos and Othman, the UN Security Council lost the higher ground when it favored “a non-binding dual tract option without laying down the measuring rod for assessing compliance or conformity”.⁸² The criticisms include the concern that the legal framework establishing the Indonesian courts are legally and factually flawed. This has meant that the court does not have jurisdiction over crimes that have not been committed within a specific time period or in other regions of East Timor. Prosecutions have been conducted ineffectively. The trials have not made use of the valuable jurisprudence of the UN Ad Hoc tribunals nor reports prepared by thematic special rapporteurs or the UN International Commission of Inquiry. There have been concerns that the courts are not

⁷⁸ The ICTY and ICTR, given their mode of establishment, exercise concurrent jurisdiction with courts of all members states of the UN but enjoy primacy over the latter as well. Ambos and Othman, *supra* note 1.

⁷⁹ Jallow, *supra* note 41.

⁸⁰ Article 17.

⁸¹ Former members hold influential positions in government and the Khmer Rouge is not quite an absolute political party. (Sary's pardon in 1996 (the #2) in exchange for acknowledging the coalition government shows how still influential the Khmer Rouge was. See Donovan, *supra* note 55.

⁸² Ambos and Othman, *supra* note 1.

impartial. In this instance, it is now up to the Security Council to review and decide whether the government of Indonesia has lived up to its commitment to address impunity for the atrocities committed in East Timor.⁸³

One of the main concerns regarding the Cambodia Extraordinary Chambers is the lack of judicial independence due to interference by political manipulation of the Cambodian government.⁸⁴ According to Klein, the Cambodian tribunal places too heavy a burden on Cambodia's underdeveloped judicial system and relinquishes too much power to the Cambodian government, which suffers from a history of systematic corruption. Other concerns include the fact that there are a limited number of competent Cambodian judges.⁸⁵ The law regulating the Extraordinary Chamber in Cambodia leaves a number of matters vague and amendable to different inferences and interpretations. With reports on the weak and corrupt justice system, accountability remains a concern. Another concern is the flawed supermajority formula. The "super majority" which requires at least one vote by foreign judge may create an extremely politicized judicial process from the start. This unprecedented supermajority formula is fraught with ambiguities that could render trials completely ineffective.⁸⁶ The Chambers does not have jurisdiction to issue orders to other States or third parties. It thus limits the authority and effectiveness of the Chambers. The King can still grant amnesty which could undermine the whole process. Also another main concern is that there is no independent international prosecutor.

The length of time to negotiate these kinds of judicial mechanisms is seen as a drawback for establishing hybrid tribunals. Particularly in the situation of Cambodia, where the alleged perpetrators are old, delayed negotiations could result in the suspects dying before having to face justice. One author suggests that some States are just not in a position to comply with the UN's stringent standards for investigating and prosecuting potential defendants and that such standards might not take into account the political reality faced by governments.⁸⁷ So for example, in Cambodia the UN standards might result in the trial of more Khmer Rouge members than the Cambodian government was willing to try. The continued political instability in Cambodia might not allow for such a sweeping measure.

⁸³ Ambos and Othman, *supra* note 1.

⁸⁴ Klein's article, *supra* note 55, highlights the political complexity of the current Government of Cambodia and the concerns of politically interfering in the Extraordinary Chambers. Hun Sen, who was Prime Minister when negotiating the March Agreement, had been a former Khmer Rouge soldier and had defected to Vietnam during one of the purges. This author says that Hun Sen's vehement opposition to an international tribunal coupled with his status as a former member of the Khmer Rouge casts a questionable light on his sincerity with regard to bring the former leaders of the Khmer Rouge to justice. There is evidence that Hun Sen's request for international assistance with establishing a tribunal may have been strategic ploy to divert attention from the bloody military coup he staged in 1997 to overthrow the then First Prime Minister Norodom Ranariddh. Hun Sen's motives, which appear to lack good faith, combined with his power as the Prime Minister and ability to interfere in the future trials, casts considerable doubt as to the appropriateness of a joint tribunal.

⁸⁵ Klein, *supra* note 55.

⁸⁶ It requires that if decisions are not unanimously, then decisions shall require the affirmative vote of at least 4 judges (or in the other level one more than a regular majority). Where this majority is not reached, does this result in a hung jury (like in the US) or rather dismissal. Klein, *supra* note 55.

⁸⁷ Donovan, *supra* note 55.

V. Conclusion - The Importance of a Permanent International Criminal Court

The establishment of these tribunals is seen as supporting the need for a more permanent international criminal court. They reflect the need for accountability, the need to ensure that there is no longer impunity for such atrocities and the need to restore the rule of law on a more permanent basis. The crimes committed in these countries are of such magnitude as to shock the international community. As a judge from the Special Court of Sierra Leone stated: “the judicial power exercised by the Special Court is not that of Sierra Leone as a sovereign state but that of the Special Court itself reflecting the interests of the international community”.⁸⁸ The same sentiments were articulated by the Government of Cambodia, as stated in the letter from the Prime Ministers of Cambodia to the UN in 1997 requesting assistance, these are crimes of “such magnitude that are a concern to all persons in the world, as they greatly diminish respect for the most basic human rights, the right to life”.⁸⁹

With these hybrid tribunals, for the first time, we see the national application of the laws contained in the Rome Statute. These tribunals can be seen to reconfirm the primary responsibility of national authorities for the investigation and prosecution of international crimes. The exercise of the jurisdiction of the ICC is complementary, with the ICC being seen as a court of last resort. It has been noted that the establishment of the Special Panel for Serious Crimes does not preclude the jurisdiction of an international tribunal for East Timor, if such a tribunal was ever established.⁹⁰

Rather than seeing these hybrid tribunals as conflicting with the jurisdiction of the ICC, these tribunals should be viewed as providing for “a second level of accountability situated between the first level of domestic prosecutions by the territorial state and the third level of purely supranational prosecutions by the ad hoc tribunals established by the Security Council and the ICC”.⁹¹ The approach to addressing impunity needs to include various models of justice, not just one. Each model can reinforce the value and virtue of other approaches and this is reflected in the Rome Statute and the principle of complementarity.

With the establishment of the ICC, this will contribute to the elimination of selective justice. As put forth by Ambos and Othman:

“Indeed, no State and no people subjected to arrangements of criminal prosecution imposed by the UN Security Council will ever understand why rules of international criminal law should only authoritatively apply to them but not to those states that, as permanent members of the SC (China, France, UK, USA, and Russia) make rules only applicable to others. This contradiction can only be remedied by the unconditional recognition and acceptance of the ICC by all States, including, of course, the USA as the world’s most powerful democracy”.⁹²

⁸⁸ *Prosecutor v Fofana*, as cited in Knowles, *supra* note 6.

⁸⁹ Klein, *supra* note 55.

⁹⁰ *ibid.*

⁹¹ Ambos and Othman, *supra* note 1.

⁹² *ibid.*

Unilateral mechanism of accountability are not suitable for dealing with crimes of international concern.

One of the most critical feature of the ICC is that the Office of the Prosecutor is completely independent, answering to no one, not even to the Security Council, limited only by the requirement that there be ‘reasonable grounds for believing that a subject has committed a crime’. As such, concerns as those raised regarding the co-prosecutors in the Extraordinary Chambers in Cambodia being influenced by the government would be lessened.

Some argue that a permanent Court will be more swift, certain and non-discriminatory and act as a deterrent for future atrocities. The practice of the ICC Office of the Prosecutor so far has been to work cooperatively with States Parties, such as the Democratic Republic of Congo (DRC) and Uganda, to encourage State Party referrals. However in situations where the States Parties are reluctant to refer situations to the ICC Prosecutor, the ICC Prosecutor can proceed on his own motion and need not get bogged down in negotiations with reluctant states. The situation of Cambodia illustrates how negotiations with the government and the UN can take over two decades to bring perpetrators to justice.⁹³ Luftglass raises the example of the ICTR, where the government of Rwanda initially sought international assistance in the tribunal and then regretted its cessation of sovereignty.⁹⁴ Again, this is reflected in the Cambodia government seeking assistance but then backing down during the negotiations, which has caused lengthy delays.

Justice is compromised when it is selective. The presence of ad hoc tribunals with limited temporal and territorial scope, in the absence of an ICC effectively privileges accountability with respect to a narrow geographical area and time period. Looking at the issue of selectivity from a different angle, the existence of criminal tribunals with certain subject-matter jurisdiction over individuals, in the absence of accountability mechanisms applicable directly to international actors conducting administration, may operate on a symbolic level to foster an idea that accountability operates exclusively on the individual level and only in respect of the most serious acts.⁹⁵ Such a view supports the need for not only the ICC but also other criminal justice responses, including hybrid tribunals, domestic trials and truth and reconciliation commissions.

⁹³ *ibid.*

⁹⁴ Scott Luftglass’ article, *supra* note 55.

⁹⁵ Ralph Wilde “Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor” (2001) 7 ILSA Journal of International & Comparative Law 455.