

Current Developments in Internationalized Courts

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I. Introduction

This paper covers recent developments in trials of international crimes taking place in national and internationalized courts. 'International crimes' is used throughout to refer broadly to genocide, war crimes and crimes against humanity.

During 2002 internationalized courts continued to develop in four parts of the world: Cambodia, East Timor, Kosovo and Sierra Leone. Of these, only East Timor and Kosovo are sufficiently advanced to be holding trials. In Cambodia discussions continue, in an attempt to find an acceptable basis for a tribunal. In Sierra Leone the foundations for a court are being laid, but no indictments have yet been issued.

In addition, wholly national trials of international crimes are taking place in Indonesia.

In the courts where cases are progressing, the principal obstacle to analysis is the inaccessibility of judgments and information. In Kosovo and Indonesia, there is no publication of indictments or judgements. It is necessary to rely on secondary sources for information on trials. Consequently, opportunities for analysis are limited.

In East Timor the situation is better; an active and committed NGO provides copies of indictments and judgements on-line. However, its efforts are hampered by the fact that many judgements are given orally, and are not supported by written decisions; and by the fact that some written judgements are not translated into English.

II. Cambodia

(A) Historical Background

On 17 April 1975, after extended fighting, the Communist Party of Kampuchea, popularly known as the Khmer Rouge, seized power in Cambodia's capital Phnom

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Penh. For nearly four years, under the leadership of General Pol Pot, the Khmer Rouge pursued a policy of economic and social cleansing in which an estimated 1–1.5 million people were murdered, or died of disease and starvation.

Nearly 20 years later, the process of bringing to justice those responsible for these atrocities was begun when Cambodia sought the assistance of the UN in 1997. However, negotiations have been beset by difficulties.

A UN Group of Experts reporting in March 1999¹ unanimously recommended the establishment of an ad hoc tribunal along the lines of the existing ICTs. The reason it gave was that it feared that the Cambodian judicial system was corrupt, and subject to internal political manipulation. The Cambodian government disagreed, and was insistent that there should be significant domestic participation in any trials.

After lengthy negotiations, a precarious understanding was reached between the UN and the Cambodian government in July 2000: trials for offences of genocide, crimes against humanity and other international and domestic crimes committed between 1975 and 1979 would take place in special ‘Extraordinary Chambers’ of the Cambodian courts. Trial chambers would be composed of a majority of Cambodian judges; but decisions on guilt or innocence could only be made by a ‘super-majority’ which would require the consent of at least one of the international judges.

Two co-prosecutors and two co-investigating judges (one international and one Cambodian) would have equal responsibility for these roles. Disagreements between them would be resolved by a panel of pre-trial judges. There would be a three tier court system mirroring Cambodia’s own system, with a trial chamber of five judges, an appeal chamber of seven and a supreme court of nine.

The law was adopted by the Cambodian parliament in January 2001, and received royal approval on 10 August the same year.² However, the UN and the Cambodian government reached an impasse over whether the Extraordinary Chambers should be governed primarily by this law, or whether the proposed Memorandum of Understanding (MOU)³ between the UN and Cambodia should prevail. The UN takes the position that it cannot be bound by national law, and that a MOU binding both parties is the appropriate governing instrument. The Cambodian government however states that while the MOU ‘may clarify certain nuances in the law, and elaborate certain details, it is not possible for them to modify, let alone prevail over, a law that has just been promulgated’.⁴

Apart from the question of precedence, the text of the law as adopted by the Cambodian parliament was not wholly acceptable to the UN. It stressed that trials would be limited to ‘senior leaders of the Democratic Republic of Kampuchea and

1 *Report of the Group of Experts for Cambodia*, 15 March 1999, S/1999/231.

2 *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (Law)* (text available at <http://www.derechos.org/human-rights/seasia/doc/krlaw.html>).

3 *Draft Memorandum of Understanding Between the United Nations and the Royal Government of Cambodia* (text available at <http://www.yale.edu/cgp/tribunal/mou-v3.html>).

4 Letter from the Prime Minister of Cambodia to the UN Legal Counsel, 23 November 2001.

those most responsible' for the atrocities.⁵ However, one of the UN's many concerns was that it differed in key respects from the proposed MOU with regard to the question of amnesties. The MOU provided that amnesties, previously bestowed on many surviving Khmer Rouge leaders as well as on the late General Pol Pot, would not be a bar to prosecution.⁶ In contrast, the law passed by the Cambodian Parliament provided only 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 Articles 3, 4, 5, 6, 7 and 8 of this law.⁷

It is silent on the status of amnesties and pardons which may be or have been granted. There were therefore fears that trials would not be conducted fairly according to international standards.

(B) Progress in 2002

On 8 February 2002 the Legal Counsel of the Secretary General announced that the UN had decided to end negotiations with Cambodia to set up a tribunal.⁸ He did not cite specific difficulties, but stated that:

[. . .] 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.⁹

For some months the matter appeared to be closed. However, in August 2002 the UN Secretary General expressed a willingness to re-open talks if he was given a new mandate by the Security Council or the General Assembly to do so. A mandate to this effect was passed by the General Assembly on 18 December 2002,¹⁰ and on 26 December the Cambodian government accepted the UN Secretary General's consequent proposal to begin exploratory talks.

Talks began on 6 January 2003; it is too early to speculate as to their possible outcome. However, there is renewed optimism that internationalized trials may at last take place.

III. East Timor

(A) Historical Background

The tiny island of East Timor was invaded by Indonesia in December 1975. Indonesia claimed East Timor as its 27th province, and it remained under Indonesian

5 *Law*, cit. Article 2.

6 *Draft Memorandum*, cit. Article 9.

7 *Law* Article 40.

8 Statement by UN Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York, 8 February 2002, (text available at <http://www.camnet.com.kh/ocm/government/government116.htm>).

9 *Ibid.*

10 General Assembly Resolution A/RES/57/228, 18 December 2002.

occupation for the next 24 years. At the beginning of 1999, President Habibie of Indonesia announced a referendum, which would allow the population of East Timor to choose between autonomy within Indonesia, or independence. Over the ensuing months violence in the province increased; after the overwhelming vote for independence on 30 August 1999,¹¹ Indonesian forces withdrew in a stampede of violence and destruction, forcibly displacing a quarter of the population of East Timor as they did so.

They left behind them a country without even the basic components of civil administration. On 25 October 1999 the United Nations Security Council passed Resolution 1272,¹² under which it established a Transitional Administration in East Timor (UNTAET), which was given a mandate to administer the country until independence was viable.¹³

UNTAET's mandate required it to bring to justice 'those responsible' for the violence surrounding the referendum.¹⁴ This was a difficulty in a country where the entire court structure had been dismantled by the Indonesian withdrawal. Under Indonesian occupation, the courts were operated entirely by Indonesian lawyers, judges and personnel. After the withdrawal there were almost no qualified lawyers in East Timor, no functioning courts or court system, and no-one with any experience of how a court system should operate.

In January 2000 an International Commission of Enquiry reported to the UN Security Council as follows:

The United Nations should establish an international human rights tribunal consisting of judges appointed by the United Nations, preferably with the participation of members from East Timor and Indonesia. The tribunal would sit in Indonesia, East Timor, and any other relevant territory to receive the complaints and to try and sentence those accused [. . .] of serious violations of fundamental human rights and international humanitarian law which took place in East Timor since January 1999 [. . .].¹⁵

This recommendation was not acted on by the Security Council. Instead, the Special Panels for Serious Crimes, composed of national and international judges, were established by UNTAET in East Timor's capital, Dili, to try suspects in East Timor.

Meanwhile, the Indonesian Human Rights Commission carried out an investigation and published a report in January 2000.¹⁶ Within the recommendations of that report was a proposal to establish a tribunal to deal with cases arising out of human rights violations in East Timor during 1999. In due course, an ad hoc tribunal was

11 In which 78.4% of voters chose independence from Indonesia.

12 Security Council Resolution 1272 (1999) of 25 October 1999 on the Situation in East Timor.

13 Independence was achieved on 20 May 2002. A United Nations Mission in Support remains in East Timor, and retains responsibility for the Serious Crimes project.

14 Security Council Resolution 1272 (1999) cit., at para. 16.

15 United Nations Office of the High Commissioner for Human Rights: *Report of the International Commission of Enquiry on East Timor to the Secretary General*, January 2000.

16 KPP HAM *Report on the Investigation of Human Rights Violations in East Timor*, 31 January 2000.

established in Jakarta, to try cases arising from human rights violations in East Timor during 1999.¹⁷

This analysis will deal with the process currently underway in East Timor. It will go on to provide an update on the progress of trials in Jakarta. It should be noted that there has to date been little co-operation between those responsible for the two different processes.

III.(i) Special Panels for Serious Crimes in Dili

(A) Legal Context

UNTAET Regulation 2000/15 of 6 June 2000 established Special Panels for Serious Crimes within the District Court in Dili.¹⁸ The Special Panels were given exclusive jurisdiction over genocide, war crimes and crimes against humanity; and over murder, sexual offences and torture which occurred in East Timor between 1 January and 25 October 1999.¹⁹

The UN's budget provides for two Special Panels, each comprising three judges: two international and one East Timorese.²⁰ They operate as part of the Dili District Court, and use the same Court of Appeal as all other panels of the Court. The Court of Appeal is also composed of two international judges and one East Timorese.²¹ The judges were originally appointed by the United Nations Transitional Administrator, but since independence they are appointed by the Supreme Council of the Judiciary.

The prosecution of cases before the Special Panels is carried out by a special prosecution unit, which is staffed principally by United Nations international civilian staff and police officers.

The substantive law used by the Special Panels in trials of genocide, war crimes and crimes against humanity is taken *verbatim* from the Rome Statute for the International Criminal Court (ICC).²² The trials which have taken place are the first trials in the world to use this new law. As such it might be hoped that they would provide some interesting jurisprudence on issues which will come before the ICC in the future.

Crimes of murder, sexual offences and torture are still tried under the provisions of the Indonesian Penal Code, which applies in East Timor in default of any superseding

17 *Indonesian Human Rights Courts Act 26/2000*, House of Representatives, Republic of Indonesia; and *Presidential Decree No 53/2001 Concerning Establishment of an Ad Hoc Human Rights Tribunal at the Central Jakarta District Court*, 23 April 2001.

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

19 *Ibid.* Section 2; 1 January to 25 October 1999 covers the period between the announcement of the intention of the Government of the Republic of Indonesia to hold a popular consultation on the question of independence for East Timor, and the establishment of UNTAET.

20 *Ibid.* Section 22.1.

21 *Ibid.* Section 22.2.

22 *Ibid.* Sections 4–6.

law.²³ Procedural law is governed by UNTAET Regulation 2000/30.²⁴ This establishes a civil law system but includes elements of common law procedure, and procedural rules taken from international tribunals. Any areas not covered by UNTAET Regulations are governed by the Indonesian Penal Code.

(B) Progress in 2002

From the outset, the Special Panels have been severely handicapped by staffing and resources difficulties. These were referred to in the report by the United Nations Secretary General to the Security Council in April 2002, which stated that in relation to justice:

Considerable difficulties remain, owing to the lack of experienced national personnel, limited resources and language barriers, particularly in the light of the four languages utilized in the courts.

The lack of an effective administrative support structure, coupled with delays in recruitment, has meant that only one of the Special Panels for Serious Crimes is operational, moreover the Court of Appeal has had no quorum since October 2001, following the departure of two international judges.²⁵

The most significant handicap for the Special Panels has been the lack of judges. There have never been sufficient judges for two Special Panels to operate at once. During 2002 the situation significantly deteriorated. In October 2001 there were three international judges for the Special Panels, and two for the Court of Appeal. By September 2002 one international judge and both Appeal Court judges had left the mission. By January 2003 they had not been replaced. The consequence has been that there has been little progress in trials and none in appeals during 2002.

As a result of this, many defendants have been in custody on charges of serious crimes for up to three years without their trials having started.

During 2002, the Deputy General Prosecutor for Serious Crimes issued 12 indictments, in which 51 accused were charged with crimes against humanity. Almost all the accused under these indictments are persons who are understood to be in Indonesia. To date the courts in East Timor have been unable to secure the presence of defendants from Indonesia. Unless there are significant political developments, this situation is unlikely to change. Therefore trials which take place will continue to be trials of low-level East Timorese militia members, rather than Indonesian military and political commanders.

23 UNTAET Regulation 1999/1 of 27 November 1999 on the authority of the Transitional Administration in East Timor, Section 3.1.

24 UNTAET Regulation 2000/30 on the Transitional Rules of Criminal Procedure, as amended by Regulation 2001/25 of 14 September 2001.

25 *Report of the Secretary General on the United Nations Transitional Administration in East Timor*, 17 April 2002, S/2002/432.

*(C) Jurisprudence*²⁶

Although the judgements issued by the Special Panels are public documents, there remains only one reliable source for obtaining the indictments and judgements outside of East Timor. The Judicial Studies Monitoring Programme (JSMP) maintains a site which includes indictments issued by the prosecution, as well as judgements issued by the Panel.²⁷

i. The Los Palos Trial

During 2001, the Special Panels issued judgements in 12 cases of murder and closed their work for 2001 with the issuing of the judgement in the first crimes against humanity trial, *Public Prosecutor against Joni Marques and nine others* ('the Los Palos trial').²⁸ One year on, that judgement, issued on 11 December 2001, remains the only written decision in English on crimes under international criminal law to have been made by the Special Panels.

The Prosecutor presented the opening statement to the court on 9 July 2001, and the trial continued to hear evidence and statements during the following three months.²⁹ There was no evidence for the defence beyond statements made by the accused to the court at the outset and conclusion of the trial.

The final judgement issued by the Panel includes very limited analysis of the law of crimes against humanity; just three pages out of 249 deal with the applicable law.³⁰ The judgement is largely concerned with quoting and summarising the witness evidence, and the submissions made by the prosecution and defence. Typically, the findings of court on the basis of the evidence and submissions are contained in single sentences, with no justification provided for the conclusion reached.³¹

In the course of the judgement, the Court makes no independent reference to any international criminal law. This is despite the fact that the prosecution and counsel for the first defendant cited international case law extensively, including cases from the ICTY and ICTR. The judgement quotes the final statements of the parties at great length, but makes no comments on the legal submissions therein. It adds no further authorities, and makes no findings of its own on international jurisprudence.³²

Of the seven charges in the indictment, the Panel found that six were proved. It acquitted all defendants on a charge of murder as a crime against humanity, deciding that there was insufficient evidence to determine who had been responsible for the killing.³³ All defendants were convicted of at least one offence and were sentenced to

26 All indictments and judgments of the Special Panels are available at <http://www.jsmp.minihub.org>

27 The site is maintained in English. To date all indictments have been issued in English. However not all judgments have been issued in English. Notwithstanding an obligation upon the court to provide translations, some judgments have been issued only in Portuguese.

28 *Public Prosecutor v. Joni Marques and 9 others*, Case No 09/2000, Judgment 11 December 2001 (available at <http://jsmp.minihub.org/judgmentspdf/LPEnglish.pdf>).

29 *Ibid.* at 8–12.

30 *Ibid.* at 209–211.

31 *Ibid.* at 216–239.

32 *Ibid.* at 209–211.

33 *Ibid.* at 231.

terms of imprisonment ranging from 4 years to 33 years and 4 months.³⁴ The length of sentence is likely to be affected by the East Timorese Constitution,³⁵ which limits the maximum prison sentence to 25 years.

ii. Other Trials

During 2002, the Special Panel developed a practice of issuing oral decisions, with a commitment to issue a written decision on the issue within a short time. As at 31 December 2002 some of those written decisions had still not been made available.

The Panel handed down written judgments in six cases. Five of these cases dealt with ordinary crimes under the Indonesian Penal Code: four cases charging murder³⁶ and one charging rape.³⁷ The sixth case was a trial of a single count of murder as a crime against humanity. In this case the Panel found that the contextual elements required for a crime against humanity were not proved and substituted a conviction for murder.³⁸ However, this judgment was given in Portuguese and, despite an obligation on the Court to provide translations,³⁹ it has not been made available in English. Therefore no comment on its jurisprudence is possible.

A further three crimes against humanity trials reached their conclusion with no written decision yet available. Charges of crimes against humanity against a minor were withdrawn by the Public Prosecutor and replaced by charges of murder, to which the accused minor pleaded guilty.⁴⁰ During their trial on counts of crimes against humanity, two accused changed their pleas to guilty and were sentenced by the Court.⁴¹ The trial of one remaining accused continues.

34 *Ibid.* at 240–249.

35 In force from the date of independence, 20 May 2002.

36 *Public Prosecutor v. Gaspar Leki*, Case No 5/2001, Judgment 9 September 2002 – acquitted of murder, found guilty of criminal negligence causing death. Sentenced to 11 months imprisonment. *Public Prosecutor v. Augusto dos Santos*, Case No 6/2001, Judgment 14 May 2002 – convicted of murder. Sentenced to 5 years imprisonment. *Public Prosecutor v. Anigio de Oliveira*, Case No 7/2001, Judgment 27 March 2001 (Portuguese only) – convicted of being an accomplice to murder. Sentenced to 4 years imprisonment. *Public Prosecutor v. Marcurious de Deus*, Case No 13/2001, Judgment 18 April 2002 – convicted of murder. Sentenced to 5 years imprisonment.

37 *Public Prosecutor v. Fransisco Soares*, Case No 14/2001, Judgment 12 August 2002 – convicted of rape. Sentenced to 4 years imprisonment.

38 *Public Prosecutor v. Armando dos Santos*, Case No 16/2001, Judgment 10 September 2002 (Portuguese only) – convicted of 3 counts of murder. Sentenced to 20 years imprisonment.

39 UNTAET Regulation 2000/11 on the Organisation of the Courts in East Timor, as amended by Regulation 2001/25 of 14 September 2001, Section 23.

40 *Public Prosecutor v. X*, Case No 4/2002 – pleaded guilty to murder. Oral decision, 2 December 2002. Sentenced to 1 year imprisonment. No written decision issued.

41 *Public Prosecutor v. Joni Franca*, Case No 4A/2001 pleaded guilty and convicted of crimes against humanity. Oral decision, 29 October 2002. Sentenced to 5 years imprisonment. No written decision issued. *Public Prosecutor v. Sabino Gouveia Leite*, Case No 4B/2001 pleaded guilty and convicted of crimes against humanity. Oral decision, 18 and 20 November 2002. Sentenced to 3 years imprisonment. No written decision issued.

III.(ii) Ad Hoc Human Rights Tribunal in Jakarta

(A) *Legal Context*

Following the publication of the Report by the Human Rights Commission in January 2000,⁴² the Indonesian Parliament passed Law No. 26/2000 incorporating the Rome Statute for the ICC into Indonesian law. This provided a legal basis for trying those responsible for human rights violations in East Timor in 1999.

In March 2001 President Wahid of Indonesia issued Decision 53/2001, authorising the establishment of an ad hoc court to try cases of serious violations of human rights which occurred in September 1999 immediately after the referendum in East Timor. In August 2001 his successor, President Megawati, issued Decision 96/2001 which extended the timeframe to include offences which occurred in April 1999.

The tribunal is made up of panels of three Indonesian judges. Some are career judges, others are academics. A unit within the Office of the Attorney General of Indonesia has responsibility for the prosecution of offences at the tribunal.

(B) *Progress in 2002*

In January 2002 the prosecutors announced a list of 18 suspects who were to be tried in respect of five incidents of human rights violations in East Timor in April and September 1999. Proceedings against 14 of those 18 were completed by the tribunal during 2002.

The indictments charge 18 military and police officers, civilian officials and militia leaders. There are no indications that any further indictments will be issued. There is no indictment against General Wiranto, the former Indonesian military commander, despite the fact that he was named in the original report of the Human Rights Commission as having overall responsibility for human rights offences.⁴³ It is generally felt that those on trial represent the 'second division', and not the top command.

There has been very little sharing of evidence between the prosecutors in Dili and those in Jakarta. After continuing difficulties over East Timorese witnesses giving evidence in Jakarta, the first statements to be given by video link took place in January 2003. However there is no sense in which this could be described as a joint project. Notwithstanding this background, in November 2002 the Secretary General emphasized the commitment of the East Timorese government to work together with the Indonesian authorities to bring to justice those responsible for crimes during 1999.⁴⁴

The first judgments by the tribunal were issued on 14 August 2002. By the end of 2002, trials of 14 of the 18 defendants had been completed. Eleven had received

42 KPP HAM Report, cit.

43 *Ibid.*

44 Report of Secretary General on the United Nations Mission in Support of East Timor, 6 November 2002.

complete acquittals. Three defendants had been convicted of crimes against humanity for failing to prevent the violence, and had received sentences of between 3 and 10 years imprisonment.

(C) Jurisprudence

The judgments handed down by the ad hoc Tribunal in Jakarta have not been made public. In any event they, and the main court documents, have not been translated into English. The following comments are based upon secondary sources.⁴⁵

In a report published in May 2002 the International Crisis Group (ICG) expressed concerns over the adequacy of the cases presented by the prosecutors.⁴⁶ It stated that:

The problem is not so much with the way the cases are being judicially conducted. [...] Rather the problem, as revealed in court documents obtained by the ICG, is with the limited mandate of the ad hoc court and the very weak way in which the indictments have been drawn up and presented by the prosecution.⁴⁷

Though purporting to identify crimes against humanity, the indictments as drafted suggest little more than criminal negligence on the part of the accused.⁴⁸

As a result, whatever the outcome of the trials:

The concept of crimes against humanity in Indonesia will have been trivialised.⁴⁹

It appears that the actions with which the accused in these trials are charged would be unlikely to meet the criteria required for proving crimes against humanity in courts elsewhere in the world. The ICG concludes:

Both prosecution and defence portray the events of 1999 as resulting from a civil conflict involving two violent East Timorese factions in which Indonesian security forces were concerned and sometimes helpless bystanders. The evidence that this was not the case is overwhelming [...].⁵⁰

The findings of the court have confirmed the fears of observers that a proper assessment of violations of human rights in East Timor would not result from these trials. In one case, the court found that the violence occurred due to the fraudulent conduct of the popular consultation by the United Nations mission which oversaw the ballot.⁵¹ In most cases the verdicts appear to have reflected the allegations in the indictments that the violence was led by the East Timorese.

The Special Panel for Serious Crimes in Dili came to a very different conclusion on the evidence presented in the *Los Palos* case. It found that it was established:

beyond reasonable doubt that there was an extensive attack by pro-autonomy armed groups supported by the Indonesian authorities targeting the civilian population in the area, namely

45 Information on cases before the ad hoc tribunal in Jakarta is available on the JSMP website at <http://www.jsmp.minihub.org>

46 *Indonesia: Implications of the Timor Trials*, International Crisis Group Jakarta/Brussels, 8 May 2002

47 *Ibid.* at 1.

48 *Ibid.* at 1.

49 *Ibid.* at 2.

50 *Ibid.* at 12.

51 *Military innocent: UN to blame for Timor atrocities* – Sydney Morning Herald, 17 August 2002.

those linked with political movements for the self-determination of East Timor.⁵²

In a statement following the first judgments, the UN High Commissioner for Human Rights expressed concerns over the conduct of the trials in Jakarta. She stated that she was concerned that the prosecution had not put before the court evidence that portrayed the killings and other human rights violations as part of a widespread or systematic pattern of violence:

Rather, the indictments present the killings and other abuses as the result of spontaneous conflict between armed factions within East Timorese society. This seriously undermines the strength of the prosecution's case and jeopardizes the integrity and credibility of the process.⁵³

The limited use of evidence from East Timorese witnesses, and the reliance upon witnesses from within the Indonesian military and police establishment by the prosecutors were cited as areas of particular concern – especially because many of those prosecution witnesses were themselves defendants in other trials. This statement was endorsed by the UN Secretary-General on 15 August 2002.

(D) Conclusion

Neither the Special Panels for Serious Crimes in Dili, nor the ad hoc tribunal in Jakarta are providing any real answer to the problem of bringing the perpetrators of crimes committed in 1999 to justice. As a result, there are continued calls from East Timorese civil society, and national and international human rights NGOs for an international tribunal to be established along the lines of the ICTY and ICTR.⁵⁴ However, it is highly improbable that an investment on that scale will be made by the UN at this stage. Realistically, trials will take place in the courts in Dili and Jakarta, or they will not take place at all.

The UN has shown little commitment to ensuring that the Special Panels in Dili are adequately resourced. Despite general undertakings to improve the situation made in the November 2002 report of the Secretary General,⁵⁵ there is no indication that there will be any real change. Further, the political and diplomatic realities of the relationship between Indonesia and its tiny new neighbour make it difficult to foresee an improvement in the progress of trials in either Dili or Jakarta. There are much bigger concerns for the newly independent East Timorese government than the prosecution of crimes from 1999, in particular as such prosecutions inevitably cause friction with an Indonesian government they have tried hard to befriend.

52 *Public Prosecutor v. Joni Marquez and 9 others*, Case No 09/2000, Judgment 11 December 2001, at para. 686.

53 Statement by UN High Commissioner for Human Rights, 14 August 2002. See also *East Timor Trials Deliver Neither Truth nor Justice*, Joint Press Release, JSMP and Amnesty International, 15 August 2002.

54 *Joint Statement of Request for an International Tribunal*, 12 November 2002 (available at <http://jsmp.minihub.org/Reports/Internas%20Tribunal.htm>).

55 *Report of Secretary General on the United Nations Mission in Support of East Timor*, 6 November 2002.

IV. Kosovo⁵⁶

(A) Historical Background

On March 23 1989, Serbian authorities stripped the predominantly Albanian province of Kosovo of its autonomy. Increasing tensions during the 1990s due to attacks on Serb occupiers by the Kosovo Liberation Army (KLA) culminated in a crackdown by the Serb authorities in March 1998, in the course of which up to 250,000 Kosovan Albanians were forcibly displaced. A ceasefire agreed in September 1998 proved ineffective. A bombing campaign by NATO began on 24 March 1999 and lasted until 9 June 1999.

The United Nations Interim Administration Mission in Kosovo (UNMIK) was created by Security Council Resolution 1244 on 10 June 1999.⁵⁷ The mandate given to UNMIK under this Resolution does not include any provision for a tribunal dealing with international crimes arising out of the conflict. The mandate recalls the jurisdiction and the mandate of the International Tribunal for the Former Yugoslavia (ICTY) and demands 'full cooperation by all concerned [. . .] with the International Tribunal for the Former Yugoslavia'.⁵⁸ However, there is no further mention of the role which the UN mission is to take in international criminal trials, and no specific mandate to bring to justice those responsible for crimes during the period of the conflict.

The mandate 'authorises the Secretary General [. . .] to establish an international civil presence in Kosovo in order to provide an interim administration'.⁵⁹ The responsibilities of the international civilian presence include 'performing basic civilian administrative functions' in pursuit of the mandate.⁶⁰ The prosecution of international crimes therefore takes place within the context of the justice pillar of the international civil presence in Kosovo.

In cases of crimes related to the conflict in Kosovo, the ICTY has primary jurisdiction. However, the ICTY Prosecutor has repeatedly stressed that the tribunal will only try the principal perpetrators of crimes in the region. To date it has only issued one indictment against five defendants relating to Kosovo.⁶¹ Although more are projected, it is clear that the huge majority of trials of international crimes will take place either within the Kosovo justice system, or not at all.

(B) Legal Context

The national courts in Kosovo are left to deal with trials of cases arising out of the conflict. These trials take place in the five district courts, with a right of appeal to the Supreme Court in Pristina.

56 The author is indebted to Quincy Whitaker, barrister and criminal justice consultant for DFID in Kosovo 2001–2002, for her assistance with this paper.

57 Security Council Resolution 1244 (1999) of 10 June 1999 on the Situation in Kosovo.

58 *Ibid.* at para. 14.

59 *Ibid.* at para. 10.

60 *Ibid.* at para. 11.

61 *Prosecutor v. Slobodan Milošević and others*, ICTY, Case No IT-99–37-PT.

As part of its functions as the interim administration, UNMIK has passed a number of regulations dealing with the application of law and the court system. Under Regulation 1999/24 (as amended by Regulation 2000/59) the courts apply the UNMIK Regulations, and the Kosovo Criminal Code (which had been superseded by the Serbian Penal Code on 22 March 1989).⁶² In the absence of provisions under UNMIK Regulations or the Kosovo Criminal Code, the Federal Republic of Yugoslavia (FRY) Criminal Code is applicable. In addition, the courts are required to apply internationally recognized human rights standards, as set out in various treaties and conventions.⁶³

Articles 141 and 142 of the FRY Criminal Code provide the substantive law for genocide and war crimes; there is no specific provision to deal with crimes against humanity.

When UNMIK arrived in 1999 it was faced with the problem of an inexperienced judiciary and legal community; Kosovan Albanians had been prohibited from receiving degrees or practising law while the country was under Serbian occupation. Most of those who had practised in the intervening decade had fled to Serbia. There was a further problem of significant anti-Serb bias within the legal system.

In order to alleviate these problems, UNMIK Regulations 2000/6⁶⁴ and 2000/64⁶⁵ allowed for the appointment of international judges and prosecutors, and their assignment by the Department of Justice to appropriate cases at the request of the prosecution or the defence. As a result of such a request, or of its own motion, the Department presents a recommendation to the Special Representative of the Secretary General, who can authorize or reject it.⁶⁶

Internationalized panels consisting of a mixture of Kosovan and international judges operating within the Kosovan legal system began to be used in February 2000, when the first international judge was appointed. As of late 2002 this number has risen to 12 international judges,⁶⁷ and further recruitment is planned.

Like the Special Panels for Serious Crimes in East Timor, and in contrast to the proposed systems in Cambodia and Sierra Leone, the internationalized panels operate within the local system. But unlike the East Timor model they do not have exclusive

62 UNMIK Regulation 1999/24 put an end to the controversy which had arisen as a result of Regulation 1999/1, which ruled that the law applicable was the law in force on 23 March 1999, i.e. the Serbian Criminal Code. Many Kosovan judges believed the imposition of the Serbian Criminal Code after 22 March 1989 was unconstitutional, and applied the Kosovo Criminal Code regardless of Regulation 1999/1. This led to uncertainty and inconsistency. Regulation 1999/24 resulted from the acceptance of the inevitable, and retrospectively validated all decisions of the courts made under the Kosovo Criminal Code.

63 UNMIK Regulation 1999/24 On the Law Applicable in Kosovo, as amended by Regulation 2000/59 of 27 October 2000, at Section 1.3.

64 UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors, as amended by Regulation 2001/2 of 12 January 2001.

65 UNMIK regulation 2000/64 of 15 December 2000 On Assignment of International Judges/Prosecutors and/or Change of Venue.

66 *Ibid.* at Section 1.3.

67 Figures obtained from *Report of the Secretary General on the United Nations Interim Administration in Kosovo*, S/2002/1126, 9 October 2002.

jurisdiction over serious crimes, nor are they intended to deal specifically with international crimes. A proposal was made by UNMIK in December 1999 to establish a dedicated Kosovo War and Ethnic Crimes Court (KWECC) to deal exclusively with international crimes and other serious crimes committed after January 1998. However, by August 2000 this proposal had been shelved, principally on grounds of excessive cost.⁶⁸

It is important in assessing the progress of trials to bear in mind that the prosecution of ethnic crimes and crimes related to the conflict is only a small part of the task of the judicial system in Kosovo. Of far greater perceived importance in the system as a whole is the problem of current criminal activity, in particular the high levels of organized crime and people trafficking.

The fact that trials of these crimes is not seen as a priority by the UN is well illustrated by the December 2002 report of a Security Council Mission to Kosovo and Belgrade.⁶⁹ The 15 page report makes three references to war crimes trials.⁷⁰ In each case it stresses the importance of co-operation with the ICTY. However, beyond stating that '[...] a number of cases of war crimes had come to trial in Kosovo in 2002 in accordance with the responsibilities of UNMIK [...]',⁷¹ it makes no further comments or recommendations with regard to trials of offences arising from the conflict.

In the light of this it seems unlikely that significant extra resources will be made available for these trials in the future.

(C) Progress in 2002

In the first nine months of 2002, international judges and prosecutors were participating in 177 cases; only 17 of these cases concerned crimes connected to the conflict in 1998–99.⁷² These 17 comprised the total number of cases of this nature which were being heard in Kosovo during 2002. All were tried before panels comprising a majority of international judges; almost all were tried by international prosecutors.

Only a handful of these 17 cases related to charges of international crimes. Statistics have been made available to July 2002 by the Organisation for Security and Co-operation in Europe (OSCE), which shares responsibility for the judiciary and other rule of law institutions in Kosovo with UNMIK. In September 2002 the OSCE published a special report on 'war crimes trials' in Kosovo.⁷³ The OSCE cites 17 'war

68 *Finding the Balance: The Scales of Justice in Kosovo*, ICG Balkans Report No 134, 12 September 2002, at 20.

69 *Report of Security Council Mission to Kosovo and Belgrade, Former Yugoslavia, 14–17 December 2002*, S/2002/1376, 19 December 2002.

70 *Ibid.* at paras 11, 22 and 28.

71 *Ibid.* at para. 11.

72 Figures taken from *UNMIK Pillar 1 (Police and Justice) Presentation Paper*, November 2002, at para. 2.1.4.

73 *Kosovo War Crimes Trials: A Review*, OSCE Mission in Kosovo, September 2002. The use of this terminology is somewhat misleading; the term 'war crimes' is used as a term of art to cover not only war crimes but also genocide, crimes against humanity and ordinary crimes which are linked in some manner to the Kosovan conflict.

crimes trials' as ongoing or completed at that time; of these only eight involved actual charges of war crimes or genocide; there were a further three cases in which a charge of genocide had initially been laid by Kosovan prosecutors, and was later withdrawn by an international prosecutor and replaced with charges of ordinary crimes under the Kosovan Criminal Code. The remaining six cases also relate to ordinary crimes which are alleged to have taken place in the context of the conflict.⁷⁴

The high rate of convictions which initially occurred before Kosovan panels has been reversed by the predominantly international panels. The International Crisis Group (ICG) reports in September 2002:

In all but one case of genocide and war crimes, retrials have been undertaken with panels of international judges. In these retrials, some defendants were acquitted due to incomplete establishment of fact; the inability of witnesses to attend the trial; inconsistent witness testimony; and insufficient evidence. In several cases the verdicts were upheld and the length of sentences increased, while most genocide and war crimes charges were diminished to murder (with only one charge of war crimes standing).⁷⁵

It should be noted that the arrests of ethnic Serbs accused of these crimes took place in the summer and autumn of 1999. Many Serb defendants have since escaped from custody. Further arrests of ethnic Serbs are unlikely as suspects are no longer resident within the jurisdiction. The Serbian government argues that all trials should take place in its domestic courts, and shows no willingness to comply with requests for extradition. To date only one domestic trial in a court in Serbia in relation to crimes committed during the conflict in Kosovo has been concluded.⁷⁶

In Kosovo, there have been a number of arrests of Kosovan Albanians during the course of 2002 in connection with atrocities which occurred in 1999. The reaction to this from the Kosovo Albanian population has been extremely negative; the popular view is that the worst crimes were committed by the Serb occupiers, who have almost all escaped justice to date. This difficulty in obtaining the arrest of suspected criminals mirrors the problems suffered by the ICTY, and also (in a different context) the courts in East Timor.

(D) Jurisprudence

The principal difficulty in providing any insight into the jurisprudence emerging from the internationalized courts in Kosovo is the lack of access to any case information. Indictments, decisions and judgments are not published in any format, and it appears that they can only be obtained in hard copy from the court on an ad hoc basis. The following comments are based upon secondary sources.

What is apparent from all sources is that the standards of practice and jurisprudence in trials in Kosovo, even before internationalized panels, continue to be

⁷⁴ Statistics taken from *Kosovo War Crimes Trials: A Review*, OSCE Mission in Kosovo, September 2002; correct to July 2002.

⁷⁵ *Finding the Balance: The Scales of Justice in Kosovo* ICG Balkans Report No 134, 12 September 2002.

⁷⁶ On 8 July 2002 a Serbian court convicted Ivan Nikolic of war crimes committed against the civilian population in Kosovo, and sentenced him to 8 years imprisonment, citing his 'youth and bravery' as a reason for imposing such a short sentence.

unacceptably low. The use of international judges and prosecutors may have assisted in alleviating the problem of ethnic bias; it has not erased the problem of low standards, which still prevail in the courts.

It is clear that the international panels make very little use of international jurisprudence in coming to their findings. The OSCE reports that:

... with one exception, local and international judges to date have not, in their written verdicts, based their decisions on war crimes and international humanitarian law jurisprudence; the same situation applies to international human rights jurisprudence.⁷⁷

This may be due in part to the lack of availability of internet access, and the lack of legal assistance. However, it should be recognized that the aim of raising standards is not being achieved if the internationalized panels make little or no use of international law.

Legal reasoning and analysis of any kind is limited. The OSCE report states:

[Supreme Court judgments] are a meagre source of war crimes jurisprudence. They are characterised by brevity (the average length of decisions is three to four pages), poor legal reasoning, absence of citations to legal authority, and lack of interpretation concerning the applicable law on war crimes and human rights issues.⁷⁸

It is unhelpful that many of the international judges appear to have an insufficient command of English to make their judgments clear. Select quotations from judgments provide worrying illustrations of this. The OSCE report quotes (in another context) the following passage from a judgment of the (predominantly international) Supreme Court:

Supreme Court found that factual state is wrongly verified concerning all the charges, since there is no direct evidence of final one that the accused acted personally or gave the orders that brought to crimes alleged or that he might be held responsible for duties of command responsibilities in connection with the above mentioned crimes, and there is no evidence that shows his aware intention in the case of attempted murder and neither unjustified conclusion of throwing out the window.⁷⁹

(E) Conclusion

The use of internationalized panels in Kosovo has not to date made significant progress towards ending impunity for international crimes in the region. Nor have the judgments of the internationalized panels made any real contribution to jurisprudence in this field. However, a proper review of the jurisprudence is impossible while the judgments of the panels remain inaccessible to those not directly involved in cases before the courts.

⁷⁷ *Kosovo War Crimes Trials*, OSCE, cit., September 2002, at 47.

⁷⁸ *Kosovo War Crimes Trials*, OSCE, cit., September 2002, at 48.

⁷⁹ *Prosecutor v. Momcilo Trajkovic*, quoted in *Kosovo War Crimes Trials*, OSCE, cit., September 2002, at 50.

V. Sierra Leone

(A) *Historical Background*

In 1991 the Revolutionary United Front (RUF) led by Foday Sankoh entered Sierra Leone from neighbouring Liberia. It began to establish control over increasing territory in the course of a particularly brutal civil war, which was waged between the RUF and government forces until May 1999, when the Lome Peace Agreement was signed by the warring parties.

In a country decimated by almost a decade of conflict, it was clear that those responsible for atrocities which occurred in the course of the war would only be brought to justice with international assistance. An ad hoc tribunal was considered, but rejected on financial grounds. A Security Council Resolution of 14 August 2000 requested the Secretary General to negotiate an agreement with the government of Sierra Leone to create an independent special court.⁸⁰ On 4 October 2000 the Secretary General reported to the Security Council on his negotiations with the government of Sierra Leone, and appended a draft Statute.⁸¹ The final draft of the Statute for the Special Court was agreed in Freetown on 16 January 2002.⁸²

The Special Court for Sierra Leone is not a UN body. It is an international treaty organization, created by an agreement between the UN and the government of Sierra Leone. Unlike the internationalized panels in East Timor and Kosovo, the Special Court is therefore independent both of local judicial institutions, and of the UN Mission in Sierra Leone (UNAMSIL).

The Special Court operates under a predetermined budget consisting of voluntary contributions from member states. It is currently projected to operate for a period limited to 3 years.

(B) *Legal Context*

The Special Court is composed of a single Trial Chamber with a panel of three judges, and an Appeals Chamber with a panel of five.

A number of matters concerning the competence of the Court, as regulated by the Statute signed on 16 January 2002, are worthy of note.

The Special Court has jurisdiction over both international crimes, and crimes under Sierra Leonean law. The international crimes within the jurisdiction of the Court are crimes against humanity; violations of Article 3 common to the Geneva Conventions; and other serious violations of international humanitarian law.⁸³

The Statute of the Special Court does not borrow the language and definitions of the Rome Statute. Instead, following the precedent set by the ICTs it relies on older established law including that of the Geneva Conventions and Additional Protocols. There is no provision for the prosecution of the crime of genocide.

80 Security Council Resolution 1315 (2000) of 14 August 2000.

81 *Report of the Secretary General on the establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000.

82 Statute of the Special Court for Sierra Leone, 16 January 2002.

83 *Ibid.* Articles 2–4.

The Special Court has jurisdiction over offences under Sierra Leonean law relating to the abuse of girls, and the wanton destruction of property.⁸⁴ Jurisdiction under Sierra Leonean law is limited to these two areas. The Court does not have jurisdiction over crimes of murder, rape or other crimes under Sierra Leonean law. Therefore, if for example a defendant is tried before the Special Court for murder as a crime against humanity, and the contextual elements cannot be proved, it appears that the Court has no jurisdiction to find the defendant guilty of murder under Sierra Leonean law. An acquittal would be the only possible verdict, and under the principle of *ne bis in idem*⁸⁵ a further trial for murder based on the same facts would be barred.

There was general agreement that trials before the Special Panels should be limited in number, and should be confined to trials of principals rather than rank and file. There was some discussion as to whether the relevant article would give the Court jurisdiction over those 'who bear the greatest responsibility for the commission of the crimes' (the wording favoured by the Security Council); or those 'persons most responsible' (the wording favoured by the Secretary General). The Security Council believed that jurisdiction should be limited to those in leadership roles, while the Secretary General took the position that the magnitude of the crimes committed should be a consideration in determining who to prosecute.⁸⁶

The final draft of the Statute used the wording proposed by the Security Council,⁸⁷ but it is left open as to whether this may be interpreted to allow for the prosecution of persons other than political and military leaders.

One of the most controversial clauses in the Statute for the Special Court was the extension of jurisdiction to persons between 15 and 18 years of age. So called 'child soldiers' played a significant and horrific part in the conflict in Sierra Leone. But juveniles do not usually fall under the jurisdiction of courts dealing with international crimes: the ICTs for example have no jurisdiction over persons under the age of 18.

While international organizations were opposed to a lower age of criminal responsibility for the Special Court, and feared that it would interfere with child rehabilitation programmes, the Sierra Leone government and civil society were adamant that there should be a process of judicial accountability for child combatants. Consequently the Statute does allow for the prosecution of juveniles over 15 years of age,⁸⁸ but with strict regulation of the process of trial and sentencing.

84 *Ibid.* Article 5.

85 *Ibid.* Article 9; this allows for the trial of a person by the Special Court for acts for which he has already been tried by a national court if these acts were characterized by the national court as ordinary crimes; but it states that 'No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.'

86 This discussion is reflected in an exchange of letters between the Secretary General and the Security Council in December 2000 and January 2001.

87 Statute of the Special Court for Sierra Leone, 16 January 2002, Article 1.

88 *Ibid.* Article 7.

(C) Progress in 2002

The Planning Mission for the Special Court, which convened in Sierra Leone in January 2002, projected that the court should be in operation by 31 May 2002.⁸⁹ There were hopes that trials would begin during the course of 2002. However, slow recruitment processes have meant that the swearing in of the eight judges of the Special Court only took place on 2 December 2002. In January 2003 trials were projected to start during the course of 2003. The prosecution office was still at the recruitment stage and substantial work on individual cases had not yet begun.

VI. Conclusion

It is possible to see the internationalized courts playing a greater role in the future prosecution of international crimes. The ICC does not have superior jurisdiction, and in any case will never be able to try more than a handful of high-ranking defendants. The heavy costs and long delays of the ICTY and ICTR have created the desire for a sleeker, more efficient form of justice, delivered at the national level.

Currently Cambodia, East Timor, Kosovo and Sierra Leone remain the only four jurisdictions in which this field of criminal law is being pursued. Notwithstanding continuing allegations of atrocities in many countries, including the Middle East and central Asia, no new projects have been proposed or started during 2002.

Overall, 2002 was a disappointing year for progress in trials of international crimes in national and internationalized courts. The Cambodian project was put on hold in February, and negotiations were only revived late in the year. The work of the Special Panels in East Timor has slowed considerably. Although the ad hoc tribunal in Jakarta completed a large part of its work, there was widespread concern about the standards of justice. In Kosovo, the limited commitment to prosecuting international crimes has been clearly demonstrated. The Special Court in Sierra Leone spent another year in preparation; the process is moving more slowly than anticipated and no trials are expected until well into 2003.

The internationalized courts continue to show very little jurisprudential development. The judgments which are available contain little legal reasoning. Judgments from the courts of East Timor and Kosovo during 2002 are characterized by being short in both length and substance.

Internationalized courts remain an attractive option for the world community. They offer the possibility of justice of a better quality than in many national court systems, at a cost far lower than that of the ICTs. The principle of complementarity in the Rome Statute for the ICC reflects the desire to deal with international crimes in the national courts, before resorting to a international jurisdiction.

However, although internationalized courts may be a cheaper alternative to ICTs, they cannot be expected to operate effectively with limited budgets and low levels of commitment. The resources which have been applied to the task in both East Timor and Kosovo have proved insufficient. It must be recognized that courts of this kind require substantial commitments of funds, quality personnel and political will if they are to be effective in the development of justice for international crimes in the future.

⁸⁹ *Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone*, S/2002/246, transmitted to Security Council 8 March 2002.