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CAMBODIA, EAST TIMOR AND SIERRA LEONE: EXPERIMENTS
IN INTERNATIONAL JUSTICE

In Cambodia, East Timor and Sierra Leone, the United Nations has been involved in efforts to create a new species of tribunal for the prosecution of international crimes. These are the “internationalised domestic tribunals”, grafted onto the judicial structure of a nation where massive violations of human rights and humanitarian law have taken place, or created as a treaty based organ, separate from that structure. In a radical move away from the earlier prevailing wisdom that the non-inclusion in any position of nationals of the country most affected would preserve impartiality, objectivity and neutrality, mixed panels of international and local judges have jurisdiction to try crimes such as genocide, crimes against humanity and war crimes. The cases are brought by prosecuting agencies that are also mixed in composition.

This latest of transitional justice options is one that came into being with the 1999 round of United Nations-Cambodia negotiations on a tribunal for Cambodia, with East Timor being the first to implement such a scheme in 2000 (Kosovo’s planned War and Ethnic Crimes Court project has been abandoned, but international judges and prosecutors continue to work within the courts of Kosovo on war and ethnically motivated crimes). In each of Cambodia, East Timor and Sierra Leone, there have been persistent calls for the establishment of *ad hoc* tribunals along the lines of those created for Rwanda and the former Yugoslavia. The internationalised tribunals are a half-way house, a hybrid containing elements of domestic prosecutions and an international process.

For internationalised tribunals to be correctly understood, they must first be recognised as being one of a range of transitional justice options, from those of a judicial nature to non-judicial truth seeking mechanisms, available to nations seeking to address a legacy of violence. A single initiative on its own is unlikely to bring about a peaceful, stable and restored nation. The answer may lie in a combination of options.

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There is much that is positive in the concept that international and local judges can sit together as panels adjudicating international crimes, as part of the judicial system of the nation which has suffered the atrocities. With many pre-existing factors presumed and others taken for granted, the concept envisages international standards applying throughout, and full respect for due process and the rights of the accused, while at the same time honouring a State's need to retain sovereignty through adequate involvement in the process. Having international involvement from judges and prosecutors with particular experience in this field brings in much-needed objective expertise and minimises the risks of partiality and lack of independence that arise from local participation in the process, particularly where those local participants form a part of the victim population. With adequate dissemination of information and public trials, the affected public has a sense of participation in all aspects of the proceedings.

This paper examines the internationalised domestic tribunals in Cambodia, East Timor and Sierra Leone. Cambodia is believed to have been the model for the latter two.¹ Designing a scheme that is realistic and workable, suited to the needs, wishes and capacities of the host nation, and at the same time that meets international standards of due process, has proven a considerable challenge. This paper finds that enormous difficulties caused by problems in design and implementation confront such ventures. Although they are not yet functioning, examination of the Cambodian Extraordinary Chambers and Sierra Leone Special Court projects is important. Cambodia's, in particular, is a highly compromised scheme, which places the international community in the difficult position of deciding whether to involve itself. Either way, there are far reaching, possibly damaging, implications for international justice.

If internationalised domestic prosecutions are to be a new way forward for international justice, it is important that there is particularly close examination of the already functioning Serious Crimes project in East Timor. A year has now passed since it came into existence, and the time would seem right for a critical, but constructive examination, for there are many lessons to be learnt, most immediately for Cambodia and Sierra Leone. Sections 2.1–2.5 look beyond the veneer of a functioning criminal justice system and attempt to understand the challenges of bringing

¹ See *Press Briefing by Deputy Legal Adviser, UN Mission in East Timor*, Press Briefing (19 April 2000) <<http://www.un.org/peace/etimor/DB/DB20000419.htm>>: "The credibility of these trials would be insured because the model under consideration for Cambodia was being used in East Timor." According to Minister Sok An, who introduced the Law on Extraordinary Chambers to Cambodia's National Assembly on 29 December 2000 and 2 January 2001, the Cambodia model is the basis for the Sierra Leone Special Court, see <<http://www.camnet.com.kh/ocm/government60.htm>>.

justice to East Timor. This does not detract from the fact that, in the face of tremendous challenges, the United Nations has made great progress in its efforts to rebuild East Timor and prepare it for statehood. Certainly, Rome was not built in a day, but unless lessons are learned from the Serious Crimes project, the internationalised domestic tribunal will fail to fulfil its potential and do great injustice.

1. CAMBODIA

The extent of the atrocities committed in Cambodia by the Khmer Rouge during the reign of Democratic Kampuchea between 17 April 1975 and 8 January 1979 needs no introduction.² Discussions about what to do to bring those responsible to justice have been slow and complicated by international and domestic political considerations. In the aftermath of the overthrow of the Pol Pot regime by invading Vietnamese forces in 1979, the United Nations continued to recognise the government in exile of Democratic Kampuchea as the lawful representative of the people of Cambodia, permitting it to occupy Cambodia's seat at the General Assembly. As for domestic considerations, an ambiguous governmental policy which both held show trials (of Khmer Rouge leaders Pol Pot and Ieng Sary)³ and then granted amnesties and immunity from prosecution in the name of national reconciliation, has contributed to the impunity enjoyed by those responsible for the atrocities.

1.1. *Negotiating the Extraordinary Chambers Regime*

After nearly twenty years of international paralysis in the face of impunity, on 21 June 1997 the Cambodian government sought the assistance of the

² For further reading, see BEN KIERNAN, *THE POL POT REGIME* (1996); Ben Kiernan, *The Cambodian genocide: Issues and responses*, in *GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS* 191 (George J. Andreopoulos, ed., 1994); DAVID P. CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR, AND REVOLUTION SINCE 1945* 1991; BEN KIERNAN, *HOW POL POT CAME TO POWER: A HISTORY OF COMMUNISM IN KAMPUCHEA* 1985; NAYAN CHANDA, *BROTHER ENEMY: THE WAR AFTER THE WAR* 1986. Also, Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 *HUMAN RTS Q.* 82 (1989); Kathryn Railsback, *A Genocide Convention Action Against the Khmer Rouge: Preventing a Resurgence of the Killing Fields*, 5 *CONN. J. INT'L L.* 457, 465 (1990).

³ Pol Pot and Ieng Sary were tried in absentia in 1979; a jury of ten people found them guilty of the deaths of three million people, destroying religion, the economic structure, culture, and family and social relationships. For the proceedings of the trial, see: *GENOCIDE IN CAMBODIA, DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY* (Howard J. De Nike, John Quigley & Kenneth J. Robinson, eds., 2000).

United Nations in dealing with the atrocities committed during the rule of the Khmer Rouge, which began on 17 April 1975 and ended on 8 January 1979. A United Nations Group of Experts, headed by Sir Ninian Stephen of Australia, was mandated to evaluate existing evidence with a view to determining the nature of the crimes committed, to assess the feasibility of apprehending the perpetrators, and to explore the legal options for bringing them to justice before an international or national jurisdiction.⁴

Having considered the various options, which included a purely domestic prosecution, as well as an internationalised one, the Group of Experts was emphatic that the only satisfactory option for Cambodia was to create an international tribunal under the control of the United Nations.⁵ The Group of Experts noted the prevalence of corruption and political influence over the judiciary, and concluded that Cambodia's system falls short of international standards of criminal justice established in the International Covenant of Civil and Political Rights.⁶ The Group of Experts even declined recommending a mixed Cambodian-foreign judiciary domestic court controlled by internationals:

based on our assessment of the situation in Cambodia, that even such a process would be subject to manipulation by political forces in Cambodia. The possibilities for undue influence are manifold, including the content of the organic statute of the court and its subsequent implementation, and the role of Cambodians in positions on the bench and in prosecutorial, defence and investigative staffs. A Cambodian court and prosecutorial system, even with significant international personnel, would still need the Government's permission to undertake most of its tasks, and could lose independence at crucial junctures.⁷

According to the Group of Experts, "the Cambodian judiciary presently lacks three key criteria for a fair and effective judiciary: a trained cadre of judges, lawyers and investigators; adequate infrastructure; and a culture of respect for the process".⁸

⁴ G.A. Res. 52/135.

⁵ "Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135" ("*Group of Experts Report*"), transmitted by the Secretary-General along with his own report ("*Secretary-General Report*"), U.N. Doc. A/53/850, S/199/231.

⁶ (1976) 999 U.N.T.S. 171. See *Group of Experts Report, ibid.*, 5, para. 129; see also "Kingdom of Cambodia, No Solution to Impunity: the case of Ta Mok", *Amnesty International*, 22 April 1999: "Amnesty International has seen many instances of unfair trial in the country since the adoption of the new constitution in 1993. Basic safeguards to ensure fair procedures are simply non-existent in most cases, and ignored in others. At present, it is almost impossible to obtain a fair trial in Cambodia's courts, even on common criminal charges, with no political elements involved."

⁷ *Group of Experts Report, ibid.*, para. 137.

⁸ *Ibid.*, para. 126.

Cambodia's government did not agree with the Group of Experts' recommendations for the creation of an international tribunal:

[T]he Government of Cambodia, in a letter addressed to [the Secretary-General] dated 3 March 1999, cautioned that any decision to bring Khmer Rouge leaders to justice must take account of Cambodia's need for peace and national reconciliation, and that, if improperly conducted, the trials of Khmer Rouge leaders would create panic among other former Khmer Rouge officers and rank and file and lead to a renewed guerrilla war . . . [T]he Cambodian courts were fully competent to conduct any such trial. [The Minister for Foreign Affairs and International Cooperation of Cambodia] recalled that the criminals are Cambodian, the victims were Cambodians and the crimes were committed in Cambodia.⁹

The United Nations and Cambodia negotiated these matters throughout 1999 and 2000. Cambodia insisted upon retaining the power to appoint judges, that Cambodian judges would be in the majority, and that the chambers be integrated as part of the Cambodian legal structure. It also raised the spectre of renewed civil war arising as a result of an overly aggressive prosecution. In this context, it should be noted that the Group of Experts had "significantly" discounted the risk of renewed warfare arising from prosecutions.¹⁰ The United Nations, on the other hand, stressed the importance of ensuring that the process that brings those most responsible to justice is one that meets international standards of justice, fairness and due process of law, and has supported the view that this could only be achieved through an international tribunal.¹¹ It sought guarantees that those indicted would in fact be arrested, a prohibition on amnesties or pardons, the appointment of independent, international prosecutors, and the appointment of a majority of foreign judges.

Faced with Cambodia's refusal to accept an international tribunal, the United Nations eventually agreed to the establishment of a tribunal under Cambodian law controlled by Cambodians, but with international participation. The resulting compromise involves the establishment of special chambers within the Cambodian court structure, with both international and Cambodian participation on the bench and in the prosecution. On 2 January 2001, Cambodia's National Assembly approved the Law on the Establishment of Extraordinary Chambers in The Courts of Cambodia For the Prosecution of Crimes Committed During The Period of Democratic Cambodia ("Law on Extraordinary Chambers").¹² The Extraordinary

⁹ *Secretary-General's Report*, *supra* note 5, para. 7.

¹⁰ *Group of Experts Report*, *supra* note 5, para. 108.

¹¹ *Secretary-General's Report*, *supra* note 5, para. 10.

¹² *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, adopted by the National Assembly of the Kingdom of Cambodia on 2 January 2001, available in English at <<http://www.derechos.org/human-rights/seasia/doc.krlaw.html>>.

Chambers will be three tiered (Trial, Appeal and Supreme courts), with Cambodian judges forming the majority at each level. There are to be two Co-Prosecutors and two Co-Investigating Judges. The subject matter jurisdiction is to cover genocide, crimes against humanity, grave breaches of the Geneva Conventions,¹³ violations of the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict¹⁴ and crimes against internationally protected persons pursuant to the Vienna Convention on Diplomatic Relations of 1961.¹⁵ Homicide, torture and religious persecution can be prosecuted under the 1956 Cambodian Penal Code.

Criminal proceedings under the Law on Extraordinary Chambers are restricted to senior leaders of Democratic Kampuchea and those most responsible for the atrocities, and are tied to the 1975–1979 period. There is therefore not to be a massive prosecution of low-level Khmer Rouge cadre. Funding is to be borne by Cambodia and the United Nations (through a specially created trust fund comprising voluntary contributions), with the assistance of States contributing staff to the United Nations and other voluntary funds contributed by foreign governments, international institutions, NGOs and private donors. The Law on Extraordinary Chambers has since been approved by the Cambodian Constitutional Council subject to an amendment prohibiting the use of the death penalty; it will come into force upon approval by King Sihanouk.¹⁶

United Nations support for the venture remains uncertain. The Law on Extraordinary Chambers was passed despite its objections on key issues, and is not in accordance with several aspects of the draft Memorandum of Understanding agreed in July 2000, to be signed after the passing and adoption of the Law on Extraordinary Chambers.¹⁷ This draft Memor-

¹³ *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field* (1951) 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1951) 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War* (1951) 75 U.N.T.S. 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1951) 75 U.N.T.S. 287.

¹⁴ *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1956) 249 U.N.T.S. 240.

¹⁵ *Vienna Convention on Diplomatic Relations* (1961) 500 UNTS 95.

¹⁶ See *Khmer Rouge Trial Law Given Go-Ahead*, CNN Asia (February 12, 2001), available at <http://asia.cnn.com/2001/WORLD/asiapcf/southeast/02/12/cambodia_tribunal/htm>.

¹⁷ *Tribunal Memorandum of Understanding Between the United Nations and the Royal Government of Cambodia*, PHNOM PENH POST, No. 9/22, 27 October–9 November 2000, available at <http://www.yale.edu/cgp/tribunal/mou_v3.htm>. See *Cambodia Ignored UN Request in Passing Tribunal Law*, TIMES OF INDIA ONLINE, 19 January 2001; Colum

andum of Understanding set out the blueprint for an internationalised domestic tribunal, and the modalities for cooperation between Cambodia and the United Nations. Despite the United Nations' unhappiness with certain aspects, which do indeed differ from the agreement reached in the draft Memorandum of Understanding, the scheme follows closely the form of tribunal contemplated in that document. The key concerns of the United Nations centre on who should be prosecuted and the role of amnesties that have been given to convicted Khmer Rouge leaders.

1.2. *Structure*

Under Cambodia's Law on Extraordinary Chambers, all judges, domestic and international, are ultimately selected by Cambodia's Supreme Council of the Magistracy, said to be strongly linked to the ruling Cambodian People's Party.¹⁸ It also selects the President of each of the chambers, who is to be Cambodian. The international judges are in principle to be nominated by the Secretary-General of the United Nations. Although the Draft Tribunal Memorandum of Understanding limited the right of nomination of international judges to the Secretary-General alone, article 46 of the Law on Extraordinary Chambers makes limited provision for the Supreme Council of the Magistracy to appoint judges and prosecutors proposed by governments of member states of the United Nations or other foreign legal personalities, and in case of last resort, it provides that Cambodians can be appointed to take the place of foreign judges and prosecutors. Thus, should the United Nations withdraw from the process, the enterprise could continue with all-Cambodian personnel, with international personnel seconded directly by states or with international experts of Cambodia's choice, entirely bypassing the United Nations.

The Extraordinary Chambers will have three tiers, mirroring the structure of Cambodian courts. The Trial Court, which sits as a court of first instance, will be composed of three Cambodian judges and two international judges. The Appeal Court, hearing appeals from accused persons, victims, or by the Co-Prosecutors on grounds of errors of fact or law, is to be composed of four Cambodian judges and three international judges. The Supreme Court is to decide appeals on issues of fact and law against the decision of the Appeal Court. It will be composed of five Cambodian judges and four international judges.

One of the major compromises reached, with United States mediation, has been the adoption of a voting formula known as the "Super

Lynch, *UN Warns Cambodia on War Crimes Tribunal*, WASHINGTON POST 3 February 2001.

¹⁸ HUMAN RIGHTS WATCH, *WORLD REPORT 2001*, Cambodia.

Majority”, applicable to all three tiers of the Extraordinary Chambers. Where unanimity cannot be achieved, a decision on innocence or guilt can be made on the basis of a qualified majority. For example, the Trial Chambers are composed of five judges, three Cambodians and two internationals. A decision can only be reached with the affirmative vote of at least four judges. The effect of this is that while the Cambodian judges are in a majority, no decision can be made unless at least one international judge agrees.

A Cambodian and an international judge are to be appointed as Co-Investigating Judges. They are to be jointly responsible for investigations and are equal in status. The Co-Investigating Judges are to conduct investigations on the basis of information received from unlimited sources and can question suspects, victims and witnesses, and collect evidence in accordance with existing procedure, but may seek guidance from “procedural rules established at the international level”. The investigating judge is a feature of the Cambodian Code of Criminal Procedure, but it is not constitutionally rooted, as are the judiciary and prosecution. There have been calls for the abolition of this office, said to be an impediment to the proper administration of justice in Cambodia, contributing to systemic dysfunction and miscarriages of justice, as well as hindering police investigations into crimes and reducing the effectiveness of the prosecutor.¹⁹

Where there is disagreement between the Co-Investigating Judges, investigations should proceed unless a formal request is made by one of the two within thirty days to have the dispute resolved by a Pre-Trial Chamber. It appears that the judges of the Pre-Trial Chamber are to be chosen in addition to those of the Trial, Appeal and Supreme courts.²⁰ Thus, five additional judges are to be appointed just to resolve disputes between international and Cambodian officials (they will also resolve disputes between the international and Cambodian Co-Prosecutors). A decision of the Pre-Trial Chamber requires the affirmative vote of at least four judges; where there is no majority decision, the prosecution shall continue. There is no appeal from such a decision.

¹⁹ See *Statement of Participants of a Workshop on the Reform of Administration of Justice Relating to Police in Cambodia* organised by the Cambodian Defenders Project/IHRLG (CDP), at <http://www.c-r.org/acc_cam/intro.htm>.

²⁰ The *Law on Extraordinary Chambers*, art. 20, provides: “The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three appointed by the Supreme Council of the Magistracy, with one as President, and two appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations. Article 10 shall apply to the judges.” *Supra* note 12.

A Cambodian and an international jurist will be appointed to be Co-Prosecutors, jointly responsible for the preparation and issuing of indictments by the Extraordinary Chambers. Although article 16 makes it clear that there are only two Co-Prosecutors with joint overall responsibility, the language of articles 17 and 21 strongly suggests that there will be Co-Prosecutors at the Trial, Appeal and Supreme Court levels, and that the Co-Prosecutors appearing before the Supreme Court have senior rank to those appearing before the Trial and Appeal Courts.²¹ In other words, these provisions suggest there will in fact be six Co-Prosecutors.

The Co-Prosecutors are to act in accordance with existing Cambodian procedure, but may seek guidance from “procedural rules established at the international level”. Disagreements between Co-Prosecutors are also to be resolved by reference to the Pre-Trial Chamber, and decided in the same way as discussed above in relation to the Co-Investigating Judges. Here too, unless one of the Co-Prosecutors requests a decision from a Pre-Trial Chamber, the prosecution should continue. If the dispute is referred to the Pre-Trial Chamber, absence of a weighted majority decision from the Pre-Trial Chamber means the prosecution can proceed.

1.3. *Substantive Law*

Under article 3 of the Law on Extraordinary Chambers, the crimes of homicide, torture and religious persecution may be tried as violations of the 1956 Penal Code of Cambodia. The Penal Code’s statute of limitations is extended for a further twenty years to enable these crimes to be investigated and tried. The Group of Experts, while recognising the validity of prosecutions under domestic law, pointed out the inherent problems with trials pursuant to Cambodian criminal law:

[Two] obstacles make the task complex. First, the sources on Cambodian law are extremely scarce. The primary source of criminal law prior to the Khmer Rouge period is the 1956 Code Pénal et Lois Pénales, published by the Ministry of Justice of the Kingdom of Cambodia, though it appears that no sources reliably and comprehensively update this law through 1975. As for subsequent law that might govern the Khmer Rouge years, Democratic Kampuchea appears to have published none. No secondary sources on Cambodian criminal law appear extant. Second, because Cambodia has seen at least six legal regimes

²¹ The *Law on Extraordinary Chambers*, art. 17, provides: “The Co-Prosecutors in the trial court shall have the right to appeal the verdict of the Extraordinary Chamber of the trial court. The Co-Prosecutors in the appeals court shall have the right to appeal the decision of the Extraordinary Chamber of the appeals court.” According to article 21, “[t]he Co-Prosecutors under this law shall enjoy equal status and rank according to each level of the Extraordinary Chambers”. *Supra* note 12.

since independence, the extent to which the law of the prior regimes has remained in force is simply undetermined in many cases.²²

Article 4 is essentially derived from articles II and III of the 1948 Genocide Convention. Cambodia has been a party to the Genocide Convention since it entered into force in 1951. There is little dispute that major crimes were committed during the reign of the Khmer Rouge. However, difficulties will arise in meeting genocide's additional legal requirements of discrimination against a national, ethnic, racial or religious group, and the requisite intent to destroy that group, whether in whole or in part. There is evidence indicating the targeting of minority groups on the basis of their ethnicity, such as the Cham, Chinese, Vietnamese and other minority groups, and the Buddhist monkhood. However, the main targets of Khmer Rouge criminality were those Cambodians who were not of their political persuasion, and who formed the urban educated classes regarded by them as being responsible for the subjugation of Khmer peasantry. Political, economic and social groups were deliberately excluded from the ambit of the crime of genocide set out in the Genocide Convention, suggesting that the Khmer Rouge committed crimes against humanity rather than genocide against their own people.²³

The definition of crimes against humanity in article 5 closely follows that of the Statute of the International Criminal Tribunal for Rwanda (ICTR).²⁴ The chapeau's requirement that all crimes against humanity must have a discriminatory or persecutory element is not one that reflects contemporary customary international law.²⁵ However, this does not necessarily offend the principle of legality because the definition is to the advantage of the accused, given that it places an additional burden on the prosecution.

Article 6 gives the Extraordinary Chambers jurisdiction over grave breaches of the Geneva Conventions. For the grave breaches regime to apply, there must be an international armed conflict between States parties to the Geneva Conventions. During the period of Democratic Kampuchea,

²² *Group of Experts Report*, *supra* note 5, paras. 84, 85.

²³ *Prosecutor v. Jelusic* (Case No. IT-95-10), Judgment, 14 December 1999, para. 69; *Prosecutor v. Rutaganda* (Case No. ICTR-96-3-T), Judgment, 6 December 1999, paras. 55–57; *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 516.

²⁴ *Statute of the International Criminal Tribunal for Rwanda*, U.N. Doc S/RES/955, annex.

²⁵ *Prosecutor v. Tadic* (Case No. IT-94-1-A), Decision, 15 July 1999, para. 292: "... customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity".

the Khmer Rouge was engaged in hostilities with its neighbours, namely Vietnam, Laos and Thailand. All were parties to the Geneva Conventions at the time,²⁶ although none had ratified the 1977 Additional Protocols. If the hostilities meet the threshold required for an armed conflict,²⁷ the Geneva Conventions and their grave breaches regime, apply to the situation. However, as the Group of Experts noted, this aspect of Khmer Rouge activity constituted only a small portion of their human rights abuses.²⁸ Atrocities committed against Cambodians during the applicability of the Geneva Conventions would have to be linked to the international armed conflict in order to qualify as grave breaches. This would apply to Cambodians of Vietnamese descent during the struggle with Vietnam, and to Vietnamese in Vietnam, as well as to attacks on Thai villages by Khmer Rouge troops during repeated border clashes with Thailand.²⁹

Given that the overwhelming bulk of Khmer Rouge atrocities were committed against Khmer civilians, the issue of violations of common article 3 of the Geneva Conventions and violations of the laws or customs of war in an internal armed conflict becomes a key issue. However, common article 3 is not part of the grave breaches regime³⁰ and there is no jurisdiction under the Law on Extraordinary Chambers to prosecute other violations of the Geneva Conventions or violations of the laws or customs of war. In any event, as the Group of Experts noted, violations of common article 3 and other violations of the Geneva Conventions that are not grave breaches do not appear to have been viewed as war crimes under customary international law as at 1975.³¹

Finally, prosecutions under the Law on Extraordinary Chambers are limited to senior leaders of Democratic Kampuchea and those most responsible for the atrocities of that era. It would thus appear that it is only acts by

²⁶ Cambodia (8 December 1958), Vietnam (14 November 1953), Laos (29 October 1956), Thailand (29 December 1954).

²⁷ *Prosecutor v. Tadic* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 para. 72: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".

²⁸ *Group of Experts Report*, *supra* note 5, para. 72.

²⁹ *Ibid.*, paras. 72–75.

³⁰ *Prosecutor v. Tadic*, *supra* note 27. There are however *dicta* that atrocities committed in internal armed conflicts can constitute grave breaches: see *Prosecutor v. Tadic* (Case No. IT-94-1-AR7 2), Separate Opinion of Judge Abi-Saab, 2 October 1995, part IV; *Prosecutor v. Delalic et al.* (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 202. Also see George Aldrich, *Jurisdiction of the International Tribunal for the Former Yugoslavia*, 90 AM. J. INT'L L. 64 (1996), p. 68.

³¹ *Group of Experts Report*, *supra* note 5, para. 75.

Cambodians in violation of the Geneva Conventions that can be charged. This is exactly what the Group of Experts cautioned against:

[W]ar crimes prosecutions should not be limited to one side in a conflict. This principle would mean that, if war crimes were included in the jurisdiction of a court for Cambodia, it would have to include war crimes by persons from other States during the period of Democratic Kampuchea. For the reasons discussed above, we believe this would divert the attention of the court from the bulk of the atrocities, and we thus believe war crimes should not be included.³²

Cambodia acceded to the Cultural Property Convention, its attached regulations and the 1954 First Hague Cultural Property Protocol on October 12, 1961. These instruments provide for the protection of cultural property in times of international armed conflict, with more limited protection in a non-international armed conflict (the provisions on “respect for cultural property” contained in article 4 provide the minimum standard of protection in any conflict). Much of Cambodia’s rich cultural heritage was destroyed during the reign of the Khmer Rouge. Thus, by article 7, Cambodia is taking the necessary steps to “prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to commit or order to be committed a breach of the present Convention”.

This is the first time that violations of the Cultural Property Convention are being prosecuted on the basis of the treaty itself. Such acts are more usually regarded as violations of the laws or customs of war, as evidenced by the statutes of the International Criminal Court (ICC)³³ and the International Criminal Tribunal for the former Yugoslavia (ICTY).³⁴ Attacks against cultural property in an international armed conflict can also amount to an attack against a protected object and constitute a grave breach of the Geneva Conventions, prosecutable under article 6 of the Law on Extraordinary Chambers.

Crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations were not widespread or systematic. They are known to have occurred when local spouses of diplomatic personnel were removed from the French Embassy after the fall of Phnom Penh and then murdered. However, the 1961 Convention does not in fact contain penal provisions; these are contained in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally

³² *Ibid.*, para. 151.

³³ *Rome Statute of the International Criminal Court*, U.N. Doc A/CONF.183/9.

³⁴ *Statute of the International Tribunal for the Former Yugoslavia*, U.N. Doc S/RES/827, annex.

Protected Persons, Including Diplomatic Agents, to which Cambodia is not a party.

Article 29 of the Law on Extraordinary Chambers declares that anyone who planned, instigated, ordered, aided and abetted, or committed crimes is individually criminally responsible for his actions. In this, the position or rank of the person does not relieve such person of criminal responsibility, nor does it mitigate punishment. Command responsibility is provided for, in that crimes committed by a subordinate do not relieve the superior of personal criminal responsibility if that person had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators. This includes the requirement that the superior must have “effective command and control or authority and control” over the subordinate, wording drawn from the Statute of the ICC.³⁵ The fact that a person acted pursuant to an order of the government of Democratic Kampuchea or of a superior does not relieve him or her of individual criminal responsibility.

Surprisingly, the Law on Extraordinary Chambers makes no provision concerning defences to crimes under its jurisdiction. Where both domestic and international law form the legal basis for criminal prosecution, it would seem to be only fair that this division is reflected in the defences that are available to an accused. In accordance with the principle of legality, the law to be applied must be that which was effective from 1975 to 1979. Logically, defences to charges of violations of the 1956 Cambodian Penal Code should be based on articles 89 to 104 of that code, which provides a list of defences. These include insanity, youth, *force majeure*, superior orders and self-defence.³⁶ In the absence of any provision on defences in the Law on Extraordinary Chambers, it is assumed that these are the defences that apply not just to domestic crimes, but also to international crimes. The latter is problematic, for an accused should be entitled to rely on defences recognised as valid under international law at the relevant time, particularly if they are more favourable to him or her.

³⁵ The requirement that the superior has effective control over subordinates is a reflection of the position in contemporary customary international law, as expounded in *Prosecutor v. Delalic et al.*, *supra* note 30, para. 378: “In order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.” This finding has been confirmed by the ICTY Appeals Chamber, *Prosecutor v. Delalic et al.* (Case No. IT-96-21-A), Judgment, 20 February 2001.

³⁶ *Group of Experts Report*, *supra* note 5, para. 89.

Although Cambodia is a party to the International Covenant on Civil and Political Rights, the Law on Extraordinary Chambers has no provisions enshrining the principle of *non bis in idem* (a person cannot be tried for something for which he or she has already been convicted or acquitted). This is relevant to the case of a former Khmer Rouge leader, Ieng Sary, who was tried and convicted, albeit in controversial circumstances. A provision along the lines of that employed in the ICC Statute would have directly addressed the problem of “sham trials”.³⁷

There are two current bars to prosecution of leaders of the Khmer Rouge thought to be key targets for prosecution: pardons granted to those convicted and amnesties granting immunity from prosecution given to others who surrendered to the government. The United Nations is insistent that there can be no bars to prosecution; this is one of its major concerns about the Law on Extraordinary Chambers, “a determining factor when [the United Nations] ultimately has to decide on its cooperation with the Royal Government”.³⁸ Its desired wording is that of article 9 of the Draft Tribunal Memorandum of Understanding: “The Parties agree that there shall be no amnesty for the crime of genocide, war crimes and crimes against humanity. An amnesty granted to any person falling within the jurisdiction of the chambers shall not be a bar to prosecution.” The Law on Extraordinary Chambers has weakened this considerably. Article 40 provides: “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.” This fails to address the fact that the King of Cambodia may still grant amnesties pursuant to his constitutional powers and laws may be passed to shield persons from being investigated or prosecuted under the Law on Extraordinary Chambers. It also ignores the issue of someone who has already been pardoned, and those who benefit from existing amnesties.

Cambodia’s current criminal procedure will apply to proceedings under the Law on Extraordinary Chambers. This is said to offer insufficient protection to accused persons in areas such as access to evidence and court files, access to counsel, the right to confront one’s accusers, and the

³⁷ *Rome Statute of the International Criminal Court*, *supra* note 33, art. 20(3).

³⁸ See Colum Lynch, *UN Warns Cambodia on War Crimes Tribunal*, WASHINGTON POST (3 February 2001), also: “The action raised concerns that Cambodia is seeking to shield a former Khmer Rouge foreign minister, Ieng Sary, 71, from prosecution. Sary was granted an amnesty by King Norodom Sihanouk for genocide, after he and 10,000 armed loyalists defected from the Khmer Rouge and made peace with the government. Cambodian Prime Minister Hun Sen has warned recently that any attempt to prosecute Sary could lead to civil war.”

right to cross-examination of witnesses.³⁹ The Group of Experts found that Cambodian criminal procedure is confused and has several laws currently applicable with differing provisions on the same issues.⁴⁰ The Law on Extraordinary Chambers has attempted, through article 35, which essentially repeats article 14(3) of the International Covenant on Civil and Political Rights, to strengthen the core due process rights afforded to accused persons. It is also repeatedly stressed that guidance may also be sought in procedural rules established at the international level. A reasonable reading is that this permits reliance on “soft law” such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,⁴¹ as well as the Rules of Procedure and Evidence of the ICTY, ICTR and ICC.

1.4. *Problems of Implementation*

The Extraordinary Chambers have yet to be created, but it is clear that implementing the Law on Extraordinary Chambers and then ensuring it works in accordance with international standards will be difficult tasks. The court system onto which the Extraordinary Chambers are to be grafted is by all accounts, including that of the Cambodian government itself, a weak one, rife with undue influence and corruption. Its existing judicial personnel will not just take part in the venture but control it. In such circumstances, Cambodian control of the Extraordinary Chambers is a fatal defect. This cannot be repaired by devices such as the “Super Majority”, which will create an extremely politicised judicial process from the start. It appears the “Super Majority” will only apply to decisions on innocence or guilt; in all other matters, the bare majority will be able to control proceedings. There is the obvious risk that there may be insufficient votes to convict, yet no clear basis for acquittal.⁴²

Given that the law is aimed at a restricted group, namely leaders and those most responsible, there are unlikely to be many trials before the Extraordinary Chambers. Thus, it is unnecessary to duplicate existing structures and to have three levels of court; two levels would have sufficed

³⁹ See *Core Issues in Khmer Tribunal Law Unresolved*, Human Rights Watch Press Release (21 January 2000).

⁴⁰ *Group of Experts Report*, *supra* note 5, para. 125. In addition to the 1993 Constitution, Cambodian criminal procedure is governed by the 1992 Supreme National Council Decree on Criminal Law and Procedure (drafted by United Nations officials during the mandate of the United Nations Transitional Authority in Cambodia) and the Law on Criminal Procedure of 28 January 1993.

⁴¹ G.A. Res. 43/173.

⁴² See *Core Issues in Khmer Tribunal Law Unresolved*, Human Rights Watch Press Release (January 21, 2000).

and would be more cost effective (particularly when one considers that the top tier, the Supreme Court, is to have nine judges). In addition to the three levels of court, there is also to be a specially appointed Pre-Trial Chamber, whose task is just to sort out the differences between the Co-Prosecutors and Co-Investigating Judges. All these layers will undoubtedly inhibit expeditious trial.

The concept of having two equally responsible Co-Prosecutors and Co-Investigating Judges in charge of prosecutions and investigations respectively is an exceptional one born of compromise. How is work to be divided amongst them? Cross cultural work ethics and inconsistent practices will certainly cause difficulties and polarised office relations can be expected. Much inefficiency and waste can also be anticipated. Substantial delays are inevitable as both persons are required to agree on a course of action, and disagreements, of which there can be expected to be many, have to be resolved by a panel of judges. That a panel of judges, voting on the basis of the “Super Majority”, is empowered to make decisions on investigation and prosecution is also a unique concept. It is most unusual and contrary to all notions of prosecutorial independence for a panel of judges to, for example, decide on disputes between the Co-Prosecutors concerning prosecutorial strategy at trial. It dilutes standards of judicial independence and creates a politically charged indictment process.⁴³

The uncertainty in Cambodian criminal procedure identified by the Group of Experts can be expected to cause much confusion, delay and violations of fundamental rights. Furthermore, the roles envisaged by the Law on Extraordinary Chambers for Co-Investigating Judges and Co-Prosecutors are difficult to reconcile with existing Cambodian criminal procedure as contained in the Law on Criminal Procedure of 1993.⁴⁴ Under the Law on Extraordinary Chambers, the Co-Investigating Judges are meant to investigate and the Co-Prosecutors are to prepare indictments and prosecute cases, all of which is to be done in accordance with the Cambodian Law on Criminal Procedure. There is thus meant to be a clear division between investigation and prosecution. However, this is not the situation under Cambodian criminal procedure. It provides for police who work under prosecutorial supervision at the initial stages of investigation.⁴⁵ The police report to the prosecutor, and forward the evidence collected in

⁴³ *Supra* note 18.

⁴⁴ *Kram dated 8 February 1993 on Criminal Procedure*, adopted by National Assembly of the State of Cambodia on January 28, 1993, available in English at <http://www.big-pond.com.kh/Council_of_Jurists/Penal/pen002g.htm>.

⁴⁵ Article 36, *ibid.*, makes it clear that judicial police themselves are under direct guidance of the prosecutors and under supervision of the prosecutor general of the Appeals Court.

the case to him or her.⁴⁶ If further investigation is warranted, the prosecutor refers the matter to the investigating judge by way of an “introductory charge”.⁴⁷ The investigating judge will then investigate and report back to the prosecutor.⁴⁸ In practice, it is the police who carry out investigations and the investigating judge generally passes police and prosecution files along uncritically.⁴⁹

Under article 36 of the Cambodian Law on Criminal Procedure, both prosecutors and investigating judges are authorized to perform judicial policing activities, which include the gathering of evidence. Thus, the prosecutor is entitled to initiate investigative activities, in addition to supervising the police and basic duties as set out in article 56.⁵⁰ Pursuant to article 69, the investigating judge is bound by the “introductory charge” of the prosecutor and cannot take any independent investigative steps prior to receiving the introductory charge. Thus, the investigating judge has no right to initiate investigations. Even if a criminal report has been lodged directly, the investigating judge cannot commence investigative steps without the prosecutor providing an introductory charge.⁵¹ The investigating judge is also limited by the terms of that charge, and can only investigate the area of criminality identified by the prosecutor in the introductory charge.⁵² These are not the clear divisions of labour envisaged in the Law on Extraordinary Chambers.

There are few time limits under the Code of Criminal Procedure, and substantial delays impinging on the right to expeditious trial may well arise from the absence of a time limit within which the Co-Investigating Judges have to complete investigations or issue their report to the Co-Prosecutors. Among the few time limits is one that requires a person arrested to be brought to the court within forty-eight hours of arrest.⁵³ Another provides that appeals from detention orders of the investigating judge have to be

⁴⁶ *Ibid.*, art. 44.

⁴⁷ *Ibid.*, art. 69.

⁴⁸ *Ibid.*, art. 70.

⁴⁹ See *Core Issues in Khmer Tribunal Law Unresolved*, Human Rights Watch Press Release (21 January 2000).

⁵⁰ These are “to receive the complaint and the denunciation related to the crime or the misdemeanour even though the complaint is from any person, from any officer of the judicial police or from any official competent for the penal action; to receive the report made by the officer of the judiciary police who ascertains crimes, misdemeanours or the minor offences; to proceed to preparatory investigation by himself/herself in case where the offence is a crime or a flagrante delicto misdemeanour; to call out the public force for the performance of his/her duty,” art 56, *supra* note 44.

⁵¹ *Ibid.*, art. 69.

⁵² *Ibid.*, art. 70.

⁵³ *Ibid.*, art. 38.

dealt with within fifteen days by the Court of Appeal.⁵⁴ One that can be expected to cause problems is the requirement that after the investigating judge forwards his or her complete report, the prosecutor is required to file a charge within three days.⁵⁵ Not only does this seem to bind the Co-Prosecutors to the findings of the Co-Investigating Judges, but compliance with this time limit would be impossible in situations where the Co-Prosecutors disagree and the matter requires resolution by a Pre-Trial Chamber.

2. EAST TIMOR

East Timor was for several hundred years a colony of Portugal and, since 1960, a “non-self governing territory”.⁵⁶ It was being taken by Portugal towards independence when it was invaded by the armed forces of the Republic of Indonesia, on 7 December 1975.⁵⁷ East Timor was declared Indonesia’s twenty-seventh province on 17 July 1976. Although faced with many reports of widespread atrocities, the international community was only prepared to engage in token gestures.⁵⁸ Beyond a failed attempt by Portugal indirectly to challenge Australian recognition of the annexation at the International Court of Justice,⁵⁹ there was no concrete response to the invasion and the suppression of East Timor’s right of self-determination.

⁵⁴ *Ibid.*, art. 79.

⁵⁵ *Ibid.*, art. 89.

⁵⁶ In 1960, the General Assembly declared East Timor to be a non-self-governing territory administered by Portugal: G.A. Res 1542 (XV).

⁵⁷ See CATHOLIC INSTITUTE FOR INTERNATIONAL RELATIONS AND THE INTERNATIONAL PLATFORM OF JURISTS FOR EAST TIMOR, *INTERNATIONAL LAW AND THE QUESTION OF EAST TIMOR* (1995); JAMES DUNN, *TIMOR: A PEOPLE BETRAYED* (1983); JOHN TAYLOR, *INDONESIA’S FORGOTTEN WAR: THE HIDDEN HISTORY OF EAST TIMOR* (1991); JOHN TAYLOR, *EAST TIMOR: THE PRICE OF FREEDOM* (1999). From United Nations practice, it is clear that East Timor continued to be considered a non-self-governing territory under the administration of Portugal.

⁵⁸ The Security Council passed two resolutions, calling for Indonesian withdrawal from Portuguese Timor and calling upon all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination (S.C. Res. 384 (1975)), and condemning the Indonesian invasion (S.C. Res. 389 (1976)). The General Assembly demonstrated a little more interest, passing several resolutions on the question of East Timor: G.A. Res. 3485 (1975); G.A. Res. 31/53; G.A. Res. 32/34; G.A. Res. 33/39; G.A. Res. 34/40; G.A. Res. 35/27; G.A. Res. 36/50; G.A. Res. 37/30.

⁵⁹ *Case Concerning East Timor (Portugal v. Australia)*, [1995] I.C.J. Reports 90, brought in relation to the *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, 11 December 1989, [1991] 29 I.L.M. 469.

In 1999, following a change of leadership and a volatile domestic situation, Indonesia agreed to a referendum that would permit the people of East Timor to determine their future. On 30 August 1999, 78.5% of the East Timorese voted against remaining within Indonesia. There had already been a significant escalation in violence in the months before the referendum, but after the result was announced, violence increased dramatically throughout East Timor, including murders, kidnappings, rape, property destruction, theft of homes and property, the burning and destruction of military installations, offices and civilian residences, with the goal of forced deportation.⁶⁰ An international force (INTERFET) mandated by the Security Council to restore order landed in East Timor on 20 September 1999.⁶¹

Since 25 October 1999, the United Nations' role in East Timor has been as transitional administrator, taking the former colony to independence. The United Nations Transitional Administration in East Timor (UNTAET) is mandated to exercise all legislative and executive authority, including the administration of justice, security, maintenance of law and order, establishment of an effective administration, support of capacity-building for self-government and assistance in the establishment of conditions for sustainable development.⁶² One of its major tasks has been the creation of a criminal justice system from scratch. East Timorese jurists with no prior experience of working as judges, prosecutors and defence counsel have been appointed to office with full powers to act from the moment of appointment, and ever developing hybrid laws based on that of Indonesia, with substantial amendments by UNTAET, are applied. Although the external structures of a system (appointment of personnel, establishment of courts, commencement of proceedings) have been created, the administration of justice has been fraught with difficulties.⁶³

East Timor's "Serious Crimes" enterprise is said to be based upon the model which was being discussed for Cambodia in early 2000. It is also believed to have been heavily influenced by United Nations work in Court Kosovo, where the War Crimes and Ethnic Crimes Court project has now been abandoned. While the discussions about how to deal with

⁶⁰ KPP-HAM, *Report on the Investigation of Human Rights Violations in East Timor* (2000), para. 31. Only an Executive Summary of this *Report* has been officially released: see <<http://www.indonesia-ottawa.org/news/Issue/HumanRights/ham-kpp-timtim-0131-2000.htm>>.

⁶¹ S.C. Res. 1264 (1999).

⁶² UNTAET was established by S.C. Res 1272 (1999).

⁶³ See *Report of the Security Council Mission to East Timor and Indonesia*, U.N. Doc. S/2000/1105, para. 8; *Report of the High Commissioner for Human Rights on the Situation of Human Rights in East Timor*, U.N. Doc. E/CN.4/2001/37, para. 13.

the Cambodian atrocities have been painfully long and complex involving close negotiation with the democratically elected leaders of Cambodia, East Timor's scheme was rushed through within a matter of months of the United Nations taking over as its administrator. And while the Cambodian government has had the luxury of rejecting the offer of an international tribunal, the persistent calls from East Timorese,⁶⁴ experts⁶⁵ and NGOs⁶⁶ for such a tribunal to try the East Timor atrocities have come to no avail.

The Serious Crimes project is centred on the District Court of Dili, where a specially established prosecution service (almost exclusively international in composition, with its own totally international investigation unit) pursues cases of genocide, crimes against humanity, war crimes, torture and certain violations of the Indonesian Criminal Code (murder

⁶⁴ On June 20, 2001, East Timor's National Council passed a resolution calling for the creation of an international tribunal, "East Timor National Council sets up truth commission to probe rights violations", *UN Department of Public Information*, 20 June 2001. See also *Nobel Laureate Appeals For East Timor Tribunal*, Associated Press (23 April 2001); *International Court must be Set Up in Timor Lorosae as Fast as Possible*, Suara Timor Lorosae (11 April 2001), <<http://www.pcug.org.au/~wildwood/01aprfast.htm>>. For a contrary view see *Human Rights Tribunal Not a Priority: Gusmao*, Jakarta Post (20 April 2001) and the strong response of East Timorese NGOs: *Expression of Concern at Xanana's Statement Regarding an International Tribunal*, NGO Forum Press Release (23 April 2001): "given that the courts both in Indonesia and Dili, in their investigations into instances of crimes perpetuated by the Indonesian military in East Timor, have so far failed to satisfy the victims' families demands for justice [t]he NGO Forum regards an International Tribunal as an option that needs to be seriously considered given that to date Indonesia has not made any progress in investigating human rights offences committed by the Indonesian military in East Timor".

⁶⁵ The International Commission of Inquiry on East Timor was established by the Secretary-General to gather and compile information on possible violations of human rights and acts which might constitute breaches of international humanitarian law committed in East Timor since January 1999. Reporting on January 31, 2000, it recommended the establishment of an international tribunal for East Timor (see *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, U.N. Doc. A/54/726,S/2000/59 ("Report of the International Commission of Inquiry")). The Special Rapporteurs on Torture, Extrajudicial, Summary or Arbitrary Executions and Violence against Women recommended that unless the Indonesian government "in a matter of months" brings those responsible to justice, then the Security Council should consider the establishment of an international tribunal (see *Report submitted by the Secretary-General to the General Assembly on the Situation on Human Rights in East Timor*, U.N. Doc. A/54/660) ("Report of the Special Rapporteurs").

⁶⁶ See *Petition for International Tribunal on East Timor*, at <<http://www.pcug.org.au/~wildwood/01maytribunalpetition.htm>>; *East Timor: Crimes Against Humanity Must Not Go Unpunished – TAPOL Demands International Tribunal for East Timor on Anniversary of UN Report*, TAPOL Press Release (31 January 2001). *East Timor Still Awaits Justice One Year After UN Call for International Tribunal*, ETAN [East Timor Action Network] Press Release (31 January 2001).

and sexual violence) before an internationally dominated panel of judges known as the Special Panel. Appeals are to the Court of Appeal (also dominated by internationals), which hears all appeals from the four district courts of East Timor. It is a strictly United Nations operation (the few East Timorese involved are considered part of the civil service), even though it is now technically part of the East Timor Transitional Administration (ETTA), the coalition of UNTAET senior officials and certain handpicked East Timorese who are meant to be jointly running the country for the remainder of UNTAET's transitional administration. In this paper, references to UNTAET include the ETTA where relevant.

The law does not provide for a separate fund for the Serious Crimes enterprise; therefore the Special Panel is funded by UNTAET as part of the District Court of Dili,⁶⁷ and the Office of the Deputy General Prosecutor for Serious Crimes (also referred to as the Serious Crimes Unit) is funded by the Transitional Administrator as part of the public prosecution service of East Timor.⁶⁸ Financing of the enterprise is therefore split between the budget of the ETTA and UNTAET, which is channelled through the United Nations Department of Peacekeeping.

Through the incorporation of much of the substantive legal regime of the ICC Statute, a state of the art system for prosecuting international crimes has been created for East Timor. The truth is that by adopting provisions meant for the International Criminal Court, UNTAET may have been overambitious and bound itself to completing a extremely costly and complex process that would seem to be beyond its capacity. Many have noted the enormous difficulties faced by the effort to bring those responsible to justice, with minimal resources and apparent lack of institutional support.⁶⁹ Reports also blame bad leadership and poor management for the

⁶⁷ Section 34 of *Regulation 2000/11 on the Organisation of Courts in East Timor*, UNTAET/REG/2000/11 provides that "during the transitional period, UNTAET shall provide the necessary financial and technical support to the courts in East Timor".

⁶⁸ Section 2 of *Regulation No 2000/16 on the Organisation of the Public Prosecution Service in East Timor*, UNTAET/REG/2000/16, provides that the "necessary funding and technical assistance for the Public Prosecution Service shall be provided by the Transitional Administrator". The Special Representative of the Secretary-General, in his capacity as the Transitional Administrator, is responsible for all aspects of the UN's work in East Timor, with the power to enact new laws and regulations and to amend, suspend or repeal existing ones.

⁶⁹ See *Petition for International Tribunal on East Timor*, at <<http://www.pcug.org.au/wildwood/01maytribunalpetition.htm>>: "The judicial system in East Timor has also failed to deliver justice to date. Investigations by the Serious Crimes Investigation Unit (SCIU) have been unacceptably slow. The SCIU initially concentrated on a select few cases and major atrocities, such as that committed at the Suai church compound on 6 September 1999 where dozens were murdered, have not been properly investigated. There are persistent

under-performance of the Serious Crimes Unit and its internal strife.⁷⁰ The problematic enterprise is being closely monitored by the Security Council, whose mission to Indonesia and East Timor reported in November 2000 on the inability of the Serious Crimes Unit to carry out its mandate.⁷¹ In extending UNTAET's mandate to 31 January 2002, the Security Council stressed the need to address shortcomings in the administration of justice in East Timor, particularly to bring to justice those responsible for Serious Crimes in 1999.⁷²

UNTAET Regulation No 2000/11 on the Organisation of Courts in East Timor⁷³ sets out the basic concept of mixed panels within the District Court of Dili, and UNTAET Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences⁷⁴ provides the nuts and bolts of the project. Regulation 2000/15 draws much from the substantive legal provisions of the ICC Statute. The Special

reports that the SCIU's work is severely hampered by problems relating to a lack of resources, management conflicts, poor communications, the lack of clear policy guidelines, and reluctance to expose the systematic nature of the 1999 violence. There are also allegations of political interference in the judicial process." See also *East Timor Still Awaits Justice One Year After UN Call for International Tribunal*, ETAN Press Release (31 January 2001): "Both Indonesian and UN prosecutorial efforts have proven inadequate . . . UN prosecutions in East Timor are fraught with procedural and other problems. [Charles Scheiner, National Coordinator of ETAN] attended the first day of the trial of Joao Fernandes in Dili District Court on 10 January. He observed a lack of resources and professionalism in the prosecution, the defense, and the management of the court." Also, *E. Timor: Investigators Struggle with Criminal Lack of Resources*, South China Morning Post (14 November 2000); *UN Pledges more Resources to East Timor's Chief Investigator*, AFP (20 November 2000).

⁷⁰ See Charles Scheiner, *Estafeta* (newsletter of the East Timor Action Network/US, April 2001): "The unit is inadequately funded and staffed, and plagued with mismanagement and incompetence which leads many to doubt its seriousness of purpose . . . The under-resourced judicial system is fraught with problems . . . The SCU seems oblivious to systematic military execution of the 1999 destruction, failing to develop cases or obtain Indonesian cooperation against Indonesian military officers." Also see Mark Dodd, *Timor's crime fighters in crisis*, *The Age*, 1 May 2001: "The United Nations' Serious Crimes Unit, the taskforce gathering evidence to prosecute perpetrators of the violence that swept East Timor in 1999, is on the point of collapse. Morale is at rock bottom and qualified investigators are quitting amid claims that the unit is under-equipped and badly managed. In January the UN sent a senior official to report on problems in the taskforce, now dubbed the 'Not-So-Serious Crimes Unit' by its staff."

⁷¹ See *Report of the Security Council Mission to East Timor and Indonesia*, *supra* note 63.

⁷² U.N. Doc. S/RES/1338 (2001), para. 8.

⁷³ *Regulation No. 2000/11*, *supra* note 67.

⁷⁴ UNTAET *Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UNTAET/REG/2000/15.

Panel is required to apply the laws of East Timor and, where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict. Given that no interpretative document accompanied Regulation 2000/15 and its heavy reliance on the ICC Statute, the latter's *travaux préparatoires* as well as the Elements of Crimes should be considered by the Special Panel for the purposes of interpreting the applicable law.⁷⁵ In addition to the primary sources of international law, the Special Panel should also examine secondary sources such as the jurisprudence of the post-World War II prosecutions, the ICTY and ICTR, and the jurisprudence of national courts dealing with international crimes. Finally, given that the majority of cases are being dealt with under Indonesian law, recourse to the practice in that system is also called for.

Regulation 2000/15 employs the customary international law definition of genocide, embodied in article II of the Genocide Convention and the statutes of the ICC, ICTY and ICTR. As already noted in the discussion on Cambodia, political groups are excluded from this definition of genocide. The East Timor atrocities would seem to have been politically motivated, with East Timorese pro-independence supporters (and those perceived to be supporters) being targeted by attackers who, for the greater part of the occupation, were primarily Indonesian but included East Timorese. Nevertheless, there is judicial support for a more flexible approach, one that considers that in the absence of internationally recognised definitions of the protected groups, the court may assess the concepts of national, ethnical, racial and religious groups in light of the particular political, social and cultural context of the country in which the genocide is alleged to have occurred.⁷⁶

Section 5.1 of Regulation 2000/15 essentially replicates the definition of crimes against humanity in the ICC Statute, with one subtle distinction, namely that both the punishable act and the widespread or systematic attack must be directed against a civilian population. One of the hallmarks of the crime against humanity is the existence of a policy element; this means there is state involvement, either by way of governmental policy, sponsorship or mere toleration of the widespread or systematic attacks.⁷⁷ Although operating under legally unclear standards of proof, both the International Commission of Inquiry and Indonesia's KPP-HAM were

⁷⁵ See *Report of the Preparatory Commission for the International Criminal Court, Part II, Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2.

⁷⁶ *Prosecutor v. Rutaganda*, *supra* note 23, para. 56.

⁷⁷ *Prosecutor v. Kupreskic* (Case No. IT-95-16-T), Judgment, 14 January 2000, para. 552; *Prosecutor v. Tadic* (Case No. IT-94-1-T), Judgment, 7 May 1997, para. 648.

able to identify clear patterns of a widespread, systematic attack on the civilian population of East Timor coupled with official Indonesian government involvement, the key elements of crimes against humanity.⁷⁸ Most tellingly, the Special Rapporteurs found that even applying the strict standards of the International Court of Justice to establish state responsibility for the acts of armed groups in a context of external intervention (dependency of the group on the state) and the exercise of effective control of the group by the State, there was sufficient evidence that the Indonesian Army (Tentara Nasional Indonesia, TNI) was involved in the operational activities of the militia, which for the most part were the direct perpetrators of the 1999 crimes, to incur the responsibility of the Government of Indonesia.⁷⁹

Section 6.1 of Regulation 2000/15 deals with war crimes and mirrors article 8(2) of the ICC Statute. It recognises four categories of war crimes: grave breaches of the Geneva Conventions; other serious violations of the laws and customs applicable in international armed conflict; serious violations of common article 3 of the Geneva Conventions; and serious violations of the laws and customs applicable in armed conflicts not of an international nature.

Charges of war crimes will require the prosecution to prove the existence of armed conflict in East Timor. The orthodox view is that the East Timor conflict began on 7 December 1975 with the invasion of Portuguese-administered East Timor by the armed forces of Indonesia in violation of the Charter of the United Nations and customary *jus ad bellum*.⁸⁰ As a non-self governing territory, East Timor was not then (and still is not) a State and could not be party to international conventions. Both Portugal and Indonesia had ratified the Geneva Conventions.⁸¹ The invasion became an occupation as Indonesia consolidated its authority over East Timor. Occupation is defined in Article 42 of Hague Convention IV: "Territory

⁷⁸ *Report of the International Commission of Inquiry*, *supra* note 65, paras. 135–142; *KPP-HAM Report*, *supra* note 60, paras. 22, 60.

⁷⁹ *Report of The International Commission of Inquiry*, *supra* note 65, para. 72.

⁸⁰ Indonesia claims that it was asked to restore law and order in a civil war and that the East Timorese exercised their right to self-determination by seeking to join the Republic of Indonesia. The United Nations and the vast majority of States, apart from Australia, did not accept this claim. Another view is that the Democratic Republic of East Timor was born following the declaration of independence made by the Fretilin administration on 28 November 1975 and that Indonesia therefore invaded the new State on December 7, 1975. Although several countries did recognise the Democratic Republic of East Timor, it is generally felt that the criteria for statehood were not met.

⁸¹ Indonesia (30 September 1958), Portugal (14 March 1961); Portugal ratified Additional Protocol I on May 7, 1992

is considered occupied when it is actually placed under the authority of the hostile army. The occupation only extends to the territory where such authority has been established and can be exercised.”⁸² The Fourth Geneva Convention is also crucial here, for it applies “to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.⁸³ Although some of its provisions “expired” a year after the occupation, core provisions continued to apply during the entire period of Indonesia’s occupation.⁸⁴

During the twenty-four years that East Timor was occupied by Indonesia, the occupying forces met with local armed resistance⁸⁵ engaged in a struggle for national liberation. The intensity of these encounters varied over time, with the Indonesian forces being assisted by domestic militias and other paramilitary groups, and the FALINTIL at times enjoying control of territory. The categorisation of the situation as one of occupation remains valid until the retreat of the last Indonesian forces at the end of October 1999, and Indonesia’s formal handover of its authority and control over East Timor to the United Nations on 25 October 1999.⁸⁶ Although the month of September 1999 is unique for the scale of atrocities committed and the near absence of armed engagements between

⁸² “[B]y 1939 these rules laid down in [*Hague Convention IV*] were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war”: *France et al. v. Goering et al.*, (1948) 22 I.M.T.497. *Hague Convention IV* was ratified by Portugal on 13 April 1911. In any event, the *Convention* is widely acknowledged to form part of customary international law.

⁸³ *Supra* note 13, art 2.

⁸⁴ Articles 1–12, 27, 29–34, 47, 49, 51–53, 59, 61–77 and 143 continue to apply throughout an occupation.

⁸⁵ The FALINTIL was the Timorese armed resistance, formally the armed wing of the Fretilin, the main Timorese resistance party, and a founding member of the National Council of East Timorese Resistance. The FALINTIL has now been restructured as the defence force of East Timor.

⁸⁶ It can be argued that Indonesia, as the illegal occupying power of a non-self-governing territory, had no legal standing to transfer sovereignty, which still vested *de jure* in the administering power, Portugal. See Jarat Chopra, *Introductory Note to UNTAET Regulation 13*, 39 I.L.M. 936 (2000), 937, who reported that the Personal Envoy of the Secretary-General told Indonesian representatives that they need not formally accept the outcome of the referendum and relinquish authority because the United Nations had never recognized the legitimacy of their occupation of East Timor. Also see Roger Clark, “East Timor, Indonesia and the International Community”, 14 *TEMPLE INT’L & COMP. L. J.* 75 (2000), referring to the fact that the preamble to the *Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor*, 5 May 1999, U.N. Doc. S/1999/513, noted both Indonesian and Portuguese claims, and that this seems to employ the controversial approach of the International Court of Justice in the ICJ East Timor case, *supra* note 59.

the Indonesian forces and the FALINTIL (under orders not to engage), the same laws and customs governing the occupation continued to apply during that month. Thus, it would seem clear that the invasion and occupation of East Timor constituted an international armed conflict to which international humanitarian law, in particular the Geneva Conventions, applied. However, given that the atrocities took place from 1975 to 1999, there are likely to be substantial problems with prosecuting certain offences from the 1970s, 1980s and possibly even the 1990s in accordance with international standards.

The prosecution of torture as a serious crime is complicated by the fact that two definitions are employed in Regulation 2000/15. Section 5.2(d) of Regulation 2000/15 provides that “[t]orture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”. The second definition of torture, that of section 7.1, is to apply to torture when it is not committed as a crime against humanity but as war crimes, a means of committing genocide and the stand-alone international crime of torture: “torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or humiliating, intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” Prosecutions based on acts of torture committed in the 1970s, 1980s and even 1990s will confront issues concerning the principle of legality, an issue discussed in detail later in this paper.

Murder and sexual offences that took place between 1 January 1999 and 25 October 1999 are serious crimes and can be tried as violations of the Indonesian Criminal Code by the Special Panel. The Indonesian Criminal Code’s sexual offence provisions are contained in a section entitled “Crimes against Decency”; in this is to be found the criminalisation of adultery⁸⁷ and the definition of rape as being “forcing a woman

⁸⁷ “By a maximum imprisonment of nine months, shall be punished: 1.a any married man who knowing that art 27 of the Civil Code is applicable to him, commits adultery”: *Indonesian Criminal Code*, art. 284(1).

to have sexual intercourse out of marriage".⁸⁸ Sexual crimes are crimes committed against a person and not against abstract concepts such as decency or honour. Among its other flaws, the Indonesian provision does not recognise that rape is possible within marriage, or that men can be the victims of rape too. It is difficult to reconcile this legal regime with the recent progressive jurisprudence emerging from the international *ad hoc* tribunals.⁸⁹

The grounds of individual criminal responsibility set out in section 14 mirror those of the ICC Statute. They arise if the individual committed, planned, instigated, ordered, solicited, induced, aided, abetted or otherwise assisted in the commission of the crime, or a substantial step was taken towards its commission. There is also individual criminal responsibility where an individual in any other way contributes to the commission or attempted commission of the crime (the contribution must be intentional and either made with the aim of furthering the criminal activity or purpose of a group or with the knowledge of the group's intention to commit the crime). Direct and public incitement to commit genocide is specifically identified as grounds for individual criminal responsibility. Under section 16, command responsibility arises where a superior knew or had reason to know that a subordinate was about to commit illegal acts or had done so and the superior failed to take the necessary and reasonable steps to prevent such acts or to punish the perpetrators thereof. This formulation is that used by the ICTY and ICTR Statutes rather than that of the ICC Statute. On the subject of defences, Regulation 2000/15 reiterates the relevant provisions of the ICC Statute.

All criminal proceedings in East Timor are now regulated by the Transitional Rules on Criminal Procedure,⁹⁰ a hybrid UNTAET document drawing mainly from the continental law tradition, with influence from common law jurisdictions, as well as some of the provisions for the international tribunals and the ICC. The law of procedure therefore applies equally to serious crimes as it does to all other crimes perpetrated in East Timor. The venture is however administered separately from ordinary crimes, in that there is an investigation unit dedicated to the investigation of serious crimes, acting under the direction and supervision of the Office

⁸⁸ "Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage, shall, being guilty of rape, be punished by a maximum imprisonment of twelve years": *Indonesian Criminal Code*, art. 285.

⁸⁹ See *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T) Judgment, 2 September 1998; *Prosecutor v. Furundzija* (IT-95-17/1-T10), Judgment, 10 December 1998; *Prosecutor v. Kunarac et al.* (IT-96-23 and IT-96-23/1), Judgment, 22 February 2001.

⁹⁰ *UNTAET Regulation 2000/30 on Transitional Rules of Criminal Procedure*, UNTAET/REG/2000/30.

of the Deputy General Prosecutor for serious crimes. While the judges of the Ordinary Panels have dealt with issues of detention relating to serious crimes, the judges of the Special Panel only deal with serious crimes. An investigating judge specifically appointed to the Special Panel ensures the rights of suspects are protected, and issues documents such as arrest warrants and exhumation orders. He or she is empowered to order detention for up to six months (with monthly reviews), but thereafter detentions must be reviewed by a panel of judges. Serious crime indictments are filed at the District Court of Dili, and the cases prosecuted before the Special Panel. Appeal is to the Court of Appeal. Evidentiary rules are relaxed: all that is relevant and of probative value is admissible.⁹¹ Admissions of guilt, a feature of many of the East Timor cases, are provided for in section 29A.1, which mirrors article 65 of the ICC Statute.

2.1. *Grand Design v. Reality*

Taken at face value, the East Timor Serious Crimes legislation creates a state of the art regime that, with its enormous reliance on the ICC Statute, is progressive and has much to commend it. It has attempted to balance some of the considerations particular to East Timor: the fact that many were already being held in detention, the need to ensure that the investigation and prosecution of atrocities would not detract from those into current crime and the pressure to establish a functioning criminal justice system. With suspects (all low level perpetrators with no leadership role or involvement in ordering or organising the atrocities) already being held in detention, and being continually arrested for 1999 atrocities, UNTAET obviously felt it did not have the luxury of time and had to act as a matter of urgency in establishing a system for prosecuting atrocities. In the rush to “get started”, it would seem that much has been overlooked.

There was either a failure to consider, or to give adequate consideration to, the realities of implementing such a regime in East Timor. The only United Nations reports that examined the question of how to deal with the atrocities in East Timor are those of the Special Rapporteurs and the International Commission of Inquiry, sent to investigate the atrocities in late 1999. These experts were commissioned primarily to examine what happened, but were also to make recommendations to the Secretary-General. They did not, as did the Group of Experts for Cambodia, closely examine the various models and their suitability for East Timor. Both nevertheless called for an international tribunal to try the East Timor atrocity cases; the International Commission of Inquiry

⁹¹ *Ibid.*, s. 34.1.

proposed Indonesian and East Timorese participation and the Special Rapporteurs recommended that that if Indonesia failed in a matter of months to “investigate TNI involvement in the past year’s atrocities . . . both in the way of credible clarification of the facts and the bringing to justice of the perpetrators”, an international tribunal should be created.⁹²

The Special Rapporteurs also wisely foresaw that the East Timorese judicial system, which had yet to be created and tested, could not hope to cope with investigations into atrocities of this scale, and that the best efforts would be unlikely to result in complete investigations into the full range of crimes.⁹³ And, it was only as an interim measure pending the establishment of an international tribunal that the International Commission of Inquiry recommended strengthening UNTAET’s investigative capacity.⁹⁴ The international community chose instead to put its faith in Indonesian promises to try perpetrators, as well as in developing UNTAET’s own investigative capacity.⁹⁵

There is no record that UNTAET carried out its own detailed study that consulted experts and meaningfully engaged the East Timorese on how best to address the atrocities.⁹⁶ Nor is there one to explain why UNTAET decided the Cambodian model of mixed panels within the existing criminal justice system was appropriate for East Timor, with its destroyed infrastructure, dysfunctional criminal justice system with novice legal personnel (the first judges and prosecutors, who had never practiced before, were appointed on January 7, 2001), shell-shocked society and atrocities committed over a brutal twenty-four-year long occupation. Furthermore, it is not known why it was felt that the legal regime designed

⁹² *Report of the Special Rapporteurs, supra* note 65, para. 73.

⁹³ *Ibid.*

⁹⁴ *Report of International Commission of Inquiry, supra* note 65, para. 150.

⁹⁵ See Mark Riley, THE SYDNEY MORNING HERALD, Feb. 7, 2000: The Costa Rican MP who headed the [International Commission of Inquiry], Sonia Picado, went further and said she had no faith in the ability of the Indonesian legal system to deliver justice to the East Timorese. Yet, Annan did not endorse the panel’s recommendations. Instead, he now says Indonesia should first be given the opportunity to prosecute those responsible itself. “The main thing is to put people on trial and make them accountable,” [the Secretary-General] says. “Normally, we need to see how they proceed. If the Government has the capacity and the willingness to do it and is doing it, you don’t want to create another tribunal.”

⁹⁶ Judging by the strength of East Timorese support for an international tribunal, it would seem that this would have been their mechanism of preference, had they been properly consulted and allowed to have a meaningful say in the matter. There was discussion with East Timor’s unelected leaders through a body known as the National Consultative Council before the adoption of the already drafted legislation, but the matter was not opened for public debate in the community.

for the ICC could realistically be implemented in a district court of one of the world's poorest nations.

This system was grafted onto the District Court of Dili, a newly established court that was struggling to "stay afloat" with novice judges, prosecutors and defence counsel who had never worked in that capacity before.⁹⁷ Even the court building was new (rebuilt by Portugal in March 2000). There was little guidance and training provided, and dealing with the ever growing case load was an enormous struggle. There was hardly any administrative staff to assist with court organisational and management issues, and files and evidence were routinely misplaced. Pre-trial detention was the norm, even for juveniles. Equipment in the hot and over crowded rooms was limited to a few second-hand computers donated by an Australian NGO. With four languages in use in East Timor (Bahasa Indonesia, English, Tetum and Portuguese), interpretation and translation facilities have been woefully inadequate. The persistent failure to provide adequate support to the court, prosecution and defence, coupled with resentment of alleged interference in professional independence, led to difficult relations between UNTAET's Ministry of Justice and East Timorese judicial personnel.⁹⁸ To cap it all, the adoption of the Serious Crimes project was viewed with much anger by the East Timorese jurists, who felt they had been excluded from the process and that the atrocity cases, which they had previously been dealing with, were being taken away from them by the international community. There was particularly strong resentment that despite the provisions of Regulation 2000/11, the Presidency of the District Court of Dili had not been consulted.⁹⁹

⁹⁷ See Seth Mydan, *Modest Beginnings for East Timor's Justice System*, THE NEW YORK TIMES (March 4, 2001): "And so the tiny court house in Dili with its ill-prepared staff, its shortage of translators, its missing records, its lack of a court reporter or copy machine, its confused schedule and its inadequate budget is for the moment the only venue for this ravaged country. Prosecutors misplace their indictments, the police misplace defendants who are free on bail and cases recess in midstream when foreign judges break for their vacations. No money has been allocated to house and support witnesses from outside Dili." Also see Human Rights Watch, *Unfinished Business for East Timor*, (August 2000), Part III.

⁹⁸ In particular, the problem of resources has soured the relations between UNTAET and the jurists. This led to strikes at the districts courts in October 2000: see *Strike Cripples East Timor's Legal System*, ABC News Online (10 October 2000), <http://www.abc.net.au/news/2000/10/item20001010023441_1.htm>. The strikes were called off after UNTAET promised to provide long overdue and desperately needed vehicles, furniture, stationery and other equipment: see *UNTAET*, Daily Briefing (11 October 2000), <<http://www.un.org/peace/timor/DB/DB111000.htm>>.

⁹⁹ "The Transitional Administrator, *after consultation with the Court Presidency*, may decide to establish panels with the expertise to exercise exclusive jurisdiction vested in the

It is no easy matter to investigate, prosecute, defend and try international crimes, particularly if this is to be carried out with due process, full respect for the rights of the accused and in a way which focuses on those most responsible. It is unknown if UNTAET seriously considered the costs that would arise out of having such an ambitious programme to prosecute atrocities at the District Court of Dili before it proceeded with the adoption of Regulation 2000/11. In the time between the passing of that regulation and Regulation 2000/15, no budget was prepared and approved to ensure the immediate implementation of the Serious Crimes venture. Thus, the prosecution of Serious Crimes in East Timor has been crippled from the start, starting life with no resources. For the first few months, its personnel and equipment were borrowed from the Human Rights and Judicial Affairs Departments, as well as from CIVPOL.¹⁰⁰ Perhaps lessons have already been learned, for in Cambodia and Sierra Leone, the United Nations has made it clear that internationalised domestic prosecutions will not start work until the Secretary-General is satisfied of the availability of funds for establishment and an initial period of three years. It is also significant to note that until recently the position of Deputy General Prosecutor for Serious Crimes has only been filled on a temporary basis and the General Prosecutor himself has had to head the Serious Crimes Unit in addition to his responsibility for the prosecution service as a whole.¹⁰¹

The consequences of the lack of support have manifested themselves in predictable ways:

A serious lack of resources, both human and material, has hampered the investigative work of the Serious Crimes Investigation Unit. This has prevented investigations being undertaken in connection with the overwhelming majority of crimes against humanity and war crimes committed during 1999. Because of the delay in or non-existence of investigations, a number of detainees, who had been held for months in pre-trial detention, have been released by the General Prosecutor on grounds of insufficient evidence.¹⁰²

It has also seriously impacted the effectiveness of the enterprise in addressing the true extent of the criminality that was committed in East Timor: most crimes are being charged under the less demanding Indonesian Criminal Code, rather than as international crimes. Funding, or rather the lack of it, has therefore determined prosecutorial strategy. Unlawful

court by section 10.1 of the present regulation”: *Regulation 2000/11*, *supra* note 67, s. 10.3 (emphasis added).

¹⁰⁰ Human Rights Watch, *supra* note 97.

¹⁰¹ It was only on 5 July 2001 that Jean-Louise Gilissen from Belgium was sworn in as Deputy General Prosecutor for Serious Crimes.

¹⁰² See *Report of the High Commissioner for Human Rights on the Situation of Human Rights in East Timor*, U.N. Doc. E/CN.4/2001/37, para. 13.

detention arising from inadequate monitoring has been a major problem.¹⁰³ Investigations of the major incidents are limited to a few (among the excluded are some of the most notorious massacres) and those that are being investigated are not able to be investigated to the full extent necessary.¹⁰⁴ Charging policy has been inconsistent.¹⁰⁵ The historical record generated by the judicial process will therefore show that many isolated murders and arsons were committed in East Timor by the East Timorese upon each other, and only a few were international crimes or had direct Indonesian involvement. Although the resources situation has improved since a Security Council mission visited East Timor in November 2000 and learned at first hand the impossible circumstances of the Serious Crimes Unit, the struggle continues and the enterprise continues to draw criticism for failing to bring justice to East Timor.¹⁰⁶ It has in fact reached a stage where the unit's failures are cited as grounds for the creation of an international tribunal.¹⁰⁷ Calls have been made for UNTAET either to boost its

¹⁰³ See *Report of the UNTAET Human Rights Unit* (March 2001): "At the end of January 2001, approximately 103 detainees were being held unlawfully because their detention orders had expired due to the inability of the judiciary to hear applications to extend the detention orders. Significant efforts have been made by the Serious Crimes Unit to address this issue and as of 9 March, that number had been reduced to 55."

¹⁰⁴ See *The La'o Hamutuk Bulletin* (East Timor) (April 2000): "At the same time, UNTAET officials assert that they do not have the funds to investigate many of the serious crimes committed in 1999. Scarce resources have forced UNTAET to prioritise five high-profile cases initially, and thus to neglect the important first phase of investigation of other cases. Indeed, there has been no excavation of a large number of graves from 1999 simply due to the lack of forensic experts and sufficient morgue space. The 6 September, 1999 massacre at the Catholic church compound in Suai, for example, is not one of the five initial cases. Local leaders in Suai complained to the visiting Security Council delegation in November that individuals who participated in the killing spree are living freely among the local population. UNTAET's local District Administrator admitted that 'We've had to release criminals who've confessed to rape and murder' due to a lack of resources for investigation."

¹⁰⁵ For example, Jose Valente, a member of the militia group Team Alfa, was tried and convicted by the Special Panel of murder. This incident could be seen as linked to the acts committed by other members of Team Alfa, shortly to go on trial for crimes against humanity in the Lospalos Case. The Lospalos case involves members of Team Alfa who were involved in the same series of incidents in the same area at the same time as Jose Valente was.

¹⁰⁶ See for example, See *Report of the Security Council Mission to East Timor and Indonesia*, *supra* note 62, para. 8; *East Timor Still Awaits Justice One Year After UN Call for International Tribunal*, ETAN Press Release (31 January 2001).

¹⁰⁷ See Petition for an International Tribunal for East Timor, *supra* note 66.

support for the unit or dismantle it altogether and set up an international war crimes tribunal.¹⁰⁸

The reasons for UNTAET's inability, or reluctance, to provide adequate support to the Serious Crimes venture are unclear. They probably include a genuine lack of understanding by officials from a peacekeeping mission, new to the challenges of nation-building, of the realities of creating and maintaining a criminal justice system that complies with international standards. An inability to appreciate the complexities and costs of investigating and prosecuting international crimes involving the highest levels of State authority may also have contributed. United Nations peacekeeping missions are notoriously impoverished, and the organisation's entrenched bureaucracy is certainly not designed to respond in a flexible and immediate fashion to the particular needs of judicial institutions. Much also may stem from UNTAET's ambiguous attitude toward prosecutions in East Timor itself, which is suggested by the surprising degree of faith placed in the Indonesian criminal justice system and its particular support for the reconciliation process, discussed below. It is of course possible that UNTAET only expected simple cases of low-level perpetrators to be processed in East Timor itself; this does not explain why despite the General Prosecutor's efforts to build evidence against leaders there are still ongoing problems with resources or why such a complicated scheme was adopted in the first place. Whatever the reasons, UNTAET's recurring failure to provide adequate support to the venture and to address its many reported problems lend support to the view that the Serious Crimes venture exists simply to be used as political leverage in dealing with Indonesia, the legal mechanism used as a bargaining tool.

2.2. Need for Clarity of Purpose and a Targeted Group

Beyond the obvious prosecution of atrocities, it is unclear what the aim of the Serious Crimes experiment is meant to be. Is it an end in itself, in other words, with no greater purpose beyond retributive justice in the individual case? Or is the purpose to contribute towards reconciliation in a nation struggling to come to terms with a violent history, with the courts used as a means of checking impunity, establishing the rule of law and determining the wider truth of what occurred? It has never been clear precisely how the exercise is to tie in with the Indonesian criminal process, and with the truth and reconciliation mechanisms recently adopted in East Timor, and mooted in Indonesia. Furthermore, the judgments emerging from the Special Panel indicate that the purpose of the exercise is regarded

¹⁰⁸ See Mark Dodd, *Call to Support or Scrap Crimes Unit*, SYDNEY MORNING HERALD (25 May 2001).

by its judges as one limited simply to justice in the individual case. For example, its judgment in the case of Joao Fernandes, convicted for his role in a major massacre at the Maliana Police Station on September 8, 1999, reveals no placing of the incident within the context of the massacre, let alone what occurred across East Timor.¹⁰⁹ There is no examination of the massacre as a whole, how and why it happened. To be fair, this limited approach may have been dictated by the approach of the prosecution which, despite challenge from the bench, insisted on charging this incident as an ordinary murder rather than as a crime against humanity, presenting evidence limited to the incident in which Joao Fernandes was involved.¹¹⁰

Also, it does not appear clear who the target group of Regulation 2000/15 is meant to be, whether the enterprise is designed to bring leaders and those most responsible to trial or to process the cases of low level perpetrators who are already detained, leaving the Indonesian justice system to sort out the leaders. The preamble of the regulation is not instructive; the legislation directs itself to the establishment of panels with exclusive jurisdiction over serious criminal offences. This implies that all perpetrators are to face criminal justice. Certainly this is legally correct, for international law demands that there must be individual criminal responsibility for such atrocities. Yet, the courts in any nation, let alone dysfunctional courts in fragile nations like East Timor and Cambodia, cannot cope with processing all such perpetrators whilst fulfilling their obligations to deal with current crime. Distasteful as it is, clear lines have

¹⁰⁹ *General Prosecutor v. Joao Fernandes*, Special Panel for Serious Crimes, Case No. 001/00.C.G.2000, Judgment, 25 January 2001. The Serious Crimes Unit has publicly identified the Maliana Police Station massacre as one that is being investigated as a crime against humanity. KPP-HAM has also examined this as a crime against humanity.

¹¹⁰ According to the judgment, the Special Panel questioned the prosecutor about why only one murder was charged when the evidence revealed multiple murders and indicated that crimes against humanity had been perpetrated. The prosecutor acknowledged that in 1999 there had been widespread and systematic attacks against the civilian population and that the Maliana massacre was part of that. However, the prosecutor “explained that she charged one murder because there is no evidence of crimes against humanity, the accused is detained and seek a quick justice” [*sic*]. See *Conviction in East Timor Falls Short of Calls for Justice*, CHRISTIAN SCIENCE MONITOR (30 January 2001): “In Fernandes’s case, prosecutors felt they couldn’t yet make a case for the more muscular charge of a crime against humanity. ‘There’s tons of evidence. But we haven’t gone out and gotten it yet,’ says one prosecutor. ‘This man participated in one of the worst massacres and all they come up with is one count of murder,’ fumes [Aniceto Gutierrez, director of the East Timor Human Rights Foundation] ‘The evidence is everywhere. Perhaps they’re not up to the job.’”

to be drawn as to who and what gets prosecuted; the alternative would be to swamp the system with investigations and trials of low-level perpetrators, making it impossible to pursue the cases of those with the highest levels of responsibility. Selective prosecution is not unusual and it is taken into account in the Cambodian Law on Extraordinary Chambers and Sierra Leone's Special Court, which direct themselves at the prosecution of those most responsible, with leaders being the main target.

It is highly unlikely that a focus on individual cases that are, in the scale of things, less significant, can address the truth of what happened in East Timor. It can only divert scarce resources. Public statements of East Timor's General Prosecutor indicate his office is pursuing leaders and those most responsible, while recognising its obligation to process the less significant cases too.¹¹¹ This is partly a reflection of the complex relationship with Indonesia, for if those authorities had prosecuted their military, police and civilian authorities as they had promised to do and in line with their international obligations, there would be no need for the Serious Crimes project to focus on investigating the criminality of those leadership figures. The effect of this is that resources, already severely limited, are split between pursuing the people that the prosecution would like to try and processing the cases of the "small fry" that it is stuck with.

2.3. *Retroactive Prosecutions*

While the Khmer Rouge atrocities occurred over the course of four years, East Timor's did not just occur after the 1999 referendum and up to the handover to UNTAET, but over the course of a twenty-four-year long occupation. Addressing the atrocities of this era is obviously crucial to any credible effort to bring justice to East Timor. This problem was clearly considered by the drafters of Regulation 2000/15, who provided that: "The panels shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the serious criminal offence is based is consistent with section 3.1 of UNTAET Regulation No 1999/1 or any other UNTAET Regulation." Furthermore, section 5.2 of Regulation 2000/11 provides: "Courts shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the offence is based is consistent with s 3.1 of

¹¹¹ See transcript of press conference given by the General Prosecutor of East Timor on 11 December 2000, *UNTAET Daily Briefing 11 December 2000*, <www.un.org/peace/etimor/DB/db011200.htm>; also Fact Sheet Update on Serious Crimes and Justice for Victims of 1999 Violence, UNTAET Press Release, 25 May 2001.

UNTAET Regulation 1999/1 or any other UNTAET regulation.”¹¹² Thus, the Serious Crimes enterprise permits prosecution of atrocities committed during the entire period of occupation from 1975 onwards. This raises the issue of *nullum crimen nulla poena sine lege*, entrenched in Regulation 2000/15 itself, for no one can be tried for acts that were not criminal at the time they were committed. As the Group of Experts noted in relation to Cambodia, when addressing cases during a particular historical era, the law to be applied must be that which was then applicable. In relation to the international crimes identified as being within the jurisdiction of the Special Panel, these must reflect customary international law at the time of the commission of the offence.

Regulation 2000/15’s extensive reliance on the ICC Statute has already been discussed. The ICC Statute incorporates significant recent advances in international law resulting from the practice and jurisprudence of the *ad hoc* tribunals, and developments deriving from the ever-growing influence of human rights. The ICC will not undertake retroactive prosecutions, its jurisdiction being limited to crimes that occur after it comes into force. Its provisions were not designed to deal with historical atrocities. Numerous aspects of the ICC Statute are innovations on international law applicable in the 1970s, 1980s and even the 1990s; a fact recognised by the Secretary-General himself when reporting to the Security Council on Sierra Leone’s Special Court. For example, it has only recently been recognised that violations of common article 3 in an internal armed conflict are prosecutable as war crimes under international law. This was not the position in the 1970s and 1980s, according to the Group of Experts on Cambodia.¹¹³ Thus, article 6.1 would run foul of international standards if used as a basis for prosecution of such acts committed in that era.¹¹⁴

Earlier in this paper, some problems with prosecuting torture under Regulation 2000/15 were identified. Prior to the adoption of the ICC Statute, the customary definition of torture was that of the Torture Convention which specifically requires that the act be “inflicted by or at the instigation of or with the consent or acquiescence of” a public official and that there be one of certain identified purposes behind the acts.¹¹⁵ The

¹¹² Section 3.1 provides that the laws of East Timor must be compatible with international standards. *Regulation 2000/15* satisfies such conditions, subject to concerns raised herein about retroactivity.

¹¹³ *Group of Experts Report*, *supra* note 5, para. 75.

¹¹⁴ This is simply an illustration of the dangers of wholesale import of the ICC’s provisions, for in reality it is unlikely that the prosecution would categorise the period 1975 to 1999 in East Timor as one of internal armed conflict.

¹¹⁵ See *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* G.A. Res. 39/46, 10 Dec. 1984.

Convention's definition is drawn from the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by consensus by the General Assembly on December 9, 1975.¹¹⁶ Neither definition is incorporated into Regulation 2000/15, which uses the 1998 ICC Statute's definition and a second one that does not mirror the other definitions of torture. Article 7(2)(e) of the ICC Statute was adopted in accordance with the dominant view at the Rome Conference that it was necessary to extend the definition of torture beyond that contained in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Although that definition represented customary international law,¹¹⁷ it was regarded by many delegates at Rome as being too restrictive because it excludes acts committed by non-State actors, and requires that there be one of certain identified purposes behind the torture. The new definition thus encompasses persons who would not otherwise be liable for torture under customary international law. Prosecutions for torture as a crime against humanity based on section 5.2(d) arising from the 1970s, 1980s and even the 1990s would therefore seem in conflict with the principle of legality, in particular *nullum crimen sine lege* and the prohibition on retroactive criminal legislation.

While it is closer to the customary international law definition with its recognition that torture is carried out for certain purposes, like section 5.2(d), section 7.1 omits the requirement that the severe pain or suffering be inflicted under colour of State authority, that is, it is committed by or with the acquiescence of a State official. In 1980 customary international law required that the act be committed "by or at the instigation of a public official" and "for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons". The prosecution of a "private" act of torture committed in 1980 on the basis of Regulation 2000/15 would be incompatible with international standards. This legislative failing is somewhat alleviated by the fact that the criminality could be prosecuted under the Indonesian Criminal Code,

¹¹⁶ G.A. Res. 3452 (XXX).

¹¹⁷ The prevailing view that the definition of the Torture Convention reflects customary international law is supported by international jurisprudence such as *Prosecutor v. Delalic et al.*, *supra* note 30, para. 459 and *Prosecutor v. Furundzija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, para. 111. This has recently been challenged in the *Foca* case, see *Prosecutor v. Kunarac et al.* (Case No. IT-96-23-T and IT-96-23/1-T), Judgment, 22 February 2001, paras. 473–482.

applicable throughout the occupation, but this would be subject to the statute of limitations.¹¹⁸

2.4. *Complications with Other Mechanisms*

The East Timor investigations in Indonesia have had a direct impact upon the efficacy of the Serious Crimes venture. They have detrimentally affected its ability to perform its tasks and reveal the importance of a means of securing cooperation from nations with a clear involvement in the process or of assured support from the international community in securing such cooperation. Since the issuing of KPP-HAM's powerful report on January 31, 2000, Indonesia's efforts to prosecute atrocities, in which such faith was put by the international community, have been agonisingly slow, degenerating into farce in 2001. In September and October 2000, the Attorney General of Indonesia named twenty-two persons as suspects.¹¹⁹ However, prosecution was delayed until the adoption of legislation permitting the establishment of human rights courts in which atrocities could be tried.¹²⁰ When that was adopted, there was a further delay of five months before the President issued a decree establishing a special *ad hoc* court for East Timor. The long-awaited decree very controversially limited the scope of the *ad hoc* court to events after the 1999 referendum, a period when the atrocities were primarily committed by East Timorese militias rather than Indonesian forces.¹²¹ The appearance of a concerted attempt to block the East Timor prosecutions was further reinforced when a previously confidential report from KPP-HAM to the Attorney-General was leaked: it detailed the extent of the role of the Indonesian armed forces in the East Timor atrocities and specifically identified the responsibility of the army commander, General Wiranto.¹²² Despite this, the Attorney General has failed to charge General Wiranto. To compound matters further, Indonesian

¹¹⁸ Under section 17.2 of *Regulation 2000/15*, the time limits of the then applicable law will apply to prosecutions under the Indonesian Penal Code. If an Indonesian offence is charged, the accused should in all fairness be entitled to rely on Indonesian defences applicable at the time. To this end, it is relevant that unlike *Regulation 2000/15*, Indonesian law permits a defence of superior orders.

¹¹⁹ See *East Timor Massacre Suspects Named*, CHRISTIAN SCIENCE MONITOR (5 September 2000). In October 2000, three more persons were named as suspects, one of whom was militia leader Eurico Guterres.

¹²⁰ *Law Establishing Human Rights Court* (Law No. 26 of 2000), enacted 23 November 2000.

¹²¹ See *Wahid Decree Rules Out Trial of Key Timor Suspects*, AFP (3 May 2001); *East Timor Cases Axed by Jakarta*, THE AGE (3 May 2001).

¹²² See Hamish McDonald, *Architects of Mass Murder*, SYDNEY MORNING HERALD (28 April 2001).

courts handed down exceptionally light sentences on East Timorese militia members, most notably in the case of the three accused of murdering UNHCR staff in West Timor.¹²³

The Indonesian “efforts” have hampered those of East Timor in various ways. With Indonesia clearly backtracking on its pledges and international obligations, the burden has fallen on the troubled Serious Crimes Unit to investigate incidents that the Indonesian authorities were meant to be dealing with. Also, despite the terms of a Memorandum of Understanding with UNTAET allowing for the transfer of suspects to East Timor and cooperation in legal, judicial and human rights related matters on 6 April 2000, Indonesia has refused to transfer militia leader Enrico Guterres to stand trial before the Special Panel on the grounds, first, that he is an Indonesian national and, second, because its own investigative bodies are said to be examining allegations against him. The vast majority of perpetrators, both at low and high level, remain in Indonesia (pro-integration East Timorese have kept their Indonesian nationality), which refuses to transfer Indonesian nationals to East Timor to stand trial.

Under the Memorandum of Understanding, Serious Crimes officials visited Indonesia hoping to interview key witnesses and suspects in several major incidents under investigation. Thanks to an atmosphere of hostility and unwillingness to cooperate, stoked by the commander of the TNI, witnesses and suspects refused to be interviewed. Thus, Indonesia has the power to block the effectiveness of the Serious Crimes enterprise and to ensure that it is little more than a token gesture. Clearly, given that the Serious Crimes process is rooted in a Chapter VII resolution of the Security Council creating UNTAET, much pressure can be brought to bear upon Indonesia to cooperate. However, with Indonesia reeling under internal pressures that threaten to disintegrate the nation and lead to massive violence, the international community continues to tread carefully in relation to the East Timor prosecutions.

East Timorese society, familiar with the informal mechanisms of traditional justice, is believed to be receptive of the concept of reconciliation and truth commissions. On June 20, 2001, almost a year after the adoption of Regulation 2000/15, the National Council approved the creation of a Reception, Truth and Reconciliation Commission (RTR Commission).¹²⁴ It will have two main functions: to establish the truth regarding

¹²³ *Secretary-General Shocked by Light Sentences Handed Down in Indonesian Court Case Concerning Killing of UNHCR Staff*, UN Secretary-General Press Release (4 May 2001), Jonathan Thatcher, *International Outrage at Indon Court's Timor Murder Sentences*, REUTERS (4 May 2001).

¹²⁴ *East Timor National Council Sets Up Truth Commission to Probe Rights Violations*, UN Department of Public Information (20 June 2001); see *UNTAET Regulation 2001/10*

the pattern and scope of human rights violations in the past and to facilitate community acceptance of those who committed lesser crimes. In order to undertake the first task, the Commission will hold public hearings at which victims speak of their experiences and can conduct its own investigations. In order to undertake the second task, the Commission will develop a mechanism for “community-based reconciliation”, involving granting amnesties to perpetrators of less serious crimes. Suggestions that the RTR Commission will recruit 300 staff, as much as that of the South African Truth and Reconciliation Commission,¹²⁵ contrast strikingly with the situation of the Serious Crimes project. If true, this must call into question UNTAET’s commitment to criminal justice and rule of law.¹²⁶ In a resource starved mission that is drawing to the end of the transitional period of administration, the creation of two ventures engaged in similar issues raises the spectre of competition for scarce resources.

A truth and reconciliation mechanism ideally complements judicial processes, and in its enthusiasm for the former, UNTAET has always stressed that those who committed Serious Crimes could not receive amnesties and would have to face justice through the courts.¹²⁷ Much of course depends on how a “Serious Crime” is defined. For example, arson is considered a suitable offence for amnesty under the RTR Commission project. Arson was one of the most striking features of the violence in September 1999. With over 90% of East Timor razed to the ground, it was employed in a devastatingly effective way as part of the widespread and systematic attack on the civilian population. Viewing each incident in isolation removes the connection to the wider attack in which the act took place. Burning a house is arson, but when viewed in the context of what happened elsewhere in the village and in the next village and across East Timor, it is a crime against humanity and must not be amnestied.

A clear policy on transitional justice is needed from the very start. Because the Serious Crimes project is already well underway, it is vitally important to ensure that this new truth and reconciliation mechanism does

on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, 13 July 2001, UNTAET/REG/2001/10 (*Regulation 2001/10*).

¹²⁵ See Charles Scheiner, *Estafeta* (newsletter of the East Timor Action Network/US, April 2001).

¹²⁶ See Mark Dodd, *Call to Support or Scrap Crimes Unit*, SYDNEY MORNING HERALD (25 May 2001): “[The Director of East Timor’s NGO Forum] said UN support for a South African-style truth and reconciliation commission had resulted in a contradictory policy of reconciliation with former militia leaders, many of whom are sought for war crimes.”

¹²⁷ This is now enshrined in section 4 of Schedule I annexed to Regulation 2001/10: “In no circumstances shall a serious criminal offence be dealt with in a Community Reconciliation Process,” *supra* note 124.

not damage ongoing investigations and prosecutions. The two are now to operate simultaneously with mandates covering the same time period and there is likely to be overlap and focus on the same incidents. This carries with it dangers for fair trial, including trial by media, prejudice to the presumption of innocence, the tainting of evidence and the risk of inconsistent testimony. It is crucial to ensure that the work of the Serious Crimes venture is not compromised or obstructed in any way. However, while Regulation 2001/10 grants the General Prosecutor a reasonable input into the "Community Reconciliation Process",¹²⁸ beyond a provision requiring the RTR Commission to obtain the permission of the Office of the General Prosecutor before carrying out exhumations, it is silent on how the RTR Commission is to carry out its tasks without jeopardising the work of the criminal justice organs.

The RTR Commission has at time of writing yet to start its work. What does however appear to have impacted upon the project is UNTAET's push for reconciliation by wooing militia leaders in West Timor, with a view to getting the approximately 100,000 refugees there to return to East Timor; some of these leaders are reportedly key Serious Crimes targets for investigation and prosecution.¹²⁹ The situation is reminiscent of the international community's negotiations with Radovan Karadzic and Slobodan Milosevic during the Bosnian conflict. Karadzic was eventually excluded from the Dayton peace negotiations because of Bosniak refusal to deal with him, and his international pariah status really followed the issuing of an indictment against him by the ICTY, controversial at the time as it impacted upon peace negotiations. The extent, if at all, to which UNTAET's cultivation of certain militia leaders has dictated investigation and prosecution strategy is unknown, but what is clear is that certain militia leaders involved in the reconciliation process are able to enter and leave East Timor without fear

¹²⁸ Section 22.2, contained in the section relating to Community Reconciliation Procedures, *supra* at note 124, provides that nothing in the regulation will prejudice the authority of the Serious Crimes institutions. The General Prosecutor will "vet" applications for amnesty. Provision is made for referral to him at various other stages of the process.

¹²⁹ See Vanja Tanaja, *East Timor: UN Lets Indonesian Military Off the Hook*, GREEN LEFT WEEKLY, Issue 447 (9 May 2001): "Meanwhile, militia leaders and other prominent opponents of East Timor's independence ensconced in Indonesian West Timor are feted and treated like state visitors on UN-sponsored 'look see' visits to East Timor, supposedly designed to encourage the return of Timorese refugees held captive by the militias in West Timor . . . In the name of reconciliation, the UNTAET Chief of Staff spends much of his time courting militia leaders such as the de Carvalho brothers whose militias razed Ainaro town to the ground." Also, *UN in Secret Parleys With East Timor Militia Leaders*, TIMES OF INDIA (18 November 2000).

of arrest for Serious Crimes.¹³⁰ The reason none of these leaders has been indicted may be explained either by a lack of hard evidence against them or by UNTAET's political agenda, which provides an effective immunity from prosecution in return for engaging in reconciliation negotiations.

2.5. *Due Process, Fair Trial and the Rights of the Accused*

One of the driving considerations behind internationalised domestic tribunals is an assumption, never articulated in such blunt terms, that internationals sent by the United Nations can do the job better than the locals. The first decision of the international dominated Special Panel of the District Court of Dili reveals the dangers of such an assumption. On January 10, 2001, in the course of a pre-trial hearing in the matter of Julio Fernandes, it was discovered that both prosecution and the Special Panel had failed to monitor the detentions of twenty persons against whom indictments had been filed. In some cases, the detention orders had lapsed but the accused continued to be held in detention. On 12 January 2001, the Special Panel, without holding hearings and without taking submissions from the defence, attempted to remedy the situation by effecting a "blanket" extension of the detention of all those detainees. The judges chose a convoluted means of extending those detentions *de facto* by issuing warrants of arrest for all the identified detainees, although all but one continued to be held in detention. The twenty accused appealed.

On 14 February 2001, the Court of Appeal (also dominated by internationals) allowed the appeal and found that those who had continued to be deprived of their liberty after their detention orders had expired had been illegally detained.¹³¹ According to the majority, "one can neither continue an illegal detention nor legalise it by issuing retroactive continued preventive detention". There was unanimity in condemning the Special Panel's issue of warrants for the arrest of nineteen accused (already in detention), and its re-arrest of Julio Fernandes, who had earlier been

¹³⁰ See Mark Dodd, *Timor's Crime Fighters in Crisis*, THE AGE (1 May 2001): "A frustrated investigator said that at times he wondered if the unit and the UN transitional administration were on the same side. 'They (UNTAET) are holding reconciliation negotiations with militia leaders we want to arrest.'" Also, *Human Rights Watch*, UNFINISHED BUSINESS FOR EAST TIMOR (August 2000) and Joanna Jolly, *East Timorese Leaders Hold Talks*, ASSOCIATED PRESS (24 May 2001). From records of indictments filed at the District Court of Dili compiled by international observers, it does not appear that any of the militia leaders involved in reconciliation negotiations have been indicted, see Judicial System Monitoring Programme, available at <[www://http.jsmp.minihub.org/](http://http.jsmp.minihub.org/)>.

¹³¹ *Julio Fernandes and 19 others v. Prosecutor General*, Judgement of the Court of Appeal of East Timor, Case of Appeal No. 2 of 2001, Majority Decision and Separate Opinion of Judge Frederick Egonda-Ntende.

released when it was realised he had been unlawfully detained. The majority of the Court of Appeal was scathing about the Special Panel's "mental juggling" and misinterpretation of the law. It declared it was "totally useless and made no sense to issue warrants of arrest against accused persons already in custody according to indictments filed with the court". Judge Egonda-Ntende, dissenting from the majority on this point, stressed that that it is one of the tenets of a fair hearing that an accused is present at his trial, or at a proceeding where a matter that affects him or her is in issue. For him, all the accused were entitled to be heard before the Special Panel made its decision on detention. The Special Panel's omnibus decision was unanimously held to be wrong for not considering the facts of each case. The majority was also highly critical about the Special Panel's mere recital of the law and its failure to evaluate the facts of each case in light of the legal requirements. Thus, the decision of the Special Panel was also held to have been made without grounds.

Among the most striking features of this matter are that United Nations institutions violated fundamental human rights by illegally detaining those whose orders of detention had expired, and that a panel of judges, with an international majority, sought to remedy that situation by a convoluted method of issuing new arrest warrants in order to effect continued detention, without hearing the accused and without consideration of the facts of each case. This further violated the rights of the twenty persons. The first situation reveals a failure of close detention monitoring by the international dominated prosecution and the Special Panel. The second situation is even more worrying, for as the Court of Appeal judges made clear, the standard demonstrated by the Special Panel in this case was well below par. Rather than setting an example and observing internationally recognised human rights standards pursuant to section 2 of Regulation 1999/1, it further violated the rights of Julio Fernandes and the others through the application of flawed legal reasoning and by ignoring due process.

This situation occurred in relation to basic issues and it is fortunate that there appears to be a robust Court of Appeal, prepared to be trenchantly critical of the Special Panel and a watchdog of the rights of accused persons. As the Special Panel's first decision, it could perhaps be excused as a "teething problem". However, when seen with another recent decision, in the case of Joseph Leki, discussed below, it is clear that there is a very real need to monitor the work of the Special Panel closely.

Under Regulation 1999/3, East Timorese judges and prosecutors are appointed by the Transitional Administrator upon non-binding recommendation of the Transitional Judicial Services Commission ("TJSC"), on

which a majority of East Timorese sit along with UNTAET staff.¹³² All the East Timorese judges, prosecutors and defence counsel appointed to date have been recommended by the TJSC. Regulation 2000/15 requires international judges to be appointed by the Transitional Administrator in accordance with existing law on appointments,¹³³ that is after their applications have been examined by the TJSC who make non-binding recommendations to the Transitional Administrator. Thus, the TJSC is meant to be a key player in the appointments process for internationals too, even though its recommendations can be ignored. This was reinforced by Regulation 2000/25, under which it is stressed that the TJSC “shall receive and review individual applications of international legal professionals for appointment in judicial or prosecutorial offices” and “may conduct an interview with each candidate”.¹³⁴

All of UNTAET’s international judges have been appointed to office directly by the Transitional Administrator at the recommendation of the Ministry of Judicial Affairs, entirely bypassing the TJSC.¹³⁵ This is a procedural flaw that goes to the validity of the appointment itself and must raise the possibility that the Special Panel’s international judges and prosecutors may be unlawfully appointed. It is debatable what the exact consequences flowing from the situation would be, most importantly for those persons who have been tried and convicted and are serving their sentences. However, what is abundantly clear is that the integrity of a process is lost if its judges and prosecutors have been unlawfully appointed, and exercise powers they do not have to investigate, indict, prosecute and convict. This must invariably invite cynicism about the effort to prosecute Serious Crimes in East Timor.

An accused person’s rights, classically set out in article 14 of the International Covenant on Civil and Political Rights, are statutorily well protected in East Timor.¹³⁶ But in practice serious failings have impacted

¹³² UNTAET Regulation No. 1999/3 on the Establishment of a Transitional Judicial Service Commission, UNTAET/REG/1999/3.

¹³³ UNTAET Regulation No. 1999/3, UNTAET Regulation 2000/11, *supra* note 67, s. 10.3, UNTAET Regulation 2000/15, *supra* note 74, ss. 22–23.

¹³⁴ UNTAET Regulation No. 2000/25 on Amending Regulation No. 1999/3, UNTAET/REG/2000/25.

¹³⁵ See Frederick Egonda-Ntende, Commonwealth L.J. (forthcoming): “In spite of the foregoing the subsequent appointments of international judges, up to the time of writing this article, were not routed through the Transitional Judicial Service Commission, raising the possibility, of irregular or void appointment of the said international judges.” The author is an international judge himself, sitting on East Timor’s Court of Appeal.

¹³⁶ Regulation 2000/30 on Transitional Rules of Criminal Procedure, UNTAET/REG/2000/30, s. 2.

on due process and fair trial. These have arisen across the criminal justice system, and are not restricted to the Serious Crimes project. They would seem to be due to a combination of factors, including the extreme conditions under which personnel have had to operate, poor management of the system and the weakness of the underlying legal institutions.

The Special Panel's impartiality has recently been called into doubt by its findings on Indonesian involvement in the 1999 atrocities. State involvement is central to crimes against humanity and war crimes (in particular grave breaches of the Geneva Conventions), and because of the nature of the crime, will usually be present where genocide has been committed. It is traditionally determined by the legal test propounded by the International Court of Justice in the *Nicaragua* case.¹³⁷ More recently, this has been challenged by the ICTY's Appeals Chamber in *Tadic*, which has developed a separate test.¹³⁸ Without applying legal standards for determining State involvement and without evidence having been led, in its recent decision in the case of Joseph Leki, on trial for murder in violation of the Indonesia Penal Code, the Special Panel concluded that Indonesia planned and executed the carnage in East Timor, a matter which is hotly contested:

In addition, the plan outlined and executed by Indonesian military forces and its supported local militia groups was the forced deportation of hundreds of thousands of East Timorese. These facts do not call for any formal evidence in the light of what even the humblest and most candid man in the world can assess.¹³⁹

[The accused] acted to carry out an order from a government who was supporting militia groups in East Timor as reprisal to the popular consultation who decided by the independence of this territory.¹⁴⁰

Through these findings, the Special Panel has revealed that it has prejudged certain crucial issues and is therefore not an impartial tribunal.

At time of writing, nine East Timorese act as UNTAET public defenders, assisted by three internationals. The East Timorese public defenders are severely lacking in legal background and skills, having had no prior practical experience and having received very little training or mentoring since their appointment. They lack experience in the applicable Indonesian law, even more so the international crimes that are tried by the Special Panel. They face experienced international prosecutors, the majority of whom, admittedly, have not had experience in the international crimes arena either. It should be noted that the preamble to the

¹³⁷ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v. United States*, [1980] I.C.J. Reports 115.

¹³⁸ *Prosecutor v. Tadic* (Case No. IT-94-1-A), Judgment, 15 July 1999, paras. 115–145.

¹³⁹ *Prosecutor v. Joseph Leki*, Case No. 05/2000, Judgment of the Special Panel of the East Timor Transitional Administration, 11 June 2001, p. 7.

¹⁴⁰ *Ibid.*, p. 11.

United Nations Basic Principles on the Role of Lawyers speaks of the right of an accused to have “adequate legal assistance” at all stages of the proceedings.¹⁴¹

In a mission where lack of resources is endemic, those granted to the Public Defenders have been particularly debilitating, even worse than those granted to the Serious Crimes Unit. This situation reached a head in September and October 2000 with a complete breakdown in relations with UNTAET’s Ministry of Judicial Affairs and a nationwide strike by public defenders (and judges), after which some improvement in conditions emerged. The novice Public Defenders have had to defend persons accused of the most serious crimes with only minimal resources available to them. This has severely impacted upon their ability to represent their clients effectively. For example, article 14(3)(e) of the International Covenant on Civil and Political Rights states that an accused has the right “to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”. Duress is a major issue in the East Timorese cases and if proven is a complete defence. Counsel are generally unable, for lack of resources, to locate witnesses who are able to verify an accused’s claim that he or she was forced to commit a crime.

According to independent observers, most defendants to date have been farmers or fishermen lacking in formal education, many of them illiterate.¹⁴² There have been particular problems with the availability and quality of translation facilities (Bahasa Indonesia, Tetum, English and Portuguese are used in court). While efforts are made to accommodate the accused’s language of choice during proceedings, several defendants have had obvious problems understanding questions (although it is unclear whether this is due to lack of language skills, the translation or simply the way the questions are phrased). Language and interpretation problems, as well as the defendants’ lack of understanding of the procedures, make it extremely difficult to determine whether a defendant is actually answering the questions from the judges correctly. The greatest difficulties seem to arise during attempts to ascertain whether the pre-trial rights of defendants have been respected, whether they understand the indictments and in relation to pleas. The answers, as understood by the judges following translation, become part of the court record and are relevant to determining innocence or guilt.

¹⁴¹ Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

¹⁴² See Judicial System Monitoring Programme, Project Proposal, April 2001, available at <<http://www.jsmp.minihub.org>>. The information in this section is derived from JSMP’s findings.

3. SIERRA LEONE

Since 1991, a particularly vicious civil war has been raging in Sierra Leone between its government and the rebel Revolutionary United Front (RUF). The winds of peace seemed to have prevailed when the warring parties signed the Lomé Peace Agreement on 22 May 1999.¹⁴³ In addition to a general ceasefire, this granted amnesty to the RUF rebel leader Foday Sankoh and his followers, appointed him Vice-President and made provision for the establishment of a truth and reconciliation process. When signing the Lomé Agreement, the Special Representative of the Secretary-General appended a statement that the United Nations understood that the amnesty provisions of the Agreement would not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. Shortly thereafter, the United Nations Mission in Sierra Leone was established to help implement the Lomé Agreement and assist in the disarmament, demobilization and reintegration process.¹⁴⁴

However fighting between government and rebel forces resumed in violation of the agreement. RUF attacks on United Nations peacekeepers, in particular its abduction of 500 of them, hardened the position of the international community and renewed the impetus to restore rule of law in Sierra Leone through the means of criminal justice. Following a request for assistance in prosecuting those responsible for the atrocities by the Sierra Leone government, the Security Council requested the Secretary-General to enter into negotiations with Sierra Leone with a view to concluding an agreement on the establishment of a special court for the prosecution of atrocities.¹⁴⁵

3.1. *Negotiating the Special Court*

Sierra Leone's law does not incorporate international crimes such as crimes against humanity. After a decade of sustained armed conflict, the country was not financially able to establish a new system for such prosecutions and to implement it in accordance with international standards. International assistance was thus required to ensure the correctness

¹⁴³ *Peace Agreement Between The Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, Lome (Togo, 18 May 1999), U.N. Doc. S/1999/777.

¹⁴⁴ U.N. Doc. S/RES/1270 (1999).

¹⁴⁵ U.N. Doc. S/RES/1315/2000). See *UN to Establish a War Crimes Panel to Hear Sierra Leone's Atrocity's Cases*, NEW YORK TIMES (15 August 2000); *Council Agrees on Creation of a War Crimes Tribunal for Sierra Leone*, U.N. Press Release (14 August 2000).

and credibility of any judicial proceedings. The international community was however reluctant to establish another *ad hoc* international tribunal due to the cost implications.

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 for the court and agreement with Sierra Leone.¹⁴⁶ The Security Council accepted the majority of the proposals, but suggested several changes in relation to the personal jurisdiction of the court, its size and funding.¹⁴⁷ As a result, the current vision for the court is that of an internationalised domestic tribunal, separate from the Sierra Leonean criminal justice system, that will be jointly administered by the United Nations and Sierra Leone. The Statute directs itself toward the prosecution of those who bear the greatest responsibility; particularly those leaders who, in committing such crimes, had threatened the establishment and the implementation of the peace process in Sierra Leone. It is expected that the court will only try between twenty-five and thirty people, juveniles and adults.¹⁴⁸ In a novel development, it will also have jurisdiction to address “any transgressions by peacekeepers and related personnel in Sierra Leone” where the sending State is unwilling or genuinely unable to carry out an investigation. The agreement recognises the primary responsibility of sending States to discipline their peacekeeping troops. Exercise of the Special Court’s jurisdiction must be authorised by the Security Council on the proposal of any State.

The Special Court will have jurisdiction over crimes against humanity, serious violations of common article 3 and Additional Protocol II, serious violations of international humanitarian law and selected provisions of Sierra Leonean law. It will be staffed with both local and international judges and prosecutors. The Court’s temporal jurisdiction will cover crimes committed since 30 November 1996, the signing of the Abidjan

¹⁴⁶ *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (4 October 2000), U.N. Doc. S/2000/915. The Secretary-General drew the Security Council’s attention to an alternative which would be the creation of an internationalised structure within the domestic criminal justice system, the concept that is used in East Timor.

¹⁴⁷ See *Letter dated 22 December from the President of the Security Council addressed to the Secretary-General*, U.N. Doc. S/2000/1234; *Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council*, U.N. Doc. S/2001/40; *Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General*, U.N. Doc. S/2001/95.

¹⁴⁸ *UN Says Sierra Leone War Crimes Court Should Be Able to Try Children*, AGENCE FRANCE PRESSE (5 October 2000).

Accords, the first comprehensive peace agreement between the Sierra Leone government and the RUF. As the conflict is ongoing, there is no cut-off date.

The Special Court will have concurrent jurisdiction with and primacy over Sierra Leonean courts. Under article 8(2), it has the power to request that any national Sierra Leonean court defer to its jurisdiction at any stage of proceedings. The obstacle to prosecutions created by the amnesty provisions of the Lomé Peace Accords has been removed; the Sierra Leonean government has agreed to a provision in the Statute that such amnesties will not be a bar to prosecution.

This is an internationalised domestic tribunal that will only be established once there is sufficient funding, raised through voluntary contributions. Relying on individual states to contribute towards the cost of establishing and operating the Special Court is risky and could jeopardise its very creation.¹⁴⁹ As a result of compromise reached between the Security Council and the Secretary-General, who had recommended that it be funded on the basis of scaled assessments, an agreement will not be entered into with Sierra Leone establishing the court until the United Nations Secretariat has obtained sufficient contributions to finance the establishment of the court and twelve months of its operations, as well as pledges equal to the anticipated expenses of the following twenty-four months. The estimated budget of the court over three years was set at US\$114 million, which has now been scaled down to US\$16.8 million for its establishment and first year of operation and US\$40 million for the next two years. At time of writing, it appeared as if the reduced budget for the establishment and first year of operation would be met and that steps would be taken to conclude an agreement with the government of Sierra Leone on the establishment of the Court.

3.2. *Structure of the Special Court*

Unlike the internationalised domestic tribunals of Cambodia and East Timor, Sierra Leone's Special Court will be created by a treaty between the United Nations and the Sierra Leone government. It is neither "grafted" onto the existing criminal justice system, part of a peacekeeping mission nor created as an organ of the United Nations. Rather, it is a "treaty-based sui generis court of mixed jurisdiction and composition".¹⁵⁰ The most

¹⁴⁹ *The International Community's Resolve to End Impunity Must Be Strengthened*, Amnesty International Press Release (24 April 2001).

¹⁵⁰ *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 146, para. 9.

immediate and obvious advantage of this is that it avoids problems caused by reliance on a weak underlying criminal justice system.

Its judiciary will consist of a minimum of eight judges (rising to a maximum of eleven should a second trial chamber be warranted by the caseload) sitting as a trial chamber and an appeals court. Article 20 attempts to ensure jurisprudential consistency by requiring the Appeals Chamber to consider the jurisprudence of the ICTY and ICTR Appeals Chamber. Each trial chamber consists of a panel of three judges, two appointed by the Secretary-General, with particular focus on judges from member states of the Economic Community of West African States and the Commonwealth; the remaining judge is to be “appointed by the Government of Sierra Leone”, which does not necessarily mean it will appoint one of its own nationals. The Appeals Chamber will comprise five judges, two of whom will be appointed by Sierra Leone and the rest by the Secretary-General. This is therefore a court controlled by the United Nations.

The Chief Prosecutor of the Special Court will be an international appointed by the Secretary-General, while the Sierra Leone government, in consultation with the United Nations, will appoint a Deputy. Likewise, an international will be appointed Registrar.

3.3. *Substantive Law*

Article 2 adopts a definition of crimes against humanity that contains elements of all of the ICC, ICTY and ICTR definitions, but is at the same time distinguishable from each. For example, the ICTY and ICTR statutes both identify “rape” as a crime against humanity. Article 2 of the Special Court Statute identifies “rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence” as crimes against humanity. But although the provision resembles the one found in article 7 of the ICC Statute, the term “other forms of sexual violence” need not be of comparable gravity to those that are listed, nor do the “other inhumane acts” have to be of similar gravity to the offences listed. The “missing” crimes such as enforced sterilisation, forcible transfer of population and other severe deprivation of liberty in violation of fundamental rules of international law, present in the ICC Statute, could arguably be covered by the broader language of the Special Court Statute. In line with the current state of customary international law, crimes against humanity as defined in the Special Court Statute neither requires a nexus with an armed conflict nor a discriminatory element.

Mirroring article 4 of the ICTR Statute, article 3 of the Special Court Statute provides for the prosecution of violations of common article 3 and

Additional Protocol II.¹⁵¹ The Secretary-General's Report recognised both common article 3 and article 4 of Additional Protocol II, particularly since the establishment of the ICTY and ICTR, as entailing individual criminal responsibility under customary international law.¹⁵² It should be noted that the listing of offences here is not exhaustive and other crimes relevant to Sierra Leone, such as enslavement, are not necessarily excluded from the ambit of article 3.

Article 4 is unusual. Only three crimes felt to be specific to the Sierra Leone situation are to be prosecuted, and then, as "serious violations of international humanitarian law" rather than as the routinely used laws and/or customs of war on which international prosecutions of war crimes since Nuremberg have been based. These are attacks against the civilian population as such, or against individual civilians not taking a direct part in hostilities; attacks against peacekeeping personnel involved in humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict; conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

The Secretary-General's Report goes to some length to justify the inclusion of attacks against peacekeepers and the use of child soldiers, but does not explain the exclusion of other violations recognised as customary in nature and which were extensively perpetrated in Sierra Leone, such as sexual assault in all its manifestations, and enslavement. The concept of attacks against peacekeepers as an international crime is drawn from the 1994 Convention on the Safety of UN and Associated Personnel,¹⁵³ and was first criminalised in article 8(2)(b)(iii) of the ICC Statute. United Nations peacekeepers in Sierra Leone came under hostile attack on many occasions and were also kidnapped and held hostage. According to the Secretary-General, at the time of the adoption of the ICC Statute peacekeepers were already protected by existing customary international law that prohibits attacks against civilians and persons *hors de combat*. The Secretary-General identifies the peacekeeper as a civilian, rather than as a non-combatant. He regards peacekeepers in Sierra Leone as "a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection . . .

¹⁵¹ Sierra Leone acceded on 21 October 1986.

¹⁵² *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 146, para. 14.

¹⁵³ 31 I.L.M. 482 (1995).

[but this] does not imply a more serious crime than civilians in similar circumstances, and should not entail, therefore, a heavier penalty".¹⁵⁴

There are two aspects to the forced recruitment and use of child soldiers, a terrible feature of the fighting in Sierra Leone: the unenviable task of working out how best to deal with brutalised children who brutalise others, and the simpler task of dealing with those who brutalise children through abduction or forced recruitment and turn them into killing machines. Article 4(c) turns itself to the latter. One of the celebrated achievements of the ICC Statute is the categorisation of the act of "[c]onscripting or enlisting under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" as a war crime.¹⁵⁵ The Secretary-General's original draft, based on his doubts about whether this is customarily recognised as a war crime entailing individual criminal responsibility, had required that the child under fifteen be abducted and forcibly recruited for the specific purpose of active participation in hostilities.¹⁵⁶ Excluded as a result of this definition were girls abducted and enslaved either for the sexual gratification of soldiers, or kept to perform domestic chores, as well as children who are used for dangerous but non-combat functions, such as the carrying of weapons. The Security Council has modified this to conform with what it sees as "the statement of law existing in 1996 and as currently accepted by the international community", the ICC Statute's definition. As a result, article 4(c) now allows for the prosecution of those who conscript or enlist children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

The final group of offences prosecutable at the Special Court are a selection of crimes under Sierra Leonean law: sexual offences against young girls drawn from the 1926 Prevention of Cruelty to Children Act and offences relating to wanton property damage under the 1851 Malicious Damage Act. Security Council Resolution 1315 recommended resort to domestic legislation in order to cover situations which are not adequately regulated in international law.

Individual criminal responsibility under the Special Court's Statute, contained in article 6, mirrors the provisions of the ICTY and ICTR statutes. Also replicated are the provisions on official capacity, command responsibility, superior orders, *non bis in idem* and rights of the accused.

¹⁵⁴ *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 146, para. 16.

¹⁵⁵ *Rome Statute of the International Criminal Court*, *supra* note 33, art. 8(2)(b)(xvii).

¹⁵⁶ *Report of the Secretary-General on the Establishment of a Special Court For Sierra Leone*, *supra* note 146, paras. 17, 18.

However, in light of the possible resort to Sierra Leonean law, individual criminal responsibility in relation to those crimes is to be determined in accordance with national law. Unlike the Serious Crimes and Extraordinary Chambers regimes, it has here been correctly recognised that the applicability of two systems of law requires that the elements of the crimes be governed by two different bodies of law and that this should also be reflected in the rules of procedure followed. Hence, although the Rules of Procedure and Evidence of the ICTR are to apply *mutatis mutandis* to proceedings at the Special Court, the judges are empowered to amend or adapt those rules to the specific needs of the Court and can have resort to Sierra Leone's 1965 Criminal Procedure Act.¹⁵⁷

In light of the extent of atrocities committed by child soldiers, the Statute contains numerous provisions relating to juvenile justice. According to the Secretary-General, the Special Court's Statute has had to strike a balance between the clearly expressed desire of the Sierra Leonean government and civil society for juveniles to be made accountable for their actions and those of the international and local NGO community who objected to any kind of judicial accountability for children below eighteen years of age for fear that such process would place at risk the existing child soldier rehabilitation programme.¹⁵⁸ Several options were considered in relation to juvenile justice, but the one that has been adopted for the Special Court grants it jurisdiction over juveniles between fifteen and eighteen years, and then only in particularly serious cases, where the acts could include the offender within the ambit of those "most responsible" for the carnage in Sierra Leone. It is believed that very few juveniles, if any, will in fact come before the court. The Security Council has stressed that other institutions, such as the Truth and Reconciliation Commission,¹⁵⁹ are better suited to deal with juveniles.

In the event that juvenile prosecutions are undertaken, article 7 requires that the matter be handled in a child-specific manner in accordance with international standards of human rights, in particular, the rights of the child. The Prosecutor is obliged to ensure that the child rehabilitation programme is not placed at risk, and that where appropriate, resort should be had to any alternative truth and reconciliation mechanisms.¹⁶⁰ Juveniles

¹⁵⁷ *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, supra note 146, Annex, *Special Court Statute*, art. 14.

¹⁵⁸ *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, supra note 146, para. 35.

¹⁵⁹ *The Truth and Reconciliation Commission Act 2000*, available at <<http://www.sierra-leone.org/trc.html>>.

¹⁶⁰ *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, supra note 146, Annex, *Special Court Statute*, art. 15.

will not be sentenced to imprisonment if found guilty, but may be subjected to various measures, such as guidance and supervision orders, community service orders, counselling and correctional training.¹⁶¹ A special chamber dealing exclusively with juvenile justice is to be created, with at least one sitting and one alternate judge having the necessary expertise in this area;¹⁶² it would appear that this chamber may operate under different procedures which take into consideration the needs of juvenile justice. Suitably skilled staff will also be recruited in the prosecution.

3.4. *Implementation*

The Special Court's Statute has been carefully calibrated to fit the circumstances of Sierra Leone. Unlike Regulation 2000/15 in East Timor, it does not simply import virtually the whole of the ICC Statute's substantive legal provisions. The problems with excessive reliance on the ICC Statute have already been discussed in relation to East Timor. The ICC Statute contains some innovations that raise serious issues if they are to be applied retroactively.

The temporal jurisdiction of the Special Court, from 30 November 1996, is one that only covers part of a conflict that has been raging since the RUF rebellion began on 23 March 1991. Commencing the jurisdiction from 1991 was ruled out as creating too heavy burden for the prosecution and court. According to the Secretary-General, the choice of 30 November 1996 puts the conflict in perspective and ensures that the most serious crimes committed by all parties fall under the Special Court's jurisdiction. Objectively, it is hard to see how the Special Court can "end impunity and contribute to the process of national reconciliation and to the restoration and maintenance of peace"¹⁶³ if it only examines a certain period within the continuing conflict. What justice is there for the victims of atrocities committed between 1991 and 1996? Certainly, the jurisdiction must be workable, but the choice of what to focus on is one that is best made by the Prosecutor. If the jurisdiction is focused on those with greatest responsibility, including leaders, then the burden on the prosecution and court is not in fact an oppressive one and the jurisdiction has been unnecessarily restricted. A truncated scope of temporal jurisdiction may impose grave evidentiary hurdles to any prosecutor attempting to show the responsibility of those in command. For example, between 15 March 1997 and the signing of the Lomé Accord in 1999, Foday Sankoh, the leader of

¹⁶¹ *Ibid.*, art. 7.3(f).

¹⁶² *Ibid.*, art. 7.3(b).

¹⁶³ U.N. Doc. S/RES/2000/1315.

the Revolutionary United Front, was in Nigeria under house arrest and imprisoned in Sierra Leone.¹⁶⁴

Despite the many reports of violations arising during conduct of hostilities since the conflict began, it is surprising that the Special Court has no provision for prosecutions of the laws and customs of war which cover violations of a “means and methods” variety. Prosecution under “international humanitarian law” in accordance with international standards would require that the provision be rooted in humanitarian treaties and principles, such as those in the Geneva Conventions of 1949, which have evolved into customary international law. The Secretary-General has identified this provision as one that turns on the well established principle of distinction between civilian and combatant. This is not a question of semantics, but of whether outside of common article 3 (which is prosecutable under article 3), the grave breaches regime of the Geneva Conventions (only prosecutable in an international armed conflict) and the laws and customs of war (not prosecutable under the Statute), customary international humanitarian law really does criminalise the identified conduct in the terms set out in article 4.

Prosecuting peacekeepers through the Special Court “for any transgressions”, an amendment inserted into the Statute by the Security Council, is an interesting development that raises many technical legal issues. However, given the focus of this paper, it is more relevant to ask whether it is appropriate to use the Special Court to try errant peacekeepers. Like Regulation 2000/15 in East Timor, the legislation does not make it clear what its overall purpose is to be, whether retributive justice in the individual case, or whether it aims at the more elusive challenges of peace and reconciliation. Resolution 1315 reveals that the Security Council, despite its belated wish to use the Court to process rogue peacekeepers, views it as contributing to the process of national reconciliation and the restoration and maintenance of peace. Seen in conjunction with its categorisation of the situation as one threatening international peace and security in the region, Sierra Leone’s bloody history of civil war since 1991, the factors taken into consideration in the Sierra Leone Report and the general statement of purpose contained in article 1(1) of the Special Court Statute, this is an institution that is directed at those participants in a particularly brutal civil war who are most responsible, in order to bring justice and ensure lasting peace. The prosecution of peacekeepers “for any transgressions” at the Special Court appears to be an afterthought. It will detract from the main purpose of the Court and the gravity of the crimes committed by Sierra Leoneans upon each other. It is instead suggested that if the

¹⁶⁴ See *Letter to Security Council*, Human Rights Watch (1 November 2000).

sending State is unwilling or genuinely unable to investigate, efforts would be better employed by obtaining a waiver of the provision in the Status of Forces Agreement which otherwise prevents Sierra Leone from exercising jurisdiction over crimes committed by peacekeepers. The Sierra Leonean courts are the correct venue for peacekeepers who are not tried by their own States for crimes committed while on peacekeeping operations in Sierra Leone. To use the Special Court for this purpose would divert limited resources and be a disservice to the victims of Sierra Leone's warring factions.

Much dissatisfaction has been expressed that child soldiers between the ages of fifteen and eighteen may be prosecuted at the Special Court. There is concern that this could be a misuse of limited resources.¹⁶⁵ Juvenile justice at the Special Court is likely to be very complex and controversial, should any cases in fact be pursued. A variety of reasons may account for the conduct of child soldiers, including fear, mental conditioning, duress, adult manipulation or the influence of drugs or alcohol. Most child soldiers in Sierra Leone were abducted or forcibly recruited.

In the absence of specific criteria for establishing juvenile culpability, it would appear that a fifteen to eighteen year old is to be considered culpable using the same criteria as are applied to adults. Thus, if the offence is one which requires a particular criminal intent, the Prosecutor would have to prove beyond reasonable doubt that the juvenile had the necessary intent as with an adult. One of the challenges for the Court would be to examine the content of customary international law pertaining to juvenile justice and answer the many questions that will arise. Are there any legal presumptions that operate in favour of a juvenile above the age of fifteen? Can a child soldier be expected to know the difference between a lawful and unlawful order, and that he or she is not legally required to follow an unlawful order? Can a juvenile be reasonably expected to have the requisite knowledge of and intent to participate in a widespread or systematic attack against the civilian population? Is it correct to assume a juvenile knows that civilians in an armed conflict are not the enemy and therefore not to be attacked? Equally problematic would be the situation of a child soldier who, having been introduced to alcohol by adults, becomes voluntarily intoxicated and then commits atrocities. Can a juvenile be expected to consider the consequences of intoxication in the same way as an adult offender?

The Sierra Leonean legal provisions that are to apply at the Special Court have been described as unnecessary and containing "regressive

¹⁶⁵ *Ibid.*

assumptions about crimes of sexual violence".¹⁶⁶ Furthermore, it is felt that:

The inclusion of these provisions discriminates against boys who may have been victims of sexual assault during the armed conflict in Sierra Leone, as these laws only apply to sexual assaults on girls. This inclusion also implies that sexual assaults on girls over fourteen is not a serious crime. Indeed the content of the two provisions clearly shows that the law implies a sliding scale of seriousness according to the victim's age, as the offence of abusing a girl under thirteen is described as a "felony" with a penalty of conviction of up to fifteen years imprisonment, whereas the offence of abusing a girl between thirteen and fourteen years is described less seriously as a "misdemeanour" with a much lighter penalty of imprisonment up to two years only.¹⁶⁷

Certainly, these provisions are not progressive. They are however not necessarily contrary to international human rights law and represent the law that applied in Sierra Leone during the period within the temporal jurisdiction of the Special Court. Jurisdiction over crimes that are regulated by domestic law gives the prosecution flexibility in charging, provides it with a "safety net" should it not be able to prove that international crimes were committed and may be more conducive to an expeditious trial. Unfortunately the list is not longer, and it omits many of the crimes widely committed, such as murder, torture, serious physical assaults and battery and kidnapping. For these offences, the drafters leave the Prosecutor no option but to rely on international law alone.

There are said to be two to three hundred persons, including about fifteen juveniles, already in detention in Sierra Leone.¹⁶⁸ Fodeh Sankoh, the RUF leader, has been held for over a year without charge, and it is unclear when the Special Court will be established. This is the same situation that East Timor has had to deal with – persons were arrested and held in detention awaiting the creation of the Special Panel. Sierra Leone and the United Nations will have to deal with the fact that fundamental human rights are being seriously violated by the current situation. They may take guidance from East Timor, where many suspects were released, and the prosecution was forced to utilise the Indonesian Criminal Code as a means of ensuring expeditious trial for those who continued to be detained.

¹⁶⁶ *Sierra Leone: Recommendations on the Draft Statute of the Special Court*, Amnesty International, AFR 51/083/2000, 14 November 2000, p. 1.

¹⁶⁷ *Ibid.*, p. 6.

¹⁶⁸ *Supra* note 148.

4. CONCLUSION

This examination of internationalised domestic prosecutions in Cambodia, East Timor and Sierra Leone suggests several lessons. There must be no compromise on due process or judicial impartiality and integrity. Clearly, United Nations involvement will legitimise any ventures providing tainted justice and it must therefore reject options that are not feasible and must not support any enterprises that are unlikely to meet the minimal standards of justice. And, if things go wrong, the United Nations as a participant or administrator of the venture must have the determination to address the shortcomings promptly, demand changes or withdraw from the process altogether. With its own reputation and that of the principles it represents at stake, the United Nations cannot afford to be involved in failed experiments in international justice.

The selection of the internationalised domestic tribunal must be one that is made following full and informed consideration of other models, such as an *ad hoc* international tribunal, domestic prosecutions and truth and reconciliation options. It should not be simply copied from elsewhere on the assumption that it must be a “good” model because it is used there, but be designed with the needs and circumstances of the particular country, and the wishes of its people, in mind. In this, consultation with experts and public debate are crucial. So too is consideration of international relations to the extent that they will impact upon the success of the venture. A means of ensuring that these courts have adequate methods of securing the cooperation of third party States, such as devolution of Chapter VII powers upon them by the Security Council, needs to be developed.

An internationalised tribunal will not work to international standards if the criminal justice system upon which it is grafted is not solidly rooted in due process and respect for fundamental rights, or where the independence, integrity and basic competence of its personnel are compromised. Where a decision is made to proceed with internationalised domestic tribunals in such a situation, there must be international control of the process, and over certain key administrative elements, such as the selection of judges and the recruitment of prosecutorial staff, the places of confinement of detainees and convicts and security for court personnel, accused persons and witnesses.¹⁶⁹ In addition to suitably skilled personnel, the host criminal justice system should at least have adequate and secure facilities, such as courtrooms, correctional facilities, as well as investigative and prosecutorial offices. If the domestic police/investigative skills are inade-

¹⁶⁹ *Group of Experts Report, supra* note 5, para. 187.

quate, there must be provision enabling skilled international investigators to conduct investigations.

Much harm is done by rushing through inadequately considered legislation. The legislation needs to accord fully with international standards of human rights. In view of the particular problems in prosecuting historic atrocities, great care must be taken to ensure that the legislation complies with the principle of legality, in particular of *nullum crimen nulla poena sine lege*, and the prohibition of retroactive criminal legislation. As not all the provisions of the ICC Statute reflect existing customary international law, and even less so customary international law applicable in earlier eras, drafters must exercise caution in reliance on its provisions. That being said, there needs to be some way of ensuring there is a uniform understanding and application of customary international law by the internationalised domestic tribunals, perhaps through requiring the application of the jurisprudence of the Appeals Chamber of the ICTY and ICTR.

It is also most important that any process involving international prosecutors must also provide the accused with the option of retaining international defence counsel. There must be financial provision for such legal assistance should the accused not have adequate means.

The selected model for an internationalised domestic tribunal must be realistic and consider whether the existing system is able to support such a venture. It should not be unduly complicated or cumbersome, and should not be used to deal with peripheral problems such as those arising from State failure or inability to discipline peacekeepers. An internationalised domestic tribunal is not an *ad hoc* international tribunal and the same demands cannot be made of it, although there should not be compromises on fundamental rights of the accused and due process. It must be clear what the purpose of the enterprise is, whether justice is to be an end in itself or whether it is part of a nation's strategy for moving forward towards peace and reconciliation. In situations of massive violations of human rights, it will rarely be possible to prosecute every criminal act, and it may be necessary for legislators to consider identifying a target group, such as leaders or those bearing greatest responsibility.¹⁷⁰ This will clearly colour prosecutorial strategy.

Additionally, where both national and international crimes fall under the jurisdiction of an internationalised domestic tribunal, careful consideration must be given as how to reconcile or manage the two systems of law. Key issues such as defences and rules of procedure should be carefully calibrated to deal with both regimes in accordance with international standards.

¹⁷⁰ *Ibid.*, para. 213.

The relationship with other transitional justice mechanisms such as truth and reconciliation commissions must be clear and unambiguous from the start. The issue of amnesties needs to be widely and publicly discussed, and the United Nations must be careful not to involve itself in enterprises that conflict with fundamental principles of international law. Where both mechanisms exist in a situation, very great care needs to be taken to ensure that the relationship is worked out in advance and there is no conflict. Truth and reconciliation commissions must not interfere with an ongoing criminal justice process, for example in the collection of evidence. Criminal justice is a question of legal obligation, and the politics of reconciliation must not dictate investigative and prosecutorial strategy.

Competent administration and management of the system is crucial. This does not mean recruiting “internationals” but rather, competent personnel with the necessary training, skills and experience.¹⁷¹ International judges and prosecutors must have experience of international law, in particular international criminal law, international humanitarian law and international human rights law, and should ideally have had exposure to international practice.

“Deterrence and prevention of crime, however, need the full commitment of the international community to supporting the quest for justice and accountability by providing the necessary financial and operational means to judicial arrangements, whether established under the auspices of the United Nations or by national governments. Establishing courts without secure and sustained funding, and without follow-up efforts to rebuild national criminal justice systems, can do a disservice to victims of large-scale violence and undermine their confidence in justice.”¹⁷² There must be a thorough assessment of the costs involved before decisions on models of justice are taken. Although they are not *ad hoc* international tribunals, internationalised prosecutions also have very large financial, material and personnel requirements. There must be certainty of adequate financial and material support before legislation is passed, and the enterprise should not be started until a minimum amount of funding is set aside. However, care must be taken so that there is not material inequality in the treatment of the internationalised process and the national criminal justice system, for that may lead to public resentment. There should ideally be a grace period

¹⁷¹ The inability to find suitable personnel may not necessarily be the fault of the United Nations, which is often hostage to broken promises by States who earlier pledge to send them; see Mark Riley, *Promises on East Timor Fall Victim to 'Crisis Syndrome'*, SYDNEY MORNING HERALD (26 April 2001).

¹⁷² *Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict*, UN Doc. S/2001/331.

enabling the institutions to be “up and running” before substantive work commences. Clearly, lack of resources must not be permitted to shroud other reasons for malfunction, such as poor leadership, mismanagement or the absence of a coherent strategy. Where this arises, immediate remedial steps must be taken.

Careful consideration should also be given as to how best to finance and administer these courts. It may be more suitable to financially administer them through a special trust fund rather than a peacekeeping mission. Funding through scaled assessments would assure the finances needed to establish and run the court, but as has been seen in the case of Sierra Leone, the Security Council is reluctant to consider anything but voluntary contributions. It may also be desirable for the enterprise to have independent reporting lines directly to the Security Council or the Secretary-General, rather than through a peacekeeping mission as is the case in East Timor. In any event, there needs to be flexibility in the way that they are administered, for example, through a streamlined procurement process, exemptions from competitive bidding and relaxation of the rules against seconded staff.¹⁷³

The internationalised domestic tribunal is a creative experiment that has the potential to bring accountability and justice for massive violations of human rights close to the affected population. With international assistance, a nation in transition is afforded the very important opportunity to be directly involved in an internationally sanctioned judicial process delivering justice to its own people, rather than doing nothing, doing it alone or sitting on the sidelines watching what an *ad hoc* international tribunal does somewhere removed from the locus of the crimes. United Nations involvement gives the process credibility. National sovereignty is preserved when there is adequate local involvement in the process. There is also a tremendous potential for internationalised domestic prosecutions to disseminate international standards of justice and demonstrate the highest levels of professionalism to local judges, prosecutors and lawyers, as well as the general public, therefore playing an important role in capacity building and strengthening the existing judicial system.

However, the East Timor process reveals that the path to justice through the internationalised tribunal is a rocky one, for any effort to prosecute and try international crimes is complex, politically sensitive and requires substantial resources, as well as competent and experienced personnel who are able to bring the required expertise and professionalism to such situations. Enterprises born of compromise on fundamental issues, such as the Extraordinary Chambers project in Cambodia, are unlikely to be able to be

¹⁷³ *Group of Experts Report*, *supra* note 5, para. 213.

implemented in accordance with international standards. Many problems can be expected if there is reliance on weak domestic legal institutions that are not firmly grounded in due process. Failure may cause a fragile society to reject rule of law and cause irreparable damage to long-term efforts to achieve peace and reconciliation. New problems will arise if a judicial enterprise in politically and emotionally charged circumstances does not satisfy public demands for accountability and international standards of human rights.

There is certainly tremendous potential for internationalised domestic tribunals. But East Timor, Cambodia and Sierra Leone show that unless certain key issues are addressed beforehand and throughout, they will not just fail to deliver justice to a traumatised nation but may cause yet more damage.