Not Much Justice:
The Performance of the Internationalized Criminal Courts in Kosovo, East Timor, Cambodia, and Sierra Leone

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Abstract

It has been claimed that internationalized, or "hybrid" courts, courts which mix international and local personnel and international and domestic law, can be used to replace or complement the work of the International Criminal Court. Four such hybrid courts- courts located in Kosovo, East Timor, Cambodia and Sierra Leone, have either just completed their work or are far enough along in their operation to provide a type of "justice laboratory" to test this claim. Analysis reveals that the performance of these courts has been poor. It shows that the courts in Kosovo and East Timor were doomed to failure, that the court in Cambodia is headed in the same direction, and that only the court operating in Sierra Leone offers a possibility that something close to justice will result. The summary recommendation drawn from the analysis is that hybrid courts should only be employed where: 1) international personnel control the proceedings, 2) the legal framework of the court conforms to international standards, and 3) the sponsors of the enterprise possess a clear ability, and demonstrate a credible commitment, to try and punish those most responsible for committing gross human rights offenses.

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Résumé

Une thèse a été avancée voulant que les cours à influence internationale, ce qu'on pourrait appeler des cours « hybrides », composées à la fois de personnel international et local et fondées sur le droit international et domestique, peuvent être mises en place pour remplacer ou être le complément du Tribunal pénal international. Le travail de quatre de ces cours « hybrides », installées respectivement au Kosovo, au Timor oriental, au Cambodge et en Sierra Leone, a été récemment complété ou est suffisamment avancé pour que leurs activités servent comme une espèce de « laboratoire de justice » permettant de vérifier cette thèse. Une analyse des résultats du fonctionnement de ces cours a révélé des résultats piteux. Il en ressort que les cours au Kosovo et au Timor oriental étaient vouées à l'échec, que la cour au Cambodge se dirigeait vers une issue semblable et que seule la cour en Sierra Leone avait une chance de rendre quelque chose s'apparentant à la justice. La recommandation générale découlant de cette analyse est que les cours « hybrides » ne devraient être utilisées que dans les conditions suivantes : 1) les procédures judiciaires relèvent du personnel international, 2) le cadre légal de la cour est conforme aux standards internationaux, et 3) les promoteurs de l'initiative possèdent la capacité indéniable, et font montre d'un engagement crédible, de juger et de punir les personnes reconnues comme étant les plus responsables de violations flagrantes des droits humains.

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I. Introduction

The international human rights community has heralded the International Criminal Court (ICC) as being the next best hope for bringing war criminals and serious human rights offenders to justice.[1] The ICC however, has significant limitations. It has a narrow jurisdiction,[2] a small budget,[3] and limited political support, with the United States, the world's only superpower, and China, a superpower in the making, refusing to participate.[4] In simple terms, this means that there will be many atrocities the ICC will not be able to address and many serious offenders it will not be able to punish.

It has been suggested that "hybrid" or "internationalized" courts, courts which mix international and local personnel and international and domestic law, could be used to

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[1] See *e.g.* "About the Coalition," Coalition for the International Criminal Court, online: Coalition for the International Criminal Court < http://www.iccnow.org/index.php?mod=coalition >; Remarks of Kenneth Roth, Executive Director of Human Rights Watch International Criminal Court, Assembly of State Parties, (9 September 2002), online: Human Rights Watch, International Justice <http://hrw.org/campaigns/icc/docs/ken-icc0909.htm>.

[2] *Rome Statute of the International Criminal Court*, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998) (adopted by United Nations 17 July 1998), online: <http: //www.un.org/icc> [hereinafter Rome Statute]. Article 5 of the Statute currently restricts the court to considering crimes that meet the Statute's definition of genocide, crimes against humanity or war crimes. Article 12 restricts the court to considering only cases where the territorial State (the State on whose territory the situation which is being investigated has taken or is taking place), or the State of nationality (the State whose nationality is possessed by the person who is being investigated) is a party to the Statute.

[3] For a listing of 2005 budget figures and reporting of difficulties collecting assessments from States Parties see *Assembly of States Parties to the Rome Statute of the International Criminal Court: Third Session, The Hague 6-10 September, 2004*, ICC-ASP/3/25, online: <www.icc-cpi.int/library/asp/ICC-ASP-3-PART_II-3(A8)_EnglishPDF>; For a listing of concerns regarding the budget process, budget amounts and failure of States Parties to meet their responsibilities see "Concerns at the second Session of the Assembly of States Parties," Amnesty International, International Criminal Court (8 - 12 September 2003), online: Amnesty International <web.amnesty.org/library/index/engior 400162003> and "Concerns at the third Session of the Assembly of States Parties," Amnesty International, International Criminal Court (6 to 10 September), online: Amnesty International <web.amnesty.org/library/Index/ENGIOR 4002004>.

[4] See Marc Grossman, "American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies" (6 May 2002), online: U.S. Department of State <http://www.state.gov/p/9949.htm>. For a more complete explanation of the U.S. position, see Jennifer Elsea, "U.S. Policy Regarding the International Criminal Court," Report for Congress, Congressional Research Service, Library of Congress (Updated 14 June 2006), online: <http://www.usembassy.at/en/download/pdf/crs_icc.pdf>; See "China and the International Criminal Court" (28 October 2003), online: Ministry of Foreign Affairs of the Peoples Republic of China <http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/tyfl/2626/2627/t15473.htm.>.

replace or complement the work of the ICC.[5] Given the ICC's limitations, this is an intriguing suggestion worthy of exploration. In fact, five hybrid courts have either just completed their work or are in various stages of operation around the world today. This paper will analyze the performance or expected performance of four of these courts- the courts located in Kosovo, East Timor, Cambodia and Sierra Leone. The fifth court- the Wars Crimes Chamber in Bosnia, will not be included in this analysis since it began operation such a short time ago and there is not yet enough data from which to draw meaningful conclusions.[6]

To analyze the courts' performances, this paper will use a framework whose four points are drawn from the stated objectives of the currently functioning international criminal courts, courts which range from the ICC, to the ad hoc criminal tribunals operating in Yugoslavia and Rwanda, to the aforementioned hybrids themselves. In the end, the analysis will reveal that the overall performance of UN-built hybrid courts has been poor, in some cases dismal. It will conclude that the efforts of the first two internationalized courts- those of Kosovo and East Timor, were doomed to failure, and at least in the case of East Timor, may have done more harm than good. It will forecast that in Cambodia, where the court is just starting up after years of negotiation, the endeavor is unlikely to provide the Cambodian people the justice they seek. Only in Sierra Leone, where a narrowly circumscribed effort is in full swing will it suggest that there is hope that something close to justice will eventually emerge.

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[5] See *e.g.* Comments by Pierre Prosper, U.S. Ambassador-At-Large for War Crimes Issues, in Transcript of Remarks at UN Headquarters, USUN *Press Release # 46B (02)* (28 March 2002), online: UN Mission to the UN <http://www.un.int/usa/02_046B.htm>; See generally Antonio Cassese, "The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality" in Cesare P. R. Romano, Andre Nollkaemper & Jann K. Kleffner, ed., *International Criminal Courts: Sierra Leone East Timor, Kosovo, and Cambodia* (Oxford: Oxford University Press, 2004) 3; Laura Dickinson, "The Promise of Hybrid Courts" (2003) 97 Am.J.Int'l L. 295; Jenia Iontcheva Turner, "Nationalizing International Criminal Law" (Winter 2005) 41 Stan. J. Int'l 1.

[6] The War Crimes Chamber represents a joint initiative of the ICTY and the UN Office of the High Representative and is designed to operate within the Bosnian national court system. The Chamber employs a significant number of international judges, prosecutors, defense counsel, and other court officials. It began operation in March 2005. See "Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina," Human Rights Watch, Vol. 18, No. 1(D) (February 2006), online: Human Rights Watch <http://hrw.org/reports/2006/ij0206/ij0206web.pdf>.

II. Developing a Framework of Analysis

To properly assess the operation of a given hybrid court it is not enough to ask whether the court brought about "justice" since coming up with a universally accepted definition of justice is likely to prove a fruitless task. Many of humanity's great philosophers and legal thinkers have, after all, pursued such a definition without achieving consensus.[7] Even the definitions that have carried the most weight over the years are not easily reducible to a set of criteria that can be used to measure the performance of a criminal justice process. But having a single set of criteria to apply to the analysis is essential if meaningful, overall conclusions are to be made. One way of developing the criteria is to draw their substance from the stated objectives of the ongoing international criminal courts.

A. Punish Those Most Responsible

A logical place to begin the search for objectives is within the foundational document of the ICC- the Rome Statute. This is because the Rome Statute has been accepted by such a large number of nations[8] and because its drafters were able to draw upon the experience of previous international criminal tribunals dating back to Nuremberg. While the Statute fails to provide a clear listing of ICC objectives, language used in parts of its preamble suggest the ICC's broader goals. Some of this language can be used to craft the first of four justice criterion.

Paragraph four of the preamble states:

> Affirming that **the most serious crimes of concern to the international community as a whole must not go unpunished** and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

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[7] See generally Robert C. Solomon & Mark C. Murphy, *What is Justice? Classic and Contemporary Readings*, 2nd ed. (Oxford: Oxford University Press, 2000).

[8] The Rome Statute was established on 17 July 1998, when 120 States participating in the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" adopted the Statute. Rome Statute, *supra* note 2. As of 1 November 2006, 103 countries are States Parties to the Rome Statute. See "The States Parties to Rome Statute" online: International Criminal Court <http://www.icc-cpi.int/asp/statesparties.html>.

This paragraph identifies perhaps the most important, and certainly the most measurable, objective of any criminal justice effort – *punishment*. Whatever other purpose a criminal court may serve, ordinary people expect, at the very least, that it will *punish* the individuals responsible for committing crimes.

Unfortunately, the Rome Statute's preamble does not adequately identify *who* should be punished and gives a very general, insufficient, description of *what* an offender should be punished for. This being the case, the search to complete the punishment criterion logically moves to the foundational documents of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). This is because both of these tribunals were established by UN Security Council resolution and can therefore be viewed as representing the collective thinking and will of the international community.

The Security Council established the ICTY in 1993 by passing Resolution 827.[9] The resolution's preamble expresses "grave alarm" over reports of human rights violations in the territory of former Yugoslavia and explains that the tribunal is being established "for the sole purpose of **prosecuting persons responsible for serious violations of international humanitarian law.**"[10] The core objective mentioned here- the prosecution of persons responsible, is no improvement on the objective derived from the Rome Statute since it only speaks of *prosecution* and does not mention the more meaningful result- *punishment*. However, the objective does seem to provide a more precise description of the crimes the prosecution would address- these crimes being, "serious violations of international humanitarian law." Unfortunately, in the case of the ICTY, this definition actually sows confusion. The generally accepted meaning of the term "international humanitarian law" is the law that applies to violations of the law of war, and *not* to include the international crimes of genocide and crimes against humanity.[11]

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[9] *Resolution Establishing the Tribunal for the former Yugoslavia*, UN SC Res. 827, UNSCOR, 3217th Mtg., UN Doc. S/RES/827 (1993).

[10] *Ibid.* at Preamble.

[11] See Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) at 64-66; see also "What is international humanitarian law?" online: ICRC <http://www.icrc.org/web/eng/siteeng0.nsf/html/humanitarian-law-factsheet.>

Since articles found within the statute of the ICTY give the court jurisdiction to consider not only serious violations of international humanitarian law but also genocide and crimes against humanity,[12] there seems to be a conflict between the stated objectives of the Security Council and the actual jurisdiction of the court. For the purposes of establishing justice criteria for the hybrid courts however, we can borrow the Security Council's attempt at precision but avoid any ambiguity or conflict by including all three categories of international crimes in our criterion: *serious violations of international humanitarian law, genocide, and crimes against humanity.*

This still does not completely answer the question of "who" should be punished for these offenses. Should the aim of an international court be to punish everyone who committed the requisite crimes, or only those who committed the worst crimes, or possessed the greatest degree of responsibility? Neither the Rome Statute nor the foundational documents of the ICTY and ICTR address this question. The language used in the foundational documents of one of our hybrid courts however, does suggest a more selective approach that is worth considering.

Article 1(1) of the Agreement for the Special Court of Sierra Leone states:

> There is hereby established a Special Court for Sierra Leone to prosecute **persons who bear the greatest responsibility** for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[13]

This article limits the personal jurisdiction of the court to only those individuals "who bear the greatest responsibility" for the serious violations. This notion of restricting the prosecution effort to those individuals who bear the greatest responsibility for the crimes is rational and reasonable. It is rational because in the case of serious war crimes and human rights violations, there usually exist gradations of culpability- even if these gradations are based on numbers of lives taken or extent of human misery inflicted. The

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[12] *Supra* note 15, Art. 2-5.

[13] *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* (16 January 2002), online: Special Court for Sierra Leone, Documents, Special Court Agreement <http://www.sc-sl.org/>.

commander who orders the murder of a whole village is surely more culpable and worthy of prosecution than the army private who carries out a single execution. The political leader who orchestrates a genocide or ethnic cleansing campaign that slaughters thousands is surely more worthy of prosecution than the commander who, following illegal orders, forces the evacuation of a township. The limitation is reasonable because the resources available to prosecute and adjudicate are always going to be limited. No criminal court can pursue every offender. Choices must be made. If a court chooses to expend its limited resources pursuing those individuals possessing lesser degrees of culpability and ignoring those possessing higher, it stands to lose its legitimacy both in the eyes of the surviving population and in the eyes of the world. Criteria number one can be completed therefore, by adding language similar to that used in the Sierra Leone Agreement and reads in question form: *Did the Court punish those individuals most responsible for perpetrating serious violations of international humanitarian law, genocide and crimes against humanity?*

B. Deliver a Sense of Justice to Survivors

When speaking in terms of universal justice and about such offenses as crimes against humanity, it is all too easy to overlook the emotional requirements and expectations of the still-living people most affected by the crimes – the survivors. The term "survivors" in this context, means not only those who were harmed directly by the violence and survived, but also those whose friends and relatives were killed or injured or whose property was damaged or destroyed. An internationalized court should be able to deliver some emotional relief or satisfaction to these flesh and blood people – perhaps in the form of a feeling, or belief, that their suffering has been recognized and that those responsible have paid some price for their actions. This feeling or belief could be labeled "a survivor's sense of justice" and should be taken into account, somehow, when analyzing a hybrid court's performance. It is, after all, the survivors who continue to suffer the most pain and it is they who will need to rebuild their lives and their communities. While this sense of justice will be difficult to measure, some educated conclusions can be drawn from the attitudes and behaviors exhibited by the survivor population toward the hybrid court operation.

Support for the establishment of this criterion can be found in the ICTY's Resolution 827. Part one, paragraph seven of the resolution states,

> *Believing* that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such **violations are** halted and **effectively redressed,**

The use of the word "redressed" in this paragraph implies that a goal of the ICTY is to provide some sort of compensation for losses to victims. The drafters could not have meant financial compensation since part two, paragraph seven, of the resolution suggests quite strongly that victims should seek financial compensation for damages in other forums.[14] It might therefore be construed to refer to a type of emotional compensation for the survivors - a belief that their suffering has been recognized and that the offenders have paid an appropriate price for their actions. The second criterion for analysis therefore, can be said to derive from the stated objectives of the ICTY and reads: *Did the Court deliver a sense of justice to the survivors?*

C. Contribute to Reconciliation

The creation of the International Criminal Tribunal for Rwanda (ICTR) followed upon the heels of the establishment of the ICTY and its foundational document, Security Council Resolution 955, mentions similar goals.[15] At least one of the resolution's paragraphs however, includes language which can be interpreted to identify a somewhat new and different goal. Paragraph six of the resolution states:

> *Convinced* that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would **contribute to the process of national reconciliation** and to the restoration and maintenance of peace,

This paragraph identifies the goal of "contribut[ing] to the process of national reconciliation." While it may prove impossible to measure how a court process made this

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[14] Paragraph 7 states: "*Decides also* that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law." *Supra* note 15.

[15] *Establishing the International Tribunal for Rwanda*, UN SC Res. 955, UN SCOR, 3453th Mtg., S/RES/955 (1994).

contribution in empirical terms, it may be possible to reach some informed conclusions about the degree of reconciliation reached between former antagonists and draw further conclusions about how much or how little the court assisted in that reconciliation. Moreover, we will see that it is sometimes not so difficult to show that a justice enterprise has negatively impacted the reconciliation process. For these reasons, the goal of reconciliation should be used to establish our third criterion: *Did the Court assist in the process of reconciliation between peoples?*

D. Provide Due Process

We now have three criteria drawn from the foundational documents of the ICC, the international ad hoc tribunals, and the hybrids themselves, but before proceeding with the assessment of the hybrids it is worth noting that none of the foundational documents mentioned above say anything about providing a *fair process*. This seems odd since the protection of the rights of the accused has for so long been a focus of international human rights efforts and a cornerstone of the legal systems of the world's democracies. The quality of a justice effort depends not only upon its results but also upon the fairness of the process. If a court fails to provide internationally accepted protections of individual rights, any convictions it achieves must be viewed with skepticism and perhaps in some cases, rejected out of hand. Moreover, a court's failure to provide fair process may end up doing more harm than good not only because of the increased likelihood of false conviction but also because of the bad precedent it sets for developing legal systems.

In recent years, a body of international law has developed that provides a relatively detailed and widely accepted outline of the basic requirements. The sources of this law range from international covenants and treaties to identifiable trends in domestic law. The most authoritative and widely accepted sources exist within the texts of such instruments as the Universal Declaration of Human Rights [16] and the International Covenant on Civil and Political Rights.[17] They exist in the opinions given by such courts

[16] *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

[17] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

as the European Court of Human Rights and the Inter American Court of Human Rights and, of course now, they exist in the procedural law and jurisprudence of the ICC, the international ad hoc tribunals and the hybrid courts.[18] All of this being the case, the fourth and final criterion is: *Did the Court provide a fair process which ensured that the rights of the accused were protected?*

E. The Justice Criteria

Drawing upon the stated objectives of past and present international tribunals, we have now established the criteria we will use to assess the work of the hybrid courts as follows:

1. Did the Court punish those individuals most responsible for the perpetration of serious violations of international humanitarian law, genocide and crimes against humanity?
2. Did the Court deliver a sense of justice to the survivors?
3. Did the Court assist in the process of reconciliation between peoples?
4. Did the Court provide a fair process which ensured that the rights of the accused were protected?

III. Kosovo: Stumbling Out of the Blocks

The U.N.'s justice effort in Kosovo can rightfully claim to represent the first attempt by the international community to create a hybrid criminal court.[19] However, as we will see, the Kosovo hybrid court was created not as part of a well-thought-out plan or scheme but more as a piecemeal, too-little-too-late, response to negative developments on the ground. Not surprisingly, the quality of the justice it has delivered in war crimes and serious human rights cases reflects this flawed mode of construction.

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[18] For a listing of international and regional fair trial standards and their sources see "Amnesty International: Fair Trials Manual," online: < http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm>.

[19] *On the Appointment and Removal from Office of International Judges and International Prosecutors*, UNMIK Regulation 2000/6, was passed 12 January 2001and allows for the appointment of internationals to the Kosovo judiciary. This Regulation predated the establishment of East Timor Special Crimes Panel by three months.

A. Background

On 24 March 1999, the North Atlantic Treaty Organization (NATO), led by the United States, began bombing targets in the Former Republic of Yugoslavia (FRY). The purpose of the bombing was to force the FRY and FRY-supported paramilitary forces to withdraw from the province of Kosovo and to end Serbian repression of the province's Albanian population.[20] In response to the bombing, the FRY leadership unleashed a campaign of "ethnic cleansing" against Kosovo Albanians. In this campaign, FRY-supported security forces killed thousands of civilians, committed acts of sexual assault, destroyed large amounts of property, and drove more than 800,000 people from their homes.[21] After nearly three months of continuous NATO bombing and Serb led violence against the Albanian citizenry, the FRY leader, Slobodan Milosevic, relented. On 9 June 1999, Milosevic's government signed an agreement with NATO which ended hostilities and required a withdrawal of all FRY forces from Kosovo.[22] The following day, the UN Security Council passed Resolution 1244 which replaced FRY control over Kosovo with UN control and gave the UN responsibility for governing Kosovo for the foreseeable future.[23] It did this by creating an "international security presence"- Kosovo Force (KFOR) and an interim governing institution- the United Nations Interim Administration Mission in Kosovo (UNMIK).[24]

There was no question that KFOR and UNMIK faced a difficult road ahead. When the Kosovo Albanian refugees returned home, many found their towns and villages destroyed,

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[20] "The Situation in and Around Kosovo: Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, Brussels, on 12 April 1999," NATO, Publications, Press Release M-NAC-1(99)5, online: < http://www.nato.int/docu/pr/1999/p99-051e.htm.>.

[21] See *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, UN SCOR, 54th Sess., U.N. Doc. S/1999/779 (12 July 1999) para. 8 [hereinafter Report of the Secretary-General]; see also *Kosovo/Kosovo: As Seen, As Told: An Analysis of the Human Rights Findings of the OSCE Kosovo Verification Mission October 1998 to June 1999: Part One (1999)*, Org. for Sec. & Cooperation in Eur., online:
<http:// www.osce.org/kosovo/documents/reports/hr/part1>.

[22] *Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia* (9 June 1999), online:
<www.nato.int/kosovo/docu/a990609a.htm >.

[23] *Resolution 1244*, U.N. SCOR, 54th Sess., 4011th mtg., UN Doc. S/RES/508 (1999) [hereinafter Resolution 1244].

[24] *Ibid.*

their livestock and fields depleted, and their water contaminated.[25] Some of these people were motivated to take revenge on the Kosovo Serbs remaining in the province by committing targeted killings, abductions and forcibly expropriating property.[26] The departure of FRY security forces created a law and order vacuum which not only left the minority Serb population vulnerable to Albanian reprisal but also allowed organized criminal elements to move into the province and operate freely.[27]

Because of the continuing ethnic violence and growing criminality, the interim authority was under intense pressure to restart Kosovo's legal system and do it quickly.[28] The UN however was not only faced with the task of establishing a legal structure which would handle ordinary criminal cases that occurred in the province daily but also needed to determine how it would deal with the extraordinary human rights violations which took place prior to, and during, the NATO intervention. They needed to decide whether to create two different structures to handle the two different types of cases or to somehow create a single structure that would handle them both. Their initial decision on this issue would start the Kosovo justice effort out on the wrong foot and leave UNMIK playing a game of catch-up from that point forward.

B. The UNMIK Solution

The UN placed the responsibility for building the new Kosovo justice structure in the hands of the Special Representative of the Secretary-General (SRSG).[29] Acting under the authority of Resolution 1244, the Secretary-General vested the SRSG with all legislative and executive powers, including the administration of the judiciary, and gave him the authority to "change, repeal or suspend existing laws to the extent necessary."[30] The Secretary-General also gave the SRSG the power to appoint interim civil authority officials including members of the judiciary.[31]

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[25] See *Chronology UN Interim Administration in Kosovo (UNMIK), 8 July 1999*, online: <www.un.org/peace/kosovo/news/kos30day.htm>.
[26] *Supra* note 21 at para. 5.
[27] *Ibid.* at para. 6.
[28] See generally Hansjorg Strohmeyer, "Collapse and Reconstruction of a Judicial System: the United Nations Missions in Kosovo and East Timor" (January 2001) 95 Am. J. Int'l L. 46.
[29] Secretary-General Annan appointed Dr. Bernard Kouchner to the position. See *supra* note 21 at para. 3.
[30] *Ibid.* at paras 35, 39, 40. This was later codified in UNMIK/REG/1999/1 Section 1.1.
[31] *Ibid.* Later codified in UNMIK/REG/1999/1 Section 1.2.

Since Resolution 1244 did not specifically mandate UNMIK to investigate and prosecute those suspected of committing serious crimes that took place leading up to and during the NATO bombing campaign, it was unclear in the beginning whether UNMIK would take on the task of prosecuting serious war crimes cases. The possibility existed that UNMIK would refer all such cases to the ICTY, which by that time, had been functioning for six years and had indicted some members of the FRY government and security forces.[32] UNMIK's leadership however, indicated that prosecution of at least some of Kosovo's war crimes and human rights offenders would be one of the interim administration's goals. On 6 December 1999, Kosovo's first SRSG, Bernard Kouchner, stated his expectations in this regard by writing in the Forward to the OSCE report *Human Rights in Kosovo: As Seen, As Told*, "Impunity cannot be tolerated and those that have committed crimes and human rights violations must be convicted and serve their punishment according to law."[33]

While Kouchner's intention may have been to focus some of UNMIK's efforts on bringing serious offenders to justice, it was clear that creating a hybrid court to do this was not part of his plan. The initial regulations he passed did not establish any sort of specialized court to hear human rights offenses,[34] they did not adopt an international legal framework,[35] and they did not allow for the employment of international court personnel, only local, Kosovo judges and lawyers.[36]

Kouchner and the UNMIK leadership certainly had justifications for proceeding in this fashion. They had an immediate need to apply judicial process to the large number of

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[32] The Secretary-General seemed to encourage this approach by making liaison with the ICTY a part of the SRSG job description. See *ibid.* at para. 4.
[33] *Human Rights in Kosovo: As Seen and Told Part II, June 14 to October 31, 1999*, Organization for Security and Co-operation in Europe (OSCE), Forward, at iv., online: <http://www.osce.org/documents/mik/1999/11/1622_en.pdf>.
[34] See *On the Authority of the Interim Administration in Kosovo*, UN Doc. UNMIK/REG/1999/1 (25 July 1999), and *On the Law Applicable in Kosovo*, UN. Doc. UNMIK/REG/1999/24 (12 December 1999), online: <www.un.org/peace/kosovo/pages/regulations/reg1.html>.
[35] UNMIK Reg. 1999/1 Section 3 states, "The laws applicable to the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with standards referred to in section 2 (internationally recognized human rights standards)..."
[36] *Supra* note 21 at para. 68.

individuals KFOR had detained.[37] They were acutely aware of the vulnerability of the Serbian and other minority populations in Kosovo, and hoped that by creating multi-ethnic legal institutions they would help the ethnic groups move toward reconciliation.[38] They possessed limited resources with which to construct a more sophisticated, internationalized justice system.[39] But while these justifications may have existed, the initial justice formula arrived at by UNMIK proved to be short-sighted and unstable.

There were three major flaws in formula which created this instability. The first flaw was that the UNMIK legal framework was unacceptable to Kosovo Albanians. When Kosovo Albanian judges and prosecutors were asked to apply the regional law of Serbia as required by UNMIK regulations, they balked, since they viewed Serbian law in general, and the Serbian criminal code in particular, to be instruments of Serb repression.[40] Instead, these local judges and prosecutors chose to interpret the regulations to include laws in force in Kosovo *prior* to March 1989 which included the Kosovo Criminal Code (KCP) *not* the Serbian Criminal Code (SCP). Adding to the confusion was the language used in some UNMIK regulations and pronouncements which suggested but did not make clear, that international law would take precedent when a conflict between international law and local law arose.[41] Further clouding the picture was the fact that while the FRY criminal code did include some violations of international humanitarian law, the language used to describe the offenses was not completely consistent with international law[42] and neither the pre nor post 1989 domestic law included the offense of crimes against humanity.[43]

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[37] *Supra* note 28 at 6.
[38] *Ibid.* at 6.
[39] *Ibid.*
[40] *Supra* note 21 at para. 55.
[41] *OSCE Review of the Justice System in Kosovo: February 2000 to 31 July 2000*, at 1-2, online: <www.osce.org/documents/mik/2000/08/970_en.pdf.>
[42] For example, while FRY CC 141 follows the language of the Genocide Convention almost verbatim, it diverges somewhat when it states that "forcible dislocation of the population" is a means of committing genocide. This language is not present in the Genocide Convention and could expand liability for genocide beyond the boundaries established by the Convention. See *OSCE Kosovo War Crimes Trials: A Review, September 2002*, OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, at 29-30, online: <http://www.osce.org/documents/mik/2002/09/857_en.pdf>.
[43] *Ibid.* at 50.

The second major flaw in the new structure was the problem of *capacity*. While it was a fine notion to seek local acceptance of the new legal system by placing local judges in control of the court, the fact was, there were not enough experienced judges and lawyers left in Kosovo to go around. Most of the Serbian judges and lawyers who had operated the system prior to the NATO bombing, fled to Serbia. Of the Kosovo Albanian judges and lawyers who were appointed, few possessed recent experience in the practice of law since most had been pushed out of their positions during the decade of Serb repression.[44] Moreover, the judges and lawyers who were available possessed little or no familiarity with international standards and procedure.[45]

The third major flaw in the UNMIK approach was setting out under the assumption that Kosovo Albanian judges would be able and willing to give Serbs suspected of committing war crimes a fair trial, and would be able and willing to hold Albanian defendants accused of such crimes responsible for their actions. Given the suffering the Albanian population had endured at the hands of Serbian security forces over the previous ten years, and the especially vicious nature of the conflict in 1999, UNMIK's willingness to place faith in the objectivity of Albanian jurists was surprising. Making the creation of an ethnically blind justice system even more difficult was the fact that the few Serbian judges who had been appointed to positions in the new court system, quit in short order.[46]

These flaws in the UNMIK scheme resulted in immediate malfunction. Because the mostly Albanian judges chose to apply the old Kosovo criminal law rather than the new UNMIK regulations, there were serious questions about the legality of the proceedings[47] and great uncertainty as to which law was actually in force.[48] The lack of qualified

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[44] *Supra* note 21 at para. 66.; *Kosovo: A Review of the Criminal Justice System 1 September 2000 – 28 February 2001*, OSCE Department of Human Rights and Rule of Law, at 31. [hereinafter, Kosovo: A Review, September 2000- February 2001]

[45] Kosovo: A Review, September 2000- February 2001, *ibid.*

[46] By December 1999, all of the Kosovo Serb judges who had been appointed to serve in the transitioning legal system had either quit for security reasons or departed for Serbia. *Supra* note 28 at para. 54.

[47] *Supra* note 41 at 1-2.

[48] Observations 1999, *supra* note 41 at 4.

domestic judges and prosecutors resulted in a growing backlog of cases[49] and helped create a situation where numerous suspects were detained without indictment beyond the legally allowable time periods.[50] The scarcity of qualified personnel also helped create a trial process that lacked many of the basics of fair process – there was insufficient access to legal representation,[51] insufficient exploration of the evidence during trial,[52] and there was a failure to apply the law consistent with internationally accepted standards.[53] Perhaps most troubling of all, was the clear indication that the judicial process was heavily biased against non-Albanian defendants and victims. In a March 2000 report entitled, *The Treatment of Minorities by the Judicial System*, the Organization for Security and Cooperation in Europe (OSCE) which had been given the task of monitoring the UNMIK-supported justice sector, cited numerous examples of cases where Kosovo Serbs were arrested and detained on flimsy or dubious evidence while Kosovo Albanians, whose arrests were supported by compelling evidence, were released pending trial.[54]

UNMIK attempted to deal with these problems by making incremental course corrections. In December 1999, in an effort to conform the law on the books to the law actually being applied in the court rooms, the SRSG passed regulations which made the pre-1989, autonomy-era law, the applicable law in Kosovo.[55] Later that month, in an effort to provide the fledging court system more time to process detainees, the SRSG passed a resolution which allowed the courts to extend pretrial custody by as much as six

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[49] *Ibid.* at 5.

[50] OSCE observers noted in December 1999, that 81individuals who were being held by either KFOR, the UN Civil Administration and UNMIK Police, were either approaching the limit of their detention period or should have already been released. *OSCE The Observations and Recommendations of the OSCE Legal System Monitoring Section: Report No. 3, Expiration of Detention Periods for Current Detainees, 3 March 2000*, OSCE Mission in Kosovo, Department of Human Rights and Rule of Law at 1. In March of 2000, OSCE identified 26 cases where suspects had been held without indictment beyond the legal time period. *Observations and Recommendations of the OSCE Legal System Monitoring Section, Report 4, Update on the Expiration of Detention Periods for Detainees, 18 March 2000*, OSCE Mission in Kosovo, Department of Human Rights and Rule of Law at 1.

[51] *E.g.*, of the 196 detainees interviewed by OSCE observers before July 2000, none reported having access to counsel while in custody or at their detention hearing. *Supra* note 41 at 47.

[52] *Ibid.* at 51, 54.

[53] *Ibid.* at 1.

[54] *Background Report: The Treatment of Minorities in the Judicial System*, OSCE Mission in Kosovo, 13 April 2000, at 4.

[55] *Supra* note 21 at para. 56.

months.[56] These adjustments however, did not address the problem of ethnic bias within the court system. While the UNMIK leadership recognized that their goal of creating an objective, multi-ethnic judiciary was becoming increasingly difficult,[57] they struggled throughout 1999 trying to make the system work using only local personnel. Events taking place on the ground however, eventually forced UNMIK to reconsider using international judges and lawyers to assist in some capacity.

In February of 2000, in the city of Mitrovica, ethnic tensions between Kosovo Serbs and Albanians exploded. On February 2nd, a clearly marked bus belonging to the Office of the United Nations High Commissioner for Refugees (UNHCR) which was carrying 49 Serb passengers, was hit by a rocket, killing two people and injuring many others.[58] This attack was followed by fighting between Serbs and Albanians in the streets of Mitrovica, and the looting of the KFOR office as well as the offices of several NGOs.[59] KFOR took dozens of people into custody, most of them Kosovo Albanians,[60] but the Kosovo court system failed to aggressively prosecute them. UNMIK responded to what it termed this "inadequate judicial" response by the Kosovo Albanian dominated justice system[61] by promulgating a resolution which required the appointment of one international judge and one international prosecutor to the Mitrovica District Court.[62] Later, in May of 2000, in order to end a hunger strike held by Kosovo Serb and Roma detainees protesting the lengths of their pretrial detentions, the SRSG extended his power by appointing international judges and prosecutors beyond Mitrovica to all of Kosovo.[63] But while these regulations may have added some international flavor to Kosovo's legal framework, there was little chance they would reduce verdicts motivated by ethnic bias. This was because under the domestic procedural rules being used in Kosovo, trial panels in war crimes and ordinary murder cases were composed of two professional judges and three

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[56] *On the Extension of Pretrial Detention*, UNMIK/REG/1999/26 (22 December 1999).
[57] *Supra* note 21 at para. 54.
[58] *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, UN SCOR, UN S/2000/177 (3 March 2000) at para. 20-21.
[59] *Ibid.*
[60] *Ibid.* at 21.
[61] *Ibid.* at 110.
[62] *Supra* note 19.
[63] See *Amending UNMIK Regulation No 2000/64 on Assignment of International Judges/Prosecutors and/or Change of* Venue, UNMIK/Reg /2000/34 (15 December 2001).

lay-judges, all with equal voting power.[64] The *single* international judge appointed to a panel was outnumbered and often outvoted by the majority of local judges.[65]

Reports of ethnic bias within the court system continued.[66] This forced UNMIK to continue to expand the use of international personnel. On 15 December 2000, fully eighteen months after the UN had taken responsibility for governing Kosovo, the SRSG finally gave internationals control over ethnically sensitive cases by promulgating Regulation 2000/64.[67] Under this new regulation, a prosecutor, an accused, or the defense counsel for the accused could now petition the Special Representative of the SRSG to assign international judges and prosecutors to a particular case.[68] If the Special Representative approved the petition, the case would be given to an international prosecutor and be assigned to a panel of three judges, two of which had to be international judges.[69] These assignments could take place not only at the trial court level but also at the appeals court level.[70] This meant that international judges could now outvote the locals in cases where the UNMIK leadership believed such a panel was warranted. The SRSG further increased the power of the internationals in January of 2001 by issuing a measure which gave international prosecutors the ability resume cases abandoned by local Kosovo prosecutors.[71]

With the creation of these majority international trial court panels (which would became known as "64" panels), Kosovo possessed a domestic court system which could consider both ordinary criminal cases and cases involving massive human rights violations both prior to and after the period of the NATO bombing campaign. In addition, the

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[64] Kosovo: Review of the Criminal Justice System, 1 September 2000- 23 February 2001, *supra* note 45 at 76; see also Michael E. Hartman, "International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping," United States Institute of Peace, Special Report 112 (October 2003) at 10, [Hartman] online: <www.usip.org/pubs/specialreports/sr112.html>.
[65] Hartman, *ibid.*
[66] *Ibid.* at 9-12; See generally *Kosovo:* A Review of the Criminal Justice System,1 September 2000 – 28 February 2000, *supra* note 44.
[67] *On Assignment of International Judges/Prosecutors and/or Change of Venue*, UNMIK/REG/2000/64 (15 December 2000).
[68] *Ibid.* sections 1.1, 1.2.
[69] *Ibid.* section 2.1.
[70] See *supra* note 42 at 48-52.
[71] *Amending UNMIK Regulation No. 2000/6, as Amended, on the Appointment and Removal from Office of International Judges and International Prosecutors,* UNMIK/REG/2001/2.

internationalized Supreme Court panel had the ability to review the decisions made by all the lower court panels and determine if they should be upheld or reversed. It had taken some time to get there, but at the end of 2000, Kosovo had its hybrid court system.

C. Performance in "War Crimes" Cases

How did the Kosovo hybrid perform in war crimes cases? The numbers tell much of the story. By May 2006, prosecutors had filed only 23 war crimes cases in the courts of Kosovo.[72] They filed 17 of these cases before September 2002,[73] and only six additional cases in the four years that followed.[74] This is very thin gruel for more than six years of effort. The gruel gets even thinner when case outcomes are considered.

In September 2002, OSCE issued a report which surveyed the war crimes cases filed in Kosovo's courts up until the time.[75] OSCE reported that most of the defendants indicted in those cases eventually had the charges against them dropped, were acquitted after trial,[76] or had their convictions reversed on appeal.[77] In the end, after all the appeals and retrials had run their course, only six of the individuals indicted before September 2002 were convicted.[78] All were Serbs.[79] What is more, the quality of the adjudicative process puts the integrity of even these few convictions in serious doubt.

OSCE reported that the trial process and judicial decision making were both deeply flawed. In many cases, there was very little effort made by the local trial courts to obtain Serbian defense witnesses.[80] In some cases, the trial court flatly refused to hear Serb and

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[72] "Not on the Agenda: The Continuing Failure to Address Accountability in Kosovo Post-March 2004," *Human Rights Watch* (May 2006) Volume 18, No. 4 (D) at 18, online: <http://hrw.org/reports/2006/kosovo0506/index.htm>.
[73] *Ibid.* at 18-20.
[74] *Ibid.*
[75] *Supra* note 42.
[76] See *ibid.* at 12-28.
[77] See *ibid.* at 12-28.
[78] This figure is reached by adding up the number of final convictions reported by the OSCE War Crimes Report in 2002, *ibid.*, and then determining the ultimate outcome of the cases the report listed as being in ongoing trial status.
[79] See *ibid.* at 12-28.
[80] *Ibid.* at 37.

Croat defense witnesses.[81] The quality of language translation and interpretation in the courts was inconsistent, uneven and unreliable.[82] The trial verdicts were poorly written, poorly reasoned and sometimes illogical. [83]

To be fair, it was the majority-international Supreme Court panels that reversed many of the lower court decisions and it was the majority-international "64" trial panels which acquitted many of the defendants that were sent back for retrial. However, the performance of the international judges and prosecutors does not give one much confidence in the overall fairness of the internationally controlled judicial process or in the correctness of the results. International prosecutors made serious mistakes in their charging decisions[84] and international court panels made serious errors in their verdicts. At least four international trial panels convicted defendants for crimes different from those charged in the indictment and incorrectly re-qualified the charges before reaching a verdict.[85] The international trial panels' method of analyzing credibility was also highly suspect.[86] In making the assessment of credibility, the international panels failed to follow a realistic mode of assessment which took categories of human fallibility into account and instead deemed witnesses who had given any sort of inconsistent statements "unreliable and untruthful."[87] The poor performance of the majority international courts extended to the Supreme Court. Supreme Court judgments on war crimes cases often failed to separate the issue of criminal responsibility from the other issues of fact in the case[88] and Supreme Court judgments failed to provide any in-depth analysis or refer to any guiding or persuasive authority.[89]

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[81] See Dragan Nikolic, *ibid.* at 13.
[82] *Ibid.* at 41-42.
[83] *Ibid.* at 43.
[84] They report for example, that in the Alexander Mladenovic case, the first international prosecutor undercharged the case; only charging ordinary crimes even though it was during a period of armed conflict. The second international prosecutor in the case amended the charges to add war crimes offenses, offenses for which the defendant was eventually acquitted. *Ibid.* at 36.
[85] According to OSCE, "qualification" is a term used in some civil law systems to describe the selection of a criminal charge whose elements match the facts of a specific case, a process equivalent to identifying included or lesser included offenses. *Ibid.* at 47.
[86] *Ibid.* at 38-40.
[87] *Ibid.* at 39.
[88] *Ibid.* at 51.
[89] *Ibid.* at 52.

Finally, there is the issue of *who* the courts decided to prosecute. The 2002 OSCE report lists the names and biographical information of the individuals indicted up until that time; none of them appear to be high-level leaders.[90] They were either foot soldiers or possessed some form of low-level leadership.[91] Of course, when it comes to the Serbian officials who were most responsible for the ethnic cleansing campaign, Kosovo's courts have little or no ability to reach into Serbia and bring them back for trial. There is some attractiveness to the argument that the operation of Kosovo's hybrid courts should be viewed as part of a larger, complementary justice regime which includes the ICTY, and that since the ICTY is trying some of the high-level Serbs and Kosovo Albanians alleged to be most responsible for the violence in 1999, the regime is working as it should.[92] This would be a better argument if 1) the record showed real coordination between Kosovo courts and the ICTY, and 2) the Kosovo courts consciously and actively pursued prosecution of the next level down in leadership. There is however, very little evidence indicating that Kosovo's justice sector works in close coordination with the ICTY or that UNMIK developed any type of strategy to focus their prosecution efforts on those holding leadership positions.[93] The fact remains that the net result of the Kosovo war crimes effort has been the conviction and punishment of a very few, very small, fish.

D. Justice Analysis

1. *Did the Court punish those individuals most responsible for the perpetration of serious violations of international humanitarian law, genocide and crimes against humanity?*

The UN may have helped reconstruct a demolished local justice system and for this it deserves credit. If it is judged for how well it punished those most responsible for war

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[90] See *supra* note 42.

[91] *Ibid.*

[92] These individuals include at least four retired Serbian generals- Vladomir Lazarevic, Sreten Lukic, Nebojsa Pavkovic, and Vlastimir Djordjevic. See "Serb General Wanted Over Kosovo War Crimes Hands Himself Over to UN Court," *AFP* (4 February 2005), online: <www. Kosovo.com/news/archive/ticker/2005/February_04/22.html>. They also include Kosovo's former Prime Minister , Ramush Haradinaj, who is charged with crimes connected to his role as commander of the Kosovo Liberation Army (KLA). "Kosovo's Ex-Premier Faces Charges of Murder, Rape and other War Crimes at UN Tribunal," *UNMIK News Coverage* (10 March 2005), online: <www.unmikonline.org/news.htm>.

[93] See Frédéric Mégret, "The ICTY and Domestic Courts: What Interaction?" in *Strategy for Transitional Justice in the former Yugoslavia-Dealing with the Past-Post-conflict Strategies for Truth, Justice and Reconciliation in the Region of the former Yugoslavia*, Proceedings of the International Conference Co-organized by the Humanitarian Law Center and the Council of Europe, Humanitarian Law Center (2004).

crimes and serious human rights offenses however, it must be labeled a failure. Kosovo's courts have convicted and punished only a handful of "war crimes" offenders, and none of these individuals can remotely be labeled architects or high-level leaders of the ethnic cleansing campaign that took place in 1999.[94] Moreover, the process out of which the convictions of these few individuals emerged was so loaded with inequity and error that the convictions remain suspect.

While the involvement of international judges and prosecutors in Kosovo's criminal justice system has continued into 2006, it seems clear that the system has ceased to regard the prosecution of war crimes cases as a priority. Only six additional war crimes cases filed since 2002 is proof enough of this.

2. Did the Court deliver a sense of justice to the survivors?

Serbian security forces visited death, destruction, and great suffering on the Albanian population of Kosovo yet the courts have punished very few Serbian war crimes offenders. From this, it is reasonable to assume that the Kosovo Albanian survivors feel little or no sense of justice.[95] Of course there is a second victim population-Serbian civilians who were targeted by the KRT during the period of the Serbian invasion and who have been victimized by Kosovo Albanians since the time of the UN's arrival. These civilians continue to suffer at the hands of their Kosovo Albanian neighbors and the UNMIK-built justice system has proven wholly unable to protect them.[96]

3. Did the Court assist in the process of reconciliation between peoples?

The evidence is that it did not. Seven years after the NATO intervention, Serbs and Albanians living in Kosovo remain very much at odds. There have been repeated outbreaks of violence between the two groups. One of the worst outbreaks occurred in Mitrovica on 17 March 2004, and left 19 killed, 800 injured, 20 churches destroyed and

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[94] See *supra* note 42.

[95] In 2006, Human Rights Watch reported that, among Albanians in Kosovo, the impression has been that there has been "little or no justice for the atrocities of the Milosevic regime." *Supra* note 72 at 18.

[96] See generally *ibid.* Human Rights Watch concluded that the new Kosovo justice system was failing, and this failure was resulting in a "continuation of a cycle of impunity and the reinforcement of the belief in all communities in Kosovo – majority and minority alike – that the criminal justice system is neither reliable nor in the service of the people."

many other buildings burned to the ground.[97] In some of the few remaining areas of Kosovo that possess significant Serb populations, parallel justice systems operate- one run by and for Kosovo Serbs, the other by and for Kosovo Albanians.[98] As time drags on with no solution to the ethnic conflict in sight, there is a greater and greater likelihood that the international community will abandon the goal of a multi-ethnic Kosovo and accept the some sort of partition of Kosovo on ethnic lines.[99]

4. Did the Court provide a fair trial process which ensured that the rights of the accused were protected?

This question must be answered with a definite, no. The UNMIK justice process left suspects and accused in custody for lengthy periods of time, often beyond legal limits. The system did not provide effective legal representation at all stages of the process. The trial process frequently failed to meet international standards and in many cases, appeared to be strongly biased in favor of Albanian defendants and victims.

In conclusion, it must be said that while the UN-supported effort to prosecute war crimes in Kosovo might be well intentioned, it has been, in most regards, a failure. The results might have been much better if the UN had acted more boldly and placed internationals in charge from the outset. This would have gone far to eliminate actual and perceived bias within the justice process. The UN also failed to develop a clear strategy to go after higher level commanders. As it was, the courts seemed to have charged only those few individuals of lower rank who fell into their hands, with marginal results, leaving little reason for the victim population to feel like justice had been done.

IV. East Timor: Choosing the Path of Least Resistance

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[97] *UNMIK Pillar 1 Police and Justice*, Presentation Paper (June 2004) at 43-44, online: <www.unmikonline.org/justice/documents/Pillar1_Report_June04.pdf>.

[98] "Bridging Kosovo's Mitrovica Divide," International Crisis Group, Europe Report N 165 (13 September 2005) at 13, online: International Crisis Group <http://www.crisisgroup.org/home/index.cfm?l=1&id=3650>.

[99] See generally *ibid.*

While UNMIK was stumbling its way through the first stages of building some kind of justice system for liberated Kosovo, events were occurring halfway around the world that would put the UN yet again in the position of rebuilding a violence ravaged country. In September of 1999, after East Timorese citizens voted overwhelmingly for independence from Indonesia, Indonesian security forces and Indonesia-supported militiamen engaged in a campaign of violence similar in many regards to that orchestrated by Serbian forces in Kosovo. The Australian military, operating under UN authority, interceded to prevent even greater violence and a short time later, the UN took responsibility for administering East Timor.

Faced again with the dual tasks of building a country's legal system from scratch and seeking justice for the victims of serious human rights violations, the UN, this time, decided to create two separate criminal court systems- one to deal with ordinary crimes, the other to deal with "special crimes"- crimes against humanity, that had occurred leading up to and immediately following the vote for independence. A review of the East Timor special crimes operation will show that in constructing the special crimes branch of the dual East Timor justice system, the UN avoided some of the errors it had made in Kosovo and repeated others. It will reveal that since it never possessed the ability to bring high-level Indonesian perpetrators to trial and since the UN never possessed the political will to force Indonesia to cooperate, any effort to achieve larger justice objectives was doomed to fail.

A. Background

The Pacific island of Timor sits in the middle of the vast island chain known as the Indonesian Archipelago.[100] East Timor makes up only half of the island; West Timor, a province of Indonesia, makes up the other half.[101] This split between the island halves is a result of the island having had two different sets of colonial masters. The first Portuguese explorers arrived in the area in the 1500s and established trading posts on

[100]Bartholomew, *Illustrated Atlas of the World* 50-51 (2d ed. 1994).
[101] *Ibid.*

several islands including the island of Timor.[102] When the Dutch arrived two hundred years later, they built their own trading posts on the western side of Timor leaving the Portuguese in control of the eastern side.[103] The Portuguese and Dutch ruled the island halves separately but did not reach a formal agreement establishing the current borders of East and West Timor until 1912.[104] When Indonesia gained its independence from the Netherlands in 1949, West Timor became a part of Indonesia and East Timor remained under Portuguese control.[105] With the exception of a short period of Japanese occupation during World War II, Portugal controlled East Timor for nearly 500 years.

In 1974, Portugal announced its intention to divest itself of its colonies around the world including East Timor.[106] Despite the fact Indonesia had no historical claim on East Timor, Indonesia's leadership, having determined that an independent East Timor was a threat to Indonesia's internal security, put plans in motion to absorb East Timor into its island conglomerate.[107] Indonesia first attempted to manipulate the political environment in East Timor by providing support to groups within East Timor that would push for integration with Indonesia once Portugal had withdrawn.[108] When these efforts proved inadequate, Indonesia's leadership orchestrated a civil war between rival East Timorese political parties, and of course provided support to the party more inclined to favor integration.[109] When the pro-Indonesia faction lost, Indonesia's military invaded and took over the half island.[110] During the invasion, Indonesia killed thousands of East Timorese fighters and civilians and drove the resistance into the mountains. Two years

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[102] Jose Ramos-Horta, *FUNU: The Unfinished Saga of East Timor* (Trenton, New Jersey: The Red Sea Press, Inc. 1986) at 17. See also Geoffrey C. Gunn, "The Five-Hundred-Year Timorese Funu" in Richard Tanter, Mark Selden & Stephen R. Shalom, eds., *Bitter Flowers, Sweet Flowers: East Timor, Indonesia, and the World Community* 3 (Lanham: Rowman & Littlefield Publishers, Inc., 2001) at 3.
[103] John G. Taylor, "The Emergence of a Nationalist Movement" in Peter Carey & G. Carter Bentley eds., *East Timor at the Crossroads: The Forging of a Nation* (Honolulu: University of Hawaii Press 1995) 21 at 23-28.
[104] Ramos-Horta, *supra* note 101 at 19.
[105] Gunn, *supra* note 101 at 32.
[106] *Ibid.* at 6.
[107] Ramos-Horta, *supra* note 101 at 64-65
[108] *Ibid.* at 8-11.
[109] See generally Ramos-Horta, *ibid.* at 65-71.
[110] Don Greenlees & Robert Garran, *Deliverance: The Inside Story of East Timor's Fight for Freedom* (Crows Nest NSW Australia: 2002) at 10-15.

after the invasion, Indonesia annexed East Timor, making it Indonesia's twenty-seventh province.[111]

The East Timorese did not accept Indonesian annexation happily. Segments of the population became actively involved in resistance activities.[112] The Indonesian response to this resistance was harsh in the extreme. Indonesian security and pro Indonesian militia killed thousands of East Timorese in an effort to end the resistance.[113] They used starvation, torture and rape as instruments of extermination and terror.[114] By 1980, they had killed, either by violence or starvation, more than 200,000 people, one third of East Timor's population.[115] Despite this brutal campaign, pockets of resistance fighters survived and maintained a guerilla war against Indonesian forces for nearly twenty five years.[116]

Although Indonesia attempted to seal off the island from the outside world for much of the 1970's and 1980's, word of the atrocities committed by the Indonesian security forces leaked out and Indonesia came under relentless international pressure to remove its heavy hand from the half island.[117] This political pressure brought about unexpectedly rapid political change. On 27 January 1999, newly elected Indonesian President B.J. Habibie announced his intention to allow the East Timorese to choose between some type of autonomy within Indonesia or independence.[118] Less than five months after this announcement, Indonesia, Portugal, and the United Nations reached an agreement, termed the Tri-partite Agreement, which allowed for a popular referendum in which the East Timorese would be allowed to vote for special autonomy within Indonesia or for a

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[111] Rodney Tiffen, *Diplomatic Deceits: Government, Media and East Timor* (UNSW Sydney, Australia University of New South Wales Press Ltd. 2001) at 25-42.
[112] *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste in 1999*, UN Doc S/2005/458 (26 May 2005) at 8, section 3.
[113] *Ibid.*
[114] One Indonesian journalist who visited East Timor during this time period called the island an Indonesian army "playground." Hidayat Djajmihardja, "A Reporter's View" in Damien Kingsbury ed., *Guns and Ballot Boxes: East Timor's Vote for Independence* (Monash Asia Institute: 2000) at 107.
[115] Kingsbury, *ibid.* at II. For an explanation of where this figure originated see Tanter, *supra* note 116 at 260.
[116] *Supra* note 109 at 4.
[117] See *supra* 111 at 8, section 4.
[118] See *supra* note 109 at 101.

separation from Indonesia that would ultimately result in independence.[119] The agreement called upon the UN to conduct and monitor the referendum but gave Indonesia, not the UN, full responsibility for providing security during the referendum period.[120]

Leaving Indonesia with responsibility for providing security for the referendum proved to be a recipe for terror and bloodshed. Even before the Tri-Partite Agreement was signed, the Indonesian military and the local militia groups it supported began to terrorize pro-independence supporters in hopes of provoking a reaction that would bring about the cancellation of the referendum or, failing in that, discouraging pro-independence supporters from casting their votes.[121] Despite this campaign of intimidation, 98% of the citizens turned out to vote.[122] More than 78% of these citizens rejected the offer of special autonomy and thereby selected independence.[123]

Indonesian security forces and the East Timorese militia they supported responded to the election results by going on a rampage of violence and destruction. They put the island to the torch, burning and otherwise destroying seventy to eighty per cent of the man- made structures in the country.[124] They killed thousands of East Timorese villagers.[125]
In an operation similar to that conducted by Serbian forces in Kosovo, the Indonesian military drove more than 200,000 people from their homes and transported them to West Timor.[126]

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[119] *Ibid.* at 148.
[120] *Ibid.* at 148-149.
[121] *Ibid.* 129-58.
[122] *Supra* note 111 at 9, section 6.
[123] *Ibid.*
124 KPP-HAM Report: Executive Summary, Report on the Investigation of Human Rights Violations in East Timor (Jan. 31, 2000), online: <http://www.asahi-net.or.jp/~ak4a-mtn/documents/kppham.html>.
125 The UN Commission of Experts report states that there were "more than 1,400 killings." *Supra* note 133. However, it is impossible to know how many people were actually killed. This is due to a number of factors. The practice of the military and militias was to take the bodies away and bury them or dump them in the sea. In the hot and humid climate of East Timor, bodies decay quickly and the sea is deep and vast. Also, with so many people forcibly deported, it is not clear how many were killed and how many remain in West Timor. There are also areas of East Timor where violence occurred, but the United Nations has not yet had an opportunity to do an investigation. Tanter, *supra* note 116 at 243, 262.
[126] *Supra* note 109 at 202.

Since much of this violence took place in plain view of UN election observers, it was difficult for the UN to ignore and, for a change, drew a relatively quick UN response. On 20 September 1999, the UN sent a peacekeeping force, spearheaded by Australian soldiers and labeled the International Force East Timor (INTERFET), to the island in an effort to stem the violence and encourage Indonesian forces to withdraw quickly.[127] Indonesian forces did withdraw and by the end of October, INTERFET was in control of the country.[128] The Security Council followed up the military intervention by passing Resolution 1272, which established the United Nations Transitional Authority for East Timor (UNTAET) as the short term-government of East Timor.[129]

B. Establishing the Justice Framework

Of course one of the first priorities of UNTAET was to establish law and order and this demanded the creation of some type of justice system.[130] In this, the UN faced many of the same problems it faced in Kosovo. The physical infrastructure of East Timor's justice system had been completely wiped out.[131] Courthouses and offices had been burned; office equipment had been carried off or destroyed.[132] Most importantly, the vast majority of judges and lawyers who had experience running a justice system had left for Indonesia and were not coming back.[133]

The other major dilemma UNTAET shared with UNMIK was the dilemma of how to handle the serious human rights violations that took place in 1999 and years proceeding. From the beginning, the international human rights community strongly advocated the creation of an international ad hoc tribunal along the lines of the ICTY and ICTR.[134] Early statements coming from within the UN system suggested this would be the route the UN would select. For example, a UN sponsored International Commission of Inquiry

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[127] *Ibid.* at 270.
[128] *Ibid.* at 291-294.
[129] U.N. SCOR, 54th Sess., 4057th mtg, U.N. Doc S/Res/1272 (1999).
[130] See *supra* note 28 at 3-4.
[131] *Ibid.* at 3-4.
[132] *Ibid.* at 4.
[133] *Ibid.* at 4.
[134] See "Calls for International War Crimes Tribunal" *Back Door Newsletter on East Timor*, online; <http://www.tip.net.au/~wildwood/tribunal.htm#indonesians>.

concluded that the Indonesian Army was responsible for the intimidation and violence[135] and advocated the creation of an international human rights tribunal.[136] Also, the UN Human Rights Committee (UNHCR) sent Rapporteurs to East Timor in November 1999 who returned to write a report that laid the blame for the violence squarely on the shoulders of the Indonesian authorities and recommended the creation of an international ad hoc tribunal. [137] A paragraph from the UNHCR report bears quoting since it states, very plainly and precisely, why they felt justice mechanisms other than an international ad hoc, would not work in East Timor:

> The East Timorese judicial system, which still needs to be created and tested, could not hope to cope with a project of this scale. It is clear that the best efforts of INTERFET/UNTAET, geographically limited as they will be, or of the United Nations Commission of Inquiry, limited in time and powers as it will be, are unlikely to lead to the carrying out of complete investigations into the full range of crimes that require to be clarified. The record of impunity for human rights crimes committed by Indonesia's armed forces in East Timor over almost a quarter of a century cannot instill confidence in their ability to ensure a proper accounting. Nor, given the formal and informal influence wielded by the armed forces in Indonesia's political structure, can there, at this stage, be confidence that the new Government, acting in the best of faith, will be able to render that accounting. The investigative forces will need to feed into a system which ensures that those responsible are brought to justice. The same factors that argue for international investigation argue similarly for an international judicial process.[138]

The Rapporteurs language left no room for misinterpretation of their message: Indonesia could not be trusted to bring those responsible to account. A domestic tribunal, acting under the authority of UNTAET, would not possess the resources or the reach to get the job done. An international ad hoc was the only reasonable solution.

In the face of these unambiguous recommendations and the unassailable logic supporting them, the UN leadership rejected the establishment of an international tribunal and

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[135] *Report of the International Commission of Inquiry on East Timor*, Office of the UNHCHR, 54th Sess., A/54/726, S/2000/59 (2000).
[136] *Ibid.* at sections 147 and 152.
[137] *Ibid.* at sections 147 and 152.
[138] *Situation of Human Rights in East Timor,* Office of the UNHCHR, 54th Sess., UN Doc. A/54/660, (1999).

instead, headed down a road that would lead to the creation of exactly the types of tribunals the Rapporteurs forecasted for failure. In a letter dated 31 January 2000 to the Security Counsel, Secretary-General Kofi Annan responded to the International Commission of Inquiry report by refusing to establish an international ad hoc tribunal and expressed confidence in Indonesian President Abdurrahman Wahid's assurance to "uphold the law and.. support the investigation and prosecution of the perpetrators through the national investigation process under way in Indonesia."[139] He left the door open for some UNTAET involvement in human rights prosecutions however by writing that the UN should "pursue various avenues" to ensure that justice would be brought to the people of East Timor.[140]

At the beginning, it was not clear how UNTAET would interpret this mandate to "pursue various avenues" of justice. Security Council Resolution 1272 gave UNTAET the authority to administer East Timor and to provide for the administration of justice but it did not call for the creation of any sort of tribunal, domestic or international, to try crimes against humanity.[141] It was not long however before UNTAET revealed that it did intend to pursue serious human rights prosecutions and that it would do so by creating a type of hybrid justice system. On 6 March 2000, UNTAET passed Regulation 2000/11 which established the basic structure of the East Timor court system.[142] Article 10.1 of this regulation gave exclusive jurisdiction of "Serious Crimes" that occurred between 1 January 1999 and 25 October 1999 to the District Court in the capital city of Dili and defined serious crimes as being: genocide, war crimes, crimes against humanity, murder, sexual offences and torture. A few days later, UNTAET passed regulation 2000/15

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[139] *Identical Letters Dated 31 January 2000 From the Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, U.N. SCOR, 54th Sess., agenda Item 96, at 1, U.N. Doc. A/54/726 (2000).
[140] *Ibid.*
[141] *Supra* note 128.
[142] *Regulation No 2000/11 on the Organization of Courts in East Timor,* UNTAET/REG/2000/11, (entered into force 6 March 2000), *Official Gazette of East Timor,* UNTAET/GAZ/2000/Add.1 This regulation followed upon the passage of Regulation 1999/1 which gave the Transitional Administrator the authority to appoint judicial authorities, and provided that the laws that would apply in East Timor, until new regulations were drafted, would be the laws applied prior to 25 October 1999 insofar as they did not conflict with established international human rights standards, *Regulation No 1999/1 On the Authority of the Transitional Administration in East Timor,* UNTAET/REG/1999/1, (entered into force 27 November 1999), online: <http://www.un.org/peace/etimor/untaetR/etregl.htm.>.

which created Special Panels to hear Serious Crimes cases[143] and required that these panels be made up of a majority of international judges- two international judges and one East Timorese judge.[144] With regard to genocide, war crimes, and crimes against humanity, Regulation 2000/15 adopted the pertinent articles of the Rome Statute as the law to be applied by the Special Crimes Panels.[145] To prosecute serious crimes cases, UNTAET created a special unit within the Public Prosecutor's Office, the Serious Crimes Unit (SCU), which it gave the authority to direct and supervise the investigation and prosecution of serious crimes.[146] While the Regulation establishing the SCU called for the creation of a staff that included East Timorese and international experts "as necessary," the unit would in fact be staffed almost exclusively by international prosecutors, investigators and case managers.[147]

Initially UNTAET did not pass a corresponding regulation to establish an organization to defend those accused of human rights offenses but instead relied upon ad hoc representation of serious crimes defendants.[148] Eventually, in September of 2002, the United Nations Mission to East Timor (UNMISET), UNTAET's successor, established the Defense Lawyer's Unit (DLU) to provide competent representation to Special Panel defendants.[149]

Although the defense piece of the justice structure was slow in forming, it can be said that by March 2000, East Timor had its hybrid. It seems clear from the foundational steps UNTAET took in creating the hybrid that it intended to apply some of the lessons learned

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[143] *Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses,* UNTAET/REG/2000/15 (entered into force 11 March 2000), *Official Gazette of East Timor,* UNTAET/GAZ/2000/Add.3.
[144] *Ibid.*
[145] *Ibid.* For a comparison to the Rome Statute, see Suzannah Linton, "Prosecuting Atrocities at the District Court of Dili" (October 2000) 2 Melbourne Journal of International Law 414.
[146] *Regulation No. 2000/16 on the Organization of the Public Prosecution Service in East Timor,* UNTAET/ REG/2000/16 (entered into force 11 March 2000), *Official Gazette of East Timor,* UNTAET/GAZ/2000/1/Add.3.
[147] See Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor" (2003) 16 Harv. Hum. Rts. J. 245 at 3.
[148] On *the Establishment of a Legal Aid Service in East Timor,* UNTAET/REG 2001/24 (5 September 2001). This regulation established a legal aid service for East Timor but did not specifically mention who would staff it.
[149] *Supra* note 111 at 36.

from mistakes made in Kosovo. For example, this time they did not mix ordinary cases with extraordinary cases but created a separate system to deal with serious human right offences and provided it with a largely international legal framework. This time, from the very beginning, they manned the operation with a majority of international staff-judges, prosecutors, defense lawyers. In creating the hybrid however, the UN seemed to have ignored the central problem of the East Timor justice equation which was- those most responsible for the violence in 1999 were living in Indonesia and an UNTAET hybrid court would not be able to reach them. It was a problem that would not go away, no matter how efficiently or inefficiently the hybrid operated. It was the elephant under the bed. The other issue that no one had apparently given much consideration was the issue of what the consequences would be to the future nation of East Timor if the SCU actually issued indictments against prominent Indonesians- indictments that neither UNTAET nor East Timor had the power to enforce.

Why did UNTAET create a hybrid justice system against the advice of so many and without having solutions to such important problems? The answer to this is not clear. It cannot be denied that UNTAET had a pressing need to quickly create a court to deal with serious human rights offenders. INTERFET had arrested a large number of East Timorese suspected of serious human rights offenses and needed to submit them to some sort of justice process.[150] They could not hold them in custody indefinitely. The UN must also have felt the pressure exerted by the international human rights community to do *something* to see that human rights offenders were prosecuted. It is possible that the hybrid's architects hoped to create a type of complementary justice regime in which Indonesia would pursue human rights prosecutions of their citizens in Indonesia while the East Timor Special Panels would try East Timorese. If this was in fact their thinking, it was worse than wishful thinking; it was delusional. As the 1999 Rapporteaurs had recognized, Indonesia had been committing crimes against the East Timorese people without apology for twenty-five years before the referendum. During the referendum, the Indonesian military and elements of Indonesia's civilian government had used extreme measures in their effort to derail the referendum, often in full view of UN monitors. After

[150] *Supra* note 28 at 4.

the intervention, Indonesian government officials were less than contrite, some still repeating the absurd claim that Indonesian security forces were not involved in the violence at all, only East Timorese operating independently of Indonesian authorities. In short, the facts offered no realistic possibility that Indonesia would either make a good faith effort to prosecute its citizens or cooperate with an UNTAET sponsored tribunal.

It is possible that the architects of the hybrid simply did not take the time to step back and see the whole picture. Perhaps in their desire to improve on the Kosovo justice model, they did not look ahead and see that they were creating an impotent organ that could not reach those most responsible for the violence and were putting a process in motion that would make reconciliation between East Timor and Indonesia much more difficult. Certainly the UN leadership saw that creating an ad hoc tribunal along the lines of ICTY or ICTR would put the UN in conflict with Indonesia and that engaging in such a conflict with a country the size and importance of Indonesia would be a much different proposition than dealing with a rogue state like Serbia or a failed state like Rwanda. So it would seem that by choosing to create a hybrid rather than an ad hoc tribunal, the UN was not so much interested in choosing the best path, but in choosing the path of least resistance.

C. What Results Achieved

The Special Crimes Unit and Special Crimes Panels operated under the authority of UNTAET for approximately two years. On 20 May 2002, East Timor formally became an independent nation, and SCU and the Special Crimes Panels technically became part of the East Timorese domestic justice system.[151] However, even after East Timor acquired nationhood, the special crimes justice effort remained very much a UN operation. The Special Crimes Panels, SCU, and the offices of the defense continued to be staffed by a majority of international personnel whose salaries were paid by the UN and who were accountable to the UN.[152] When the Special Crimes Panel conducted its

[151] United Nations Mission of Support for East Timor Home Page, online: <http://www.un.org/Depts/dpko/missions/unmiset/index.html>.
[152] *Supra* note 111 at 18-37.

final hearing on May 12, 2005, it had operated for approximately five years.[153] How did it perform? To give a fair answer to this question it is helpful to first review the individual, overall performances of the three branches of East Timor hybrid structure – the judiciary (Special Crimes Panels), the prosecution (SCU), and the defense.

1. Special Crimes Panels

The performance of the Special Panels has been very much a mixed bag. Certainly in terms of the number of human rights cases handled and the ratio of convictions to acquittals it was an improvement over Kosovo. During the course of its operation, the Special Panels convicted 84 defendants and acquitted three.[154] This statistic, if nothing else, suggests that the hybrid achieved results with a high degree of efficiency. Also, since the Special Panels were staffed with a majority of internationals from the outset and since post-referendum East Timor was homogenous in ethnicity, the Special Panels verdicts faced little or no criticism for being influenced by ethnic bias. But while the efficiency of the Special Panel appears to have been superior to that of Kosovo's courts, there were problems the Special Panels had in common with Kosovo.

One of the problems shared by the East Timor and Kosovo courts was the problem of insufficient staffing. For much of the time the Special Panels operated, they were short of personnel. During its years of operation, there were usually not enough judges to fill the two trial court panels and the one appeal court panel called for by the regulations. There was also a complete or near complete absence of secretaries, legal clerks and court stenographers or transcribers.[155] This situation led to lengthy delays in cases being tried, and resulted in defendants being held in custody for periods far exceeding those allowed by the regulations. Frequently, defendants were detained beyond the seventy-two hour limit before their preliminary hearings[156] and some individuals were left in prison

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[153] "The Special Panels for Serious Crimes Hear Their Final Case," Justice Update: Period 12 May – 20 May, Issue 12/2005, online: East Timor, Judicial System Monitoring Programme <http://www.jsmp.minihub.org/Justice%20update/2005/May%202005/050520_JSMP_JUissue12(e).pdf>.
[154] *Ibid.*
[155] Katzenstein, *supra* note 146 at 48; David Cohen, "Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?" (Aug. 2002) 63 Asia Pacific Issues at 259-60, [Cohen, Seeking Justice] online: <http://www.eastwestcenter.org/stored/pdfs/api061.pdf.>.
[156] Katzenstein, *ibid.* at 4.

awaiting trial for months or even years.[157] The lack of court reporters and stenographers also had an impact on the functioning of the appellate court since they were forced to make their decisions without benefit of a complete trial court record.[158]

Similar to many of the proceedings in the courts of Kosovo, many of the Special Panel proceedings lacked elements necessary to provide a fair trial under international standards. Since there was often a severe shortage of interpreters it was not always clear that the accused, the witnesses or the court personnel understood what was being said in court.[159] There were also problems with the quality of judicial decision making. In the early cases heard by the court, the judges neglected to apply international law or applied it, some say, incorrectly.[160] For example, in July 2003, when the Appeals Chamber finally began operation, a majority of the court ruled that a defendant previously convicted of Crimes against Humanity was instead guilty of Genocide, a crime with which he had never been charged.[161] Even more disturbing was the Appellate Court's decision in the Armando dos Santos case where a majority ruled that the Special Panel should be applying Portuguese law rather than Indonesian law thereby challenging the validity of Regulation 2000/15 and all of the decisions that were based upon its authority.[162] The Special Panels chose to ignore this ruling, finding it to be unconstitutional, and continued to apply Indonesian law,[163] a state of affairs which at the very least, put into question the supremacy and integrity of Appellate Court decisions.[164]

While the Special Panels have been criticized for all of the above mentioned deficiencies, it is important to note, that the Panels have not been criticized for convicting innocent

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[157] *Ibid.*
[158] Cohen, Seeking Justice, *supra* note 154 at 259-60.
[159] *Ibid.* at 7
[160] *Ibid.*; See also Linton, *supra* note 144 which provides a detailed analysis of first two cases tried by the Special Panel.
[161] Court to Appeal Decision Raises National and International Concern, Press Release, Judicial System Monitoring Programme (17 July 2003), online: < http://www.jsmp.minihub.org/News/17nb-7_03nb.htm>; Jill Jolliffe, "Old European Tongue Brings Chaos to New Nation," *Sydney Morning Herald* (26 July 2003), online: < http://www.smh.com.au/articles/2003/07/25/1059084208801.html>.
[162] *Ibid.*
[163] *Supra* note 111 at 34, section 131.
[164] Prime Minister Alkatiri called the ruling "incompetent and unconstitutional." Jill Jolliffe, "Chaos Fears Follow Ruling," *The Age*, online: <http://www.theage.com.au/articles/2003/07/25/1059084208852.html.>.

individuals. From this it can be concluded that at least in regards to determining the critical issue of culpability, the Panels have done an adequate job. Furthermore, while the Panels may have failed to provide quality interpretation of witness testimony at times, the manner in which the Panels conducted trial proceedings did, by and large, provide victims and witnesses a controlled and neutral forum in which to relate their experiences and be questioned by the parties.[165]

2. The Defense

In the early days of East Timor's hybrid operation, the UN exercised a profound level of neglect for the needs of the defense.[166] From the beginning, the UN allocated very few resources to the effort to defend those accused of committing human rights offenses. For the first two years of the hybrid's operation, there was effectively only one individual assigned to defend cases in front of the Serious Crimes Panel.[167] The situation improved in the following years with an increased number of defense lawyers to defend clients in front of the Panels, but the quality of representation suffered from the lawyer's lack of experience.[168] During most of its operation, defense lawyers were not given translators or investigators, and had no budget for witness expenses such as travel and witness protection.[169] For these and other reasons, the defense did not call a single witness in any of the first 14 cases the Serious Crimes Panel tried.[170] While the UN provided greater support as the years passed, the defense continued to be grossly undermanned, under funded and ill prepared in many cases to provide what could be considered high quality representation by international standards.[171]

3. The Serious Crimes Unit

When the SCU first began its operation, it moved slowly and drew criticism for failing to aggressively pursue cases against high level Indonesian commanders.[172] Some observers

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[165] *Supra* note 111 at 33, section 125.
[166] See Sylvia de Bertodano, "East Timor: Trials and Tribulations" in Romano, *supra* note 5 at 88-89.
[167] *Supra* note 146 at 9.
[168] *Supra* note 111 at 36-37.
[169] *Supra* note 146 at 9.
[170] Cohen, Seeking Justice, *supra* note 154, at 7.
[171] *Supra* note 165.
[172] *Supra* note 146 at 4, 14-15; Cohen, Seeking Justice, *supra* note 154 at 414.

attributed this slow beginning to lack of resources and poor management. [173] By the end of the second year of operation however, the UN had changed the management of the operation and had provided the SCU greater resources.[174] The effect of these changes upon the operation was dramatic. SCU's pace of investigation and indictment accelerated. While at the end of 2001, SCU had indicted 77 individuals for serious crimes offenses,[175] by the end of 2003, it had indicted a whopping 395.[176] After suffering constant criticism for moving too slowly against the Indonesian architects of the 1999 violence, on 23 February 2004, SCU filed its "National Case" indicting former Indonesian Army General Wiranto, former governor of East Timor Abilio Suarez, and six other high ranking Indonesian and civilian commanders with crimes against humanity. [177] The indictment alleged that the men were responsible for massive human rights violations that had occurred all across the island of East Timor and included allegations of arming, providing financial support, and in some cases, directing the militias who carried out much of the violence.[178]

Looking only at the raw numbers, SCU's performance appears extraordinary. In just five years, SCU indicted 440 individuals for serious crimes, and ended up with a conviction rate of 97 per cent.[179] Unlike the Kosovo prosecutor's offices, SCU issued indictments against those believed *most responsible* for the bloodshed and destruction reaching as high as Indonesia's top military commander at the time of the referendum. But the numbers are deceiving. While SCU convicted 84 defendants of serious crimes, *none* of the defendants were high ranking Indonesian military or civilian officials. [180] The

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[173] Allen Sipress, "Most Suspects in Timor Violence Remain Free in Indonesia'" *Washington Post* (15 October 2003), online: <http://www.globalpolicy.org/intljustice/tribunals/timor/2003/1015free.htm>.
[174] Cohen, Seeking Justice, *supra* note 154 at 4-5.
[175] *Supra* note 152.
[176] *Ibid.*
[177] Deputy General Prosecutor for Serious Crimes, Indictment Before the Special Panel For Serious Crimes, (24 February 2003), online: <http://www.jsmp.minihub.org/indictmentspdf/wirantoindictenghs4mar03.pdf> [hereinafter 2003 Indictment]. The indictment charges Wiranto, Zacky Anwar Makarim, Kiki Syahnakri, Adam Rachmat Damiri, Suhartono Suratman, Mohammad Noer Muis, Yayat Sudrajat, and Abilio Jose Osorio Soares. Soares was the Governor of East Timor, while all of the other indictees were Indonesian military officers in 1999.
[178] *Ibid.*
[179] *Supra* note 152.
[180] *Supra* note 111.

overwhelming majority, if not all, were East Timorese.[181] Moreover, while SCU indicted 440 individuals for serious crimes, 339 of those, more than two thirds, are living outside the jurisdiction of East Timor.[182] This of course includes all of the Indonesian military and civilian commanders accused of being the architects of the 1999 campaign of terror and many of their most trusted East Timorese subordinates. Since Indonesia and East Timor have no extradition agreement and since the government of Indonesia has refused from the beginning to cooperate with the UN sponsored court in any meaningful way,[183] neither the SCU nor the Special Panels have any means to compel defendants or witnesses living in Indonesia to appear in court. Since Indonesia continues to maintain an antagonistic stance toward East Timor's courts, the only possibility that accused living in Indonesia will answer in East Timor will be through some sort of international intervention. Such intervention is exceedingly unlikely. Proof of this fact was shown by the UN's reaction to the Wiranto indictment.

D. the Wiranto *et al* Indictment

On 24 February 2003, the SCU filed the Wiranto *et al* indictment. Just a few hours later, in response to the indictment, the spokesman for the UN Secretary-General, Fred Eckhard, made a statement to the international press which was clearly intended to distance the UN from the indictment. [184] Eckhard "remind[ed]" the press that the indictments were issued by the Prosecutor General of East Timor and not the United Nations and told them the UN merely "provides advisory assistance to the East Timorese."[185] Eckhard's statements were disingenuous since it was in fact, UN personnel who ran the SCU and it was UN staff that created and pushed the filing of the indictment. He also failed to provide the

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[181] *Ibid.* at 5, section 9.
[182] *Supra* note 152.
[183] *Supra* note 111 at 5, section 13.
[184] Daily Press Briefing, Office of the Spokesman for the Secretary-General (Fred Eckhard) (25 February 2003), online: <www.un.org/News/briefings/docs/2003/db022503.doc.htm>.The complete text of Eckhard's comments is as follows:

> Many of you have seen a number of different reports by major news agencies today concerning a United Nations indictment of a leading Indonesian general in connection with crimes in East Timor. I have to remind you that those indictments were issued by the Office of the Prosecutor General of Timor-Leste, and not by the United Nations, which merely provides advisory assistance to the East Timorese in this matter. So, we hope that in future you'll say, "East Timor indicts", and not "the United Nations indicts."

[185] *Ibid.*

slightest indication that the UN would assist East Timor to bring the indicted individuals before the court. In fact, the clear implication of the statement was that the UN was washing its hands of the Wiranto indictment, leaving the new government of East Timor holding the bag.

The reaction of East Timor's leadership to the UN's pusillanimity, was at first disbelief, then anger, and then ultimately, confusion. East Timor's Prime Minister Mari Alkatiri, strongly criticized the UN for its lack of courage[186] and later suggested that since the international community was obviously not sincere about punishing those most responsible for the 1999 violence- the Indonesian commanders, East Timor should grant amnesty to all the East Timorese militiamen convicted to date.[187] East Timor's President Xanana Gusmao, the charismatic leader of the East Timor's guerilla resistance during much of the Indonesian occupation, at first expressed surprise that the indictment had been issued without his ever being consulted or even informed.[188] His next reaction was to criticize the UN for issuing the indictment at all since it created an enormous obstacle to East Timor's reconciliation with Indonesia.[189] How could East Timor build economic ties and reach accommodation on border and security arrangements while it held leading members of Indonesia's military and government under criminal indictment? East Timor General Prosecutor, Longuinos Monteiro's reactions were the most conflicted of the lot and ultimately left him looking the most foolish. After the indictment was first filed by his office, he publicly and repeatedly expressed outrage over the UN leadership's lack of support and filed a request with the Special Panel to issue arrest warrants for Wiranto and the others.[190] Later, after being called into the offices of President Gusmao, Longuinos changed his tune completely, saying that his office had "jumped the gun" and made a "stupid move."[191] When the Special Panels actually issued an arrest warrant for Wiranto,

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[186] Jill Jolliffe, "Timor PM Slams UN on War Criminals," *Asia Times* (15 May 2003), online <http://www.atimes.com/atimes/Southeast_Asia/EE15Ae03.html>.
[187] "PM Alkitiri Wants Amnesty for Crimes of 1999," Lusa (12 June 2003), online: <http://www.etan.org/et2003/june/08-14/12etpm.htm>.
[188] " Xanana Regrets Indictment Against Wiranto et al.," *Dow Jones Reuters-Factiva* (28 February 2003).
[189] "Dili Worried Indictments Damaging Key Relations with Jakarta" East Timor Action Network/US, (28 February 2001), online: <http:www.etan.org/et2003/February/23-28/28dili.htm>.
[190] *Supra* at 111, section 71.
[191] *Ibid.*

Longuinos appeared in person before the court in a clumsy and ultimately futile attempt to retrieve it.[192]

Of course this absurd situation was brought about by the UN leadership's original failure to have foreseen the inevitable consequences of the SCU actually doing the job it had been asked to do. Foreseeable or not, inevitable or not, it was now clear that neither the UN nor the government of East Timor was about to take steps to pressure Indonesia into bringing the indicted Indonesians to face the charges in front of the Special Panels. Of course at that time, there was still one possible avenue of accountability still in play. This avenue was the investigation and prosecution process promised to the Secretary-General by the President of Indonesia back in early 2000.

E. The Indonesian Ad Hoc Human Rights Tribunal

After promising the Secretary General that it would pursue justice for those Indonesians responsible for human rights violations in East Timor, Indonesia slowly began to assemble the elements of a special court system that at least resembled an effort to prosecute and punish human rights violators. On 23 April 2001, President Wahid enacted Presidential Decree No. 53/2001 and established the Indonesian Human Rights Court to try human rights offenses committed in East Timor.[193] Indonesian prosecutors eventually went on to charge eighteen individuals with crimes against humanity. While their list of indictees did not include Wiranto, it did include high level military officers like Adam Damiri, the Regional Force Commander responsible for military activities in East Timor in 1999, civil authorities like Abilio Soares, the former Governor of East Timor, and the notorious East Timorese militia leader Eurico Gutierrez, then living in Indonesia.[194]

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[192] *Ibid.*

[193] Wahid's successor, President Megawati Soekarnoputri signed a new decree on August, 2001, New Presidential Decree No. 96/2001, which specified the crimes against humanity to be brought to court, namely human rights violations in the Tanjung Priok in September 1984 and in East Timor in April and September 1999. Fabiola Desy Unidjaja, "Ad hoc Trial Delay Could Harm Indonesia's Image," *The Jakarta Post* (10 January 2002), online: Judicial System Monitoring Program <http://www.jsmp.minihub.org/News/news11_1-2.htm>.

[194] *Ibid.* at 13.

The Indonesian ad hoc operated for approximately 16 months[195] and in that time, revealed itself to be a farce. The Indonesian Attorney General's office set the scene of the farce by restricting its investigation to only four major events that took place during April and September of 1999.[196] This had the effect of limiting the temporal jurisdiction of the ad hoc and excluding consideration of many events that might have shown the widespread and systematic nature of the attacks against the population.[197] The Indonesian court completed the farce by acquitting all but one of the accused either at trial or later on appeal.[198] Moreover, none of the accused was detained prior to trial or pending appeal[199] and none of the accused military officers were suspended from their posts pending trial or appeal.[200] In fact, one defendant, Major General Adam Damiri, was given command responsibility in Aceh during the period of his trial and appeal[201] and, in what could be viewed as the military's final spit-in-the-eye to the whole Indonesian justice effort, the military command went on to appoint acquitted defendant Brigadier-General Tono Suratman to the position of chief spokesman for the Indonesian military in 2004.[202]

No one who observed the Indonesian Ad Hoc trials could have been surprised by the results since the ad hoc judicial process lacked even the veneer of fairness and objectivity. Observers reported that the prosecutors were generally inept and ineffective in presenting their cases and showed little commitment to either pursuing the truth or achieving accountability.[203] In some cases, the prosecution even seemed to be making a conscious effort to lose by choosing to base their case on the testimony of witnesses who had clear motives to *exonerate* the defendants.[204] Throughout the trials, there were blatant attempts

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[195] The Indonesia ad hoc tribunal began hearing its first case on 14 March 2002. It finished its last case on August 5, 2003.
[196] Cohen, Seeking Justice, *supra* note 154 at 10-12.
[197] *Supra* 111 at 56.
[198] The one person convicted, Eurico Guiterres, received the minimum allowable sentence. He remains free awaiting the results of his appeal. *Ibid.* at 42, 45.
[199] *Ibid.* at 42.
[200] *Ibid.*
[201] *Ibid.*
[202] *Ibid.*
[203] *Ibid.* at 47,70.
[204] *Ibid.* at 69.

made by the Indonesian military to intimidate the judges on the panel.[205] The judges themselves frequently revealed a bias in favor of the defense by treating witnesses from East Timor with disrespect and derision.[206] A UN Commission of Experts assigned to review the prosecution of serious violations of human rights in East Timor concluded in their 2005 report that the prosecutions before the Indonesian ad hoc court were "manifestly inadequate," that the ad hoc courtroom "did not provide a credible judicial forum" and that overall, the ad hoc court was "not effective in delivering justice for the victims."[207] Human rights organizations which monitored the ad hoc were blunter in their assessments, describing the proceedings as "sham prosecutions,"[208] a "white wash,"[209] and "seriously flawed" because they had delivered "neither truth nor justice."[210]

If the intent of the architects of the East Timor hybrid had been to create a complimentary justice regime, clearly their ambition failed.

F. Justice Analysis

1. *Did the Court punish those individuals most responsible for the perpetration of serious violations of international humanitarian law, genocide and crimes against humanity?*

As was the case for Kosovo, the answer to this question is no. The Special Panels for Serious Crimes did not bring a single high-level Indonesian military or political leader to trial for offenses committed on East Timor and there are no realistic prospects for this to ever happen. The Special Panels convicted only East Timorese and most of these individuals were unsophisticated militia members who were being used as pawns in the much larger game of terror and intimidation orchestrated by the Indonesian leadership.

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[205] For examples of prosecution ineptness and outrageous intimidation of judges see the analysis of the Damiri trial see Cohen, Seeking Justice, *supra* note 169 at 16-19. Cohen reports that, "According to observers, when the verdict was announced, the defendant arose and began screaming abuse at the judges. Pandemonium broke out in the courtroom and members of Kopassus (Special Forces) stood on the benches and also began yelling. One reportedly shouted, "Rudi Rizki, you are dead!" In this threat, he identified the judge who is widely seen as the key factor in four of the six guilty verdicts."

[206] *Supra* note 111 at 71.

[207] *Ibid.* at 6.

[208] "Justice Denied for East Timor" *Human Rights Watch* (December 2002), online: <http://www.globalpolicy.org/intljustice/tribunals/timor/2002/1202deny.htm>.

[209] Brad Adams, "Indonesia has failed in its promise to hold the military accountable for the atrocities in East Timor." *Human Rights Watch,* online: <http://www.hrw.org/press/2002/12/etimor1220.htm>.

[210] "Indonesia: East Timor trials deliver neither truth nor justice," (15 Aug 2002) *JSMP and Amnesty International,* online: <http://www.jsmp.minihub.org/News/15_8-2_02.htm.>

It is true that the Special Panels convicted a significant number of individuals whom they found to have committed horrible crimes against their fellow citizens and that many of these individuals are serving long sentences. There is some merit to the argument that in doing this, the Special Panels has doled out a measure of justice and that some justice is better than none at all. However, if the first measure of a hybrid's effectiveness is to punish those *most responsible* for their crimes, then the Special Panel begins the first step of the analysis, a failure.

2. Did the Court deliver a sense of justice to the victims?

While it is impossible to crawl inside the heads of the victim population and put a measure to their feelings, anecdotal evidence strongly indicates that the East Timor hybrid also failed to deliver a sense of justice to the victims. The UN Commission of Experts who visited East Timor in 2005 reported that East Timorese victims groups complained that only East Timorese had been tried and sentenced while those bearing the greatest responsibility were still free.[211] They reported hearing "consistent calls" for the individuals responsible to be brought to justice and cited a national public opinion poll that reported the majority of the East Timorese people preferred that justice be sought even if it slows down reconciliation with Indonesia.[212] When the Special Panels ceased operation in May 2005, one East Timorese human rights organization, the Judicial System Monitoring Programme, perhaps expressed the general feeling within the East Timorese community when it issued a press release stating that the community and the victims' families were disappointed with the "premature" end of operations and complained that none of those who bore "primary responsibility" for the crimes had been held to account.[213]

3. Did the Court assist in the process of reconciliation between peoples?

With regards to the reconciliation between East Timor and Indonesia, it is quite clear that if anything, the justice effort has made the reconciliation process more difficult. When

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[211] *Supra* note 111 at para. 382.
[212] *Ibid.* at para. 381.
[213] "Justice for Victims Still Elusive," JSMP Press Release (24 May 2005), online: Judicial System Monitoring Programme <http://www.jsmp.minihub.org/Press%20Release/PR_2005/May/050524%20End%20SPSC. pdf>.

the UN shut down operation of the court in May 2005, it left East Timor holding a batch of unenforceable indictments against prominent Indonesians. East Timor's President, Xanano Gusmao stated in no uncertain terms that this has created an obstacle to normalizing relations with Indonesia.[214] The Indonesian government, on the other side, denounced the indictments as a grave insult to Indonesia and refused to accept their legitimacy.[215]

It is possible that by identifying and punishing some of the East Timorese who were supportive of Indonesia during the occupation, the hybrid assisted the process of reconciliation between factions within the East Timorese population since it provided a mechanism for accountability that might otherwise have been filled by members of the public carrying out individual acts of retribution. However, since so many pro-Indonesian East Timorese remain in Indonesia, it is difficult to say to what degree, if any, the formerly pro and anti-Indonesian factions have achieved some sort of comity.

4. Did the Court provide a fair process that ensured the rights of the accused were protected?

It seems that the justice process in East Timor was an improvement in terms of protections provided an accused over that of the Kosovo hybrid courts. By employing a majority of international judges and international prosecutors and defense lawyers from the beginning, the East Timor hybrid was able to avoid the taint of ethnic or factional bias in the proceedings. Following a legal and procedural framework based largely on international law did, in general, provide defendants with the ability to hear the evidence against them and challenge it in a meaningful fashion. There were however, cases in which the judicial process was less than fair. Most notable among these, were the cases where defendants suffered extended detentions without hearing and the cases where defense lawyers provided less than competent representation.

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[214] *Supra* note 187.

[215] See "Indonesian Politicians React to UN Move to Indict Senior Military," *Detik Com* (26 February 2003), online: <http://www.etan.org/et2003/february/23-28/26ipol.htm>.

If the results of the above assessment are summarized, it can be said that the UN's justice effort in East Timor was an improvement over the UN effort in Kosovo but still, on the whole, must be graded a failure. It was a failure because it did not succeed in punishing those most responsible for committing human rights offenses in 1999 and never had any reasonable chance of doing so. It was a failure because it has hampered efforts to reconcile with Indonesia. It was a failure because there is no clear indication that the results it achieved have provided a sense of justice to the victims.

V. Cambodia: Hun Sen Rules

Between 1975 and 1979, the Khmer Rouge killed between one and three million Cambodians.[216] Twenty-four years later, on 17 March 2003, the United Nations and the Cambodian government reached an agreement to establish a criminal tribunal designed to try those most responsible for the massive human rights violations which took place during the Khmer Rouge reign of terror.[217] Another three years later, on 4 July 2006, international and Cambodian judges and prosecutors were sworn in to begin work at the Extraordinary Chamber in the Courts of Cambodia (ECCC).[218] To quickly grasp the Cambodia court's prospects for success, one only need know a few basic facts.

First, the jurisdiction of the court will be limited to crimes that took place between 17 April 1975 and 6 January 1979.[219] Thus, the only crimes the court can consider occurred more than twenty-seven years ago, which means that many of the responsible parties and

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[216] Craig Etcheson, "The Politics of Genocide Justice in Cambodia," in Romano, *supra* note 5 at 181-82.
[217] "UN and Cambodia Reach Draft Agreement for Prosecuting Khmer Rouge Crimes," *UN News Service, UN News Centre* (17 March 2003), online: <http://www.un.org/apps/news/storyAr.asp?NewsID=6487&Cr=cambodia&Cr1=>.
[218] "KR Tribunal Judges, Prosecutors are Sworn in," *The Cambodia Daily* (4 July 2006) at 1.
[219] *Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea* [hereinafter ECCC Agreement], G.A. Res. 57/228(B), U.N. GAOR, 57th Sess., at para. 3, U.N. Doc. A/Res/57/228(B) (2003) (ratified by the National Assembly of the Royal Government of Cambodia on Oct. 5, 2004) Art. 1-2; and *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, with inclusion of amendments (promulgated Oct. 27, 2004) [hereinafter ECCC Law] NS/RKM/1004/06, Art. 1-8, *translated at* http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20amended%2027%20Oct%202004%20Eng.pdf.

witnesses are dead and that the memories of surviving witnesses have faded. Second, the Khmer Rouge mastermind, Pol Pot, and many of his top henchmen are in fact dead and beyond the reach of human justice.[220] Third, according to the agreement concluded between the UN and the Cambodian government, Cambodian judges will be in the majority on the judicial panels.[221] Fourth, while in theory the Cambodian judiciary is an independent organ within the Cambodian government structure, [222] in practice, Cambodia's judges are heavily influenced if not controlled by Cambodia's ruling party and its leader, Prime Minister Hun Sen.[223] Fifth, Hun Sen is a former Khmer Rouge member, and his Cambodian Peoples Party (CPP) and his government include many former Khmer Rouge leaders, some of whom are possible targets of investigation and indictment.[224] Sixth, the ECCC has been given a shoestring budget and a three-year time period within which to accomplish its task.[225] This all adds up to a depressing forecast that the Cambodian hybrid will ultimately do a very poor job of delivering justice to the Cambodian people.

A. Background

In ancient times Cambodia possessed one of the world's most advanced civilizations and its people ruled an Asian empire, but its modern history has been one of colonization and subjugation by foreign powers.[226] The most recent colonizers were the French, who dominated Cambodia from 1863 until the early 1950s.[227] When the French withdrew from Indochina following their defeat at Dien Bien Phu in 1954, Cambodia was left to

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[220] Pol Pot died in 1998. He murdered his former Defense and Security Chief, Son Sen, in 1997. David Chandler, *A History of Cambodia*, 3d ed., (Boulder: Westview Press: 2000) at 243 [hereinafter Chandler, History]. Former Army Chief Ke Pauk died in 2002. Justin Corfield & Laura Summers, *Historical Dictionary of Cambodia*, (Lanham, Maryland: Scarecrow Press, Inc. 2003) at 193. Southwest Zone Commander Ta Mok died of "old age and tuberculosis" in a Phnom Penh military hospital on Jul. 21, 2006. "KR Chief Ta Mok Dies in Military Hospital," *The Cambodia Daily* (22-23 July 2006) at 3.

[221] Agreement, G.A. Res. 57/228(B), *supra* note 218, at para. 13.

[222] Chapter IX, article 109 of the Cambodian Constitution states, "The Judicial power shall be an independent power." Article 111 states, "Judicial power shall not be granted to the legislative or executive branches." *Kingdom of Cambodia Constitution*, Art. 109.

[223] *See* Reality Check *infra*.

[224] *The Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution* 52/135, 53rd Sess., Agenda Item 110(B), U.N. Doc. A/53/850, S/1999/231, (1999) at para. 96 [hereinafter Group of Experts Report].

[225] *See* A Court Built for Delay and Confusion, Financing *infra*.

[226] *See generally* Chandler, History, *supra* note 220.

[227] *Ibid.* at 117-208.

follow its own way as an independent nation under the leadership of then-youthful King Norodom Sihanouk.[228] Sihanouk and his new nation found themselves in a dangerous neighborhood. Some of the dangers were familiar. For centuries Cambodia maintained rivalries with the countries on its borders: Vietnam, Thailand, and Laos and these rivalries were never far from the surface. But the new and more pressing danger was the escalating conflict in Vietnam and its potential for expanding into Cambodia.

In order to keep his country from being sucked into the conflict, Sihanouk adopted a foreign policy of neutrality.[229] This policy worked for nearly a decade but when the war in Vietnam escalated, Sihanouk and his government were soon overwhelmed by the presence of Vietnamese communist sanctuaries within Cambodia's borders, by economic crisis, and by a domestic communist insurgency led by a former school teacher named Solath Sar, who would later become better known as "Pol Pot."[230] In the face of these growing problems, Sihanouk's grip on power began to slip and when he left the country on holiday in March 1970, a group of disenchanted civil servants and military officers led by General Lon Nol staged a successful *coup d'etat.*[231] When Sihanouk heard of Lon Nol's betrayal, he made what would turn out to be the most disastrous about-face of his political career: he leant his name and support to the Cambodian communists who by this time were known as the Khmer Rouge.[232]

Prior to Lon Nol's coup, Sihanouk had brutally repressed the communists and driven them from the cities into the countryside.[233] Although they were receiving financial and military aid from North Vietnam, the communists were a factionalized group without widespread support from the population.[234] This situation changed when Sihanouk joined forces with them since Sihanouk was still very popular with the Cambodian peasantry

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[228] Ben Kiernan, "Introduction: Conflict in Cambodia, 1945-2002," (2002) 34 Critical Asian Stud. 483, 484.
[229] *Ibid.* at 484.
[230] *Ibid.*
[231] Chandler, History, *supra* note 220, at 204-06.
[232] *Ibid.* at 205.
[233] See David P. Chandler, *Brother Number One: A Biography of Pol Pot*, rev. ed. (Chiang Mai, Thailand:Silkworm Books) at 65-85 [hereinafter Chandler, Brother].
[234] Ben Kiernan, *The Pol Pot Regime: Race, Power and Genocide in Cambodia Under the Khmer Rouge 1975-1979* (Chiang Mai, Thailand: Silkworm Books 1996) at 13-25 [hereinafter Kiernan, Pol Pot].

and the Khmer Rouge skillfully played upon this popularity to expand their support base.[235] The Khmer Rogue recruiting efforts were further assisted when the United States began bombing Cambodian territory in 1973, leading many angry Cambodians to join the cause they identified most strongly with opposition to the U.S.[236] With moral and material assistance flowing in and its ranks growing by the day, the Khmer Rouge movement became an unstoppable force. On 17 April 1975, the inevitable occurred -- Lon Nol's government collapsed and the Khmer Rouge marched into Phnom Penh- as the new rulers of Cambodia.[237]

While Cambodia's population had grown accustomed to conflict, few were likely to have foreseen the fate that awaited their country under the Khmer Rouge. As soon as they had seized control of Cambodia's few cities, the Khmer Rouge drove the urban population into the countryside, forcing them to march for days, sometimes weeks, to villages where they were put to work in the fields.[238] The precise motivation for these forced expulsions remains unclear but it is certain to have involved both the Khmer Rouge's determination to turn the country into a nation of peasants as part of their purifying revolution and the recognition by Pol Pot and his associates that these forced expulsions provided a means of gaining control of the urban population and rivals within their own party.[239] During the time of the expulsions and in the years that followed, the Khmer Rouge executed hundreds of thousands of civilians for a variety of reasons- for having been officials of the former government, or members of its army, or for being family members of such people; for coming from an educated background; for not working hard enough; for expressing religious sentiments; or simply for being sick.[240] Many more died from hunger, disease, and exposure. Estimates of the number of people who perished under the Khmer Rouge vary but respected sources estimate that between 1975 and 1979, approximately 2.2 million people died.[241]

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[235] Chandler, Brother, *supra* note 233 at 85-99.
[236] Kiernan, Pol Pot, *supra* note 234 at 16-25.
[237] Chandler, History, *supra* note 220 at 208.
[238] *Ibid.* at 209-11.
[239] *Ibid.* at 210-11.
[240] *See* Group of Experts Report, *supra* note 224, at paras. 5-35.
[241] *Supra* note 216, at 181-82.

The Khmer Rouge leadership's destructive revolutionary philosophy and its extreme paranoia soon led it to devour its own. When Lon Nol's forces were defeated and Cambodia's educated elite had been eliminated, Pol Pot and his ruling clique orchestrated a series of bloody purges in which tens of thousands of Khmer Rouge members, including many of its most important leaders, were tortured and killed.[242] Pol Pot and the Khmer Rouge then turned on their Vietnamese benefactors by killing or driving out large numbers of ethnic Vietnamese living in Cambodia and then engaging in a series of border conflicts with Vietnamese troops.[243] Eventually, the Vietnamese ran out of patience and on 25 December 1978, invaded Cambodia. The much superior Vietnamese army quickly routed Pol Pot's fighters and captured Phnom Penh on 7 January 1979.[244] Pol Pot managed to escape and went into hiding in the forests near the Thai-Cambodian border.[245] With the majority of the country under their control, the Vietnamese set up a new communist government using as front men former Khmer Rouge members who had escaped to Vietnam in earlier years to avoid being purged by Pol Pot.[246]

While the initial response of the Cambodian population to the Vietnamese defeat of the Khmer Rouge seems to have been one of gratitude and relief, it was not long before the mood of many turned to resentment and resistance.[247] As the Vietnamese presence in Cambodia dragged on through the 1980s, a variety of Cambodian resistance groups organized to end the Vietnamese occupation.[248] These groups included communists and non-communists but the dominant group was the Khmer Rouge, still led by Pol Pot, who operated in relative safety from his border stronghold.[249] In fact, even though news of Khmer Rouge atrocities filtered out of the country and soon became widely known, the U.S., China, and other world powers recognized the Pol Pot government as the legitimate

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[242] Chandler, History, *supra* note 219 at 216-19.
[243] *Ibid.* at 134.
[244] *Ibid.* at 223-25.
[245] Chandler, Brother *supra* note 233 157-59.
[246] Chandler History, *supra* note 220 at 225.
[247] See generally Evan Gottesman, *Cambodia After the Khmer Rouge: Inside the Politics of Nation Building* (Yale University Press 2003).
[248] Chandler, History *supra* note 220 at 227, 231-39.
[249] *Ibid.*

government of Cambodia and provided the Khmer Rouge with various forms of assistance.[250]

Eventually, Vietnam grew weary of propping up a dysfunctional Cambodian government and fighting an endless guerilla war. In 1989, Vietnam announced its intention to withdraw its forces from Cambodia.[251] This announcement led to a comprehensive settlement between the Cambodian government and the major resistance groups, signed in Paris on 23 October 1991.[252] The agreement called for resistance forces to demobilize and for a United Nations Transitional Authority in Cambodia (UNTAC) to conduct fair elections.[253] Despite the fact the Khmer Rouge refused to participate in the elections and continued to commit human right atrocities in the countryside,[254] UNTAC was able to orchestrate elections in 1993 which resulted in the formation of a coalition government made up of royalists, headed by Sihanouk's son, Norodom Ranariddh, and former communists, now led by a young, former Khmer Rouge leader named Hun Sen.[255]

Even with the election of a new, ostensibly democratic, government, the Khmer Rouge was still a force to be reckoned with. Pol Pot still loosely commanded thousands of battle hardened fighters, still held the loyalty of significant segments of Cambodia's rural population, and still controlled significant pieces of Cambodian territory.[256] Since the new government was weak and since UNTAC adopted a passive interpretation of peacekeeping, which meant refusing to engage the Khmer Rouge militarily,[257] the guerilla war seemed likely to drag on for a very long time. When the UN began withdrawing its peacekeepers, co-Prime Minister Hun Sen set out to accomplish what the Vietnamese and the UN could not – destroy the Khmer Rouge as a military threat. He did this by convincing key leaders of the Khmer Rouge to cease their struggle and join

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[250] *Ibid.* at 231-35.
[251] Group of Experts Report, *supra* note 224 at para. 40.
[252] *Ibid.*
[253] U.S. Institute of Peace, Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, online: < http://www.usip.org/library/pa/cambodia/agree_comppol_10231991.html>.
[254] Group of Experts Report, *supra* note 224, at para 41.
[255] Chandler, History, *supra* note 220 at 239-41.
[256] *Ibid.*
[257] *Ibid.*

his government. Tired of decades of conflict and, certainly in many cases, eager to partake in whatever largesse Hun Sen could provide, a number of Khmer Rouge leaders defected and brought with them hundreds of Khmer Rouge fighters.[258] In return, Hun Sen foreswore retribution and gave some of these men high positions in his government and his security forces.[259] In the case of some Khmer Rouge military units it was as simple as changing uniforms- one day they were Khmer Rouge guerillas in black pajamas, the next day they were loyal government soldiers in green uniforms.[260] Due to these defections, by the mid 1990s, the Khmer Rouge had ceased to exist as fighting force.[261] In July 1997, Hun Sen and Ranariddh made a joint appeal to the UN asking that an international tribunal be established to judge the Khmer Rouge.[262]

B. Negotiating the Extraordinary Chambers

1. The Group of Experts

From the time that the extent of the Khmer Rouge mass murders became widely known, elements of the international community pushed for the establishment of some type of criminal tribunal to try those responsible. For many years, however, the political situation within the country was so unstable, that serious planning for such an endeavor was not possible. When in 1997, co-Prime Ministers Hun Sen and Norodam Ranariddh requested assistance, it seemed that a watershed had been reached and the UN began to engage the Royal Government of Cambodia (RGC) in negotiations over creating some sort of justice operation.[263]

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[258] Chandler, History, *supra* note 220 at 243. One of the early defectors was Ieng Sary, Pol Pot's former Prime Minister, who defected in return for a promise of amnesty for his 1979 genocide conviction in absentia and for crimes he may have committed under Cambodia's 1994 law outlawing the Khmer Rouge and a promise that he would be able to stay living in the border region of Pailin. Group of Experts Report, *supra* note 224 at para. 44.

[259] For example, former Khmer Rouge army chief, Ke Pauk, was made a Brigadier General in the Royal Cambodian Armed Forces after his defection in 1999. Corfield, *supra* note 220at 194. Chouk Rin, the Khmer Rouge commander who orchestrated a 1994 train attack and kidnapping of three western backpackers was made a colonel in the Cambodian army. Peter Maguire, *Facing Death in Cambodia* (Columbia University Press 2005) at 102 [hereinafter Maguire].

[260] Maguire, *ibid.* note 259 at 102.

[261] See Chandler, History, *supra* note 220 at 241–43.

[262] Group of Experts Report, *supra* note 224 at paras. 4-5.

[263] *See U.N. Office of Legal Affairs, History of Negotiations of Khmer Rouge Tribunal Between the United Nations and Cambodia: A Chronology*, Feb. 8, 2002 [hereinafter History of Negotiations], online: <http://www.dccam.org/history_of_the_negotiations_on_the_khmer_rouge_tribunal.htm>.

To begin the process of negotiation, the UN sent a three-member Group of Experts to Cambodia in 1999 on a fact finding mission.[264] The Group conducted research, met with government and nongovernmental officials, and then wrote a report presenting their findings and recommendations.[265] In the report, the Group identified what they saw to be the two main options available for bringing former Khmer Rouge leaders to justice. The first option was to conduct trials in a domestic Cambodian court using Cambodian law.[266] This option included the possibility of setting up a hybrid, or mixed court which would employ some blend of Cambodian and international personnel as judges, prosecutors, investigators and defense attorneys, and would apply a mixture of domestic and international law.[267] The second option was for the United Nations to use Chapter VII, Chapter VI, or some other part of the United Nations Charter to establish an ad hoc international tribunal similar to those created for the former Yugoslavia and Rwanda.[268] This option called for creation of a tribunal that applied international law, operated according to internationally accepted rules and procedures, and was controlled by international, not domestic, judges and prosecutors. Considering these two alternatives, the Group recommended that the UN establish an ad hoc international tribunal[269] and specifically recommended *against* UN involvement in any sort of Cambodian domestic tribunal, even if it received foreign support or used foreign personnel.[270]

The Group gave numerous reasons for this recommendation. They expressed grave doubts that the Cambodian legal system would be able to operate a competent court, with or without international assistance, since it lacked the three main ingredients necessary to run a justice operation, namely, a trained group of judges, lawyers and investigators, an adequate infrastructure, and a "culture of respect for due process."[271] The Group expressed equally strong doubt that Cambodia's domestic political reality would allow a

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[264] Group of Experts Report, *supra* note 224 at para. 6. (The Groups members were Sir Ninian Stephen, an Australian judge, Rajsoomer Lallah, a judge from Mauritius, and Steven R. Ratner, an academic from the United States).
[265] *Ibid.* at para. 7.
[266] *Ibid.* at para 122.
[267] *Ibid.* at para 137.
[268] *Ibid.* at paras. 139-48.
[269] *Ibid.* at para. 47.
[270] *Ibid.* at paras 131-32.
[271] *Ibid.* at paras 127-29.

locally based tribunal to proceed at full speed and in good faith. They noted that both of the principal political parties in Cambodia had strong connections with the Khmer Rouge and both parties included many former Khmer Rouge members, some of whom were likely to be targets of investigation.[272] They expressed concern that even if a mixed tribunal were created, the tribunal would not be able to avoid being manipulated or thwarted by the Cambodian government or other "political forces in Cambodia."[273] The Group summed up its opposition to the domestic court option by stating:

> Our decision to recommend against United Nations involvement in the establishment of a Cambodian tribunal is not an easy one and comes only after careful consideration of the situation in Cambodia based on our research and interviews. It doubtless will be difficult for some to accept our opinion that even substantial international funding and insertion of international personnel will not be worth the effort in that it will still encounter the many impediments likely to be placed in its way as a result of Cambodian politics. But we believe it is our responsibility to reject options that are not likely to be feasible and not to encourage the United Nations to fund any tribunal that is unlikely to meet the minimal standards of justice.[274]

The Cambodian government's response to the Group's recommendations was swift and negative. In a letter to Secretary-General Annan, the RGC suggested that an effort by the UN to create an ad hoc tribunal might cause panic among the former Khmer Rouge and result in a new guerilla war.[275] In a follow-up meeting, RGC representatives argued that since both the perpetrators and victims were Cambodian, it was a matter to be handled by a Cambodian court not an international ad hoc.[276] They also expressed their opinion that Cambodian courts and Cambodian judicial personnel were fully capable of conducting the investigations and court trials.[277]

Secretary-General Annan passed along the Group's report to the General Assembly and Security Council but failed to endorse its recommendations completely. The Secretary-

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[272] *Ibid.* at para 96.
[273] *Ibid.* at para 137.
[274] *Ibid.* at para. 138.
[275] *Ibid.* Letter from the Secretary General to the President of the General Assembly and the President of the Security Council, at para. 2.
[276] *Ibid.*
[277] *Ibid.*

General did not agree with the Group's conclusion that the only acceptable option was to create an ad hoc international tribunal but instead, recommended that the UN explore "other options" that would be "international in character."[278] The UN's Office of Legal Affairs (OLA) was then given the task of working with the Cambodian government to build a court that both sides could live with. This began four years of tortuous negotiations aimed at creating a new model of international justice- a model which would use a mixture of international and domestic law and international and domestic personnel. Meanwhile, out in the countryside, Pol Pot and other high level members of the Khmer Rouge were dying, disappearing, negotiating actual or *de facto* amnesty deals with the government, or otherwise living out the remains of their lives in relative peace and obscurity.

2. The Negotiations

Beginning in August 1999, the OLA team began a negotiating odyssey, flying back and forth to Cambodia with the aim of creating a tribunal that would meet the Cambodian government's requirements but would also operate within internationally accepted norms.[279] There were numerous issues to be negotiated and some issues changed as negotiations moved along but ultimately the five main points of negotiation for the OLA boiled down to the following:

First, the OLA wanted recognition that any agreement forged between the UN and the Cambodia government to establish the tribunal would reign supreme over any domestic law passed by the Cambodian legislature to implement it.[280] The OLA believed that if the Cambodian law were allowed to reign supreme, the UN would be bound by that law and likely be forced to support the implementation of legal procedures which did not comport with international due process standards.[281]

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[278] *Ibid.*

[279] See History of Negotiations, *supra* note 263; see *also* Chronology of Cambodian Events Since 1950, Yale University Cambodian Genocide Program, online: <www.yale.edu/cgp/chron.html>.

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

[281] *Ibid.*

Second, the OLA wanted the tribunal to employ international rules of procedure, not domestic rules.[282] This was necessary to ensure that the trials, paid for and supported mostly by the international community, would follow internationally accepted standards and provide internationally accepted protections for the rights of the accused.

Third, the OLA wanted an agreement that ensured no mass human rights abusers would be shielded from prosecution by amnesty or pardon.[283] The UN had taken the position in previous years that international customary law strictly forbids granting either amnesty or pardon to serious violators of international humanitarian law and human rights law.[284] A court that rejected this central tenant of progressive international law could never stake a claim to international legitimacy. The OLA position on this point is also consistent with a recognition that allowing the Cambodian government to give some former Khmer Rouge leaders immunity and not others would jeopardize the integrity and credibility of the whole exercise.

Fourth, the OLA wanted the court and the office of the prosecutor to be controlled by international judges and international prosecutors.[285] This requirement was necessary to ensure that the justice process would be objective and unbiased. It would also help ensure that the judicial panels and the prosecutor's office would have an adequate number of personnel who were experienced in the law and had some knowledge of international standards.

Fifth, the Secretary-General and the OLA wanted to see a financing scheme put in place that would ensure that the justice effort would be adequately funded. To this end, the

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[282] Ben Kiernan, "Cambodia and the United Nations-Legal Documents," 34 Critical Asian Stud. 611 (2002).

[283] Craig Etcheson, "A Fair and Public Trial: A Political History of the Extraordinary Chambers," in Justice Initiatives (newsletter of the Open Society Justice Initiative), Spring 2006, 7-24, at 15; Ernestine E. Meijer, "The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal," in Romano, *supra* note 5 at 214.

[284] See Cassese, *supra* note 11 at 312-16.

[285] *The Secretary-General, Report of the Secretary-General on Khmer Rouge Trials*, para16(c), *delivered to the General Assembly*, U.N. Doc. A/57/769 (Mar. 31, 2003) [hereinafter *Report on Khmer Rouge Trials*].

Secretary-General fought a battle within the UN to establish a financing mechanism based upon assessed contribution rather than relying upon voluntary contribution. Under a scheme of assessed contribution, UN Member States would be billed their portion of tribunal costs at rates consistent with their regular UN budget assessment.[286] Under a voluntary contribution scheme, each individual State would decide how much it would contribute, when it would contribute, or if it would contribute at all.[287] Based upon his experience, the Secretary-General believed that funding by voluntary contribution was too uncertain and would start the enterprise out on very shaky ground.[288]

Negotiations quickly revealed that the Cambodian government was pursuing a very different set of priorities than the UN. To begin with, it was unclear if Hun Sen and the RGC wanted a Khmer Rouge tribunal to be created at all. Throughout the years, Hun Sen had made a variety of statements expressing his ambivalence toward the prospect.[289] He and his negotiators also made it known from the beginning that if a tribunal were created, they wanted it to be an institution that was more national than international in character and structure.[290] They insisted that Cambodian judges be in control of the court and that Cambodian law govern its operation.[291] Ultimately, Hun Sen would outmaneuver the OLA with an assist from a number of powerful nations, including the United States.

The backsliding began in May 1999, after the RGC rejected the recommendation of the Group of Experts to establish an international ad hoc tribunal. At that point, the UN Special Representative for Human Rights in Cambodia, Thomas Hammerberg, proposed that a "mixed tribunal," made up of a majority of international judges and a minority of

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[286] For a detailed explanation of how other international criminal tribunals are financed, see Thordis Ingadottir, "The Financing of Internationalized Criminal Courts and Tribunals," in Romana, *supra* note 5 at 271-89.
[287] *Ibid.*
[288] *See Report on Khmer Rouge Trials*, *supra* note 285 at paras 72-78.
[289] *E.g.*, in 1998, Hun Sen received Nuon Chea, formerly Pol Pot's number two, and Khieu Samphan, former Head of State for the Khmer Rouge, at his home and announced to the press that Cambodians should "dig a hole and bury the past and look to the future." "UN Dismay at Khmer Rouge Immunity," *BBC News*, (29 December 1998), online: < http://news.bbc.co.uk/1/hi/world/asia-pacific/243634.stm>.
[290] *See* Group of Experts Report, *supra* note 224, *Letter from the Secretary-General to the President of the General Assembly and the President of the Security Counsel*, at para. 2.
[291] *Ibid.*

Cambodian judges, be established instead.[292] Hun Sen and his government refused this proposal since it placed the international majority in control of the court.[293] To break the stalemate in negotiations, the U.S. stepped in and proposed a mixed tribunal with a majority of Cambodian judges and "co-prosecutors"- one international, one Cambodian with equal power.[294] The U.S. also proposed a "supermajority" voting formula which required a majority plus one of judges for any decision to stand.[295] The presumed rationale for this system is that because it requires the assent of at least one international judge it will work to reduce the influence of Hun Sen and his government.[296] The OLA did not agree with the U.S. proposal and continued to push for a tribunal where the international personnel would be in control of both the court and the prosecutor's office.[297]

On January 2001, the Royal Government of Cambodia blindsided the OLA by arranging for the Cambodian parliament to pass legislation that created, at least on paper, a hybrid court within the Cambodian court system which contained many of the elements the UN negotiators had refused to accept.[298] The passage of the law had the dual effect of making it appear that the RGC was sincere in its efforts to bring the Khmer Rouge to justice while at the same time, locking down the RGC negotiating position by creating a specialized national court that would pre-date any agreement the RGC might reach with the UN.[299]

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[292] "Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement," *Human. Rights Watch*, (April 2003) at 9, online: <http://hrw.org/backgrounder/asia/cambodia040303-bck.htm>.
[293] *Ibid.* at 10.
[294] *Ibid.*
[295] *Ibid.*
[296] *Ibid.*
[297] *Ibid.*
[298] *See* Law, *supra* note 219. The original version of the Law, NS/RKM/0801/12, was adopted by the Cambodian National Assembly on Jan. 2, 2001. Translated at <http://www.genocidewatch.org/CambodianTribunalLaw.htm>.
[299] The Secretary-General acknowledged the effect the passage of the Law had upon the UN negotiating position by stating in his Mar. 31, 2003 report to the General Assembly, "It was clear to me, then, that the only agreement it would be possible to negotiate with the Government was one that accepted the structure and organization of the Extraordinary Chambers foreseen in Cambodia's Law of 10 August 2001." See Report on Khmer Rouge Trials, *supra* note 285 at para. 23.

In the eyes of the OLA, the Cambodian government had finally gone too far. On 8 February 2002, UN Legal Counsel Hans Correll, speaking for the Secretary-General, announced that the UN was pulling out of negotiations. Correll stated, "The United Nations has come to the conclusion that the Extraordinary Chambers, as currently envisaged, would not guarantee the independence, impartiality, and objectivity that a court established with the support of the United Nations must have."[300] The UN, it seemed, had drawn a line in the sand. This was a significant event since it represented a moment where the UN leadership took the long view, showed courage of conviction, and refused to accept a debilitating compromise that would ruin any chances for real justice to be achieved. Significantly, the UN's position was supported by a wide coalition of Cambodian human rights groups.[301] But the UN leadership's resolve did not last long. Powerful countries like the U.S., Japan, France, India, and Australia wanted to see some type of tribunal created and pressured the UN leadership to accept what it did not wish to accept- a tribunal controlled by Cambodians.[302] In the end, Correll was forced to travel back to Cambodia, hat in hand, and sign an agreement which gave Hun Sen and his government most of what they wanted.[303]

C. Reality Check

The UN and the RGC signed the Agreement in March 2003. In 2006, despite the recommendations of the Group of Experts and the expressed reservations of the OLA negotiating team, the UN began its support for a court situated in Cambodia and controlled by Cambodians. To understand how the court will operate within this Cambodian context, it is necessary to take into consideration some of the realities of Cambodian politics and the limitations of the Cambodian justice system.

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[300] Statement, *supra* note 280.
[301] *Supra* note 216 at 200.
[302] *Ibid.* at 204.
[303] When Correll was asked if the agreement would provide judicial independence, Correll replied, "As an international civil servant I have been given the task to negotiate this text and I have done so to the best of my ability. My personal opinion is a different matter." Etcheson, *supra* note 283 at 18 (citation omitted), online: < http://www.justiceinitiative.org/db/resource2?res_id=103182>.

The reality is such; while the Cambodian government is labeled a constitutional monarchy[304] and claims to be a democracy, in truth, it is a country governed by an authoritative regime led by former Khmer Rouge communists who use a mixture of harsh Marxist-Leninist management practices and old fashioned clan patronage to keep themselves in power. While there have been significant efforts made by international donors over the last fifteen years to help Cambodia build a functioning justice system which includes an independent judiciary, the reality is that Cambodia's judges are not independent but are controlled by Prime Minister Hun Sen and his ruling party. It is also true that Cambodian court officials work within a culture of corruption that is so deeply rooted and so openly accepted that it is not uncommon for judges to admit taking bribes without a hint of shame.

These are troubling assertions to be sure but they are supported by the facts. There is of course no question that Hun Sen is a former Khmer Rouge communist. He started his political career as a low level Khmer Rouge commander operating in the eastern area of Cambodia.[305] When Pol Pot began his purges of Eastern Zone cadres in 1973, Hun Sen fled for his life across the border to Vietnam.[306] The Vietnamese put him in custody for a time but later released him so that he could play a role in the anti-Pol Pot resistance movement which the Vietnamese had decided to foster.[307] When the Vietnamese drove Pol Pot from power in 1979, they made Hun Sen, twenty-seven years old at the time, Foreign Minister of the new government.[308] From that position, Hun Sen maneuvered rapidly to the top of the communist government power structure.[309]

The UN's relationship with Hun Sen began with the signing of the 1991 Paris Peace Accords and has been stormy since. In 1993, when the UN was able to deliver a nationwide election in the face of Khmer Rouge threats and dire predictions of failure, Hun Sen robbed them of their success by refusing to acknowledge that his party lost and

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[304] See CIA, World Fact Book 2006 – Cambodia (2006), online: <www.cia.gov/cia/publications/factbook/geos/fr.html#intro>.
[305] Corfield, History, *supra* note 220 at 47.
[306] Kiernan, Pol Pot, *supra* note 234 at 369-70.
[307] Gottesman, *supra* note 247 at 31-34.
[308] Corield, *supra* note 220 at 158-59; see also Gottesman *supra* note 261, at 45-48.
[309] Chandler, History, *supra* note 220 at 228.

by threatening violence if he were not allowed to remain in power.[310] He leveraged this threat into an agreement where the true winner of the election, Prince Norodom Ranariddh, was forced to share the office of Prime Minister. This left Hun Sen, the co-Prime Minister with the strongest support from the military, in *de facto* control of the country.[311] In 1997, Hun Sen seized complete control of the government in a *coup de force* which drove Ranariddh into exile and crushed his party's security forces.[312] During the coup, Hun Sen's party henchmen tortured and murdered many Ranariddh supporters.[313]

Since 1997, Hun Sen has been in full control of the country and has not again needed to resort to large scale murder to remain in power. However, he has frequently used less deadly means to intimidate and silence his opposition. For example, he has used the Cambodian judiciary and the arbitrary application of the UNTAC-era Penal Code to eliminate his enemies and discourage dissent. His favorite weapon has been to charge his critics with the crime of defamation and have them arrested and put in prison. The most recent, well-publicized example of this occurred in December 2005 following an International Human Rights Day rally in Phnom Penh. While the facts remain murky, there were allegations made that someone had displayed a banner during the rally which included language accusing Hun Sen of selling or giving away Cambodian land to Vietnam. Following the rally, a number of well known human rights advocates involved in sponsoring the rally were arrested and charged with criminally defaming Hun Sen.[314] There was an outcry by the local human rights community,[315] complaint made by some

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[310] See Henry Kamm, *Cambodia: Report From a Stricken Land* (New York: Arcade Publishing Co.: 1998) at 223-229.
[311] *Ibid.*
[312] Chandler, History, *supra* note 220 at 243.
[313] *Ibid.*
[314] Guy De Launey, "Cambodia Arrests Rights Activists," *BBC News*, (31 December 2005), online: <http://news.bbc.co.uk/2/hi/asia-pacific/4572208.stm>. The five individuals who were ultimately arrested were Kem Sokha, Director of the Cambodian Center for Human Rights (CCHR), Pa Nguon Teang, Deputy Director for CCHR, Yeng Virak, Director of the Cambodian Legal Education Center (CLEC), journalist Mom Sonando, and President of the Cambodian Teachers Association, Rong Chhun.
[315] Vong Sokheng, "Yeng Virak on Bail; Outcry Continues," *Phnom Penh Post*, (13-26 January 2006) at 1.

elements of the international community,[316] and an apparent intervention attempted by a high level U.S. diplomat.[317] At first, Hun Sen claimed no responsibility for the arrests. He claimed that it was the court, not he, that had independently decided to arrest and charge the men. "The government has never used any power to arrest or detain anyone," he stated.[318] Some days later, in comments making Hun Sen's earlier statements farcical, a senior advisor to Hun Sen announced that Hun Sen was releasing the men as a "gift" to visiting U.S. Assistant Secretary of State Christopher Hill.[319] Hun Sen ordered the men's release and then used his statements to the press to warn them to behave. "Just let things go quietly," he advised, "[but] if you are rude, the court will summon you, so there will be another problem."[320] At the time of this writing, the charges against the men have not been dropped; Hun Sen keeps them in fear and uncertainty. What has not been lost on anyone following these events is the fact that in Cambodia, Hun Sen controls the courts.

Will Hun Sen restrain himself from influencing the ECCC out of respect for the UN and its mission to bring justice to the victims of the Khmer Rouge? This seems unlikely based upon his past dealings with the UN. Over the years he has consistently been able to thwart the UN's most ambitious aims. In the process, he has frequently expressed disrespect for the UN's activities and its representatives.[321] He has been most contemptuous of its human rights activities, expressing this contempt whenever it suits his political interests or his rhetorical whim. For example, on 29 March 2006, Hun Sen responded to UN Special Representative for Human Rights in Cambodia, Yash Ghai's criticism of the human rights situation in the country by calling him a "long term tourist," and asking Secretary-General Annan to dismiss him.[322]

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[316] See, *e.g.*, David Gollust, "US Condemns Arrest of Human Rights Activists," *VOA News*, (4 January 2006), online: < http://www.voanews.com/english/archive/2006-01/2006-01-04-voa2.cfm?CFID=31385156&CFTOKEN=83029046>.

[317] Yun Samean & Lee Berthiaume, "Four Detainees are Freed from Prey Sar on Bail," *The Cambodia Daily* (18 January 2006) at 1.

[318] "Yeng Virak is Released from Prison on Bail," *The Cambodia Daily* (12 January 2006) at 1.

[319] *Supra* note 314.

[320] See "Cambodian PM Again Attacks Foreign Critics of Defamation Arrests," *Agence France Press* (30 January 2006), online: < http://www.iri.org/pdfs/1-30-06%20Cambodian%20PM%20says%20courts%20will%20not%20dismiss%20defamati.pdf>.

[321] For more examples, see Yun Samean & Erik Wasson, "PM Steps Up Attack on UN And Its Envoy," *The Cambodia Daily* (31 March 2006) at 18.

[322] Chhim Spheark & Erik Wasson, *PM Says UN Envoy Should be Removed, The Cambodia Daily*, 30

Will the Cambodian judges and prosecutors selected for the tribunal be able to avoid Hun Sen's influence? This also is unlikely. The prospects for independent action by Cambodian judges and prosecutors might be different if they were either in a position to resist intrusion by the executive or had some history of independent action. Regrettably, Cambodia's judicial branch has no history of independence- the current court system is built upon a communist era superstructure where the executive branch had the last say over cases that entered the formal justice system.[323] While Cambodia's Constitution calls for an independent judiciary and requires both the King and an institution named the Supreme Counsel of Magistracy (SCM) to guarantee that independence,[324] in May 2005, Hun Sen rendered the SCM impotent by dissolving its Secretariat and transferring its powers to the Ministry of Justice, a Ministry now headed by a member of his ruling party.[325] Even before this transfer, the executive branch and the ruling party frequently reached down to influence the actions of the judicial branch. Cambodian judges and prosecutors know that if they do not toethe party line, they are likely to find themselves transferred to a less desirable post or be out of a job entirely.

Just as disturbing as the lack of judicial independence, is the lack of professionalism within the ranks of the judges and lawyers. It is a sad fact that the Cambodian judicial system is deeply corrupt.[326] Litigants offer bribes to judges and prosecutors as an expected step in the litigation process. Bribery is such an entrenched part of the system

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March 2006, at 1.

[323] Koy Neam, *Introduction to the Cambodian Judicial Process* (1998) at 3.

[324] *Kingdom of Cambodia Const.*, Art. 113.

[325] Prak Chan Thul & Lee Berthiaume, "Power Shift Puts Judiciary Under Government Control," *The Cambodia Daily* (9 May 2005).

[326] In May of 2006, the UN High Commissioner for Human Rights, Louise Arbour, visited Cambodia and reported that the justice system lacked integrity and independence. *"UN Urges Cambodia Judicial Reform," BBC* (19 May 2006); also in May 2006, LICADHO, a leading Cambodian NGO stated in their human rights report "Cambodia's judiciary continues to be characterized by corruption, incompetence and political bias while institutional changes made in 2005 have brought the courts further under control of the executive. The judiciary continues to be used as a tool of the government in political cases, and as a theatre of corruption." LICADHO Report, Human Rights in Cambodia: The Facade of Stability, (May 2006), at 17, online: <http://www.licadho.org/reports/files/8682LICADHOFacadeDemocracyReport2005-06.pdf>; in 2006, Human Rights Watch reported that, "[t]he courts-widely viewed as corrupt, incompetent, and biased-continue to be used to advance political agendas, silence critics, and strip people of their land." Human Rights Watch World Report 2006 – Cambodia, Jan. 2006, online: <http://hrw.org/english/2006/01/18/cambod12269.htm>.

that those who accept bribes often make little or no effort to deny it. Consider an example particularly relevant to the personnel make-up the ECCC: After the Supreme Council of Magistracy named Battambang Provincial Court President Nil Nonn to become a judge for the ECCC Trial Chamber, it emerged that in 2002, Judge Nil had indicated to a foreign journalist that he frequently accepted bribes from litigants. When asked about these statements, Judge Nil denied that he had made them. After hearing of Judge Nil's denials, the show's producer announced that she still had the film and the transcripts of the 2002 interview, and they showed that when Judge Nil was asked if he was ever offered money by parties to a case, he responded, "Yes, it happens to me as it does to others as well, but it is not through any efforts on my part. However, if after a trial people feel grateful to me and give me something, that's normal, I don't refuse it. I've settled the case for them and people feel grateful."[327] Confronted with this confirmation of Judge Nil's admissions, the Cambodian spokesman for the ECCC told the press that the issue was in the past and irrelevant to the proceedings.[328] Judge Nil remains an ECCC Trial Chambers judge.

The 2006 reality is that the ECCC is located in Cambodia. Cambodian judges will hold the majority voting power in the court panels and they will be under the control of Hun Sen and his government. To believe that placing Cambodian officials, be they judges, prosecutors, or lawyers, in a building with international colleagues will somehow block Hun Sen's influence and make them independent actors imbued with a new sense of professionalism is magical thinking which can only lead to disillusionment.

D. A Court Built for Delay and Confusion

With critical aspects of 2006 Cambodian reality set out, the elements of the Agreement can be analyzed in proper context. The discussion must begin with a reminder that the ECCC is *not* an international tribunal, but a Cambodian court in which some international personnel work. The foundational documents of the ECCC place the institution firmly

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[327] James Welsh & Prak Chan Thul, "Amanda Pike Filmmaker: KR Judge Said He Accepted Cash," *The Cambodia Daily*, (10-11 June 2006) at 3 (discussing Amanda Pike's "Pol Pot's Shadow," *in Frontline World*, Oct. 2002, <http://www.pbs.org/frontlineworld/stories/cambodia/diary04.html>.

[328] *Ibid.*

within the Cambodian court structure. It is also important to understand that there are two separate, albeit similar, documents which establish the jurisdiction and structure of the ECCC. The first document is the Agreement reached between the UN and the RGC in 2003 which was later ratified by the Cambodian National Assembly in 2004.[329] The second is the Law passed by the Cambodian National Assembly in 2001 and amended in 2004 to conform to the Agreement.[330] Despite the amendments made to the 2001 Law to conform to the 2004 Agreement, there are still some differences between the two documents and there is still uncertainty over which document will prevail in the case of conflict between the two. To fully understand the structure and jurisdiction of the ECCC, one must refer to both of these documents. Nonetheless, the main components of the two documents are the same and for ease of discussion I will refer here only to the relevant articles of the Agreement.

While the purported aim of the long negotiations between the UN and the RGC was to create an institution that would bring those most responsible for the Khmer Rouge atrocities to justice, an analysis of the main components of the Agreement reveals that the court is structured, first and foremost, to protect the interests of the Cambodian government leadership. This analysis also reveals a court structure fiendish in its potential for creating confusion, deadlock, and delay. The five main components discussed here will be: 1) jurisdiction, 2) amnesty, 3) procedural framework, 4) structure and 5) funding.

1. Jurisdiction

The Agreement limits the *temporal jurisdiction* of the court to crimes that were committed during the period 17 April 1975 to 6 January 1979.[331] This might be considered a reasonable limitation to the extent that it focuses the Court's attention on the period when the Khmer Rouge were in control of the country and thus makes the number of offenses under consideration more manageable. In reality, the four-year period is artificial since the Khmer Rouge committed similar offenses prior to marching into

[329] ECCC Agreement, *supra* note 219.
[330] ECCC Law, *supra* note 219.
[331] ECCC Agreement, Article 1.

Phnom Penh on 17 April 1975, and continued to commit such offenses after they had been driven from power in 1979.[332] Limiting temporal jurisdiction to that four-year period in the 1970s also eliminates any consideration of possible crimes committed by Hun Sen and his government while fighting the Khmer Rouge-led insurgency in the decades that followed. Of course, limiting jurisdiction to crimes that occurred before 1979 has the effect of making prosecution generally more difficult since many of the main suspects are dead or dying and the evidence against the survivors is fading with each passing day.

The Agreement limits the *personal jurisdiction* of the court to "senior leaders of Democratic Kampuchea" and those who were "most responsible."[333] If one accepts the temporal jurisdiction described above, this would seem a reasonable limitation of personal jurisdiction. It would seem reasonable since it is limited to those who were most responsible for the mass killings and it is consistent with one of the main goals of any international justice effort – punishing those most responsible for committing large scale atrocities. Of course questions can arise about the definitions of "senior leader" and "more responsible" since these are terms that are open to interpretation. Ultimately, the court will determine which individuals fall within these definitions and herein lies the problem. The majority of the judges sitting on the trial and appellate panels are Cambodian. With Hun Sen exercising control over the Cambodian judges, it will be Hun Sen and not the court who will decide who was a "senior leader" and who was not, and who was "more responsible" and who was not.

The Agreement describes the *subject matter jurisdiction* of the court as being:

> Genocide as described in 1948 Convention, Crimes against humanity as defined in 1998 Rome Statute, Grave breaches of the Geneva Convention of 1948, Violations of Hague Convention for Protection of Cultural Property, Violations of the Vienna Convention of 1961 on Diplomatic Relations, Other Crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001.[334]

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[332] See generally Chandler, Brother , *supra* note 233.
[333] ECCC Agreement, Article 2(1).
[334] ECCC Agreement, Article 9.

Article 3 of the Law states that the court shall have the power to consider certain categories of crime listed in the Cambodian 1956 Penal Code; these categories of crimes are homicide, torture and religious persecution.[335]

This subject matter jurisdiction is very similar to the subject matter jurisdiction of the International Criminal Court (ICC) and the other international ad hoc tribunals mentioned above but there are differences worth mentioning. To allow special consideration of cases where the Khmer Rouge murdered foreign diplomats and their family members or removed nondiplomats from diplomatic compounds however, the Agreement gives the Court the power to consider Violations of the Hague Convention of 1961 on Diplomatic Relations.[336] The Agreement also includes by reference to the Law, cases of ordinary murder under Cambodia's 1958 Penal Code as well as the crimes of torture and religious persecution.[337] The Agreement presumably includes the crime of religious persecution to allow consideration of crimes related to the Khmer Rouge effort to wipe out Buddhist monks and Buddhist institutions in Cambodia.

2. Amnesty

The Agreement first appears to follow the prohibition in international customary law against granting amnesty or pardon for mass human rights offenders by stating in Article 11(1) that, "The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement."[338] But the Agreement goes on to confuse matters somewhat by recalling in Article 11(2) that the

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[335] ECCC Law, Article 3.

[336] A haunting account of the Khmer Rouge treatment of those seeking sanctuary at the French Embassy during the fall of Phnom Penh can be found in Francois Bizot, *The Gate* (New York, New York: Vintage Books 2002).

[337] ECCC Law, Article 3.

[338] ECCC Agreement, Article 11(1).

Cambodian government had previously granted a pardon (to Ieng Sary), and leaves the "scope of the pardon" to be decided by the Extraordinary Chambers. [339]

Ieng Sary aside, it appears that the UN got most of what it asked for since the wording of Agreement suggests that none of Hun Sen's *de facto* amnesties will be recognized by the court. It is not surprising, however, that Hun Sen's government would acquiesce on this point, since Hun Sen can maintain his *de facto* amnesties by controlling the process of indictment through his control of Cambodian court personnel. In fact, the Agreement gives Hun Sen a new method of controlling former Khmer Rouge leaders in his government. He can hold the threat of ECCC investigation over their heads, and if he decides to have any of them indicted, he can respond to their complaints by claiming that international law and principles of international justice tie his hands. When it comes to the pardon of Ieng Sary, Hun Sen leaves himself the same ability to control the man's fate that he has always held. He may allow the Cambodian co- Investigating Prosecutor and Cambodian judges to view the scope of Ieng's pardon narrowly so as to allow prosecution, or he may insist that they view it more broadly and uphold the pardon. No one knows what Hun Sen will do but it is difficult to imagine him giving up Ieng Sary after protecting him for so many years.

3. Procedural Law

Representing a significant concession on the part of the UN, the Agreement requires the ECCC to follow Cambodian procedural law, not international procedural law. The current criminal procedural law of Cambodia exists in two separate codes,[340] both created in the UNTAC era and both designed as quick fixes until the Cambodian government could draft a more comprehensive criminal procedural code. After years of drafting work, it appears that a new procedural code will be passed at some point in 2007.[341] Since the new law will be *the* Cambodian criminal procedural law, the ECCC will likely be forced

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[339] ECCC Agreement, Article 11(2).

[340] *Provisions Dated September 10, 1992 Relating to the Judiciary and Criminal law and Procedure Applicable in Cambodia during the Transitional Period*, (10 September 1992), online: < http://www.eu-asac.org/programme/arms_law/UNTAC%20Law.pdf>; *Law on Criminal Procedure* (1993), online: <http://www.cdpcambodia.org/soclaw.asp>.

[341] The draft of the new code, containing more than 900 articles, and was submitted to the Cambodian National Assembly in December 2006.

to shift to its use at some point during its operation. This would a difficult prospect for any court operation, much less, for a court in which the judges and prosecutors come from different legal traditions. The switch over, if it occurs, is likely to cause delay, and not a little confusion.

The Agreement does not completely ban the court from considering international law and international standards. In fact, it allows the court to seek "guidance.. in procedural rules established at the international level" in three circumstances: 1) where issues arise that Cambodian law does not cover, 2) where uncertainty exists regarding the interpretation or application of Cambodian law, and 3) where Cambodian law and international law conflict.[342] While this granting of allowance to seek guidance in international law was likely intended to encourage the adoption of some international norms into the court's procedural framework, it may in the end, serve only to confuse matters. This is because the Agreement fails to identify which international procedural rules it is referring to. There are a number of different sets of international procedural law being used in international criminal courts around the world today,[343] and the Agreement leaves all of this territory open for consideration. While the Agreement requires the Extraordinary Chambers to "exercise their jurisdiction in accordance with international standards" set out in the ICCPR,[344] these articles will not give much assistance since they provide only a basic list of due process rights.[345] Assuming that there will be gaps in Cambodian law, or problems interpreting Cambodian law, or perceived inconsistencies between Cambodian law and international law, each judge will have wide latitude to determine which "international level procedures" should be used to guide the court. This creates much uncertainty about how court proceedings will be conducted.

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[342] ECCC Agreement, Article 12(1) states: "The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level." Agreement, *supra* note 233 at para. 53.

[343] See Hakan Friman, "Procedural Law of Internationalized Criminal Courts," in Romano, *supra* note 5 at 58.

[344] ECCC Agreement, Article 12(2).

[345] ICCPR, *supra* note 17.

The second problem with Agreement is that it does not clearly state what will happen when a judge finds that a conflict *has* arisen between international standards or procedures and Cambodian law. It does not say whether international law or Cambodian law will prevail. Because the Cambodian government has maintained from the beginning that Cambodian law should prevail, it is reasonable to assume that Cambodian judges will find Cambodian law controlling. It is also reasonable to assume that the international judges, who are unlikely to feel an allegiance to the Cambodian government or possess a special affinity for Cambodian domestic law, will take the position that international law should control. This creates more uncertainty and sets the stage for conflict within the judicial panels.

4. Personnel Structure

Of all the flaws of the ECCC, by far the greatest lie within the mix of its court personnel. The Agreement creates a trial court with a majority of Cambodian judges- three Cambodians and two internationals.[346] It creates a single appeals court, a "Supreme Court Chamber," which also has a majority of Cambodian judges- four Cambodians and three internationals.[347] The judges are encouraged to achieve unanimity in their decision-making, but if this does not occur their decisions require a so-called supermajority vote.[348] If it is true that Hun Sen possesses the ability to control the actions of the Cambodian judges, then it will be Hun Sen who will exert the greatest influence on final outcomes since Cambodian judges make up the majority of the court panels and can outvote their international colleagues. While the supermajority voting scheme does give the international judges (if they vote together) some ability to block decisions made by a majority of Cambodian judges, it does not allow the international judges to convict defendants worthy of conviction without some of the Cambodian judges acquiescing.

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[346] ECCC Agreement, Article 3.
[347] *Ibid.*
[348] ECCC Agreement, Article 4.

Similar concerns regarding government intrusion into decision-making exist within the offices of the Prosecutor and the Investigating Judge. The Agreement establishes a prosecutor's office[349] and an office of Investigating Judge[350]- an institution familiar to those operating in continental systems.[351] The creation of these institutions is unremarkable. What is remarkable is that the Agreement calls for the positions of Investigating Judge and Prosecutor to be filled by "co-investigating judges" -- one Cambodian and one international -- and "co-prosecutors"- one Cambodian, one international.[352] In neither case, does the Agreement give ultimate decision-making authority to one or the other; the Cambodian and the international share equal authority. It is difficult to imagine that this shared power structure will work very well in either institution. It is unrealistic to expect the co-prosecutors and co-investigating judges to agree consistently on the myriad of issues that will demand resolution. The fact that the Cambodian co-Investigative Judge and co-Prosecutor will work under the influence of Hun Sen and the Cambodian government, is certain to make the situation more difficult.

While the Agreement provides a mechanism to resolve conflicts arising within the offices of the Investigating Judge and Prosecutor, this mechanism may only work to tie more knots in the operation. The Agreement creates a "Pre-Trial Chambers" to settle what the article labels "differences" between the co-investigating judges and prosecutors.[353] According to the Agreement, if the judges are not able to reach a supermajority decision, "the investigation or prosecution shall proceed."[354] Since the Agreement only talks about investigations or prosecutions "proceeding," it seems to limit the types of "differences" it can consider to only those differences involving a determination of whether or not a case should continue down the defined procedural pathway. It

[349] ECCC Agreement, Article 6.
[350] ECCC Agreement, Article 5.
[351] See, *e.g*,. Richard S. Frase, "France," in *Criminal Procedure A Worldwide Study*, Craig M. Bradley, ed., (1999) at 143-85.
[352] ECCC Agreement, Article 5.
[353] ECCC Agreement, Article 7.
[354] ECCC Agreement, Article 7(4).

does not seem to leave room for consideration of more ordinary disputes, such as, disagreements over which witnesses should be interviewed, which charging language should be used in an indictment, or which interpretation of a law is correct. The supermajority voting here therefore, appears narrowly designed to keep less than a supermajority of judges (read- the Cambodian judges) from blocking a worthy case from going forward. It does not appear to create a mechanism that will be able to resolve what will likely be a wide range of misunderstandings and disagreements between co-Prosecutors and co-Investigating Judges.

5. The Defense

As mentioned previously, the Agreement protects the accused rights as given in the ICCPR. These rights include the right to engage counsel of choice and to have adequate time and resources to prepare a defense. In an encouraging move, indicating a departure from most of the previous international tribunals where providing competent defense counsel seems to have been a forced afterthought,[355] the UN appointed a principal defender and provided him an office at the Extraordinary Chambers.[356] It is unclear, however, how much freedom he will have to engage in investigation and discovery activities or what the extent of his office's resources will be. One significant issue that has yet to be resolved is how international lawyers will gain the proper authority to represent clients in front of the court. According to the Cambodian Law on the Bar, foreign lawyers cannot represent clients by themselves in court.[357] In fact, they cannot provide legal services in any capacity unless they are given authorization by the Khmer Bar Council.[358] Since the ECCC is a court operating within the Cambodian system, presumably the same restrictions will apply.[359] As it stands, if only Cambodian lawyers

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[355] See Rupert Skilbeck, "Building the Fourth Piller: Defence Rights at the Special Court for Sierra Leone," 1Essex Hum. Rts. Rev. 66, 71-78 (2004).

[356] See Erik Wasson & Kay Kimsong, "KR Defenders Office to Have Foreign Lawyers," *The Cambodia Daily* (8-9 July2006) at 3.

[357] Law on the Bar, art. 5, *translated at* <http://www.cdpcambodia.org/bar_law.asp>.

[358] *Ibid.*

[359] In November of 2006, the President of the Cambodian Bar Association, Ky Tech, in a statement sent in response to a set of draft internal rules circulated by the ECCC, threatened to file suit against any foreign lawyers who attempted to represent clients at the ECCC unless the Cambodian Bar Association was given

are allowed to represent defendants in court, the quality of representation will be suspect since very few Cambodian lawyers are likely to have the skills and experience necessary to function effectively in an international court.

6. Financing

While Secretary-General Annan initially argued for funding based upon assessed contribution, it was another argument that he and his team ultimately lost. The UN Member States rejected the assessed contribution option and decided instead to rely upon voluntary contributions from donors, including a reasonable contribution from the RGC.[360] This funding arrangement is reflected to a certain extent in Article 14 of the Agreement which requires Cambodia to provide the courtroom facilities and court administrative offices and the salaries of Cambodian personnel.[361] The Agreement requires the UN to pay the salaries of all international personnel, defense counsel, the cost of witness travel, the cost of security and, "such other limited assistance as may be necessary ...."[362] On its face this seems an equitable enough distribution of financial responsibility. However, for Hun Sen's government, signing an agreement is one thing, delivering on the agreement is quite another.

Working on the assumption that the tribunal would complete its work within three years,[363] the UN budgeted $56.3 million for the court's operation and reached an agreement with the RGC which required it to provide US $13.3 million of that total figure.[364] In August of 2005, after contributing only US 1.5 million,[365] Hun Sen announced that Cambodia did not have the money to pay the rest of Cambodia's share of the costs.[366] Rather than insist that Cambodia come up with the money, the international

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more authority to in selecting local defense attorneys and directing defense activities. "Bar Association Demands More ECCC Control," *The Cambodia Daily*, (17 November 2006) at 1.

[360] Press Release, "Governments Pledge $38.48 Million for Khmer Rouge Trials in Cambodia," U.N. Doc. L/3082 (28 March 2005).

[361] ECCC Agreement, Article 15.

[362] ECCC Agreement, Article 16-17.

[363] See Report on Khmer Rouge Trials, *supra* note 285 at 56.

[364] Press Release, *supra* note 360.

[365] "EU and Untac Funds Transferred to Tribunal," *Dev. Weekly*, (19 June 2006).

[366] "Khmer Tribunal Stalled Again," *Bangkok Post*, (22 August 2005), online: <http://www.globalpolicy.org/intljustice/tribunals/cambodia/2005/0822stall.htm>.

community scrambled to make up the shortfall. India provided US $1 million, the European Union US $1.2 million, and the contributors to a still-existing UNTAC-era trust fund, released US $5 million of the fund to the ECCC.[367] As of September 2006, the shortfall remains approximately US $5 million which international donors will probably, at some point, step in and cover.[368] It would seem then, that the UN's obligation to provide "other limited assistance as may be necessary" under the Agreement will end up meaning- paying for pretty much everything.

Of course, there is an even more important question regarding the ECCC's funding, and that is the question of sufficiency. Broken down into years, the total budget will allow the court to spend approximately US $19 million per year. Compared to the expenditures necessary to operate the ICTY and ICTR, this is a pittance. The ICTY had an annual budget of US $128 million in 2003 alone.[369] The ICTR's budget in 2002-2003 was US $180 million.[370] On the other end of the scale, the hybrid tribunals operating in Kosovo, East Timor, and Sierra Leone, operated or are operating on, much smaller amounts. For example, East Timor's 2001 budget was US $6.3 million, the international trial panels in Kosovo operate on about US $15 million annually, and the figure for the Special Court in Sierra Leone is about US $20 million.[371] While each of these hybrids is much different in structure than the ECCC, their experience does suggest that it is at least possible for the ECCC to achieve results with its current funding -- if its activities remain carefully prescribed.

7. The Escape Clause

In sum, an analysis of the main elements of the Agreement reveals that, after all of those years of negotiation, Hun Sen got most everything that he wanted. He got a tribunal he

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[367] *Dev Weekly*, *supra* note 365.
[368] There remains the possibility that the gap will ultimately be filled by the U.S. since U.S. officials have indicated a willingness to do so if they feel that the trials meet "international standards." See "KR Tribunal Should Begin Quickly: US Ambassador," *The Cambodia Daily*, (26 July 2006) at 17.
[369] See Thordis Ingadottir, "The Financing of Internationalized Criminal Courts and Tribunals," in Romano, *supra* note 5, at 285.
[370] Patrick Fullerton, Cost of Trials, Global Just. Program at the Liu Inst., June 2003, at 1, 2, online: <http://www.gjp.ubc.ca/_media/srch/030701costsoftrials.pdf>.
[371] *Supra* note 369 at 285.

can control and he got the UN to pay for it. If the tribunal fails to perform to international expectations, he can blame the UN for the problems. When the time comes for blame to be placed on someone for *creating* such a faulty institution however, it should not be placed entirely on the Secretary-General and his negotiators. They tried to pull away from a bad deal early on but the dominant powers would not let them. Also, understanding the rotten nature of deal they had been forced to make, the UN team included an extraordinary provision in the body of the Agreement -- an "escape clause," it states:

> 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 to the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement.[372]

While the existence of this clause might have provided some consolation to the UN negotiators, given the efforts that have been made by so many international players to bring about the creation of a tribunal, any tribunal, over the years, it is unlikely the UN will ever employ it. It is much more likely, that the operation will stumble along no matter what, until the assumed three-year operating period is up or all of the available funds are expended.

E. Who will Hun Sen Allow to be Convicted?

This of course is the million dollar question. In some ways it should not be that difficult a question to answer since it is now well known which individuals occupied the top tier of the Khmer Rouge leadership and the living members of this group still reside in Cambodia and are thus available for prosecution. It could be as simple as the prosecution starting at the top of the command structure and working as far down that structure as the court has time, resources, and of course, proof, to prosecute. The list would perhaps start with Nuon Chea, Pol Pot's second in command, move to individuals like Ieng Sary, former Foreign Minister for Democratic Kampuchea (the name the Khmer Rouge gave Cambodia during their time in power), and end with Kang Kech Eav, known as "Duch,"

[372] ECCC Agreement, Article 28.

the notorious warden of Tuol Sleng prison. A great deal of research and documentary evidence has been compiled over the years that should give the prosecutor's office a running start on building its cases.[373] Scholars and researchers on Cambodian affairs have given significant thought to the question of which individuals should be prosecuted and why.[374]

Unfortunately, bringing the surviving Khmer Rouge leadership to justice is unlikely to prove so simple. Hun Sen may be unwilling to back away from the amnesty deal he cut Ieng Sary back in 1996.[375] He may have made deals with other Khmer Rouge leaders he feels an obligation or compulsion to protect. Given the secrecy of his regime over the years and the lack of transparency in his decision making, it is impossible to know what these deals were or what his approach to this issue will be. What we do know is that the office of the prosecutor will not be free to make those determinations independently since Hun Sen will control the Cambodian members of the prosecutor's office.

Casting further uncertainty onto the question of who will be prosecuted by the ECCC, is the likelihood that Hun Sen and his administration will discourage investigative pursuits which could result in a presentation of events that is at odds with the version the Cambodian government has been telling the Cambodian people for the last thirty years or would implicate or tarnish the reputations of prominent members of his party. Since the time of the Vietnamese invasion, Cambodia's government has attempted to pile all of the blame on Pol Pot and a few members of his inner circle and limit the responsibility of those at the lower levels, many of whom later left the Khmer Rouge and joined the government.[376] The Khmer Rouge murdered many people over a long period of time and there were many individuals beside Pol Pot and his small circle killing and giving the

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[373] Most of this evidence has been collected and archived by the Documentation Center of Cambodia ("DC-Cam"). For an explanation of the work done by DC-Cam and a summary of materials contained in its extensive archives, see DC-Cam, <http://www.dccam.org/>.

[374] One of these scholars, Stephen Heder, co-authored a book that presents the case against seven likely candidates for prosecution, and has been hired as an Investigator for the ECCC prosecutor's office. See Stephen Heder & Brian D. Tittemore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* (Documentation Center of Cambodia, 2001).

[375] Hun Sen has frequently indicated over the years that he would uphold Ieng Sary's amnesty. *See* Etchinson, *supra* note 283 at 12.

[376] Chandler, History, *supra* note 220 at 230-31.

commands to kill. An unfettered investigation is likely to turn up unsavory facts about members of Hun Sen's government. Claims that the ranks of the ruling party and the government are filled with former Khmer Rouge leaders are not hyperbole. It is no trouble at all to point to former Khmer Rouge filling very prominent positions: Heng Samrin, currently Honorable President of the CPP and National Assembly member, was formerly Commander of the Eastern Zone of Democratic Kampuchea until Pol Pot's purges caused him to defect to Vietnam in 1978.[377] Chea Sim, currently Chairman of the CPP and President of the Senate was a Khmer Rouge Eastern Zone party secretary and military commander until he fled to Vietnam in 1978.[378] Keat Chlon, currently Minister of Economy and Finance, was formally an aid to Pol Pot and roving ambassador for the Pol Pot regime.[379] Sar Kheng, currently the head of the powerful Ministry of Interior, was in 1976, the permanent secretary of the communist party for the Northeast Zone until he fled to Vietnam.[380] Hor Nam Hong, currently Minister of Foreign Affairs, was formerly Democratic Kampuchea's ambassador to Cuba.[381] The list goes on and on. Given the positions some of these men held during the Khmer Rouge time there are certain to be skeletons in many of their closets. Given the risks to his regime, Hun Sen will almost certainly "manage" the fact finding direction of the proceedings to avoid those skeletons being unearthed. If the tribunal hearings begin to paint a picture of events significantly divergent from the picture painted by Hun Sen and his government over the years or gets too close to a valued ally, Hun Sen is bound to find ways to divert or rein in the fact finders.

F. Prospective Justice Analysis

1. Will the Court punish those individuals most responsible for committing serious violations of international humanitarian law, genocide and crimes against humanity?

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[377] Corfield, *supra* note 220 at 144.
[378] *Ibid.* at 64.
[379] *Ibid.* at 194-95.
[380] *Ibid.* at 349; currently listed as Minister of the Interior in *Who's Who in Cambodia: The Sole and Vital Reference Book 2006-2007* (2006) at 223.
[381] Corfield, *supra* note 220 at 154.

Unlike Kosovo and East Timor, Cambodia has the ability to apprehend the main suspects since most of the surviving Khmer Rouge leaders are living in Cambodia.[382] Now that the ECCC exists, Hun Sen will probably feel compelled to allow a few of these surviving leaders to be prosecuted but because the ECCC's investigation and trial process will be protracted and most likely contentious, a number of the leading suspects are likely to die of ailments related to old age before receiving the judgment of the court. Moreover, Hun Sen is unlikely to back away from his deal with Ieng Sary and waive amnesty and is unlikely to allow the ECCC to pursue investigations or prosecutions which get too close to valued members of his government. If trials do occur, there should be no illusions held about the basic nature of the trial process - the ECCC will provide a brand of "show trial," convicting only those former Khmer Rouge leaders Hun Sen has decided to put on the block.

2. Will the Court deliver a sense of justice to the survivors?

Twenty-seven years have passed since the Khmer Rouge were run out of Phnom Penh. In those twenty-seven years, the Cambodian population has experienced a decade-long civil war during which China and much of the west recognized Pol Pot and the Khmer Rouge as the lawful government of Cambodia. The Cambodian people have seen the UN promise of representative government stolen by former Khmer Rouge communists who have shape-shifted themselves and their party just enough to claim to be democratic while still keeping an iron grip on the political and economic life of the country. Former Khmer Rouge rule them, former Khmer Rouge live and work among them. Nothing the ECCC will do will change the situation. Because of all of this, expectations for the ECCC delivering a sense of justice should remain low. Surveys have shown that most Cambodians want to see the trials go forward.[383] They want to understand how and why their society was visited with such horror. It would be nice if the ECCC could do this for

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[382] See *supra* note 224 at para. 112.

[383] For example, a 2004 study done by the Khmer Institute for Democracy (KID) showed that more than 97 per cent of the population was in favor of prosecuting the Khmer Rouge leadership. Eighty-nine per cent of the individuals polled indicated that they constantly thought of genocide. Almost half the participants (44 %) preferred to have no trial if the trial was going to be sub-standard. Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal (2004), The Khmer Institute of Democracy at 5-7, online: http://www.bigpond.com.kh/users/kid/KRG-Tribunal.htm..

them. Given its limited scope, time frame, and ability to act independently of Hun Sen's government, it is exceedingly unlikely to do so.

3. Will the Court assist in the process of reconciliation between peoples?

Twenty-seven years have passed. Cambodia is ruled by ex- Khmer Rouge and this is unlikely to change anytime soon. Punishing a few old men for their ancient, albeit unforgivable, crimes will be a good thing but it is unlikely to lead to any sort of reconciliation that has not already occurred in the last twenty-seven years.

4. Will the Court provide a fair process which will ensure that the rights of the accused are protected?

If the Cambodian government decides to allow foreign lawyers to defend clients in front of the court, it is possible that the litigation process will generally conform to international fair trial standards. The international judges are also likely to serve as reasonably effective guides and watchdogs over their Cambodian counterparts in matters of procedure and the supermajority rule will allow the internationals to block verdicts they believe to be unfair. There will certainly be much talk and expression of commitment by members of the ECCC to protect the defendants' rights. All of this talk of defendants' rights however may be revealed as so much window dressing when the court first confronts the case of Kang Keck Ieu (alias Duch). Duch, the former warden of Tuol Sleng prison, has been in custody awaiting trial since 1999.[384] The Cambodian courts have violated Cambodian law to keep him there.[385] They have violated the international standards that the international community has mentioned so frequently when speaking about the court.[386] Since it is exceedingly unlikely that the ECCC will

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[384] See David Chandler *Voices from S-21: Terror and History in Pol Pot's Secret Prison* (Changmai: Silkworm Books 1999) at 20-23.

[385] Article 14 (4) of the current Cambodian Code of Criminal Procedure allows for a pre-trial detention of only four months that can be extended for another six months if justified by the "requirements of the investigation." In 2004, it was Cambodian Military Court Judge Ney Thol, now an ECCC Pretrial Chambers Judge, who extended Duch's custody. "Cambodian Court Extends Khmer Rouge Detentions" *Reuters* (25 February 2004).

[386] Article 9(3) of the ICCPR states that anyone arrested on a criminal charge shall be entitled to a trial in a "reasonable time or to release." Seven years would seem to exceed the definition of "reasonable time" in the view of most, if not all, of the international human rights courts which have considered the

abide by these standards and release Duch pending trial no matter how strong his arguments for release, the court will start its due process journey with one foot dragging in the mud.

Make no mistake, the most troubling aspect of the whole ECCC effort is that because Hun Sen controls Cambodia's judges and prosecutors, Hun Sen will determine who gets convicted, or if anyone gets convicted at all. Hun Sen will decide how fast the process will move and how far the investigation will range. Manipulating the important levers of the machine, Hun Sen will use the machine to achieve his political ends. The aid money will flow, patronage opportunities will expand, and the former Khmer Rouge in his government will be more easily controlled since they will fear indictment. He will blame the UN for the ECCC's failures and take credit for its successes. For all of this, the ECCC as an international justice mechanism should be considered an abomination. It will, in all probability, send a few old men to prison at the end of their lives but this will be a poor substitute for real justice.

VII. Sierra Leone: Finally the Right Formula

Since the UN efforts to bring justice to Kosovo, East Timor and Cambodia have been so disappointing, one could be forgiven for expecting more of the same for Sierra Leone. But there is finally some good news. The Sierra Leone Special Court began operations in August 2002, and by 2006, the Court is well on the way to completing a justice process that will punish those most responsible for the mass human rights violations that took place during its decade-long civil war. A streamlined court system guided primarily by international law and controlled by international personnel is providing a fair and relatively efficient trial process that adequately protects individual rights. While the Court has funding problems and these problems are likely to continue, it now seems more likely than not that the Court will be able to complete its mandate before funding dries up. In short, it appears that the UN has finally found a hybrid formula that works.

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reasonableness issue. See Amnesty International Fair Trials Manual, 7.2 What is reasonable time?, online: <http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm>.

A. Background

1. A Decade of Civil War

In March 1991, a small group of men calling themselves the Revolutionary United Front (RUF), led by a former-Sierra Leone army corporal named Fodoh Saybana Sankoh, began attacking villages on the Sierra Leone/Liberia border.[387] The RUF's stated intent was to overthrow the government's one-party military rule and establish a real democracy but much of its effort was spent looting, forcibly recruiting new members and terrorizing the civilian population.[388] The RUF was sponsored in its activities by then warlord and later President of Liberia, Charles Taylor, who provided arms and training to RUF fighters.[389] With Taylor's support, the RUF quickly took control of some of Sierra Leone's diamond mining districts and pushed the Sierra Leone army back toward the capital city of Freetown.[390] The RUF was not strong enough to take Freetown from Government forces however; their advance bogged down, and the conflict turned into a long, devastating, civil war.[391]

Over the next decade, Sierra Leonean territory became a writhing patchwork of violence and horror. Government and rebel troops rarely engaged in pitched battles or troop maneuvers; they mostly traded off control of villages, each side looting and committing atrocities against the people that lived in those villages.[392] During this period of conflict, approximately 100,000 people were killed, thousands were intentionally mutilated and more than two million people were forced to flee their homes and seek refuge in camps around Freetown or along the border.[393] The signature act of terror for the RUF and some

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[387] David Lord, "Introduction: The Struggle for Power and Peace in Sierra Leone, Paying the Price at The Revolutionary United Front, The Sierra Leone Peace Process" *Conciliation Resources Accord* (September 2000), online: Conciliation Resources < http://www.c-r.org/accord/s-leone/accord9/index.shtml>.
[388] See David Keen, *Conflict & Collusion in Sierra Leone* (Oxford: James Currey, 2005) at 39-47.
[389] *Ibid.* at 396.
[390] U.S. Department of State, Bureau of African Affairs, *Background Note: Sierra Leone, Profile*, (November 2003) at History, online: U.S. Department of State <http://www.state.gov/r/pa/ei/bgn/5475.htm>.
[391] See generally Lansana Gberie, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone* (Bloomington: Indiana University Press, 2005).
[392] *Ibid.*
[393] Establishing reliable figures for those killed, injured or displaced is a difficult task. The figures given here are taken from Tom Perriello & Marieke Wierda, "The Special Court for Sierra Leone Under

of the other armed groups was the intentional amputation of hands and feet or arms and legs.[394] Sometimes they cut off noses, ears or lips.[395] All factions committed acts of sexual violence against women.[396] All factions recruited child soldiers.[397] An especially savage method of conscription used by some groups was to enter a home, kill a family member, then force the boy recruit to kill another relative.[398] This destroyed the boy's sense of family and made it easier for the faction commanders to assume the role of surrogate parents.

In 1996, with this widespread violence as a backdrop, the country held multi-party elections which resulted in former-UN official, Ahmed Tejan Kabbah, being named President. Shortly after the elections, Kabbah reached a peace agreement with the RUF in the Ivory Coast city of Abidjan.[399] The Abidjan agreement did not hold however, and the fighting continued.[400] In May 1997, a group of Sierra Leonean Government military officers, calling themselves the Armed Forces Revolutionary Council (AFRC), overthrew Kabbah and replaced his government with a military junta.[401] The junta placed former army corporal, Johnny Paul Koroma, at its head and set off on its own path of terror.[402] Rather than fight with the RUF, Koroma and his AFRC, joined forces with the RUF and formed a governing alliance.[403] These groups proceeded to work, more or less in concert, to strip the country of its natural resources and terrorize its population.[404]

With Sierra Leone being pillaged from within and the risk of regional destabilization growing, a regional military force, the Military Observer Group (ECOMOG), representing the Economic Community of West African States (ECOWAS) and led by

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Scrutiny" (March 2006), International Center for Transitional Justice, Prosecutions and Case Studies Series at 8-9.

[394] *Supra* note 391.

[395] *Supra* note 393.

[396] *Ibid.*

[397] *Ibid.* at 9.

[398] *Ibid.* at 9.

[399] Sierra Leone-UNAMSIL-Background, online: UNAMSIL <http://www.un.org/Depts/dpko/missions/unamsil/background.html>.

[400] *Ibid.*

[401] *Supra* note 393 at 97-117.

[402] *Ibid.*

[403] *Ibid.*

[404] *Ibid.*

Nigeria, intervened.[405] In February 1998, ECOMOG forces attacked the junta, drove its fighters out of Freetown and placed Kabbah back in his presidential seat.[406] A group of civilian militias, based loosely on the country's traditional hunting societies, assisted ECOMOG in their efforts.[407] Shortly after resuming power, Kabbah formalized these civilian militias by putting them under the control of a provincial Chief named Sam Hinga Norman and calling them the Civilian Defense Force (CDF).[408]

While the RUF and the AFRC had been pushed out of Freetown, they had not been destroyed. They regrouped in the countryside, and resumed their war against Kabbah and the forces that supported him. In January of 1999, a rebel force made up of RUF and AFRC fighters, mounted "Operation No Living Thing" and attacked Freetown.[409] During this offensive, the rebels killed thousands of people, mostly civilians, and destroyed large parts of the city.[410] ECOMOG and the CDF ultimately pushed the rebels out of Freetown but in the process committed their own atrocities against the population.[411] Violence raged throughout the country until July of 1999, when the main factions in the fighting signed a peace agreement in Lomé, Togo.[412]

The Lomé Peace Agreement was strongly pushed by international actors eager to find a solution to the Sierra Leonean civil war and resulted in extreme compromises being made by Kabbah and his Government.[413] The agreement included amnesty for all fighters in all factions, and required all Nigerian forces to leave Sierra Leone even though they represented the only defense against future RUF attacks. The agreement awarded Fodoh Sankoh not only the Vice Presidency but also the Chairmanship of the Strategic Mineral Resources Commission.[414] Despite this beneficial deal Sankoh and the RUF could not

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[405] *Supra* note 399.
[406] *Ibid.*
[407] *Supra* note 393 at 6.
[408] *Ibid.*
[409] *Ibid.* at 7.
[410] *Ibid.*; see also Gberie, note 391 at 118-155.
[411] *Ibid.*; see also Keen, note 388 at 244-247.
[412] *Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999*, online: http://www.sierra-leone.org/lomeaccord.html
[413] See note 388 at 248-252.
[414] *Supra* note 399.

hold their violent impulses in check. As soon as the last ECOMOG troops departed in May 2000, the RUF violated the agreement by taking several hundred UN peacekeepers hostage.[415] British paratroopers freed the hostages but the conflict picked up where it had left off and low level violence resumed. By this time however, the UN had established a large peacekeeping force in Sierra Leone, the United Nations Mission to Sierra Leone (UNAMSIL), and its disarmament and demobilization program was beginning to work.[416] UNAMISIL efforts were so successful that by January 2001, the war was declared officially over. Four months later, peaceful elections were held in which Kabbah captured 70 per cent of the presidential vote.[417]

2. Building the Court

Eager to punish Foday Sankoh and other rebel leaders but fearful that a domestic trial of these individuals would result in renewed conflict, President Kabbah wrote Secretary-General Annan and asked the UN for assistance in creating a special tribunal to try the men.[418] The request resulted in a debate between the Security Counsel and the UN Secretariat over what form such a court should take.[419] The Secretariat favored granting the court enforcement powers under Chapter VII of the UN Charter; the Security Council did not.[420] The Secretariat favored funding the court by assessed contribution while the Security Council insisted upon voluntary contributions.[421] The Secretariat wanted the court's personal jurisdiction to extend to "those most responsible" while the Security Council preferred the narrower, "those who bear the greatest responsibility."[422] As was the case in internal negotiations over other hybrid tribunals, the Security Council's arguments prevailed. On 14 August 2000, the UN Security Council passed Resolution 1315 which requested Secretary General Annan to negotiate an agreement with the

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[415] *Supra* note 412 at 7.
[416] *Supra* note 399.
[417] *Supra* note 393 at 7.
[418] *Letter from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council* (9 August 2000) UN Doc S/2000/786.
[419] *Supra* note 393 at 10-11.
[420] *Ibid.* at 10.
[421] *Ibid.*
[422] *Ibid.*

Government of Sierra Leone to create an "independent special court."[423] The Security Council recommended that the special court have personal jurisdiction over persons who "bear the greatest responsibility" for the crimes.[424] It requested Annan to prepare a report to lay the groundwork for the establishment of the court and that the report include recommendations as to the amount of voluntary contributions necessary for operations.[425]

Approximately two months later, on 4 October 2000, Secretary General Annan submitted his report which included a draft statute for the Special Court.[426] In the report, Annan proposed that the Special Court operate as a mixed tribunal which would be composed of Sierra Leonean and international judges and apply both domestic and international law.[427] On 16 January 2002, the UN and the government of Sierra Leone signed an agreement to establish a Special Court for Sierra Leone, and included the Statute of the Special Court as an annex.[428] The Sierra Leonean Government quickly integrated the Special Court Statute into its domestic law by passing the Court Ratification Act of 2002.[429]

B. The Statute of the Special Court

It was clear from the negotiations that the goal of the Security Council was to create a court which would deliver a measure of justice to Sierra Leone but would also limit the drain on UN finances. While this approach might be viewed as penurious by some, it has resulted in the creation of a legal and organizational framework that may in the end produce the best results of any of the hybrids. If the Special Court proves to be a formula for success, it will largely be because the Special Court Statute includes the following critical ingredients: 1) reasonable jurisdictional limitations, 2) primacy of international

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[423] S.C. Res. 1315, 55th Sess., 4186 mtg., U.N. Doc. S/Res/1315 (2000).
[424] *Ibid.*
[425] *Ibid.*
[426] *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone* (4 October 2000) UN Doc S/2000/915.
[427] *Ibid.* at para. 9.
[428] *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* (16 January 2002), found online: Special Court for Sierra Leone, Documents, Special Court Agreement, online: <http://www.sc-sl.org/>.
[429] *The Special Court Agreement, 2002, Ratification Act, 2002*, Supplement to the Sierra Leone Gazette Vol. CXXX. No. II dated 7th March 2002, online: <http://www.sc-sl.org/specialcourtact2002.pdf.>.

law over domestic law, and 3) a streamlined court structure with internationals firmly in control.

1. Limited Jurisdiction

a. Personal Jurisdiction

As demanded by the Security Council, the Statute of the Special Court limits the Court's consideration of individual culpability to only those individuals who "bear the greatest responsibility for serious violations of international humanitarian law."[430] This means that only the leaders who were alleged to have directed and organized the violence, not the rank and file combatants, can be brought before the tribunal. The determination of which individuals "bear the greatest responsibility" will be made initially by the Prosecutor and ultimately by the Court.

There has been criticism, especially from Sierra Leoneans, that the Court was given too limited a mandate in terms of the individuals it can try, and that this will result in too many guilty individuals going unpunished.[431] This criticism is understandable and to a certain extent valid but the limited mandate can also be seen as an open and honest recognition of the Court's limitations. The Court only has the funds to pursue a few of the major offenders and there is little political will to support a lengthy justice process. Allowing prosecution of only the top-level factional leaders was a rational and pragmatic choice. It should also be pointed out, that the phrase "bear the greatest responsibility" leaves a fair amount of flexibility for interpretation by the prosecution and the Court should they find themselves with the resources and the inclination to expand the pool of indictable individuals beyond the main factional leaders.

b. Temporal Jurisdiction- Although it is generally accepted that the Sierra Leone civil war began on March of 1991 when RUF forces invaded Sierra Leone from Liberia,[432] the Statute limits the court to considering only crimes committed after 30

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[430] *The Statute for the Special Court for Sierra Leone* (16 January 2002) Article 1(1).
[431] *Supra* note 393 at 2.
[432] *Supra* note 426 at para. 25.

November 1996.[433] This was the date that the Government of Sierra Leone and the RUF concluded the Abidjan Peace Agreement, a short time after which, the Agreement collapsed and large-scale violence resumed.[434] The drafters established this later starting date because they wanted the jurisdiction to be "reasonably limited in time" so the Prosecutor and the Court would not be overburdened.[435] They also felt that starting jurisdiction at 30 November 1996, would have the benefit of "putting the Sierra Leone conflict in perspective" and would ensure that the most series crimes committed by all of the parties would be covered.[436]

The drafter's justifications aside, the selection of Abidjan agreement has to be considered somewhat arbitrary. Large scale violence in Sierra Leone began in 1991, and since neither the Abidjan Accords nor the other agreements reached by the combatants held for long, the violence could be said to have been continuous throughout the decade. However, even if the date of Abidjan Accords represents an arbitrary or artificial date, it is questionable that the setting of that date has actually served to limit the prosecution's charging decisions. Since the Court has limited personal jurisdiction, and more importantly, since it possesses limited resources, the prosecution cannot extend its attention beyond the obvious leaders of the main factions and there is no indication that beginning temporal jurisdiction before 1996 would have changed the names of the individuals that were ultimately selected for prosecution.

c. Subject Matter Jurisdiction

Most offenses falling within the jurisdiction of the Court are offenses defined under international humanitarian law and international human rights law. These offenses are, crimes against humanity,[437] violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, [438] and other serious violations of international humanitarian law, including crimes against peace-keepers and the recruitment of

[433] Statute, Art. 1(1).
[434] *Supra* note 426 para. 26(a).
[435] *Ibid.* at paras 25(a), 26.
[436] *Ibid.* at paras 25(a), 27.
[437] Statute, Art. 2.
[438] Statute, Art. 3.

children.[439] The drafters did not list genocide as an offense under the Court's jurisdiction, since they claimed to have found little evidence indicating that the violence in Sierra Leone was perpetrated against a national, racial, ethnic or religious group with the intent to destroy the group.[440] By choosing to give the Court jurisdiction of violations of common Article 3 and Additional Protocol II which apply during internal conflicts, and not to choose the grave breaches provision of the Geneva Convention which apply during international conflict, the drafters determined from the outset that the conflict was an internal conflict, not international in nature. This had the effect of eliminating from the court's consideration, many offenses prosecutable under international humanitarian law.

In addition to the crimes defined by international law, the Statute grants the Court jurisdiction to consider certain types of offenses defined under Sierra Leonean law, including crimes related to the abuse of children and to wanton destruction of property.[441] The rationale for including these local offenses was that they were not regulated, or were inadequately regulated, under international law.[442]

2. Primacy of International Law

The legal framework of the Special Court is primarily international, not domestic. Although there are a small number of offenses within the court's jurisdiction drawn from Sierra Leonean law, the majority of offenses recognized by the Court derive from international law, not Sierra Leonean law.[443] Not only are the majority of its offenses derived from international law but its rules of procedure and evidence are based on those of the International Criminal Tribunal for Rwanda (ICTR).[444] And while the Special Court and domestic courts can theoretically exercise concurrent jurisdiction over a case, the Statute expressly grants the Special Court primacy over domestic Sierra Leonean courts.[445]

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[439] Statute, Art. 4.
[440] *Supra* note 412 at para. 13.
[441] Statute, Art. 5
[442] *Supra* note 426 at para. 19. The prosecution yet to charge a single defendant with a single local offense. See Cases, The Special Court for Sierra Leone, online:< http://www.sc-sl.org/index.html>.
[443] See Statute, Art. 2-5.
[444] Statute, Art. 14(1).
[445] Statute, Art. 8(2).

The Statute relies on international law to establish the rights of the accused. While the Statute does not directly mention any international instrument when it lists the rights of accused, there is little doubt that the language used to define those rights was taken from Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[446] These rights include the right to a presumption of innocence,[447] the right to have adequate time and resources to prepare a defense,[448] the right to self representation or to counsel of a person's choosing or to legal assistance provided by the court,[449] and the right to examine or have examined witnesses against him and to call and examine witnesses on his own behalf.[450]

Finally, there is no doubt that the Court *views itself* to be an entirely international court and not a domestic court. When defense counsel made preliminary motions challenging the establishment of the Court by claiming that it was created in violation of the Sierra Leonean Constitution, the Appeals Chamber of the Special Court dismissed the motions, holding that since the Court's creation was based on a valid treaty, the Court is acting under international law and is independent of Sierra Leonean Law.[451]

3. Streamlined Organizational Structure with International Leadership

The Statute creates a streamlined and uncomplicated court structure. It places international personnel firmly in positions of leadership and control but allows for significant local participation. The court structure consists of three organs: the Chambers, the Office of the Prosecutor (OTP), and the Registry.

a. The Chambers

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[446] See ICCPR, *supra* note 17 Art. 14.
[447] Statute, Art. 17(3), ICCPR Art. 14(2).
[448] Statute, Art. 17(4)(b), ICCPR Art. 14(3)(b).
[449] Statute, Art. 17(4)(d), ICCPR Art. 14(3)(d).
[450] Statute Art. 17(4)(e), ICCPR Art. 14(3)(e).
[451] *Prosecutor v. Augustine Gbao* (25 May 2004), Case Number SCSL-2004 -15-AR72(E), Decision on Preliminary Motion on the Validity of the Agreement Between the United Nations and the Government of Sierra Leone Summary on the Establishment of a Special Court (Special Court for Sierra Leone), online: <http://www.sc-sl.org/Documents/SCSL-04-15-PT-141.pdf>.

The Chambers includes two Trial Chambers and one Appeals Chamber. The Statute calls for each Trial Chamber to be staffed by three judges- two international, one Sierra Leonean.[452] It calls for the Appeals Chamber to be staffed by five judges- three international and two Sierra Leone.[453] Each Chamber elects its own Presiding Judge.[454] In all Chambers, judgments are rendered by a simple majority vote and the judgments are required to be accompanied by a "reasoned opinion in writing."[455] Interestingly enough, the Sierra Leonean government has chosen to nominate two internationals out of its four judicial nominations.[456] This has contributed to both the perception and the reality that the Special Court is much more international than domestic.[457]

b. Office of the Prosecutor (OTP)

The Special Court has one Prosecutor, an international staff member[458] appointed by the Secretary-General.[459] The Prosecutor is required to act independently, and not be influenced by any Government or other party.[460] Although more than a third of the OTP staff is Sierra Leonean, almost all of the senior positions are held by internationals.[461]

c. The Registry

Representing an enlightened move by the drafters, the Statute established a Registry and gave its Registrar a broad mandate. This mandate includes the tasks of managing the Court's budget, personnel, and infrastructure and also providing support for a Victim and Witnesses Unit,[462] an outreach program, [463] and a first-of-its-kind Defense Office.[464]

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[452] Statute, Art. 12(1)(a).
[453] Statute, Art. 12 (1).
[454] Statute, Art. 12(3).
[455] Statute, Art. 18.
[456] *Supra* note 393 at 19.
[457] See *ibid.* at 19.
[458] *Supra* note 426 at para. 47.
[459] Statute, Art. 15 (3).
[460] Statute, Art. 15(1).
[461] *Ibid.* at 21.
[462] *Ibid.* at 23.
[463] Statute, Art. 16.
[464] *Ibid.* at 23.

While there is no provision in the Agreement or the Statute which establishes a Defense Office, the Court's Rules of Procedure and Evidence require the Registrar to establish such an office to "provide advice, assistance and representation" to suspects and accused persons.[465] In what has been hailed as an innovation that could provide a new model for defense in international tribunals, the Management Committee of the Special Court went on to decide that the Defense Office should be headed by a Principal Defender, supported by a Defense Advisor and three Duty Counsel.[466] The Defense Office decided in turn, that each defendant would be represented by a team of lawyers that would include both Sierra Leonean and international lawyers.[467]

C. Funding- The Fly in the Ointment

As was the case in Cambodia, during preliminary discussions, Secretary-General Annan objected to the Court being financed solely by voluntary contribution because he felt this mechanism would not provide a continuous source of funding and would risk leaving the Court stuck with contractual and moral commitments it would not be able to honor.[468] He suggested that the only "realistic solution" was financing the court through assessed contribution.[469] His objections initially fell on deaf ears. The UN Member States refused the assessment option and approved an Agreement that required the expenses of the Special Court to be provided by voluntary contributions from the "international community."[470] The Sierra Leone court at this point, became the first internationalized court to be funded solely by voluntary contributions.[471] What made this particularly unique was that under this arrangement, neither the UN nor the Sierra Leone Government was expected to carry any of the financial burden for establishing or operating the Court.

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[465] *Rules of Procedure and Evidence*, Rule 45, online:
< http://www.sc-sl.org/rulesofprocedureandevidence.pdf .>
[466] Rupert Skilbeck, "Building the Fourth Pillar" Essex Human Rights Review, Vol. 1, No. 1 at 79.
[467] *Ibid.* at 81.
[468] *Supra* note 426 at 70.
[469] *Ibid.* at 71.
[470] *Agreement*, note 428, Art. 6.
[471] The costs of the Kosovo and East Timor tribunals are incorporated into the respective budgets of UNMIK and UNTAET/UNMISET. See Ingadottir, *supra* note 369 at 271-2.

The voluntary contribution scheme however, did not get off to a good start. The original budget for three years of operation was set at US $114.6 million[472] but when it became clear that voluntary contributions would not approach the original budget figures, this amount was scaled down to $56.2.[473] Even with the budget reduction, the Court has faced continual financial shortfalls. In 2004, the Special Court was forced to ask the UN Secretary General for US $40 million to help meet its financial obligations, a request to which the UN General Assembly responded by providing $33 million to help fund operations through 2005.[474] In 2006, the Court continues to plead for funds to continue its work and complete its mission.[475]

D. Performance

In July and August 2002, the Prosecutor and Registrar arrived in Freetown and began to set up operations.[476] By November 2006, the Special Court Trial Chambers had made it more than the halfway through three of the four cases that had been presented for indictment.[477]

1. Focused Prosecution Approach

Aware from the outset that the Court possessed a limited mandate and a restricted budget,[478] the OTP has pursued a narrowly focused and pragmatic prosecution strategy. The OTP's first Prosecutor, American David Crane, made it known that he would not prosecute juveniles even though it was widely recognized that juveniles had committed a

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[472] *Letter dated 12 July 2001 from the Secretary-General Addressed to the President of the Security Counsel*, UN Doc S/2001/693 (13 July 2001).
[473] Ingadottir, *supra* note 369 at 284.
[474] See *Special subjects and questions relating to the programme budget for the biennium 2004-5*, GA Res.., UNGAOR, A/RES/59/294 (31 August 2005) paras. 7-14; *Questions relating to the programme budget for the biennium 2004-5*, GA Res., UNGAOR, A/RES/59/276, (17 January 2005) section VII, paras. 16-20; *Estimates in respect of special political missions, good offices and other political initiatives authorized by the General Assembly and/or Security Council UN General Assembly*, UNGAOR, A59/569/Add.4, (22 April 2005) paras. 15-26; *Request for a subvention to the Special Court for Sierra Leone, Report of the Secretary-General*, UNGOR, A/58/733, (15 March 2004).
[475] "New War Crimes Court President Pleads for Extra Funds," *Integrated Regional Information Networks, Global Policy Forum*, online: www.globalpoicy.org/intljustice/tribunals/sierra/2006/0525extrafunds.htm
[476] *Supra* note 393 at 11.
[477] The Special Court of Sierra Leone, online: <http://www.sc-sl.org/CDF.html>.
[478] The Special Court of Sierra Leone, online: <http://www.sc-sl.org/>.

large number of horrible offenses during the conflict,[479] and the OTP has stuck to that policy ever since. The OTP also adopted a narrow interpretation of the Court's personal jurisdiction and sought the indictment of only those very few individuals who occupied the highest levels of the factions' command structures.[480] This has led to the indictment of only 13 people.[481] This small pool of indictees has been further narrowed by the deaths of two individuals- RUF leaders Foday Sankoh and Sam Bokerie.[482] Of the remaining eleven indictees, AFRC leader, Johnny Paul Koroma, remains at large, leaving the number of individuals currently being prosecuted in the Special Court at a very manageable, 10.[483]

Rather than expend its resources trying each individual alone, the OTP divided its trial strategy into four cases - joining defendants in terms of the factions they represented in the conflict. The cases against the RUF, CDF, and AFRC, each contain three defendants, who represent the surviving members of the top level command structure of each group. Charles Taylor is charged in his own separate case. Rather than follow the unwieldy precedent set by the ICTR and ICTY which frequently included numerous cumulative charges on the indictment, the OTP indictments include fewer than twenty charges for each indictment. The OTP avoided the potentially troublesome effort of interpreting and applying local statutes and jurisprudence by charging international crimes, not domestic crimes.

The OTP built its cases with speed and efficiency. A UN Planning Mission which visited Sierra Leone in January 2002, reported that for the bulk of the crimes committed during the decade-long civil war, virtually no evidentiary material had been collected by anyone.[484] Despite this initial dearth of assembled evidence, the OTP was able to issue

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[479] "Special Court Prosecutor says he will not Prosecute Children," Special Court Press Release (2 November 2002), online: <http://www.sc-sl.org/Press/prosecutor-110202.pdf.>.
[480] Sara Kendall & Michelle Staggs, "Interim Report on the Special Court for Sierra Leone" (April 2005) War Crimes Studies Center of the University of California, Berkely at 6-7.
[481] See Cases, *supra* note 429.
[482] The Special Court of Sierra Leone, Cases, RUF, online: < http://www.sc-sl.org/RUF.html>.
[483] The Special Court of Sierra Leone, Cases, Other Cases, online :< http://www.sc-sl.org/cases-other.html>.
[484] *Report of the Planning Mission on the Establishment of the Special court for Sierra Leone*, UN Doc S/2002/246 at para. 26.

its first indictments on 7 March 2003, after having been in the country only seven months.[485] The OTP employed a mixed team approach to its prosecutions but has generally placed international staffers in the lead positions.[486] This has led to some complaint and discontentment from Sierra Leonean staff members[487] but there is no doubt that this staffing profile has helped the OTP avoid claims that it was acting with bias against any particular group.

2. Efficient Court Proceedings

Like the OTP, the Special Court moved swiftly in its initial operations. After the OTP filed indictments in March of 2003 against defendants in the three multi-defendant cases, the Court was able to begin trial in two of the cases just a little more than a year later.[488] By December 2006, the Court had heard all of the evidence in both the AFRC and CDF cases with closing arguments in both scheduled to begin before the close of 2006.[489] In the RUF case, the Court has gotten through the prosecution evidence and is ready to move on to hear defense witnesses. [490] Considering the legal complexity of these cases and the logistical challenges the Court faced in pulling the pieces of the process together, the relative speed with which it has worked, at least with regards to the CDF and AFRC trials, has been impressive.

Up to this point, the Special Court has probably been the most closely monitored of any of the hybrid tribunals.[491] A variety of human rights organizations have been involved in

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[485] The RUF indictees at that time were Foday Saybana Sankoh, Sam Bockarie, Issa Hassan Sesay and Morris Kallon. *Supra* note 482, online: <http://www.sc-sl.org/RUF.html>. The CDF indictee was Sam Hinga Norman. *Supra* note 477, online: <http://www.sc-sl.org/CDF.html>. The AFRC indictees were Alex Tamba Brima and Brima Bazzy Kamara. The Special Court of Sierra Leone, Cases, AFRC, [AFRC] online: <http://www.sc-sl.org/AFRC.html>. Charles Taylor was also indicted on that date as well. Special Court of Sierra Leone, Cases, Taylor, online: <http://www.sc-sl.org/Taylor.html>.

[486] *Supra* note 393 at 21-23.

[487] *Ibid.* at 21-22.

[488] The CDF trial began 3 June 2004. *Supra* note 482, The RUF trial began 5 July 2004. *Supra* note 477. The AFRC trial began a year later on 7 March 2005. AFRC, *supra* note 485.

[489] Press Release, Special Court for Sierra Leone (27 October 2006) online: <http://www.sc-sl.org/Press/pressrelease-102706.pdf>.

[490] "Prosecution Closes Case in AFRC Accused Trial, Press Release, Freetown, Sierra Leone, 21 November 2005," *The Special Court for Sierra Leone Press and Public Affairs Office*, online: <http://www.sc-sl.org/Press/pressrelease-112105.pdf>.

[491] These monitoring organizations include Human Rights Watch, the International Center for Transitional Justice (ICTJ) and the War Crimes Studies Center of the University of California, Berkely.

the monitoring and these organizations have generally given the Court high marks for efficiency and for delivering a fair process to the parties. In a November 2005 report, Human Rights Watch labeled the Court "a highly functional operation"[492] and noted that both trial chambers "have overall demonstrated a strong degree of efficiency."[493] In its March 2006 report, the International Center for Transitional Justice (ICTJ) stated, "the Special Court is succeeding in rendering a measure of justice for some of the worst atrocities in Sierra Leone..."[494] The monitoring groups have also praised the Special Court for protecting the rights of the accused. Human Rights Watch took special notice of Trial Chamber II which it reported was making "a useful contribution to addressing the need to fully protect the rights of the accused and the interests of witnesses while promoting the efficient administration of justice."[495]

The Special Court has also issued opinions on legal issues that have the potential of becoming significant milestones in international jurisprudence. For example, in May of 2004, the Appeals Chamber ruled that the recruitment or use of children under the age of 15 was a crime under international law and that the violation of fundamental protections provided to these children by such international instruments as the Convention on the Rights of the Child leads to individual criminal responsibility.[496] Also in May of 2004, the Appeals Chamber rejected Charles Taylor's' claim of sovereign immunity, and found that heads of state are not immune from prosecution before an international criminal tribunal.[497]

3. The Defense

While the establishment of the Defense Offense was tardy - a Principal Defender was not appointed until April 2004,[498] the unique structure and mandate of the Defense Office

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[492] "Sierra Leone, Justice in Motion, The Trial Phase of the Special Court for Sierra Leone" Human Rights Watch (November 2005 Volume 17, No. 14(A) at 3.
[493] *Ibid.*
[494] *Supra* note 393 at 1.
[495] *Supra* note 492 at 3.
[496] *Prosecutor v. Sam Hinga Norman*, (31 May 2004), SCSL 2003-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (Appeals Chamber).
[497] *Prosecutor v. Charles Ghankay Taylor*, (31 May 2004), SCSL-2003-01-I, Decision on Immunity from Jurisdiction, (Appeals Chamber).
[498] *Supra* note 492 at 16.

allowed it to get up to speed quickly and provide an adequate defense for those accused.[499] The Defense made sure than an individual who was arrested had immediate access to legal advice.[500] It then provided an accused with a list of "highly qualified criminal defense counsel" from which he could choose.[501] The Office has also made sure that Sierra Leonean lawyers were included on the defense teams; in the case of some defendants, local lawyers lead the team.[502] While valid concerns have been expressed about the quality of some defense counsel[503] and worries expressed about the funding inequity between prosecution and defense,[504] the defense function at the Special Court for Sierra Leone has been judged a significant improvement over approaches used in other international criminal courts.[505]

4. Charles Taylor

Charles Taylor is widely considered to be the individual most responsible for the Sierra Leone civil war.[506] As such, the Court's inability to bring Taylor before it hung like dark cloud over the Court's early years of operation. The OTP filed an indictment against Taylor in March 2003 but at that time,[507] Taylor was President of Sierra Leone, and the Court had no way to force his appearance, especially without Chapter VII powers. A rebel insurgency within Liberia in August of 2003 however, caused Taylor to seek asylum in Nigeria,[508] where he remained until March 2006, when the new Liberia President, was able to convince Nigeria to surrender Taylor to the Special Court.[509] Taylor attempted to flee but was arrested at the Nigerian-Cameroon border and then turned over to Liberia. [510]

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[499] *Supra* note 393 at 25-26.
[500] *Rules of Procedure and Evidence*, Rule 45(A),(B).
[501] *Supra* note 492 at 17.
[502] *Supra* note 393 at 26.
[503] *Supra* note 492 at 17-18.
[504] *Ibid.* at 14-16.
[505] *Supra* note 393 at 26; see also *supra* note 492.
[506] See "Trying Charles Taylor in the Hague: Making Justice Accessible to Those Most Affected" (June 2006) *Human Rights Watch* at 8.
[507] Special Court for Sierra Leone, Cases, Taylor, online: <http://www.sc-sl.org/Taylor.html.>
[508] *Supra* note 506 at 15.
[509] *Ibid.*
[510] *Ibid.*

On 29 March 2006, Liberia surrendered Taylor to the Special Court.[511] The surrender came with a request from Liberian President Ellen Johnson-Sirleaf that Taylor not be tried in Sierra Leone.[512] Johnson-Sirleaf was worried that if Taylor's trial took place in the region, it might lead to region-wide bloodshed and destabilize her fragile government.[513] The Special Court took Johnson-Sirleaf's request to heart and made arrangements for Taylor to be transferred to The Hague.[514] The arrangements called for Taylor to be tried by Special Court personnel using Special Court law, rules and procedures.[515] Only the venue would be changed; the venue would be the facilities of the International Criminal Court (ICC) at The Hague.[516]

Of course the decision to try Taylor in the Netherlands has some negative implications. The Hague is very far from Sierra Leone and no amount of outreach will change this. This is bound to create a disconnect between the victim population and the proceedings taking place at The Hague. It is also likely to increase the costs. Court personnel and witnesses will have to travel back and forth, from Africa to The Hague, and this will create a large strain on the Court's already limited resources. All of this considered, it still appears to have been a reasonable decision. The last thing the region needs is a return to hostilities caused by the close proximity of a Taylor trial. Taylor's trial at The Hague is scheduled to begin on 2 April 2007.[517]

F. Justice Analysis

1. Did the Court punish those individuals most responsible for perpetrating serious violations of international humanitarian law, genocide, and crimes against humanity?

Looking ahead, it seems almost certain that within the next couple of years, the Special Court will convict and punish the men, at least the surviving men, who were most responsible for perpetrating the ten-year horror on the people of Sierra Leone. The list of

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[511] *Ibid.*
[512] *Ibid.* at 2-3.
[513] *Ibid.*
[514] *Ibid.* 1-4.
[515] *Ibid.* at 4.
[516] *Ibid.*
[517] Prosecutor v. Charles Taylor, Cases, The Special Court for Sierra Leone, online: <www.sc-sl.org/Taylor.html>.

convicted men will probably include Charles Taylor, a former Head of State, and a man responsible for causing immense suffering not only in Sierra Leone but across the entire region. This will be a substantial accomplishment and will make the Special Court for Sierra Leone the only one of the world's hybrid courts that has come (or will come) anywhere near achieving the goal of trying and punishing the individuals most responsible for their respective mass atrocities.

2. Did the Court deliver a sense of justice to the survivors?

Because the jurisdiction of the Court is restricted and because the resources of the Court are limited, many individuals deserving punishment will go free and this will probably result in the surviving population feeling deeply disappointed. These feelings of disappointment may be mitigated somewhat however, by the work the Registry's Outreach Unit is doing informing the Sierra Leonean public about the Court's structure and activities.[518] While the results of one survey completed in 2003 indicated that the general public felt the court was necessary and would benefit the people of Sierra Leone[519] it remains difficult to determine how the majority of survivors perceive the Court at this point in time.[520]

3. Did the Court assist in the process of reconciliation between peoples?

Sierra Leone is a society in the first stages of recovery and what role the Special Court is having in that recovery is still too early to say. As mentioned above, at least one public opinion poll has indicated a mostly positive reaction to the Court's work by the majority of the people surveyed.[521] Certainly, the arrest of Charles Taylor was greeted with general joy and satisfaction among the citizenry. While transferring Taylor to The Hague for trial will deny the victim population the opportunity to witness the proceedings first hand, the decision was made specifically to avoid the risk of destabilizing Sierra Leone and the surrounding region, and in the end, will probably prove to be a wise move. The prosecution's decision to charge Sam Hinga Norman and the other CDF leaders on the

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[518] *Supra* note 393 at 35-37; See also note 492 at 32-35.
[519] See *Ibid.* at 37.
[520] *Ibid.*
[521] *Ibid.* at 37.

other hand, has been strongly criticized by some and could have the effect of maintaining or even increasing tensions within Sierra Leonean society since Norman and the CDF are considered by some to be heroes who helped rid Sierra Leone of the rebel groups.[522] Even so, the prosecution's decision to pursue indictments against leaders of groups allied with the Government, along with those that fought against it, may go a long way toward establishing the Court's reputation and legacy as a fair and objective dispenser of justice.

4. Did the Court provide a fair trial process which ensured that the rights of the accused were protected?

Human rights groups that have monitored the Special Court have praised the Court for meeting international due process standards.[523] A review of court transcripts available on the Special Court's website supports these opinions.[524] The creation of the Defense Office represents an innovation which may prove itself worth replicating in future international criminal tribunals.

VIII. Conclusion

We have now seen that in most cases where the United Nations has attempted to employ some version of internationalized criminal court, the effort has not gone well. Most of the hybrids have failed to meet the objectives listed in our criteria. In the case of the Extraordinary Court of Cambodia, the failure is on its way to becoming truly spectacular. Only the Special Court for Sierra Leone provides hope that in certain situations, some form of hybrid court may be worth the trouble to create.

Despite these disheartening conclusions, this paper does not recommend that internationalized criminal courts be completely rejected for consideration as alternative justice mechanisms. There have been lessons learned from the previous and ongoing hybrid experiments that can be applied to make future hybrid courts perform more

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[522] *Ibid.* at 38.

[523] See *ibid.* at 2 where the ICTJ states, "..trials are generally considered to meet international standards. The same is true for conditions of detention, although local perceptions are that the accused enjoy a higher standard of living than many Sierra Leoneans."

[524] See The Special Court for Sierra Leone, online: <www.sc-sl.org/>.

effectively. Analysis has shown however, that the creation of a hybrid court should only be considered where the following conditions are met: 1) the court will possess, or will otherwise be provided, the ability to apprehend and prosecute the individuals *most responsible* for committing serious human rights offenses; 2) the legal framework of the court is based upon international law; 3) international judges, prosecutors and court administrators, not local personnel, control the process; and 4) the sponsors of the court exhibit a clear, unambiguous commitment to provide a fair process that protects the rights of the accused. This list of prerequisites is limiting to be sure but employing a hybrid under anything less than these circumstances is near certain to lead to failure.

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