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Aaron Fichtelberg

Hybrid Tribunals

A Comparative Examination

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For Renée.

Introduction

This book is a study of the formation and operation of the "hybrid," "internationalized," or "mixed" tribunals that have come into existence over the past two decades and have operated (and in some cases continue to operate) in several different countries around the globe. It is intended as an introduction to these tribunals for scholars interested in the subject or for students trying to grasp their nature and function for an educational purpose. In this study, I do not expect much specialized knowledge of either the circumstances surrounding the creation of the tribunals, nor do I expect readers to be fluent in the legal issues underlying these institutions. Rather, I expect only a moderate understanding of global affairs as well as a minimal understanding of international law. My hope is that this approach will allow students and scholars, as well as other interested readers, access to a subject that spans decades of international politics and involves discussions of the thorny and dense subjects of international law, as well as some of the deeper moral dilemmas of international justice.

The hybrid courts represent a unique development in the history of international law and international criminal justice. While the border between "international" and "domestic" law has always been somewhat porous, and in many fields outright illusory, nowhere have the international and the domestic been so closely integrated in an institutional form as in these courts. Consisting of the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Serious Crimes Panel, Dili (SCPD), the Bosnia War Crimes Chamber (BWCC), the UNMIK Court in Kosovo, and the Special Tribunal for Lebanon (STL), these hybrid courts have sought to integrate foreign laws and personnel with domestic ones to different degrees and to different extents. Most directly this is done by having a portion of the judicial bench, that is, a number of the judges, come from outside the country in question, while the remaining judges are recruited from the domestic legal community. In addition, foreign prosecutors have played a key role in determining who is an appropriate target for prosecution in the tribunals and shaping what I describe as the "prosecutorial strategy"—the ways that prosecutors shape historical narratives about mass violence. Further, although the different bodies have been structured in different ways, each of them has also integrated some

set of international legal norms with their domestic counterparts in ways that are intended to be synergistic. This integration of international laws and personnel with domestic ones is what gives the hybrid courts their unique place in international justice.

Hybrid courts have largely been created as a sort of compromise position in response to a number of different concerns about the prevailing forms of international and domestic criminal justice. In particular, the hybrid courts must be seen in relation to the more properly international courts currently in existence: the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), collectively known as the ad hoc international criminal tribunals, as well as in relation to the permanent International Criminal Court (ICC). These courts were created by recognized methods of international law, either through the Security Council using its Chapter VII powers to maintain international peace and security or through an international treaty such as the Rome Statute. They are staffed by international personnel who apply an unmediated form of international criminal law. These three courts are legally and institutionally distinct from the states under their jurisdiction and are in no ways creatures of domestic law.

In many ways it is precisely their international nature that made these larger courts not sought after responses to the conflicts we are focusing on here. While the "purely" international courts have been successful in their own way—they have at least prosecuted some of the major offenders in the various conflicts for which they were created—they nonetheless have displayed some significant weaknesses over the course of their existence. They have been extremely expensive endeavors, requiring large numbers of highly paid legal personnel as well as support staff, logistical expenses, and facilities. In addition to being massively over budget, the two ad hoc courts which were envisioned as short-term institutions have long outlived their expected life-spans, continuing to consume the donations given by their international backers as they lumber toward their terminus. While in each of the cases we look at in this text, courts akin to the ad hoc tribunals were proposed by interested parties but were invariably rejected. Clearly the international community's experience with the ad hoc courts left many with a great reluctance to return to such a high-profile and high-cost approach.

Nonetheless, in each of the cases studied here, using a conventional domestic court was not a viable option either. The defendants in these cases were not ordinary criminals accused of minor crimes. More often than not, they were high-profile individuals who played a central role in mass atrocities: They were politically powerful when they were engaged in their alleged criminal activities and often had legions of followers who remained loyal to them even after they had been defeated. Some, such as those responsible for the violence in East Timor, had backers from a much larger and more powerful government situated nearby. Still others were themselves former heads of state. All of them were accused of the worst crimes in the world: genocide, war crimes, and crimes against humanity. Clearly the attempt to prosecute and punish such individuals creates unique political and institutional challenges, challenges that many states are unable to meet.

In all of the situations that we look at here, the states involved in these tribunals were uniquely bad candidates for conducting domestic trials for those who perpetrated mass violence. Most of these states remained too weak, economically and politically, to carry out the complex and far reaching procedures necessary for such high-profile offenders, having had their societies torn apart by intense conflicts that in most cases lasted several years. Many of the countries, such as Sierra Leone and Bosnia, had been ravaged by years of war and lacked the fiscal and intellectual resources to effectively run a criminal trial. Finally, in cases like Kosovo and East Timor, there was no state in existence at the time the trials were being considered, and the territories were under the governance of a UN authority. This means that, although an international trial was not supported by the broader international community, a purely domestic trial was similarly impossible. Yet there remained a strong need to find some measure of accountability for those responsible for the terrors that these countries had faced.

In some of the cases we look at, there was little confidence in the ability of the local government to conduct fair, impartial trials for defendants in such high-profile cases. Bitter ethnic fighting in Bosnia and Kosovo left a deep distrust in domestic justice institutions that were associated with "the other side" of the conflict. The conflicts ran too deep and touched too many lives for observers to believe that impartial procedures would be followed and a fair ruling would be proffered by an ordinary domestic court. Equally important, the international community (by this I mean the UN and foreign, mostly Western, governments) with vast political, military, and financial resources usually did not trust the local governments to deal with these accused individuals in a way that they deemed appropriate. These fragile governments crave international legitimacy and need international financial support to function, and inadequate trials that failed to live up to international standards of due process would clearly not help their cause. In some of these states, Bosnia in particular, international justice officials "stepped in" in response to what were perceived as abuses of due process by domestic courts. Weak governments that lack the resources for handling politically charged cases cannot always be expected to be "honest brokers" in criminal trials without some external check on how cases are prosecuted and adjudicated—or at least so much of the international community believed.

Along with these practical motivations for having a mixed tribunal is a very important, albeit, symbolic reason: Unlike a purely international court, a tribunal that is at least in part a domestic court can aspire to a form of legitimacy that foreign courts cannot provide. A court that is recognizably local, being conducted in indigenous languages and including significant numbers of local personnel, could have a better chance of being recognized as legitimate by the local populations who observe it. We might call this a matter of "ownership." Rapoza describes ownership as:

> The degree to which the national and international components "buy in" to the process [of criminal justice]. Ultimately, the degree to which each accepts and acknowledges its share of ownership in the tribunal will affect the allocation of responsibility, and thus accountability, within and for the criminal process. (Rapoza, 2006, p. 526)

Including a strong domestic presence in international cases allows local residents to claim ownership over these proceedings and their outcomes in a way that they do not in international proceedings. Further, these local personnel receive vital training and skills that would help them establish the rule of law in nations that were in desperate need of stability and development. At the same time, the international presence in the court helps to ensure skeptics that the court will function in a fair, impartial manner.

Practical and the normative considerations overlap in the international tribunals in a number of different ways, but clearly the point where they intersect most dramatically is in their financing. Throughout this book we see that funding issues have a played a crucial role in the structure and operation of these tribunals. As many of the tribunals have had to rely on the contributions of states or on a cash-strapped UN to function, their work has often been shaped by financial concerns in ways that can be at once both understandable and problematic. States can withhold funds if they are unsatisfied with the directions the tribunals are taking. As a result, prosecutors have had to shape their strategies in response to financial concerns and skeptics have charged that the tribunals are either underfunded or are operating at the behest of their financial backers. While they are clearly cheaper than the more conventional international tribunals, they are not cheap and funding has proven to be a crucial influence over the lives of the various hybrid tribunals.

It follows from this that these institutions should first and foremost be understood as *political* institutions. While, as I have argued elsewhere the distinction between politics and law is largely an illusory one, these institutions were created largely to serve a number of different goals which are, for the most part, political in nature. (Fichtelberg, 2008) For some of the tribunals supporters, the tribunals were created to place the blame for a conflict clearly on the shoulders of one group and accrue the resulting political benefits. Others saw the tribunals as crucial for political stability—as a tool for transitional justice. Still others, such as much of the Cambodian leadership, saw the tribunal as part of a campaign to get into the good graces of the international community and help clear the way for international financial support. As we see, few of the actors behind these tribunals saw them primarily in terms of the traditional goals of criminal justice (such as deterrence, reform, or incapacitation) when they advocated for their creation.

Along with financial considerations, tribunals are also hamstrung by their reliance on the cooperation of states. None of these tribunals have extraterritorial enforcement powers and therefore cannot locate witnesses abroad conduct investigations or arrest an accused person living abroad.[1] Due to the nature of the conflicts, many defendants have fled in order to find shelter in a sympathetic state to live more or less openly under the protection of this state's government. As a result, the tribunals must convince a state to extradite a suspect or convince third party states to pressure the residing state to transfer the accused to the tribunal for prosecution. This is particularly challenging given the fact that many of these conflicts took place in poor, remote corners of the world and gained little public attention or con-

[1] See for example Peskin (2008).

cern in the richer, more powerful nations of the developed world. As we see, this means that, among other things, prosecutors must be especially clever in how they gain custody over defendants who are abroad.

However, whatever the aims of their supporters, the tribunals themselves are not designed to produce "political" outcomes. Criminal tribunals are created to determine the liability of specific people for specific actions and to give these defendants adequate opportunities to defend themselves against the charges. The legal process generally is not good at the proportionate distribution of blame: It focuses on violations rather than root cause and tribunals are bad at politics. For example, they are not good at developing broader historical narratives that may aid in transitional justice or at tailoring their outcomes to serve the interests of the political elites that support them. Many of these tribunals, such as the tribunal in East Timor saw its political support evaporate when it pursued cases that were politically inconvenient. In Sierra Leone, the prosecutor's efforts to be evenhanded in prosecuting all sides of the conflict there led to a false equivalence: the crimes of the Revolutionary United Front (RUF) were much greater than those of the government forces and their allies, but both were prosecuted in equal numbers by the SCSL. Courts in general, and international courts in particular, are clumsy actors in the political realm. This tension between the political goals of their backers and the traditional goals of many of those working in the institutions is a predominant theme running through each of these institutions.

The Outlier: The Special Tribunal for Lebanon

All of the hybrid tribunals are designed to prosecute individuals responsible for large scale atrocities committed against a broad population base. All of these, that is, save one. The Special Tribunal for Lebanon is unique insofar as it was essentially created to prosecute the perpetrators of one crime: the assassination of former Lebanese Prime Minister Rafik Hariri in February 2005. This tribunal is unique not only in its limited subject matter jurisdiction but in addition, it is set amidst an elaborate and ongoing political drama for which the term "Byzantine" is an understatement. As of this writing, one major player in the Lebanese drama, Syria, is in the throes of a dramatic civil war and its leader (and one of the prime movers in the events surrounding Hariri's murder [Blanford, 2006]) is threatened with political extinction and stands accused of using chemical weapons against his own people. Further, the STL has issued indictments against four Hezbollah figures but has not conducted any trials for these individuals, leaving any study of the tribunal incomplete. This makes the STL a unique case that is difficult to integrate into a broader analysis of the hybrid courts. The fact that the Lebanon court has such a strikingly limited jurisdiction indicates that this case and the tribunal are unique and should probably be the subject of an independent analysis.[2] All of this means that it is somewhat difficult to place this tribunal within the narrative and analytical framework that is been used here. Given its unique status it will largely be left aside.

[2] For an in-depth study of various aspects of the STL see Alamuddin et al. (2014)

A Note on Nomenclature

Each of these tribunals is independent from the others—there are no hard institutional links between them (though personnel sometimes go back and forth between them). As a result, each tribunal uses its own terminology to describe itself and its own set of names for the different bodies that make up their hybrid system. Thus, the ECCC refers to its judicial bodies as the Pre-Trial Chamber, the Trial Chamber, and the Supreme Court. The United Nations Interim Administration Mission in Kosovo (UNMIK) court in Kosovo refers to the trial courts, and the special panel for serious crimes refers to panels. Other times, terms such as "tribunal," "court," and "chamber" are used more or less interchangeably. As these terminological differences mean very little in terms of the functioning of the various courts, I have not stuck faithfully to the appropriate titles for the different judicial bodies. Trial chambers are generally referred to as such (though sometimes more technical terms are used) and appellate chambers are generally referred to as such, regardless of their exact titles. In sum, the terms "courts," "panels," "tribunals," and "chambers" will be used more or less interchangeably. Given that we are comparing a number of different bodies, if we stuck by the precise terminology used by the different courts, readers would likely be more confused than enlightened.

A Further Comment Regarding Dates

This book was largely written in 2013 and 2014. Many of the tribunals covered are still in operations and constitute "moving targets" of sorts. In particular, the ECCC has undergone a great number of changes over the course of writing this. Further, by the time this book is published, more changes will have undoubtedly taken place. I have done my best to keep this work as up-to-date as possible, but I encourage readers to investigate recent activities in this tribunal.[3]

As if to underline this point, as this book was going into production Khieu Samphan and Nuon Chea, the remaining defendants in Case 002 before the ECCC were convicted of crimes against humanity in one of the "mini-trials" into which their much larger charges divided. (Crothers and Naren, 2004) Further the prosecutors have charged several defendants in Cases 003 and 004 - a promising development. (UN-backed court charges, 27 March 2015)

[3] The website for the ECCC is http://www.eccc.gov.kh/en. It is largely up to date, but further information can be gathered from the Cambodia Tribunal Monitor (http://www.cambodiatribunal.org/).

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Acronyms

Below is a list of the acronyms used in the text to help you follow along.

AFRC	Armed Forces Revolutionary Council
APC	All Peoples Congress
BiH	Bosnia-Herzegovina
BWCC	Bosnia War Crimes Chamber
CAVR	The Timor-Leste Commission for Reception, Truth and Reconciliation
CDF	Civil Defense Forces
CIJ	Co-Investigating Judge
CPK	Communist Party of Kampuchea
CSN	Court Support Network
DC-Cam	Documentation Center of Cambodia
DGPSC	Deputy General Prosecutor for Serious Crimes
DK	Democratic Kampuchea
DLU	Defense Lawyer's Unit
DSS	Defense Support Section
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
EJS	Emergency Judicial System
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICJ	International Court of Justice
IJ	International Judge
IJP	International Judges and Prosecutors
IMT	International Military Tribunal at Nuremberg
JCE	Joint Criminal Enterprise
KFOR	Kosovo Force
KJI	Kosovo Judicial Institute
KLA	Kosovo Liberation Army

KWECC	Kosovo War and Ethnic Crimes Court
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NPFL	National Patriotic Front of Liberia
OKO	Odsjek krivicne odbrane
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor
PAS	Public Affairs Section
PIOS	Public Information and Outreach Section
PRK	People's Republic of Kampuchea
RK	Republic of Kampuchea
RUF	Revolutionary United Front
SCPD	Serious Crimes Panel, Dili
SCSL	Special Court for Sierra Leone
SCU	Serious Crimes Unit
SFOR	Stabilization Force
SFRY	Socialist Federal Republic of Yugoslavia
SLA	Sierra Leone Army
SPRK	Kosovo Special Prosecutors Office
SPSC	Special Panel for Serious Crimes
SRSG	Special Representative of the Secretary-General
STL	Special Tribunal for Lebanon
TRC	Truth and Reconciliation Commission
UN	United Nations
UNAMET	United Nations Mission in East Timor
UNMIK	United Nations Mission in Kosovo
UNPROFOR	United Nations Protection Force
UNTAET	United Nations Transitional Authority for East Timor
VSS	Victim Support Services

Chapter 1
Background Conflicts

Unlike traditional standing courts such as domestic criminal courts or the International Criminal Court (ICC), each hybrid tribunal that we will be discussing was created as a response to a conflict or set of conflicts that took place in a particular place over a defined period of time. These tribunals were reactions to circumstances rather than free standing judicial bodies. In this chapter, we will be examining the background conflicts that ultimately led to the formation of the various hybrid tribunals. We will look at the people and states that were involved in these conflicts, as well as some of their more notable and infamous moments. Finally, we will look at the resolutions of the conflicts, seeing who was left standing and who held political power when the hybrid courts in question were conceived. Our discussions of these conflicts will not aim for comprehensiveness, as many of these conflicts have deep roots along with many complex twists and turns. Instead, we will focus on the aspects of these conflicts that made the formation of hybrid tribunals appealing to the various stakeholders. We will show the features that presented challenges for prosecutors and for others seeking justice in the wake of such violence.

For a variety of reasons, it is essential to understand the conflicts themselves before we can understand efforts to impose a legal order over it. In many cases, the nature of the conflicts shaped the structure and operations of the hybrid courts—there was no single template laid down by some political or legal higher power. Often it was the various stakeholders left standing at the end of the conflict who haggled and fought over the structure, jurisdiction, and the funding mechanism for the tribunals. This process took a long time before the courts began to operate. In each case, the nature of the conflict, its participants, and the character of its resolution led to specific decisions about the composition of the judges involved, the prosecutorial strategy, and the list of defendants for the hybrid courts. Moreover, many of these same considerations and stakeholders continued to exert pressure on the tribunals during their operations. They used the courts to their advantage when possible, thwarting the tribunals when the prosecutors and judges would not bend to their will, and boosting prosecutors or judges whom they deemed amenable to their interests. Therefore, knowing both the domestic and international actors involved in

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the conflict, as well as their interests, can serve as a valuable guide for understanding the structures and operations of the hybrid tribunals themselves.

In each of these conflicts, all of which were, nominally at least, domestic conflicts or civil wars, other states were intimately involved. Sometimes these states instigated or initiated the trouble. Sometimes they openly or surreptitious allied themselves with one party in a pre-existing conflict for their own ends. Still other times, states intervened in a conflict by stepping into it (with varying degrees of earnestness) to facilitate peace talks or by sending armed troops to serve as peacekeepers. Moreover, as we will see, some European states had intimate ties with their former colonies—motivating their involvement in the conflict. Others, such as the USA and the Soviet Union, often saw these countries and their people as pawns in a much larger game of international politics. Few of these states felt any blowback from these interventions, but many were nonetheless anxious to obscure their involvement in the violence in order to preserve their international standing. It should be no surprise then to observe that when the dust settled, many states that were involved in the conflicts were equally interested in the tribunals that were then created in their wake.

We will start with the earliest conflict that prefigured a hybrid tribunal: the Khmer Rouge regime in Cambodia that ultimately led to the creation of the Extraordinary Chambers in the Courts of Cambodia. From there, we will turn to the gruesome civil war in Sierra Leone that resulted in the creation of the Special Court for Sierra Leone. Then, we will look at the invasion, occupation, and liberation of East Timor by Indonesia and the violence that followed their referendum on independence. That resulted in the United Nations (UN) mission in East Timor and the creation of two separate tribunals: the ad hoc human rights court in Jakarta, Indonesia (not a hybrid court, but we will discuss it in later chapters nonetheless) and the Special Panels for Serious Crimes, Dili (SPSC). Finally, we will look at the various wars in the Balkans, with particular attention to the Bosnia and Kosovo conflicts, each of which led to the creation of a different hybrid court: The War Crimes Chamber in Bosnia and the UNMIK court in Kosovo. These discussions should set the pieces in place for when we discuss the formation of the different hybrid tribunals later.

Cambodia

In April 1975, Marxist rebels, led by their mysterious leader Pol Pot and a shadowy group of leaders known as “the Organization,” took over the small Southeast Asian country of Cambodia (also known as Kampuchea) and ran a brutal regime known primarily for torture, starvation, and mass murder. These killings took place in primitive prisons such as the infamous Tuol Sleng prison in Phenom Penh, collective labor camps, as well as the “killing fields” that were scattered throughout the country and came to public attention in the 1984 film of the same name. For most historical observers and students of human cruelty, Pol Pot and his comrades

have become as synonymous with the mass terror and ideological fanaticism of the second half of the twentieth century, as Hitler and the Nazi Party were for the first half. However, the route from the killing fields of Pol Pot's Democratic Kampuchea to the ECCC is an extremely long and complex one, a story that we will only be able to examine in the broadest of outlines.

The horror story of Cambodia in the 1970s is intimately bound up both with the ambitions of its grasping neighbors and with the cold war that pitted the communist states against the democratic, capitalist, Western powers for nearly five decades. While Cambodia was a French colony from 1864 until its liberation in 1954, it has continually lived under threat from its more powerful neighbors, Vietnam and Thailand. Both nations have repeatedly sought to influence and, at times, outright annex the country of nearly 15 million people over the course of Cambodian history. The fear of Vietnam shaped the fate of that nation in the 1970s, along with broader and deeper cultural trends of Buddhism, exceptionalism, and xenophobia. The US bombing of Vietnamese forces in Cambodia in the waning era of the Vietnam War, however, was the match that ignited the tinder of Cambodian radicalism and made the Khmer Rouge takeover possible.

In the 20-year period stretching from its independence from France to the ascendance of the Khmer Rouge, Cambodia was largely under the influence of King Norodom Sihanouk. The king ran a quasi-constitutional monarchy (with some communist sympathies) that managed to maintain a reasonable measure of stability in the country. That stability abruptly ended when the US government determined that the king was insufficiently supportive of the movement against communism and was insufficiently aggressive against the North Vietnamese forces. Many of them were encamped on the Cambodian side of the Vietnam–Cambodia border only to return across the border to fight the Americans. With the help of the US government, Sihanouk was ousted by his prime minister, Lon Nol, while the king was out of the country in March of 1970. Nol took over the reins of the state and created the new, US-allied Republic of Kampuchea (RK) which would run Cambodia for 5 years until its leaders were driven from power and into exile by the Khmer Rouge.

With the backing of the US government and aided by his politically ruthless brother, Nol set about crushing political opposition and placating US policymakers. While the USA provided military support for the new republic in an effort to get their new allies to fight against the Communists on their border, it was wholly inadequate to the task, particularly in the face of the widespread incompetence and corruption that characterized the RK government and its military. Funds sent from the US were embezzled in progressively larger quantities by Cambodian military and government officials. They developed increasingly sophisticated ways of pocketing the money sent by the USA to aid in their "fight" against the Cambodian and Vietnamese Communists, which Sihanouk had dubbed "les Khmers Rouge" ("the Red Cambodians").

Against this background of palace intrigue, corruption, and political suppression in Phnom Penh, the Vietnam War was still raging to the east of the capital. US involvement in Vietnam had deepened through the latter half of the 1960s, and the conflict began to spill over into Cambodia in a variety of ways in the period

up to and following Nol's coup d'état. In 1969, the USA had launched a top-secret bombing campaign known as "Operation Menu," which targeted Vietnamese Communists operating within Cambodia with a series of extensive bombing raids. Cambodia was a neutral state and invading its territory was a violation of international law and Cambodia's sovereignty. The operation was only called off when it was exposed by leaks to *The New York Times* (Beecher, 1969) but in the 3 months that Operation Menu was in effect, the bombings caused widespread havoc and death in the eastern part of the country. The destructive nature of this US intervention ultimately created a great deal of problems for the government of Cambodia as well as for the USA. There was a dramatic fall in support for Nol and increased support for the Communists among the Cambodian people.

While the USA was fighting the Vietnamese forces in Cambodia, the Nol government cooperated with the allies by seeking to dislodge Vietnamese forces from their territory. The RK military was deployed to fight against the guerillas. However, the republican government was too weak, corrupt, and inefficient to do much beyond the confines of the capital. Often, officers pocketed American military aid or even sold their supplies to the enemy, while political opposition to the RK government's corruption and oppression was suppressed. (Chandler, 1991) Meanwhile, the Cambodian Communists, with some support from the Vietnamese and the Chinese, began to gain traction against the Nol government. From his exile in Beijing, Prince Sihanouk publicly supported the Communists against the RK government and encouraged them in their struggles against the forces of "American imperialism." While its existence was still shadowy and its precise ideology and plan for governance was not publicly known, the Khmer Rouge was beginning its march to dominance in Cambodia.

The Communist Party of Kampuchea (CPK), more commonly known as the *Khmer Rouge* came to existence in the 1940s as part of Cambodia's anti-colonialist struggle. Its brand of communism, particularly as it grew, was fanatically agrarian and heavily influenced by the thoughts of both Mao and Stalin. People who lived within cities were not considered the "proletariat," as Marx envisioned most urban dwellers (for Marx, urban, industrial labor was to form the heart of the revolution), but rather were considered a suspect class alongside the bourgeoisie and other counterrevolutionary groups. Only peasants or "old people," as they were known in Khmer Rouge rhetoric, were sufficiently "pure" to serve as the basis for a truly communist society. Those with high degrees of education, with urban or foreign background, also known as "new people" were suspected by the Khmer Rouge forces and would later be targeted for reeducation or extermination when the CPK took control of the country.

The central figure of the Khmer Rouge movement was Saloth Sar, more commonly known as Pol Pot or "Brother Number One." Pol Pot was a French-educated revolutionary from northern Cambodia who joined the fight for Cambodian independence, but soon rose to the top ranks of the CPK. A hardened revolutionary and guerilla fighter, Pol Pot kept his own existence and the nature of his organization a closely kept secret, even after seizing power. He only released a photograph of himself in 1978 and rarely acknowledged the existence of the CPK or its central

position in the Cambodian state. Along with Pol Pot, Ieng Sary (deputy prime minister and foreign minister of Democratic Kampuchea or "DK"), his wife Ieng Thrith, Chhit Chhoeun ("Ta Mok"—the DK defense minister), Nuon Chea ("Long Bunruot"), Kheiu Samphan and Son Sen led a group of revolutionaries through a long, and ultimately successful struggle in the jungles of Cambodia against the existing government. Each of these individuals played a featured role in the Khmer Rouge government and were therefore targets of prosecution in the ensuing internationalized tribunal.

After the long civil war, riddled with corruption and abandoned by its primary benefactor, the USA, the government of the RK completely collapsed in the spring of 1975. In the face of defeat, Nol fled to the USA where he lived out the rest of his days (dying in 1985). The Khmer Rouge forces quickly finished off the remaining RK troops and triumphantly marched into Phnom Penh on April 17, 1975. At the time, many of the capital's residents were exhausted from years of fighting and were therefore jubilant that the conflict had finally come to an end. Many of them had disliked Lon Nol's corrupt and brutal government and earnestly hoped that Cambodia was turning a corner to a brighter, more stable future. However, the events of that very same day quickly dashed their hopes and revealed that the Khmer Rouge regime (later known as "Democratic Kampuchea") was not going to be a benevolent or moderate one.

Immediately after the city was taken, the Khmer Rouge began to impose a radical social vision on the people of Cambodia. The new government declared that April 11 marked the beginning of "Year Zero," a new era of radical agrarian socialism. It was to be the complete annihilation of Cambodia's past culture, economy, and society. As a first dramatic step in this direction, the residents of Phnom Penh and later those living in all Cambodian cities were forced out of the city en masse and sent out to the countryside to work in the fields and to learn from the peasants. The city itself would remain almost completely vacant for nearly 4 years, occupied by only a few of the top DK officials and their staffs. Shortly after the city was cleared of its local population, almost all foreigners were thrown out of the country, embassies were closed, and the borders sealed with guards and land mines. For all intents and purposes, Cambodia became a social and political "black hole" from which little to no news came. As a result of this silence, few outsiders understood the extent of the humanitarian catastrophe in Cambodia until the Khmer Rouge were driven from power and shocked Vietnamese troops saw the aftermath of their rule.

Under the Khmer Rouge, a strict anti-Western, anti-foreign, and anti-Capitalist order was imposed on the entire nation. Infused with Buddhist stoicism, Maoist totalitarianism, Stalinist paranoia, and a fanatical notion of cultural and national purity the Khmer Rouge sought absolute control over every aspect of the lives of their citizens. They wanted to dramatically reshape their society along Marxist and "authentically Cambodian" lines. Modern ("Western") medicine was banned as decadent and most hospitals were razed to the ground. All property without exception was nationalized, and people were herded onto collective farms to live in large dormitories and work 14 hour days in the fields, deprived of the basic necessities of life. Individuals were forbidden to show personal affection for each other and

personal relations were frowned upon as distractions from the revolutionary cause. The government developed a policy of classifying all individuals according to their "revolutionary status" and assigned living spaces within a collective. This status was later used to control almost all aspects of an individual's life, including who the government would allow them to marry.

Life under the Khmer Rouge was almost unbelievably harsh, and while there is some debate about the exact number of people directly or indirectly killed by the DK government as a result of their policies. Estimates range from 1.2 to 2 million people (though the consensus seems to be about 1.7 million, or 21% of the population of Cambodia). Some of these deaths were the result of a horribly mismanaged economy and some from the deliberate infliction of suffering on the Cambodian people by the Khmer Rouge. Logistically, the obsession of the Khmer Rouge government with the centralization of power and ideological correctness brought bureaucratic roadblocks that needed navigation for the simplest of actions. Vast government programs were put forward that had almost no basis in the realities of Cambodian life, causing such disruptions to the economic life of the country that economic productivity ground to a halt. Even after toiling in the fields for upwards of 16 hour per day, malnutrition and starvation ran rampant in the Cambodian countryside as much of the agricultural production was sent to China to finance Cambodian war debt. The DK government adapted the failed Maoist policies from the Great Leap Forward (which killed tens of millions in China) which magnified the program into a "Super Great Leap Forward." (Kiernan, 2006) Despite the sufferings of the Cambodian people, the DK government refused all offers of foreign assistance and remained steadfastly independent.

Along with its obsession with an ideologically correct domestic economic policy was a security policy based on a mix of paranoia and racism. One of the first targets of the Pol Pot government was Cambodia's ethnic minorities: Vietnamese, Thais, Chinese and other minority groups were ruthlessly attacked and murdered by the government. As Ben Kiernan argues in his study *The Pol Pot Regime: Race Power and Genocide in Cambodia under the Khmer Rouge* (2008), the Khmer Rouge, whatever its rhetoric, was more interested in racial "purity" than ideological correctness. "[N]on-Khmers who comprised a significant part of the supposedly favored segment of the peasantry were singled out for persecution because of their race. This was neither a communist proletarian revolution that privileged the working class nor a peasant revolution that favored all farmers. Favors in DK, such as they were, were reserved for approved Khmers." (Kiernan, 2008, p. 26) Long held beliefs about the inferiority of non-Khmers, shared by Lon Nol and others in Cambodian history, were enthusiastically embraced by DK and its willingness to commit mass slaughter meant that, along with the urban classes, these minorities would bear the brutal brunt of Khmer Rouge governance. Distrust of the Vietnamese was so great that ethnic Cambodians (including Khmer Rouge) who had spent time in Vietnam or spoke Vietnamese were often murdered by the government as suspected traitors.

Along with the Vietnamese, Cambodia's Muslim minority, known as the Chams, were singled out for ethnic cleansing and ultimately for genocide by the Khmer Rouge. Their religious practices and language were quickly banned by the gov-

ernment and they were forcibly uprooted from their communities and dispersed throughout the countryside. One observer described the Chams as "the favorite target of sadism of the Khmer Rouge." (Kiernan, 2008, p. 258) Unlike other minorities, the Chams rebelled against the authority of the DK government, causing harsh crackdowns on their communities and the extermination of entire villages. (Duong, 2006)

The Khmer Rouge government also targeted anybody even remotely suspected of failing to be completely in support of the Khmer Rouge government. Under the KR's ideology, the term "counterrevolutionary" was expanded to include virtually anyone with a formal education or anyone who could be perceived as a threat to Pol Pot and his inner circle, including long standing members of the KR political and military establishment. Those who were suspected of counterrevolutionary beliefs or activities were shipped to camps like Tuol Sleng ("S-21") where they were tortured and executed. At that former high school, over 12,000 people were tortured and killed under the supervision of Khang Khek Eav ("Comrade Duch"), who would later become one of the first targets for prosecution by the Cambodia Tribunal. Another figure in the Khmer Rouge leadership, Nuon Chea ("Brother Number Two") also oversaw and approved these executions, helping cleanse the party of those deemed traitors or spies, often based on the flimsiest of grounds. Only seven people were found still alive at Tuol Sleng when it was ultimately liberated. Choeung Ek, a former Buddhist monastery, was converted into one of the execution centers, commonly referred to as "the Killing Fields" where approximately 17,000 former Tuol Sleng inmates were killed.

The single significant interaction that the Khmer Rouge government had with the outside world during its reign over the country was its consistently antagonistic relationship with its neighbor, Vietnam. The Vietnamese (or more accurately, the communist North Vietnamese) had partially supported the Khmer Rouge during the war against the RK, but when the DK was ultimately established, the new Cambodian government's antagonism towards Vietnam was both immediate and ferocious. The two nations fought over their disputed borders for the entirety of the DK's existence, in what is now referred to as the Cambodia-Vietnamese War, and the hate existing between the two forces was palpable. During the war, the Khmer Rouge forces frequently killed Vietnamese civilians in the fighting and often transferred prisoners of war directly to S-21 for torture, interrogation, and execution.

The fears of Pol Pot and the Khmer Rouge leadership were that the Vietnamese sought to dominate Cambodia, fears that were deeply rooted in the Cambodian psyche. This would prove to be a self-fulfilling prophecy. In many ways, however, Cambodia and Vietnam were serving as mere proxies for much bigger conflicts both within the communist world and beyond it. China and the Soviet Union, both communist states that had long operated as rivals, supported different parties in this conflict: Vietnam allied itself with the Soviets and the Cambodian rebels fighting with them, while China supported the Khmer Rouge. (The USA would later support the Khmer Rouge to counter the Soviets and Vietnam.) These alliances would later prove important when the UN considered a tribunal for the Khmer Rouge

leadership insofar as many foreign governments feared the embarrassment that an aggressive tribunal's revelations could create for them.

The continuous conflict with Cambodia eventually became intolerable for the government of Vietnam, which had only obtained complete control over its own territory a few years prior. The Vietnamese government concluded that peaceful relations with the Khmer Rouge government would be impossible while the Khmer Rouge dominated that country and on Christmas Day in 1978, they invaded Cambodia with heavy air support and 14 divisions alongside a group of Cambodian rebels. The Cambodian troops were vastly outmatched by the hardened, organized, and heavily equipped Vietnamese. The Khmer Rouge was quickly defeated. On January 7, Vietnamese troops and Cambodian partisans entered Phnom Penh and set about establishing the puppet state of the People's Republic of Kampuchea (PRK). (Among the invaders was Hun Sen, a former Khmer Rouge commander and future prime minister of Cambodia—the individual who would play the single most important role in the function and dysfunction of the Cambodia Tribunal.) In response to the Vietnamese aggression, the Chinese invaded northern Vietnam for a brief punitive campaign with the support of the USA, kicking off the 4-week Sino-Vietnamese War.

With the Vietnamese invasion, the Khmer Rouge regime collapsed, bringing an end to Democratic Kampuchea and to the rule of Pol Pot and his allies. The remainder of the Khmer Rouge quickly fled to the mountains of western Cambodia, where many of them remained for the rest of their lives. The remnants of the Khmer Rouge occupied lands on Cambodia's border with Thailand and received support from the Thai and Chinese government. They engaged in a guerilla campaign to subvert the PRK and the ensuing Cambodian governments. Within the Khmer Rouge leadership, intrigue and political killings continued over the ensuing years and after being arrested by the Khmer Rouge forces that ruled the area in 1997, Pol Pot himself was put on trial by the Khmer Rouge for crimes against humanity. After a trial that was largely considered to be strictly for show, (most saw it as an attempt to convince the world that the Khmer Rouge had abandoned its violent ways), he was sentenced to spend the rest of his life under house arrest. (Mydans, 1997) He died, reportedly of natural causes, in 1998. Only a few of the leadership of DK had outlived their leader—most had died in Khmer Rouge infighting or simply succumbed to old age. Among these surviving leaders, only a select few would ultimately face prosecution before Cambodia's hybrid court: the Extraordinary Chambers of the Courts of Cambodia.

The Special Court for Sierra Leone

The brutal slug fest between the government of Sierra Leone and the Revolutionary United Front (RUF), from 1992 to 2002 is often described as a "civil war," but this term oversimplifies the conflict in many important ways. While the conflict was ostensibly over control of the state of Sierra Leone, along with its abundant resources,

and both sides of the war were nominally led by Sierra Leoneans, the war was much broader. It actually ensnared many more people than even occupied the relatively small African state. In reality, state actors from all over Africa were dragged into the conflict (some, it should be said, eagerly jumped in). There were some non-African states also, such as the UK, India, and the USA. Along with its globalized nature, the conflict gave rise to a cruelty and brutality that is shocking even by the standards of modern warfare, including torture, beheadings, and mutilations of innocents, including children—denoting a kind of conflict that is far fiercer than the oxymoronic term "civil war" usually connotes. Finally, the term "war" usually implies a military struggle for political dominance over a people, whereas the Sierra Leone conflict was largely over something even baser than raw political power. (This aspect of the conflict has led some to call it a "resource war.")

The social and political problems that sparked the war in Sierra Leone can be traced back to colonial policies pursued by Great Britain over its 160-year rule over Sierra Leone: Britain used the territory as a site for resettling former slaves and only granted it autonomy in 1961. After gaining independence, a series of single-party governments and military coups left the state fractured and destitute, leaving many ethnic groups disempowered and cut out of any meager development that took place in the country. Siaka Stevens, Sierra Leone's strongman, ran a single-party government with his All Peoples Congress (APC) from 1973 to 1984, when he retired leaving a mismanaged economy and a deeply corrupt political system in his wake. By the beginning of the civil war, Sierra Leone's government, now led by Joseph Momoh (Stevens' handpicked successor) was weak, corrupt, and extremely unpopular with the majority of Sierra Leoneans. This made an armed insurrection popular. (Shortly after the war with the RUF began, Momoh was ousted in a military coup led by the 25-year old military officer Valentine Strasser.) When it began fighting the government of Sierra Leone, the RUF initially billed itself as an organic revolutionary movement and the solution to the corrupt status quo.

The initial impetus for the conflict is murky and the motives of the RUF leaders are also unclear—even to observers who were in Sierra Leone at the time the war began. Clearly, the extant government of Sierra Leone was venal and corrupt and needed to go, but this ultimately happened a short 13 months after the war began and the conflict only escalated under ensuing regimes. The RUF was led by self-styled revolutionary, Alfred Foday Saybana Sankoh. Many observers believe that Sankoh's claims of being a liberator were never more than rhetoric: Whatever the weaknesses of the APC government and its successors, Sankoh had something far worse in mind for his Sierra Leone. Stronger than any political agenda were the powerful financial incentives behind the war, primarily control of the nation's vast diamond and titanium resources, which were the state's primary export and source of wealth. These resources were continually a focus of the conflict as both object of the conflict and its facilitator. Both sides sought access to their riches and were willing to continue fighting as long as these were held out as a possible future source of revenue (as well as a source of personal wealth). The term "blood diamonds" entered the Western lexicon and consumers were warned to avoid diamonds from Sierra Leone in films and in popular music.

The RUF began its campaign against the government of Sierra Leone on March 23, 1991, when approximately 100 RUF troops, consisting of Sierra Leonean expatriates and foreign mercenaries, crossed the border into Sierra Leone, attacked the villages of Bomaru and Sien, looted the towns, and then retreated back into Liberia. Shortly thereafter, Sankoh took to the BBC airwaves and declared a "people's struggle" against the government of Sierra Leone and Joseph Momoh. Sankoh would turn out to be the leader of the force and the prime cause of many of Sierra Leone's woes for the next decade. Many, including Momoh himself, considered Sankoh to be merely a puppet of Liberian strongman Charles Taylor. The two had close ties going back to the early 1970s when they had been imprisoned together. Later, they had trained together in Gaddafi's camps in Libya. Although they were not completely explicit at the outset of the war, the links between Sankoh and Taylor would be a central element in the conflict and later play an important part in the prosecutorial strategy of the SCSL in its prosecution of Taylor.

In addition to the domestic political conflicts and simple greed swirling around the fighting in Sierra Leone, regional actors were also heavily invested in the conflict and in the fate of the RUF. From Liberia, Taylor bankrolled the RUF and provided material and logistical support throughout the conflict. Many of those fighting in the RUF were Liberian, funded by Liberia, or had been trained and equipped by the Liberian government. In addition to Taylor, Libyan strongman Muammar Gaddafi had Machiavellian ambitions to be an African kingmaker and used his vast oil revenues to train and support the RUF. These leaders provided training, funding, and support for the RUF, which in many ways served as proxies for their respective regional ambitions. West African states like Nigeria, Guinea, and Cote d'Ivoire were similarly invested in the war in Sierra Leone for their own reasons. While it is clear that the RUF was responsible for widespread atrocities in the country and observers assert it was the prime source of violence, government forces and private militias of various stripes were far from innocent in the conflict: there was blame to spare for other actors in the African nation.

The role of the lucrative diamond and mineral resources of Sierra Leone in driving the conflict cannot be understated. Despite massive poverty, the country is rich in natural resources, particularly in diamonds, and many groups both in Africa and beyond have long coveted them. During the conflict all sides would exploit these resources both for financing their forces and for lining the pockets of both the leadership and the rank and file. Civilians were often enslaved in order to search out the minerals and individual soldiers would exploit them for their own personal profit. These "blood diamonds" were illegally mined from Sierra Leone then sold on the world market, often to European buyers, with many of the profits funneled back into the war through illegal arms transactions. Along with diamonds, however, Sierra Leone had large deposits of titanium and other minerals that were also exploited by both sides over the course of the war. Many observers intimately involved with the conflict and its aftermath charge that, all along, the war was about exploiting the resources of Sierra Leone for personal profit.

While it is true that the war eventually devolved into a naked grasp for power and wealth for both Taylor and Sankoh, their initial motivations to go to war were both

deeply personal and bizarrely idiosyncratic. Some observers have argued that the RUF, at some point in its history, was a genuine revolutionary movement and others believe that the war was about the revenge fantasies of the two men. According to Gberie's study of the conflict:

> Diamonds may not have been the cause of the war; the question of 'causes' can often seem wholly misdirected—Taylor, the real mastermind, aimed at both revenge and pillage, as we will see, and his protégé Sankoh's grudges against the ruling All Peoples Congress (APC) party went beyond a simple wish to steal, with many among the country's despairing poor sharing his incoherent political sentiments. (Gberie, 2005, pp. 6–7)

In his study, Gberie examines a number of grievances, both big and small, that led Sankoh and Taylor to loath the government of Sierra Leone. Sankoh had served a lengthy prison sentence after being caught up in a failed coup d'état, and Taylor wished to punish the extant government of Sierra Leone for providing support to the remnants of his predecessor's troops and for participating in the international peacekeeping forces in Liberia (known as Economic Community of West African States Monitoring Group or ECOMOG). (Gberie, 2005, p. 65) Reportedly, Taylor vowed that Sierra Leone would "taste the bitterness of war" in a 1991 interview, a promise he clearly made good on. (Dougherty, 2004a, p. 314)

A detailed analysis of the 10-year conflict would go beyond the scope of this study, nonetheless the war can be broken down into several different periods. The early portion of the war, from 1992 through the deployment of foreign mercenaries ("Executive Outcomes") who were able to push the rebels back from Freetown and nearly forced them out of Sierra Leonean territory in 1996. Then, there was a first peace agreement in Abidjan in 1997 where elected president Ahmad Tejan Kabbah sought to contain the RUF and put an end to the conflict. After the Abidjan agreement unraveled, President Kabbah himself was deposed in a military coup led by the Sierra Leonean military officer Johnny Paul Koroma. The military coup led to an alliance between the Sierra Leon Army and the RUF and a bloodthirsty pseudo-government known as the Armed Forces Revolutionary Council (AFRC) that rampaged across Freetown, looting and killing at will and left Sierra Leone politically isolated. During this period, hundreds of civilians were arbitrarily massacred by the AFRC and RUF junta (which used the notorious youth gangs like the "West Side Boys" to do a great deal of their killing) in what Gberie describes as an "ecstatic" cruelty that went on for 7 months until they was forcibly ejected from power by Nigerian forces. These forces, in turn, placed Kabbah back in power. It was also during this time that Kabbah, in exile, appointed Sam Hinga Norman to direct the Civil Defense Force (CDF) resistance deep in the jungles of Sierra Leone, recruiting the feared Kamajor people from northern Sierra Leone to fight a brutal campaign against the AFRC/RUF forces and their supporters.

The RUF began 1998 with the commencement of "Operation No Living Thing." The capture of Sankoh by Nigerian forces and his transfer to Freetown led the RUF to plan a brilliant guerrilla attack on Freetown, which reportedly killed 700 Nigerian troops stationed there. This led the government to begin negotiations with the RUF in Lomé which culminated in a 1999 power sharing agreement. Though this agreement did not get the RUF to lay down its arms, one of its principles was an amnesty

that, as we will see, created a significant legal obstacle to prosecution of the RUF leaders by the SCSL. The breakdown of the Lomé agreement resulted in a largely failed set of UN peacekeeper missions (collectively known as United Nations Mission in Sierra Leone or UNAMSIL) in the country, many of which were routed by RUF forces that were still being commanded by a strikingly duplicitous Sankoh. One striking attack in February 2000 led to the capture of nearly 500 Zambian peacekeepers along with their vehicles and weapons in one blow. By the beginning of 2000, the RUF appeared to be in a very strong position in relation to the government of Sierra Leone.

Despite these successes against UN forces, February 2000 marked the beginning of the end for Sankoh and the RUF. Several factors had converged to put an end to the rebels and Sankoh's ambitions. The British military had begun to put pressure on the rebels with the commencement of Operation Palliser. Starting in May 2000, Palliser quickly expanded from an attempt to evacuate British citizens from Freetown in the wake of failed UN interventions, to a broader anti-RUF mission.[1] While the British largely played a supporting role in the conflict, the intervention tipped the balance of power in favor of the government and the CDF/Kamajor forces. Guinean forces, frustrated with RUF incursions into their territory also began striking at rebel bases in Sierra Leone and increased pressure on them. Finally, in May 2000, Sankoh was forced to flee Freetown dressed in women's clothing after his security forces opened fire on a group of peaceful protestors. He was captured shortly thereafter, paraded through the streets of Freetown naked, and then promptly arrested by the government. The British and other international forces conducted other operations against remaining RUF forces and began training the Sierra Leonean troops that remained loyal to the government to fight effectively against the rebels. In August 2000, Issa Sesay, a RUF commander, was appointed head of the RUF and he began peace negotiations with the UN and the Sierra Leonean government, ultimately signing a ceasefire agreement in November 2000.

East Timor

The spasm of violence that took place in East Timor (also referred to by its Portuguese name: "Timor-Leste") in 1999, coupled with the 24 years of colonial oppression that prefigured it, stands as one of the great unknown atrocities of the post-World War Two world. On August 30, 1999, in the wake of a referendum on East Timorese independence, a group of Indonesian partisans, with the participation of the Indonesian military rampaged across the country, killing anybody they determined to be sympathetic to East Timorese independence and wreaking havoc on the newly established nation. These partisans caused nearly 300,000 civilians to flee to the jungles and forced others to move to the side of the island that remained Indonesian.

[1] For an in-depth analysis of British operations in Sierra Leone, see Evoe (2008).

While the Timorese fled, the partisans, alongside regular troops from the Indonesian military, systematically destroyed the infrastructure of the tiny new nation while the international community, led by Australia, struggled to develop an appropriate response and prevent the violence and destruction. It was over 2 weeks after the referendum, on September 15, 1999 that international peacekeepers were able to hit the ground in East Timor, causing the partisans and their Indonesian allies to retreat. By the end of the 2-week rampage, approximately 1400 people had been murdered—a number that must be calculated alongside the many thousands of people killed during the more than 20 years of Indonesian occupation. After the havoc, the new nation was placed under the care of a UN transitional government while it built the foundations of the new state. While East Timor was ultimately able to establish itself as a sovereign state, it only came at a great cost in terms of money, resources, and human life.

As with many other conflicts in the post-Cold War World, the roots of the conflict in East Timor lie deep in the region's colonial history and in the interventions of the West over several centuries. The island of Timor is part of an archipelago off the coast of Australia, known as the Lesser Sunda Islands. It sits about 250 miles from the northern Australian coast and almost 1300 miles from Jakarta, the capital of the island nation of Indonesia. In the early sixteenth century, the Portuguese began trading with the native population and colonized the island in the middle of that century. A conflict between the Dutch and the Portuguese forced Portugal to cede control over the western half of the Island but they maintained sovereignty over the eastern half until 1975 (with a brief hiatus while the country was occupied by the Japanese during the Second World War). As a result of this lengthy colonial dominion over the country, the East Timorese developed in a manner quite different from the other islands in the region and from greater Indonesia. East Timor is 98% Catholic in a part of the world that is dominated by Islam and to a lesser extent Hinduism and Buddhism. (Central Intelligence Agency, n.d.) Portuguese is one of the primary languages of the country along with Tetum, neither of which are spoken with the same frequency in the island's western half or anywhere else in the South Pacific. All of this unique history and culture means that East Timor is in many ways culturally distinct from the rest of the region, almost all of which are under the dominion of Indonesia and share many Indonesian beliefs and values.[2]

Despite its cultural and religious idiosyncrasies and its close cultural links with its European colonial master, Indonesia was interested in East Timor since the former nation achieved independence in 1945. Other islands linked to Europeans through colonialism were annexed by Indonesia in the latter half of the twentieth century, so it is reasonable to believe that Indonesia simply considered East Timor to be rightfully "theirs." On the other hand, the Timorese considered themselves to be a sovereign state, independent of their colonial masters. In the 1970s, as the movement for independence grew in East Timor, the Indonesian government

[2] However, one should be careful about attributing any real homogeneity to Indonesia as it is a country made up of numerous cultural, linguistic, and ethnic groups stretched over some 17,000 islands.

actively supported splitting the colony away from Portugal. The Marxist Timorese Liberation Front ("Fretilin"), inspired by the Black Liberation movements in Portuguese Africa fought to establish an independent Marxist state. Other rebel groups associated themselves directly with the Indonesian government or remained loyal to Portugal. Shortly after a 1974 coup in Portugal, the new Portuguese began to negotiate with various parties for an independent East Timor. However, frustrated by the pace of the talks on the matter, Fretilin unilaterally declared the creation of an independent Democratic Republic of East Timor on November 28, 1975.

In spite of the high hopes of Fretilin at the end of November in 1975, East Timor's independence was to prove very short lived. On December 7th of that same year, Indonesia invaded the newly independent half of the island and declared that it was now a part of Indonesia. This move was not a complete shock to international observers, however. Reportedly, prior to the invasion, US secretary of state, Henry Kissinger had met with Indonesian president Suharto and given America's blessing to the invasion, seeing the conflict as part of the broader struggle against international communism. (Hanhimaki, 2004, p. 402) The war between East Timorese nationals and Indonesian forces lasted until 1978 and killed an estimated 40,000 people, ending with victory for the Indonesian forces and the full annexation of East Timor. While Fretilin continued to operate underground, it was largely neutralized as a military threat for two decades as Indonesia consolidated its control over the island and sought to normalize its position within Indonesia. In 1976, the Indonesian government declared that it had "integrated" East Timor into the island nation, making it the country's twenty-seventh province. (Kammen, 2000, p. 157) The Indonesian government declared that "the wishes of the People of East Timor have been fulfilled, the process of decolonization has been completed." (Weatherbee, 1981, p. 1)

Indonesia feared the existence of an independent East Timor for several important reasons. The ideology of Fretilin represented a danger to Indonesia insofar as the radical doctrine that undergirded the movement had potential to spread to other disaffected ethnic minorities in Indonesia. It could serve as a base for Marxist revolutions in the archipelago. In this way, the conflict over East Timor fit into the broader cold war and hence, interested the USA. Further, the very existence of an independent state within the territorial heart of Indonesia represented an existential challenge to Indonesia, whose motto was "Bhinneka Tunggal Ika" ("Unity in Diversity"). Jakarta's claim to represent the people of the archipelago depended to a large extent on the fact that no island or ethnic group in the area was outside of Indonesian sovereignty. The existence of one independent group beyond the control of Indonesia could undermine Indonesia's claim and thereby inspire other disaffected groups to follow suit and fight for independence. Other parts of Indonesia had similar claims to autonomy and independence, most notably the province of Aceh, and their cause would be both bolstered and legitimized by an independent East Timor. Finally, Indonesia could refer to the process of decolonization in other parts of the world, where some recalcitrant minorities or provinces were forcibly brought into the larger, post-colonial state with few repercussions. (To cite one example: The province of Goa located on the West Coast of the Indian subcontinent was forcibly

taken over by India in 1961 with few negative consequences for the Indian state.) Thus, there were political, ideological, and existential reasons for Indonesia to want to establish dominion over East Timor, and they had a certain amount of historical precedent on their side when they invaded East Timor in 1975.

Whatever the merits of Indonesia's claims over East Timor, the occupation of the island itself was a brutal one as the legitimacy of Indonesian control was never truly accepted by the majority of Timorese. The occupational government was largely run by the Indonesian military, which traditionally acted with a great deal of autonomy from the Indonesian government. Reports of mass population transfers and starvation were common and the government implemented a policy to "Indonesianize" the Timorese population, bringing them into "mainstream" Indonesian society, leading to resistance by the Timorese and retaliation from the Indonesian military. In one particularly well documented case, in November 1991, Indonesian military forces opened fire on a crowd of peaceful Timorese who were mourning the loss of one of their supporters at Santa Cruz cemetery, killing 250 civilians. (A video of the event was smuggled out of the country, sparking international outrage.) The post-Independence truth commission estimated that, during the quarter century that Indonesia controlled the entire island of Timor, approximately 102,800 people died as a result of the occupation. Of these, approximately 18,600 were from actual armed conflict and the remainder to hunger and illness ("which exceed the total that would be expected if the death rate due to hunger and illness had continued as it was in the pre-invasion peacetime period." [CAVR, 2006])

In spite of the reports of the human rights abuses in East Timor during the period of occupation, few states or international organizations were greatly concerned with events there and some states actively supported Indonesia's agenda on the island. According to the Truth and Reconciliation Commission, Australia "provided economic and military assistance to Indonesia during this period and worked as an advocate for the Indonesian position in international fora." The USA, similarly, sold arms to Indonesia and provided some political support to their cold war ally in their mutual fight against the spread of international communism. There were two UN Security Council resolutions passed during the conflict, but both used mild language to describe events there and eschewed talk of "invasion," much less threatened UN intervention on the matter. (UN Security Council Resolutions 384, 1975, and 389, 1976) The General Assembly, for its part, passed several resolutions, although "with decreasing majorities." (Reydams and Wouters, 2012, p. 55) over this period, with little or no impact. The pressures of Cold War politics and the economic interests of the great powers in the last quarter of the twentieth century left the East Timorese to fend for themselves against the forces of Indonesian annexation and indoctrination.

There were several changes in the late 1990s that made Indonesia's continued domination of East Timor untenable and gave momentum to the independence movement. Whether or not the occupation was sustainable militarily, the politics in Indonesian and in the broader region had turned the winds against their East Timor policy. In 1998, Bacharuddin Jusuf ("B.J.") Habibie replaced President Sharto as Indonesia president, ending the latter's 31-year tenure as Indonesia's leader. Suharto's successor sought to turn a new page on Indonesian governance, portraying

Indonesia as a defender of democracy and human rights and turning its back on the country's authoritarian past. Along with many reforms undertaken by Habibie, this transition meant reorienting Indonesia's relationship with their troubled territory. Habibie recommended that East Timor be given a special autonomous status within the country, but as the politics of the region changed, Habibie eventually opted for a referendum on independence.

While the government had changed its stance toward East Timor, the Indonesian military (known as Tentara Nasional Indonesia, or TNI) was not inclined to change their stance on the matter. Since independence, the military in Indonesia had operated with a great deal of independence and under the leadership of General Wiranto, it had developed its own policies in the region, independent of the views of the civilian leadership. Unlike the new government in Jakarta, the military expressed a strong nationalistic, anti-colonialist orientation and therefore opposed the idea of an Independent state within what was considered Indonesian territory. (Crouch, 1988) As a result, regardless of whether Habibie genuinely believed that the East Timorese wished for some kind of autonomy or independence, the Indonesian military had no such wish—East Timor was a part of Indonesia in their view. As a result of TNI's policy towards the region, there were reports of new paramilitary militia organizations forming within East Timor with the assistance of the Indonesian military at the very same time that a discussion regarding the possibility of an independent East Timor was underway. (United Nations (UN) Office of the High Commissioner for Human Rights, 2000) In many ways, the conflict in East Timor was a reflection of these civilian-military tensions in Indonesian government in the post-Suharto era.

Along with these changes in policy coming from the government in Jakarta, there were also pushes for political change for East Timor coming from the island's influential neighbor, Australia. Australia had been one of the few states that had recognized Indonesia's annexation of East Timor and successive Australian governments supported this view as a part of their Indonesia policy. A new Australian president, John Howard, took power in 1996 and recognized that Indonesia's control over the island had irreversibly slipped. As a consequence, he began pushing the Indonesian government to provide some form of autonomy for the eastern half of the island in order to accommodate the reality there. (Kelly, 2011, p. 482) While they could not publicly admit to the fact, as it would offend their neighbor, the Australian government had decided to change their longstanding policy and quietly began to promote independence for East Timor. Towards this end, in a December 1998 letter to the Indonesian government, Howard proposed holding a referendum in 10 years' time, at which time the East Timorese could choose between autonomy within Indonesia and independence from Indonesia.

In response to these pressures, Habibie had proposed a form of political autonomy for East Timor and suggested that a referendum on the matter be held in 6 months' time in East Timor, rather than the 10-year timeline proposed by Howard. (Though it is unclear why Habibie made such a move, it is likely that he mistakenly believed that public opinion in East Timor was on the side of Indonesia.) In May 1999, the UN, Indonesia and Portugal agreed to establish a UN mission in East Timor in order to conduct a referendum for the Timorese people. However, fearing

violence and political interference, the Secretary-General made several conditions which had to be met prior to the holding of the plebiscite. As the Secretary-General described the situation at the time:

> The Security Council will be aware of the high level of tension and serious incidents of political violence that have recently occurred coupled with the reported opposition to the proposed consultation by some political elements in East Timor. I have emphasized to the parties the main elements that will need to be in place in order to enable me to determine that the necessary security conditions exist for the start of…the consultation process. These include the bringing of armed civilian groups under strict control and the prompt arrest and prosecution of those who incite or threaten to use violence, a ban on rallies by armed groups while ensuring the freedom of association and expression of all political forces and tendencies, the redeployment of Indonesian military forces and the immediate institution of a process of laying down of arms by all armed groups to be completed well in advance of the holding of the ballot. (UN Secretary-General, 1999)

Shortly thereafter, the UN Security Council established the United Nations Missions in East Timor (UNAMET) to help organize and conduct the referendum. Once the conditions set out by the Secretary-General were met (most importantly, the armed militias in the country were placed under control), the people of East Timor would be allowed to determine their political destiny.

The referendum (sometimes called the "plebiscite," or more formally, the "popular consultation") was initially scheduled for August 8, 1999, but it had to be postponed twice out of concerns for the safety of the voters. There were several violent attacks against civilians by those preferring integration into Indoenesia, which made it nearly impossible to run such a large vote. The militias, trained and supported by the Indonesian military sought to intimidate the East Timorese into siding with Indonesia in the voting in the run up to the referendum. The primary militia groups opposed to independence were Besi Merah Putih (BMP, "Red and White Iron"), Aitarak, Laksaur, and Mahidi, each of which was supported in some way or another by the Indonesian military. "Government officials have strenuously denied it, but the militias in East Timor received substantial financial and material backing from the Indonesian government and military authorities." (Robertson, 2003, p. 7) The pre-referendum violence foreshadowed the massacres and destruction that would strike after the votes were finally tallied a few months later. For purposes of our study, it is important to notice that much of this pre-election violence would ultimately be under the jurisdiction of the hybrid courts that were created after independence.

Among the worst events in the pre-referendum violence was the "Liquiçá Church Massacre." On April 6, 1999, BMP militants and their TNI allies under the command of Manuel de Sousa attacked pro-independence families taking shelter in a Catholic Church. When priests tried to intercede on behalf of the families, BMP militants entered the church and attacked the refugees. As one victim described the attack, "Around 1.00 pm, the Besi Merah militia along with the police and the military attacked the church. They fired shots into the air to give the signal to the militia to enter the church, and then they started shooting the people. Wearing masks that covered their faces, the militia and the military then attacked with axes, swords, knives, bombs and guns. The police shot my older brother, Felix, and the militia

slashed up my cousins, Domingos, Emilio, and an eight-month old baby." (CAVR, 2003) Approximately 60 people were killed in the attack, but definite numbers were hard to come by as the bodies were removed and disposed of shortly after the massacre. The Liquiçá Massacre will become one of the central cases of both the tribunals that were created in response to the violence surrounding the referendum.

In a second attack less than 2 weeks after the church attack in Liquiçá, two pro-integrationists, Joao Tavares and Eurico Guterres held a rally of like-minded activists in front of the Governor's office to protest independence. At the protest, violent anti-independence speeches from militia leaders "incited the crowd to capture and kill those who did not support integration with Indonesia." (CAVR, 2003b) Reportedly, Guterres declared that they were to "conduct a cleansing of all those who have betrayed integration. Capture and kill them if you need to." After the rally, Tavares and Guterres organized a militia of approximately 1000 men to encircle the city of Dili and target the homes of prominent independence activists. In total, they killed approximately 12 people, including the son of the prominent independence leader Manuel Carrascalão. This attack, later known as the "Manuel Carrascalão House Massacre," took place reportedly with the support of several high ranking members of the Indonesian military involved in the occupation of East Timor at the time. (CAVR, 2003b)

As the facts surrounding these two attacks show, the military was in close contact with the militias at all levels, coordinating the violence against independence supporters. Among observers, it was widely understood that the militias and the military represented one unit, with the tacit support of the civilian government and some TNI personnel were also militia members. As the report of the Truth Commission described the situation at the time:

> Impunity created a context where the unlawful killing or enforced disappearance of civilians was tolerated, supported and condoned. As in earlier years when ABRI/TNI launched operations against the civilian population, it mobilised all branches of security apparatus, including auxiliaries, and much of the civil administration in pursuit of its goals. Throughout this period, ABRI/TNI, the police and militia groups acted in a coordinated manner. Military bases were openly used as militia headquarters, and military equipment, including firearms, were distributed to militia groups. Some ABRI/TNI personnel were also militia commanders or members. ABRI/TNI intelligence officers provided lists of the names of people to be targeted, and coordinated attacks. Civilian authorities openly provided state funding for militia groups and participated in militia rallies and other activities. (CAVR, 2003b, para. 924)

Though the attacks were nominally conducted by independent militias, these groups were so closely linked to the Indonesian forces in East Timor that at times there was nothing separating the two other than a simple change of clothes. Nonetheless, the state tried to frame these attacks as "clashes" between two paramilitary organizations, despite the fact that witnesses reported no violence emanating from the pro-Independence side of the massacres. The precise nature of the linkages between the TNI and the militia movements will become a point of contention between Indonesia, which sought to minimize these connections, and the prosecutors at the Dili Court, which saw the two organizations as significantly more related.

Despite the horrific nature of these attacks (which tapered off as international observers streamed in, in preparation for the vote), the UN continued to organize the ballots for the referendum. When the referendum was finally conducted on August 30, 1999, there were two options presented to voters on the ballot: On one hand, Timorese could accept Habibie's offer of autonomy and continue to live under the umbrella of Indonesian government or they could reject the autonomy proposal and instead have full independence as a sovereign nation. Despite the history of harassment and a threat of violence from TNI and the militias (or perhaps because of it), there was a massive turnout—98.5% of the Timorese population came out and voted. By the end of the day, the choice of the East Timorese was abundantly clear: they overwhelmingly rejected Indonesia's offer and decided to declare the independent state of East Timor. The final tally was 78.5–21.5% against the autonomy scheme proposed by Indonesia. (UN Security Council, 3 Sept 1999)

Within hours of the announcement of the referendum results at the beginning of September 1999, violence broke out throughout East Timor. Shortly after the announcement, Habibie declared martial law for the province and the military assumed responsibility for security there, reducing the police and civil authorities to mere supporting roles. Early reports stated that the security personnel, that were supposed to be maintaining peace during the election, stood by as militiamen descended on pro-independence celebrants and even went so far as to assist the militias by allowing them easier access to their victims. (Aglionby et al., 1999) In one particularly gruesome attack, militia forces surrounded a police station in the town of Maliana (on the border with West Timor) and hacked into the 6000 civilians, who had taken refuge there, with machetes. Despite international calls for the Indonesian government to halt the violence, the militias and their TNI allies continued to terrorize the Timorese population and destroy much of the country.

The CAVR report on the violence in East Timor lists several pieces of evidence to support claims that the Indonesian military and their militia allies coordinated their actions in the aftermath of the referendum. This listing provides a clear snapshot about the depth of the post-referendum violence as well as the collusion that took place between the TNI and the militias at the time:

- On September 6, TNI and Brimob troops backed militias as they executed scores of people, including three priests, who had sought refuge in the Cathedral in the town of Suai….
- On the same day, soldiers and police stood by as militias forcibly evacuated thousands of people who had taken refuge in the Dili residence of Bishop Belo, and at the International Committee of the Red Cross and the Canossian Convent nearby….
- Two days later, on September 8, militias and TNI soldiers massacred as many as 14 people who were among hundreds who had taken refuge at the police station in Maliana. Another 13 who fled the massacre were hunted down and killed the next day….

- At least 21 people, including a foreign journalist [Sander Thoenes], were killed in September, by elements of TNI Battalion 745 as it withdrew from its base in Los Palos through Baucau and Dili, en route to West Timor….
- In the enclave of Oecussi, almost 100 people were massacred by militiamen and TNI soldiers in two separate incidents in September and October, bringing the total number killed in the district to 170 people….(Robinson, July 2003, p. 47)

The violence was intense, coordinated and bitter for the 2 weeks that East Timor was left to the mercy of the Indonesian military and their allies. At the same time, an erratic Habibie denounced reports of violence as "lies" and "fantasies" and threatened to use force against any UN peacekeepers who went to East Timor to restore order. (Nevins, 2005, pp. 104–105)

Along with attacking pro-Independence activists, the paramilitary groups turned their weapons on many foreigners who were in the area. In particular, they targeted journalists, and most surprisingly UNAMET officials. Sander Thoenes, a Dutch journalist working for the *Financial Times* and the *Christian Science Monitor* was shot and killed by Indonesian forces shortly after arriving in Dili, reportedly by a member of the Indonesia Battalion 745. (Barr, 2000; Parry, 2007, pp. 310–313) Several foreign UNAMET personnel were murdered at the close of the voting and most of the remaining UN staff was forced to seek shelter within their headquarters. (CAVR, 2005, para. 826) Working together, the two groups rampaged across the country killing, raping, looting and destroying as much infrastructure as they were able. On September 14, UNAMET forces evacuated the island with approximately 1400 Timorese who had sought shelter with them leaving the remaining Timorese on their own. (Nevins, 2005, pp. 104–105.)

Thousands of the remaining East Timorese were forced to leave their homes as a result of the attacks. As many as 300,000 were forced to flee the violence and hide in the forests or hills near where they lived. Others, up to 250,000 were forcibly moved to West Timor by the militias after the referendum, where they were held against their will. (CAVR, 2005, para. 423) Under threat of death, the civilians were rounded up by the militia troops and herded onto trucks or boats where they were soon transferred across the border, where (presumably) they were denied the right to return to their homelands. These transfers happened in the context of killings, beatings, imprisonments, and rapes from the TNI and their allies that destroyed their ability to resist. Once taken over the border, the East Timorese were placed in 200 different internment camps based on their place of origin, and denied sufficient food, clothing, and medicine, all the while subject to harassment by the pro-integrationist forces that had now become their jailors.

Eventually the violence in East Timor became too much for the international community and some of its members were forced to respond. Reydams and Wouters point to three major elements of the post-referendum violence that eventually led to international calls for action. First, because many of the serious offenders in the East Timor violence had retreated to Indonesia, there was little likelihood that the domestic Timorese justice system would be able to gain custody over these individuals without the support of the international community. Second, the fact that UN

bases and personnel had been targeted by Indonesian loyalists made the violence a concern for the UN itself, heightening international pressure on Indonesia. Finally, the West had fears about charges of selectivity: "NATO's intervention earlier that year in a crisis similar in scope and nature (Kosovo) made it harder for Western countries to remain oblivious [to events in East Timor]." The West would open itself to charges of hypocrisy (or worse) if they ignored the deaths of thousands of Timorese in the relatively remote jungles of Indonesia but acted forcefully in the face of crimes in Europe. Regardless of the actual motivation behind the international community's reaction to the violence in East Timor, their ultimate response proved to be timid when compared to the expense and effort behind similar efforts in the former Yugoslavia.

With the backing of the USA, Indonesia eventually agreed to allow Australian peacekeepers into East Timor in the middle of September 1999, and shortly thereafter the Indonesian militias and military withdrew. The newly independent state was then temporarily placed under UN authority and a UN administered government was established for the badly damaged nation. (UN Security Council Resolution 1272, 25 Oct 1999) The UN Transitional Administration for East Timor (UNTAET) was tasked with helping the new nation rebuild its badly damaged infrastructure and preparing the ground for full-fledged independence as a sovereign state. The UN ran the country for two years, dealing with the mass displacement of citizens, creating the basic instruments of governance, managing the country's foreign policy (most importantly, its relationship with Indonesia) and preparing for a new election to determine the first generation of Timorese political leadership. It was run by Sérgio Vieira de Mello, a Brazilian UN Official who would be killed by al-Qaeda terrorists a year after leaving UNTAET and serving as UN Representative to Iraq. After 2 years under the guidance of the UN, a council of Timorese representatives established a new constitution and, on May 20, 2002, sovereignty was officially transferred to a new Indonesian government headed by former Fretilin leader Xanana Gusmão. UNTAET transitioned into the UN Mission in Support of East Timor (UNMISET), which in turn was dissolved by the Security Council in May, 2005 in Security Council Resolution 1543—a resolution which also brought an end to the Special Panel for Serious Crimes.

The Former Yugoslavia

Much of the historical narrative leading up to the creation of the Bosnia courts is well-known to students of international justice, and because they took place in Europe, they received a relatively high degree of public attention at the time that they took place. As a state, Yugoslavia, sometimes called the "Second Yugoslavian State" (to distinguish it from its pre-war ancestor), was created at the end of World War Two through the welding together of several different ethnic and religious groups that had lived uneasily side by side in the Balkans for centuries. In this postwar iteration, Yugoslavia consisted of several different ethnic groups that were aligned

with different religious sects. They shared a contentious history filtered through the various conflicts that shaped the continent over the course of the twentieth century. The largest ethnic group, the Serbs, traced their origins back to Medieval Europe and allied themselves with the Eastern Orthodox Christian Church. Historically, the Serbs have often allied themselves with Russia, such as at the beginning of World War One, and Russia historically saw itself as the protector of the Serbs as fellow Slavs. The Croatians were largely located in the north of the country and mostly Catholic. Albanian Muslims, on the other hand were located in the Kosovo region along the border with Albania. The region of Bosnia-Herzegovena was populated by the Bosnian ethnic group ("Bosniaks") who were also primarily Muslims. Clearly, Yugoslavia as a single unified state faced many historical, demographic, and religious challenges that would ultimately prove its undoing.

Given this makeup, it is no surprise that the history of the Balkan region over the course of the previous century was in many senses a series of spasms of ethnic conflict and brutal violence as different groups sought dominance and allied themselves with larger foreign powers to protect themselves. Serbian nationalists assassinated Archduke Franz Ferdinand in 1914, provoking both Austrian and Russian responses and ignited the First World War. Croat fascists, known as the Ustaša, allied themselves with the German invaders during the Second World War and persecuted Serbs in their own concentration camps as did some Bosnian Muslims who also operated alongside Nazi SS outfits. There was a long history of bad blood between these groups and an equally long history of the different ethnic groups trying to wipe out their rivals and achieve hegemony in the region.

From the end of the Second World War until the end of the Cold War, the tensions between these different ethnic groups were largely kept in check by the Yugoslav government. The Socialist Federal Republic of Yugoslavia (SFRY) under Josip Tito suppressed ethnic nationalism with force (he reportedly executed some 20,000 Croats and other ethnic partisans in the region after the Second World War) (Bass, 2002, p. 209) and thereby maintained an uneasy peace. Politically speaking, some groups were given a measure of autonomy in particular parts of the federation. The SFRY constitution had established six republics within the Yugoslav federation: Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia along with two autonomous provinces within the Serbian Republic itself: Kosovo and Vojvodina, allowing different groups to be represented in the various regional and provincial governments. However, as Michael Scharf (1997) put it, "Prior to its dissolution in 1991, Yugoslavia was not so much an ethnic melting pot as a boiling cauldron of ethnic tensions with deep historic roots." (p. 21)

The dramatic and violent collapse of the SFRY and the return of ethnic violence in the region began in 1991 with the end of the Soviet Union and the termination of its support for its allies in Eastern Europe. The loss of the political and economic support of the Soviet Union left the communist government significantly weakened. Without a strong government at the core of the Yugoslavian state (which was then being led by President Slobodan Milosevic a former Communist turned Serbian Nationalist), the old bonds of ethnic nationalism rushed in to fill the void. Without the powerful central state and its Soviet backer, it was only a matter of time before

the federation broke up. As a result, many of the regions of the SFRY began to agitate for independence and the state began to implode in a series of violent political confrontations through the 1990s. The first state to gain independence from the Yugoslav federation was Slovenia, the northwesternmost region of the former Yugoslavia, which fought a brief but decisive war against Yugoslavia in 1991. Croatia, on the other hand, fought a much longer, more drawn out war, but one which ended with similar results. Within a few short years of the end of the Cold War, every republic of the SFRY would be an independent state and Yugoslavia would no longer exist.

While the wars in Croatia and Slovenia were both bloody conflicts, the more serious conflicts, at least from the perspective of the international community, took place in the regions of Bosnia-Hercegovina and Kosovo. These regions were different from the other former members of the Yugoslav Republic as they were not as cleanly defined, ethnically speaking. The populations of these states were more mixed than the others and thus ethnic boundaries were more difficult to draw. Many Serbs lived scattered throughout the Bosnia region (as did many Croats) and they had considered it to be their home for centuries. In addition, these regions were in many ways more important, symbolically speaking, than the other Yugoslav Republics. Therefore, the Yugoslavian government, dominated by Serbian nationalists, was less willing to surrender these regions to the ethnic minorities that sought their independence there. The unique nature of these regions and their relationship to ethnic politics in the region ensured that they would be the subjects of more bitter conflicts that the other parts of Yugoslavia that had sought independence.

This struggle for ethnic control over these territories led to two distinct conflicts, the Bosnian War, which ran from 1992 until the Dayton Accords brokered by the USA were signed in Ohio in December 1995, and the Kosovo War for independence which began in 1998 and effectively ended in spring of 1999 with the NATO bombing campaign of Serbia. (Though it is perhaps better to say that the bombings constituted a hiatus in a conflict that continued for 14 more years—Kosovo declared independence in 2008, but Serbia only agreed to normalize relationships with them in the spring of 2013.) These wars were ethnic conflicts wherein each group sought to grab as much territory as possible for their own group and forcibly removed members of other ethnicities that were living in the region in order to establish ethnic homogeneity. It is an ironic fact that, while there were longstanding tensions, many people living in the region reported no strong feelings of ethnic kinship prior to the collapse of the SFRY. The ethnic violence developed as a result of political manipulation by politicians like Milosevic, who saw ethnic nationalism as a route to political power in post-socialist Yugoslavia. These tactics were used with a measure of effectiveness in Bosnia as each group, but Serbians in particular, sought to carve out an ethnically "pure" homeland.[3]

The war in Bosnia was clearly the more brutal of the two wars. The ethnic makeup of the province of Bosnia was scattered between a majority of Bosnians and a

[3] Though it should be noted that many scholars argue that international financial institutions exacerbated the problems in the region. (Daalder, 1996)

minority of ethnic Serbs. The Bosnian Serb forces, however, had a powerful ally in the government of Slobodan Milosevic next door in Yugoslavia, who styled himself as the leader of the Serb people. In January 1992, the Serbian population of Bosnia declared their independence from the Bosnian majority under the title Republika Srpska and formed a paramilitary organization. Its aim was to defend the Serbians and carve out an ethnically pure space in Bosnia for the Serbian people—often at the expense of those non-Serbs living in the Serb-majority region of eastern Bosnia. Bosnia held a referendum on independence which was boycotted shortly thereafter by the Serbia population. The resulting overwhelming support for independence kicked off a 3-year civil war where the Bosnian Serbs and the Bosnian Muslims each sought to gain control over territory and "cleanse" the areas under their control of any ethnic rivals.

Given the nature of the conflict, it is unsurprising that civilians were often targeted by the various forces in Bosnia and the conflict is marked by a series of civilian massacres. Perhaps these conflicts are best known for introducing the term "ethnic cleansing" ("etnicko ciscenje" in Serbian) into the vocabulary. Ethnic cleansing, which has taken a specific meaning in international criminal law, refers to the forcible expulsion of civilians belonging to a particular group from an area, a village, or a town usually using tactics of threats, forcible deportation, rape, and outright murder. Perhaps the best known of these massacres is the long running siege on the city of Sarajevo. From April 1992 until 1995, the city of Sarajevo, the site of the Winter Olympics only a decade before, was subject to nearly constant bombardment from the Bosnian Serb forces that held the hills surrounding the city. Mortar fire indiscriminately rained down on the city and snipers routinely targeted civilians inside the city, attacking women and children in order to force them out of town. Nonetheless, the Bosniak population of the city refused to surrender to the Serbs and fought back with ferocity. UN peacekeeping forces were stationed in the city, ostensibly to protect the civilian population, but were ineffective, though they did fly in humanitarian relief for the besieged civilians. An estimated 10,000 people were killed in Sarajevo over the course of the siege, which only came to a halt when NATO forces began bombing Serb positions surrounding the city in September 1995. Along with Sarajevo, there were high profile massacres in Visegrad, Srebrenica, Prijedor, and Foča, and many other smaller atrocities. While it is generally agreed that the majority of violence in the Bosnian War was committed by Serbs on non-Serbs, Serb civilians were also at times victims of violence committed by Croats and Muslims in the region with Muslims and Croats also committing acts of violence against each other.

In the middle of the conflict, in February 1993, the United Nations Security Council passed Resolution 808, creating the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY was the first international criminal tribunal created since the end of the Second World War and in many ways marked a dramatic change in the development of international law and international criminal justice. Unlike the hybrid courts that we are studying here, the ICTY is a fully international court operating under the Security Council's Chapter 7 powers. The court was established for "the prosecution of persons responsible for serious violations of

international humanitarian law committed in the territory of the former Yugoslavia since 1991." (UN Security Council Resolution 808, 22 Feb 1993, para. 1) As of this writing, the ICTY, operating out of The Hague in The Netherlands, remains a largely high profile affair that has been intermittently the subject of a great deal of international attention, particularly when key figures like Slobodan Milosevic were in its dock. While it was envisioned as a temporary court for a single series of conflicts, it set the precedent for the formation of future international courts to prosecute highly ranked violators of international criminal law. However, many have suggested that the ICTY had an ulterior motive—it was created in lieu of decisive action on the part of the UN to stop the violence in the former Yugoslavia, and was ultimately only half-heartedly supported by the Western powers that had created it.

The Bosnian War came to a conclusion shortly after the end of the Sarajevo siege with the signing of the Dayton Peace Accords in December 1995. Brokered by the Clinton Administration, the Accords determined that the Federal Republic of Yugoslavia, Bosnia and Herzegovina and Croatia would agree to recognize each other's sovereignty and Bosnia and the Republika Srpska would exist as separate entities within the state of Bosnia. These two entities agreed to certain confidence building conditions with the eye on the formation of a single multi-ethnic Bosnian state. Radovan Karadzic and Ratko Mladic, the civilian military leaders of the Republika Srbska, were both indicted by the ICTY in 1995 for crimes committed during the war, as was Yugoslav president Slobodan Milosevic in 1999. All three were eventually arrested and put on trial before the ICTY.

The final major conflict comprising the dissolution of Yugoslavia took place in 1999 in the autonomous region of Kosovo, located in the southern region of Yugoslavia. Unlike Bosnia, however, Kosovo had always been considered a part of Serbia and remained symbolically important to Serbian identity. Kosovo was the site of the famous "Battle of Kosovo Field" in 1389 where a Serbian prince fought and was eventually defeated by Ottoman forces, putting the Balkans under the sway of the Ottoman Empire for several hundred years. Despite the fact that it ended in defeat for the Serbs, the battle led Kosovo to be described as the birthplace of Serbian culture and made it symbolically important to Serbian identity. While Kosovo was a relatively ethnically homogeneous (approximately 90% Albanian) region of the SFRY, it was never given the political independence that was given to the other ethnic regions that made up the country and its population was tightly controlled by the SFRY government. All of this meant that, as previously with Bosnia, the Yugoslav Federation was not going to surrender Kosovo without a prolonged and bloody fight.

In 1990, after the regional assembly of Kosovo unilaterally declared independence from Yugoslavia, the government in Belgrade dissolved the local government and in a calculated move to change the ethnic balance in the region, began sending Serbians to live in Kosovo. Meanwhile, the Kosovo Liberation Army (KLA) a pro-independence guerilla movement began an armed campaign against Serbia in order to force Serbian forces and allied civilians out of the region. The KLA goaded the Yugoslavian government into a brutal ethnic conflict where civilians were used as the target of choice by both sides. American diplomats denounced the KLA as a terrorist organization, which the Serbian government interpreted as an invitation

to ramp up the suppression of Kosovo. (The KLA, 28 June 1998) Among the most significant violence in the conflict was the so-called "Racak Massacre," where approximately 45 men and boys were murdered by Serbian forces.

Given that NATO and the UN were strongly criticized for allowing violence in Bosnia and the strong public antipathy towards the Serbian government, particularly Milosevic, it was perhaps inevitable that the violence in Kosovo would provoke an international reaction. In an environment of escalating hostilities, Western diplomats sought to broker an agreement between the Serbian government and the Kosovar independence forces. UN Security Council Resolution 1199 (passed on 23 Sept 1998) demanded that "all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo… which would enhance the prospects for a meaningful dialogue between the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership and reduce the risks of a humanitarian catastrophe." (UN Security Council Resolution 1199, 23 Sept 1998, para. 1) The Serbian forces reduced their footprint in the region but the violence and massacres continued and an agreement presented to the Yugoslav government in Rambouillet, France was rejected. While the Security Council had not authorized the use of force in the resolution, it was clear that there was shrinking patience among the principle parties engaged in the negotiations.

The conflict in Kosovo only ended when NATO began bombing Serbia in an effort to get it to withdraw its forces from the region in Operation Allied Force. On March 24, 1999, NATO, led by the US military, began a series of strikes in Yugoslavia that lasted until June 10. The bombings, aimed largely at Serb military targets killed over 1000 Serbian troops along with roughly 500 civilians. (Human Rights Watch, 2000) While the attacks did not have the support of the UN Security Council (which would have required the acquiescence of Serbia's long-time ally, Russia), they were largely supported by European powers. Unfortunately, one NATO bomb errantly hit the Chinese embassy in Belgrade, killing three in early May, setting off a series of violent protests across China. At this point, in June 1999, Yugoslavian forces began to withdraw from the province, paving the way for eventual Kosovar independence 9 years later. UN Security Council Resolution 1244, which demanded that the Federal Republic of Yugoslavia "begin and complete [a] verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable," also created a UN authority for "Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement." This institution, the United Nations Mission in Kosovo (UNMIK) would be the source of the hybrid courts that operated in the region as part of the UN regime there. However, to complicate matters for the UN, in February 2008, Kosovo declared its independence from Yugoslavia and has since received widespread recognition from the international community in general and the EU in particular. This unilateral declaration from Kosovo, now the Republic of Kosovo was rejected by the Yugoslav government which described Kosovo as a "false state," and by the people of Belgrade who threw rocks at the US Embassy there in protest over the move. Since then, the Serbian government (the remaining state of Yugoslavia changed its name to Serbia in 2006) has entered

into negotiations with Kosovo but has pointedly refused to recognize the state of Kosovo, though with Serbian efforts to join the EU underway, recognition may ultimately occur.

Conclusions

As was mentioned at the opening of this chapter, it is dangerous to oversimplify these conflicts. An attempt to provide a straightforward historical account of a complex series of events can carry a great deal of bias and may conceal more than it reveals. This is especially so when these summaries are brief and many of the facts are contested by experts as well as by those who participated in the events in question. Nonetheless, the aim of this chapter has not been to provide a complete account of the events in East Timor or Sierra Leone. Rather, it has been to set the stage for the following chapters where states, politicians, diplomats, prosecutors, defendants, and other stakeholders will seek to grapple with these events through the lens of criminal justice.

In the next chapter, we will examine the political maneuvers and negotiations that led to the formation and structure of the tribunals themselves. In almost every case the tribunal was created through a convoluted and often contentious series of negotiations between the various stakeholders. The structure of the courts, including this staffing, jurisdiction, procedures and funding were almost always the result of a compromise. Nearly all of the figures that we have discussed here, be it individual figures like Hun Sen, or nations like Indonesia and the USA would play some role in the formation of the hybrid tribunals, each trying to have their say in its structure and operation. Other individuals would be primary targets for prosecution by these same courts. However, it should be kept in mind that almost all of these stakeholders went into this negotiation process with some larger ambitions beyond the creation of the tribunal itself, and almost all had a broader political agenda of which the criminal proceedings were only a part.

Chapter 2
Creating the Tribunals

The decision to deal with widespread atrocities through the norms and institutions of criminal justice is first and most notably a strategic one, a choice that presents both local and international policymakers with a wide array of potential risks and rewards. Courts, at least objective courts that adhere to accepted principles of due process, are not easily controlled by political powers and can easily spin out of policymakers' grasps, potentially leading to results that are unsatisfying for the public or politically destabilizing (or both). Uncomfortable questions can be raised and the court itself can become politicized by crafty defendants and their lawyers. It can be converted into a form of spectacle that creates embarrassment and frustration for those disaffected by the conflict who counted on it to provide some form of satisfaction or catharsis. In short, criminal justice is dangerous during unstable times.

There are, of course, alternative responses to mass atrocity, each of which has its own advantages and disadvantages. Creating tribunals with outcomes that are predetermined by political actors (so-called "Vishinskyism") may generate good theater and lead to punishments that some may find satisfying, but these courts can easily generate cynicism among observers. Equally important, such show trials are unlikely to receive political and financial support from influential international actors, like the USA and the European Union, who advocate principles of the rule of law. In addition, there are alternative nonlegal approaches to handling those responsible for violence, each with varying degrees of acceptability, such as truth commissions, amnesties, or even the imposition of extrajudicial punishments. Each of these approaches can produce important results, but none of them is *both* punitive and carries the authority of law that is central to the legalistic ideology of modern statehood. (Shklar, 1964) Thus, alternative approaches to handling these cases, which have been used in many conflicts around the globe also generate their own risks and potential rewards. (Hayner, 2010)

In the previous chapter, we discussed the different conflicts or series of conflicts that led to the formation of the different hybrid tribunals that we will discuss in the remainder of the book. In this chapter, we will turn to the tribunals themselves, looking at the decisions made by the different actors (national, international, and individual) that led to their formation as well as the political and legal challenges

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that each tribunal faced at its outset. In many of these situations, as we will see, the negotiations leading to the formation of the tribunals were fraught with political complexities and calculations. Each collective or individual actor sought the best position for themselves in relation to the others vis-à-vis the hybrid tribunal they were considering. The risks and rewards that could come from creating a hybrid court weighed on the mind of all stakeholders while they were in the process of creating the tribunals.

While some people involved in establishing the hybrid courts sought a just punishment for those most responsible for the violence, in many cases, this value took a back seat to more concrete political and economic calculations. Many actors saw these tribunals as a way to improve the standing of their particular nation within the international community—helping rehabilitate the reputation of nations associated primarily with horrific violence. Others saw it as a tool to gain the political and financial support of wealthier benefactor states or, at a minimum, to avoid the financial punishments that could come from ignoring the wishes of these states, many of whom expected some kind of accountability. Finally, and most cynically, many actors saw these tribunals as a way to punish political enemies and settle scores remaining from the violence and the related political fighting. All of these interests were thrown into the mix of arguments and negotiations in the countries that sought to establish some form of hybrid court.

Not every tribunal went through a torturous process at the outset. While Sierra Leone and Cambodia faced a number of contentious issues at their birth, the tribunals that were created either directly by the UN, namely the tribunals for East Timor and Kosovo, or those created after international justice had already been functioning in the conflict, namely Bosnia, were much more straightforward affairs. In the former set of cases, there was no government in existence that could seek to manipulate the process for their own benefit. In the latter case, the Bosnian state was largely interested in establishing itself as an honest political broker. It had developed a strong enough relationship with the international system that the creation of the Bosnian War Crimes Chamber was more a matter of legal reform than political machination. Of course, as we will see in later chapters, none of this means that there were no efforts to manipulate these courts by interested governments, particularly in the case of East Timor. It just means that their formations were less politically complex, and hence they will receive less attention here.

There are a number of common themes shared by the different tribunals as well as some common considerations that helped shape the tribunals at the outset. On the one hand, with the exception of the tribunals created by the UN transitional authorities, the hybrid tribunals were consciously developed in lieu of larger institutions such as the ICC or the ICTY. That is, many of those who initially pushed for some sort of criminal justice processes in Cambodia and Sierra Leone wished for one of these more purely international courts to be set up to deal with their situations. However, in each case, their requests were rebuffed by a skittish international community which feared the great expense incurred by those courts. This meant that in many of the cases the hybrid courts were a compromise position that was taken only when more elaborate and high profile options were removed from the table.

A second theme involved efforts of stakeholders to control the procedures of the different hybrid courts in order to frame the recent conflict. In different ways each actor sought to influence how the tribunal was organized and staffed so that the relevant actors would have veto power over prosecutorial decisions as well as judicial outcomes. Thus, in many cases and in Cambodia particularly, the court was seen as a way to shape the historical narratives regarding complex historical periods, periods which in many ways lack clear heroes but have villains to spare. For example, jurisdictions were carefully delimited in order to maximize the accountability of some groups and minimize it for others. Thus, the structure of the tribunals was shaped by efforts to change the political narrative of the conflicts that spawned them.

The third, and arguably the most significant, theme of the tribunals involved money. As was previously mentioned, the hybrid courts were in many ways intended to serve as a cheaper option for international justice, cheaper at least when compared with their more conventionally international counterparts. However, despite their low cost, money was still a driving factor in shaping the courts. Not only did money provide influence over the personnel and structure of the courts, it also provided an incentive for many states to involve themselves in negotiations for establishing the hybrid courts. Poor states were willing to participate in the negotiation process because they sought various financial incentives that came with the process. Other states feared financial sanctions for not participating in justice processes. Finally, the fact that all of these tribunals lacked direct funding from the UN or some other permanent source of money meant that the funding was always precarious. While these courts have never functioned as "for profit" industries, even the cheapest courts require a great deal of money and cannot afford to alienate their patrons, meaning that money was integral throughout the formation and operation of the hybrid courts.

Along with these issues, many feared that these tribunals would provide an illegitimate form of ex post facto justice against the accused. In some cases, these tribunals were created long after the conflict had ended and other political compromises had played themselves out. The Khmer Rouge had been out of power for decades when the Extraordinary Chambers in the Courts of Cambodia (ECCC) was created, and while almost everybody agreed that their leaders deserved some sort of accountability and punishment, previous courts, however flawed, had already provided this, in part at least. This is also the case for the Special Court for Sierra Leone (SCSL) where a novel court was invented that some defendants charged was contrary to the Sierra Leonean constitution and contravened previous peace agreements. While there are sophisticated legal arguments that can be generated to legitimize prosecuting particularly egregious offenders decades after the fact, such arguments are often only persuasive to an elite class of international lawyers and to those already unsympathetic to the defendants. The general public, ostensibly those who are the "audience" for transitional justice are often skeptical and jaded about such procedures insofar as they look like improvised justice designed to achieve particularly political ends.

Internationalized courts can often disrupt a delicate legal equilibrium that has been cultivated in many states in the aftermath of intense conflicts. In some cases,

the domestic political or legal system had previously sought to accommodate or prosecute the offenders in other ways. In Cambodia, some of the defendants had already been condemned to death *in absentia* by preceding governments. Others (such as Ieng Sary and Foday Sankoh) had been given amnesties by their governments. As we discussed in the previous chapter, many of the tribunals were formulated in delicate political circumstances that relied upon compromise and innovation: Two things that can chafe against principles of criminal justice. The Lomé Agreement in the Sierra Leone conflict, for example, provided amnesty under domestic law and there were strong arguments made by defendants that this amnesty trumped the jurisdiction of the hybrid tribunals. Moreover, these domestic legal accommodations were made by people in the throes of conflict and were searching for any route to peace and stability—not well-fed foreigners piously harping on the need for "accountability." Although there is no doubt that amnesties are troubling, they have a *prima facie* legal legitimacy which legal professionals find difficult to completely shunt aside. The friction between these two ideals, peace and justice, is a classic dilemma of international criminal justice, but one which comes into particular relief when setting up the hybrid tribunals.

Establishing the ECCC

Cambodia's political turmoil and the suffering of its people did not end with the expulsion of the Khmer Rouge from Phnom Penh and it was a long time before there was serious talk about prosecuting the Khmer Rouge leadership for their years of misrule. The government set up by the Vietnamese after their invasion was a puppet operating under their direction. The Vietnamese, in turn, remained closely allied with the Soviet Union, while the remaining Khmer Rouge forces were supported by the Chinese and, indirectly, by the USA. The Chinese, of course, had long supported the Khmer Rouge and Prince Sihanouk (the Prince had spent much of his time in Beijing while in exile) and the USA wished to bolster its support for China and torment its enemies in Communist Vietnam and in the Soviet Union. This struggle prevented much humanitarian aid from reaching the Cambodian people for years after the fall of the Khmer Rouge and exacerbated the economic problems left in the wake of Khmer Rouge mismanagement. Encamped along Cambodia's northwestern border with Thailand, Pol Pot, Ieng Sary, Ta Mok, Nuon Chea, and the remaining Khmer Rouge troops maintained themselves with the aid of their international backers and Pol Pot remained in control of his organization. The Khmer Rouge was even allowed to continue representing Cambodia in the UN with the vocal support of western governments—a fact which would be bitterly pointed out by opponents of the Cambodia tribunal during negotiations over its structure. This meant that whatever the consequences of their rule and however thoroughly they had been discredited, the Khmer Rouge were still significant players in Cambodian politics. Therefore, prosecuting them would be a near impossibility through the 1980s.

After the Vietnam-backed government took power from the Khmer Rouge, there were some efforts by the new government to confront the atrocities committed by the Khmer Rouge leadership. It is fair to say that whatever their aims were when they entered the country, many Vietnamese were truly shocked by what they found in Cambodia in general and Phnom Penh in particular. The Democratic Kampuchea (DK) government fell so quickly that the retreating Khmer Rouge troops were unable to destroy documents and evidence regarding their activities before withdrawing. The descriptions provided by the first Vietnamese troops to enter the rat-infested grounds of Tuol Sleng, littered with rotting corpses are particularly striking. (Dunlop, 2006)

The new government conducted investigations into the activities of its predecessor and convened a People's Revolutionary Tribunal in 1979. Pol Pot and Ieng Sary were each tried and convicted *in absentia* for the crime of genocide and sentenced to death by the tribunal. By most observers, however, these proceedings were generally considered to be show trials. Critics suggested that the choice of defendants was selective and the conclusions predetermined by the government in order to bolster its legitimacy. (Boulet, 2009) Similarly, the government held a form of truth commission bringing forward statements from victims regarding the crimes committed by their former leaders. This was largely considered to be part of a plan to embarrass the UN into forcing the Khmer Rouge out of their position as the representative for Cambodia in the General Assembly. Like the People's Revolutionary Tribunal, the commission was also considered by most observers to be the product of a deeply flawed process and the statements were never presented to the UN. Nonetheless, the material from the commission would later provide enlightening observations regarding life in DK and the tribunal's conviction of these two figures would play a role in Sary's pretrial proceedings before the ECCC.

The struggle between the Vietnam/Soviet-backed government of Cambodia and the US/China-backed Khmer Rouge rebels led to another 10 more years of fighting. The Vietnamese tried to crush the rebel troops while the USA, China, and their regional allies used the Khmer Rouge as a tool to undermine the Vietnam-backed government. The Khmer Rouge continued to occupy and govern large parts of northern Cambodia, while the People's Republic of Kampuchea (PRK) struggled to normalize the country and establish its own brand of one-party rule. It was only in 1989, as the Cold War ended and the Vietnamese withdrew from Cambodia, that there were serious efforts to reconcile the country's warring factions and to provide a political basis for moving forward. Under the guidance of Hun Sen, a former Khmer Rouge soldier, turned rebel (and ally Vietnam), the PRK was scrapped in 1993 and the "Kingdom of Cambodia" was reestablished as a Constitutional Monarchy. While much of the war was over, Khmer Rouge holdouts still held sway over a portion of northwest Cambodia where it retains power today, though largely shorn of its Marxist ideology and bereft of greater political ambitions.

Over the 14 years following the ousting of the Khmer Rouge from Phnom Penh, many expected (and probably hoped) that the Khmer Rouge leaders would die of natural causes in the Cambodian hinterlands without causing any further distress to the Cambodian people. Beyond calls for trials from the Indonesian and Australian foreign ministers and agitation from some justice-minded NGOs, there was little

political support for putting Khmer Rouge leadership on trial in the new Cambodia[1]. (Edwards, 2005) The agreements reached Paris in 1990 between the various Cambodian forces even went so far as to open the door to reintegrate some members of the Khmer Rouge into Cambodian politics. However, when Khieu Samphan, a former Khmer Rouge leader, returned to Phnom Penh as part of this process, he was assaulted by crowds of angry Cambodians shouting "Murderer!" and "Kill the monster!" and had to be rescued by Cambodian police, while the remaining Khmer Rouge leadership in the city fled. (Shenon, 1991) Despite the lingering public outrage toward the Khmer Rouge, there was little support from the leaders of the Cambodian government (many of whom were former Khmer Rouge officials themselves) for some sort of trial for them. As Cambodian Prime Minister Hun Sen stated while entertaining some of the Khmer Rouge leadership in 1998, many Cambodian politicians simply wished to "dig a hole and bury the past." (Human Rights Watch, 2011)

In the 1990s, however, coinciding with the creation of the ad hoc tribunals for Rwanda and the former Yugoslavia, were changes in the global consensus on justice for the remaining Khmer Rouge. This was particularly the case in the USA. In 1994, the US Congress passed the "Cambodia Justice Genocide Act" which declared that "It is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity." (22 U.S.C. 2656, Part D, Sect. 571-574) The Cambodian Genocide Program at Yale University was established to study the violence in Cambodia (part of the center, the Document Center of Cambodia became independent in 1997). Furthermore, the Act asked the American president "in circumstances which [he] deems appropriate, to encourage the establishment of a national or international criminal tribunal for the prosecution of those accused of genocide in Cambodia." In addition, in 1998 US government attorneys explored the possibility of prosecuting Pol Pot in the USA, but they ultimately determined that there were no legal grounds for such a case. (Scheffer, 2008, p. 3) There was clearly a growing political momentum in the international community for putting the Khmer Rouge leadership on trial.

Nonetheless, there remained a great deal of resistance to this proposal from leading figures within the Cambodian government. The two parties that comprised the Cambodian government at the time, the Cambodian People's Party led by Hun Sen and FUNCINPEC, the Royalist Party led by Prince Norodom Ranariddh, were engaged in political warfare with each vying to recruit former Khmer Rouge members to their side to gain advantage over the other. (Hammarberg, 2001) In 1996, King Sihanouk gave amnesty to Ieng Sary, lifting the death penalty imposed by the People's Revolutionary Tribunal when Sary agreed to peacefully disarm those Khmer Rouge troops who were loyal to him. As one observer stated, "It is almost like a reward for bringing peace and reconciliation. One has to know the magnitude of this breakaway movement. This is practically the beginning of the collapse of the Khmer

[1] One exception in the USA was US Republican Congressman Jim Leach who wrote in The New York Times, "Pol Pot should be tried as one of the great criminals of the twentieth century, not countenanced as the eminence grise behind a new Cambodian government." (Leach, 1989)

Rouge." (Mydans, 1996) The splits within the Khmer Rouge quickly worsened and their position weakened as former leader Son Sen and his wife Yun Yat were executed by Khmer Rouge leaders for treason. Pol Pot himself was then placed under house arrest by members of the Khmer Rouge in 1997 where he remained until he died in April 1998. The disintegration of the surviving Khmer Rouge resistance, along with the growing momentum of an international movement, began to shift the tides in favor of some form of legal accountability for those responsible for the DK era.

Initial efforts at the international level to develop some kind of tribunal for the Khmer Rouge began with the UN Human Rights Commission passing Resolution 1997/49 ("Situation of human rights in Cambodia") which called on the "Secretary-General, through his Special Representative for human rights in Cambodia, in collaboration with the Centre for Human Rights, to examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability." (UN Human Rights Commission Resolution 1997/49, 11 April 1997) In response to the UN resolution, in June 1997 Hun Sen and Prince Norodom Ranariddh sent a letter to the UN requesting help for establishing a court for the remaining Khmer Rouge leadership. The letter went as follows:

June 21, 1997

Dear Mr. Secretary-General,

On behalf of the Cambodian Government and people, we write to you to ask for the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979.

The April 1997 resolution on Cambodia of the United Nations Commission on Human Rights requests: "the Secretary-General, through his Special Representative, in collaboration with the Centre for Human Rights, to examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability".

Cambodia does not have the resources or expertise to conduct this very important procedure. Thus, we believe it is necessary to ask for the assistance of the United Nations. We are aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia.

We believe that crimes of this magnitude are of concern to all persons in the world, as they greatly diminish respect for the most basic human right, the right to life. We hope that the United Nations and international community can assist the Cambodian people in establishing the truth about this period and bring those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion.

Please, Mr. Secretary-General, accept the assurances of our highest consideration.

(signed): Prince Norodom Ranariddh

First Prime Minister
(signed): Hun Sen
Second Prime Minister.

Critics have pointed out that, whatever the merits of the proposal, the timing of this request is suspect: Soon after he sent the letter, Sen seized exclusive power for his party and ousted the first prime minister in a violent *coup d'état* which included the killing of supporters of his political rival. After the coup, he came out strongly in favor of the tribunal. Observers have speculated that Hun's backing of the project, a position that was to prove temporary, was at least in part an effort to divert the Cambodian public and the international community from domestic political turmoil and from his own questionable actions. As Luftglass (2004) puts it: "On July 5, 1997, Hun Sen took power with a bloody military coup, killing more than forty political opponents. Sen was deeply concerned with both asserting Cambodian sovereignty and gaining international credibility. The coup had been planned for months; it is possible that Sen foresaw a means of diverting attention from the coup by pursuing international prosecution of the Khmer Rouge." (p. 907) As another observer stated, Sen, "knew that formally prosecuting top members of Khmer Rouge would be a chance to cast himself as a savior-statesman, the leader who would pacify Cambodia after decades of conflict. It would also be an opportunity to burnish his credentials with Cambodia's foreign aid donors." (Giry, 2012) While Sen supported the tribunal after the coup, he probably had no intention of allowing such a body to come into being, much less prosecute the Khmer Rouge leadership.[2] Luftglass speculates that during this period there was collusion between Sen and the Chinese government to use the Chinese position on the UN Security Council to prevent the establishment of any international tribunal in Cambodia similar to the two ad hoc courts and thereby thwarting the USA and other states pushing for accountability. The quagmire of Cambodian politics was already beginning to undermine the Cambodia tribunal before it had even come into existence.

The domestic and international politics surrounding the establishment of the Cambodia tribunal are complex and many different actors spoke out of both sides of their mouths in the nearly 4 years it took to create it. As Etcheson (2004) described the political landscape in Cambodia and internationally, there were a wide array of different interests and values at stake in debating the prosecution of the Khmer Rouge. (pp. 183–185) Domestically, some opponents of a tribunal (which he labeled "Nativists") believed the court to be degrading to Cambodian sovereignty, others ("Protectionists") believed that it could reveal embarrassing information about the current Cambodian leadership who were involved in the Khmer Rouge, while others feared that the tribunals could destabilize the still unstable country ("Rejectionists"). The aims of Cambodian supporters were similarly complex: Some sought material benefits that would emanate from such an institution, some sought to help

[2] It is also worth noting that at times Sen had discussed expanding the scope of the tribunal's jurisdiction to include US bombings of Cambodia and Chinese support for the Khmer Rouge, proposals that would have been the death knell for international support for the tribunal.

establish the rule of law in Cambodia, and still others simply craved a "pound of flesh" from their political enemies who were allied with the Khmer Rouge.

Beyond Cambodian policymakers, there were many other actors with an interest in the formation of such a tribunal, and therefore, had strong feelings about the actions of the UN. As we have seen a number of nations had played a supporting role in the Cambodian atrocities or in their aftermath and feared embarrassment or political blowback for their policies. The Chinese, in particular, long-term allies of Khmer Rouge wished to quash such a tribunal and threatened to use their veto powers in the UN Security Council to do so. The remaining Khmer Rouge leadership sought a role in Cambodian politics and many political players still saw them as important potential supporters for their side in a tough partisan political world—all of which argued against supporting a tribunal. One of the few groups that strongly and almost unequivocally supported the idea of the tribunals was the Cambodian public, which responded positively to the idea by 75–85 % in public surveys despite having had little experience with formal justice systems. (Etcheson, 2004, p. 189) The politics around the formation of the tribunal were complex both domestically and internationally.

One further issue in the politics surrounding the establishment of the ECCC was the lure of foreign aid. Cambodia, still destitute after years of war and mismanagement, remained highly dependent on foreign assistance in order to continue operating and thus had to accommodate the, at times conflicting or imprudent, demands of its foreign benefactors.[3] Under such circumstances, the Cambodian leadership had become skilled at manipulating and placating foreign demands on a variety of issues, including those involving justice for the Khmer Rouge. As Etcheson observed, "The mere prospect of Khmer Rouge trials produced a financial windfall for the Cambodian government. The possibility that a tribunal might be established keeps billions of dollars of assistance flowing into Cambodia, both from those who oppose[d] as well as those who support[ed] the idea of a trial for the Khmer Rouge." (Etcheson, 2004, pp. 202–203) To this end, the Chinese, Americans, Japanese, and Australians, each major benefactors of the Cambodian government, played a role in shaping Cambodian policy toward the Cambodian tribunal as Sen and the Cambodian government sought to placate their interests and keep the spigot of international aid open.

Despite these contradictory international and domestic pressures, the UN began to respond to the request from the Cambodian leadership. Some of this came from the Secretary General, some from the Security Council, but the most significant contribution came from the General Assembly. In response to the June 1997 letter and 8 months after Sen's violent coup, the General Assembly passed Resolution 52/135 (On the "Situation of human rights in Cambodia") in December of that year, requesting that "the Secretary-General … examine the request by the Cambodian authorities for assistance in responding to past serious violations of Cambodian and international law, including the possibility of the appointment, by the Secretary-

[3] Cambodia stands among the Asian countries most dependent upon foreign assistance. Since 1995, 90 % of Cambodia's public expenditures have been derived from foreign aid. (Sato et al., 2011, p. 2093)

General, of a group of experts to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability." There was some effort by the USA to put the weight of the Security Council behind an International Tribunal for Cambodia, but ultimately resistance from China and Russia prevented any Security Council action on the matter. (Reydams et al., 2012, pp. 50–51)

This General Assembly resolution led to a report from Secretary General Kofi Annan's representatives, raising the possibility of bringing the remaining Khmer Rouge leadership to trial. After examining both the history and current political situation of the Khmer Rouge at the time, as well as the *prima facie* case against its leaders, the experts advocated creating a tribunal along the lines of the two extant ad hoc tribunals for those most responsible for the atrocities committed in DK. It is particularly interesting to note that the panel initially rejected the idea of a hybrid tribunal out of a fear that it could face interference from Cambodian authorities whereas a UN Tribunal with Security Council backing would not face such a problem:

> The key concern [of a hybrid tribunal] is that the negotiation of an agreement and the preparation of legislation for and its adoption by the Cambodian National Assembly could drag on. Many issues concerning the role of the United Nations would be part of this negotiation, and no progress could be made until all were settled. The Cambodian government might insist on provisions that might undermine the independence of the court …. In contrast, a resolution of the Security Council (or even the General Assembly) is likely to move far more expeditiously. While the members of the Council will need to consult with the Cambodian government, the burden of going forward will fall upon the Council rather than the Cambodian government. (Group of Experts for Cambodia, 1999, para. 190[4])

Thus, the most effective and prompt way to ensure that there was some measure of impartial justice for the crimes perpetrated by the Khmer Rouge was an international tribunal operating independently of the Cambodian government. Such a tribunal could be created by the Security Council and would work alongside an alternative form of "truth telling mechanism" such as a truth commission "to provide a fuller picture of the atrocities of the period of Democratic Kampuchea." However, given China's role as a permanent member of the Security Council and its keen interest in preventing embarrassing details about its role in the DK from surfacing, there was little likelihood that the report's recommendations would have been implemented, whatever their soundness.

At the same time the Group of Experts was diligently preparing its report for the Secretary General, Sen "switched" his views toward prosecuting the Khmer Rouge leadership and did so in a dramatic fashion. In December 1998 Sen met with Chea, Samphan, and Sary (among the top remaining Khmer Rouge officials) in his home on the outskirts of Phnom Penh. As Ambassador Hammarberg describes the nature of this meeting:

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[4] A great deal of the report has been expanded and elaborated upon in Ratner et al. (2009, pp. 227–328). Ratner was one of the original members of the Group of Experts tasked with writing the report.

> In a symbolic sense this was a major event in Cambodian modern history. Though there was no doubt that the two old men had capitulated and came to pay their respect, Hun Sen appeared to turn the occasion into one of reconciliation and forgiveness. His statements were controversial and even took some of his ministers by bitter surprise. One metaphor he used was that "the time had come to dig a hole and bury the past" which appeared to be at odds with his support for a tribunal and the principle of justice. (Hammarberg, 2001)

He wrote a letter to the UN describing his new views regarding accountability:

> We have never rejected the accountability of the Khmer Rouge leaders for the crimes of genocide in Cambodia. We just want, however, to caution that any decision to bring the Khmer Rouge leaders to justice must also take into full account of Cambodia's need for peace, national reconciliation, rehabilitation and economic development for poverty reduction. Therefore, if improperly and heedlessly conducted, the trials of Khmer Rouge leaders would panic other former Khmer Rouge officers and rank and file, who have already surrendered, into turning back to the jungle and renewing the guerrilla war in Cambodia. (as cited in Hammarberg, 2001)

In lieu of criminal prosecution, this same letter suggested South Africa's Truth and Reconciliation Commission (TRC) could serve as a model for dealing with the remaining Khmer Rouge. (Hammarberg, 2001) A second letter to the UN in March 1999 suggested that, given the complete collapse of the Khmer Rouge (Ta Mok was the only significant surviving figure who opposed the Cambodian government), there was no longer any reason for an international court.[5] Sen's "change of heart" over the matter of criminal prosecution was only one of several moves that the wily prime minister would make in an attempt to both placate the Khmer Rouge leaders and frustrate the UN representatives, all the while claiming that his views had not changed. In March 1999, Sen declared that he was no longer interested in negotiating with the UN over an international tribunal for the Khmer Rouge. (Hammarberg, 2001)

Given that the resistance from Sen's government, as well as the impasse at the Security Council, prevented the Secretary General from following the Expert Group's suggestions and given that international and domestic pressure persisted on Sen to find *some* means to deal with the Khmer Rouge, an alternative solution had to be found. A few months after the collapse of the March meeting, both sides agreed to support the formation of a tribunal that was "international in character" though legally, institutionally, and financially distinct from the ad hoc tribunals. The idea, suggested by a number of different parties involved in the discussion, was a Cambodian tribunal with an international component. The hope was that the international presence would ensure that recognized principles of procedural fairness and the rule of law were followed, as well as preventing undue political interference in the proceedings from domestic interests. These legal principles would be protected in the arrangement of the court by including non-Cambodian personnel as courtroom

[5] As Ambassador Hammarberg (2001) describes Sen's approach during this period: "It appears that the tribunal had been considered as a means of defeating the Khmer Rouge. When this goal now had been achieved through other means, there was no need to try anyone else than the one person who had refused to surrender: Ta Mok. When referring to the process against him, international standards were not mentioned."

actors (lawyers and judges) alongside qualified Cambodians. As Hans Correll described this idea, the tribunal was to be "a Cambodian court with the participation of international judges and prosecutors" (Hammarberg, 2001) and therefore independent of Sen and other Cambodian parties. Adherence to principles of fairness and impartiality would be a necessary condition for international support and (more importantly) international funding for this tribunal. On the other hand, the Cambodian presence would help make it a Cambodian court, and would, therefore, respect the sovereignty of a state that had suffered a great deal at the hands of foreign powers. Given the different forces prevailing on both the Cambodian government and on the UN, it is unsurprising that some form of compromise was reached. Supporters hoped that a Cambodian court with international actors would ensure impartiality and an unbiased application of the law, thus appealing to all sides.

With an institution like this in mind, the Secretary General's representatives began negotiations with the Cambodian government in July 1999 to determine the precise contours of this tribunal—the first one of its kind. (UN Secretary-General, 15 March 1999, p. 3) In addition, Cambodian legislators began negotiating with a group of international legal experts from the UN on the drafting of a Cambodian law that would create the legal space for such an institution, now called the ECCC. The panel of UN experts was led by Ralph Zacklin (who also played an important role in the formation of the SCSL) and Correll. The plan was to pen a Memorandum of Understanding (MoU) between the UN and the Cambodian government as soon as the Cambodian legislature passed a law that matched the expectations of the UN. The first draft of the Cambodian law to create the ECCC for the prosecution of crimes committed during the period of DK was presented to the UN in August 1999. At the same time, a UN delegation went to Cambodia to begin to address the material and logistical aspects of creating the court. These were to be the first stages of an extensive and frustrating process that would drag on for another two and a half years before achieving any kind of resolution.

At the same time, the Secretary General's representatives were negotiating with the Cambodian government regarding the Chambers, there were several important domestic developments inside Cambodia as well as some issues abroad that further impacted the tribunal. A number of Cambodians living in Europe used the extraordinarily broad jurisdiction of the Belgian criminal justice system at the time to press charges against Khieu Samphan, Nuon Chea, and Ieng Sary. (The International Center for Transitional Justice, 2008) In addition, a number of former Khmer Rouge leaders were arrested by the Cambodian government. Among the "biggest fish" caught was Ta Mok ("Grandfather Mok"), a Central Committee member of the Khmer Rouge who had fallen out of favor with his comrades. These events put further pressure on negotiations—something had to be done with the surviving DK leadership. The only issue was whether or not they would be tried with the help of the UN or in some other form.

There were three significant points of contention between the UN representatives and the Cambodian government that arose during the tribunal's negotiations. The first one involved the legal status of the amnesty that was given to Sary by King Sihanouk in 1996 and whether this amnesty was to be honored by the new tribunal.

The second, more pressing issue was the composition of the ECCC, that is, how the tribunal could be constructed and staffed in such a way that it would be both authentically Cambodian and also international in character, ensuring that it remained a domestic institution but was shielded from political manipulation by the Cambodian government. The third issue was the legal status of the Chambers vis-à-vis the rest of the Cambodian court system—how the Chambers would relate legally to other courts, as well as the procedures used by ordinary Cambodian courts. At the time, the Cambodian legislature was coy about whether or not Sary was protected from the ECCC by the King's amnesty.

The second issue dealt more directly with the independence of the tribunal in general: It was a central concern of the UN representatives that the ECCC be independent of political pressure from the Cambodian government or from other actors. This concern could only be addressed by ensuring that key personnel were not subject to the authority of the Cambodian government. The Cambodian government wished to keep control over the court and make it primarily a Cambodian affair, while the UN delegation insisted upon an independent body that was not beholden to the regular Cambodian judicial system or to the government. One of the central ways that they wanted to ensure this independence was to have a majority of non-Cambodian judges sit on the trial bench. As Zacklin himself stated,

> If the trial of the Khmer Rouge leaders is to meet international standards of justice, fairness and due process of law, and gain the support and legitimacy of the international community, it is vital that the international component of the tribunal be substantial and that it be seen to be effective on the international as well as the national plane. This cannot be achieved by merely adding a number of foreign judges to the composition of the existing court system. Only a special, *sui-generis* tribunal, separate from the existing court system, in which Cambodians and non-Cambodians would serve as judges, prosecutors and registry staff accomplish this. (Hammarberg, 2001)

The Cambodian government was not willing to allow the majority of the judges or prosecutors for the ECCC to be foreigners and thereby relinquish control over its proceedings. The Cambodian law establishing the court, entitled "The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea," insisted that Cambodian judges be in the majority, that the President of the Chamber be Cambodian, and that the President be authorized to appoint clerks for the Chamber. (Meijer, 2004, p. 219) The one compromise that the Cambodian government gave to the UN was the provision in the law that, while the Chambers will strive for unanimity in its rulings, any decision of the Chambers would require a "supermajority" of judges, meaning that the assent of at least one foreign judge would be required. (Meijer, 2004, p. 219)

While the supermajority approach solved the technical matter of how to ensure that there was substantial input from the international actors at the ECCC, this solution came with its own share of issues. As Hammarberg pointed out, such an arrangement created two distinct problems. On one hand, it fostered an oppositional structure among the judges, effectively separating the two types of judges into separate "blocks" with different and possibly opposing interests. In addition, it could

potentially create a situation where a majority of judges vote in one direction, but, lacking a foreign judge, cannot act on this decision.

> The "super majority" notion… carries an implicit notion of there being two categories of judges which would be an unfortunate perception even in more normal circumstances. Such a notion of two 'sides' seems to be based on a lack of trust which ought to be handled more directly. Also, the model could in real life lead to stalemate situations in which there would be a majority, but not a large enough one for a decision.[6] (Hammarberg, 2001)

While in some ways this structure created more accountability for the domestic legal system of Cambodia (which all international observers agreed was deeply flawed), this solution also created a potential for further legal mayhem, a potential that was ultimately fulfilled.

There was a third, more technical matter at issue in the discussions between the UN and the Cambodian government: The precise legal status of the ECCC itself and its relationship with the UN and the Cambodian government. Correll, the UN representative, was adamant that the body be an international body and that the agreement between the UN and the government of Cambodia be the controlling document, whereas Cambodia sought to place Cambodian law at the top of the tribunal's legal hierarchy. As Correll put it across during a press conference:

> The ultimate issue is that unless the whole concept of these Extraordinary Chambers is governed by an agreement between the United Nations and the Government, the United Nations cannot enter into this, because it will leave the field open to the Government in Cambodia to make whatever changes they see fit in the future. And this is not the way the United Nations would enter into an agreement with a member state. (As cited in Jarvis, 2010, p. 619)

A court solely under the authority of the Cambodian government, giving that government total control of its operations while maintaining some kind connection to the UN (presumably for credibility and funding), would put the international body in an untenable situation of having responsibility for but not authority over the tribunal, potentially giving its proceedings undeserved international credibility.

The talks around the structure of the tribunal were drawn out and extensive, lasting for over two and a half years until the Secretary General finally withdrew from negotiations in February 2002, (Shraga, 2004, p. 17) stating that "as currently envisaged, the Cambodian court would not guarantee independence, impartiality and objectivity, which is required by the United Nations for it to cooperate with such a court." (Mydans, 2002) In a later report to the General Assembly, the Secretary General used harsher language (by UN standards) to describe the breakdown of negotiations:

> Throughout those previous negotiations, the Cambodian Government had exhibited a lack of urgency, together with an absence of the active and positive commitment to the process that would be essential when it came to implementing any agreement and to establishing the Extraordinary Chambers, making them operational and ensuring their sustained operation. (UN Secretary-General, 31 March 2003, p. 6)

[6] For more on this point see de Bertodano (2006).

In response, the Cambodian government and other international powers implored the Secretary General to reconsider his decision and the government of India even went so far as to offer to support a hybrid tribunal *without* the cooperation of the UN. Other states became involved and a year later in February 2003 the General Assembly passed Resolution 57/228A ("Khmer Rouge Trials") which requested that the Secretary General resume negotiations "without delay" to establish the ECCC with the stipulation that the government of Cambodia "ensure that the Extraordinary Chambers exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law." (UN Secretary-General, 31 March 2003, p. 6) The resolution did not spell out the precise composition of the court, but did emphasize, "the importance of ensuring the impartiality, independence, and credibility of the process, in particular with regard to the status and work of the judges and prosecutors." (UN Secretary-General, 31 March 2003, p. 6) In essence, the General Assembly forced the Secretary General's hand: The UN was going to back the Cambodian government whether Kofi Annan liked it or not.

During this second round of negotiations, the Secretary General relented on the issue of judges. As he stated in his report to the General Assembly, "It was clear to me, then, that the only agreement that would be possible to negotiate with the Government was one that accepted the structure and organization of the Extraordinary Chambers foreseen in Cambodia's Law of 10 August 2001." (UN Secretary-General, 31 March 2003, p. 10) The Trial Chambers would consist of five judges: three Cambodians and two international judges, with a "supermajority" necessary for any decision.

The final agreement between the UN and the Cambodian government (6 June 2003) also clarified the relationship between the expectations of the UN (as manifested in the agreement) and the Cambodian Law establishing the ECCC—the third issue mentioned above. As Article 2 of the agreement spells out this relationship:

2. The present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended. The Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.

3. In case amendments to the Law on the Establishment of the Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by consultations between the parties.

And Article 31:

31. The present Agreement shall apply as law within the Kingdom of Cambodia following its ratification …

As Meijer points out, these two sections of the agreement point to a central dichotomy in contemporary international law: *dualism* versus *monism*. (Meijer, 2004, pp. 210–211) (Meijer himself describes the situations as a type of moderate dualism.) Articles 2 and 3 present a dualist picture of the law insofar as the agreement expects the Cambodian government to pass laws that cohere with the agreement while Ar-

ticle 31 remains monist in character: The agreement is automatically incorporated into Cambodian law upon being ratified by Cambodia.

While it is obvious that the Secretary General still had serious reservations about the ECCC after the end of the second round of negotiations, at the end of March 2003 he nevertheless reported to the General Assembly that he had reached an agreement with the government of Cambodia. In this report, the Secretary General described the agreement as a "considerable improvement" over preceding drafts, but included some stern cautions:

> The negotiations which resulted in the elaboration of the text of the draft agreement were protracted and, at times, difficult. There still remains doubt in some quarters regarding the credibility of the Extraordinary Chambers given the precarious state of the judiciary in Cambodia. … It is worthwhile noting that, under the terms of the draft agreement, any deviation by the Government from the obligations undertaken could lead to the United Nations withdrawing its cooperation and assistance from the process. (UN Secretary-General, 31 March 2003, p. 1)

The Secretary General estimated that the tribunal would require approximately $ 18.2 million from the international community in order to cover personnel costs plus additional funds for operations and travel for its expected 3-year life span—it has lasted significantly longer than this and its actual budget has dwarfed this initial estimate. (Half of the Extraordinary Chambers' budget was to be covered by the Cambodian government.) In order to maintain its ability to function, the Secretary General asked that the ECCC be funded by the UN (through "assessed" contributions) rather than by voluntary contributions from interested nations as, "The operation of the court should not be left to the vagaries of voluntary contributions." (UN Secretary-General, 31 March 2003, p. 18) As we will soon see, the issue of funding has plagued almost all of the hybrid tribunals, but nowhere has the problem been as severe as in Cambodia.

On May 22, 2003, the UN General Assembly passed Resolution 57/228B ("Khmer Rouge trials") which approved the agreement between the Secretary General and the Cambodian government but rejected the Secretary General's argument for assessed contributions, making the funding of the tribunal subject to the voluntary contributions of individual states. As part of the resolution, the UN signaled its doubts about Cambodian leadership by including a statement in the agreement that the UN would walk away from the ECCC if the Cambodian government altered the Chambers' fundamental character:

> Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement. (Article 28)

A month later both parties signed the agreement and 10 days after that it was approved by Cambodia's National Assembly. Much of the remainder of 2004 through 2005 was spent raising sufficient funds for the tribunal, a problem that was exacerbated when the Cambodian government announced that it lacked funds for covering its half of the tribunal's cost.

For its part, the Cambodian government passed the law establishing the ECCC in August 2001. This document, outlining the structure of the Chambers, became a point of contention in future UN–Cambodian negotiations as the Cambodian government refused to change it in order to meet the UN demands regarding this structure, regardless of what was set out in the UN–Cambodia agreement signed 2 months earlier. As the Cambodian foreign minister described the attitude of his government, "While the Articles of Cooperation (the Agreement) may clarify certain nuances in the Law, and elaborate certain details, it is not possible for them to modify, let alone prevail over, a law that has just been promulgated [by the Cambodian legislature]." (Statement by UN Legal Counsel, 8 Feb 2002) Returning to the issue of monism and dualism, the government argued that the agreement between the UN and the Cambodian government could not change the Cambodian tribunal without a separate piece of domestic legislation (which would require the consent of Sen). Thus, while nominally a mark of progress, in practice, the Law establishing the Extraordinary Chambers further hamstrung negotiations and delayed the Chambers' founding.

The judges for the ECCC were sworn into office in July 2006 and promptly set about drafting the final major document for the court: The Chambers' Internal Rules (IR). These rules would lay out in detail the powers of the various actors at the tribunal, as well as the procedures they were expected to follow in operation. As with the earlier phases of establishing the tribunal the drafting of the internal rules was a contentious one, lasting 11 months. (Starygin, 2011, p. 21) Reportedly, the disagreement was (characteristically) between the international and the domestic judges and revolved around the precise nature of the standards to be applied in the ECCC chambers. While the agreement and the Cambodian law both establish clearly that the ECCC is a part of the Cambodian justice system,[7] international participants believed that further protections were necessary for the tribunal to be considered legitimate by international standards as "Cambodia is perceived as not having a good reputation for the application of human rights norms to criminal proceedings."[8] (Acquaviva, 2008, p. 130) As You Bun Leng, the Cambodian Co-Investigating judge, described the dispute, "They [ECCC international judges] demanded international standards without considering adapting Cambodia's procedures to international standards in a way acceptable to both sides."[9] The first version of the IR was accepted for the Chambers in June 2007, making the court ready for hearing cases.

[7] For example, Article 12(1) of the Agreement states that, "The procedure [of the ECCC] shall be in accordance with Cambodian law."

[8] For a more detailed account of the legal considerations behind the drafting of the Internal Rules see Sluiter (2006).

[9] Interview with You Bun Leng, Co-Investigating Judge, ECCC, SOmne Thmey (Trans: Development Weekly), June 2007. Cited in Starygin, Stan, "Internal rules…", footnote xiv (p. 37).

Creating the SCSL

The formal impetus for the SCSL was a June 2000 letter from President Kabbah to the UN Secretary General requesting the formation of a tribunal "to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages." (UN Secretary-General, 12 June 2000) In response to the request, 2 months later, the UN Security Council passed Resolution 1315, officially authorizing the UN Secretary General to begin establishing the Special Court. (While these initial developments mark the legal beginning of the Court, in reality it had been "in gestation" for 2 years prior. [*Reliefweb*, 9 Sept 2002]) The text of the resolution called on the Secretary General to "negotiate an agreement with the Government of Sierra Leone to create an independent special court." (UN Security Council Resolution 1315, 14 Aug 2000) This, in turn, led to negotiations between the UN and the government of Sierra Leone both in New York and in Freetown (Sierra Leone's capital), the latter of which were led by the UN Assistant Secretary-General for Legal Affairs Ralph Zacklin.

As with Cambodia, the initial vision for the tribunal (prior to the passage of UN Security Council Resolution 1315) was an independent, Security Council-backed ad hoc tribunal. Although the letter from Kabbah refers to the ICTY and the International Criminal Tribunal for Rwanda (ICTR) as models for the Sierra Leone Court, the Security Council itself rejected importing the ICTY model directly to Sierra Leone.[10] There were a number of political and financial considerations behind this decision. At the time of the resolution, there was a perception that these previous tribunals were too slow and expensive, and therefore few states were willing to take on the large financial burdens of supporting a third tribunal of this kind. At the time that the SCSL was being contemplated, the indictment lists for the ICTY and ICTR were rapidly expanding and the tribunals seemed to have no clear end point in sight. Their size and complexity led them to operate very slowly, frustrating the observers. As Dougherty puts it, "Each tribunal suffers its own particular difficulties, but there is a core set of criticisms routinely leveled at both: they are expensive, enormous, slow, inefficient and ineffective." (Dougherty, 2004, p. 312) At the time the Sierra Leone war was winding down, ICTY and ICTR expenses accounted for approximately 10 % of the total UN budget and the UN had called upon the ad hoc tribunals to wrap up their prosecutions by 2008. (Dougherty, 2004b, p. 312) This meant that there was little support for returning to the systems in place in The Hague, The Netherlands (ICTY) and Arusha, Tanzania (ICTR).

UNSCR 1315 clearly stated that the Sierra Leone court was to be "an independent special court" that would have jurisdiction over those "who bear the greatest responsibility" for war crimes, crimes against humanity and other serious violations of international law. It further stipulated that it would have jurisdiction over "crimes

[10] Indeed, the US Ambassador the UN, Richard Holbrooke asserted, 'some form of extension of the international war crime umbrella to cover these odious people must be undertaken." (Crossette 2000)

under relevant Sierra Leonean law committed within the territory of Sierra Leone." (UN Security Council Resolution 1315, 14 Aug 2000) This notion of a "Special Tribunal" came largely from the USA, although other states were purportedly involved in the process. There were a number of reasons for favoring such an approach over that of the ICTY and ICTR. Financially speaking, the funding for the court could be solicited from states and thus would not be dependent upon the general UN budget. This allowed the court to begin operations without securing such UN funding. This approach further allowed the USA to avoid working within the framework of the ICC, which was disliked by members of the US government, which was headed by President George W. Bush at the time, while simultaneously proving its support for international justice.[11] As Cerone (2009) puts it, "In the SCSL, the Bush Administration saw an opportunity to build an international justice mechanism that would conform more closely to the model espoused by the U.S. as preferable to the ICC." (p. 168) The SCSL had few of the features that the USA has considered so odious in the ICC: International peacekeepers were to be granted immunity from prosecution and the Security Council was given the power to override any indictments issued by the SCSL's prosecutor. These factors, along with the fact that the tribunal was in many ways "good politics" in America, meant that the USA would provide strong political and financial support for the SCSL during the course of its operations.[12]

As a result of the resolution, the UN Secretary General began negotiating the structure of what was to become the SCSL with the government of Sierra Leone. The agreement that created the tribunal (formally known as the "Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone") was signed by the Secretary General and by Solomon Berewa, Sierra Leone's Attorney General and Minister for Justice as well as by UN Under-Secretary-General for Legal Affairs, Correll, on January 16, 2002. During the ceremony, Correll implored the people of Sierra Leone and its "traditional leaders" to cooperate with the court and expressed hope that, "the Special Court for Sierra Leone will serve as an important contribution to the healing process that this beautiful country must undergo to be able to create a better future for those who live here." (Correll, 6 Jan 2002) Annexed to the Agreement was the Statute of the Special Court which set out the basic structure of the Special Court—which we will discuss in further depth in the next chapter.

The SCSL, then, is the creation of a treaty between the UN and the government of Sierra Leone, giving it a legal status that differs in many ways from the ad hoc tribunals that preceded it. The Statute of the SCSL clearly establishes the Court's legal primacy over Sierra Leone's national courts and "at any stage of the procedure, the Special Court may formally request a national court to defer to its competence," (Article 8) but it has no power to compel other states beyond Sierra Leone to comply with its requests. This means that an accused individual could flee abroad and find a safe haven if the government that offered asylum does not wish to return the

[11] For a lengthy study of the relations between the US and international justice (with some brief discussion of the SCSL see Cerone (2007).

[12] For a study of the US attitude towards the SCSL, see Cerone (2009).

individual to Sierra Leone—a serious flaw given the international nature of the conflict and the fact that many of the most culpable suspects were foreign nationals. These issues did not trouble the ad hoc tribunals: As Security Council created entities, the ad hoc tribunals did have the power to compel extradition and could compel states to comply with its orders under the Security Council's Chapter VII powers to maintain international peace and security.

However, as Schabas (2006) pointed out, the distinction between the different tribunals was in many ways "more theoretical than real." (pp. 58–59) Simply put, neither brand of court had any self-generated power to enforce their demands on governments regardless of their legal relationship with the UN Security Council. None of them had a military or police force that could force unwilling states to comply with their requests or rulings. In order to impose their will on an uncooperative government, they would have to request assistance from the Council. "Like the two ad hoc tribunals, there is nothing preventing the Special Court from appealing to the Security Council to assist it, nor does anything stand in the way of the Council complying with such a request, aside from the omnipresent political considerations. For this reason, the concrete position of the Special Court does not necessarily seem to be very different from that of the ICTY and ICTR." (Schabas, 2006, p. 59) Whatever it said on paper, there was effectively no difference between the two types of tribunal: they had different nervous systems, but were attached to the same muscles, namely the Security Council. As we will see, the lack of powers given to the SCSL created legal and political problems when the prosecutor sought to arrest his most powerfu already mentioned, the previous ad hoc l target, Charles Taylor, who avoided setting foot on Sierra Leone territory. After losing power in Liberia, Taylor fled to Nigeria with a guarantee from the Nigerian government not to extradite him to the Special Court. It is highly debatable whether a more traditional ad hoc tribunal would have faced similar challenges.

There were also some "cultural" (for lack of a better word) and institutional differences between the Special Court and the ad hoc tribunals that resulted from the former institution's unique legal status. For example, the SCSL was more closely tied to Sierra Leone's preexisting legal system and bureaucratic structures, giving its brand of justice a more domestic flavor, one of the appealing aspects of hybridity discussed in the first chapter. Moreover, the Government of Sierra Leone had a larger say in personnel and administrative decisions for the tribunal than one would find in international courts which were usually staffed by a cadre of international experts who are entrenched within the international bureaucracy and had no real relationship with the international court. (Jallow, 2003, p. 151) As we will see, the organizational structures of international institutions and their links to the domestic culture of the state being investigated were very important for the sense of "ownership" over the tribunals. By linking the SCSL to the domestic system and staffing it, to the degree possible, with domestic personnel, such a tribunal could provide a credible form of transitional justice.

An important concern for those involved in establishing the SCSL was finding a reliable source for funding the court's operations. Financial concerns clearly had a significant impact on the final structure of the tribunal. There are good reasons

to believe that the Court's funding sources may have dictated the behavior of the prosecutor and the judges, as we will see when we discuss the case of Muammar Gaddafi. (Cryer, 2001, p. 439) As was already mentioned, the previous ad hoc tribunals had both gone far over budget and faced serious problems securing funding, which in turn hampered their ability to function.[13,14] However, this dispute was not simply a matter of states understandably wishing to keep the notoriously lax UN financially in line. Financial resources had a direct influence on the independence of such a tribunal, as prosecutions could be affected by fears about its impact on the budget of the court. In his letter, the UN Secretary General had insisted upon a regular source of funding that would have allowed it to function independently of the whims of the various states. (Dougherty, 2004a, pp. 318–319)

A great deal of the early struggle surrounding the establishment of the SCSL was between the Secretary General and the Security Council and centered on this subject of funding. The court was ultimately dependent on voluntary funding from states and its budget was significantly lower than those for the ad hoc tribunals—the total budget over the first 3 years of operations was set at $ 57 million, while the ad hoc tribunals' budgets were both almost twice this amount *for a single year*. (Dougherty, 2004a, p. 320) As Dougherty recounts, these budgetary conflicts were so entrenched that they delayed the court's operations for about 6 months as the Secretary General refused to commence operations without having secured funding pledges for the first 3 years of the court's operations.[15] Schabas points out that "this 'lean' version of an international tribunal … benefitted from much of the acquired experience in The Hague [the ICTY] and Arusha [the ICTR], including a staff of whom many had worked for the other tribunals."[16] (Schabas, 2006, p. 39)

Beyond the issue of its funding, there were other significant disagreements in these early planning stages for the tribunal. One was the potential subjects for prosecution. The Secretary General sought a wide scope of potential defendants, prosecuting "those most responsible" for the war, and the Security Council preferred a more limited scope, only prosecuting those "who bear the greatest responsibility" for the war.[17] The limited jurisdiction preferred by the Security Council tied into the conflict over the SCSL's funding as the financial constraints on the SCSL would most likely limit the number of people the court could process. The trials were sure

[13] There is some discussion about whether or not the funding for the SCSL impacted on the decision of the prosecutor to effectively ignore Gaddafi's role in the conflict. Some observers speculatethat the prosecutor feared losing support from the UK if they pursued the Libyan dictator (Schabas 2011).

[14] See for example, the ICTY 1994 Yearbook (pp. 90–91), cited in Cryer (2001, p. 439).

[15] In 2004, the Secretary General reported that, "my doubts about the sustainability and security of the court's operations being financed through voluntary contributions have been borne out" ("Report of the Secretary General on the rule of law and transitional justice in conflict and post-conflict societies," August 3, 2004S/2004/616).

[16] As we will see in later chapters, one of the criticisms of the SCSL is that it relied too heavily on foreign, largely western practitioners and failed to adequately integrate with the domestic legal community.

[17] This correspondence would later be brought up in the Trial Chambers during a preliminary decision in the CDF case.

to be lengthy, expensive, and involve many pre-trial, trial, and appellate hearings. There was some discussion of ameliorating these expenses by linking the Appeals Chamber for the SCSL with a joint ICTY–ICTR Appeals Chamber. This would have the benefit of providing some clear doctrinal consistency between the ad hoc tribunals and the SCSL, but presented some serious legal, logistical, and (again) financial concerns that were too great to be overcome: The SCSL was in many ways a part of the Sierra Leonean criminal justice system and was too closely linked to it to simply be grafted onto the ad hoc tribunals' appellate system.

Although the Security Council had requested that the Secretary General consider a possible alternative host state for the tribunal (UN Security Council Resolution 1315, 14 Aug 2000, para. 7), it was decided that the court would be located within Sierra Leone itself. The significance of this decision should not be under-emphasized. The ad hoc tribunals were located outside of their respective countries making them both symbolically and literally distant from the sites of the conflicts that they are dealing with. This decision was even more significant given the fragile state of Sierra Leone in the early years of the tribunal and the potentially tumultuous consequences of prosecuting high profile individuals, many of whom still had significant numbers of followers in the areas around the courthouse. Cambodia's violence was ancient history by the time the ECCC was established, but many parts of Sierra Leone remained fragile and unstable and could have been subject to attacks from forces hostile to the court or to any individual held within it. As we will see in the next chapter, some of these concerns led the tribunal to move its operations from Freetown to The Hague in order to conduct proceedings for its highest profile defendant, Charles Taylor.

Despite these concerns, negotiators decided to base the court in Freetown for a number of different reasons, both material and abstract. The Secretary General spelled some of these out in his 2004 report, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies":

> [I]f security and independence are adequately maintained, there are a number of important benefits to locating tribunals inside the countries concerned, including easier interaction with the local population, closer proximity to the evidence and witnesses and being more accessible to victims. Such accessibility allows victims and their families to witness the processes in which their former tormentors are brought to account. National location also enhances the national capacity-building contribution of the ad hoc tribunals, allowing them to bequeath their physical infrastructure (including buildings, equipment and furniture) to national justice systems, and to build the skills of national justice personnel. In the nationally located tribunals, international personnel work side by side with their national counterparts and on-the-job training can be provided to national lawyers, officials and staff. Such benefits, where combined with specially tailored measures for keeping the public informed and effective techniques for capacity-building, can help ensure a lasting legacy in the countries concerned.[18] (UN Secretary-General, 3 Aug 2004, para. 44)

As we will see, the dire financial situation faced by most Sierra Leoneans (Sierra Leone is frequently cited as one of the poorest nations in the world) meant that their interest in the court's location was not simply legal: Many Sierra Leoneans hoped to find lucrative work there. Both the prosecution and defense hired many former sol-

[18] See also, Schabas (2006, pp. 589–590)

diers who had no other source of revenue after the war. Still, others complained that many of the funds expended on it effectively went back to the first world through the high salaries provided to the judges and lawyers that staffed the court. Thus, the court's location was not just a house of justice but a place for training and, more importantly, for work and income.

Along with finances, legitimacy, and location, there were a number of significant legal questions that negotiators and jurists had to resolve before opening its doors. For example, there were several peace agreements that had been reached between the government and the RUF during their 10 years of conflict (most of which were breached by one or both sides before their ink had dried). While they had done little to promote peace, they now created significant legal challenges for the Court's founders. Along with the Abidjan Accord, the most significant of these agreements was the one signed in Lomé, Togo in 1999. As a condition of peace, the Lomé Accord declared a blanket amnesty for those involved in the conflict[19] and further called for the establishment of a TRC along the lines of the post-Apartheid commission in South Africa. The TRC was expected to wade through the various charges against the RUF and the Sierra Leonean forces and "recommend measures to be taken for the rehabilitation of victims of human rights violations." (Article 26) International and domestic observers roundly rejected the amnesty provisions of the accord, though to be fair, not all rejected them completely.[20] Regardless, the Lomé Accord was largely shunted aside when the RUF shortly resumed hostilities and marched on Freetown in late 1999. The amnesty provisions of the treaty, however, apparently remained in effect.

Along with the legal complexities presented by the Lomé Accord, the defeat of the RUF created further legal challenges for the government of Sierra Leone. The international nature of the conflict meant that many foreign actors were involved with the war in ways that were *prima facie* criminal. Of particular note are the Nigerian forces that served in the conflict, sent into the country by Nigerian dictator Sani Abacha, who were accused of being reckless (sometimes targeting civilians) and had allegedly plundered Sierra Leone's resources alongside the RUF. Other foreign nationals such as South Africans were also involved in the conflict via the many private security companies that were used by both sides, including the well-known outfit Executive Outcomes. In addition, Sierra Leone had been a playground for Taylor and Gaddafi, both of whom were implicated in criminal activity in the country. A criminal tribunal could raise uncomfortable questions about the conduct of foreign leaders, whose immunity was already under assault by a number of other international and domestic criminal proceedings at the time—potentially further destabilizing the region.

Further, "the RUF" as both a political and military entity was not clearly defined and its structure and membership changed throughout the lengthy conflict. Atrocities that could in some sense be attributed to the RUF could have also involved many who were not formally members of the force, who allied themselves with

[19] There was a similar provision in a 1996 agreement signed in Abidjan, Cote d'Ivoire.

[20] For a discussion of the Sierra Leone TRC see Lun and Caulker (2000).

the RUF only when it was beneficial to do so. The barriers between governmental forces and the RUF were porous during the conflict. *Sobels*, for example, were members of Sierra Leone's Army (SLA) who were often complicit with the forces that they were fighting against, mutually agreeing to pillage towns on alternating schedules. (The term itself is a portmanteau of "soldier" and "rebel."[21]) Nigerian troops ostensibly stationed in Sierra Leone as peacekeepers were equally complicit in robbing civilians and stealing diamonds from Sierra Leone's mines. All sides, it seemed, treated the civilian population of Sierra Leone as sheep ready to be fleeced whenever the opportunity presented itself and at times the war was simply a pretense for the sake of Sierra Leone. Nobody on any side of this conflict was truly innocent and though affiliations ebbed and flowed, the criminal treatment of Sierra Leone's civilians remained a constant.

It was clear then that there were a great number of political and legal risks involved in prosecuting those responsible for the atrocities of the Sierra Leone war. The remnants of the SLA, fearing prosecution, could rise up and seek to destabilize an already fragile peace. Foreign powers, such as Liberia, Libya, or Nigeria could try to undermine the judicial process (or undermine Sierra Leone itself), in order to help their leaders evade prosecution or to hide evidence of their previous activities in Sierra Leone. There were already signs of this at the beginning of the Court's establishment: One of the leaders of the RUF, Sam Bockarie, was killed under mysterious circumstances in Liberia only a few weeks after he was indicted by the SCSL. It was a move some believed was intended to cover up President Taylor's liability. Children could become targets for prosecution, which led to objections from some of the same human rights groups pushing for some form of accountability for Sierra Leone's worst offenders. Finally, the entire tribunal process could have turned into an expensive, legalistic boondoggle that provided outcomes unsatisfying for anyone and undermined peace, stability, and the development of democracy within Sierra Leone.

Child Soldiers

One tragic feature of the Sierra Leone conflict raised further complications for any effort to prosecute wrongdoing: Many of the individuals who committed the worst atrocities in the conflict were children. Apparently learning from Charles Taylor's National Patriotic Front of Liberia, the RUF sought out young people who were easily swayed by the organization's ideology and enjoyed the power that military authority and weaponry provided. As Ishmael Beah's heartbreaking first person account of his time serving in the war, *A Long Way Gone* (2008), shows, many of these child soldiers had lost their family in the war and were left with no other means of survival beyond military service. During the war they were provided with ample amounts of alcohol and drugs to help them cope with their situation and set loose

[21] See for example, the account in Abraham (2000a).

on civilians and enemy soldiers alike. Many who did not join willingly were abducted outright and forced to serve against their will. UNICEF estimates that more than 10,000 Sierra Leonean children were forced to serve in the war, half of which served in combat. While the recruitment and arming of these children was clearly a war crime in itself, the children themselves could also have been prosecuted for individual atrocities as they were themselves implicated in much wrongdoing: Their emotional vulnerability made them well suited to brutality. This issue raised troubling legal and moral questions about the responsibility of child soldiers in war that the court would be forced to confront.

The Secretary General's October 4 Report to the UN Security Council made it clear that, "although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded first and foremost as victims." (p. 2) To further this point, the jurisdiction of the court was limited in two important ways: First, the court was denied jurisdiction over anybody who was under the age of 15 at the time that they allegedly committed their crimes. Further, any individual who was between the age of 15 and 18 when they committed the crime "shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into the assumption of a constructive role in society, and in accordance with international human rights standards." (Statute, Article 7) In addition, the court criminalized "conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities." (Statute, Article 4) As a result of these developments, no minors were prosecuted before the SCSL.

The Lomé Amnesty

The Lomé Peace agreement was negotiated at the behest of the UN and the USA by the American political activist Jesse Jackson and was signed in Lomé, Togo in July 1999. While the Lomé accords were largely ignored by the RUF in practice (they were quickly abandoned when the rebels marched on Freetown), the agreement explicitly provided "absolute immunity" for all participants in the conflict:

> After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement. (Article IX, Sect. 2)

It further stipulated that "no official or judicial action is [to be] taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organizations." (Article IX, Sect. 3) While the agreement called for a truth and reconciliation commission "to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past," (Article XXVI, Sect. 1) it was clear that this commission was to have no legal power to try and punish those involved in the worst atrocities associated with

the conflict, meaning that prosecution appeared to be a legally dubious prospect at the end of the conflict.[22]

To further complicate matters, Sankoh, the main driving force behind the RUF and, indeed one of the prime movers of the war in general, was given special considerations and dispensations under the Accord. Sankoh, who was in prison and facing a death sentence for treason at the time negotiations began in Togo, was to be given an "absolute and free pardon" under the agreement. Moreover, he was to be made Vice President of Sierra Leone and Chairman of the "Commission for the Management of Strategic Resources, National Reconstruction and Development." This latter position was particularly significant as it gave Sankoh control over the nation's gold and diamond mines, and thus access to tremendous wealth that he used to rearm and resupply his RUF troops. In one swoop the defeated leader of the rebel movement was provided with legal immunity, political capital, and a tremendous amount of wealth which he could use to reignite his campaign against the government of Sierra Leone when the time suited him.

The political consequences of the amnesty provided by the Lomé Accord, both within Sierra Leone and around the world, were complicated. On one hand, the USA and its allies had clearly pushed to have an agreement that was acceptable to both sides but had also forced the agreement upon the unwilling government of Sierra Leone. These states, it seemed, wished to ease the criticism they were receiving from the international human rights community and in the end little concern for the moral or political consequences of the agreement.[23] As they did not have to live with the RUF killers and had not felt the consequences of their rampage, the sooner this matter could be resolved, the better. If an amnesty was the price to pay, so be it.

Human rights organizations were, unsurprisingly, highly critical of the amnesty deal. Both Human Rights Watch and Amnesty International condemned the agreement and asked the UN to reject the deal because of its amnesty component. Many considered the amnesty to be a dangerous message to other rebel groups in Africa that one could target civilians in a conflict with impunity as it was always possible to hold out for amnesty as part of a final peace agreement. Human Rights Watch called on the UN Security Council to "reconfirm explicitly that the purported Lomé amnesty does not apply to crimes of genocide, crimes against humanity, war crimes and other serious violations of human rights and humanitarian law regardless of when these crimes were committed." (Human Rights Watch, 2000b) More to the point, Amnesty International described the amnesty as "unjust and unacceptable." (Amnesty International 1999)

The view of the Sierra Leonean leadership, as well as its people, toward the amnesty provisions was complex. The people of Sierra Leone were widely reported to be outraged by the provisions, although there was some measure of support for the deal. (Tejan-Cole, 2009, p. 243) President Kabbah, testifying before Sierra Leone's truth and reconciliation committee admitted that "to the average Sierra Leonean, the

[22] Nonetheless, Schabas points out that, "Perpetrators regularly appeared before the Commission, despite the fact that they had no amnesty to gain" (Schabas 2004, pp. 152–153).

[23] See for example (Perlez and Onishi 2000).

terms of the Lomé Agreement were like a bitter pill they were asked to swallow." (Testimony of President Kabbah before the Truth and Reconciliation Commission, 5 Aug 2003) Even so, he suggested that a broad amnesty, covering both domestic and international crimes, was a necessary condition for the RUF signing the agreement.

> We had resisted the persuasion of the international community for the exclusion of war crimes, crimes against humanity and against international humanitarian law from the applicability of the amnesty provision in the Lomé Agreement. We did this deliberately. We realized that limiting the operation of the amnesty provisions would give a justification to the AFRC/RUF for refusing to sign that Agreement and for the resumption of hostilities in the country. Thus, we put beyond the ability and outside the jurisdiction of our domestic courts power over the prosecution of crimes committed before the signing of the Lomé Agreement since the amnesty granted amount to a constitutional bar to any form of prosecution in our domestic courts in respect of the offences amnestied. (Testimony of President Kabbah before the Truth and Reconciliation Commission, 5 Aug 2003)

Clearly, Kabbah's government felt cornered by the remaining RUF forces and by the international community, and Kabbah himself did not believe that the agreement was worth the effort, having described Sankoh as "the most treacherous and evil man I have had to deal with in my over 40 years of public service." (Gberie, p. 157) Nonetheless, he signed the agreement.

The response from the various bodies of the UN to the Lomé amnesty was likewise equivocal. On one hand, the Secretary General, Kofi Annan, had initially instructed his representative, Francis Okelo, not to sign the agreement because of these provisions, but he was later persuaded by Okelo to change his mind as the latter considered the agreement to be essential to the nation's peace process. As a result, the UN added a hasty, hand-written reservation to the agreement stipulating that "The United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law." (Schabas, 2004, pp. 148–149) The Secretary General himself in his *Report* to the Security Council placed the amnesty (and his reservation to the Accord) in context:

> [S]ome of the terms under which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity… At the same time, the Government and people of Sierra Leone should be allowed this opportunity to realize their best and only hope of ending their long and brutal conflict. (Para. 54)

In response, the UN Security Council adopted a resolution "welcoming" the Lomé resolution and "taking note" of this passage of the *Report*, leading Schabas to conclude that their views regarding accountability of RUF members were "little more than a perfunctory nod that criticized the amnesty 'for the record' but went no further." (Schabas, 2004, p. 150)

All of these various political and legal complications set the stage for a tremendous struggle over the legal status of the amnesties set out in the Lomé Accord. This tragedy was doubly frustrating for onlookers because, like the Abidjan Agreement before it, the Lomé Accord ultimately did nothing to stop the conflict in Sierra Leone, and many insiders believed this to be the case at the time the agreement was

signed. The RUF had no intention of following it any longer than necessary to gain strategic advantage over the government, despite the wishful thinking of the international community. According to Arthur Abraham:

> The major blunder [of the Lomé Accord] was in the basic postulate underlying the whole approach to the negotiations which assumed that the RUF was genuinely interested in peace, and that in return for a share of power and other concessions, it would be willing to end the fighting and reinvent itself as a legitimate political movement ready to vie for power in a democratic context. (Abraham, 2000b, p. 213)

Shortly after the agreement was signed, the RUF forces began efforts to hinder international peacekeepers and started rearming in order to continue their fight against the government of Sierra Leone. The only significant outcomes of the agreement, beyond the formulation of a Truth Commission, were the legal and political obstacles that the accord's amnesty created for the SCSL.

Given the (quasi) international status of the SCSL and the intransigence of the UN Secretariat, as well as the objections of the larger international legal community, the immunity provided by the Lomé Agreement was likely doomed to failure on both political and legal grounds. Early in the process of forming the SCSL, it was understood that the immunity of the Lomé Accord was not going to apply to international crimes.[24] (Abraham, 2000b, p. 213). During the negotiations for the Lomé Accord, UN officials strongly opposed the immunities that the accord guaranteed. (Gberie, 2003, p. 638) Still, the accord was meant to apply to domestic law and not to international law, which has historically been unwilling to recognize the legal authority of such amnesties. As only a fraction of the crimes that were under the jurisdiction of the SCSL were, in fact, domestic crimes in Sierra Leone, and the others (such as war crimes) were international crimes, the immunity agreement was not seen as a tremendous burden on the court's operations. As a result, the Statute makes clear that, "An amnesty granted to any person falling within the jurisdiction of the Special Court… shall not be a bar to prosecution." (Article 10)

As we have already seen in the case of Cambodia, the relationship between the mixed tribunals and traditional national courts (as well as the more purely international tribunals for Rwanda and Yugoslavia) was a delicate legal and political matter. The *Report* made it clear that the tribunal was to have "concurrent jurisdiction with, and primacy over Sierra Leonean courts." (para. 10) This meant that both traditional courts and the SCSL could prosecute individuals accused of war crimes or other offenses from the war, but "at any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence." (Statute, Article 8) Thus while the SCSL was not a part of the domestic justice system of Sierra Leone, it applied some Sierra Leonean law, making it in many ways the most legally and institutionally independent hybrid tribunal of the ones that we are examining here.

[24] See the September 9 statement from UN Legal Advisor Ralph Zacklin.

Establishing the Hybrid Tribunal(s) for East Timor

In September 1999, as the Indonesian loyalists were retreating from East Timor and the UN forces were moving in, the UN Human Rights Commission called for the creation of a committee of experts "in order to gather and compile systematically information on possible violations of human rights and acts which might constitute breaches of international humanitarian law committed in East Timor." (Statute, Article 8) Even at this early juncture, regional and global politics were already shaping the response to the massacres. While most western countries supported the resolution, many Asian countries, including China, India, Pakistan, and the Philippines, voted against it and Japan (often a supporter of the western human rights agenda) abstained. After completing its investigation, the committee, chaired by Costa Rican human rights lawyer and Judge Sonia Picado Sotela, presented its report to the UN in January 2000. Its findings were namely that "there were patterns of gross violations of human rights and breaches of humanitarian law which varied over time and took the form of systematic and widespread intimidation, humiliation and terror, destruction of property, violence against women and displacement of people." (International Commission of Inquiry on East Timor, 31 Jan 2000, para. 123) The committee recommended that the serious offenders in East Timor be prosecuted by some sort of tribunal, "consisting of judges appointed by the United Nations, preferably with the participation of members from East Timor and Indonesia." (para. 153)

As with the recommendations leading to most of the other tribunals, this Panel of Experts for East Timor initially proposed creating an international ad hoc tribunal similar to the ICTY and the ICTR. Given the decades of officially sanctioned human rights violations in East Timor and the weakness of the Indonesian justice system, only an international court could adequately handle the crimes committed surrounding the referendum—prosecutions that would most certainly be blocked were they to occur in Indonesia.

> The record of impunity for human rights crimes committed by Indonesia's armed forces in East Timor over almost a quarter of a century cannot instill confidence in their ability to ensure a proper accounting. Nor, given the formal and informal influence wielded by the armed forces in Indonesia's political structure, can there, at this stage, be confidence that the new Government, acting in the best of faith, will be able to render that accounting. The investigative forces will need to feed into a system which ensures that those responsible are brought to justice. The same factors that argue for international investigation argue similarly for an international judicial process.[25] (para. 73)

And further, the Committee darkly warned that though the East Timorese people have been largely restrained in their response to the violence, "unless justice is provided, it may not be possible to maintain this discipline." They recommended a tribunal that would sit in Indonesia, East Timor, "and any other relevant territory to receive complaints and to try and sentence those accused… of serious violations of fundamental human rights and international humanitarian law which took place in

[25] See also de Bertodano (2004).

East Timor since January 1999." (UN Office of the High Commissioner for Human Rights, Jan 2000)

The response from the international community to this proposal ranged from outright dismissal to mere silence. The UN Security Council, the body that would have the authority to make a truly international tribunal akin to the ICTY, acknowledged the report but ignored its recommendations and took no action to create the recommended tribunal. The Indonesian government's foreign minister called the proposal of an international tribunal "totally unacceptable," and pledged to bring Indonesian offenders to justice before domestic, Indonesian courts. (Indonesia attacks Timor tribunal call, 29 Jan 2000) Rhetorically at least, much of the international community seemed to place its faith in the Indonesian government to handle the problem of the killers who had fled into their territory. Whether they actually believed that there would be any form of justice in East Timor or they simply hoped that the Timorese people would "move on" is an open matter. United Nations Transitional Authority in East Timor (UNTAET) signed a Memorandum of Understanding (MoU) with the Indonesian government in early April 2000 pledging, "The widest possible measure of mutual assistance in investigations or court proceedings, including gathering evidence, serving warrants, and the transfer of suspects." The UN likely feared the expense in general of an ad hoc tribunal and was happy to leave the matter to domestic courts. As the Secretary General stated, "There will be no need for the Council or the UN to set up another tribunal to compete with one set up by the Indonesian government that is going to do exactly the same thing." (Kofi Annan as cited in Cohen, 2002, p. 3) The inflated costs of the ad hoc tribunals, coupled with the fragility of the East Timor-Indonesia context, meant that a truly international tribunal was highly unlikely.

To its credit, the Indonesian government did organize a truth commission of its own to investigate the violence in East Timor, known as KPP-HAM (Kamisi Penyelidik Pelanggaran Hak Asasi Manusia, Commission of Inquiry into Human Rights Violations). Despite the fears of many in the international community that it would be a whitewash, the report was described as "very robust" and, "Confirmed the existence of a very intimate relationship between the TNI, police, the civil administration, and the East Timorese militias, and stressed that the violence that arose in East Timor in 1999 was the result of a systematic campaign, and not a civil war." (Linton, 2004, p. 306) The political will in Indonesia to follow this up with actual prosecutions of those blamed by the commission, however, was to prove illusory. To complicate matters further, those suspected of committing or ordering the worst of the offenses were living safely within Indonesia, having fled when foreign forces began arriving on the island. With little support in the UN Security Council for creating a tribunal, opposition from the Indonesian government, and the fact that there was no extant sovereign government for East Timor in 2000, there were few avenues to prosecute those responsible for the horrific violence related to the referendum that were pointed out by KPP-HAM.

Nevertheless, there were good reasons to believe that at least a few actors would face charges for the violence in some sort of court. Some militia members had been caught on East Timorese soil before they could escape the island. There were also

great numbers of witnesses to the atrocities committed by Indonesians and their supporters, a fact which could be leveraged against the Indonesian government. The crimes had been committed in front of too many people to be ignored or "swept under the rug" by their former occupiers. However, Indonesian intransigence meant that it fell upon UNTAET, the prevailing authority in the new nation, to develop some institutions for prosecuting those suspected of violence, or at least those who it could get within its custody. Effectively, they would have to make a court within the court system of the transitional authority to prosecute those who committed serious crimes in East Timor. As with the ECCC, however, the lack of direct Security Council authority to prosecute those suspects on Indonesian territory meant that any tribunal without Chapter VII powers would have a difficult time getting Indonesia to cooperate.

In order to handle those militia members caught in East Timor, UNTAET created two separate institutions to investigate, prosecute, and conduct trials for the referendum violence. The Serious Crimes Unit (SCU) inside the prosecutor's office for East Timor was the investigative unit in charge of researching the violence and indicting those deemed responsible for the crimes. The second body was the SPSC, or the Special Panels for Serious Crimes—Dili, a court specially designed to handle the worst criminals associated with the violence before and immediately after the independence referendum. A third body, the Defense Lawyer's Unit (DLU) was created in September 2002 to provide legal counsel for those prosecuted by the SCU. While initially part of the UN authority, as we will see, the Serious Crimes regime largely continued to function after sovereignty was transferred over to the government of East Timor, albeit with several notable changes in policy. At its high point, the SCU had 124 staff members, including 44 prosecutors, as well as police investigators, translators, and other staff. (Hirst and Varney, 2005, p. 6) The position of head of the SCU, known officially as the Deputy General Prosecutor for Serious Crimes (DGPSC), served under East Timor's General Prosecutor and had "the exclusive prosecutorial authority to direct and supervise the investigation and prosecution of serious crimes in the competent court." (UNTAET Regulation 2000/16, Sect. 14.4) The role of DGPSC was filled by several people over the SCU's lifespan: Jean-Luis Gillisen was appointed first in July 2001 and served for 6 months, replaced by Norwegian Siri Firgaard, who held the position until Nicholas Koumjian took over in October 2003. Koumjian was replaced by Carl de Faria in February 2005, who held the position until the serious crimes regime was dissolved in May of 2005. (Hirst and Varney, 2005, p. 7)

Like the other hybrid courts, the SPSC used both international and domestic personnel and applied a combination of international and domestic law. However, it should be noted that the SPSC is a hybrid tribunal in a slightly different sense than the SCSL or the ECCC. The SPSC was created by a decree of the UN transitional government, which in turn existed as a result of a Security Council Resolution (S.C. Res. 1272—which "empowered [UNTAET] to exercise all legislative and executive authority, including the administration of justice"). There was no international agreement between a UN body and a sovereign state as in the case of the ECCC as

there was no sovereign state of East Timor at the time that the tribunal was created. Rather, the court was "international" simply because the government that created it was empowered by the UN to administer justice within East Timor. As part of this administration, it set up a special court within East Timor's UN administered court system as well as a unit aimed at investigating and prosecuting those most responsible for the violence. The SPSC and SCU were both the domestic authority in East Timor and a subsidiary organ of the UN at the same time. (Williams, 2009, p. 463)

While the creation of the SPSC and the SCU was an important development for the Timorese, these bodies began their existence with a fundamental logistical problem—almost all of those accused of serious atrocities during the conflict, be they militia leaders, individual killers, or high officials in the Indonesian military, were physically beyond their reach, safely in the hands of an uncooperative Indonesia. While some militia members had returned to East Timor after they were driven out by UN forces, anybody of any significance in the anti-independence movement, in particular TNI members of any rank, certainly did not. This meant that barring a deep commitment from the international community to support the Serious Crimes project in East Timor and force Indonesia to hand over the suspects, only the "small fish" that had been captured on East Timorese soil would face justice.

The Jakarta Trials

The refusal of the Indonesian government to consent to an international court asserting jurisdiction over its citizens, coupled with the awareness that the crimes committed by its forces and their allies needed to be addressed, led to the formation of a second tribunal operating alongside the SPSC. However, this second tribunal was a purely domestic Indonesian court which prosecuted Indonesians and Timorese for international crimes. Although it was distinct from the traditional courts within the Indonesian judiciary, it was not created with the cooperation or support of the international community or the UN and did not use any non-Indonesian personnel. It had some cooperation with the government of East Timor through a MoU that allowed the Timorese government to cooperate but otherwise was a fully Indonesian body. While this court, often known as the Jakarta Court (officially called "The Human Rights Ad-Hoc Tribunal for East Timor"), was not an international or hybrid court, and was considered to be deeply flawed by observers, we will nonetheless also briefly examine it alongside the hybrid court in Dili as the two are linked.

The Human Rights Ad-Hoc Tribunal for East Timor began in February 2001 and finished in August 2003 after having conducted 12 separate trials. It was tasked with prosecuting gross violations of human rights (in this context, genocide and crimes against humanity) including those "perpetrated by an Indonesian citizen outside the territorial boundaries of the Republic of Indonesia." The court was run by a panel of five judges, two traditional Indonesian judges, and three ad hoc judges consisting of law professors recruited from Indonesian universities. The prosecutions were run by the Attorney General supplemented by ad hoc investigators or prosecutors "which

may be a government agency and/or a public constituent," provided that they were all Indonesian citizens. The Court was not limited to events in East Timor and was part of a broader network of permanent human rights courts operating throughout Indonesia. The Attorney General selected a team of 84 individuals to investigate the violence in East Timor. H. M. A. Rahman (who would later become Indonesia's Attorney General) served as the head of this team, which, controversially included members of the TNI and Indonesian police. (Linton, 2004, p. 307)

The politics in Indonesia around the issue of East Timor meant that a real, earnest effort to domestically prosecute those involved in the violence was highly unlikely. Most of those accused of crimes were working with the Indonesian military or were in the TNI. Many of these people had a good deal of popular support and were backed by important political figures, many of whom doggedly believed that the UN had "rigged" the referendum and "stolen" East Timor away from Indonesia. Those in the Indonesian government who sympathized with the pro-integrationists and the power and influence of the military ensured that no highly placed official (such as General Wiranto) would face serious punishment for their role in the violence. Thus, even at its inception, there was little likelihood that Jakarta would make any serious effort to prosecute those most responsible for the offenses committed prior to, during, or in the aftermath of the independence referendum.

Given these circumstances, it is no surprise that most international observers believed that the Jakarta Court failed. Moreover, it is likely that the court was designed by the Indonesian government to fail. One report compared the Jakarta Trials with the infamous "Leipzig Trials" of the 1920s, where leaders of the German military were prosecuted for war crimes by the German government, but were only given the mildest of sentences for their misdeeds. Adam Damiri, Eurico Guterres, Asep Kuswani, Endar Priyanto, Timbul Silaen, Jose Abilio Osorio Soares, Letkol Inf. Soedjarwo, Yayat Sudrajat, Tono Suratman, Herman Sedyono, Liliek Koeshadianto, Gatot Subiyaktoro, Achmad Syamsudin, and Sugito, were the only defendants put in the dock in Jakarta and none of them spent any serious time in prison. (The final five were indicted together in one case resulting from the Suai Church Massacre.) Almost all of them were either acquitted at trial or had their convictions overturned on appeal.

Of the 18 people prosecuted by the court, only two were convicted by the trial chamber, one of whom had his sentenced reversed on appeal. Even among these mediocre results, there was a suspicious trend: All of those acquitted by the court were Indonesian military officials while those convicted were East Timorese. (Human Rights Watch, 2002) Among those individuals convicted by the tribunal was the last governor of East Timor, Jose Abilio Osorio Soares, who actively supported the anti-independence groups. Soares was convicted by the trial chamber in 2002 for crimes against humanity and was sentenced to 3 years in prison. (Critics also argued that prosecutors "had failed to present the violence as part of a systematic campaign." [East Timor chief acquitted, 15 Aug 2002]) However, his conviction was overturned by the Indonesian Supreme Court in 2004 and he died in July 2007 and was reportedly given a "hero's burial" in Kupang, West Timor. (Ex-East Timor governor, 20 June 2007) Timbul Silaen, the commander of the police force in East

Timor at the time of the referendum, was acquitted by the court of failing to exert adequate control over his forces during the massacres. (East Timor chief acquitted, 15 Aug 2002) The only individual sentenced to any serious time in prison was Eurico Guterres, whose case we will discuss later.

Sylvia de Bertodano points to four major problems with the Jakarta Court that prevented it from providing any serious justice: Its limited jurisdiction, its omission of high-ranking suspects, the limited nature of the indictments presented to the court, and most importantly, a "lack of commitment to justice." (de Bertodano, 2004, pp. 92–96) Whether or not the lack of commitment was universal among the Jakarta Court's staff, those involved had clearly succumbed to intimidation and political pressure from the military and from the Civilian Government of Indonesia. The tribunal was given jurisdiction only over events in April and September of 1999 and only over three of East Timor's 13 districts. While they did have jurisdiction over the capital, Dili, and the site of one of the most notorious massacres, Liquiçá, they did not have the ability to prosecute any events leading up to the April massacres or other crimes committed during the brutal 25-year occupation.

The independence of the military within Indonesia and its hostility to the prosecutions were further factors working against the court. The TNI has had a long history of operating with impunity in Indonesia, and it was clear that the Jakarta Court was not going to seriously challenge this tradition. In fact, according to the International Crisis Group (ICG), the Jakarta Trials sought to change the prevailing narrative of the East Timor atrocities to place the Indonesian military in a better light. While the ICG praised the judges at the court for "exceeding expectations," they argued that the prosecutors framed their cases in such a narrow fashion that they had obfuscated the roots of the conflict and obscured the role played by agents of the TNI in the violence. "The events of 1999 are portrayed [by the tribunal] as resulting from civil conflict between two violent East Timorese factions in which Indonesian security forces were essentially bystanders." (International Crisis Group, 2002) As a result, "The involvement of Indonesian military in creating, equipping, training, and funding the pro-integration militia forces in East Timor will remain unexamined," and "The near-universal image within Indonesia of the conflict as a civil war between two equally matched factions of East Timorese will be reinforced." Further, the Jakarta court helped uphold the view widely held in Indonesia that the majority of Timorese had in fact desired integration into Indonesia and that the referendum was manipulated by the UN.

The Special Panel in Dili

Regardless of the fact that it was dubbed a "Human Rights" tribunal, the Jakarta Court was a wholly Indonesian affair and operated under the authority of the Indonesian government. It was in no way an international or hybrid tribunal in the sense set out here. However the *other* court that was tasked with prosecuting offenders in the East Timor conflict, the Special Panel for Serious Crimes, and its prosecutorial

colleague in the Serious Crimes Unit in Dili, was much closer to the hybrid courts in Cambodia and Sierra Leone. While the Serious Crimes Regime had fewer high profile defendants certainly, the procedures it followed as well as its commitment to the rule of law (at least in its beginning), gave it more legitimacy than its companion court in Jakarta.

The genesis of the SPSC came out of UNTAET, the UN administered government in East Timor. In June 2000, UNTAET passed Regulation 2000/15 ("On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses") which called for the creation of panels of judges to hear cases regarding genocide, war crimes, crimes against humanity, murder, torture, and "sexual offenses" that occurred within the territory. As with other tribunals, this court was envisioned as being "mixed" on two levels: it was mixed in terms of the law applied by the court (that is, it applied laws that were international as well as those that were native to East Timor) and it was mixed in terms of the composition of the bodies, that is, it employed both international and domestic judges and prosecutors. The Panel was expected to use both international law and the laws of East Timor, which were comprised of the regulations promulgated by UNTAET. The Panels were to be populated by three judges, two of which were international and one Timorese. An Appeals Chamber was to be similarly staffed, though a panel of five judges (three international) was envisioned "in cases of special importance or gravity." This meant that, while the court was not created by an international agreement as the ECCC and SCSL were, structurally at least, it resembled the other courts we have looked at here.

Even at the inception of the Serious Crimes regime, there were already some indications that it would face serious challenges going forward. According to Linton, there were several significant problems with Regulation 2000/15 that led to confusion about the nature and role of the tribunal as it sought to find its footing. On one hand, the temporal jurisdiction of the tribunal was unclear in the regulation, leaving the question open as to whether or not crimes before 1999 would fall under the Court's jurisdiction. (Judicial System Monitoring Programme, 2004; Suzanne Linton, 2008, p. 262) While the regulation clearly stated that the SPSC "shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999," it further stipulated 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."[26] (Sect. 2.3) This led to confusion and misallocated resources as prosecutors pursued cases that were not relevant to their mandate. This problem that was only resolved when Norwegian Prosecutor Siri Frigaard took the reins of the SCU in 2001. At that point, the SCU focused its efforts on offenses committed around the referendum and on those individuals who were deemed most responsible

[26] UNTAET Resolution 1999/1, the first UNTAET resolution sets out the international legal standards to apply to East Timor, that is, human rights treaties, as well as the applicable law of the country while under UNTAET authority.

for the violence. They only briefly considered an investigation of the 1991 "Santa Cruz massacre" and of some violence in 1998 that was a precursor to the 1999 referendum violence. (Hirst and Varney, 2005, p. 8)

As a sharp critical report issued by the East West Center suggested, the Dili Court was further hampered by problems in the past. While it was in many ways understandable, given the deep problems faced by East Timor at the time, criminal justice was not the top priority for UNTAET officials. As a result, the Serious Crimes institutions were sometimes neglected by the authorities:

> In the early stages, vital security and infrastructural needs for the devastated country took priority over the more 'marginal' task of adequately equipping the Special Panels and SCU. This neglect was exacerbated by allowing decisions about staffing, resources, and management to be made by mission personnel who lacked experience in court administration and were unaware of what the Special Panels and prosecution units required to carry out their mandate according to international standards. (Cohen, 2006, p. 4)

Moreover, once prosecutors began to focus on high level offenders in the Indonesian government, the support from East Timor dried up, leading Linton to conclude that "the Serious Crimes United was in fact never meant to be investigating anyone but low-ranking East Timorese militiamen returned to East Timor." (Linton, 2008, p. 262)

The SPSC stands on a different legal footing than the other hybrid tribunals we have examined so far. Whereas the SCSL and the ECCC were created as the result of a direct agreement between the UN and independent sovereign states, the SPSC was entirely the creation of a UN body, which was in turn created by the Security Council. This meant that the SPSC came into being without the explicit consent of any sovereign government. Though the UNTAET was empowered by the Security Council to handle all matters of governance within East Timor, including the administration of justice, (UN Security Council Res 1272, 25 Oct 1999) it did not have any direct ability to "order" another country to cooperate with its dictates or requests. It was required to rely on the good will of foreign governments in order to function. As we have already seen, Indonesia, clearly the most important international actor in the conflict saw no need to cooperate with East Timor's efforts to prosecute those responsible for the violence whatever its legal basis.[27] While none of the hybrid courts could had the political "muscle" to compel states to cooperate, the unique relationship between Indonesia and East Timor was particularly challenging for the SPSC.

Despite this weakness, there was much to speak of in favor of the Serious Crimes regime at its outset. Most practically, the regime had the backing of the extant authorities in East Timor, that is, UNTAET, so it wielded some measure of power within the island nation itself. Additionally in its indictments, the SCU was willing to point to the collusion between the TNI and the anti-independence militias and acknowledged the large scale and systematic nature of the violence on the island—a fact ignored by the Jakarta court. In a study of the court, Amnesty International compared indictments issued by the two tribunals regarding the Liquiçá Church Massacre. As they

[27] For a fuller discussion of the legal basis of the Serious Crimes regime, see Williams (2009, pp. 463–464).

described the differences, it was notable that the indictments issued by the Indonesian tribunal minimized the harm done in the attacks as well as downplayed the interconnections between the TNI and the anti-independence forces, while the SCU described much greater damage and death and directly linked the Indonesian military to the Indonesian partisans.[28] (Amnesty International, 2004, p. 35)

Jakarta Indictment	SCU indictment
• "Around 100 members of TNI and Polri supported the BNP During the attack." • "Figures given for the number of deaths vary, but are consistently much lower that [sic.] the SCU indictment. Twenty-two is the number usually sited [sic.], although in the indictuemnt of Brigadier Timbul Silaen, 18 people are named has having been killed an in that of Colonel Suhartono Suratman's the number is 20."	• "The BMP was created and under the command and control of the civil administration and military authorities. Both TNI and Polri were involved in the planning and execution of the attack." • "More than 100 persons were killed or injured during the attack on the church. Four other were were killed and one 'disappeared' during attacks on the surrounding area in the previous 2 days."

There was no separate funding source for the SPSC—all funds for its operations came out of the UNTAET funds allocated to the court system of the new nation. The prosecutor for the Special Court (which was comprised almost entirely of international staff) was funded out of the money allocated to the public prosecutor's office for East Timor. This meant that the SPSC was seeking to conduct very expensive operations on a limited budget, and observers pointed out that this had a definite effect on the court's operations. Opinions were not published in a timely way and simultaneous translation services were often not provided. As Suzanne Linton described the problem:

> 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 [the SPSC]. 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. (Linton, 2001, p. 215)

As a result, UN officials complained that, "A serious lack of resources, both human and material, has hampered the investigative work of the Serious Crimes Investigation Unit," (Report of the High Commissioner for Human Rights on the Situation of Human Rights in East Timor cited in cited in Linton, 2001, p. 215) and there were reports of non-violent protests against long-term pre-trial detention among prisoners in March 2002 (many accused individuals had been detained for over 2 years by this point). (UN Secretary-General, 17 April 2002, p. 3)

Along with these financial issues, the early days of the SPSC were complicated by the lack of trained personnel capable of conducting investigations and trials for crimes of this magnitude, as well as the poor organizational planning that plagued the serious crimes regime as a whole. While UNTAET had prepared for

[28] Amnesty International compares at two other sets of indictments and observes that the Jakarta consistently court minimized the damage done by the militias and downplays the cooperation between the militias and the TNI.

two tribunals to conduct trials for the violence, the UN had trouble finding qualified and experienced judges to staff them. The trial panels were supposed to consist of three judges each: two international and one East Timorese judge. Reportedly, the government of East Timor had insisted that the international judges recruited for the project hail from countries that operated in the civil law tradition and were able to speak fluent Portuguese. (Amnesty International 2004) To make matters more complicated, the judges who served on the panels were given short-term contracts that sometimes expired before their cases were completed, which required the panels to retry the cases with replacement judges. This added a great deal of unnecessary complication and expense to the proceedings. Finally, UNTAET insisted that the judges be experts in international law, international criminal law, and human rights law—esoteric domains of law that are not widely practiced. All of these missteps in staffing made it difficult for UNTAET to recruit the appropriate number of judges to conduct their hearings, leading an April 2002 report. (Amnesty International 2004, p. 1) to complain that the Appeals Court had not had a quorum since October of 2001. (UN Secretary-General, 17 April 2002, p. 3)

Establishing the United Nations Mission in Kosovo (UNMIK) and Bosnia Courts

Unlike most of the other conflicts that we have examined here, international criminal justice as a set of international or transnational institutions was essentially nonexistent when war broke out in the former Yugoslavia. There had not been any sort of international criminal tribunal in operation since the end of World War Two and there had been no serious efforts to create an international criminal court during the protracted Cold War that followed it. This meant that, with the exception of the precedent set by the Nuremberg Tribunal and related post-war institutions, international criminal justice had to be rebuilt "from scratch" in the face of the atrocities that were committed in Srebrenica and elsewhere in the Balkans.

Despite a dearth of precedents, there was a great deal of interest coming from many different countries to formulate a legal response to the slaughter occurring in the Balkans, one that included a criminal justice component. Led primarily by the powers of Western Europe and the USA, the UN Security Council ultimately passed a series of resolutions that established a new court for prosecuting serious international offenders. The ICTY was intended as a way to hold responsible those who participated in the Balkan atrocities before a court of international justice and would thereby revive the Nuremberg precedent for the post-Cold War world. Since its creation, it has prosecuted nearly 200 offenders on all sides of the Balkan wars, including the prime movers of the war in Bosnia: Slobodan Milosevic, Radovan Karadzic, and Ratko Mladic.

While the ICTY was an important new development for international justice, the court alone was clearly insufficient to address the widespread violence of the various Balkan conflicts for several reasons. First, the international court was only

designed to prosecute those who bore the greatest responsibility for the violence that took place in the region. While the ICTY statute itself only limits its jurisdiction to "persons responsible for serious violations of international humanitarian law," it was clearly only designed for prosecuting higher ranking officials or those instrumental in the perpetration of mass atrocities.[29] Middling offenders, such as Dusko Tadic (the first person put on trial in The Hague [*Prosecutor v. Duško Tadić,* 2006]), were sometimes prosecuted by the ICTY,[30] but this court could not prosecute everybody who bore criminal responsibility for the widespread and massive human rights violations that occurred throughout the Balkans. It lacked the resources to process the thousands of people who killed, raped, or tortured innocents as part of the series of brutal wars in the region. Lower ranking offenders were set aside by the ICTY for the most part and therefore other institutions or other procedures were needed in order to deal with them. Moreover, as we have already discussed, the ICTY turned into a very expensive and cumbersome undertaking that few states wished to reproduce or even extend beyond its original mandate. As a result of these limitations there remained a need for some alternative means of dealing with most of the "smaller offenders" in these conflicts, many of whom were still at large and living openly in the regions that they once terrorized. These issues and concerns eventually led to the development of alternative tools for prosecuting alleged war criminals—the hybrid tribunal in Bosnia.

Creating the Bosnia Court

The Bosnia court came into being in March 2005 in response to several different problems facing the extant Bosnian justice system. Bosnia existed as a sovereign, independent state with its own functioning criminal justice system at the time a hybrid system was proposed, but its ability to handle accused offenders in an even-handed and unbiased manner coming out of the Bosnian war was highly questionable. Part of this resulted from the contentious federal nature of the Bosnian state: as with other aspects of Bosnia's governance, the Bosnian courts were split between the Serbian and Muslim parts of the country, using separate systems of justice for their respective inhabitants. This meant that justice meant very different things depending upon which administrative entity one was arrested in, particularly if one was not a member of the dominant ethnic group in the region. In addition to the problem of federalism, there were a large number of offenders from the Bosnian war who did not fit the profile of those suitable for ICTY on account of their rank, age, or the nature of their alleged criminality which meant that a lesser institution was needed to adjudicate these cases. Finally, since Bosnia was a sovereign state

[29] See for example the discussion by ICTY Prosecutor Carla Del Ponte on the nature of ICTY's jurisdiction. (Ponte 2004). Of course, this does not mean that the court exclusively prosecuted only "big fish."

[30] Tadić was a café owner and minor figure in the Bosnian Serb forces.

and thus entitled to handle criminal justice matters within its borders, it meant that some form of domestic forum for the prosecution of war criminals, one that met international standards for a fair trial, was appropriate. While the ICTY was the premier site for prosecuting criminals from Bosnia and elsewhere in the Balkans, it could not remain the only one and some legitimate domestic solution was called for.

By the conclusion of the various wars in the Balkans, many of the states comprising the former Yugoslavia had compiled extensive files detailing evidence against alleged war criminals who they wished to see prosecuted, but for a number of reasons each state, particularly Bosnia-Herzegovina (BiH), lacked the capacity to conduct impartial trials for these people. The few efforts to prosecute Serbs that were captured in Bosnia for various crimes committed during the war caused serious political problems which threatened to reignite war in the region.[31] Some of the domestic courts in Bosnia were engaged in what was perceived by many as arbitrary prosecutions for the war crimes that happened in the 10 years after the Dayton Accords. Those targeted were "outsiders" (that is, individuals from other ethnic groups) rather than a state's own citizens who were accused of wrongdoing. (This was the case even after the "Rules of the Road" procedures required that the ICTY prosecutor review domestic war crimes prosecutions.) Some of the Bosnian efforts to prosecute Serbs were particularly troubling: According to one report, 47 individuals were prosecuted in absentia by one of Bosnia's catonical court with several of these defendants sentenced to death. (Barria and Roper, 2008, p. 321) On the other hand, the Republika Srbska in particular showed little interest in prosecuting individuals for war crimes in the conflict.[32] Many convictions were overturned by later courts in the face of rampant irregularities. (OSCE Mission to Bosnia and Herzegovina, 2005, p. 4) As Bohlander describes it, these cases were "often regarded as an occasion for dispensing 'ethnic' justice or exacting revenge," rather than providing any real form of justice. (Bohlander, 2003)

A further factor pushing toward the creation of the Bosnian War Crimes Court was the growing international impatience with the ICTY and the desire to see that court complete its mandate. The ICTY was established in 1993, while the violence in the former Yugoslavia was still underway, as an experiment of sorts in international justice. By 2002, it had completed dozens of cases but clearly the task of prosecuting every individual accused of international crimes in the region at the ad hoc court was not possible and the overall cost of the court was becoming too much to bear. As a result, the UN Security Council asked the ICTY (and its sister court, the ICTR) to develop a completion strategy so that it could complete its mandate and dissolve in a timely manner. In Security Council Resolution 1503, the Security Council called on the ICTY, "to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010." (UN Security Council, 28 Aug 2003, para. 7) While this did not happen (as of this writing, the court is still functioning),

[31] For a discussion of the weak state of the Bosnian judiciary at this point, see Ellis (1999, pp. 5–6).

[32] According to one article, the RS only acknowledged that 100 Bosnians had been killed illegally in the Bosnian war, whereas international observers estimated 7000 deaths (Zoglin, 2005, p. 50).

it seemed clear that the ICTY would not be able to exhaust the pool of accused individuals in the former Yugoslavia before its time and support had run out.

The Bosnia War Crimes Chamber (BWCC) was the outgrowth of the national court system that was established by the Bosnian government in the beginning of 2005. The new court helped establish a single unified court system for both halves of BiH. While the ICTY was capable of prosecuting some of those responsible for the violence in the region, both the UN and the domestic community acknowledged that in some cases domestic prosecution would be more appropriate. While the ICTY could assert its primacy over any case before a domestic tribunal in the former Yugoslavia any time it felt compelled to do so, the ad hoc tribunal was always envisioned as operating alongside domestic courts. Further, as a sovereign state, Bosnia had the right to conduct trials for those who committed crimes under its jurisdiction. Moreover, it became increasingly clear over the years following the breakup of Yugoslavia that domestic remedies were increasingly available across the region that domestic would be able handle many cases. Thus, BWCC represents a de-internationalization of international justice, though as McDonald pointed out, "this ostensibly domestic court was created by outside agencies. (McDonald, 2009)

The completion program of the ICTY meant that many cases that had been referred to the court would have to be dealt with somewhere else, presumably within the domestic courts that had been previously deemed deeply flawed. This meant that the international community and those involved in the ICTY would have to help reform the domestic courts of the Balkan states if they could serve as a site for adjudicating these cases. The Rome Agreement of 1996, signed by the Presidents of Bosnia, Yugoslavia, and Croatia, established some basic "Rules of the Road (RoR)" for prosecutions within the domestic court systems of the various countries and to alleviate some of these concerns about political bias in the post-war justice system.[33] Adherence to these rules was monitored by the RoR division of the ICTY Prosecutor's office, whose approval was required for all domestic prosecutions for war crimes in the region. This was to ensure that the basic principles of due process were followed by domestic prosecutors in controversial cases. During the approximately 8 years it operated, the RoR procedures examined roughly 6,000 files, ultimately approving approximately 865 of these for domestic prosecution in the lower courts. (Rules of the road move, 29 Sept 2004) By 2004, however, the ICTY was beginning its completion process and new venues for accused international criminals needed to be established.

Many of the proposals for handling those accused of international crimes in the face of a receding ICTY were put forward in a report written jointly by the leaders of the ICTY entitled "Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the prospects for referring certain cases to

[33] Article 5 of the Agreement establishes that, "Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal."

national courts," which was in turn endorsed by the Security Council. (UN Security Council, 23 July 2002) In the report, the ICTY leadership acknowledged that the tribunal "cannot try all persons accused of war crimes and crimes against humanity on its own," and instead, "must concentrate on the main political and military figures and refer certain cases to national courts, if necessary with the help of truth and reconciliations commissions, provided however that those courts satisfy the requirements of international justice." (p. 1) The report itself outlined various recommendations for developing a referral process as well as a list of weaknesses that would have to be addressed before such referrals could be dealt with which included a lack of adequate training, insufficient funding, and "the highly politicized nature of the judicial system, as well as the risk of corruption to which such a situation gives rise." (p. 19) The report proposed a variety of different approaches for dealing with the dilemma and outlined each proposal's strengths and weaknesses. Among the suggested reforms proposed to address the challenges faced by the ICTY was to place international judges in the domestic Bosnian courts. The advantages of such an approach, the court's leadership argued, was that it would "make it possible to guarantee that international norms are better applied [in Bosnia]." It would allow the judges to "contribute to the public's confidence in the local judicial system," would ensure "effective collaboration between the Tribunal and the nat ional courts," and could be put into place relatively quickly. (p. 21) While the ICTY acknowledged that such a proposal would require a great deal of legal reform on the part of BiH, "The sending of international judges [to Bosnia] would make it possible to resolve quickly a number of crucial difficulties [with the Bosnian judiciary] pointed to by the international observers" and would "have many considerable advantages in the specific context of Bosnia and Herzegovina." A similar recommendation was put forward by a 2000 study sponsored by the Human Rights Center at UC Berkeley and the Centre for Human Rights at the University of Sarajevo, which called on inserting non-Bosnian judges into war crimes trials in the domestic courts of BiH. (The Human Rights Center and the International Human Rights Law Clinic, 2000, p. 48)

In early 2003, a series of meetings of ICTY leaders and The Office of the High Representative (OHR) (the UN official appointed with implementing the Dayton Peace Accords, at the time Paddy Ashdown of Ireland) was held in The Hague in order to determine the legal reforms that would be required in the Bosnian legal system to facilitate the transfer of war crimes cases to Bosnia on a large scale. The final statement of this working group stated that, "Both the OHR and the ICTY recognise that an effective war crimes trial capability within BiH is an essential part of the establishment of the rule of law and fundamental to the reconciliation process, creating necessary conditions to secure a lasting peace in BiH." Toward this end, they concluded that, "A specialised, three-panel chamber within the newly established Court of Bosnia and Herzegovina, is, in the first phase, the most appropriate institution in BiH to try war crimes cases. This Chamber will be an institution of Bosnia and Herzegovina operating under the laws of the state. Nevertheless, for an initial period there should be a temporary international component in its judiciary and court management." (ICTY, 21 Feb 2003) Although the court would apply the laws

of BiH, its jurisdiction would primarily be over referrals from the ICTY and cases, "which due to their sensitivity should be tried at the State Court level." In addition to these meetings in The Hague, negotiations were held between the government of BiH and the ICTY in order to bring about the required reforms. The two main considerations that the ICTY officials mentioned involved protecting witnesses from persecution and establishing the necessary funding for the courts to operate effectively and fairly. (ICTY, 15 Jan 2003) Furthermore, reforms were also undertaken to introduce state-level criminal procedures as well as a national criminal code into the Bosnian justice system. (Human Rights Watch, 2006) Once the Bosnian judicial system's reforms were in place, the local system, aided by an international presence, could begin to take the place of the international body on cases involving lesser alleged criminals and others that the ICTY was not interested in pursuing.

Thus, the BWCC was created in order to prosecute individuals who were either considered to be too "small" for the ICTY to deal with or individuals who were to be prosecuted past the completion date of the ICTY. In addition, it served to ensure that these domestic trials were up to international standards and conducted free of the ethnic bias that was rampant throughout the extant Bosnian justice system. Finally, the BWCC created the possibility of conducting trials much more cheaply and efficiently than the ICTY. This meant that the trials would have to be run locally, using local staff while simultaneously being accountable to international standards—the basic mission of all the hybrid tribunals we have looked at here. Thus, the court became the site for conducting cases that were taken up under the RoR procedures of the Rome Agreement as well as for cases that were referred from the ICTY. The first case for the BWCC was that of Radovan Stanković, who was transferred to Bosnia from the ICTY in September 2005. His case will be discussed in detail in a later chapter.

Creating the UNMIK Court System

When UNMIK initially took control over Kosovo, creating a functioning court system was a priority as the UN troops (under the title KFOR) had quickly begun to take on conventional criminal justice tasks in the territory. These responsibilities included arresting people for criminal activity, including war crimes committed during the ethnic conflict. (Strohmeyer, 2001, p. 49) As has already been mentioned, the infrastructure of Kosovo had been seriously damaged in the war, which in turn hampered efforts to run the local criminal justice system, and to compound the problem, there were few qualified Albanian jurists available to handle these cases. The Yugoslav government had purged Albanians from the judiciary during its rule over Kosovo and almost all Serb jurists had fled the country with the Serbian forces. The Special Representative of the Secretary-General (SRSG), the head of UNMIK, began the process of stabilizing Kosovo, in part by issuing a series of decrees aimed at reconstructing Kosovo's judiciary. One decree issued on June 28 1999 created a Joint Advisory Council on judicial appointments, which consisted of two Kosovar

Albanians, a Bosnian Muslim, a Serb, and three international jurists: This began the process of staffing the judiciary. (UNMIK Emergency Decree No. 1999/1, 28 June 1999) Unfortunately, however, each of the council members, including the Albanian members, was attacked by critics for being an official tied to the Yugoslav regime. The Serb member was evicted from his home, fled to Serbia, and was threatened with death, were he to return. (Strohmeyer, 2001, p. 52)

When the court was initially established in 1999, ethnic Albanians were primarily used to staff it in what was described as the Emergency Judicial System (EJS). However, while this program might have been suitable for the ordinary crimes that came before the judicial system, it could not be relied upon to appropriately handle the war crime cases that arose from the conflict with Serbia. As Cady and Booth, two UNMIK officials, state: "Reports came in that the courts, predominantly staffed with ethnic Albanians (…) were releasing ethnic Albanians charged with crimes against Serbs, even where the evidence was strong. Conversely, Serbs were often placed in indefinite pre-trial detention without any apparent will to bring their cases to trial. Furthermore, attacks and threats were reported against judges, ensuring that even those members of the judiciary with the integrity to remain neutral in so charged an atmosphere were placed under intolerable pressure." (Cady and Booth, 2004, p. 59) As a result, the SRSG set up a special commission that ultimately recommended the creation of a new court, the Kosovo War and Ethnic Crimes Court (KWECC). This was envisioned as a mixed court separate from the main criminal court system of Kosovo and was in many ways akin to the Bosnian court or the SPSC.

However, a sudden spasm of violence in February 2000, which included bombings and ethnic violence focused on the town of Mitrovica, prevented UNMIK from establishing KWECC. In response to the violence, UNMIK passed Regulation 2000/6 which allowed the SRSG to appoint international judges and prosecutors to the District Court of Mitrovica on February 15, 2000. Shortly thereafter, internationals began serving in these positions within the existing Kosovo court system. (UNMIK Regulation No. 2000/6, 15 Feb 2000) Along with this unrest, around 30 Serbs held in detention in Kosovo began a hunger strike in protest of both the length of their detention and over the fact that their cases would be heard before Albanian judges. At this point, few Serbs wished to participate in the UNMIK court system and Albanian judges did not wish to apply the laws of Yugoslavia from which they believed themselves to be independent. The protests only ended when the SRSG agreed to allow international and Serb judges to hear their cases. (Reuters, 2000) This forced the SRSG to extend Regulation 2000/6 to other courts in Kosovo. The rush of events and the passing of Regulation 2000/6 made the creation of a special, separate court, a proposal that had already been controversial among the Kosovar community, redundant and the project was dropped. (Cady and Booth, 2004, pp. 60–61; Cerone and Baldwin, 2004, p. 49)

A further UNMIK Regulation 2000/64 ("On Assignment of International Judges/Prosecutors and/or Change of Venue"—issued on 25 Dec 2000) further bolstered the international presence in Kosovo. According to the regulation, "At any stage in the criminal proceedings, the competent prosecutor, the accused or the defense counsel

may submit to the Department of Judicial Affairs a petition for an assignment of international judges/prosecutors and/or a change of venue where this is considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice." (UNMIK Regulation 2000/64, para. 1.1) These panels, known as "Regulation 64 Panels," became the framework for the more sensitive and complex war crimes trials in Kosovo, as others were left for lower courts. We will discuss the Regulation 64 panels in some depth in the next chapter.

Conclusion

In each case the origins of the different ad hoc tribunals were quite complex and in some ways murky. Each one was the product of different organizations, states, and individuals seeking to achieve different ends through the tribunal. Some sought political power or legitimacy through the establishment of a tribunal. Others sought to bolster the rule of law within their own states. Still others, particularly those tribunals established by the UN, saw the creation of tribunals as a part of the nation-building process, a necessary step to create stability and deal with the problems lingering from previous conflicts. These agendas will not stop with the creation of the tribunals themselves though, and we will see various actors seeking to manipulate the cases that come before the court as well as the tribunals for their own ends.

Before we get to the major cases before these tribunals (the subject of Chapter. 4), we will first examine the outcome of the political processes we have looked at in this chapter. That is, we will examine the organization of the different hybrid tribunals, their various institutional structures, as well as the treaties and other legal materials that have guided and, in some cases, continue to guide the conduct of the various actors involved with them. This will give us the opportunity to see them "in action" in the penultimate chapter where we look at some of the most significant cases that the different tribunals confronted.

Chapter 3
The Organization of the Tribunals

In this chapter, we will examine three related subjects: First we will look at the basic structure of the different tribunals, examining their organizational structure, composition, and some of their operations. This will be an examination of the division of labor and power along two separate axes. We will see how authority is distinguished between the bodies that comprise the court, the chambers (involving the judges), the prosecutor's office, the defense counsel, the registry, and the administrative staff. It will become apparent that each tribunal has its own way of organization, as well as its own relations with various nation states and the United Nations (UN). This ultimately reflects the power dynamics among their respective architects. This allocation of authority and the distribution of tasks among the bodies that comprise the hybrid tribunals are crucial to understanding how they operate in actual cases. Additionally, there is a second division of power in the hybrid tribunals. As previously discussed, one of the defining features of the hybrid tribunals is that power in this context is shared between the domestic governments "hosting" the tribunals (Cambodia, East Timor, etc.) and the international bodies (the UN, primarily, but also states that have a say in their operations). This power-sharing system filters through the organizational structures of the different tribunals in distinct ways. The precise numbers and allocation of international and domestic staff dramatically affect who has influence on the operations of the hybrid tribunals. Most notably, the chosen prosecutor can shape a tribunal's operations, as this individual has a great deal of power to shape the tenor and approach that the tribunals take. In many ways, then, the makeup of the tribunal represents the institutionalized result of the political compromises made in the formation of the tribunals.

In addition to the organization of the tribunals, this chapter will also discuss the initial prosecutorial strategy employed by the prosecutors of the tribunals (focusing largely on the Special Court for Sierra Leone, SCSL, but also looking at some of the others) and the outreach efforts of the tribunals. By *outreach efforts*, I mean attempts on the part of the hybrid tribunals to make their activities known to the broader domestic and international public. By *prosecutorial strategy,* I refer to the choices of indictments that the prosecutor chooses to issue and the cases that she

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chooses to pursue—including the precise charges she levels against the defendants and the rhetoric she uses to characterize their alleged misdeeds. These two dimensions of the hybrid courts are clearly essential and both play a basic role in the didactic and historiographic function of the court. Outreach is important because a tribunal, hybrid or otherwise, can only influence the broader public discourse if its actions are made known to others, a particularly daunting challenge in countries with poor informational infrastructures such as the ones where the hybrid tribunals were located. The prosecutorial strategy is important because, through her choices of targets, the prosecutor has a strong influence on both the credibility of the tribunal as a whole, as well as the narrative that the tribunal ultimately tells about the mass atrocities it was created to address.

The decision regarding who to prosecute is an essential part of the narrative that the court tells about large-scale violent conflicts. In cases of *mass* violence there is no shortage of people who are guilty of violent crimes, many of whom could easily fall under the jurisdiction of these tribunals. However, given the logistical, financial, and in some cases political restrictions on the courts, prosecuting every individual who could fall under a tribunal's jurisdiction is simply not possible. Therefore, the prosecutor has to make a decision about exactly who to prosecute, which in turn is often based on a story that the prosecutor wants to tell about the causes of the violence and who is to blame for mass death. The language of the indictments themselves serves a similar function, outlining the crimes that the individuals are accused of committing as well as the context in which they were committed—shaping how the court will look at the facts during the trial. As we will see in many cases, such as that of the Deputy General Prosecutor of Serious Crimes (DGPSC, East Timor's prosecutor for serious crimes), the prosecution issued indictments for individuals that would most likely never come before the court, solely in order to shape the narrative around the violence and not let suspected criminals "off the hook" on account of the fact that they had fled the country before the violence had been stopped.

Along with the narratological function of the prosecutorial strategy, the prosecutor's decisions regarding indictments can help establish the court's legitimacy with the broader public. That is to say that in many cases a prosecutor's choice of targets is scrutinized and evaluated by the general public. If the wrong people are targeted, the public can begin to lose faith in a tribunal, and if individuals who are widely believed to be guilty are ignored by the court or charged with offenses that do not match up with the culpability that the public attributes to them, the public is similarly likely to become disillusioned. Of course, in contexts where responsibility for violence is controversial and contentious or places where violence was committed by all sides, *any* indictments will provoke condemnation from some observers. Therefore, as we will see, many of the prosecutors put a great deal of thought into whom they targeted for indictment, how they phrased the charges set out in the indictment, and how they unveiled these indictments to the general public. Through these acts they are not merely selling a particular interpretation of violence, they are simultaneously selling the process of criminal justice and the institutions authorized to dispense it.

Finally, the outreach mission of the tribunals is extremely important, though, in some cases, it is sorely neglected. All of the countries that host a hybrid tribunal are

poor, and many citizens lack access to a newspaper, much less a television or the internet. This means that the most important audience for the tribunals, the general public of the host states, is likely to remain entirely ignorant about its proceedings without an active effort on the part of the tribunal staff to connect with them. This involves explaining the sometimes lumbering, complex, and frustrating aspects of criminal justice to the public, often in a myriad of indigenous languages or dialects. While, as we will see, in many cases the outreach dimension of the hybrid courts is underfunded and undervalued by other parts of the tribunals, they play a vital role in their broader effectiveness.

The ECCC

There are three main organs comprising the Extraordinary Chambers in the Courts of Cambodia (ECCC), along with a number of subsidiary units handling administrative matters. Also, the court uses an inquisitorial model where much of the investigative work of the court is conducted by unbiased judges (rather than with the Anglo-American adversarial approach using prosecutors to investigate crimes and indict suspects). At the heart of the tribunal is the Judicial Chamber consisting of a Pre-Trial Chamber, a Trial Chamber, and an Appellate Chamber (referred to as "The Supreme Court"). Each of the chambers shares a similar proportion of judges—a minority of international judges (IJs) serves alongside a majority of Cambodian judges. In the Pre-Trial Chamber, there are five judges with a 2/3 international/Cambodian split in its personnel. The Trial Chambers also consist of five judges with a similar breakdown. The Supreme Court consists of seven judges, four of which are Cambodian. For any decision of the Pre-Trial or Trial Chamber, at least four judges are required, and the consent of at least five judges is required for a decision of the Supreme Court. This arrangement was designed to keep the court Cambodian in character but ensure that it was independent of the Cambodian government.

Along with the separate Chambers of the judiciary, there are several other units comprising the ECCC, each of which seeks to balance the concerns of the Cambodian state with those of the international community. There are two investigating judges and two prosecutors. One of each is Cambodian (that is, she is chosen by the Cambodian government) and the other international—selected by the UN. As with many other issues involving the Extraordinary Chambers, there was a strong disagreement between the UN and the Cambodian government on this matter as the UN would have preferred only a single, international prosecutor and a single investigating judge. Characteristically, the UN acquiesced to the demands of the Cambodian government on the matter. Despite this arrangement, the Agreement is clear that the prosecutors are expected to cooperate in their efforts and strive for unanimity wherever possible. However, if one of the prosecutors is unhappy with the other, they can seek to resolve the matter in the Pre-Trial Chamber, a body made up of five judges. Like the other bodies, the Pre-Trial Chamber decides matters by a supermajority and its rulings are not appealable (Article 7), but, "In case the prosecutors are unable to agree whether to proceed with a prosecution, the prosecution

shall proceed." (Article 6) While this arrangement has some advantages in terms of speed, we will see that it has led to serious tension between the more aggressive prosecutors and those who wanted to limit the ambitions of the tribunal.

Working alongside the prosecutors are the two co-investigating judges (CIJs)—again, one international and one Cambodian. The investigating judge (a position that does commonly exist in the Anglo-American criminal justice systems) is tasked with investigating a case in a neutral fashion and making recommendations for prosecuting or not prosecuting the individual in question—what is known as a "closing order." Once the prosecutors have made a preliminary investigation "to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and…identify suspects and potential witnesses," they make their recommendations to these judges. (Internal Rules, 3 Aug 2011, Rule 50) It is their job to search for evidence, accounting for both exculpatory and inculpatory evidence, and present it to the court. If the CIJs find sufficient evidence to indict a defendant, then an indictment is issued presenting charges which serve as the basis of the trial. This means that, to some extent, both prosecutors and defendants are at the mercy of these judges and their findings. Though both prosecutors and defendants may contribute to this investigation, the prosecutors have the ability to appeal the CIJs' findings to the Pre-Trial Chamber.

As with the prosecutors, the CIJs are expected to "cooperate with a view to arriving at a common approach to the investigation." (Agreement, Article 5) As we will see, however, the CIJs have often worked at cross-purposes and have been accused of undermining each other's efforts, particularly in the controversial Cases 003 and 004 that will be discussed in the next chapter. The tribunal has undergone a series of different international CIJs, some of which have left the tribunal in frustration either with their Cambodian counterpart or with the tribunal more generally. Currently, the international CIJ is Mark Harmon (an American attorney) and his Cambodian colleague is You Bunleng. Previous CIJs have included Siegfried Blunk (Germany) and Laurent Kasper-Ansermet (Switzerland), each of which departed with varying degrees of frustration and disappointment. (Mydans, 10 Oct 2011) We will discuss their various roles in relation to these cases in the next chapter.

Defendants before the Extraordinary Chambers have a Defense Support Section (DSS) which serves several tasks. It distributes funds for the legal aid of the defendants in the trial and represents the defendants in outreach before the Cambodian public. It aids indigent defendants who cannot afford their own attorneys, provides legal and technical support for defendants, and trains those attorneys who wish to appear before the ECCC. In addition, there is a Victims Support Section (VSS) that serves as the point of contact between victims and the tribunal, including the civil complaints that many victims have made against the defendants.

As its name suggests, the Pre-Trial Chamber oversees any preliminary legal issues that arise before the commencement of the trial itself. Given the "split" authority of both the CIJs and the co-prosecutors, it should be unsurprising that one of the central tasks of the Pre-Trial Chamber is to settle disputes between these two officials, a power that will prove central to the tribunal's dysfunction. In addition, the Pre-Trial also has the ability to hear objections from either the accused or the

defense against the decisions of the CIJs, and it serves as the final court of appeal for the investigation of the closing order itself as "no issues concerning such procedural defects [in the closing order] may be raised before the Trial Chamber or the Supreme Court Chamber." (Internal Rules [Rev. 8], 3 Aug 2011, Rule 76) The Trial Chamber conducts the trial and determines the nature and scope of the defendant's culpability (if any) in its final judgment, but its decisions are limited to the charges set out in the indictment and closing order. Further, at the initial hearing at the outset of the trial, the Trial Chamber can rule on the applications of prospective civil parties (discussed below). Finally, the Supreme Court can overrule any legal errors of the Trial Chamber as well as "an error of fact which has occasioned a miscarriage of justice." (Internal Rules (Rev. 8), 3 Aug 2011, Rule 104)

One unfortunate problem with the composition of the Extraordinary Chambers was the failure to codify a clear set of ethical guidelines to regulate the staff, an oversight that has since created a number of problems for the ECCC. In 2007, The Open Society Justice Initiative, an international NGO monitoring the tribunal, leaked the findings of a confidential UN report which pointed to corruption in the staffing of the tribunal, asserting that some of the Cambodian staffers for the court were required to give "kickbacks" to their superiors for the privilege of holding their positions. (Open Society Justice Initiative, 2009) As a result of this release, the initiative was threatened with being denied access to the tribunal's staff. (Hall, 2007) A 2007 Opinion piece in the *Wall Street Journal* cited confidential internal UN reports regarding widespread corruption among the staff in the court. (Hall, 2007) Allegedly, recruitment was "not performed in a transparent, competitive and objective manner that ensures the most suitable candidate for the job," concluding that "taking into account the serious lapses in the recruitment process to date, all the recruitments of staff…should be nullified." (Hall, 2007) The report even went so far as to call on the UN to consider withdrawing from participation in the tribunal if these matters were not addressed. (Skilbeck, 2008)

In January 2006, part of the High Command Headquarters of the Royal Cambodian Armed Forces at Kambol (just outside of Phnom Penh) was handed over to the Task Force for the creation of the tribunal, and in May 2006, the judges and the prosecutors for the court were approved by the Cambodian government. The IJs were from a variety of nations from around the world, but the prosecutor and his alternate were both from North America. The first international prosecutor for the Chambers was Robert Petit, a Canadian prosecutor who had previously worked in the prosecutor's office for the two ad hoc tribunals. His alternate was Paul Coffey, an American prosecutor from New York. The Cambodian prosecutor was Ms. Chea Lang, a German educated Cambodian lawyer, and her alternate was Chuon Sun Leng.

Initially, Petit withdrew his candidacy for the court, mentioning that he had concerns about the structure of the court's prosecution office. (Townsend, 2012, p. 302–303) As he reported later, his reluctance revolved around the inability of the prosecutors to effectively conduct independent investigations. It had been assumed that the prosecutors would rely on the Cambodian police in order to conduct investigations. (Townsend, 2012, p. 303) Such a structure would have left the co-prosecutors even more at the mercy of the Cambodian government than the Agreement

and Cambodian law had stipulated. Moreover, he had concerns about the funding of the court, stating later that "this was a cut-rate court. It was structured by people who had insufficient knowledge of the actual court process. Then it was cut up by accountants in terms of structures, staffing and budget. So, in the end, if you had wanted to devise a court that would not work, you would be hard pressed to find a better model." (Townsend, 2012, p. 304) Despite these concerns, Petit signed up as the ECCC's international co-prosecutor and began serving in June 2006.

One feature that distinguishes the procedures of the ECCC from the other hybrid tribunals is the inclusion of civil complaints into the criminal justice processes of the Chambers. Unlike Anglo-American justice, where civil and criminal actions are completely separate affairs, the Cambodian courts follow the European system allowing victims to bring civil complaints against their victimizers before the Trial Chamber. Such complaints not only allow those wronged by the accused the ability to receive some form of compensation, but in addition (and perhaps more importantly from the standpoint of the symbolism of transitional justice), it can allow them to be civil parties to the trial. Civil parties have rights within the proceedings itself, akin to the powers of a prosecutor or defense counsel. This novel feature gave the broader public an important role to play in the trials, as well as an opportunity to see themselves as stakeholders in the ECCC. At trial, civil parties have provided some of the ECCC's most dramatic moments, even if these parties have failed to receive substantial remuneration for their suffering.

Outreach in Cambodia

The outreach component of the ECCC has faced many of the same challenges that have affected other parts of the tribunal. On one hand, outreach has been hampered by the split between the Cambodian and international components of the tribunal. (Research Unit International Center for Transitional Justice, 2010) In many ways, the emphasis on outreach and the necessity of communicating and translating the court's activities to the broader public is understandable as the people most interested in the court's existence within Cambodia were not the political elites, but rather the common Cambodian people. Many Cambodians who suffered greatly during the Democratic Kampuchea (DK) era live in remote villages with little access to national news. The Public Affairs Section (PAS) of the Chambers, along with the Victims Support Section (VSS) are responsible for disseminating information about events at the ECCC, including "correcting any false or misleading information presented to the public." (Internal Rules, Rule 9)

The PAS and the VSS performed very different functions and served very different constituencies at the ECCC. The PAS was largely involved in *macro* outreach—reaching out to the broader public, both domestically and internationally, while the VSS was involved in *micro* outreach, that is, outreach to specific individuals who have claims against the various defendants. (Research Unit International Center for Transitional Justice, 2010) That is to say that the VSS was involved with

coordinating the claims of specific actors with a grievance against the defendants while the PAS sought to explain the ECCC's role to the general public at home or abroad. (It is interesting to note that this structure is different from the SCSL where the outreach offices were located in the *prosecution* office along with a more general outreach office.)

Throughout the lifespan of the ECCC, the PAS has been involved with making the Cambodian public and the international community aware of what was taking place at the ECCC. They have worked to distribute visual and audio materials about the project and held public meetings and community forums regarding the ECCC's activities. (Pham et al., 2009, p. 19) Among the projects conducted as part of the ECCC's outreach program are tours of Tuol Sleng prison, the "killing fields" at Choeung Ek. They have also participated in a joint venture with a group of National League of Commune/Sangkat Councils (local representatives) to bring local leaders to the Chambers as well as to other important Khmer Rouge (KR) sites in the Phnom Penh area. Members of the PAS have also brought important materials about the tribunal, as well as the Khmer Rouge, out to the rural population. In addition, they have published monthly reports outlining the various activities at the ECCC.

While these bodies have been working to spread information about the tribunal, its leaders concede that "the Public Affairs Section has primarily relied on local and international NGOs to conduct the bulk of the outreach activities relating to the Tribunal." (Pentelovitch, 2008, p. 465) Along with the ECCC bodies that are officially involved in outreach, a number of international NGOs have helped disseminate information about events at the ECCC to the Cambodian and international public. Among the most significant of these has been the Cambodia Tribunal Monitor (CTM) based out of Northwestern University and the International Center for Transitional Justice (ICTJ). Along with these groups, many domestic, Cambodian NGOs have been involved in documenting the atrocities committed by the Khmer Rouge, as well as publicizing the work of the ECCC. The most notable of these is the Documentary Center for Cambodia (DC-Cam), which started out through Yale University (it was created by the "Cambodia Justice Genocide Act" passed by the US Congress in 1994) but became an independent body in 1997.[1] Finally, the Open Society Institute's Justice Initiative has been a steadfast observer and critic of the court's proceedings, publishing a series of scathing critiques of the tribunal's corruption and the efforts of the Cambodian government to undermine the tribunal.[2]

In its 2009 study "So We Will Never Forget," The Human Rights Center at the University of California, Berkeley conducted surveys about the awareness of Cambodians regarding the activities of the ECCC. The center found that among their 1000 survey participants "thirty-nine percent of the respondents…had no knowledge of the ECCC, and nearly half (46%) had only limited knowledge." (Pham et al., 2009, p. 3)

[1] For a lengthy and insightful discussion of the work of indigenous NGOs in Cambodian transitional justice see Sperfeldt (2012).

[2] For a sociologically minded study of NGO outreach in Cambodia see Manning (2011).

The inclusion of civil parties into the ECCC's procedures has also been an important part of the tribunal's outreach both through the VSS and through the NGO community. As part of an umbrella organization called the Cambodian Human Rights Action Committee, a group of NGOs sought out potential civil parties and aided them in filling out the paperwork allowing them to participate in the trial as civil parties. These applications were then forwarded on to the VSS. (Stammel, 2010, p. 19) Many individuals and groups wished to be civil parties to the first case brought before the ECCC (the "Duch" case, discussed in the next chapter); however, many were summarily denied without explanation. (FIDH, 14 Sept 2010) Once accepted as a civil party, these individuals were often updated about the tribunal's activities in regards to their case, and those who were to testify were trained on courtroom procedures by the NGO. (Stammel et al., 2010, p. 19)

Prosecutorial Strategy in Cambodia

Because the ECCC was envisioned as a Cambodian court with an international component, it is unsurprising that the prosecutorial strategy for the ECCC would be somewhat disjointed, especially given the competing agendas surrounding the chambers. With two prosecutors, two CIJs, and a Pre-Trial Chamber composed of both international and Cambodian judges, and the Cambodian government's ambivalent attitude towards the court in general, it is likewise unsurprising that there would be a good deal of conflict between different parties regarding the prosecutorial strategy of the ECCC. These bureaucratic issues and the divergent interests of the Cambodian government, as well as the international and civil society actors engaged with the ECCC, virtually ensured this. These problems were compounded by the sheer enormity and complexity of the problem of the Khmer Rouge and its 4-year mismanagement of Cambodia. There was no shortage of blame to go around.

The UN–Cambodian Agreement establishing the Chambers and the Cambodian law that accompanied it both agree in their language regarding the jurisdiction of the ECCC. According to the law, "The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979." (Article 1) This restriction of the court's jurisdiction is notable in several ways: First, it limits the list of prosecutable people to a set of (undefined) "senior leaders," and eliminates any prospective criminal who was not a member of the Khmer Rouge government during their reign (thus excluding potential Vietnamese, Chinese, or American criminals, not to mention non-Khmer Rouge Cambodians who were involved in violence during the DK era). Second, it excludes any offenses that were committed before or after the Khmer Rouge controlled Phnom Penh, including the long war between the People's Republic of Kampuchea (PRK) and the Khmer Rouge holdouts in the decades after the war was concluded. It also excludes the misdeeds of the Lon Nol government or its American allies. The restriction of the court's jurisdiction to

those individuals who are "most responsible" for the atrocities committed by the Khmer Rouge was a deliberate limitation of proposed language from the group of experts which pushed for a broader scope of jurisdiction simply over "those responsible."[3] Through this stipulation, an immense, decades-long conflict, involving several regional and global powers and millions of people, was reduced to a group of aging, long-defeated guerillas who no longer posed a serious threat to anyone.

As in the cases of other tribunals, the decision to limit the scope of individuals potentially subject to prosecution by the ECCC was in many ways driven both by practical concerns as well as political ones. As has been discussed, the cost of all of the international tribunals is a matter of great concern for the states that support them, as well as for the UN itself, and the fact that Cambodia was unable to come up with its share of the funds while requiring the tribunal to begin operations anyway, underscored the fact that the tribunal was going to be greatly concerned with money. In addition, President Hun Sen's instrumental attitude towards the court (and his expressed distrust of foreign intervention into Cambodia) must surely have played a role. Too broad a personal jurisdiction would make the ECCC more difficult for Sen to control and would risk putting allies of Sen, who had been involved with the Khmer Rouge, in the prosecutor's crosshairs. (As we will soon see, to an extent this was a problem at the court.) In addition, some prosecutions could have embarrassed the government of Cambodia or their international allies who had links to the Khmer Rouge. Such prosecutions could even have destabilized Cambodia, as individuals resorted to desperate political tactics to shield themselves from the court. As US War Crimes Ambassador David Scheffer described the situation,

> The Cambodian, UN and American negotiators never limited the pool of suspects to be charged and brought to trial to five or six individuals, although it was no secret that some Cambodian officials desired a small number, which would exclude current government and military officials. Yet there was no serious negotiation expressly to embrace that Cambodian view as that would have been an intolerable position for the non-Cambodian negotiators to accept and it would have fatally undermined the integrity of the court. In my own many long negotiations with Cambodian and UN authorities, negotiators typically spoke of up to 15 or so individuals ultimately being prosecuted. We were very aware of much higher numbers being proposed by researchers and domestic and international nongovernmental organisations. UN negotiators at times spoke of 20 to 30 potential defendants, but within the negotiations we knew and expressed a more likely maximum figure of 15 or so candidates for prosecution. We knew that resource constraints and political realities, as well as aging individuals, would keep the number on the relatively low end, but not so low as to be *de minimis*. (Scheffer, 2009)

The delimitation of the suspects was thus a decision based on a political and economic calculus that reflected the deeper conflicts in the court.

On July 18, 2007, the prosecutors submitted an initial list of five potential defendants to be charged by the ECCC. The document contained "facts that may constitute crimes, persons suspected to be responsible for those crimes and requests the Co-Investigating Judges to investigate those crimes and suspects." (Statement of Co-Prosecutors, 8 July 2007) Along with the list of names were thousands of supporting documents helping prove a case that few in the public believed needed

[3] For more on this point, see Morrison (2009).

support. (As the ICTJ put it, "Many people in Cambodia often ask, 'If everyone knows they are guilty, why do you need to have a trial?'" [Research Unit International Center for Transitional Justice, 2010, p. 6]) Though the names on the list were kept secret at the time, they included Kaing Guek Eav (a.k.a. Duch, the director of S-21 Prison during the DK era), Nuon Chea (a.k.a. "Brother Number Two," the deputy secretary of the Communist Party of Kampuchea, CPK), Ieng Sary (the former minister of foreign affairs of DK), Khieu Samphan (DK's head of state), and Ieng Thirith (wife of Ieng Sary, and DK's minister of social action). All of the suspects were then arrested or were transferred to the custody of the ECCC. The first figure publicly indicted 13 days later by the court was the lowest ranked official on the list, Eav.

The international prosecutor wished to extend the scope of the prosecution to include a number of individuals beyond these five. He argued that the court should investigate these cases because "(1) the crimes described in those submissions were committed, (2) these crimes are within the jurisdiction of this Court, and (3) they should be investigated by the Co-Investigating Judges. He believed that this last set of cases to be prosecuted by this Court would lead to a more comprehensive accounting of the crimes that were committed under the Democratic Kampuchea regime during 1975–1979." (Statement of the Co-Prosecutors, 5 Jan 2009) On the other side of the dispute, the Cambodian prosecutor argued that other priorities should take precedence. The Cambodian prosecutor emphasized "(1) Cambodia's past instability and the continued need for national reconciliation, (2) the spirit of the Agreement and the ECCC Law, and (3) the limited duration and budget of the Tribunal." (Lesley, 2009) The Pre-Trial Chamber was unable to achieve a supermajority on the request and, as stipulated by the tribunal's founding documents, the case was referred to the CIJs. This, however, was by no means the end of the conflict over these cases, as we will see in the next chapter.

The Special Court for Sierra Leone

Given the legally distinct nature of the SCSL, it is understandable that there was a long list of documents needed to create the legal architecture of the court. Security Council Resolution 1315 gave the UN the authority to make an agreement with the Sierra Leonean government. Then, the UN needed to strike the actual agreement, a treaty, with the government of Sierra Leone to create the court itself. Then the government needed to create their own legal framework for the tribunal and to bring this framework into compliance with the UN treaty. Then, a number of subsidiary documents were required to further define the functions, competence, make up, and operations of the tribunal. Many of these subsidiary documents, such as the Headquarters Agreement and the Rules of Detention, largely address logistical questions about the day-to-day affairs of the SCSL and need not be discussed here other than to point out that the formation of the tribunal was a complex legal and logistical

effort coordinated on three continents. In short, creating the SCSL was an immense legal undertaking, fraught with a great deal of potential for confusion.

Besides the logistical documents is a long list of material forming the legal architecture of the SCSL. Along with UN Security Council Resolution 1315, which gave the UN authority to establish the tribunal, the central documents of the court are the Agreement between the UN and the government that establishes the court and the statute of the SCSL. Of subsidiary importance are the Special Court Agreement 2002 (Ratification) Act, and the SCSL's Rules of Procedure and Evidence. The government of Sierra Leone signed the Special Court Agreement of 2002 (Ratification) Act which helped incorporate the UN Agreement into Sierra Leone's domestic law and gave domestic courts the ability (and obligation) to cooperate with the court's rulings and requests. The Headquarters Agreement between the SCSL and the government of Sierra Leone addresses logistical issues and the protections to be provided for individuals working for the SCSL. It provides the SCSL with "privileges and immunities as are necessary for the fulfilment [*sic*] of its official functions and purposes," (Article 3) makes the premises of the court inviolable, and provides SCSL personnel with immunities equivalent to other representatives of international organizations. (Article 12)

One thing that distinguishes the SCSL from the ad hoc tribunals is the substantive law set out by the statute. While much of the court's material jurisdiction is similar to the other international courts (war crimes and crimes against humanity), Article 5 of the statute sets out the crimes under Sierra Leonean law that fall under the court's jurisdiction, including the abuse of girls under the Prevention of Cruelty to Children Act and the destruction of property under the Malicious Damage Act. These additional texts were included at the behest of the UN and the government of Sierra Leone in part as a response to criticism that the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) had not adequately prosecuted crimes of sexual violence and on account of the widespread arson committed by the Revolutionary United Front (RUF) during the war. (Macaluso, 2001, pp. 364–365; Dougherty, 2004)

A further issue stemming from the Lomé Accord was the relationship between the Truth and Reconciliation Commission (TRC) and the SCSL. On one hand, both institutions were aimed at facilitating a transition to a democratic peace and stability in Sierra Leone. On the other hand, despite their shared agendas, they often worked at cross purposes. By placing "truth" at the forefront of their agenda, Sierra Leone's TRC required an open process that allowed wrongdoers to freely come forward and account for themselves. (Evenson, 2004, 757–758) The open communication that such procedures require was undermined by the SCSL's emphasis on legal accountability and ultimately punishment, leaving some hesitant to come before the TRC if their statements could be used against them in a criminal court. As we will see in the next chapter, there were several incidents where these two institutions opposed each other's operations and were occasionally outright antagonistic to each other during the lifespan of the SCSL.

The Organizational Structure and Staffing of the Special Court for Sierra Leone

Mirroring the two ad hoc tribunals, the SCSL consists of three major bodies: the Chambers, the Prosecution, and the Registry. The Chambers consist of the judges who conduct the trials and are in many senses the directors of the court. Not only do they make authoritative rulings, but through their president they handle many personnel issues in the court. They are appointed through consultation between the UN and the government of Sierra Leone. The judges are expected to be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices." (Statute of the SCSL, Article 13) Most of the judges have served as trial judges in their own states or in the ad hoc tribunals, though some were appointed based on their expertise in the field of humanitarian law and international criminal law.

The Chambers is in turn broken down into two different categories of subchambers, a pair of three-judge Trial Chambers who conduct the actual trials for the accused, and a five-judge Appeals Chambers which addresses legal questions confronted by the lower court. As with the other ad hoc tribunals, the composition of the Chambers was an issue of some importance. A chamber with a controlling number of Sierra Leoneans sitting on the bench would render the internationalized dimension of the court moot in many ways, as Sierra Leoneans would dominate the court on key issues. It was decided that the Trial Chamber would consist of three judges, two appointed by the Secretary General and one appointed by the government of Sierra Leone, while the Appeals Chamber would be a five-person panel with three judges appointed by the secretary general. (Article 12) The first group of judges, appointed in July 2002, consisted of ten judges, seven from African states (including two from Sierra Leone) and three from Western countries. (UN Secretary-General, 15 Jan 2003) There were no American judges placed on the bench in the initial appointments, though Shireen Fisher, a superior court judge from Vermont, would be appointed in 2009. In short, the Chambers has had a strong Afrocentric staff, supplemented with Europeans and Canadians, with only two representatives from Asia.

The President of the court is also the Presiding Judge of the Appeals Chamber. He or she (two have been women) has several significant duties in relation to the court. The President consults with the Secretary General about personnel issues, appoints alternate judges, approves of pardons for convicted criminals and files an annual report to the secretary general and the government of Sierra Leone. Geoffrey Robertson, a titanic figure in the world of international humanitarian law, was appointed as the first president of the court. Robertson, an Australian/British barrister, founded the Doughty Street Chambers in London (a human rights-oriented legal group) and has a long record of legal activism on civil rights issues. His appointment clearly brought legal gravitas to the proceedings. However, he was forced to resign from his position after it was revealed that passages in a book he had written

were highly critical of Sankoh and the RUF. (Robertson, 1999; Cockayne, 2004) In March 2004, he was replaced by acting president Renate Winter of Austria.

The Prosecutor is charged with indicting and prosecuting suspected offenders. He is appointed by the secretary general (the statute does *not* require that she be appointed in consultation with the government of Sierra Leone) and serves a 3-year, renewable term. The Prosecutor is assisted by a Deputy Prosecutor appointed by the government of Sierra Leone and by "such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently." In addition, the statute requires that "consideration…be given… to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice." (Statute, Article 15) Obviously, the role of the prosecutor is central to the special court, as he has sole discretion in determining who to prosecute and what charges to level against defendants.

The first prosecutor selected by the court was the American military lawyer David Crane, who was appointed by Kofi Annan in 2002.[4] The appointment of an American with a US military background raised some eyebrows among international observers and Sierra Leoneans alike—many of whom saw the appointment as an attempt by the US to assert control over the tribunal. (The International Center for Transitional Justice, 2004, p. 7) Given US resistance to the International Criminal Court (ICC), and the widespread belief that the US was pushing hybrid tribunals and ad hoc tribunals as an alternative to the ICC, there was a great deal of trepidation that an American would somehow undermine the tribunal or seek to advance US policy goals. This was particularly true given that Crane was selected over (Australian) Ken Fleming after strong lobbying from the US. (Reydams and Wouters, 2012, p. 57) According to Cerone, the US Ambassador at Large for War Crimes under President George W. Bush, Pierre-Richard Prosper's office pushed for this for several reasons:

> They wanted someone with management experience; Crane had been a senior executive within the [Department of Defense]. They also liked the fact that he was a former Judge Advocate (having retired from the Army in 1996), again mirroring the IMT model. His Africa background was another factor. Crane was also a former teacher of Prosper's then deputy. (Cerone, 2007, p. 308)

"Further," Cerone argues, "it may be that the appointment of a former member of the US military, who brought with him a team of former military service-members, gave the SCSL more of a Nuremberg feel, further facilitating support for it [among the Americans]." (Cerone, 2007, p. 308) Crane, a 30-year military veteran, denied such claims, but they nonetheless persisted throughout the 3 years he served, despite having displeased US officials with his pursuit of Charles Taylor. (Cerone, 2007, p. 308)

[4] It is worth noting that many critics of the SCSL have charged that the Americans were using the SCSL as a means of undermining the status of the International Criminal Court. (Gberie, 2005, p. 212)

The registry serves a neutral, administrative function in the court and plays a crucial role in the staffing, security, and daily operations of the court. According to the Rules of Procedure and Evidence, the registry "shall assist the Chambers, the Plenary Meetings of the Special Court, the Judges and the Prosecutor, the Principal Defender and the Defence in the performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Special Court and shall serve as its channel of communication." (Rules of Procedure and Evidence, Rule 33) This makes the registry the central point for many functions of the tribunal: most notably, outreach and the Defence Office, which, "while officially part of the Registry, acts as an independent office in the interests of justice ." (SCSL website) One of the most important tasks of the registry is to run the Victims and Witnesses Unit, which provides "protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses." (Statute, Article 16) The court's first registrar (appointed "by the Secretary General after consultation with the President of the Special Court") was Robin Vincent.

One key innovation of the SCSL was the creation of the Office of the Principal Defender to aid in the protection of the rights of accused individuals. The office was in many ways a latecomer to the court as the court realized only on the eve of arresting suspects that the defense issues had not fully been worked out by the court. (Jalloh, 2011, pp. 437–438) The defender functions more or less independently of the registry and seeks to recruit qualified attorneys to defend those before the court. However, as Jalloh points out, though "it was envisaged, at least by some court officials, that the office could eventually become as independent as the Office of the Prosecutor," it ultimately "lacked the necessary autonomy to actually fulfill its immense potential." (Jalloh, 2011, p. 438) This bureaucratic disadvantage for the defense, coupled with the unequal resources provided for defense counsel,[5] has led some critics to charge that the court has failed to completely live up to the ideal of "equality of arms" between the defense and the prosecution. (Jalloh, 2011; Knoops, 2004)

In September 2002, construction began for the tribunal, and the prosecutor issued the first set of indictments 6 months later. It is surprising to note that the initial indictments did not exclusively target the RUF, but also included prominent members of the SLA and the Armed Forces Revolutionary Council (AFRC) government. Foday Sankoh, Johnny Paul Koroma, the former head of the AFRC, and Sam Bockarie (RUF leader) were all among these initial indictments. Neither Koroma nor Bockarie were in Sierra Leone and none of these three "big fish" would live long enough to face a conviction from the court. Sankoh, clearly the most significant Sierra Leonean in the RUF, died of natural causes while in custody of the court in July 2003, giving him what the prosecutor described as "a peaceful end that he denied

[5] According to one report, "The Defence Office budget for investigations for fiscal year 2004/2005 was less than half the amount allotted to the OTP for investigation-related travel alone." (Knoops, 2004, p. 1585)

to so many others." (Foday Sankoh, 30 July 2003) Bockarie died in Liberia, while fighting for Charles Taylor in May 2003, under suspicious circumstances. Finally, Koroma died in early June 2003 in Liberia under equally suspicious circumstances. The purpose of the court was to try those who bear the greatest responsibility for the war, but three of the biggest players in the war were dead within a year of the court's founding.

Bockarie, Koroma, and Sankoh were clearly major players in the war, and it is equally clear that they bore responsibility for some of the war's most outrageous atrocities. This was not the case for all of these initial indictments. The most controversial of these early targets was Samuel Hinga Norman, an ally of the government and staunch opponent of the RUF and AFRC. A leader of the fearsome Kamajors, Mende hunters in southern Sierra Leone, Norman worked with President Kabbah to fight against the rebel forces. The Kamajors were fierce fighters and were widely believed by the Sierra Leonean people to have magical powers that gave them a supernatural ability to evade gunfire. The indictment accused the Kamajors under his command of murdering civilians who were suspected of being RUF collaborators during the war, as well as summarily executing captured rebel fighters. (Indictment, 7 March 2003) Norman was widely considered a hero by many Sierra Leoneans and much of the public was outraged by the public manner of his arrest.

While we will discuss these prosecutions in more detail in the next chapter, it is worth stepping back and looking at the status of the SCSL around the time that it issued its first indictments. Many of the major players in the war, those accountable for the worst atrocities were either abroad or dead. Others, such as Sankoh, were near death from natural causes and, arguably the "biggest fish" among the rogues gallery of participants in the conflict, Charles Taylor, had yet to be indicted by the court. The most significant figure in custody at the time was a popular *opponent* of the RUF and AFRC, somebody who was considered a hero of the war. As the SCSL came to life physically, institutionally, and legally, it had a great deal to prove to its critics.

Outreach

The SCSL began its outreach program very early in its existence, and it has been described as the "Jewel in the Crown" of the SCSL. (Lincoln, 2011, p. 88) There was a strong recognition by those involved at the outset of the tribunal that its effectiveness as a tool of transitional justice depended upon the Sierra Leonean public's understanding of the tribunal and its proceedings. (There had been many critics who charged that the Yugoslavia and Rwanda Tribunals had been too high handed in their approach and failed to engage with the people of their respective countries, [Arzt, 2006, p. 230]) To make matters more challenging, high levels of illiteracy and a lack of a developed communications infrastructure within Sierra Leone placed significant public relations barriers before the court. Initially, outreach was conducted by the Special Court Working Group (SCWG). Later, there were two means by which

the SCSL connected with the people of Sierra Leone: the Office of the Prosecutor (OTP) and the Outreach Office. (Originally, outreach was solely under the jurisdiction of the OTP, but it was later moved to the registrar's office in order to preserve neutrality.) The significant difference between them was that the Outreach Office was avowedly neutral and simply sought to "promote understanding of the Special Court and respect for human rights and the rule of law in Sierra Leone." (Lincoln, 2011, p. 89) The prosecutor, of course, had no such need to be neutral.

The Outreach Office played a number of significant roles for the court, both when it was under the domain of the OTP and when it was operating independently. It conducted a series of training seminars, reaching out to the police, the military, and the military among other groups, explaining to them the nature and operations of the court. (It comprised Sierra Leoneans, to ensure the most impact in the community.) They also trained and employed district officers to work in the areas far outside of Freetown. They were tasked with educating the broader population about the workings of the tribunal and the rule of law principles that are meant to undergird it. Representatives of the prosecutor and defense offices were brought before the public to show videos about the court and answer questions. Tours were conducted of the tribunal's campus, including tours specifically organized for schoolchildren. They published a booklet "Wetin Na Di Speshal Kot?" to explain basic aspects of the court's procedures and structures and promoted the court's operations on the radio and in print. Later, when the Charles Taylor ruling was rendered, they released a series of jingles in common Sierra Leonean languages to inform the public about the ruling.

The outreach conducted by the OTP served different goals—namely the promotion of the prosecutorial endeavor and providing the public with assurances that those most responsible for the war would be prosecuted. Along with a lengthy "listening tour" of the country prior to issuing its first indictments, the OTP engaged in a number of its own outreach programs throughout Sierra Leone. As Crane described his efforts, "In town hall meetings throughout Sierra Leone, I listened to citizens from all walks of life tell me what happened. I began to feel, taste, touch, smell and see what took place…. For the first 4 months, I literally travelled the countryside visiting every district and every major town." (Crane, 2005, p. 6) In furthering the prosecutor's outreach, Crane's office created "Accountability Now Clubs" for Sierra Leonean youth to help spread information about the court and to promote ideas regarding the rule of law.

In her study of the outreach efforts of the OTP and the SCSL, Lincoln examined some of the effects of these differences and charged that "the disjointed nature of outreach in the beginning meant a disjointed message being relayed as the Court advanced, and unsurprisingly, a raising of expectations as to what the Court would be able to achieve." (Lincoln, 2011, p. 90) While Crane's office sought to educate the populace about the nature and function of the court, some criticized his outreach effort as narrow and focused on the narrow application of justice, assuming the guilt of the defendants, and promoting a view that "justice was the only way of bringing peace to Sierra Leone." (Lincoln, 2011, p. 91)

An issue that both "outreachers" faced when interacting with the public was explaining the limited mandate of the SCSL and its restricted ability to target wartime lawbreakers. As described in the SCSL Statute, the only people that the SCSL was tasked with prosecuting were the so-called big fish, individuals whose commanding roles meant that they were often removed from the front lines of conflict both geographically by miles and institutionally by several levels of command. This meant that the individuals who shot, killed, and dismembered individual Sierra Leoneans were not going to be prosecuted by the court in most cases, despite being the immediate face of the war. The fact that the actual perpetrators of these crimes often lived in the same communities and walked the same streets as their victims after the war must have been a bitter pill for many Sierra Leoneans. Explaining this restriction was a challenge for the court. It was also a challenge to convince Sierra Leoneans that the court genuinely intended to follow principles of "the rule of law." Sierra Leoneans had good cause to be dubious about the tribunal. In a country where corruption is normal, the international community exploited Sierra Leone's diamonds and then turned a blind eye to the atrocities occurring there. The Special Court's outreach offices had a great deal of well-earned skepticism to overcome and a lot of explaining to do.

While the court was not explicitly tasked with helping to establish stability and restoring the rule of law in Sierra Leone, clearly the Outreach Office and the OTP saw their roles as enmeshed in such nation-building tasks. Therefore, the majority of the court's outreach efforts had two simultaneous aims: fostering public interest in the court and helping establish the rule of law in Sierra Leone (at a minimum, by modeling its principles). For this second task many of the institutions that the court created, the district officers, the Accountability Now Clubs, etc., were able to explain, defend, and promote the normative principles underlying the court: The court was going to follow established rules and avowed principles of (Western) criminal justice. Critics point out that the prosecutor frequently spoke as though the accused individuals were already convicted and were going to spend a long time behind bars, undermining this claim. They have also pointed out that, whatever the merit of these principles, they are sometimes at odds with indigenous forms of justice—local ways of dealing with conflict were often shunted aside by Western legal experts.[6]

The response to the outreach efforts of the SCSL have ranged from mixed to negative, and scholars have found widely different results on the subject. Horovitz argues that, despite outreach efforts, the attitude towards the court has largely been a negative one. (Horovitz, 2007, pp. 59–60) According to his study, skeptics point to a number of factors to justify their attitude: The indictment of Norman and other CDF leaders was wildly unpopular. Some felt that the court unfairly violated the immunity promised by the Lomé Agreement and was a product of political expediency rather than legal principles. Others, such as Arzt, found "receptiveness toward the Special Court [to be] rather broad, with concerns expressed more in regard to details and implementation than overall legitimacy." (Arzt, 2006, p. 233) Examining

[6] See for example Penfold, P. (2002). For a deeper analysis of transitional justice and local justice in Sierra Leone see Goldmann (2005).

survey data about the SCSL, Clark concludes that, at least relative to the outreach programs for the ad hoc tribunals, the SCSL's outreach has been quite successful. (Clark, 2009)

Prosecutorial Strategy

In Sierra Leone, the prosecutor's hands were tied by the statute of the court. As we discussed in the previous chapter, the UN Security Council had insisted that the prosecutor limit its scope to those who bear "the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean Law committed in the territory of Sierra Leone," during the war.[7] (Article 1) Beyond this vague description, there were few specifications about who was suitable for prosecution, though there was a widespread assumption that the court would prosecute about ten people and wrap up its proceedings within a few years. Crane himself has said that he took the dictum to refer to "the people who caused and sustained the war," (Murungu, 2011, p. 101) including "the planners and instigators of the terrible violence or those who instigated or caused and sustained the serious violations of international humanitarian law in the territory of Sierra Leone." Later, in an examination of this issue and the negotiations discussed in the previous chapter, the Trial Court of the SCSL concluded that the Chambers, and not the prosecutor, could ultimately determine whether or not an individual defendant met this requirement.[8] (Judgment, 2 Aug 2007, para. 91) Therefore, Crane clearly saw his job as a limited one.

The prosecutions at the SCSL must be placed in the context of the prosecutor's comments about the conflict and about his own perceptions of his job as the prosecutor. In his early public statements about the conflict and his role as prosecutor, Crane strikes two distinct themes. First, the conflict was about a powerful elite exploiting a marginalized and oppressed majority. Despite the fact that thousands of people fought on both sides of the conflict, Crane steadfastly maintained that the war was the work of an elite few that he was going to target. In none of his public statements does he blame the Sierra Leonean people as a group or does he point to the actions of the general population. In these early accounts, he places the blame squarely on the shoulders of the small group of individuals that he sought to indict.

[7] AThere was some debate about when the war had begun, for purposes of the prosecu- tion. According to the statute, the scope was limited to crimes that occurred after November 30, 1996, despite the fact that the RUF had entered Sierra Leone and begun the war in 1991. This date marks the signing of the *first* failed peace accord, the Abidjan accord. According to Penfold, selecting this date as the beginning of the conflict "was perceived by many Sierra Leoneans to demonstrate a lack of knowledge and understanding about the rebel war…. More importantly, it fueled the perception in the minds of Sierra Leoneans living away from Freetown that the govern- ment was only concerned about what was happening to people living in Freetown and the Western area." (Penfold, 2009, p. 60)

[8] See Murungu (2011, pp. 102–103).

Along with this focus on the top leadership of the different belligerent parties, Crane does not take sides in doling out responsibility for the war in his early statements about the conflict, nor does he seek to blame any single group for starting it. Rather, the way that the prosecutor's office portrayed the conflict is as the work of a small group of people in Sierra Leone and beyond, who brought this upon the people of that country, and prosecution by the court is a means by which the people of Sierra Leone can obtain autonomy. (Critics have pointed out that his high-minded rhetoric contrasts with the realpolitik consideration that limited his targets, particularly his inability to prosecute those crimes allegedly committed by UN and Economic Community of West African States Monitoring Group (ECOMOG) forces, which were beyond the jurisdiction of the SCSL.) As he stated upon issuing his first round of indictments: "Today the people of Sierra Leone took back control of their lives and of their future. They have spoken as one voice, a voice that shouts 'no more', a voice that declares to the world 'never again'. The dark days of the rule of the gun are over. The bright shining light of the law burns back the shadows of impunity in this ravaged country."

A further notable aspect of Crane's approach as a prosecutor that merits discussion is his description of his relationship with the people of Sierra Leone. Throughout the early outreach processes and in his public statements during the proceedings, he continually presented himself as a servant of the Sierra Leonean people, who he sees as his "client." Despite being an American national who was appointed by the UN secretary general (and who receives his budget from an international consortium of states), he did not portray himself as a representative of the international community, the UN, or "humanity in general" all of which would have had been plausible. Rather, Crane repeatedly refers to the SCSL as "your court" to the people of Sierra Leone. The prosecutor works for the Sierra Leonean people and he is "their prosecutor" and they are his "clients." "I will not be influenced by anyone or anything other than the interests of the people of Sierra Leone." (Prosecutor's Office Statement, 27 Sept 2002) As Crane's office put it in the press release announcing the first round of indictments in March 2003, "Today the people of Sierra Leone took back control of their lives and of their future."

In terms of indictments, the prosecutorial strategy was to focus on the leaders of the three main factions in Sierra Leone's war and try the leaders of each group together in three discrete cases. While it was not put in such terms by the prosecutor's office, the different leaders represented these different groups in a symbolic way. The RUF case was personified by the indictments of Issa Sesay, the leader of the RUF at the end of the war, Morris Kallon, and Augustine Gbaho. The AFRC case consisted of Alex Tamba Brima, Santigie Borbo Kanu, and Brimay Bazzy Kamar. The Civil Defense Forces (CDF) case, that is those who fought the RUF, consisted of the aforementioned Sam Hinga Norma, Moinina Fofana, and Allieu Kondewa. Charles Taylor, the "biggest fish" still alive in 2004, was still beyond the reach of the tribunal, and a separate trial was planned for him when he was finally transferred to the tribunal.

While the defendants were initially indicted separately, the prosecution joined together the indictments into the obvious categories described above. There are

good reasons for avoiding discrete trials for each individual, at least from a prosecutorial standpoint. As Cockayne has pointed out, the decision to join these cases provides important advantages for a prosecutor. It has the potential to reduce costs, which was clearly on the mind of everybody involved in the SCSL. More importantly, however, joining the trials could "potentially [assist] the court's construction of a coherent historical narrative describing and defining the roles played by the three major groups in the Sierra Leone conflict." (Cockayne, 2006, p. 392) In essence, it made the war into a criminal conspiracy among the leaders of the different groups (in collusion with foreign powers) and simultaneously distinct from the larger population of Sierra Leone. There is a long legal tradition of using some form of conspiracy law from the common law system in the international context simply because the offenses under the domain of international criminal law often occur on too large a scale for individuals to commit without being a part of some joint criminal endeavor, which in turn requires special legal tactics.[9] With this in mind, the Trial Chamber allowed the prosecutor to combine the different cases and amend their indictments accordingly. While the Chambers allowed the RUF defendants to be joined and the AFRC defendants to be similarly joined, it rejected the idea of a single AFRC/RUF trial.

Along with this legal matter of joinder, there were several additional elements of this approach that deserve some scrutiny. While it is undoubtedly true that all three groups were engaged in Sierra Leone's war, placing all three on par with each other by prosecuting three members of each group misrepresents the facts of the case. Undoubtedly the RUF was instrumental in starting and prolonging the war, and the AFRC was culpable for serious atrocities during the conflict. Equally certain is the fact that the CDF and its feared Kamajors were involved in war crimes during the conflict. Nonetheless, the assumption that their crimes were in parity with those of the RUF and the AFRC is questionable, and empirical evidence supports this claim. According to the UC Berkeley War Crimes Study Center, only a small number (6%) of crimes that were subjects of testimony before Sierra Leone's TRC were committed by CDF forces. (UC Berkeley War Crimes Study Center, 2005, para. 110) By placing them side by side during the earliest indictments, it may lead an observer to conclude that the RUF and the CDF were similar to each other and lends itself to a glib "crimes were committed on all sides" response (he explained that he had to be seen as "even-handed" [Penfold, 2009, p. 61]) that overlooks the disproportionate responsibility of Charles Taylor and the RUF. While Crane stated in response to Norman's arrest that "no one is above the law," (Prosecutor's Office, 16 March 2003) this is difficult to defend insofar as the prosecutor's mandate was sharply limited to only a few top offenders. As we discussed in the Introduction, criminal tribunals' focus on violations rather than root causes can lend itself to such distortions.

In light of this overall approach of the prosecutor's office to the Sierra Leone war, the widespread criticism that Crane received for prosecuting the CDF leadership, and Norman in particular, makes sense. Clearly, Crane did not wish to make the court solely a RUF and AFRC tribunal and thus also targeted pro-government

[9] For a discussion of this, see Fichtelberg (2006).

leaders that were suspected of committing atrocities. It was widely acknowledged by Sierra Leoneans that the Kamajors were tough fighters who undoubtedly committed criminal acts during the war. They were reported to have engaged in acts of cannibalism during the war and to have magical powers. However, Norman was widely considered to be a hero by Sierra Leoneans and his prosecution raised objections from many of his countrymen. Western diplomats supported Norman and some planned to testify on his behalf. (International Center for Transitional Justice, 2004, p. 6) Protestors descended on the court, and rumors spread indicating that CDF forces planned to attack the court in an attempt to free their leaders. Few believed that Norman and his forces were innocent, the Sierra Leonean people had seen too much war to believe that, but to suggest a moral equivalence between the crimes of the Kamajors and those committed by the RUF was unacceptable to those who fought against Sankoh in the war. Some had suspected that Norman's indictment was a cynical attempt on the part of Kabbah to eliminate a potential political rival, and Kabbah's own dissembling about his role in Norman's prosecution only fueled this suspicion.[10]

The significant difference between the RUF/AFRC indictments and the CDF indictment was not the number of officials charged with crimes but rather the nature of the charges put forward. The number of charges against the CDF leadership was smaller and some significant charges that were more or less identical in the AFRC/RUF indictments were not on the CDF indictment. In their indictments, RUF and AFRC defendants were both charged with 18 different crimes, including terror, murder, rape, abducting children, forced labor, etc. The CDF was charged with only eight counts, including murder, looting, and recruiting child soldiers. Equally important, there were no charges involving sex crimes made against the CDF leaders, while such charges were included in those of the other two groups. Some court observers maintained that, though there was indeed sexual violence affiliated with Kamajor forces, these were far less widespread than with the other group simply because Kamajor beliefs precluded sex before combat. (UC Berkeley War Crimes Study Center, 2005, p. 10)

There were other lines of criticism against the early indictments. Some of which revealed a long-held suspicion among many that the prosecutor's office had been politicized by Crane and his deference to the Security Council (and in particular, the USA), as well as to the victors of the civil war. Many thought that Crane, a former American military officer, was covertly doing the bidding of the Americans and some had suggested that his list of prosecutions was determined by the Pentagon prior to his arrival in Freetown. This suspicion was only further underscored by the high-profile skepticism and outright hostility that the US government in general (and the administration of George W. Bush in particular) displayed towards other instruments of international criminal justice, most notably the International Criminal Court and its ruthlessness in prosecuting its own "war on terror." In its study of

[10] Initially, Kabbah had declared that he was unaware of the pending indictment of Norman but later it was discovered that he had called Norman shortly before his arrest in order to establish that the CDF commander was in his office. (Penfold, 2009, p. 61)

the court, the Center for Transitional Justice summarized some of these criticisms: (Perriell and Wierda, 2006, pp. 28–29)

1. The prosecution was targeting too few individuals.
2. As a consequence of their limited jurisdiction, significant numbers of individuals will be left unindicted.
3. A number of politically powerful figures were being shielded from prosecution because of their position.

As evidence of the last criticism, the CTJ cited the prosecutor's refusal to indict (sitting) President Kabbah who was politically and militarily superior to Norman and the CDF forces. In addition, the report cites Crane's refusal to indict Blaise Compaore,[11] president of Burkina Faso (who was considered an ally to the US in its war on Al Qaeda).

The other remaining figure who was never indicted by the SCSL, but whose presence was woven into the prosecutorial narrative, was Muhammar Gaddafi. Crane's attitude towards the Libyan strongman was ambivalent. On one hand, the prosecutor was criticized for making public statements about Gaddafi's role in the conflict. In 2005, he argued that the RUF was working "on behalf of Muammar Qudhafi." (Crane, 2006, p. 506) On the other hand, he refrained from indicting the man himself, later admitting that this was in part out of a fear of the diplomatic outcry that would result from the indictment of a well-known and powerful head of state. As he put it later, "It was my political sense, dealing with senior leadership in the UK, USA, Canada, UN, and the Netherlands, that this would not be welcome." Further, he asserted that "[Colonel Gaddafi's involvement] is not speculation on my part. We named and shamed him in the actual indictment." (Kishtwari, 2011) Observers have questioned whether or not there was sufficient evidence to prosecute Gaddafi for what human rights lawyer (and international panelist on Sierra Leone's TRC) William Schabas described as "small beer" activities, such as giving money to the RUF and training some of their fighters in Libya a decade before the Sierra Leone war began. (Schabas, 2011)

Along with these three main groups of prosecutions were several outstanding figures who were not woven into the prosecutor's overall narrative. In particular, the indictment of Charles Taylor was a "stand-alone" indictment, which, though issued in March of 2003 along with the other earliest indictments, was not released to the public until June 4. While he was in many ways the primary force behind the RUF and was featured within Crane's narrative of the conflict, his case was not rolled into that of the three surviving RUF leaders. In addition, his indictment was initially kept sealed because of Taylor's position in Liberia and the potential that the indictment had for instability. We will discuss the complications involved with indicting, extraditing, and prosecuting Taylor in the next chapter.

Other lesser international figures that were involved with the war were also left unindicted, most likely because of the limited mandate of the court or perhaps because of political constraints placed on the prosecutor—whatever the grounds, these

[11] Campoare had provided logistical support to Taylor. (Gberie, 2005, pp. 53–54)

oversights were not ignored by critics of the court. Also unindicted by the court, but widely blamed for many of the deaths in the conflict, were foreign entities that purchased the so-called Blood Diamonds from the RUF and therefore supported the rebel forces. (One individual, Guus Kouwenhoven, a Dutch national, was prosecuted in the Netherlands for involvement in the conflict, though he was not convicted of war crimes.) Other individuals, such as Nigerian troops who committed crimes while serving under ECOMOG, were not prosecuted because of the limits placed on the prosecutor by the statute.[12] Finally, individuals who supplied weapons to the RUF, such as the notorious Viktor Bout were not indicted by Crane. All of this served to undermine Crane's claim that the indictments showed that "no one is above the law." (Penfold, 2009, p. 62) By structuring his initial indictments the way that he did, Crane told a very clear narrative about the war in Sierra Leone: Three separate forces committed atrocities (with equal degrees of culpability) with the financial and political support of one Machiavellian outsider, Charles Taylor. All of the other figures who were involved in the conflict were left by the wayside by the prosecutor's office.

Among the other interesting dimensions of Crane's approach to the conflict dealt with his treatment of minors. Speaking to a school in northern Sierra Leone early in his tenure, Crane declared that he had no interest in prosecuting *any* minors before the SCSL. "The children of Sierra Leone have suffered enough both as victims and perpetrators. I am not interested in prosecuting children. I want to prosecute the people who forced thousands of children to commit unspeakable crimes." (Public Affairs Office, 2 Nov 2002) (As was previously discussed, the statute of the Court had made some provision for prosecuting children who were over the age of 15 at the time of the crime.) This declaration resolved an important legal question, but left the problem that many child soldiers, some of whom had committed the worst crimes of the war, were granted legal impunity by the Special Court.

The Special Court and the Truth and Reconciliation Commission

The relationship between the prosecutor's office and Sierra Leone's TRC was also an early subject that the prosecutor needed to address. The commission, created by the ill-fated Lomé Accords, predated the SCSL and operated alongside it. Modeled after the well-known TRC for post-Apartheid South Africa, the tribunal was tasked with creating "an impartial historical record of violations and abuses of hu-

[12] Article 2 of the SCSL Statute says, "Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State."

man rights and international humanitarian law related to the armed conflict in Sierra Leone." (Truth and Reconciliation Commission Act, 2000, Sect. 6) Unlike the South African Truth Commission, however, Sierra Leone's TRC did not have the power to grant amnesty to those individuals who testified before it. This meant that statements gathered by the commission could conceivably be used as evidence in prosecution, even against those individuals who came to the TRC to tell the truth about their activities and apologize for them. (Bear in mind, however, that the Lomé Agreement had the previously discussed amnesty provisions that were disregarded by the special court. Such an amnesty would have made the power to grant immunity superfluous.) Early in his tenure at the SCSL, Crane asserted that he would not use evidence gathered from Sierra Leone's TRC, stating that "victims, perpetrators, and witnesses who testify before the TRC should do so without fear of having their statements subpoenaed by my office." (Special Court for Sierra Leone, Office of the Prosecutor, 10 Dec 2002) He went so far as to encourage individuals to testify before the TRC "whether they be victims or perpetrators." (Office of the Prosecutor, 27 Feb 2003) However, the tension between the explicit goal of the SCSL to prosecute those who committed the most serious wrongdoing and the TRC's goals of truth telling and reconciliation placed the TRC and the OTP on a collision course. This conflict was further exacerbated by the silence of the SCSL's founding documents regarding its relationships with the TRC.[13]

Despite the cooperative rhetoric from both Crane and the OTP, conflicts nonetheless arose between the SCSL and Sierra Leone's TRC *outside* of Crane's office. In August 2003, Norman had asked the TRC to be allowed to testify before it, for reasons that are unclear but speculation ranges from the noble to the cynical. In response, the TRC requested that Norman be given an opportunity to speak publicly about his role in the conflict. While the prosecutor had encouraged Sierra Leoneans to participate with the TRC, his office filed a motion against allowing such a privilege for Norman himself. As his memorandum to the court argued, "The mere act of Chief Hinga Norman testifying before the TRC could stir up public feelings and frighten victims and potential witnesses from the proceedings. Indeed the public nature of the hearing would enable Chief Hinga Norman to intimidate victims and potential witnesses, probably through subtle means, which would irreparably damage the integrity of the proceedings." (Report of the Truth and Reconciliation Commission, 2005, p. 395) And further that "as some of the evidence to be used in the prosecution has been formally disclosed, any intimidation may have a direct impact on victims and witnesses."

Both the Trial Chamber and the Appeals Chamber addressed the issue of Norman's effort to testify before Sierra Leone's TRC. The Trial Chamber, in its opinion, denied the TRC's request to allow Norman to testify. Despite the fact that Norman himself desired to testify, the Chamber argued that his appearance before the TRC as a "perpetrator" of human rights violations could undermine the defendant's right to a fair trial before the SCSL as such testimony would imply guilt on the part of the

[13] For an early, but in-depth discussion of the relationship between these two bodies see Schabas (2003).

defendant. The Appeals Chamber more strongly condemned Norman's application, arguing that:

> What is actually proposed by this application may be described in different ways: it might appear as a spectacle. A man in custody awaiting trial on very serious charges is to be paraded, in the very court where that trial will shortly be held, before a Bishop rather than a presiding judge and permitted to broadcast live to the nation for a day or so uninterrupted…. In the immediate vicinity will be press, prosecutors and 'victims'…. There may be those the Prosecution fears could lead to intimidation of witnesses and the rally of dormant forces. (Decision on Appeal, 28 Nov 2003, para. 30)

Nonetheless, the Appeals Chamber relented and allowed Norman to testify, provided that his testimony was "provided in a manner that reduced to an acceptable level any danger that it will influence witnesses (…) or affect the integrity of court proceedings." (para. 41) This, Justice Robertson suggested, could be achieved by eschewing a public hearing in favor of a written affidavit. Thus the court allowed for cooperation between the SCSL and the Sierra Leonean TRC, provided that the TRC's activities did not undermine the SCSL's procedures. As a result of the decision, Norman refused to testify before the TRC. (Nesbitt, 2007; Schabas, 2004b)

East Timor

While it was operating, the Serious Crimes regime contained a tripartite structure: consisting of the Special Panel for Serious Crimes (SPSC), the prosecutor's office, dubbed the Serious Crime Unit (SCU) and the Defense Lawyers Unit (DLU). The SPSC was responsible for conducting hearings and consisted of a panel of three judges along with supporting staff. Two of these judges were international and the other was Timorese. In addition, there was an Appellate Chamber responsible for hearing grievances regarding the conduct of the hearings which had a similar 2/1 composition. However, "In cases of special importance or gravity a panel of five judges composed of three international and two East Timorese judges may be established." (UNTAET Regulation 2000/15, Sect. 22.2) The SCU prosecutor served as, "the principal public prosecution official for the investigation and prosecution of serious crimes." (Sect. 14.3) Though the tribunal initially experimented with using Timorese nationals to aid in the defense of accused criminals, ultimately, the DLU, an international body, was created in April 2003 to ensure that defendants received a competent defense at trial. (Cohen, 2006) While it was not stipulated by the United Nations Transitional Administration in East Timor (UNTAET) resolutions, most of the other staff working in the Serious Crimes Unit were non-Timorese. (Côté, 2012, p. 398)

The SCU was headed by the Deputy General Prosecutor of Serious Crimes (DGPSC), who, though serving under a general prosecutor, was independent from his Timorese superior (with a few notable exceptions discussed below).[14] The SCU was

[14] See for example Reiger and Wierda (2006, p. 13).

assigned several tasks by UNTAET. Though the Human Rights Unit of UNTAET investigated the offenses with the support of the UN Civilian Police, the SCU conducted the prosecutions for the serious crimes spelled out in Regulation 2000/15 before the SPSC. (Hirst and Varney, 2005, p. 6) Further, the SCU was responsible for the court's outreach, tasked with making the Timorese and international public aware of important events taking place in the Serious Crimes regime. The staff of the SCU varied over its lifetime: In the spring of 2004, it had 124 staff members, including 44 prosecutors and investigators, 32 UN Police investigators, and 40 local staff including morticians and translators. However, by 2005, the staff had shrunk to 74. (Hirst and Varney, 2005, p. 6) Almost all of those serving were internationals.

The first person to serve as DGPSC was Jean-Luis Gillisen of Belgium who was appointed in July 2001 and served until Siri Frigaard (Norway) replaced him in January 2002. Frigaard left in April 2003, replaced by Essa Faal (Gambia) who served as acting DGPSC until Nicholas Koumjian (USA) replaced him in October 2003. The last DGPSC, Carl de Faria (Canada), served from February 2005 until the Serious Crimes regime was officially closed down in May 2005. Each DGPSC brought their own approach and their own agenda, shaping the prosecutorial strategy in different ways, discussed below.

The defense counsel for those accused was handled by the DLU, a late addition to the Serious Crimes regime. This body was much smaller than the others in the UN Serious Crimes regime, and it was plagued with funding and staffing problems—it was not allocated any UN funding at the outset. (Cohe and Lipscomb, 2012, p. 284) In 2005, at the conclusion of the Serious Crimes process, the DLU consisted of seven lawyers and a few legal researchers. (Hirst and Varney, 2005, p. 20) In addition to its small size, the DLU was troubled by a number of different problems. In its study of the *Los Palos* case, the Judicial System Monitoring Program (JSMP) observed that the defense counsel in the case was grossly underqualified for the position, stating that "all East Timorese public defenders in the *Los Palos* trial only recently completed their law degrees from universities in Indonesia and none of them had practised as lawyers prior to their appointments in 2000." (Judicial System Monitoring Program, 2002; Cohen and Lipscomb, 2012, p. 21) Even those brought in to train the defense counsel were often unqualified for their jobs, having had little experience in international law or even criminal law more broadly. The JSMP's account of errors in defense led one observer to claim that "a conviction was more or less a fait accompli, in many cases as a result of the lack of adequate representation," (Reiger and Wierda, 2006, p. 2) which was a serious blow to the credibility of the trial process.

Prosecutorial Strategy in East Timor

The DGPSC "serve[d] as the principal official, and ha[d] the exclusive prosecutorial discretion to direct and supervise the investigation of such offenses." (Ambos and Othman, 2003) However, this terse description does not do justice to the logistical,

political, and financial concerns that shaped the strategy of the SCU's various deputy prosecutors throughout the Serious Crimes process. Along with those external forces bearing down on the DGPSC, the general prosecutor of East Timor (initially Mohamed Chande Othman of Tanzania) had influence on the DPSGC's activities, affecting who was targeted by the prosecution. (Cohen, 2006b, p. 12) Given the serious structural challenges facing the Serious Crime regime, the lack of proper defendants and the financial issues that faced East Timor more generally, the prosecution had to choose its targets carefully.

The first indictments were issued by the SCU in late 2000, including 95 separate indictments with 391 accused persons. The vast majority of those indicted by the DGPSC were located outside of East Timor and inaccessible to Timorese authorities, which Cohen describes as a "deliberate prosecutorial strategy." Initially, prosecutors developed a list of ten cases that they deemed "priority" based on the nature of the victims, the seriousness of the crimes, their political significance, and the quality of evidence against the accused. These cases included:

The Liquiça Church Massacre (April 6, 1999)
The Suai Church Massacre (Sept. 6, 1999)
The Maliana Police Station (Sept. 2–8, 1999)
The murders at the house of Manuel Carrascalão (April 17, 1999)
The Los Palos case (April 21–Sept. 25, 1999)
The Lolotoe case (May 2–Sept. 16, 1999)
The attack on Bishop Belo's compound (Sept. 6, 1999)
The Passabe and Makaleb Massacres (Sept.–Oct., 1999)

Along with these were a second case in Los Palos (April–Sept, 1999) and investigations of sexual violence that was perpetrated in various parts of East Timor (March–Sept, 1999). (Varriale, 2008, p. 85) These cases, and those responsible for them, were to stand at the center of the prosecutor's approach to the East Timor violence.

The early prosecutorial strategy received a good deal of criticism and some argued that the choice of subjects was driven largely by politics and public relations rather than by the gravity of the offense. (Cohen, 2006b, p. 14) One former prosecutor suggested that this approach was based primarily on the SCU's limited resources indicating that "funding, or rather the lack of it, has therefore determined prosecutorial strategy." (Linton, 2001, p. 215) De Bertodano described the early indictments at the time as "haphazard," with no clear strategy or plan. (de Bertodano, 2004, p. 83) Most were accused of homicide and reportedly some of these cases were unrelated to the political violence. "As it is," he argues, "poor management led to a random and disorganized system. Many small-time militia members appear to have been indicted simply because they were in the wrong place at the wrong time, while higher ranking commanders are still at liberty. Whether a person is prosecuted or not appears to be the result of an accident of geography." (de Bertodano, 2004, p. 83)

In January 2002, Frigaard dramatically changed the direction of the SCU's prosecutorial strategy, focusing on indictments against civilian and military leaders. "The result was a significant clarification of prosecutorial priorities and strategy, as well as an increase in resources for investigations." (Cohen and Lipscomb, 2012, p. 285) Among Frigaard's reforms was the creation of a gender-based crimes team

to focus on the victimization of women in the violence (however, in the end, there was no great focus on gender crime from the SCU). (Cohen and Lipscomb, 2012, p. 286) More importantly, Frigaard began indicting high-level Indonesians who were responsible for the violence, though the vast majority were not in Timorese custody. She also expanded the list of people to be prosecuted beyond those ten events described in the first round of indictments. (Cohen, 2006b, p. 14) As we will see in the next chapter, however, Frigaard's strategy of targeting Indonesian high officials would undermine the tribunal's effectiveness as East Timor sought to normalize relations with their former overlords. In the end, few political figures of any significance will face trial.

Outreach in East Timor

Much of the outreach in the Serious Crimes regime was carried out by the office of the DGPSC. Among its efforts was the production of videos in local languages about the tribunal, as well as radio and television productions about its proceedings. As with Cambodia, this work was assisted by the efforts of NGOs which held workshops and produced videos to increase awareness about the Serious Crimes regime. (McDonald, 2004, pp. 4–5) Among the most influential of these was the JSMP whose Outreach Team connected with both Timorese and international media and other interested parties to make them aware of events in the tribunal.[15] (Judicial System Monitoring Program, 2011, p. 100) Nonetheless, in her critique of the Serious Crimes process in East Timor, Linton points to "a perceived failure to engage in outreach to the East Timorese and explain the Serious Crimes process, and allegations of cultural insensitivity and arrogance on the part of UNTAET's foreign personnel," that left many Timorese "alienated from the process." (Linton, 2002, p. 112)

The Organization of the UNMIK Courts in Kosovo

On account of their similar origins, United Nations Mission in Kosovo (UNMIK) courts bear some structural resemblance to the SPSC and are less like the other tribunals discussed here. The judicial system of Kosovo is the creation of a UN administration, and not the result of a treaty or the product of an agreement with a sovereign state as is the case with the SCSL and the ECCC. (Cerone and Baldwin, 2004, p. 41) This means that it was a subsidiary of the provisional UN authorities, a feature of the system that would lead to a great deal of criticism from some observers. However, unlike the SPSC, which was a single isolated panel with a specially designated prosecutorial office, the international presence in Kosovo is woven throughout the region's court system, making it a regular part of the domestic jus-

[15] For an in-depth discussion of the JSMP see Ragni (2004, p. 139).

tice system. In Kosovo, international judges (IJs) sit in on trials on a case-by-case basis, rather than constituting a permanent presence on each tribunal. In addition, the UNMIK courts are not limited in their scope to the traditional international crimes that fall under the jurisdiction of the other courts. They are regular criminal tribunals that handle a variety of different offenses—serious or otherwise—even the international crimes that fall before the court are only applied on the basis of their status in Yugoslav law. (Cerone and Baldwin, 2004, pp. 44–45)

These distinctions shaped the operations of the tribunal in some ways that are relevant for our analysis here. Most importantly, there is no single "prosecutorial strategy" before the UNMIK courts, simply because there is no single prosecutor who is tasked with shaping the narrative through prosecutions. The panels that were charged with handling the more serious and more political cases, the Regulation 64 panels discussed below, were not under the express control of the prosecutor's office, and granting requests for such a panel was entirely under the discretion of the special representative of the secretary general (SRSG), *not* the prosecutor. (Lekha Sriram et al., 2009, p. 198) This means that the roles the international participants filled in the UNMIK court system were much broader than those in any of the other hybrid courts we will examine here. Thus, the analysis of a narrative told through a series of indictments, as was done in previous sections, is not practical to do in Kosovo.

To complicate matters further, the UNMIK courts and legal system have undergone a series of changes since UNMIK established its authority there. In 2000, UNMIK Regulation 2000/6 was promulgated to address serious inequities in the Albanian-dominated justice system by including an international presence. (However, as was discussed in the previous chapter, Regulation 2000/6 only applied to the District Court of Mitrovica.) After Regulation 2000/6 was passed, the international presence spread throughout Kosovo's courts until later in the year when Regulation 2000/64 was passed, which created a separate court for more serious cases which had a larger international presence. Finally, with the declaration of independence and the withdrawal of UNMIK personnel, European Union's Rule of Law Mission in Kosovo (EULEX) moved in and began to assist in the operation of Kosovo's courts, providing a further transformation in Kosovar criminal justice. Thus, the court system of Kosovo, though still a hybrid system, constitutes something of a "moving target" over the course of the last decade and a half.

The same holds true for the laws that Kosovo's criminal justice system has applied over the last 15 years. The law used by the UNMIK court is a mix of the several different systems that have had jurisdiction over Kosovo, and it has evolved as the legal and political situation in Kosovo has changed. (Ante, 2010, pp. 196–197) Initially, under UNMIK Regulation 1999/24, the law of Kosovo consisted of the law of the Federal Republic of Yugoslavia prior to May 22, 1989, the ensuing UNMIK regulations, and "internationally recognized human rights standards." (UNMIK Regulation 1999/24, para. 1.3) Later in 2003, UNMIK passed regulation 2003/5 which established a provisional criminal code for Kosovo which included a lengthy list of criminal violations against international law. In April 2012, the Assembly of Kosovo passed its own criminal code that went into effect in January 2013, which

also included the crimes of genocide, war crimes, and crimes against humanity. Given that the UNMIK courts do not have an independent set of laws that they can apply (as the SCSL does), the changes in Kosovo's legal code marked a change in how the courts themselves would operate. As Ante points out, "the main obstacle for the judiciary of Kosovo remains the multiple bodies of applicable laws." (Ante, 2010, p. 196)

UNMIK regulation 1999/1 (known as "the Mother of all Regulations" [Yannis, 2004]) gave the SRSG power to, "appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person" as well as power over "the administration of the judiciary." This led to the formation of the Department of Judicial Affairs, which later became Kosovo's Department of Justice. (Townsend, 2012, pp. 264–265) Shortly thereafter, Regulation 1999/5 created a five-judge "Court of Final Appeal" to stand above Kosovo's district courts and a Public Prosecutor's Office which was initially composed entirely of domestic personnel. Regulation 2000/6 created the hybrid system, but UNMIK regulation 2005/52, "On the Establishment of the Kosovo Judicial Council," set out three levels of courts for Kosovo's judiciary: minor offence courts with a single municipal court for each of Kosovo's 38 municipalities, five district courts and the aforementioned Supreme Court.

UNMIK Regulations 2000/6 set out the initial guidelines for the international courts, including the use of international judges and prosecutors (IJPs). (Cady and Booth, 2004, p. 61) These judges for the court were appointed for a renewable 6-month term by the SRSG. Still, some observers feared that the mere presence of IJs would be insufficient to ensure accountability in particularly charged cases. The Organization for Security and Co-Operation in Europe (OSCE) praised the regulation in its report but stated that "the limited number of international judges, their sporadic distribution and the restricted scope of their powers still fail to adequately address the impartiality concerns." (OSCE, n.d.) IJs were often outvoted by their Kosovar colleagues in cases, resulting in dubious acquittals and convictions, and critics suggested that the IJs were mere "window dressing" for otherwise biased decisions. (Reydams and Odermatt, 2012, p. 63) In ordinary cases, an IJ can participate in a trial if she believes her presence is necessary.

As a result of these concerns about impartiality, UNMIK issued Regulation 2000/64 which allowed for so-called Regulation 64 panels for "crimes which gravely undermine the peace process and the full establishment of the rule of law in Kosovo." (Preamble) These, special three-judge panels had two IJs and a Kosovar judge, helping maintain the impartiality of the proceedings. Under Regulation 2000/64, "At any stage in the criminal proceedings, the competent prosecutor, the accused or the defence counsel may submit to the Department of Judicial Affairs a petition for an assignment of international judges/prosecutors…where this is considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice." Alternatively the Department of Judicial Affairs may move for a panel *ex proprio motu*. However, once a trial has begun, the case cannot be transferred to a Regulation 64 panel and all irregularities must be addressed through the appeals process. In April 2001, UNMIK issued Regulation

2001/8, creating the Kosovo Judicial and Prosecutorial Council, tasked with "advising the Special Representative of the Secretary-General on matters related to the appointment of judges, prosecutors and lay-judges, as required, and hearing complaints, if any, against any judge, prosecutor or lay-judge." (UNMIK Regulation 2001/8, para. 1.2) The regulation stipulates that the council is to be "multi-ethnic and reflect varied legal expertise" and will "include both local and international members." (UNMIK Regulation 2001/8, para. 2.1)

By the end of 2000, ten IJs had been appointed to courts in Kosovo, including one serving in the Supreme Court. (Hartmann, 2003, p. 9) However, there were often problems staffing the international positions. Because the court applied a complex web of domestic and international criminal law, finding IJs who had the necessary legal knowledge to do their job effectively proved to be a problem. (Lekha Sriram et al., 2009, p. 199) Observers have reported that "the courts have had difficulty in finding qualified international personnel to serve as judges and prosecutors, have been plagued by a lack of funding, and have issued decisions that commentators have criticized." (Dickinson, 2003, p. 1063) The Kosovo Judicial Institute (KJI) was created to assist in the training of qualified domestic judges. Nonetheless, the UNMIK justice system has continually had problems employing local staff because of a lack of qualified personnel and ongoing security risks for anybody involved in law enforcement in the country. (Townsend, 2012, p. 270)

The role of the international prosecutors in the UNMIK courts was also set out in UNMIK resolution 2000/6, which stipulates that prosecutors have "the authority and responsibility to conduct criminal investigations and to select and take responsibility for new and pending criminal investigations or proceedings within the jurisdiction of the office of the prosecutor to which he or she is appointed." However, there have been complaints about the low priority that war crimes have been given by the UNMIK prosecutors, often pushed aside in favor of targeting more conventional criminal activity. As Reydams and Odermatt point out, "The international prosecutors (and investigators) have been fighting a transnational mafia reportedly more difficult to penetrate than the Cosa Nostra and which poses an immediate threat to Kosovo and the region." (2012, p. 64) As a result, the use of international prosecutors to pursue war crimes cases has been somewhat lackluster. Amnesty International pointed out that by the time the EULEX took over justice issues in Kosovo, just over 40 war crimes cases had been completed, 21 of which predated the creation of the Regulation 64 panels. (Amnesty International, 2012)

UNMIK Regulation 2001/28 provides defense for accused criminals and mandates public financing for counsel if the accused cannot afford it on her own.[16] (Sect. 3) The Criminal Defence Resource Centre (CDRC) was established in May 2001 through a collaboration between the OSCE and the Kosovo Chamber of Attorneys to support defense attorneys that were working on war crimes cases and to provide training for the criminal defense of accused war criminals. (OSCE, 2010) In addition, the Kosovo Chamber of Advocates was given funds to bolster its ability to

[16] This right was further outlined in UNMIK Administrative Direction No. 2001/15 (15 Oct 2001).

defend accused criminals—seeking to provide some form of "equality of arms" at trial. While these are improvements, as Mettraux and Cengic point out,

> Defence counsel representing clients on war crimes charges have systematically been local lawyers. Although this fact means that they will be familiar with local laws, it also often coincides with a lack of expertise in international law and international humanitarian law, thereby creating an imbalance of knowledge vis-à-vis international prosecutors generally versed in such matters. The Centre has been able to limit the impact of that situation somewhat, but has not eliminated it. (2007, p. 114)

The defense counsel suffers from the same problem that other parts of the UNMIK system must endure: poor funding, low levels of expertise, and a general lack of institutional support for their efforts. (OSCE, 2010, p. 24)

As with the other tribunals, a great deal of criticism has been leveled at the UNMIK courts. Côté has described the UNMIK prosecutor's system as "a textbook case of how not to create and administer a hybrid justice process," (Côté, 2012, p. 395) arguing that the role of the UN in Kosovo has not been consistent or transparent. Others, such as Cerone and Baldwin, argue that the ad hoc nature of the creation of the international dimension of the UNMIK courts was "implemented not pursuant to the fundamental Mission objectives of consolidating the rule of law, securing justice, or promoting the development of human rights law, but in the more immediate interests of reducing tensions among the local populations." (Cerone and Baldwin, 2004, p. 56) By placing the authority to appoint IJs and to convene Regulation 64 panels solely within the discretionary powers of the SRSG, the UNMIK system developed into a "parallel structure, under the direct control of the UN executive power," (Cerone and Baldwin, 2004, p. 64) creating a system where judges are seen as agents of the UNMIK executive branch—a system that would never be allowed in Western European states.

The Role of EULEX in Kosovo

As was mentioned in the previous chapter, after Kosovo declared its independence from Serbia in 2008 (a move that was ruled legal by the International Court of Justice, ICJ), there was a large-scale withdrawal of UNMIK personnel and a corresponding influx of EULEX personnel. EULEX[17] was set up as "a joint effort with local Authorities" whose central mission was "to assist and support the Kosovo authorities in the rule of law area, specifically in the police, judiciary, and customs." (EULEX Kosovo, 2014, p. 1) This means that much of the hybrid aspects of the Kosovar court system, including the Regulation 64 panels, were taken up in a modified form by EULEX. While all sides acknowledge that UN Security Council Resolution 1244 remains controlling in the area, there has been a clear shift towards

[17] While EULEX is a European Union program, it is worth nothing that the US is a major financial backer. See de Wet (2009, p. 83).

a Europe-centered justice system and an agenda aimed at establishing full Kosovar independence, including in the new country's court system.[18]

As part of its mission in Kosovo, EULEX seeks to "ensure that cases of war crimes […] and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently." (EULEX Kosovo, 4 Feb 2008, Art. 2) According to Bernd Borchardt, EULEX's head of mission, there were nearly 1200 war crimes cases at various stages of investigation handed over to EULEX by UNMIK, 500 of which were either closed or dismissed by EULEX for a lack of evidence. By August 2009, EULEX had investigated 50 separate war crimes cases, which is impressive given the challenges that were left in UNMIK's wake. (OSCE, 2010, p. 8) As one observer described it: "EULEX…inherited a difficult and sensitive situation, particularly in the sphere of combating serious crime: incomplete records, lost documents, uncollected witness testimony." (Committee on Legal Affairs, 2010) Further, Amnesty International reported that some documents had been deliberately "lost" in order to protect those responsible for criminal activity. (Amnesty International, 2012, p. 17)

Among the innovations undertaken by EULEX were the transformation of the previous Regulation 64 panels and the bolstering of the international presence in Kosovo's court system. (Lekha Sriram, 2009, p. 199) In March 2008, the Kosovo Assembly passed Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, which gave EULEX judges the authority to hear cases in Kosovo courts under the authority of the Assembly of EULEX judges. In most cases, war crimes panels under EULEX include two IJs and a single Kosovar judge. This EULEX Assembly consists of a set of IJs selected by the EULEX head of mission (the individual put in charge of EULEX operations[19]) and operates as a self-described "watchdog of judicial independence" in Kosovo.

The EULEX international prosecution team works alongside Kosovo prosecutors who are part of the Kosovo Special Prosecutors Office (SPRK) in a complex web of organizational relations.[20] Their authority comes from Law No. 03/L-053 as well as "the Law on Special Prosecution Office of the Republic of Kosovo," which grants them the power to independently conduct criminal investigations and prosecute cases. According to the law, the SPRK will be directed by a EULEX prosecutor, and there are to be five EULEX prosecutors within the SPRK during the duration of EULEX's presence in the country. As with its UNMIK predecessor, the EULEX system has had staffing problems and has been described as too bureaucratic and "mired in EU red tape." (Townsend, 2012, p. 274) Initially envisioned as a short-term arrangement, EULEX has repeatedly had its authority to operate

[18] For more about the legal relations between EULEX, UNMIK, and Kosovo see de Wet (2009).

[19] The Head of Mission is appointed by the EU's Political and Security Committee.

[20] For a useful analysis of these relations see Townsend (2012, pp. 271–274).

in Kosovo renewed, and in June 2012, EULEX announced that its mandate was extended until June 2014.

The Organization of the War Crimes Chamber, Court of Bosnia and Herzegovina

In order to understand the structure of the Bosnia War Crimes Chamber (BWCC), it is important to have a brief introduction to the organization of the Bosnian state after it broke off from Yugoslavia. As was discussed in the previous chapter, the Dayton Accords ended the war in Bosnia and Herzegovina (BiH), but left a number of different political issues unsettled, most notably the relative legal status of the Serbian and Bosnian areas within the overall Bosnian state. (In 2000, a third administratively independent entity, the Brčko District was created in northern Bosnia.) The Serbian Republic was ultimately given a great deal of political autonomy and as a result, there are effectively three "levels" of government within BiH. At the "highest" level, there is a single, federal government that is the government of the state of BiH. Below this, are the two regional governments, one for the Federal Republic of Bosnia and the other for the Republika Srpska. Further below these are the "Cantons," which are the smaller political entities that make up the local governments of the two different regions. The Bosnian Court exists at the national level, but there are criminal courts at the level of the individual cantons, too. Since each of these court systems have criminal jurisdiction, accused war criminals could be prosecuted at *three* different levels of court: the ICTY, the Bosnian Court, and at the local courts. (Ivanišević, 2008)

The BWCC is one of three different criminal courts that made up the Criminal Division of BiH's judiciary (one of the remaining courts handles economic crimes and corruption, while the other deals with general crime). The laws that governed the courts are set out in the Law on the Court of Bosnia and Herzegovina and the courts apply the criminal code of Bosnia and Herzegovina. While it is a piece of domestic legislation, the Bosnian Criminal Code includes most major international crimes, including fairly thorough discussions of war crimes, crimes against humanity, and genocide. The War Crimes Chamber is in turn broken down into five separate, three-person panels. In addition, there is a single Appellate War Crimes Chamber that was staffed with three IJs and two Bosnian judges. The IJs each served renewable 2-year terms in the Chamber. The registry was also composed of international and Bosnian personnel.

The staffing structure of the War Crimes Chambers changed over the course of its lifespan as IJs were phased out of the system. Originally, the panels consisted of two IJs and one Bosnian judge, with the IJ presiding over the trial. Additionally, the IJs were initially appointed by the high representative for Bosnia and Herzegovina—a UN appointed official in charge of monitoring the implementation of the Dayton Accords. In 2006, this procedure changed as the appointment of the IJs fell under the authority of the High Judicial and Prosecutorial Council of BiH.

(Ivanišević, 2008, p. 7) As part of the transition to a fully Bosnian court system in 2008, the staffing structure changed, with the majority of judges now being domestic judges alongside one IJ.

The prosecutor's office for Bosnia follows a similar structure to the larger court system of BiH: It is governed by Law on the Prosecutor's Office of Bosnia and Herzegovina. One section of the department, the Special Department for War Crimes, handles the cases that go before the BWCC, but international prosecutors also served in other sections of Bosnia's prosecutor office. (Reydams and Odermatt, 2012, p. 104) Its head is the deputy chief prosecutor, who serves under the chief prosecutor for BiH. This department is in turn broken down into six different sections or teams, each covering a particular region of the country, including one solely devoted to the investigation of crimes in Srebrenica. Within these sections were two prosecutors, one international and one local, except for Sarajevo where there were three local prosecutors and one international. (Human Rights Watch, 2006, p. 8)

In December 2008, the Bosnian Ministry of Justice developed a "National War Crimes Strategy" to centralize and harmonize the Bosnian court's approach to handling war crimes cases as well as establishing a timetable for prosecuting these cases. This document stipulates that those cases deemed "more complex" by the prosecutor's office are to be sent to the court in Sarajevo, while others are to be handled by cantonical or lower courts.[21] The strategy also set deadlines for outstanding war crimes cases, expecting to complete the high priority cases by 2015 and all war crimes cases by 2023.

Defendants in war crimes cases receive defense counsel through the Criminal Defense Support Section, or Odsjek krivicne odbrane (OKO) in Bosnian. OKO provides guidance for defendants, helping them locate a qualified attorney. It also provides guidance for lawyers in crafting and presenting legal arguments as well as training in international criminal law. (Higgins, 2007, p. 399) It operates under the court's registry and serves as a licensing body for attorneys wishing to serve before the BWCC, giving defendants access to a list of competent attorneys who can aid an individual accused of war crimes. (Wilson, 2008, p. 4) While OKO has an entirely Bosnian staff, with the exception of the director and deputy ("whose appointments were intended to demonstrate the independence and impartiality of the office" [International Center for Transitional Justice, 2008, p. 16]), it has occasionally used international attorneys under special circumstances. The OKO has several regional teams across Bosnia that aid attorneys. Though the OKO has been described as "extremely successful" and "a model of cooperation," (International Center for Transitional Justice, 2008, p. 15) some have expressed concern about the quality of the defense attorneys, (International Center for Transitional Justice, 2008, p. 16), adequate pay and remuneration for defense counsel, (Human Rights Watch, 2006, pp. 25–26) as well as the independence of the defense counsel. (Wilson, 2008, p. 4)

In its lengthy 2011 study of the Bosnian War Crimes Chamber, the OSCE reported that from its formation in 2005 until September 2010, the Bosnian court had tried 166 war crimes cases, including 68 that were completed (with 52 convictions).

[21] For a lengthy discussion of the National War Crimes Strategy see OSCE (2011, pp. 17–31).

(OSCE, 2011, p. 45) The majority of these cases involved war crimes and crime against humanity, but also included several genocide cases. In one of the few statements of praise for a hybrid tribunal, the OSCE stated that "an objective assessment of the work carried out in that period indicates that the Court of BiH and the BiH Prosecutor's Office, despite a number of challenges, have by and large succeeded in ensuring that serious war crimes are prosecuted in an efficient manner compliant with human rights standards." (OSCE, 2011, p. 45) Similarly, David Tolbert of the International Center for Transitional Justice (ICTJ) and former ICTY prosecutor described the BWCC as "the most successful undertakings when it comes to addressing the legacy of mass atrocities and to bringing the perpetrators to justice in national courts." (Tolbert, 2012) Nonetheless, Bosnia has many cases still to pursue: In 2011, Amnesty International reported that there remained 1200 war crimes cases against known persons spread throughout Bosnia. (Amnesty International, 2012, p. 7)

As McDonald points out, "One of the Chamber's greatest potential weaknesses is that it does not have any secure source of funding and relies on international donations." (McDonald, 2009, p. 310) Initial projections stated that the mission would cost approximately 24.5 million euros, but only 15 million were raised at the first donor meeting in October 2003, the largest portion coming from the USA. (McDonald, 2009, p. 310) A second meeting in Brussels in 2006 raised another 9.25 million euros, with the majority coming from the USA and Western Europe. According to the court itself, the foreign governments have donated 62 million euros since 2003.

Outreach

Given the deep distrust between the various ethnic groups comprising BiH, the ability of the Bosnian courts to publicly show their effectiveness is an essential tool for the overall success of Bosnian justice. Outreach for the BWCC is handled by the Public Information and Outreach Section (PIOS) of the court. While PIOS was envisioned as part of the BWCC from the very beginning, it only operated as a press office until 2006, failing to reach out to the public in the region. Now PIOS issues press releases, including summaries of cases and other court activities but also arranges for tours of the courts and makes audio-visual materials available upon request. (Although there has been an effort on the part of PIOS to promote a "two-way" dialog with the Bosnian people, this has been constrained due to a lack of funding [Garbett, 2011, p. 80].) Along with PIOS is the Court Support Network (CSN), a collection of NGOs who support the courts within the local communities through a network of five centers in different cities in Bosnia. The role of the CSN is to "create a social climate that is supportive of victims and witnesses and…promote the legitimacy of the court and the rule of law." (Garbett, 2011, p. 78) They distribute material, arrange for tours of the court, post advertisements about the tribunals, and hold public meetings and events regarding the court's activities. (International Center for Transitional Justice, 2008, p. 36)

Despite their efforts, the court's outreach program faced a number of significant barriers. In her study of the court, Garbett points to two significant problems with PIOS. First, many Bosnians remain ignorant of the court or do not understand its procedures: "Despite the sustained work of the PIOS and the CSN, it appears that current outreach strategies are not reaching either the populace or the issues of problematic prosecutorial practices and an unknown approach to the adjudication of cases, which means that engagement with its practices is not forthcoming." (Garbett, 2011, p. 78) Further, there remains a great amount of skepticism towards the Bosnian courts, particularly among Serbs who feel that their ethnic group has been unfairly targeted for prosecution, and thus, "the political context of BiH appears to have shaped opinions over the legitimacy of the BWCC's trials and verdicts along ethnic lines." (Garbett, 2011, p. 78) Despite its efforts, it appears that the court's outreach program has not yet been successful in its effort to use the BWCC as a tool for overcoming the deep animosity that has shaped Bosnian society over the last two and a half decades. (International Center for Transitional Justice, 2008, pp. 33–37)

Integration

The international presence in the Bosnian court system was never intended to be permanent and there were always plans to hand the courts system over to the Bosnian government. This integration process was set out in stages over 5 years, stretching from 2004 to 2009. In September 2006, the Transitional Council, consisting of the leading figures in the court, was established to help shepherd this process. (Martin-Ortega, 2012, p. 595) From early 2006 to early 2008 staff members were slowly phased out of the registry, the Victims Support Section (VSS) and PIOS. (Tolbert and Kontić, 2008, pp. 11–24)

The international prosecutors and judges were replaced last, a process that proved significantly rockier than for the other positions. Some officials associated with the court (including some judges) expressed concern that this transition was happening too quickly and that domestic personnel lacked the credibility among the Bosnian people to effectively handle the remaining course load. As the president of the court, Kreso Meddžida put it in an interview at the time,

> The unstable political situation in Bosnia and complaints of biased treatment of one ethnic group or another suggest the mandate of international judges and prosecutors needs extending. Local judges are able and ready to tackle these complex cases, but the international judges bring credibility and trust. (International Center for Transitional Justice, 2008, p. 42)

Others from civil society groups similarly expressed fears that the Bosnian officials could not operate successfully without their international colleagues. (International Center for Transitional Justice, 2008, p. 42) At the last minute, some of the international personnel were kept on until December 31, 2012. The tribunal has been further hampered by efforts on the part of Bosnian Serb politicians to undermine the tribunal by cutting off its funding and calling for its dissolution. (Tolbert, 2012, p. 8)

Conclusions

In many ways, the "setup" of the tribunals that we have discussed here is more important than the trials themselves. While it is undeniably true that the conduct and outcome of the trials matter in many important ways that we will discuss in the final chapter, the structure of the court in the early stage can have a tremendous impact on the communities that were affected by the crimes that made the trial necessary in the first place. How prosecutors go about framing the case and who they choose to assign the greatest responsibility for the conflict can have important consequences for the survivors. Even if defendants are acquitted, the indictments stand alongside human rights reports and other documents that allow contemporary and future onlookers to come to an understanding of what happened in collective violence. The act of indicting, arresting, and prosecuting a widely loathed individual, not to mention seeing him "in the dock," is already a powerful symbol of transformation. All of this work towards this end is done prior to the actual trials: The trials themselves stand as the concluding chapter of the narrative that is created by the prosecutors.

Further, the trial is shaped and deeply affected by the organization of the tribunals as they are described here. How the judges operate, the laws they apply, and most importantly, the way that the international and domestic judges share authority and power shapes the trials as much as the conduct of the attorneys or the defendant. The organization of the tribunals is intimately connected with their functions, particularly under the stress of high-profile cases. The structural problems in tribunals such as the ECCC, weaknesses that were noticed and commented on by legal experts at the time, became manifest as soon as the international staff started on a collision course with the Cambodian government. The trials cannot be separated from the broader institutions that conduct them.

In the next chapter, we will turn to see the tribunals in action—examining how the prosecutors, defendants, and judges handled the cases that went before the various hybrid tribunals. In action, many of the weaknesses of the tribunals that have been discussed in this chapter will bear fruit as several of the tribunals (the ECCC and the SPSC in particular) will struggle to balance the demands for accountability with the political demands of local governments and the international community more broadly. Sometimes they will lead to catastrophic failures, and other times the tribunals will overcome the challenges and eke out some legitimate form of justice. How they succeed or fail, however, will in many ways be dictated by their structure and the strategies that their prosecutors deploy.

Chapter 4
Leading Cases of the Hybrid Courts

In this chapter, we will examine some of the most significant trials conducted by the various hybrid tribunals. We will look at the legal as well as the political challenges that the tribunals confronted in each case, highlighting some of their high and low points. We will focus primarily on the trial phase in this chapter though, like the case of the ECCC, some of the most significant cases remain stuck at the pre-trial phase. Although this chapter will not provide a deeply legalistic analysis of these cases, we will discuss some of the central legal concepts that were deployed at the various trials—in particular, the notion of *joint criminal enterprise* (JCE) as it has been featured in several significant cases at the hybrid courts. This will allow us to see the cases as events with a great deal of political, cultural, and historical significance, along with helping to shape contemporary international criminal law.

It would take up far too much space to go through *every* case prosecuted by these tribunals, despite the fact that each presents its own challenges and is in its own way important, particularly to the defendants and the victims. The point of this chapter is to simply show some of the "highlights" of the tribunals, that is, cases that display the courts in operation as well as examining those that were central to the preceding conflict, or those with broader significance for other reasons. This means that out of necessity this chapter will be a "greatest hits" of the international tribunals, and a lot of detail will be put by the wayside. This, however, should set us up for the final chapter, where we will evaluate these trials from a more holistic perspective, examining their relative strengths and weaknesses, and look at the project of hybrid tribunals in general.

Cases Before the ECCC: 001, 002, 003, 004

At the time of this writing, only two cases have gone past the pre-trial phase at the Extraordinary Chambers in the Courts of Cambodia (ECCC), though one of these has multiple high-profile defendants. Only one of these (Case 001) has completed

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its course through the pre-trial phase, the trial, and exhausted the appeals process. The second (Case 002) is currently in the trial phase, but its operations have been hampered by a series of problems. The remaining two cases (Case 003 and Case 004) are, at present, stuck in a sort of "legal limbo" as the different factions that comprise the ECCC attempt to work out their disagreements on whether or not to proceed. Many aspects of these cases remain confidential and are, therefore not available to the public. In these last two cases, the identities of the defendants have not been acknowledged by the court at the time of this writing, though they are largely known through leaked documents. All of this means that the analysis provided here will be tentative.

In many ways, the crises that have undermined the abilities of the ECCC could have been predicted at the earlier stages of the tribunal's existence. While surveys have shown that the tribunal is popular among the Cambodian people, particularly in the rural parts of the country, support from political elites (many of whom have a checkered political history of their own) has been sclerotic at the best of times and openly hostile at the worst.[1] For the reasons discussed in earlier chapters, many in the Cambodian government, and Hun Sen in particular, wished to see the tribunal die a quiet death once it lost its political utility. On the other side, civil society organizations, such as the Open Society Institute, have sought to keep the pressure on the court, hoping to get it to operate more openly and efficiently, as well as to expand the scope of its investigations and prosecutions. They have been joined by many people working at the tribunal—particularly its international staff who have often objected loudly to the decisions of their Cambodian colleagues. As we will see below, the failure of the ECCC to adequately investigate and handle its later cases caused numerous personnel to resign from the court, including two of the international investigating judges. The behavior of the tribunal has at time brought on a great deal of criticism from the international NGOs monitoring the trial, though the UN—itself a body that once adopted a skeptical attitude toward the court and fought to "keep it honest"—has remained largely silent on the problems and failures of the ECCC.

In addition to the conflicting political pressures placed on the tribunal, financial pressure has continually hampered the ability of the ECCC to handle its case load. Along with the ethical lapses, and perhaps outright corruption in the staffing and personnel management that has been rampant among the Cambodian personnel, there has been a great deal of waste and mismanagement at the court.[2] The financial problems have been so bad that many of the staff have been forced to go great lengths of time without pay. The instability of the financial situation of the court has threatened to stop the tribunal's proceedings entirely, leaving the tribunal in a precarious position at the time of this writing.

We will begin with a discussion of the only completed case before the ECCC at this point in time: Case 001, Kaing Guek Eav, a.k.a. "Duch" the commander of the secret prison at S-21, Tuol Sleng Academy. (Given the setbacks that the other

[1] For an examination of public opinion on the tribunal see Pham, et al. (2011)

[2] See for example Brinkley (2013).

case currently underway is facing, it is probably the only case that will actually have finished a comprehensive rather than a partial trial.) Then, we will turn to the case that is in many ways more important than the *Duch* case, Case 002. This case, a trial of the four remaining leaders of the Angkat (the Khmer Rouge leaders that ran Democratic Kampuchea during the 4 years that the organization held power in Cambodia), is currently in the middle of a crisis insofar as the defendants' advanced age and declining health have prevented the court from effectively conducting trials. Finally, we will look at the controversies surrounding the remaining two cases, Case 003 and Case 004, both of which are presently stuck in the pre-trial investigation stage, still facing resistance from the Cambodian government and much of the Cambodian staff. As a result, they have no clear trial date in sight.

Case 001—Kaing Guek Eav a.k.a. "Duch"

As we discussed in the previous chapter, the decision to first prosecute a secondary official before the court is in many ways a deliberate, strategic move, and it follows the approach previously taken by the International Criminal Tribunal for the former Yugoslavia (ICTY) and some of the other preceding international tribunals. In this respect, Duch represents the ideal target for the ECCC. A former mathematics teacher, Duch was the head of the special branch of the Khmer Rouge secret police and director of S-21, running the infamous prison at Tuol Sleng Academy during the Democratic Kampuchea era. Since the fall of Democratic Kampuchea, the prison complex has become a symbol of the violent, cruel, and arbitrary nature of the Khmer Rouge era and has been turned into a Genocide Museum full of photos and renderings of the tortures and killings that took place there, along with the remains of many of the victims (including a map of Cambodia fashioned from some of the skulls found there). Thus, it was both strategically savvy and symbolically appropriate that the first defendant was the man in charge of orchestrating this horror that was so central to Democratic Kampuchea.

The Closing Order issued by the Co-Investigating Judges (CIJs) against Duch lays out much of the operations and organization of Tuol Sleng/S-21 while under his command. The closing order "sets out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility." (ECCC Internal Rules, Rule 67) Though it is not a finding of guilt—this is determined at trial—these closing orders are less biased than the prosecutorial accusations found in traditional indictments and determines whether the accused ought to in fact go to trial. In order for the CIJs to recommend prosecution, there must be "sufficient evidence against the Charged Person or persons of the charges," (ECCC Internal Rules, Rule 67) though some scholars have pointed out that, "In practice, this assessment is left to the 'unfettered discretion' of the investigating judges." (Van Schaack, 2010)

According to the Closing Order, "S-21 was unique in the network of security centres given its direct link to the Central Committee and its role in the detention and execution of CPK cadre."[3] (p. 6) This made the prison the nerve center of Democratic Kampuchea's penal process, handling the most "elite" suspects, and Duch was personally responsible for all of the individuals who were brought there. As such, Duch was involved in the interrogation, torture, and execution of over 12,000 individuals. According to the Closing Order, S-21 was not meant to hold prisoners before their prosecution or their release but was rather to be a site for interrogation prior to execution. "Every prisoner who arrived at S-21 was destined for execution. Although one witness claimed he was able to leave S-21, the vast majority of evidence demonstrates that the policy at S-21 was that no prisoner could be released." (p. 9) Everybody brought to S-21 was considered guilty upon arrival, and there was never any pretense of a trial. As was mentioned in the previous chapter, seven people interned at S-21 survived to see liberation from the Vietnamese.

S-21 was tasked by the Khmer Rouge leadership with "smashing" (i.e., killing) the "enemies of Cambodia." However, as the Closing Order makes clear, the definition of "enemy of Cambodia" changed over time. Initially, these "enemies" naturally included individuals affiliated with the former government, that is, the RK, most of whom had lived and worked in the capital (the site of S-21) when the Khmer Rouge took over. As Duch himself testified, "Initially, S-21 was just for important prisoners, or those from Phnom Penh, as well as members of the Central Committee. At first, low ranking combatants only came to S-21 if arrested in Phnom Penh." (p. 10) However, the Khmer Rouge command's concept of "enemies" "evolved and broadened" to include members of the government of Democratic Kampuchea who were designated by Pol Pot and his Central Committee as well as a number of other individuals singled out by the leadership. (pp. 10–11) In addition to victims of internal political purges, Tuol Sleng began to see individuals from outside of Phnom Penh brought to the prison for execution. As the conflict between Vietnam and Cambodia intensified toward the end of the Khmer Rouge era, individuals associated with Vietnam or accused of being Vietnamese sympathizers were also sent to the prison, including many Khmer Rouge troops who had trained over the border. Finally, even S-21 members themselves were targeted for execution if they were suspected of disloyalty (p. 17).

According to the indictment, over 12,000 prisoners, including men, women, and children, were sent to Tuol Sleng during the Democratic Kampuchea era, and only seven survived long enough to see liberation by the Vietnamese. The vast majority of the unfortunate souls there were Cambodians, originating from all parts of Cambodia, consisting primarily of "cadre, workers, and combatants as well as their relatives." (p. 14) However, many Vietnamese and other foreign prisoners, including Vietnamese prisoners of war, Thai civilians, and a few westerners who were

[3] It is worth pointing out that the "indictment" against Duch (more accurately, a "closing order") is not identical to those found in the common law system insofar as it addresses the defendants claims (given to the investigating judge) alongside the criminal allegations against him. Traditional adversarial indictments are not so balanced.

unfortunate enough to fall into Khmer Rouge custody were also killed at the prison. The descriptions of the tortures committed at Tuol Sleng are often graphic and horrifying: including a litany of physical agonies such as beatings, suffocation, and electrocution, as well as mental tortures such as force-feeding prisoners feces.

With the fall of the Khmer Rouge, Duch fled Phnom Penh and fought against the Vietnamese forces and then later against the People's Republic of Kampuchea. Duch had claimed to have become a born-again Christian after the murder of his wife by armed thugs and reportedly lived among the Khmer Rouge holdouts near the Thai-Cambodia border. There, he changed his name to Ta Sanh and later to Hang Ping and became a teacher. He was ultimately discovered by the Irish journalist Nic Dunlop while Duch was working for a Christian relief organization in Western Cambodia. (*The Sydney Morning Herald,* 17 Feb 2009; Dunlop, 2006) By this point, Duch was 57 and even expressed a certain amount of relief regarding his discovery. (Dunlop, 2006) Prior to the trial he compared himself to St. Paul—a persecutor who in turn became persecuted and expressed a desire to focus his life on God. (Mydans, 1999) Regardless of whether or not his spiritual transformation was genuine, Duch was arrested in May 1999 by Cambodian authorities and was held by a Cambodian military court for 8 years until he was transferred to the ECCC in July 2007.

A number of victims stepped forward wishing to be civil participants in the trial. Twenty-eight people had been accepted during the investigation phase claiming to be victims of Duch and another 66 were accepted by the Pre-Trial Chamber. The court struggled to adequately address the nature and scope of the participation of these private citizens in the trial. (For the sake of simplicity, they were put together into four separate groups for purposes of their legal representation during the trial.) As was discussed in the previous chapter, the ECCC follows the civil law procedures in allowing individuals with claims against a defendant to participate in the trial process in order to receive reparations for injuries suffered at the hand of the defendant. Beyond the search for compensation (which few probably expected), many of Duch's victims wished to have a moment in court in order to face the man who had killed so many of their loved ones. To be granted the status of a civil party at the trial, an individual had to show evidence of a "physical, material, or psychological" injury as a "direct consequence" of the offenses allegedly committed by Duch. Initially, 94 different people had sought to participate in the Case 001 as a civil party, though three individuals withdrew from the case and one was excluded by the court for failing to lodge his complaint in time.

The charges against Duch as set out in the Closing Order involved two different categories of international offenses. Duch was accused of Crimes against Humanity, insofar as he had committed torture, rape, murder, extermination, and persecution at Tuol Sleng as "the crimes committed at S-21 themselves constituted a discreet widespread or systematic attack against the civilian population detained therein." (p. 34) The court further argued that Duch was responsible for war crimes for the torture and murder of Vietnamese "spies," who were in fact prisoners of war or civilians captured on the front lines. (p. 36) Along with these two international crimes, Duch was further charged with homicide and torture under Cambodian law,

though the judges conceded that these offenses were in fact subsumed under the broader international crimes leveled at Duch.[4] (p. 37) According to the Closing Order, Duch was responsible for offenses that he committed, ordered, and commanded (as the superior officer) and he "personally tortured or mistreated detainees at S-21 on a number of separate occasions and through a variety of means," (also known as "commission"). In addition to committing these acts himself, he had command responsibility over the acts of others at S-21 and was accused of "aiding and abetting" others in torture and murder there (pp. 38–39).

Duch's trial officially began in February 2009, though pre-trial hearings were required to address some important preliminary matters. Observers reported that in the early period of the trial, there was a great deal of disagreement between parties about the precise nature of the proceedings and what procedural rules were supposed to guide the trial. As one NGO report described it:

> At various points throughout the proceedings, underlying tensions between the perspectives of lawyers from different jurisdictions seemed to play out. In particular, discussions regarding proof required for expert witnesses and the appropriateness of having victims call witnesses relating to sentencing caused heated debates. Defense lawyer Francois Roux seemed adamant that the procedure to be followed should be informed by French practice and scholarship. (KRT Monitor, 2009, p. 3)

The differing cultures led to conflicts between the parties, though the same NGO report declared that, "Proceedings during the two days of hearings ran extremely well, with the judges each adopting a leadership role on a different aspect of the hearings." (KRT Monitor, 2009, p. 6).

A further issue raised by Duch's lawyers during this preliminary phase involved Duch's lengthy pre-trial incarceration. Duch had been arrested nearly 9 years before he stood before the court, a length of detention that violated international human rights law as well as Cambodian criminal law, which establishes a 3 year maximum provisional detention for an individual accused of Genocide, War Crimes, or Crimes against Humanity. The defense argued that his detention from 1999 to 2007 was continuous with his detention by the ECCC, (though the two were separate bodies) and that any detention longer than 3 years was unlawful. In its decision on the matter, the Pre-Trial Chamber concluded that "the ECCC is distinct from the national Cambodian court system," and that, "Although its constitutional documents show that the ECCC was established within the existing court structure, the ECCC is, and operates as, an independent entity within this structure."[5] (Decision on Request for Release, 15 June 2009, p. 7) Thus, although the Pre-Trial Chamber conceded that "the Accused's prior detention before the Military Court constitutes a violation of Cambodian domestic law applicable at the time," (p. 10) his continued detention was necessary "on grounds of the need to prevent witness intimidation, to ensure the presence of the Charged Person during proceedings, the protection of his security,

[4] It is worth nothing that these later charges were only added after the Co-Prosecutors appealed the Closing Order.

[5] It is interesting to note that this opinion in favor of the legal independence of the ECCC from the regular Cambodian court system makes it seem closer to the more "independent" hybrid tribunals like the SCSL.

and the preservation of public order." (p. 11) Thus, despite the lengthy and illegal pre-trial detention, public safety, and the need to ensure the Duch would show up for the trial required that he remain in custody, though the court would credit his previous detention after conviction. (While it proved a moot point in Duch's case, the court further ruled that in the case of an acquittal, "the Accused would… thus be entitled to pursue remedies available within Cambodian national law." [p. 12])

Throughout the trial, which lasted from February through November 2009, Duch was largely apologetic for what he had done and accepted responsibility for (most) of what happened at S-21. There were surprisingly few denials or equivocations regarding what transpired at Tuol Sleng on Duch's part during the course of the trial. Samples from his testimony include statements such as:

> I wish to state in all sincerity before Your Honours that I am responsible for those crimes and tortures. And as for the confessions from the torture detainees which implicated others whose lives were claimed consequently, I also do not deny the responsibility for that. I merely wish to cast some light upon the truth of what happened at that time, in that place. And even if my role was like that of a police commissioner who was distributing orders to subordinates, I am nonetheless the one who shoulders the full responsibility. I apologize (Trial statement, 7 April 2009)

His primary defense was that he feared that were he to not follow the orders of the high command, he and his family would be killed. Whether this contrition stemmed from genuine remorse or was simply an effort to gain favor with the court and with public opinion is an open question and interpretations of the man vary. (According to the psychological profile of Duch conducted by the court, Duch "has constantly expressed regret since 1999."[6]) Cambodian court observers were generally skeptical of his attitude, however. As one of the Tuol Sleng survivors noted, "Duch never talked about real things [during his testimony]. Duch did not say sorry to the people—he just said sorry to the judges." (Falby, 2010) A son of one S-21 victim stated, "These tears [shed by Duch], they are crocodile tears… He tried and managed to make himself cry just to get the pity of the judges." (Khmer Rouge killer sheds, 2010)

Some have compared Duch's defense strategy, created in conjunction with his two attorneys François Roux, a French veteran of international criminal justice, and Kar Savuth, the Cambodian co-counsel, with the defense offered by Albert Speer, "Hitler's Architect" at the International Military Tribunal (IMT) at Nuremberg. At the IMT, Speer's statements of contrition and remorse allegedly allowed him to escape with a lighter sentence than his co-defendants, while others who more vigorously defended themselves were executed. (McGargo, 2011, p. 623) Others have pointed out that the apologetic tone deployed by Duch during the trial allowed Roux and Duch to shift the narrative of the proceedings, at least rhetorically, away from the alleged crimes of Duch at S-21 and on to the defendant's purported rehabilitation. As one observer put it, "In order to draw attention away from the

[6] The profile observed that Duch did not present any psychological pathology and "is responsible for all his acts." As described in the closing order, the psychologists "suggest that the question of whether DUCH's regrets are sincere or circumstantial is not of much relevance, because 'the answer lies beyond these two propositions.'" (Closing Order, 17 Oct 2004, para. 171)

pulled nails and the force-feeding of feces, the waterboarding and the bleedings that Duch had overseen there, Roux framed the debate instead around Duch's moral reconstruction, casting him as a tragic figure trapped by circumstances he has since repudiated."

The admission of civil parties into the proceedings had a notable effect upon the proceedings of the court. Twenty-two civil parties testified at the trial and, unlike common law hearings, they were not reduced to the status of a passive "witness" who may only answer the questions asked them. (Stover et al., 2011) They were allowed to make their own contributions to the case, and these were sometimes emotionally charged encounters between the families of victims of S-21 and the man they held responsible for their loss. One particularly moving account of a civil party's testimony was recounted by an International Committee of the Red Cross report:

> With the judge' s approval, Neth Phally carefully took out an 8-by-11-inch photograph of a young man with black, short-cropped hair and held it upright on the witness table in front of him. "I would like to show a photo of my brother", he said. "[I]t is like he is sitting here… next to me… I believe that my brother will be at peace, having learned that justice is achieved through this court". Phally leaned forward and turned to speak directly to his brother's image: "The soul of you [will] be here with me and in the photo forever so that I can pay homage to you and dedicate… offerings…to you. I [will] never find [your] dead body… [so] this photo… represents the ashes and body of you." (Stover et al., 2011, p. 504)

Whether or not the testimonies of these parties contributed to the judge's findings, they nonetheless provided important details about what occurred at Tuol Sleng and the repercussions of Duch's actions there for the families of his victims.

Given Duch's contrite attitude toward his own liability throughout the course of the trial, there was a great deal of surprise, when, during the final moments of the trial Duch declared that he should be freed for the benefit of "national reconciliation." Further, he maintained that he was not one of the senior leaders of Democratic Kampuchea and therefore was not most responsible for the crimes committed under the Khmer Rouge government—effectively meaning that his case did not fall under the jurisdiction of the ECCC. Shortly thereafter, he fired Roux, and rejected the legitimacy of the court and its right to hold him. As McGargo described Duch's declaration, "It was a shocking moment, suggesting that all along Roux's defence strategy, reflecting his international perspective on the tribunal—and based on extensive experience—had been light years away from the real views of both his client and his Cambodian counterpart." (McGargo, 2011, p. 624) David Scheffer described it as, "An astonishing display of hubris and arrogance that may reveal itself as a cynically smart defense strategy some day, but appeared almost obscene as a direct assault on the entire purpose of international justice and the preservation of memory." (Scheffer, 27 Nov 2009) Roux himself seemed to attribute his client's change of heart to the influence of Sen who by this point most likely wished to see the court fail. Roux stated, Duch's appeal "calls into question Duch's plea of culpability, but also the competence of the court." (Falby, 7 Sept 2010) Nonetheless, this stunning move did not bode well for the tribunal's future when even in the simplest of the four cases faced by the ECCC, with one largely contrite and cooperative witness, the Cambodian government reportedly managed to taint the court's proceedings.

With the conclusion of these last-minute fireworks, the Trial Chamber began 8 months of deliberations on the case before finding Duch guilty of numerous charges. Its 256 page final ruling, issued on 26 July 2010, spells out the broad set of convictions against Duch:

> The Chamber has found the Accused individually criminally responsible …for the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture (including one instance of rape), persecution on political grounds, and other inhumane acts. (para. 559)

In terms of Grave Breaches of the Geneva Conventions, the Chamber concluded that Duch was guilty of

> wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian. (para. 562)

Each of these crimes is spelled out in great detail in the body of the opinion.

While the conviction was in many ways a foregone conclusion, despite Duch's last-minute theatrics, it was the sentencing of Duch that garnered the greatest amount of public attention. In this portion of its judgment, the court declared that they "found the Accused criminally responsible for crimes of a particularly shocking and heinous character," and that Duch's official status, his manifest cruelty, the fact that all of his victims were defenseless and the "discriminatory intent" behind the killings were all aggravating factors for consideration when determining Duch's sentence. Further, as "an intelligent and educated man," Duch, "fully understood the nature of his acts at the time" that he committed them. While acknowledging the perplexing change of heart at the end of Duch's trial, the Chamber found that, "Notwithstanding his belated request for acquittal, the Chamber considers that the Accused's cooperation with the ECCC may serve as a mitigating factor [in sentencing]." (p. 209) Given all of these factors (which the Chamber described as "significant mitigating factors" [p. 215]), the Trial Chamber sentenced Duch to 35 years in prison, with 5 years removed in consideration of Duch's lengthy (and illegal) pretrial detention by the Cambodian government. In essence, he would spend about 19 more years in prison for his crimes.

Among the 90 civil parties who participated in Duch's trial, the Trial Chamber made a variety of pronouncements. Four of the original survivors of S-21 were considered to have been harmed by Duch: the other survivors had not established that they suffered direct injuries while at the prison under Duch's watch. Twenty of the remaining civil parties were unable to show that their relative had been killed at Tuol Sleng, leaving the remaining 63 parties with legal claims to being Duch's victims. Unfortunately, as was undoubtedly understood by all civil parties engaged in the trial, Duch himself had no money and was not capable of providing any sort of monetary compensation for his victims and their families. The only "compensation" that the court granted to Duch's victims was the publication of the apologies made by Duch during the trial as well as official acknowledgement in the ruling that their loved ones were victims of Duch and perished at Tuol Sleng prison.

While Cambodians were generally pleased that Duch had been convicted, there was widespread outrage at a sentence that had been widely perceived as too light

(at least to those who were paying attention, as many reportedly were not [Keo, 2010, p. 4]). While he was of advanced age, and it was unlikely that he would ever be free again, survivors and their families were upset. As one of the Tuol Sleng survivors declared, "I underwent brutal torture. Although Duch did not hit me himself, he ordered his men to hit me in front of him. This hurt me. The verdict seems to slap me in the face and kick me in the head." (Leitsinger, 2010) Another said, "We are victims two times, once in the Khmer Rouge time and now once again." (Mydans, 2010) Survivors were seen weeping outside of the courtroom. Beyond the immediate survivors of S-21 and the courtroom environs, there was also a fair degree of dissatisfaction. A study conducted by the Documentation Center of Cambodia concluded that, "The reaction from survivors across Cambodia was […] diverse, but again, disappointment and dissatisfaction were the most common responses." (Keo, 2010, p. 5)

On the other hand, many international legal experts expressed a qualified satisfaction with the ruling, praising its moderation and farsightedness. As court observer John Ciorciari argued, the sentence "is roughly in line with precedents from other international tribunals, but for survivors, it is understandably difficult to stomach the fact that Duch could walk free if he reaches the age of 86." (Ciorciari, 2010) Other scholars saw the sentence in a broader legal context rather than in terms of Duch's own accountability, seeing the court's consideration of his treatment by the Cambodian government as an important precedent for human rights and the rule of law. As the Director of the Documentation Center of Cambodia, Youk Chhang describes it:

> By recognizing the illegality of Duch's pre-trial detention and reducing his sentence accordingly, the verdict […] provides […] a model for fair trials in Cambodia. [Further, it offers] official accountability. This is the most important Court legacy: a final judgment recognizing the crimes committed by the Khmer Rouge. (Documentation Center of Cambodia, 2010)

In short, many (though certainly not all) scholars observed that the lenient sentence for Duch was insightfully irrelevant given the defendant's age and the ECCC "could sentence [Duch] to more than 14,000 years… and even that would not make it fair." (Park, 2010, p. 103)

Despite these expert opinions, both the defendant and the co-prosecutors appealed the ruling to both the Appeals Chamber and to the Supreme Court of the ECCC. In February 2012, the Supreme Court overruled the Trial Chamber's sentence, concluding that the Chamber "attached undue weight to mitigating circumstances and insufficient weight to gravity of crimes and aggravating circumstances." (Summary of Appeal Judgment, 3 Feb 2012, para. 35) His position of authority at S-21 ("which he abused by training, ordering, and supervising staff in the systematic torture and execution of prisoners" [para. 39]) and his "particular enthusiasm in the commission of his crimes" were clear aggravating factors in Duch's case, and more punishment was plainly in order. In a rebuke to the Trial Chamber, the court asserted that, "The crimes committed by KAING Guek Eav were undoubtedly among the worst in recorded human history. They deserve the highest penalty available to provide a fair and adequate response to the outrage these crimes invoked

in victims, their families and relatives, the Cambodian people, and all human beings." In light of these factors, the Supreme Court declared that "The Trial Chamber erred in imposing a manifestly inadequate sentence" and as a result, they increased Duch's sentence to life imprisonment. (para. 44)

Case 002

The second major case to come before the ECCC was labeled "Case 002" and consists of charges against four separate defendants, each of whom played a key role in the government of Democratic Kampuchea and was instrumental to the 4-year terror that defined Khmer Rouge governance. Perhaps the highest profile defendant, Nuon Chea, was accused of being head of the Khmer Rouge's Security Committee and was reportedly referred to as "Brother Number Two" (he has been described as Pol Pot's "chief ideologist and right hand man" [Center for Justice and Accountability, 2011]). Along with Chea was Khieu Samphan, who served as deputy prime minister and minister of defense during the war against the Republic of Kampuchea and then as the president of Democratic Kampuchea. He was charged with putting Khmer Rouge ideology into practice, overseeing the forced evacuation of Cambodia's urban centers and the compulsory "ruralization" of the Cambodian people. Finally, Ieng Sary deputy prime minister of Democratic Kampuchea and foreign minister, along with his wife Ieng Thirith (a.k.a. "Phea"), the minister of social affairs and head of Democratic Kampuchea's Red Cross Society, were targeted in the case. Aside from Pol Pot himself, Ta Mok, and Son Sen (both of whom were also dead), these four most clearly represent the remaining top leadership of "the Organization," the Khmer Rouge along with the broader abuses that defined Democratic Kampuchea.

The charges against each of these defendants were extensive. The Closing Order issued by the CIJs on September 15, 2010 runs well over 700 pages and includes genocide, war crimes, and crimes against humanity along a variety of axes. The section of the Order discussing "Factual Findings of Crimes" spells out the context where these different crimes were committed. The first of these was in the mass transfer of people in different parts of the country, starting with the evacuation of Phnom Penh, and extending throughout the Democratic Kampuchea period. During this period, the CIJs report execution and other crimes. The second context of the defendants' criminality involves the construction of worksites and cooperatives where starvation, murder, forced marriages, and withholding medical care were ordinary features of everyday life. The third site of alleged criminality of the offenders was in Security Centers such as Tuol Sleng, where prisoners were raped, tortured, and murdered. Finally, these crimes were committed in the context of policies targeting Buddhists, the Cham minority, and ethnic Vietnamese. In each case, the defendants were charged with participating in a JCE (discussed below), either before taking power or conspiring upon taking power to abuse or murder tens of thousands of Cambodians.

Over 780 civil parties were admitted to the case, most on grounds that they were forced into marriage by the Khmer Rouge. Many of them testified before the court during the early parts of the case about the stigma and humiliation resulting from their experiences.[7] (One woman was reportedly executed by the Khmer Rouge because she fell in love without authorization.) In one unique case at the hearing, a transgendered woman, Sou Sotheavy, was forced to cut her hair, dress as a man, marry a woman, and copulate with her under threat of violence by the authorities.

Preliminary Objections of Ieng Sary

Ieng Sary's attorneys raised important issues for the ECCC before the trial began. The first set of objections revolved around the 1979 trial and conviction of Sary and Pol Pot by the Vietnam-backed People's Revolutionary Tribunal and the ensuing pardon issued by King Sihanouk in 1996 (discussed in the previous chapter). Sary argued that a second prosecution by the ECCC would violate the principle traditional legal principle of *non bis in idem* (or double jeopardy). In its ruling on the subject of the previous conviction, the Pre-Trial Chamber distinguished between international and domestic offenses and argued that, "this Article applies solely to proceedings within the domestic legal order and does not apply to proceedings before the ECCC, an internationalized court." (Decision on Ieng Sary's rule 89 preliminary objections, p. 15) Therefore, "the protection against double jeopardy does not negate states' international obligations to promote accountability in relation to perpetrators of genocide, crimes against humanity and war crimes. The *non bis in idem* principle therefore does not debar the Chamber's exercise of jurisdiction in relation to Accused IENG Sary in the present case.[8]" (p. 16) In regards to the amnesty granted by the king, the court concluded that King Sihanouk's declaration could *not* be interpreted to apply to international crimes as "an emerging consensus prohibits amnesties in relation to serious international crimes" (p. 26) and therefore "the scope of application of the 1996 amnesty of necessity excludes the crimes of genocide, torture and grave breaches of the 1949 Geneva Conventions." (p. 27) Thus, as with the pre-trial objections raised in the Duch case, the ECCC court sought to draw a sharp line between Cambodian justice on one hand and the international order on the other, and the court refused to see itself as beholden to the rulings of the Cambodian justice system or those of its political leaders. In December 2012, Case 002 was dealt a blow when three of the defense attorneys resigned from the case, citing government interference. Jasper Pauw, Michiel Pestman, and Andrew Ianuzzi (all international counsel) withdrew from the trial and asked the UN to abandon what they described as the "farce" of the ECCC. (Freeman, 2012) These three attorneys

[7] See for example Kozlovski (2012).

[8] Bear in mind that many international or extraterritorial prosecutions have only been considered because the defendants were given immunity by their own governments, such as in the case of Augusto Pinochet.

were characterized as having a mocking, combative style that poked fun at the pretensions of the court. Reportedly, they hoped to make things uncomfortable for the Cambodian government by arguing that some of the civilian deaths attributed to the Cambodian government were actually the responsibility of post Democratic Kampuchea Cambodian leadership, involving the infamous and ultimately failed "K5 Plan" to militarize the Thai-Cambodian border. (Freeman, 2012) In January, these three were replaced by counsel that represented their clients in a more "low key" fashion.

Health Setbacks

As was feared by many of the ECCC's supporters, the advanced age of the defendants began to undermine Case 002 almost from the beginning. In February 2011, well before the case had concluded, defense attorneys for Ieng Thirith moved to have the charges against her dropped on account of dementia. After several examinations by psychiatric experts, the Trial Chamber concluded that she was unfit for trial and allowed her to go. In its opinion, the Trial Chamber concluded that Thirith "lacks capacity to understand proceedings against her or to meaningfully participate in her own defense" and therefore concluded that she should be released. (Mydans, 2011) Despite numerous objections from the prosecutors, from the civil parties, as well as from the public and civil society organizations, she was allowed to leave the custody of the Tribunal and was effectively set free in the middle of September 2012. (Khmer Rouge's Ieng Thirith released, 16 Sept 2012) This left three defendants in Case 002.

Between the deteriorating health of the defendants and the loss of Ieng Thirith to advanced dementia, it became increasingly less likely that Case 002 would complete its proceedings in any sort of satisfactory manner. As one NGO representative put it when the news of the hospitalizations was announced, "It's looking more and more remote that these accused will ever be prosecuted for some of the most pressing crimes of that era—meaning those that survivors remember and feel the most distressed about." (Carmichael, 2012) In March 2013, the ECCC announced that Ieng Sary had died after being hospitalized for gastrointestinal problems, leaving only two people left as defendants in Case 002, one of which was also in seriously ill health.

In January 2013, the two remaining defendants were excused from various parts of the proceedings for health reasons. On the 13th of that month, Chea collapsed in detention with what doctors described as acute bronchitis. Three days later, Samphan was similarly hospitalized for fatigue and shortness of breath. Regardless of their health, these two remain the only defendants in Case 002. As of this writing, it is unlikely that Case 002, arguably the most important prosecution that the ECCC has undertaken, will provide results that are in any way satisfactory for the victims of the Khmer Rouge. The days of Ta Mok, Pol Pot, Son Sen, and the remaining

members of the Angkat have long departed and the possibility of holding the masters of Cambodia's misery responsible has largely departed with them.

Over the course of 2013, Case 002 underwent a number of different transformations given the failing health of the defendants and the financial constraints facing the court. The Trial Chamber decided to split the case against the remaining defendants into separate "mini-trials" for the different crimes set out in the indictment, a move that was initially invalidated by the Supreme Court Chamber but was later accepted by it. These cases were designed to render quicker judgments and focused on different aspects of the defendants' criminality during the Democratic Kampuchea era. The closing arguments for Case 002/01, which addressed the forced deportations carried out by the Khmer Rouge, ended in October 2013. As of this writing, Case 002/02, dealing with a wider array of alleged crimes committed by the Khmer Rouge leaders, is scheduled to begin in early 2014.

The Conflict(s) over Cases 003 and 004

As we saw in the discussions leading up to the creation of the ECCC, the negotiation process was marked by tensions between the leadership of the Cambodian government and members of the international community. This tension shaped the ultimate structure and operations of the Extraordinary Chambers and its "dual" Cambodian/international composition. All of these issues were significant roadblocks for the court throughout its operations. However, the most serious challenge to the ECCC surrounded the later cases undertaken by the prosecutors: Case 003 and Case 004. While there was widespread consensus on both "sides" of the tribunal that Duch and the Khmer Rouge leaders comprising Cases 001 and 002 were acceptable candidates for prosecution, the Cambodian government strenuously objected to the tribunal expanding its reach beyond these five people. On the international side, however, the international co-prosecutor sought to include five additional targets, arguing that they fit the jurisdiction of the ECCC and were responsible for some of Democratic Kampuchea's most serious crimes. These differences were echoed by other stakeholders in the tribunal's operations: the Cambodian government, civil society groups, and the UN itself. In many ways, Cases 003 and 004 stood as "test cases" for the independence of the court and in many ways it was found lacking.

As stipulated by the ECCC's founding documents, the disagreement between the two co-prosecutors regarding the investigation went before the Pre-Trial Chamber in August 2009. After deliberation, the judges of the Pre-Trial Chamber were unable to achieve the requisite supermajority, with all of the Cambodian judges opposing the investigation and the two international judges supporting it. (Dearing. 2012) Because the Rules of the ECCC require that "written statements of the facts and reasons for the disagreement [between the co-prosecutors] shall not be placed on the case file," (Internal Rule 71) and the documents related to the pre-trial deliberations are similarly kept secret, it is difficult to know the precise reasoning behind the Pre-Trial Chamber's decision (or indecision as the case may be). However, according

to the tribunal's rules, absent a supermajority, the Pre-Trial Chamber is required to refer a case to the CIJs to commence with the investigation, and therefore the five individuals whose names were put forward were designated as Cases 003 and 004.

While the names of the individuals under investigation in these cases have never been officially acknowledged by the court, leaked documents have indicated the identity of the defendants in both cases. Case 003 reportedly consists of two leaders of Democratic Kampuchea's military: Sou Met (who died in July 2013 [Crothers and Phorn, 2013]), an Air Force Commander and Meas Muth, a Navy Commander. (*The Sydney Morning Herald,* 3 June 2012) They have reportedly been accused of deliberately attacking and killing Vietnamese civilians during Cambodia's war with its neighbor. Muth reportedly attacked Thai and Vietnamese civilian ships (including those carrying Cambodians fleeing the country) as well as participated in Khmer Rouge purges, targeting civilians within Cambodia. Sou Met was in charge of the Division 502, a military group responsible for, among other things, the new Cambodian Air Force. As part of his duties, he has been accused of killing civilians and sending suspect comrades to S-21 for interrogation and execution. Among the reported allegations against Met was the use of forced labor to build an airport in the Kampong Chhnang province in Central Cambodia where somewhere between 10,000 and 50,000 people, mostly Cambodian soldiers deemed to be traitors by the Democratic Kampuchea government, died under brutal working conditions. (Some workers were reportedly buried alive during the construction of the site.[9])

Case 004 is reported to consist of Ta An, Ta Tith, and Im Chem. These three were highly placed in the district parties of Democratic Kampuchea and have been accused of committing genocide while in charge of their respective territories. Ta An was responsible for the Kang Meas District where he is accused of committing acts of genocide against the Cham population there. Ta Tith was party secretary for the Kirivong district, which bordered Vietnam, and was later put in charge of the "Northwest Zone" where he allegedly purged the Khmer Rouge of those deemed counterrevolutionary, targeting Vietnamese Cambodians and other minorities for execution. (Human Rights Watch, 3 Oct 2011) He is accused of crimes against humanity. Im Chem was a party official and participated in purges of the Democratic Kampuchea government as well as the execution of those deemed insufficiently loyal to the Khmer Rouge. As part of her responsibilities, Chem was placed in charge of the "Dam of Widows" construction site in Preah Netr Preah District. As Human Rights Watch described her management of the program:

> Some laborers were executed at the water-control work site for complaining about conditions or being unable to cope with the demands. Moreover, the general conditions imposed on the overall population of Preah Netr Preah were extraordinarily difficult and worsened in many parts of the district during Chem's rule, with large numbers of deaths from starvation and disease. Those who complained or were deemed "lazy" for failing to do the required work were subject to execution or detention at punitive forced labor and re-education sites throughout the district. (Human Rights Watch, 3 Oct 2011)

[9] It is possible that some of the resistance to the investigation into Case 003 comes from the fact that the Chinese government helped in the construction of the airport and may share some of the blame for the atrocities committed there.

While the nature and scope of these charges have been widely discussed among observers, official copies of the pre-trial documents have not been made publicly available.

There was a great deal of political fallout from the international co-prosecutor's decision to pursue these two cases. Sen had previously decided that the ECCC would wrap up its mission with the conclusion of Case 002 and denounced these new investigations as a threat to Cambodian stability: "If you want a tribunal, but you don't want to consider peace and reconciliation and war breaks out again, killing 200,000 or 300,000 people, who will be responsible?" (McAuliffe, 2010) Reportedly, Sen forbade all Cambodian officials employed by the court from working on these expanded cases, stating that further trials "will not be allowed." The Cambodian Information Minister had previously stated that anybody who wished to expand the tribunal's investigations beyond the two cases already before the court "should pack their bags and leave." (Mydans, 10 Oct 2011) This recalcitrance expanded to both investigating judges who did almost nothing in relation to these cases for the 20 months following the decision of the Pre-Trial Chamber. As the Open Society Institute's June 2011 report describes their actions:

> The Case 003/004 judicial investigations raise serious questions about the ECCC's fulfillment of each of the four essential components of a genuine investigation. The co-investigating judges failed to carry out such basic investigative acts as interviewing suspects and other witnesses, or conducting basic field investigations. The Case 003 investigation stagnated for 20 months amid Cambodian government interference and lack of national cooperation within the court. The investigations were never undertaken in a serious manner: staff within the Office of Co-Investigating Judges (OCIJ) reported that any effort to push the investigations forward was met by judicial opposition. (The Open Society Institute, 2011)

According to the Institute's report, Cambodian officials went so far as to cover up their failure to investigate the report by stuffing folders with irrelevant papers to give the impression that work had been done on the subject.

The stalling over Case 003/004 came to a head in 2011 with a conflict between the international co-prosecutor Andrew Cayley and the CIJs. Cayley, unhappy with the slow pace of the investigations, threatened to resign from the tribunal. The first international CIJ, Marcel Lemonde, began an investigation but resigned after being blocked by his Cambodian counterpart, You Bunleng. As a result of Cayley's claims, the international investigating judge, German Siegfried Blunk, threatened to file contempt-of-court charges against the international co-prosecutor. (*CAAI New Media,* 2011) In April, the two investigating judges presented their report to the prosecutors, which the international judge found to be unsatisfactory and many of the international staff at the Cambodia tribunal resigned in protest. Cayley had reported that the CIJs left substantial parts of their investigation incomplete and accused the two judges of "burying" the case. At the same time, Human Rights Watch issued a statement calling on the two investigating judges to resign, charging that the two judges, "have egregiously violated their legal and judicial duties and … have failed to conduct genuine, impartial, and effective investigations into ECCC cases 003 and 004." (Human Rights Watch, 3 Oct 2011) The respected human rights NGO claimed that the judges had failed to interview key witnesses, examine alleged crime scenes, or even notify the suspects.

Blunk responded that he had met with significant resistance from the Cambodian government in conducting its investigation. (Mydans, 10 Oct 2011) Facing international criticism, however, Blunk resigned from the court on October 10, 2011. In a press statement released at the time, Blunk accused the government of Cambodia of undermining the tribunal (citing the above mentioned quote from the Cambodian minister of information), stating that, "Although the International Co-Investigating Judge will not let himself be influenced by such statements, his ability to withstand such pressure by Government officials and to perform his duties independently could always be called in doubt, and this would also call in doubt the integrity of the whole proceedings in Cases 003 and 004." To the surprise of many observers, the Secretary General (whose predecessor had threatened to withdraw UN support for the ECCC if the government of Cambodia interfered with its operations) thanked Judge Blunk for his service and said little else. As one observer put it, Blunk's resignation "renders wholly inadequate the U.N.'s continued uncritical support for a court whose lack of independence has been so openly, definitively exposed." (Goldston, 2011)

Blunk was replaced by the reserve international CIJ from Switzerland, Laurent Kasper-Ansermet. However, Judge Kasper-Ansermet had no more success than Blunk in his work on Cases 003 and 004. He frequently sparred with his international partner and the Cambodian government refused to recognize his authority, effectively stonewalling him.[10] In March the new replacement judge issued a damning note "on the egregious dysfunctions within the ECCC impeding the proper conduct of investigations in cases 003 and 004." In May 2012, Kasper-Ansermet resigned from the ECCC, issuing a statement that was even harsher than Cayley's. Kasper-Ansermet laid the blame squarely on his Cambodian colleague, You Bunleng, who he charges refused to even discuss the two contested cases with him. (ECCC Office of the Co-Investigating Judge, 4 May 2012) As part of his struggles with his colleague, Kaspar-Ansermet sought to bring disciplinary action against Judge You in Cambodian court but his complaints were ignored. The UN Secretary General's office declared that "it is essential that the judicial process in relation to Cases 003 and 004 be brought back onto a positive course," and began the process of selecting a replacement judge. (Secretary-General on the Extraordinary Chambers in the Courts of Cambodia, 30 March 2012) Eventually, they settled on Mark Brian Harmon, a former US federal prosecutor and an experienced trial attorney from the ICTY, however, by early 2013 observers were already skeptical. As the Cambodian Tribunal Monitor observed:

> The national [Pre-Trial Chamber] judges' continuing unwillingness to acknowledge and remedy the egregious and pervasive procedural defects in the handling of the Case 003 investigation can only invigorate skepticism that—even with a new international CIJ in place—this Case will be allowed to proceed in accordance with the Court's Internal Rules and international standards. (Heindel, 19 Feb 2013)

All of this means that as of this writing, Cases 003 and 004 remain in a sort of limbo as the prosecutors and the CIJs work out their differences on the subject, and critics

[10] For an account of the conflict between Judge Kasper-Ansermet and other parties involved see The Open Society Initiative (2012).

suspect that the Cambodian officials working at the ECCC are simply waiting for the accused individuals to die of natural causes.

The Special Court for Sierra Leone (SCSL): Civil Defense Forces (CDF), Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), and Taylor

As discussed in the previous chapter, the SCSL prosecutor's plan was to indict leading figures from each of the three major forces involved in Sierra Leone's 11-year civil war. Along with this, he targeted one significant international figure (Charles Taylor) who was described as the architect of the war itself as well as the major political and financial backer of the rebel forces. This meant that the surviving leadership of the rebel RUF was placed alongside the AFRC (a group of rebel soldiers that allied with the RUF) and the CDF (ruthless allies of the Sierra Leonean government and opponents of the RUF). Charles Taylor of Liberia, who was widely believed to be the godfather of the RUF, was safely ensconced in Liberia, where he was still head of state in 2003 and thus beyond the tribunal's immediate reach. In the end, nine people went to trial in the AFRC/CDF/RUF cases. Along with these nine, the deceased indictees (Bockarie and Koroma) and Taylor rounded out the most significant figures before the court. The remaining cases consist of (relatively) minor infractions involving attempts to unduly influence the court's proceedings.

CDF

As was discussed in the previous chapter, the CDF prosecutions were clearly the most controversial of the four cases central to the Special Court's portfolio. Nonetheless, the first trial to commence in the SCSL Trial Chambers was against Norman and his compatriots in the CDF. This approach was controversial not only because Norman and his troops were widely believed to be innocent of responsibility for war crimes during the conflict, but he was also generally considered to be a hero by the people of Sierra Leone. He had been highly placed in the Sierra Leonean government after the war and his arrest provoked protests from many Sierra Leoneans, as well as a few knowledgeable foreigners. Further, the CDF took orders from President Kabbah for much of the conflict, making it highly suspicious that the top leadership of the CDF forces was subject to prosecution but not the man who directed the war from the very top and who remained the head of state for Sierra Leone. All of this lent an air of suspicion to the opening of the first trial.

Along with Norman, two other individuals from the CDF were indicted by the Prosecutor's Office. Moinina Fofana and Allieu Kondewa were both accused of being second tier commanders in the CDF forces. These CDF officials were indicted

together in the initial March 2003 round of indictments, and the three individuals were combined together into a single indictment and a single trial.

The trial began on 3 June 2004 with Crane's opening statement. In characteristically grandiose terms, Crane placed the tribunal in a broad historical context and situated it in terms of nearly cosmic struggles of good versus evil.

> May it please this Chamber, Your Honours. On this solemn occasion mankind is once again assembled before an international tribunal to begin the sober and steady climb upwards toward the towering summit of justice. The path will be strewn with the bones of the dead, the moans of the mutilated, the cries of agony of the tortured echoing down into the valley of death below. Horrors beyond the imagination will slide into this hallowed hall as this trek upward comes to a most certain and just conclusion. The rule of law marches out of the camps of the downtrodden onward under the banners of never again and no more.

The defense case began 12 days after Crane's opening speech and closing statements were given in late November 2006, and in February 2007 Norman died in Dakar, ending the case against him. The Trial Court issued its verdict against Fofana and Kondewa in a 250 page ruling on August 2, 2007. Both Fofana and Kondewa were found guilty of multiple offenses. Fofana was sentenced to 6 years while Kondewa was sentenced to 8 (though, as we will see, these sentences were increased upon appeal).

In his opening statement, Crane sought to address the criticisms that his indictment of the CDF leadership raised. He placed the alleged crimes of the CDF against the otherwise justified role of civil defense in wartime, and argued (repeatedly throughout the trial) that the CDF and the Kamajors grossly overstepped their role as protector and therefore deserved punishment. According to Crane, under Norman, Fofana, and Kondewa, a legitimate task was perverted and turned into crime.

> Now, defending one's nation is a just cause. It is accomplished by an honoured and necessary profession, the profession of arms which for centuries has adhered to the laws of armed conflict. The justice cause of a civil defence force in Sierra Leone set up to defend a nation became perverted and was twisted beyond measure by Norman, Kondewa and Fofana. Under their leadership, these Accused war criminals turned what should have been a just cause into an unjust effect, serious breaches of the laws designed to protect humanity. These so-called defenders of the nation were really offenders of the nation looking out for their own self interests. (pp. 12–13)

To bolster his case at the beginning, Crane cites examples (later brought forward as testimonial evidence) of robberies, torture, and murder committed by CDF forces during the war. The descriptions of killings in Bo and the destruction of the town of Koribundo were brought up and graphically described, with the conclusion that, "No one deserves to live in circumstances like this, to die like this, to witness the horrors perpetrated by all sides, and most certainly by those Accused who twisted a just cause into an unjust perversion." (p. 13)

Joseph Kamara, Crane's deputy, provided more specifics of the prosecutor's case against the CDF and Kamajor leadership. According to the prosecution, the Kamajor elite fashioned a broad mythology around this group of rural hunters, including imbuing them with a belief that they possessed magical powers that made them immune to bullets and practices of ritual cannibalism. Kondewa was described as

a spiritual leader for the Kamajors, recruiting and training them to kill rebel forces as well as anyone sympathetic to the RUF. As part of his opening, Kamara focused on the so-called "Black December" operation. Black December was a CDF mission that involved the blockade, killing, and starvation of RUF supporters in southeastern Sierra Leone at the end of 1997 and early 1998. As part of the operation, the town of Bo was sacked by Norman's forces, and men, women, and children were murdered, often by beheading, at the whim of the CDF leadership. While there were some technical legal questions about the precise legal nature of the Black December charges in the indictment that came up during the trial itself, the operation was in many ways central to the prosecution's case and Kamara's description of the operation is graphic and disturbing.[11] Kamara's statement continues with a long list of brutal murders perpetrated by the CDF and Kamajors against anybody remotely suspected of being sympathetic to the RUF forces.

While Crane's and Kamara's opening statements were clearly dramatic and probably persuasive, their rhetorical effectiveness was most likely blunted by further procedural delays as Norman worked out the precise nature of his representation. Norman had chosen to represent himself and rejected the assistance of attorneys to argue on his behalf. (The court had offered him consultative counsel.) The Trial Chamber was unsure as to whether or not the Statute of the Special Court *guaranteed* a right to self-representation and feared that granting Norman such a right would slow down the proceedings and undermine the efforts of his co-defendants. Having been denied the right to self-representation, Norman refused to further participate in the trial. Eventually, he was coaxed back to the trial when given "stand by" counsel to assist him in the legal nuances of conducting his own defense.

Along with Black December, a good deal of the case involved the nature and operations of the Kamajor forces. The Kamajors were described by the prosecution as a rural hunting society who were coopted by Norman and his colleagues and turned into a force of religiously minded fanatical killers. Kondewa was described as the "chief initiator" and served as a spiritual leader for the Kamajor forces—convincing large numbers of Kamajor soldiers that they were bulletproof and were given special weapons by their ancestors. (Kondewa charged a fee of 10,000 *leones* to conduct this ritual.)

Beyond the Kamajor forces, the broader CDF organization and its structure were discussed throughout the case. One topic was the so-called "Base Zero" where Norman and the other CDF leadership planned strategies against the RUF. Base Zero was established by Kamajor rebels in the town of Talia after the AFRC/RUF junta took power. There they established their resistance and collected Norman from Liberia after Kabbah put him in charge of all forces within Sierra Leone. It was there that Norman convened his "War Council" and trained Kamajor forces for doing battle with the RUF.)

[11] Part of the charges against the CDF leadership that stemmed from Black December were summarily dismissed, leaving the defense counsel unclear about the precise charges that the defense counsel was seeking to defend their clients against.

Along with these procedural setbacks, the most significant blow to the prosecutor's case against the CDF was the death of Norman himself as well as the circumstances that surrounded it. There were many troubling aspects of Norman's case from the outset, and the prosecution of Norman and the other CDF leaders did not sit well with much of the Sierra Leonean population. Along with his status as a war hero who had played a central role in defeating the RUF, and the means of his arrest, there were many parts of the Norman case that left observers uncomfortable. After his arrest, security concerns led the court to transport Norman to a remote prison compound, Bonthe Island, that had historically been used to hold slaves before transporting them to the new world. (The unfortunate symbolism of a white, American prosecutor holding an admired African leader in a slave cell was lost on nobody.) Throughout his trial, Norman complained about his health and criticized the care he was provided as inadequate. In January 2007, less than 2 months after closing statements in the CDF trial, Norman was sent to Dakar, Senegal and reportedly declared that he would not return to Sierra Leone alive. While there, he complained that the conditions in Senegal were even worse than those in Freetown. His death on February 22 at a Dakar military hospital after surgery angered many back in his home country.

The death of Norman resulted in expressions of public sorrow and anger and to a profusion of conspiracy theories regarding his death. The cause of death reported by the Special Court was heart failure, a claim that was refuted by Norman's own family. Norman's adopted son, present at his death stated: "Chief [Norman] did not die of any heart failure as the people of Sierra Leone are made to understand by the Special Court. [He] died because of lack of adequate post operative care," and charged that the court's agents denied Norman adequate nursing care. (UC Berkeley War Crimes Study Center, 22 Feb 2007) Speculation revolved around Sierra Leonean politics and a few darkly alleged that members of President Kabbah's administration feared Norman's popularity and a last-minute change of political party on Norman's part led the president to order his death. His transfer to Senegal and his subsequent death were considered by some to be a means of removing Norman from the political scene before he could lend support to opponents of Kabbah's Sierra Leone People's Party (SLPP).[12]

Norman's death, when placed alongside the deaths of Sankoh, Bockarie, and Koroma underlined the failure of the SCSL to adequately address those most responsible for Sierra Leone's war. The remaining CDF members were clearly lesser figures in the movement. In addition, according to the common law principles that the court was following, Norman was effectively adjudicated innocent as there is no practice of prosecuting a dead suspect and that all individuals are considered innocent until proven guilty. Since no (legal) proof was now possible, Norman died an innocent man. A month after Norman's death, the Trial Chamber terminated the case against Norman and continued its deliberations over Fofana and Kondewa.

[12] For discussions of these theories see UC Berkeley War Crimes Study Center (22 Feb 2007) and Kabba (12 March 2007).

For their part, the defense filed separate motions in its closing. Along with specific objections to the prosecution's case, each defendant outlined separate claims about their relationship to the alleged crimes of the CDF and the Kamajors. Norman maintained that he did not have control over CDF/Kamajor forces and, particularly during the Black December operation, he "had no active role to play in the fighting" (Defendant's final statement, para. 245) and that as deputy minister of defense he was incapable of getting CDF troops to follow principles of international humanitarian law. Control over the Kamajors was largely shared between the Economic Community of West African States Monitoring Group (ECOMOG, the West African defense forces) and the chiefs of the Kamajor tribes. Further, Norman argued that he was operating under the authority of President Kabbah.

Both of the CDF defendants were convicted of multiple charges, however, when compared to the other cases before the SCSL, the sentences imposed on Fofana and Kondewa by the Trial Chamber were extremely light. The 6 and 8 year sentences were short given that the two had been convicted of serious crimes like murder (which could be a capital offense under Sierra Leonean law). In its ruling the Trial Chamber justified its approach by stating that the CDF and the Kamajors were fighting against a force bent on destroying the legitimate government of Sierra Leone: "The main distinguishing factor is that the acts of the Accused and those of the CDF/Kamajors for which [the defendants] have been respectively found guilty, did not emanate for a resolve to destabilize the established Constitutional Order. Rather, and on the contrary, the CDF/Kamajors was a fighting force that was mobilized and was implicated in the conflict in Sierra Leone to support a legitimate cause." (Sentencing Judgment, 9 Oct 2007, para. 83) Although they often targeted civilians in ways that were clearly illegal and used tactics similar to their enemies, unlike the RUF and AFRC, the CDF forces were clearly fighting for a selfless cause and did not seek personal power or economic gain. "In fact, we have found that both Fofana and Kondewa were among those who stepped forward in the efforts to restore democracy to Sierra Leone, and, for the main part, they acted from a sense of civic duty, rather than for personal aggrandizement or gain." (para. 94) For these reasons, the Chamber concluded that "a manifestly repressive sentence will be counterproductive to Sierra Leonean society." (para. 95) Fofana was sentenced to a total of 6 years and Kondewa was sentenced to 8, sentences that were later increased by the Appeals Chamber to 15 and 20 years respectively.

RUF

The case against the three remaining members of the RUF was in many ways the most important case before the SCSL (other than perhaps, Taylor's case), as the RUF was widely blamed by many for initiating the war and of many of the conflict's worst excesses. Unfortunately, with the death of Foday Sankoh, the most well-known figure in the RUF was out of reach before the trial even began. This was the same for Sam Bockarie who died in mysterious circumstances in Libe-

ria. This left three major figures for the prosecution to target: Morris Kallon and Augustine Gbao, both of which were RUF commanders, and Issa Sesay, a RUF commander and interim leader who ran the forces during peace talks and demobilization. The indictment against the three men included a wide range of offenses, including targeting civilians, murder, rape, mutilations, using childhood soldiers, abducting civilians and forcing them to work in Sierra Leone's diamond mines, looting, and attacking UN peacekeepers both as RUF leaders and while allied with the AFRC junta.

There was already some skepticism at the very beginning toward the RUF indictments, in particular that of Issa Sesay. Some critics have suggested that, with the most important individuals leading the rebel forces gone, the SCSL had largely fulfilled its mandate before existing, but instead of "folding up," the Special Court felt a need to prove itself by prosecuting *anyone* that it could blame for the war. As the outspoken SCSL critic and former British diplomat Peter Penfold put it,

> With the death of Sankoh and Bockarie and the reported death of Johnny Paul Koroma… the three persons most identified as bearing the greatest responsibility for the atrocities, there were calls for the Special Court to be disbanded, but to no effect. The only way that the Court could be disbanded was for the Court to disband itself; and clearly too many people were enjoying the lucrative salaries paid by the court to contemplate such a thing. (Penfold, 2009, p. 64)

There were still plenty of RUF killers and rapists roaming the streets of Freetown and the rural villages of Sierra Leone, but almost all of those who bore the greatest responsibility for the war were dead. According to the critics, any justice the SCSL could provide would be merely a show.

While Sesay had undoubtedly been an RUF commander and worked with Sankoh, until he assumed command of the RUF at the end of the war, he was not considered a "big fish" by many observers of the war. Critics argued that he had done a great deal to end the war through negotiations with the UN and the government. An American documentary film about Sesay's trial, entitled *War Don Don* (Cohen and Bello, 2010) portrays Sesay as a peacemaker and unwitting leader who only became a scapegoat after Sankoh's death. Augustine Gbao was not indicted with the original group in March 2003 but was only added to the docket 5 weeks later, suggesting that he was placed in the docket to "round out" the number of defendants and put the RUF trial on par with the other two cases before the court.

The initial portions of the RUF trial were consumed with procedural issues as well as some "existential" questions about the court's legitimacy. Several defendants argued that without a public referendum on the subject the creation of a court within Sierra Leone was unconstitutional. Hinga Norman argued further that the lack of control over large swaths of Sierra Leone when the court was created meant that the government was not in "effective control" over Sierra Leone and was therefore incapable of negotiating treaties with the United Nations. (SCSL Appeals Chamber, 15 March 2004) Further, he argued that the court's dependence on foreign donations undermined the impartiality of the court. Although Gbao had refused to

recognize the legitimacy of the court[13] his counsel nonetheless attacked it, charging that the UN Secretary General did not have the power to create a criminal tribunal and that the Government of Sierra Leone perpetuated a "fraud or perfidy" at the end of the war with the RUF by leading the RUF members to believe that the Lomé Amnesty was still in effect. (Appeals Chamber, 25 March 2004) (A similar argument was made by Allieu Kondewa [Appeals Chamber, 25 May 2004].) In addition, defendants argued that the court lacked jurisdiction over the defendants for a variety of different reasons.

In the Spring of 2004, the Appellate Chamber issued a series of rulings dismissing these objections to the court. As was discussed above, it's very difficult to believe that these judges would overturn years of political negotiations as well as the express will of the Security Council and rule the tribunal into oblivion. The Appeals Chamber asserted that "the Special Court is *not* part of the Judiciary of Sierra Leone," and was therefore independent of the Sierra Leonean Constitution and therefore not subject to charges of unconstitutionality. (Appeals Chamber, 13 March 2004, para. 49) Further, while the Chamber acknowledged that much of Sierra was in the hands of the RUF and the AFRC when the SCSL was established, the existing government's international legitimacy meant it "did have the authority to enter into an International Agreement, regardless of whether or not it was in 'effective control' of the majority of Sierra Leone." (para. 78) In regards to the funding, the court argued that the court's funding and its impartiality were distinct enough that "there is no way in which the remuneration of the judges…is tied to the funding of the court of can be subject to manipulation." (para. 38) Finally, in regards to the Lomé Accord, the Chamber conducted a survey of post-World War Two international legal decisions to show that "there is a substantial body of cases, comments, rulings and remarks which denies the permissibility of amnesties in international law for crimes against humanity and war crimes." (Appeals Chamber, 25 May 2004, para. 47) Having dismissed the existential cases, the court was then free to address the charges leveled against the defendants.

There was an initial petition from the OTP to join the three together which the Trial Chamber granted on January 27, 2004. This then led to the OTP issuing a joint, revised indictment against the three men. The joint trial commenced formally on July 5, 2004, but witnesses and opening statements did not begin until much later, when the Appeals Chamber had resolved some of these preliminary matters. Crane set the scene in his opening statement. In dramatic terms (which were routinely interrupted by objections from the defense counsel, objecting to his emotive rhetoric) that characterized his overall approach, Crane described the RUF rebels as "dogs of war" and "hounds of hell." He further argued that there was no truth in the claim on the part of the RUF forces to be legitimate rebels, as they took advantage of genuine anger toward the corrupt government of Sierra Leone to pursue ends that were manifestly criminal:

[13] Gbao himself began his trial by refusing to recognize the Court's legitimacy and refusing to cooperate with his own attorneys. (See his statement before the trial court on 7 July 2004.)

> [The] discontent of the citizens of Sierra Leone was a mask for these actors' own criminal purposes. This trial is not, cannot be, about this subterfuge of frustrated political aspirations, but about war crimes, the crimes against humanitarian [sic.]. (Transcript, 5 July 2004, p. 22)

The truth, behind the revolutionary rhetoric of the RUF, was that Sankoh et al were interested only in power and money, not improving the lives of Sierra Leoneans:

> Their motive: power, riches, and control in furtherance of a joint criminal enterprise that extended from West Africa north into the Mediterranean Region, Europe, and the Middle East. Blood diamonds are the common thread that bound together this criminal enterprise. The rule of the gun reigned supreme. (p. 20)

The conspiracy was one of greed, not of ideology. Sankoh et al were not political radicals, but were common crooks.

Further, throughout the opening statement, Crane links the RUF with the AFRC in what he described as a "macabre dance of death."

> It must be noted that we will show clearly that there is a key and important linkage and union between the RUF and the AFRC factually that began in the summer of 1997 lasting throughout the rest of the conflict. The RUF and the AFRC in large measure became one and the same. The facts and details of this campaign of destruction perpetrated by these two organisations are forever intertwined… (p. 23)

The trial then lasted until August 2008 and ended with convictions for all three defendants. Sesay and Kallon were found guilty of 16 charges and Gbao was convicted of 14. Served concurrently, Sesay was sentenced to 52 years in prison, Kallon to 40 years, and Gbao to 25 years.

AFRC

The final trial of the leaders of the various forces within the civil war involved the leadership of the military junta that effectively ran Sierra Leone alongside the RUF from May 1997 to March 1998. The main representatives of the AFRC at the SCSL were Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu. (Johnny Paul Koroma, the other main figure of the AFRC had died under mysterious circumstances in July 2003 in Liberia.) They were charged with unlawful killings, terrorizing the Sierra Leonean population, sexual violence (which included sexual slavery, "brutal rapes, often by multiple rapists, and forced 'marriages'" where "the 'wives' were forced to perform a number of conjugal duties by their 'husbands'"), and other violent actions, including the mutilation of civilians by carving "AFRC" and "RUF" on their bodies. Finally, they were each accused of recruiting and training child soldiers, forcing civilians to labor for the benefit of the AFRC junta and looting and burning civilian property.

The trial began on 7 March 2005 after the court allowed for the consolidation of the three individual cases into one single trial and a joint indictment. The prosecution presented a total of 59 separate witnesses and ended their presentation that November. The defense counsel began its hearing June 5, 2006 and continued its case

until October 27 of that year. The court issued its rulings in June of 2007, finding all of the defendants guilty of 11 of the 14 charges in the indictment.

A month later the Trial Chamber issued sentences for the three defendants. The sentencing opinion is notable for the harsh condemnation in its language, dwelling in part on some of the most hideous crimes committed by the defendants. "Brima, Kamara and Kanu have been found responsible for some of the most heinous, brutal and atrocious crimes ever recorded in human history. Innocent civilians—babies, children, men and women of all ages—were murdered by being shot, hacked to death, burned alive, beaten to death. Women and young girls were gang raped to death… Pregnant women were killed by having their stomachs slit open and the foetus removed merely to settle a bet amongst the troops as to the gender of the foetus…. The Trial Chamber cannot recall any other conflict in the history of warfare in which innocent civilians were subject to such savage and inhumane treatment." (Sentencing Judgment, 19 July 2007, para. 34–35) The Chamber chose to sentence them "globally," meaning that there was one single sentence for all of the crimes (most trials involved multiple sentences that were served concurrently), and Brima, Kamara, and Kanu were sentenced to 50, 45, and 50 years respectively.

Taylor

From the very beginning of the court's existence, it was clear that Charles Taylor was going to be one of the central targets of the SCSL prosecutor's office and Crane was frequently asked about his plans for Taylor in interviews. His links to the RUF and his role in Sierra Leone's war were something of an open secret throughout the conflict and although he did not explicitly say so, Crane himself alluded to the fact that Taylor would be indicted by the court. It was widely believed that he had been the prime mover behind the RUF, supplying it with funding, manpower, and logistical support throughout the conflict to punish the government of Sierra Leone for its participation in international peacekeeping during his own country's civil war, and to seek control over Sierra Leone's natural resources. Observers of the court knew that, along with Sankoh, Taylor must be prosecuted for the conflict for the tribunal to have any sort of claim to legitimacy.

However, the technical, legal, and logistical barriers to prosecuting Taylor were enormous, particularly in late 2002 and early 2003 when the SCSL was starting up and Crane was issuing his first round of indictments. At that point, Taylor was still the president of Liberia and thus a sitting head of state. This presented practical, political, and legal challenges to the prosecutor. With the backing of his own government and its military, arresting Taylor in Liberia would be impossible. Few other heads of state supported prosecuting one of their peers and thus, Crane could not expect the easy cooperation of other governments, particularly those on the African continent. Finally, the legal principle of head of state immunity, though battered by 2002, was still a basic principle of international law, which presented a significant legal roadblock to prosecuting Taylor in *any* court. The prosecutions of Slobodan

Milosevic, Augusto Pinochet, and Hissene Habre had undermined the view that heads of state were immune from criminal liability, and the SCSL statute explicitly stated that, "The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment." (Article 6) But the SCSL statute was not binding on other governments, meaning that Taylor's immunity would be a matter of customary international law. Only a few years earlier such immunity had been upheld by the ICJ in a dispute between Belgium and the Democratic Republic of the Congo. (*Arrest Warrant of 11 April 2000 [Democratic Republic of the Congo v. Belgium],* 14 Feb 2002) Together, these issues presented serious challenges to prosecuting the most significant surviving player in the Sierra Leone war.

However, in early 2003, Liberia was in the final stages of its own civil war and the tide had turned against Taylor. Rebel groups had been fighting his government and were having a great deal of success in destroying his power. Liberians United for Reconciliation and Democracy (LURD) had begun fighting Taylor in 1996, but joined in later years by a separate force, the Movement for Democracy in Liberia to pin down Taylor's forces. As the rebel forces closed in on Taylor and his government, his political position weakened and international pressure increased for Taylor to step aside. By May 2003, Taylor's government only controlled a sliver of Liberia and his days were clearly numbered. (The war continued until August, when Taylor formally handed over power to his vice president and went into exile in Nigeria, but only after he was indicted by the Special Court.)

The indictment against Taylor was among the first issued by Crane's office in early March 2003, but it was kept sealed until an opportunity presented itself to put Taylor into custody. It was finally unsealed on June 4 of that year, while Taylor was out of Liberia and thus could not count on the protection of his home country. In Accra, Ghana for a peace conference at the time of the indictment, Taylor abruptly left the meeting and took a flight back to Liberia. According to newspaper reports, Ghanian officials were unsure of their legal obligations and political duties at the time the indictment was unsealed, and thus allowed Taylor to escape. (Barringer and Sengupta, 5 June 2003) Some of the countries that had been attempting to coax Taylor into resigning felt betrayed by the indictment as it tied their hands in the matter. As Priscilla Hayner described the political response to the unsealing of the indictment:

> At the time, many observers feared that the indictment would damage the peace talks and make it harder to extract Taylor from the presidency. Critics of the action say that the prosecutor was acting rashly, indelicately and with insufficient political knowledge and preparation. The prosecutor should have known that Ghana was unlikely to send Taylor to the Court in the context of major peace talks, they say. (Hayner, 2010)

The African leadership was clearly dismayed by the indictment and considered it a politically reckless stunt by the prosecutor. However, with no police force to arrest indicted individuals, Crane clearly needed some guile in order to take custody of an individual as inaccessible as Taylor. Crane said that he himself was skeptical about

the peace talks and argued that he would have kept the indictment sealed if he really believed that Taylor was participating in the peace talks in good faith.

The indictment against Taylor included 11 separate counts. He was charged with terrorizing Sierra Leone's civilian population, "violence to life, health and physical or mental well-being of persons, in particular, murder," rape, sexual slavery, "outrages upon personal dignity," "cruel treatment," "other inhumane acts," recruiting child soldiers, enslavement, and looting. The indictment describes a collection of forces (the RUF, the AFRC, and "Liberian fighters") that were directed by Taylor to commit said offenses across the country. More specifically, the charges state that these groups were "assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to" Taylor when they committed these acts. As for the "other inhumane acts" described in the indictment, Taylor was charged specifically with orchestrating beatings and mutilations, including the infamous dismemberments throughout the country.

In Sierra Leone, the public reaction to the indictment was mixed. According to *The New York Times*, some in Freetown cheered the indictment while others feared a return of hostilities as a consequence of Taylor's arrest. (Barringer and Sengupta, 5 June 2003) Despite the disappointing outcome of the surprise unsealing of the indictment and the depressing fact that Taylor eluded arrest with the assistance of other African powers, it was clear that the tribunal had scored a public relations coup as Taylor was now considered a wanted man, a status that would effectively destroy his political future.

In early July 2003, the Nigerian President Olusegun Obasanjo offered to provide a safe haven for Taylor provided that he agreed to stay out of Liberian politics. A month later, President Taylor resigned from office, handed power to Moses Blah, his vice president and boarded a jet for Nigeria. For 3 years, he lived in the city of Calabar, Nigeria in comfortable surroundings, despite increasing pressure on the Nigerian government to hand him over to the Special Court. It was quickly discovered that Taylor had stolen millions of dollars from his country before leaving, further padding his lifestyle in Nigeria. The USA was particularly strident in its demand that Nigeria hand Taylor to the SCSL, offering a multi-million dollar reward for his arrest and Interpol put out a "red notice" for the president. Despite his promise to stay out of Liberian affairs, Taylor was widely accused of using his stolen wealth to influence his former countrymen and in late March 2006, the new Liberian president, Ellen Johnson Sirleaf promised to revoke his immunity and send him to Sierra Leone.

There was a wide array of responses to this decision to extradite Taylor. On one hand, it produced elation among some who had always viewed Taylor as the mastermind behind Sierra Leone's miseries. Others feared that, like his indictment, the arrest of Taylor would produce instability. Typically, however, it seems that many Sierra Leoneans were indifferent to the matter. As Olu Gordon told *The New York Times*, "The Taylor case doesn't have a lot of resonance… It is abstract, while the problems they face are concrete: what to feed their children, how to pay for school, and so on." (Polgreen, 30 March 2006) Taylor himself immediately went into hiding upon learning of his imminent extradition, much to the embarrassment of the

Nigerian government, which had little to say about how Taylor escaped. (Nigeria had dragged its feet in executing the extradition request, angering Liberia as well as the US government.) However, he was recognized only a day later, 600 miles from his compound trying to flee the country with large amounts of cash. He was quickly flown back to Liberia, where he was then handed to UN troops and arraigned on 29 March 2006.

It is important to note that this indictment depends on tying Taylor to these crimes, which in itself can prove to be a difficult step, legally speaking. By arguing that Taylor was responsible for these criminal acts, despite the fact that he himself did not directly commit them, the prosecution is required to show that he was responsible for them and that they were not committed by rogue groups. It further required that this actual link be established between the RUF/AFRC and Taylor, which was widely suspected, but difficult to prove. The other major defendants at the SCSL were established military personnel, operating within defined chains of command, making the link between the criminal activity and their own responsibility far easier to see than in Taylor's case, where the connection between the crimes and the man who commanded them was much murkier. The "orders" as it were, to commit these crimes, most likely took place in shadows: at meetings behind closed doors and coded communications between commanders and Taylor. These two legal hurdles, coupled with proving the actual charges themselves (that is, that rape, murder, enslavement, happened), made this prosecution a daunting one.

On the same day that Taylor was handed over to the SCSL, the president of the court filed a request that the defendant be moved to The Hague and have his trial conducted in the facilities of the International Criminal Court (ICC). Some have speculated that President Sirleaf was only willing to approve the extradition of Taylor to the SCSL if it came with an accompanying promise to try Taylor out of Africa. In June 2006, the Security Council authorized the transfer of Taylor and the moving of the SCSL (for his case) through Security Council Resolution 1688. There the Council determined that "the continued presence of former President Taylor in the subregion is an impediment to stability and a threat to the peace of Liberia and of Sierra Leone and to international peace and security in the region." The Dutch government had consented to moving the trial to the building that held the ICC provided that a third country agreed to take him after the trial ended.

There were a number of legal, logistical, moral, and financial concerns that shaped this decision and the transfer raised some objections among trial followers and human rights activists. On one hand, the Special Court had already arrested and conducted trials for powerful and popular figures in Freetown without suffering any undue consequences or causing instability within Sierra Leone. Norman was widely respected throughout the country (certainly more than Taylor was) and he had many powerful friends, but his arrest, prosecution and even his death did no harm to the country's stability. The same could be said for Foday Sankoh, who had supporters among the remnants of the RUF when he was arrested by the Special Court. Moreover, Taylor's support had largely dried up by 2006 and those remaining followers probably could not muster enough power to undermine the Special Court, much less

free Taylor. Transferring Taylor to an entirely different continent based on a speculative fear about the political effects of the trial seemed drastic to some.

Logistically, the transfer of the trial over 4000 miles away was sure to increase costs and strain the already tight budget of the SCSL. The UN Secretary General was obligated to make a special Headquarters Agreement with the Kingdom of the Netherlands and the Security Council Resolution that required all costs of the trial in The Hague be borne by the SCSL (which, as we've already seen, was plagued by funding issues from its very inception). The amount of money it would take to transport lawyers, judges, and witnesses to Europe and house them there was going to be enormous. As has been mentioned, the SCSL was operating on a "shoestring budget" and this new venue was sure to raise questions about the cost effectiveness of international tribunals. By 2006, the SCSL had already lasted longer than its initial supporters had anticipated and the price tag of a European trial for Taylor was surely unsettling for supporters of the Special Court.

The impact that the Special Court could make on Sierra Leonean society was further affected by the decision to move Taylor to Europe. By moving the trial so far away from the site of Taylor's alleged crimes, the SCSL threatened to rob the Sierra Leonean people of the right to see justice done as well as their sense of "ownership" over the Special Court's justice. As Alpha Sesay wrote, transferring Taylor "would deprive war victims of the justice that they deserve…. Victims are able to get a first hand view of how alleged perpetrators are made to answer for their acts. These are all things that Sierra Leoneans stand to lose if Taylor is transferred to The Hague." (Sesay, 19 April 2006) As the president of one human rights organization observed,

> Conducting trials in Sierra Leone has been crucial to facilitate to [sic.] re-establishing the rule of law, to rebuilding the national justice system, and to ensuring that justice is done, and is seen to be done, by the victims and the people of Sierra Leone as a whole. (FIDH, 12 April 2006)

Moving the trial to Europe undermined these goals, goals that were in some ways the heart of Sierra Leone. Moreover, relocating the trial meant that it would be less accessible to the African media, potentially blunting its impact on Sierra Leone and the broader region.

Taylor's attorneys filed a motion to prevent the transfer with the Trial Chamber, who then referred the matter to the Appellate Chamber. However, the Trial Chamber ruled that the decision to transfer the trial abroad was not within the purview of the court. Rather, the Trial Chamber considered the transfer of Taylor to be an "administrative matter" and therefore fell under the purview of the president and was therefore unreviewable by the Trial Chamber. The defense's motion, therefore, was dismissed outright. (12 March 2007) The SCSL was given chambers within the ICC building and both sides began preparing their cases.

Once Taylor's trial was moved, opening arguments began in the ICC building in June 2007. Initially, Taylor himself boycotted the trial, asserting that he was not given adequate time to prepare his case. However, he was eventually provided with counsel and agreed to participate in the proceedings. The prosecution's case began in June 2007. By this time, Crane had stepped down and been replaced by the

British lawyer Desmond de Silva. It was a stormy proceeding, including refusals by the defense to participate in the trial at times, and charges that Taylor was the victim of an international conspiracy led by the United States. Afterwards, the defense counsel presented an unsuccessful motion for a summary acquittal, which was dismissed by the Trial Chamber. Eventually, supported by the defense, Taylor began his case in July 2009, concluding it in November 2010. After a great deal of fighting over Taylor's right to give a closing statement (and another boycott by the defense team), the trial ended in March 2011.

The defense had two central lines of attack against the prosecution. The first was a denial of the factual charges against Taylor. It was impossible for Taylor to commit the crimes in the indictment because Liberia, and by extension, Taylor, was bankrupt during the conflict.

> On taking power the new President was faced with a myriad of problems. After 8 years of war Liberia was devastated. We believe in proof and not theory. Why was the war fought in the first place? To gain power. What would any President be anxious to do? Hang on to power. Surely that is best done by attending to the affairs of the nation rather than gliding off on adventures abroad. (Final Trial Brief, 9 March 2011, para. 463)

Even if he wanted to meddle in the affairs of his neighbors, a devastated postwar economy and a strict arms embargo would have prevented it. In effect, for a weak leader like Taylor, war was fiscally impossible.

Further, they argue that supporting a civil war with one of Liberia's neighbors would have had a destabilizing effect on Liberia itself, and thus supporting it would have been foolish for a leader with a fragile hold on power. As Taylor testified, "I thought that I could be of some help because I realised that unless peace returned to Sierra Leone there was no way that Liberia could make it." (para. 87) Rather than relentlessly seeking to undermine the government of Sierra Leone, the defense argued that Taylor worked as a stabilizing force in the conflict, working against the influence of regional and global powers who supported different sides of the conflict. "Indeed, during this time, rather than being an instigator, Taylor was the one who was victim of the geo-political power play between Nigeria and Britain for influence in Sierra Leone." (para. 857) The final defense brief includes several pages arguing that Taylor continually worked alongside regional powers through ECOWAS to bring an end to the conflict in various ways, and these actions effectively refute the prosecutions claim that Taylor was Sierra Leone's chief mischief maker.

> The Defence submits that the documentary and testimonial evidence before this Court bears out, without question, that Taylor could not be all things at the same time—President of Liberia and peacemaker by day and leader of the RUF/AFRC by night. Accordingly, the Prosecution's theory that Taylor abused his mandate of trust within peace in public while orchestrating criminality and fostering further conflict in private—is exceedingly misguided and devoid of merit. (para. 102)

Beyond these efforts to establish reasonable doubt in the prosecution's case and develop a compelling counternarrative regarding Taylor's role in Sierra Leone, the defense's second line of attack was a blistering critique of the behavior of the prosecutor's office and by extension, of the SCSL more generally. The defense argued that Taylor's prosecution was driven by factors that were inexorably political rather

than legal. Toward this end, the opening of the defense's final brief is a vicious political attack on the court, the prosecutor's office, and even on the trial itself. "Examined from any vantage point imaginable, the case against Taylor has at its core political roots and motives, and the inexorable determination of the United States to have Taylor removed and kept out of Liberia at any cost." (para. 1) The prosecution of Taylor was "corrupted from start to finish by the unethical conduct and irresponsible comments of prosecutor Crane…coupled with the legally impermissible and underhanded methods and mean which has characterized the *modus operandi* of the OTP ever since." (para. 8) The defense charged that witnesses were bribed or threatened to provide testimony against Taylor and that Gaddafi and Campore were ignored on account of their role in the *realpolitik* of the US government.

Among the highlights of the trial, from the perspective of popular interest was the appearance of two celebrities before the Chamber. British supermodel Naomi Campbell and the American actress Mia Farrow both testified before the Trial Chamber in August, 2010. Campbell had appeared in court only after being subpoenaed by the tribunal, testifying that she had been given a small gift of uncut diamonds ("dirty pebbles" as she described them) from "some men" who appeared at her hotel room in the middle of the night. She denied knowing that the men had been working for Taylor. Farrow contradicted her testimony, reporting that she and Campbell had met the next morning at breakfast where Campbell stated that she was well aware of the source of the gift as Campbell had been flirting with Taylor the previous evening. Whether or not this testimony moved the judges of the Trial Chamber significantly, the appearance of these celebrities gave the Special Court a measure of public attention that it had not previously experienced.

The verdict was handed down on April 26, 2012. Taylor was found guilty of all 11 charges. The opinion is a monumental 2500 pages long and goes into tremendous detail about Taylor's connections with the RUF, the AFRC, and the broader war in Sierra Leone. After the conviction, there was a month-long wait before the Chamber issued its sentencing ruling. The Chamber acknowledged that this case was in many ways unique insofar as there had never been a head of state convicted of crimes before an international tribunal of any kind. But, the court argued that "Taylor's special status, and his responsibility at the highest level, is an aggravating factor of great weight." (Sentencing Judgment, 30 May 2012, para. 97) In addition, they determined that Taylor's efforts to get the AFRC/RUF to take control of Sierra Leone's diamond mines, thus committing crimes for financial gain, was similarly an aggravating factor. While there was some precedent for considering Taylor's vicarious liability a mitigating factor in sentencing (after all, he never killed anybody with his own hands), in a forward-thinking proclamation, the court argued:

> Leadership must be carried out by example, by the prosecution of crimes not the commission of crimes. As we enter a new era of accountability, there are no true comparators to which the Trial Chamber can look for precedent in determining an appropriate sentence in this case. However, the Trial Chamber wishes to underscore the gravity it attaches to Mr. Taylor's betrayal of public trust. In the Trial Chamber's view, this betrayal outweighs the distinctions that might otherwise pertain… (para. 102)

In response to all of the crimes committed, and his unique role as head of state, the Trial Chamber sentenced Taylor to 50 years in prison.

Cases Before the Dili/Jakarta Courts

As was mentioned in the previous chapter, two separate competing tribunals were created in response to the violence in East Timor: one by the Indonesian government in Jakarta ("The Human Rights Ad-Hoc Tribunal for East Timor") and the other, a mixed court set up by the United Nations Transitional Government in East Timor ("The Special Panel Court in Dili" or SPCD). While only the latter body can claim to be a truly hybrid tribunal as the former was a domestic Indonesian affair (and arguably only a pseudo-trial primarily intended to whitewash the atrocities committed in East Timor), we will briefly discuss the prosecutions carried out by the latter if only to place the Dili prosecutions in their broader context. A number of individuals were indicted by both tribunals, although given that most of these people were on Indonesian soil, the Jakarta court claimed precedence. In total, the SPCD indicted nearly 400 people, conducted 55 trials with 87 separate defendants, while the Jakarta court prosecuted far fewer.

The Jakarta Courts

There were a total of 10 separate indictments at the Jakarta court, one of which had five individual defendants. The jurisdiction of the court was restricted temporally to events that took place in April and September 1999, leaving events before, after, and between these periods off of the court's docket. Equally significant, the court's geographic jurisdiction was limited to Dili, Suai, and Liquiçá which allowed for some of the most serious crimes to be prosecuted, but left many others unexplored. These restrictions meant that the prosecution focused on the Liquiçá Church Massacre, the "Manuel Carrascalão House Massacre" (both in April 1999), the attack on the residence of Bishop Carlos Belo in Dili on September 6, 1999, and the "Suai Church Massacre" (also in September 1999).

While the indictees were announced shortly after the tribunal was created, there was an extensive delay before the court was actually up and operating, much less ready to take on these cases. The reasons for the delay were varied, (Linton, 2002, pp. 310–311) but the judges finally took their seats in January 2001 to hear the indictments. The first three cases handled by the court produced disappointing outcomes: Only one person was convicted of any crimes, Abilio Jose Osorio Soares (the last Indonesian governor of East Timor), and his punishment was extremely light (3 years) given the gravity of the violence there. The other defendants, Timbul Silaen (the police chief of East Timor) and the five individuals charged with the Suai Church Massacre were all acquitted. In the end many of those convicted were

either given extremely light sentences or had their punishment reversed on appeal. Only six people were convicted of crimes by the court and five of these had their convictions overturned on appeal.

Among the most well-known individuals prosecuted by the Jakarta Court was the militia commander, Eurico Guterres from the Aitarak (also known in English as "Thorn"). Aitarak was one of the militias responsible for some of the worst atrocities in East Timor, and Guterres himself was considered to be one of the masterminds of the Liquiçá Church Massacre. After the conflict ended, Guterres fled to Indonesia, where he remained politically active, continuing to organize for the anti-Timorese/Pro-Indonesia movement. (Guterres has the dubious distinction of being indicted by three separate courts and convicted by two.) Guterres was convicted of inciting violence within Indonesia and sentenced to 6 months in prison by a conventional Indonesian criminal court for minor offenses—a sentence which he was allowed to serve under house arrest. (Tanter et al., 2006) He was indicted by the Dili Special Court but the Indonesian government refused to extradite him, preferring to put him on trial in Jakarta "after considerable prevarication." Guterres was also prosecuted by the Jakarta court where he was sentenced to 15 years imprisonment (with consideration of the fact that "The Defendant's attitude to fight for the Integration of East Timor with Indonesia should be honored for his loyalty to Indonesia" [Indonesian Ad Hoc Tribunal, 25 Nov 2002].)

The other significant case undertaken by the Jakarta Court was for the perpetrators of the "Suai Church Massacre" which took place on September 6, 1999, only a few days after the referendum. The Church known as the Ave Maria Church had served as a home for refugees from nearby villages who had fled their homes after several villagers were killed by Indonesian forces. After the results of the referendum were announced, the militia forces began threatening the refugees for several days until the final attack on September 9th. As Geoffrey Robinson describes the attacks:

> The first to enter the church were scores of Laksaur and Mahidi militiamen, armed with machetes, swords, knives, and home-made firearms. Immediately behind them were a mixed group of TNI soldiers and militiamen. According to witnesses, the militias headed first toward the priests' and nuns' quarters, adjacent to the old church. As they proceeded they hacked, stabbed, and shot many people in their path. Outside the compound, witnesses said, TNI and Mobile Brigade units maintained a perimeter from which they shot at those fleeing the mayhem (2009).

In total about 40 people were killed (though estimates range as high as 200), among which were about a dozen women, ten children and three Catholic priests. It is worth pointing out that several figures who were mentioned in Robertson's report were not indicted by the Jakarta prosecutors, despite "their direct role in mobilizing and coordinating militias activities in the District."[14]

Five individuals, all involved in the military occupation of the Suai district, were charged, but as in other cases handled by the Jakarta court, the prosecution

[14] These include 226 District Commander Ahmad Mas Agus, and TNI intelligence officer, Sgt. Yus Nampun.

of the Suai massacre was woefully inadequate.[15] As Linton points out, the indictment "painted a picture of the East Timorese fighting each other" and refused to link it to a broader systematic attack against the East Timorese. (Linton, 2002, p. 318) During the trial itself, the Tentara Nasional Indonesia (TNI, Indonesian Army) made a forceful presence in the courtroom, regularly sending uniformed officers there to make known their support for the accused so that "the judges usually had to look out onto a sea of TNI, police, and militia in the public gallery." (Linton, 2002, p. 325) In addition, the protests of anti-Timorese independence activists outside of the courtroom were reportedly so loud that it was difficult to hear the proceedings at times. (de Bertodano, 2004, p. 95) Clearly, these theatrics placed intimidated the inexperienced judges in the room and pushed them into bending to the will of the TNI and the majority of the Indonesian people.

Lipton, who regularly attended hearings at the Jakarta court, describes the proceedings as often chaotic, politically volatile, and for the most part, poorly run by the judges in the court. Her description of the hearings bears quoting at some length:

> From the start, the presiding judges failed to assert the authority of the court. There were days when they allowed the proceedings to be railroaded by witnesses playing to the audience, and days when it seemed as if the United Nations and its Special Representative in East Timor (Ian Martin) were on trial. Hearings involving high-profile witnesses such as Wiranto and Adam Damiri were volatile, marked with noisy outbursts from the audience. On such occasions the public gallery would be dangerously packed and the atmosphere particularly charged. The TNI in full camouflage clothing attended sporadically, but the vast majority of military personnel would attend in formal uniform. (Linton, 2002, p. 325)

Whether or not the judges intended for the trials to become political theatre, it is clear that that is what they devolved into for the most part: They served as an opportunity for the TNI to flex its political muscles and promote its interpretation of the violence surrounding the referendum.

The Jakarta Courts failed because of an unwillingness to follow up on the recommendations of KPP-HAM and human rights advocates within Indonesia and because of the deliberate bullying of the Indonesian military. From the indictments, to the prosecution, to the appeals process, the court continually refused to set its sights high and prosecute the masterminds of the violence, and those it prosecuted were only done so half-heartedly. On the other hand, the court deliberately framed the conflict in a way that shielded the Indonesian forces from responsibility for the violence. Finally, the Jakarta Court dispensed unusually light punishments for extremely serious offenses, often suspending the punishment on the flimsiest of grounds. As Reiger and Wierda describe these failures: "The prosecution did not pursue a coherent strategy and failed to present relevant and available evidence, and the judges were consistently intimidated by a large presence of TNI in the courtroom. Judgments misapplied legal principles and standards." (Reiger and Wierda, 2006, p. 10) For these reasons, many international critics have charged that, whatever the

[15] The included lieutenant colonels Gatot Subiyaktoro, Herman Sudyono, and Liliek Koehadianto, captain Achmad Syamsudin, lieutenant Sugito. All of which were involved in the military command over Suai district.

initial intentions behind the court, it ultimately served as an unconvincing attempt to whitewash the crimes committed by Indonesian forces and their sympathizers.

Dili

In total 391 people were indicted, 55 trials were held for 87 individuals, only two of which were acquitted by the Special Panel for Serious Crimes. (Cohen, 2002, p. 2) These high numbers (particularly when compared with the court in Jakarta) only tell a small part of the story, however. Unlike the Jakarta court, the Serious Crime Unit (SCU) was aggressive in its pursuit of human rights violators and was not afraid to take on the Indonesian military—on paper at least. Among the indictees were General Wiranto (the Indonesian defense minister and commander of the Armed Forces), Major General Zacky Anwar Makarim (a high military official based in East Timor prior to the referendum), and Abilio Soares—all significant players in the TNI. These three were charged (along with five others) with crimes against humanity in the form of murder, "carried out by the cooperative action of TNI soldiers and the militia group whom they controlled. That attack was part of a policy to maintain East Timor under the authority of the government of Indonesia." (Deputy General Prosecutor for Serious Crimes against Wiranto et al., 24 Feb 2003) Although the case was never prosecuted as all of the defendants were safely beyond the court's grasp, cases like this show the ambition of the Dili court when compared to its counterpart in Jakarta.[16]

On the other hand, the cases that actually went to trial were often middling figures that had no significant role in planning or orchestrating the violence. By the time the international peacekeepers arrived to restore order in East Timor, most of those in command of the Indonesian and pro-Indonesian forces prudently chose to leave the island nation either for West Timor or for Indonesia proper. As a result, almost all of those individuals actually prosecuted by the SCU were Timorese and most of them were low level foot-soldiers within the anti-independence movement. Even those who were prosecuted under the theory of command responsibility, that is, individuals who were described as being "leaders" in the militia movement were in fact middling actors, often working at the behest of the TNI. As Linton critically described this prosecution strategy:

> I would question the appropriateness of using command responsibility in a situation where all those concerned were involved in a joint criminal enterprise that was in itself part of a larger enterprise. Specifically in the case of East Timor, one is dealing with implementation of multiple layers of policy decisions about the subjugation of the occupied territories to Indonesian control. … In this context, command responsibility for atrocities in the course

[16] As Cohen points out, "The issuance of an arrest warrant against General Wiranto in May 2004 by Special Panels Judge Phillip Rapoza resulted in a complete breakdown of cooperation between the Serious Crimes Unit and the Prosecutor General of East Timor. The Timorese government refused to request INTERPOL to issue an international arrest warrant against Wiranto, effectively ending the effort to use this mechanism to exert pressure on Indonesia." (Cohen, 2006)

> of implementing the policy of subjugation is very problematic… Allegations that one of a group of militia taking part in murder, rape, torture, forced displacement etc. had command authority over the others… just does not make sense. (Linton, 2008, p. 241)

In short, there were no "commanders" actually prosecuted at the SCSU and at best those who faced the court were members of a JCE. If there were "commanders" involved in the violence in East Timor, they were safely squirreled away in Indonesia beyond the reach of the SCU.

Here, we will discuss a few of the court's more significant cases, although "significance" is a relative term. Given the fact that few "big fish" were prosecuted in Dili and the general consensus is that the poor legal quality of many of the opinions prevented many of them from having a lasting legal impact, it is hard to describe any of the cases before the court as "significant" in any meaningful sense. Nonetheless, we will focus here on three influential cases from the SPSC: the trials of Julio Fernandez and Joao Fernandez (the first cases before the court) *The Los Palos Case*, the trial of Armando dos Santos, and the indictment of General Wiranto.

Julio Fernandez and Joao Fernandez

The first cases prosecuted at the SCU involved the killing of a village chief named Domingo Gonsalves Pereira by a militiaman named Joao Fernandez, as part of what was known as the Maliana POLRES Massacre. According to the International Commission of Inquiry:

> On 8 September 1999, over 100 militia entered the police station in Maliana, where about 6000 people had sought shelter against the attacks of the military and militia. The police station was entirely surrounded with concentric rings: militia, the Mobile Police Unit and TNI. The people inside the police station were first attacked with machetes. When they fell down, they were hacked into pieces. This was done in front of the people, who were forced to watch. ... Forty-seven dead bodies were found later in the river. A witness testified that he had transported four bodies to the river in a vehicle. (Cited in Linton, 2001b, p. 7)

According to the indictment, Fernandez, who was a member of the Dadarus Merah militia ("on order from TNI and Militia Commanders"), found Pereira where the chief was hiding in Maliana and stabbed him to death with a Samurai sword in front of his family.

The defendant pled guilty to murder and was sentenced to 12 years in prison by the court. As aggravating factors, the court considered the fact that the defendant had planned to kill the victim's son and that the killing happened in front of the victim's children. In mitigation, the court considered the defendant's youth, his cooperative attitude, and the fact that he "was following orders of the TNI and Militia Commander (Natalino Monteiro and Marcos Tato Mali)." (Sentencing Judgment, 25 Jan 2001, para. 21) The Timorese judge dissented, however, arguing that "the facts in this case indicate that the defendant should have been charged with crimes against humanity." The public was also outraged with the lenience of the

sentence. The victim's daughter declared, "We reject this verdict…So many men were slaughtered, and this is it?" (Linton, 2001b, p. 7)

Ironically enough, Julio Fernandez, the second case presented before the SPSC, involved a pro-independence member of Falintil rather than a TNI-sponsored militia member. Fernandez, a commander in the Falintil forces, was charged with the murder of a captured militia member named Americo de Jesus Martens. Fernandez admitted to killing the man and there was widespread agreement on the facts surrounding the murder: De Jesus Martens, a member of the Darah Merah militia, had been left behind during the late September withdrawal of his compatriots to West Timor. Shortly after the withdrawal, de Jesus Martens was captured and tortured by Timorese civilians in the village of Gleno. When Fernandez came out of hiding, he was taken to see de Jesus Martens who had had both his ears cut off and a machete hacked into his arm. After briefly questioning the victim, and surrounded by villagers demanding that he be executed, Fernandez stabbed de Jesus Martens twice, killing him.

The trial was a brief one, stretching 3 weeks from commencement to judgment. The SPSC rejected the claim that he had killed de Jesus Martens under duress concluding "that the crowd did not threaten Julio Fernandez, but called him in order to take revenge on the militia man and to punish him in an 'official' way." (Judgment, 3 Jan 2000) However, it is particularly interesting to note that the judges ignored the significant decision of *Prosecutor v. Erdemovic*, which dealt heavily on the issue of duress in international criminal law. (Linton, 2001b) In a dissenting opinion, Judge Maria Natercia Gusmao Pereira (the Timorese judge) concluded that the defendant had in fact been guilty of a lesser crime and disputed the sentence handed out by the court. As aggravating factors, the court mentioned the defendant's commanding position in Falintil and the fact that, "when killed, Americo, had his hands tied behind his back, was sitting on a chair, defenseless, bleeding and suffering from serious maltreatment and injuries. He should have inspired pity not violence." In mitigation, the court pointed out that, "the atmosphere was very tense and, even if the accused had not been threatened and was not under duress, he was certainly under pressure." (Judgment, 3 Jan 2000) The court sentenced Fernandez to 7 years in prison.

The Los Palos Case

While the cases of Julio and Joao Fernandez were the first cases handled by the SPSC, the first major case handled by the SPSC was the "*Los Palos Case,*" officially known as *Public Prosecutor v Joni Marques and nine others*. The facts of the case revolve around events in the city of Los Palos. Located near the Eastern tip of the island, Los Palos was well known for its sympathies to the independence movement, meaning that it was subject to a heavy military presence during the years of Indonesian occupation. While under Indonesian control, the area was a training base for Indonesian Special Forces (known as Kopassus) which recruited and trained sympathetic Timorese. These Timorese troops operated under the title

"Team Alpha" (or "Team Alfa") during the 1980s, ultimately being deploying in combat against Falintil. During the run up to the referendum, Team Alpha intimidated the Timorese population and after the announcement of the referendum results, they participated in the violence against civilians, including several notable killings. Upon hearing news that Australian peacekeepers were being deployed to the island, Team Alpha fled to West Timor, but some of the retreating militia forces were ambushed by Falintil and were either killed or captured. (JSMP, March 2002, p. 7) The prisoners were handed over to the Prosecutor's Office to face charges before the SPSC.

The indictment charges 11 defendants with Crimes Against Humanity for actions around the referendum, including crimes of murder, extermination, enslavement, the forcible transfer of populations, and "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender.. or other grounds." (One individual was dropped from the case as he was missing and presumed to be in Indonesia.) More specifically, they were charged with massacring nine civilians in September 1999 near Los Palos, including nuns, priests, a journalist, an aid worker and a 14-year-old bystander. In addition, they were charged with forcibly transferring the population of the village of Leuro into their base at Los Palos.

One figure indicted in the *Los Palos* case, was Lt. Sayful Anwar, a member of Kopassus who had safely returned to Indonesia in 1999. Unsurprisingly, the Indonesian military refused to cooperate with the court and would not hand over Anwar, a move that received political support from the Indonesian government. (As an Indonesian human rights activist observed, "There's been this increasing ultranationalist flavor in our parliament, which has created sympathy for officers and for those who actually committed the crimes." [Murphy, 2000]) Among the charges against Anwar were the torture, mutilation, and murder of one Timorese man. Though Anwar was charged with a different crime than those of Team Alpha, linking the two together was believed to be a part of Othman's strategy of tying Indonesian Special Forces to the crimes committed by various militia members.

One feature of the *Los Palos* case that made it unique in the SPSC proceedings was that it was the first case where the defendants were charged with *international* crimes—crimes against humanity. Prior to this indictment, the prosecutor had chosen to frame his cases as simple murder and therefore avoided the need to prove the "context" element of a crime against humanity, that is, that the offenses occurred as a part of a "widespread and systematic attack against a civilian population." This meant that in order to get a conviction for a crime against humanity, the prosecutors needed to not only show that the defendants committed specific crimes, but in addition, show that the offenses occurred in the context of such an attack. Clearly, prior to this point, the prosecutors in the SCU did not believe that such elements could be proven legally, regardless of the fact that it was commonly known that the pre- and postreferendum violence was coordinated by Indonesian officials. In order to prove the contextual element of crimes against humanity, therefore, the prosecution needed to show that the killings were the planned policies of a broad organization,

a finding which would clearly implicate Kopassus as well as perhaps the broader Indonesian military.

The trial began in June 2001 and the final opinion was issued in early December 2001. Over 30 witnesses were heard during the 4 months of trial and the final opinion was copious, 249 pages in total. In order to prove the contextual element of the charges, the prosecutor relied on three major sources of evidence. First, they used the international reports of the violence that reported the systematic nature of the violence. Specifically, the International Commission of Inquiry argued that,

> [T]here were patterns of gross violation of human rights and breaches of humanitarian law which varied over time and took the form of systematic and widespread intimidation, humiliation and terror, destruction of property, violence against women and displacement of people. Patterns were also found relating to the destruction of evidence and the involvement of the Indonesian Army (TNI) and the militias in the violations. (*Public Prosecutor v. Joni Marques and 9 others,* Judgement, p. 210)

The second type of evidence intended to prove the systematic nature of the violence from the statements of the defendants themselves, some of whom pointed to a broader network of individuals implicated in the violence or referred to the involvement of the military. For example, Joni Marques testified that the violence "was not a Team Alpha plan but that of the political elite." (JSMP, March 2002, p. 11) While there were no specific witnesses testifying about the organizational links between Team Alpha and Kopassus, as the JSMP observed, "It was, however, obvious from both witness testimonies and the statements of the accused that Team Alpha had their base together with the Indonesian Special Forces, Kopassus, and that they performed operations together, including patrols to find and kill Falintil soldiers." (JSMP, March 2002, p. 11) Finally, the court relied on the statements of eyewitnesses who observed features of the violence that were indicative of the violence as well as physical evidence presented at trial. In examining all of the evidence presented, the panel of judges had little trouble concluding that:

> All of the accused had awareness about the accomplishment of a widespread and systematic attack against the civilian population in East Timor at the time. Although some of them used their lower level of education as an excuse for joining the militia activities or for fulfilling the orders of their superiors, all of them allowed—and called upon as a mitigating circumstance in the sentencing—the existence of an armed conflict in which all of them were involved. (*Public Prosecutor v. Joni Marques and 9 others,* Judgement, p. 210)

By some reports, the case the defendants presented at the trial was somewhat lackluster. The lead defendant in the case, Joni Marques, opened his case by accepting responsibility for some of his actions (as did another defendant) and acknowledged his links to Kopassus, but this statement was rejected as it did not match the charges in the indictment. Nonetheless, none of the defendants offered up their own evidence in rebuttal of the prosecution, instead insisting on the weaknesses of the prosecution's case and the fact that a number of prosecution witnesses did not identify the defendants at the crime scene. Others argued that they were either ordered to commit the crimes or were never involved with Team Alpha.

In its judgment, the court found the defendants guilty of several counts of murder along with torture, persecution, and the forcible transfer of civilians. Because

the court concluded that the violence took place as part of "an extensive attack by the pro-autonomy armed groups supported by Indonesian authorities targeting the civilian population in the area," the offenses were considered to be crimes against humanity. As the "the decision-maker of all the actions in fulfillment of a plan drafted by Indonesian officers and performed by paramilitary groups against the independence supporters in East Timor," (Public Prosecutor v. Joni Marques and 9 others, Judgment, para. 1015) Marques received the toughest sentence among the defendants: 33 years and 4 months imprisonment. Sentences for the other defendants varied from 4 to 33 years.

The final section in the opinion was extremely long by the standards of the SPSC, and it uncharacteristically goes into great detail about the factual allegations in the indictment. Nonetheless, as in many other cases before the court, legal experts have found it to be disappointing. As André Klip describes the opinion in his commentary on the case, "As a document that preserves the history of the atrocities that occurred in September 1999, [the judgment] has tremendous value. However, it offers little by way of legal analysis and the deliberations on matters of law are rather short." (Klip, 2008, p. 505) Klip goes on to describe aspects of the opinion as "poorly reasoned," "confused," and "ambiguous." Further, its use of precedent was considered substandard and lacking

> any real application of the then existing case law to the circumstances of the charge as well as a clear indication as to what conclusion the court should draw …. As a consequence, there are many issues about which the reader can only speculate as to the reasoning of the SPSC. (Klip, 2008, p. 506)

Whether or not the case provided any form of substantive justice for the victims of Team Alfa's terror, as a legal document, its impact has proven limited.

Armando dos Santos

Another controversial case handled by the SPSC was *Armando dos Santos*. Dos Santos was accused of being a militia commander who participated in several attacks on civilians during the referendum violence, including the Liquiçá Church Massacre and the Manuel Carrascalão House Massacre. At the end of the initial trial, dos Santos had been convicted of simple murder (and not murder as a crime against humanity) and sentenced to 17 years imprisonment. Both the prosecution and the defense objected to the Trial Chamber's judgment and appealed, however, the ensuing appellate decision only clouded the issues further and led some observers to question the ability of the tribunal to handle complicated cases and to properly apply the law.[17]

UNTAET Regulation 1999/1 requires that "laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict" with UN-

[17] Many of these are spelled out in a report by The East-West Center Special Report (2006, pp. 83–84).

TAET regulations. In addressing the legal issues of the case, the appeals court asserted that the preexisting law, the law that was in effect before UNTAET and which applied at the time of the referendum violence, was Portuguese law, not Indonesian law. The court ruled that, since the occupation of East Timor was illegal, Indonesian law never had legitimate jurisdiction over the island. As the court put it:

> The "laws applied in East Timor prior to 25 October 1999" could only be those which, in accordance with the principles of international law, were legitimately in force in that territory. And, in accordance with the principles of international law, Portugal continued to be recognised by the international community, by the United Nations Security Council and by the Timorese People as the administering Power of East Timor during [the] period between December 1975 and 25 October 1999. … Having said this, "the laws applied in East Timor prior to 25 October 1999" could only be the Portuguese law. (Appeals Panel Ruling, p. 5)

As a result, the court ruled that dos Santos was in fact guilty under Portuguese law of "three crimes of murder and for a crime against humanity in the form of genocide."

As the East-West Center report described it, in this decision, the Appeals Chamber "staked out a path that led even deeper into confusion, mistaken jurisprudence and, ultimately, a violation of the rights of the accused." (East-West Center, 2006, p. 84) There was significant political blowback to the decision for a number of reasons. Previously, the UNTAET chief, Sergio Vieira de Mello had recognized Indonesian law as the subsidiary law for East Timor, in direct contrast to this judgment. (DeShaw, 2010, p. 190) Further, the ruling had contradicted previous judgments from the SPSC which had assumed that Indonesian law was the subsidiary law and therefore it threatened the legitimacy of a great number of previous rulings. The two lower courts openly rejected the Armando dos Santos decision and refused to follow it. For example in *The Public Prosecutor v. Joao Sarmento and Domingos Mendonca*, the Special Panel offered a stinging rebuke of the Appeals Chamber's ruling, accusing the appeals court of "violating the Constitution, the applicable law in East Timor, international human rights standards and the rights of the accused." (Decision on the defense motion, 24 July 2003) Moreover, they argue that the Portuguese occupation was no more legal than the Indonesian one that followed it, and therefore Portuguese law had no more legitimacy than Indonesian. While in 2003, the East Timorese Parliament decided that Indonesian law was the subsidiary law of the country prior to independence, but the *dos Santos* conviction was never revisited. This left some to suspect that, "the Timorese government wanted to demonstrate its commitment to its Portuguese language policy and [that] there was a growing desire to discontinue the trials." (DeShaw, 2010, p. 191)

The Indictment of General Wiranto

Clearly the most controversial case pursued by the SCU was the 2003 indictment of General Wiranto for crimes against humanity. While Wiranto had retired from his position in the TNI and was pursuing a civilian political career, the decision to

indict the general had deep repercussions for the Serious Crimes regime. Many believe that the decision to indict the former head of the Indonesian military led to the disowning of the SCU by the UN authorities on the island and by the Timorese government and may have been instrumental in hastening the ultimate dissolution of the Serious Crimes regime. Whether or not the tribunal was designed to pursue individuals highly placed in the Indonesian government (many believe that it was not) and whether or not the SCU leadership seriously believed that Wiranto would be handed over to the SPSC (they probably did not), it nonetheless was a bold gamble on the part of the prosecutors, one that in many ways turned into a miscalculation.

The indictment and arrest warrant set out very explicit charges against the general, and was issued along with indictments for several other high ranking individuals in the Indonesian military in February 2003.[18] Using the theory of command responsibility, the SCU charged the General with murder, the forcible transfer of population, and persecution in 1999 as part of a

> widespread or systematic attack against the civilian population of East Timor by the armed forces of Indonesia in collaboration with various pro-autonomy militia groups[…] Initially, the purpose of the attack was to intimidate and coerce the civilian population to support autonomy within the Republic of Indonesia during the Popular Consultation. After […] the voters […] chose independence for East Timor, the attacks continued for the purpose of disrupting the implementation of the results. (p. 7)

The warrant closely connects Wiranto not only with the military violence but also with the East Timor Police Forces and the pro-Indonesian militia units there, arguing that he "had command authority over all Indonesian uniformed personnel […and] had command authority with respective to the militia over which he had effective control in fact." (p. 3) And,

> although he knew or had reason to know of the ongoing criminal violence in East Timor and the involvement of the military forces, the police and the pro-autonomy militia in such criminal activities [he] failed to take necessary and reasonable measures either (a) to prevent the commission of crimes by those over whom he had command authority or (b) to punish the perpetrators of those crimes. (p. 19)

Therefore, it stated that it was "in the interest of justice that the defendant **Wiranto** be brought before this court." (p. 19)

The SCU indicted the General with crimes against humanity, along with seven others who had been untouched by the Jakarta Court. There were a number of political advantages to prosecuting the General: It presented him as an "indicted international criminal," a label that could negatively impact his nascent career as an Indonesian politician. Further, it forced both the Indonesian and Timorese governments' hands, compelling them to either obey or openly deny the authority of the SCU and by extension the SPSC. As prosecutor Stuart Alford declared upon issuing the indictment for the General,

> I accept that we can't at the moment effect those arrest warrants. But that doesn't mean we are the only people who can play their part in this. It's now up to other people outside the

[18] For a complete list, see East Timor Action Network (2003).

> prosecutor's office in East Timor to decide what direction this investigation and prosecution will take.[19](UN Indicts General, 25 Feb 2003)

The desire to bring the General to trial played only a small part in the calculations behind the indictment, and there were good reasons for the prosecutor to pursue Wiranto without expecting to bring him to trial.

The responses to this decision to pursue the General were intense and, in the views of supporters of the Dili Court, disheartening. Both the United Nations and the Timorese government distanced themselves from both the indictment and the arrest warrant. President Gusmão expressed regret over the indictment, stating that it was not in the interests of East Timor and their relations with Indonesia. (Rapoza, 2006, p. 533) He then traveled to Indonesia and was photographed giving Wiranto, now a civilian political candidate, a warm embrace. The reaction from the General Prosecutor's Office was similar to that of the president's. "During this whole episode, the attitude of the General Prosecutor of East Timor shifted dramatically, from fully supportive to clearly obstructive, in response to pressure by political authorities in the country." (Côté, 2012, p. 400) In May 2004, the general prosecutor unsuccessfully filed a motion with the SPSC to retrieve the indictment to "review" it (and presumably quash it). The general prosecutor refused to forward the arrest warrant to Interpol and he did the same for all subsequent international defendants, "thus abandoning the very process that could assist in the apprehension of those charged with serious criminal offences in East Timor." (Rapoza, 2006, p. 534)

UN authorities similarly distanced themselves from the Serious Crimes regime in the wake of the Wiranto indictment and the ensuing arrest warrant. In a move that Linton describes as "disowning" the SCU, UN officials insisted that the SCU and the judges were not operating as UN officials. (Linton, 2008, p. 260) In a statement, the UN Secretary General's spokesman explicitly claimed that there was no institutional link between the indictments and the UN and asked that the press make this difference clear:

> Many of you have seen a number of different reports by major news agencies today concerning a United Nations indictment of a leading Indonesian general in connection with crimes in East Timor. I have to remind you that those indictments were issued by the Office of the Prosecutor General of Timor-Leste, and not by the United Nations… So, we hope in the future you'll say, "East Timor indicts," and not "the United Nations indicts." (Cited in Linton, 2008, p. 260)

As the judge who issued Wiranto's arrest warrant put it, "I was criticized by Timorese authorities as a U.N. judge [for issuing the warrant], while the U.N. representatives repeated the refrain that I worked as a judge within the Timorese court system." (Rapoza, 2006, p. 234) The attitude of the Secretary General's office was especially disheartening given that in a report to the Security Council only 10 months earlier, the Secretary General's office had clearly described a plan to "focus its investigations on ten priority cases and on those persons who had organized, ordered, instigated or otherwise aided in the planning, preparation and execution

[19] It should be noted that the indictment was issued in February 2003, but the warrant wasn't issued until May, 2004.

of the crimes."[20] (UN Secretary-General, 17 April 2002) By 2003, the politics of Timorese-Indonesian relations had shifted to one of accommodation and realpolitik. The United Nations had begun to lose interest in prosecuting those responsible for the referendum violence and the Serious Crimes regime began to wind down.

Major Cases Before the Bosnia and UNMIK Courts

As with some of the other tribunals we have already looked at in this chapter, the term "major trials" is something of a misnomer for the two hybrid tribunals for the former Yugoslavia. These courts operated in the shadow of the ICTY, which handled all of the most significant accused criminals from the Balkan wars. This means that almost all politically notable trials related to the violence in the Balkans took place in The Hague and not in Bosnia or Kosovo. As we saw in the previous chapters, the Bosnian War Crimes Chamber (BWCC) and the United Nations Mission In Kosovo (UNMIK) courts were created as support institutions for the ICTY, as well as a part of the transition to political normalcy in these countries—meaning that these trials gained less international attention than the sometimes bombastic proceedings before the ICTY. Nonetheless, the cases that we will look at here are important for understanding the functioning of the two tribunal systems and show a more "retail" form of international justice in action.

The cases that we will look at in the Bosnia tribunal will each focus on a particular set of atrocities that took place during the horrid Balkan wars, atrocities that are usually described by reference to the town or location where they occurred. Unsurprisingly, many cases before the Bosnia court involved participants of the siege of Srebrenica or similar large-scale offenses against the non-Serb Bosnian population and many of these trials mirror higher-profile cases conducted at the ICTY. Here we will look at a series of cases around crimes committed in the town of Foča as well as some that occurred in the more infamous case of Srebrenica. In Kosovo, we will look at the cases surrounding the Racak Massacre as well as the bombing of the Nis Express. As with Chap. 1, I will not assume that the reader is familiar with the events that took place in Kosovo and Bosnia during their respective wars and will seek to provide a broader historical frame before going into the trials themselves.

The Foča Rape Camp Trials

A connected series of cases that went before the Bosnian court and the ICTY nicely show both the relative roles of the two courts, as well as some of the complexities surrounding their interactions. All of these cases revolve around the violence, and in particular sexual violence, that took place in the Foča area of Bosnia-Herzegovina

[19] See also, Frease (2003-2004, pp. 291–292).

in the spring of 2002. Foča, a largely non-Serb area of Bosnia located southeast of Sarajevo, was attacked and quickly overrun by forces of the Republika Srbska in April 2002. After coming under the power of the Serbs, Foča became a textbook case of ethnic cleansing and all of the forms of brutal violence that this concept entails, as the Serbs sought to expel, suppress, and otherwise annihilate the non-Serbs living in the area. In particular, Foča became synonymous with sexual exploitation and the use of rape as a tool of ethnic warfare.[21] It is no surprise then that, along with Srebrenica, the perpetrators of the violence in Foča became an important target for the prosecutors at the ICTY and later at the BWCC.

As Human Rights Watch described Serb rule over Foča, shortly after assuming control over the area, the Serbs developed a systematic plan to rid the area of non-Serb civilians. They

> established a wartime government called the "Crisis Committee," […] to plan and carry out the expulsion of the non-Serb population. Using a thorough propaganda campaign to convince the local Bosnian Serb population that they were under threat of a Muslim fundamentalist coup, the Crisis Committee established a network of detention centers, where non-Serb civilians were detained, tortured, raped, and either expelled, killed, or "disappeared." (Human Rights Watch, 1998)

This plan led the Serb forces, alongside Republika Srpska police units, to round up the Muslim population of the town and conduct a long series of raids into the hamlets and forests surrounding the town. During these raids, many innocent, unarmed civilians were killed and wounded by the Serbs and when taken into custody, many were eventually tortured and killed by their captors. Once detained by the Serbs, the Muslim men were taken to the prison site known as "K.P. Dom," while the female prisoners were sent to several different facilities around the city. In total, some 1400 people were killed in the Foča campaign. (Horvitz, 2011, p. 24)

It is undoubtedly true that the torture, murder, and imprisonment of Muslims and Croats in Foča, many of whom were not suspected of any wrongdoing, were crimes in themselves. However, Foča is not known primarily for these offenses. In truth, these crimes were sadly commonplace during the Bosnian war and the killings in Foča are dwarfed by some of the violence in places like Sarajevo and Srebrenica. Rather, what distinguished Foča from both a legal and moral perspective was the Serb use of rape as both a tool of war and of ethnic cleansing. The separation and detention of the Muslim women was the beginning of a regime of rape and sexual violence perpetrated against a great number of women by the Serb forces. This violence was not only perpetrated for purposes of sexual gratification, but in addition conducted with the aim of removing all traces of the hated Bosnian Muslim people. (Russell-Brown, 2003)

By all accounts, the women taken prisoner and held by Serb forces upon taking over the town were "robbed of the last vestiges of human dignity women and girls treated like chattels, pieces of property at the arbitrary disposal of the Serb occupation forces." (ICTY, 22 Feb 2001) These women, many of whom were as young as 12 years old, were repeatedly subject to abuse, rape, and humiliation by Serb men

[21] See for example, Farwell (2004, pp. 395–396).

in several different camps scattered throughout the town, and were commonly used as personal servants and sexual slaves by the Serbs. There were numerous reports of women being taken and raped by up to ten Serb men at one time. (McHenry, 2002) In part, of course, this violence was intended to demoralize and humiliate a hated enemy (simultaneously providing sexual release for the rapists) but equally important, the sexual violation of these women often had the effect of eliminating these women from the Muslim community or forcing them to carry "Serb babies" and thereby shrinking the Muslim population of the area. (Diken and Laustsen, 2005, pp. 114–116) In effect, rape became a tool of ethnic cleansing in the Balkan wars.

After the war, the ICTY took great interest in the violence that took place in Foča for many important reasons, among these was the determination that rape would be a major focus of the ICTY's prosecutorial strategy. (Goldstone, 2002; Askin, 1999) As a result, several significant figures from the Serbian paramilitary forces were prosecuted before the ad hoc court for crimes committed in Foča and many of the charges against them involved the rape of female detainees. Among these were Dragan Gagović (the Chief of Police for Serb-controlled Foča), Dragoljub Kunarac (a Serb unit commander), Radomir Kovac, and Zoran Vukovic, both of whom served in the Serb military.

Kunarac, Kovac, and Vukovic were prosecuted together by the ICTY under the title "the Foča case" and were sentenced to 28, 20, and 12 years imprisonment respectively in June 2002. In addition, responsibility for the rapes committed in Foča was attached to the indictments against Serbian leaders Radovan Karadzic and Ratko Mladic, each of which was tied to the violence in the town. Several of the figures that were indicted by the ICTY for the Foča violence, however, were ultimately passed on to the Bosnian court to be prosecuted before the hybrid courts. Here we will discuss two of these.

The first defendant, referred to the court from the ICTY that was related to the events in Foča, was Radovan Stanković. Stanković (a.k.a. "Rasa") was a member of a Serb paramilitary organization, the Miljevina Battalion of the Foča Tactical Brigade of the Army of Republika Srpska, based out of Foča. Originally arrested by Stabilization Force (SFOR) troops in 2002, he was indicted, along with several others in the ICTY's initial Foča indictment. Before the trial began in May 2005, however, he was processed under the court's RoR procedures and was ultimately transferred back to Bosnia in September of that year. In evaluating the case, the ICTY referral chamber suggested that Stanković's rank was too low and the crimes set out in his indictment were insufficient for the case to remain in The Hague:

> In the context of offences dealt with by this Tribunal, the Indictment alleges a factual basis for the crimes which is limited in scope both geographically and temporally, and also in terms of the number of victims affected. It is also clear that the Accused did not have any rank of military significance, and it is not suggested that he had any political role. He was not in any relevant sense a "leader." (*Prosecutor v. Stanković,* 17 May 2005, para. 19)

Stanković was a very young man when he committed the offenses (he was 23 years old at the time), and acted in consort with other individuals who "shared a measure of responsibility for the offences." (para. 19) Further, they argued that the court system of Bosnia and Herzegovina (BiH) had been reformed significantly enough, that,

> although there have been no past referrals from the Tribunal to the authorities of Bosnia and Herzegovina upon which a record might be evaluated, the Bench considers that the legal structure in Bosnia and Herzegovina, as it now stands, is sufficient to safeguard the right of the Accused to a fair trial. (para. 68)

As a result, Stanković was the first test case of the new Bosnian judicial system.

Having exhausted his appeals to the referral decision, Stanković was transferred to Sarajevo in September 2005 and the trial began there on February 23, 2006. The trial lasted until November 14 of the same year and was, by all accounts, a dramatic affair. Because of the sexual nature of the offenses, the judges decided to close the court during the hearings. The court said that this was done in order to protect the victims of the violence from undue exposure, though observers have suggested that the secrecy was more likely aimed at protecting the reputation of the court from the harm caused by the defendant's belligerence. (International Center for Transitional Justice, 2008, p. 19) While there is no video from the trial, it is clear from the available documentation that Stanković was not a willing participant during the proceedings and sought to undermine the tribunal whenever possible. In its judgment on the case, the Trial Chamber revealed that Stanković had to be removed from the court several times for "inappropriate conduct," "plus the constant insults directed against the Court of BiH and the judges of this Court, both national and international, and insults against the representatives of the other institutions of BiH judiciary—Prosecutor's Office of BiH, Detention Unit and, finally, his very Defense Attorneys." (*Stanković* Verdict, 14 Nov 2006, p. 35) Other reports show that Stanković was, on occasion, removed from the trial and had threatened several of the judges in the court—a factor that raised security concerns after the trial had been completed.

While a part of the Serbian irregulars, Stanković was accused of running a privately owned house in Foča as a kind of "rape prison." This home, known as "Karamanova kuća" (or "Karaman's House"), served as a detention facility for up to nine different non-Serb Bosnian civilian women and girls, some of whom were juveniles who were forcibly removed from their homes and held against their will. There they were forced to sexually service the Serb troops to whom they were assigned as well as provide domestic labor for them, including bathing the men before they raped the women. Many of the girls were often quite young and some "disappeared" after their confinement, presumably having been murdered by Serbians (one victim, "AB," at 12 years old was forcibly taken from her mother while on a bus leaving Republika Srbska and never seen again [*Stanković* Verdict, p. 9]). Those who were "unassigned" to a particular Serbian fighter (such as AB) could be raped by any soldier who was invited into the house. Along with running this brothel for the Serbian forces, Stanković himself reportedly raped many of the women in his custody.

Under the ICTY indictments, Stanković was charged with eight separate counts of war crimes and crimes against humanity. Rape and enslavement, and "outrages upon personal dignity" in differing circumstances constituted the offenses which filled the particular charges in the indictment. At the conclusion of the trial in November 2006, Stanković was convicted by the court for four separate counts of crimes against humanity and was sentenced to 16 years imprisonment. In its statement on the verdict, the ICTY declared that the judgment "justifies the Tribunal's

strategy of transferring cases, expertise and know-how to the judiciaries in the region, and particularly Bosnia and Herzegovina." (ICTY, 14 Nov 2006) On appeal, the Appeals Chamber increased Stanković's punishment to 20 years in total.

As a fascinating coda to the case, Stanković escaped from custody in 2007 while being transferred to a hospital in Foča. After he had complained about feeling ill and was being transferred to receive medical treatment, a group of conspirators blocked the prison ambulance and absconded with the defendant. During the escape, Stanković shoved his guards aside and jumped into an awaiting vehicle. (*The New York Times,* 26 May 2007) As a consequence, the director of the prison as well as several prison officials was fired for not adequately following procedures. (Bosnian Serb war criminal recaptured, 22 Jan 2012) Stanković remained at large for nearly 5 years until he was apprehended again in Foča in January 2012, after which he refused to cooperate with the court, claiming that a local, not a national court should try his case. (It remains unexplained how he was able to hide for 5 years in a town of less than 50,000 people, but it was widely acknowledged that after the war, many residents of Foča remained sympathetic to the Serbian cause [Human Rights Watch, 1998].) In December 2012, he was sentenced to an additional 2 years of prison for the escape. (Stankovic sentenced, 24 Dec 2012) His brother Ranko was also sentenced to 2 years in prison for the escape and three hospital personnel were sentenced to 6 months imprisonment, while Stanković's parents were sentenced to 6 months suspended sentences. (Search for Convicted, 25 May 2010)

The second case that was passed on to the Bosnian court involving Foča was that of Gojko Janković. Unlike Stanković, however, Janković was not a minor figure in the Serb forces, but was sub-commander of the military police of the Republika Srbska and a commander in the Serbian paramilitary forces. There were several related charges made against Janković at the ICTY and subsequently at the War Crimes Court, all surrounding the Serbian occupation of Foča during the war. During that war, Janković was accused of ordering his troops to target, abuse, and sometimes kill civilians during the "round up" of the Muslim civilian population in Foča in the spring of 1993. Serbian paramilitary troops and police units were sent into the hamlets as well as the woods around Foča in order to gain control over the area's Muslim population. Once these civilians had been detained by the paramilitary forces, the troops separated them by gender and had them brutally interrogated by Serbian officials in order to discover the locations of Muslim fighters. The women were detained and many of the men were shot or beaten to death. The rest were transferred to a detention facility at a local prison.

The different indictments (both from the ICTY and from the Bosnian court) against Janković outline several instances of rape as well as torture that were part of a widespread and systematic attack against the non-Serbian population of Foča. The prosecution relied on two different means of liability: on one hand, they alleged that Janković himself had perpetrated many of the rapes in the indictment, including that of a 12-year-old girl, and on the other hand, the prosecutor linked him to his subordinates by superior orders liability, claiming that Janković "knew or had reason to know that his subordinates sexually assaulted Muslim women during or immediately following the interrogations [at Buk Bijela]." (*Prosecutor v. Janković*

et al., ICTY Indictment, 7 Oct 1999, para. 3.1) According to both the international and the Bosnian indictments of Janković, there were several different detention facilities for female Bosnian Muslims in the Foča area run by the Serbian forces. These rape camps included Buk Bijela (a hydro-electric dam construction site in the area), the Foča high school, Partizan sports hall and the aforementioned Karaman's House. Many of these other camps were significantly larger and held many more women than did Karaman's House. During their detentions, many of the women held at these facilities were systematically raped, including gang rapes by Serbian soldiers over an extended period of time, including by Janković himself.

At the end of the war, Janković continued to live in Foča and avoided prosecution with the aid of the largely passive French peacekeeping force that was stationed in the area, only later fleeing to Russia to live under a fake identity and 24 h protection. (Hazan, 2004; Wood, 15 March 2015) According to news reports, the Bosnian Serb government, seeking to improve its relations with the ICTY, asked his wife to fly to Russia in order to persuade him to surrender to the court. Janković ultimately surrendered to Republika Srbska forces in March 2005 and was transferred to the ICTY where he was indicted along with Stanković and several others. However, as with Stanković, Janković was transferred to the Bosnian chamber under the tribunal's 11*bis* procedures.

The trial of Janković began in April 2006 under Judge Roland Dekkers of the Netherlands and a verdict was handed down in February 2007. Janković was charged with murder and several rapes (some of which were added to the indictment during the trial) as crimes against humanity. During the trial, several victims of the Foča camp testified "for the umpteenth time" ("having already testified in other cases relating to Foča rapes either before the ICTY or before the State Court" [Katsaris, 2007]) regarding their treatment there. Victims testified that Janković sought to hide the rapes from other Serbian officers and that he had claimed one girl as his property and was not to be touched by other Serbs. (Jankovic hostages claim, 18 July 2006) Janković's attorneys in turn argued that several of the victims had actually been in love with the defendant at the time and one had even described the defendant as her "boyfriend." (Jankovic: Drama in court, 20 Dec 2006)

At the end of the trial Janković was convicted of most of the charges made against him. The court argued that the defendant had been responsible for several rapes while in command in Foča. Insofar as the defense's claim that the relationship constituted a loving, consensual relationship, the court maintained that under these circumstances, true consent was actually impossible:

> The Court is satisfied beyond reasonable doubt that under the aforementioned circumstances, the relationship between the Accused, who was a married man and the father of three children, and [the victim], could never amount to or *transform into* a normal and consensual sexual relationship. Given the extreme conditions in which [the victim] found herself, she was never in a position to give a true consent. She was de facto deprived of her sexual autonomy. (*Janković,* Judgment of 16 Feb 2007, p. 67)

Given the fact that this sexual violence happened far from the battleground and the unique vulnerability of his victims, the court, coupled with the fact that "the Accused's conduct repeatedly showed that he had a complete disregard for this

victim's welfare and that he showed no remorse," (p. 77) made the defendant's behavior particularly reprehensible. As a result, Janković was sentenced to 34 years imprisonment, the longest sentence given by the court, a sentence that was ultimately upheld on appeal. Since the referral and transfer of Stanković and Janković to the Bosnian Court, the ICTY has referred a total of 13 people to the various domestic tribunals with jurisdiction over the Balkans. The majority of these have been sent to BiH, but some defendants have been sent to other courts in the former Yugoslavia. This means that the vast majority of cases before the Bosnian court arrived there by other means. In some cases, evidence has been "handed down" to the lower courts by the ICTY prosecutor without the issuing of an international indictment. Others have begun at the national level by Bosnian prosecutors. The next case we will look at did not develop out of the ICTY but was pursued independently by BiH prosecutors.

The third case to come out of the massacre was for Neđo Samardžić. Samardžić, another member of the Bosnian Serb paramilitary organization, was accused of similar rapes and murders in Foča. Samardžić was arrested in October 2004 after a shootout with SFOR peacekeepers in the Bosnian Serb town of Bileca, which left Samardžić with serious head trauma. (Bosian Serb war crimes suspect wounded, 19 Oct 2004) As with the Stanković trial, Samardžić's trial was closed to the public, leading to complaints from the public and from the NGO community (Anger at secrecy, 8 March 2006), which prompted the court (in Samardžić's case, at least) to open the trial to the public. Samardžić was convicted of four of the 10 charges against him, finding him guilty of committing rapes and beatings (including rapes at "Karaman's house") in Foča. Samardžić was sentenced to 13 years and 4 months imprisonment by the trial court, but the ruling was overturned on Appeal because the Appeals Chamber believed that at trial, the judges had failed to follow appropriate procedures or to evaluate evidence in a consistent manner. The case was re-tried before the appellate chamber in December 2006, where Samardžić was convicted of nine of the 10 counts and sentenced to 28 years imprisonment.

Srebrenica (The Kravica Case)

The *Kravica* case involves the prosecution of several individuals for genocide in relation to the massacres that took place in the town of Srebrenica. Srebrenica, along with Sarajevo, stands among the most infamous massacres that took place in the Balkans wars, and Srebrenica ranks as the worst atrocity to take place on European soil since the end of the Second World War. The violence, which largely took place over several days in July 1995, left over 7000 Bosnian Muslim men and boys dead, most often from planned and systematic murder rather than as a result of the hazards of combat or a result of collateral damage. All of the killings happened in the presence of the hundreds of international peacekeepers stationed there, making it a humiliation for the UN as well as a tragedy for the Bosnian Muslim community.

Srebrenica became synonymous with the brutality of the Balkans and the impotence of the international community.

The circumstances of the Srebrenica killings as well as their sheer horror made the massacre a central focus for prosecutors in both The Hague and within the Bosnian court system. The Srebrenica massacre was attached to the indictments of some of the biggest names in the Serb leadership (Karadzic, Mladic, Milosevic) and many other, lesser figures fighting in the Serb forces. In Bosnia, seven different people were tried together at the Court of Bosnia-Herzegovina for participating in one of the killings in Srebrenica. (Though several other individuals were put on trial before the Bosnia court for actions at Srebrenica, the *Kravica* case has had the highest profile of them.) Before detailing this case, we will briefly examine the tragic events in Srebrenica.

Srebrenica's location, in the far east of Bosnia, made it of singular importance for the Serb leadership. The ultimate plan of the Serb forces was to annex much of eastern Bosnia into a larger Serbian state comprised of eastern Bosnia and its larger neighbor, Serbia proper—creating a single, unified Serb state carved out of the former Yugoslavia. Taking the town away from its Bosnian Muslim population was but one stage of a multi-pronged effort that had begun 3 years earlier to use military and paramilitary forces to target non-Serb civilians and grab as much land as possible as part of a "greater Serbia." (Sperfeldt, 2012) Without control over the city, the Serbs in Bosnia would be split between two different regions and would be denied access to Serbia proper.

The initial invasions by Serb forces in 2002 had successfully cleared much of the eastern Bosnian countryside of Muslims. Many of the Muslims who had lived in this part of the country had been forced to flee to Srebrenica and other large population centers in the area in order to escape the massacres that followed annexation. This caused the town's population to swell with refugees, some of whom were armed members of the Bosnian Muslim militias who were actively fighting the Serbs. In the face of a concentration of Bosnian Muslims in Srebrenica, as well as an ongoing resistance from the militia forces hiding among the civilian population there, Radovan Karadzic (the then president of the Republika Srpska) ordered that Serb forces create "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica" (*Prosecutor v. Krstić,* Judgment, 2 Aug 2001, para. 28) and others living in eastern Bosnia in order to clear the area of non-Serb forces.

Despite being located only a few miles from the border with Serbia and living under the full weight of the Serbian military, Srebrenica was able to hold out against Serb forces for several years. Initially, the Muslims defended themselves on their own, but later they received the support of UN peacekeepers after the UN Security Council passed a Resolution which declared that Srebrenica was a "safe area" "which should be free from any armed attack or any other harmful act." (UN Security Council, 16 April 1993, para. 1) This resolution placed the town and its civilian population under the protection of approximately 600 UN peacekeepers from The Netherlands, operating under the title of UNPROFOR ("United Nations Protection Force"). Nonetheless, many Serb leaders maintained that Bosnian Muslim military

forces were operating under the protection of the peacekeepers, and in truth Srebrenica had been a base of operations for Bosnian Muslim forces over the previous several years. However, despite the presence of hundreds of troops, the UN failed to deter the Serbian forces surrounding the town and when the Serbs attacked the UN outposts in early July, the peacekeepers either fled to the town or surrendered outright to the Serbs. Serb forces took fourteen of the Dutch peacekeepers hostage, only releasing them when the peacekeepers handed over 5000 Muslims who had sought refuge in their base. (Timeline, 9 June 2005) (Some have claimed that the Dutch forces were complicit in these developments or at least showed undue solicitude toward the invading Serb forces. A 2002 report on the actions of Dutch forces during the massacre issued by the Netherlands Institute for War Documentation led to the resignation of Dutch Prime Ministe Wim Kok. [Dutch Government quits, 16 April 2002])

After the UNPROFOR peacekeepers had been neutralized, the Serbs quickly established control over the city and began occupying it. What closely succeeded this consolidation of power was one of the clearest examples of ethnic cleansing and genocide during the entire Balkans conflict. Approximately 25,000 of the town's women, children, along with elderly residents were loaded onto busses and forcibly transferred out of Srebrenica and into Bosnian Muslim territory—though many of these were kept prisoner and used for the pleasure of the Serb forces. Thousands of Muslims fled in order to escape the Serb killings, ultimately hoping to find protection with Bosnian Muslim forces far to the west. Many of these refugees faced either harassment from Serbian artillery and sniper attacks all along their route or capture and swift execution by Serb troops. The vast majority of the men who had stayed behind were systematically murdered by Serb troops in a series of massacres either within the city itself or in places like Potočari, (the headquarters of UNPROFOR, where many refugees had sought shelter), Pilica Farm, Petkovići, and Orahovac. Thousands of victims were concealed in mass graves created with construction equipment and hidden throughout the region—some of which remain undiscovered today.

Given the horrific nature of the violence, as well as the fact that UNPROFOR failed to protect their charges so spectacularly, it is no surprise that the Srebrenica massacre was a significant part of many prosecutions at the ICTY. The two biggest officials in the Republika Srpska, Ratko Mladic and Radovan Karadzic, were charged with crimes related to the killings in Srebrenica, including a JCE seeking to "eliminate the Bosnian Muslims in Srebrenica, and… to take United Nations personnel as hostages." (*Prosecutor v. Ratko Mladic*, Judgement Summary. 15 April 2014, p. 5) The ICTY's indictment of Slobodan Milosević included killings, persecutions, and genocide in Srebrenica among the lengthy charges against him. Most directly related to the massacre at Srebrenica, however, were the prosecutions of Radislav Krstić, General in the Bosnian Serb army and head of the Drina Corps (the wing of the Army of the Republika Srpska that carried out most of the killings in Srebrenica), which means he played a central role in the Srebrenica massacre, and Drazen Erdemović, who was prosecuted for participating in the killings at Pilica. Though several dozen more were also put on trial in The Hague for crimes

in Srebrenica, these were the highest profile cases before the international court in relation to Srebrenica and Mladic, Karadzic, and Milosevic stand as the "biggest fish" to sit in the dock in The Hague.

Along with prosecutions in Bosnia and The Hague, Serbia, usually reluctant to pursue charges against members of their own ethnic group, had several individuals prosecuted for participating in the Srebrenica massacre. While the government had denied (and in many cases still denies [Bojic, 6 June 2012]) much of what happened in Srebrenica in 1995, they were forced to respond 10 years later when a video surfaced during the trial of Slobodan Milosevic, showing members of the Serb paramilitary unit, "The Scorpions," executing a group of Bosnian Muslims in the Village of Trnovo. The video, shown on Serbian TV, forced the hand of the Serbian government and prompted some soul searching within Serbia. (Servia shocked, 3 June 2005) (The four defendants were given sentences ranging from 5 to 20 years imprisonment [Wood, 11 April 2007].) In short, there was a multi-pronged, multi-forum effort to hold accountable those responsible for the killings in Srebrenica.

There were many different prosecutions in the Bosnia War Crimes Chambers for individuals who were charged with crimes that took place in Srebrenica. Here, we will look at "The Kravica trial" which focused on events that took place on July 13, 1993, 2 days after Srebrenica was overwhelmed by the Serbs. A group of 1000–4000 men who had fled Srebrenica to join up with the Bosnian forces had been induced to surrender at a spot known as Sandici Meadow, having been told by General Ratko Mladic personally that they would not be hurt if they surrendered. Of those men and boys who surrendered, approximately 1000 were led to a warehouse in the town of Kravica, approximately 10 miles from Srebrenica. When they arrived at Kravica, they were locked inside a warehouse and Serb forces began killing them indiscriminately. They fired rifles and anti-tank weapons and threw grenades inside the warehouse with guards specially tasked with killing anybody who tried to escape the building. As one survivor, who was wounded but feigned death in order to survive, described the killings:

> I was not even able to touch the floor, the concrete floor of the warehouse […]. After the shooting, I felt a strange kind of heat, warmth, which was actually coming from the blood that covered the concrete floor, and I was stepping on the dead people who were lying around. But there were even people who were still alive, who were only wounded, and as soon as I would step on him, I would hear him cry, moan, because I was trying to move as fast as I could. I could tell that people had been completely disembodied, and I could feel bones of the people that had been hit by those bursts of gunfire or shells, I could feel their ribs crushing. And then I would get up again and continue […]. (*Prosecutor v. Krstić,* 2 Aug 2001, para. 206)

Those who had survived the initial attack were reportedly required to sing Serbian songs until they too were shot dead. Soon after the killings had been completed, excavators came and removed the bodies for burial in hidden, mass graves.

The 11 individuals who were initially indicted by the War Crimes Chamber were all members of the Special Police Force unit that was tasked with carrying out the warehouse killings. According to the indictment,

> more than one thousand Bosniak male prisoners were detained in the Kravica Farming Cooperative warehouse. In the early evening hours [of July 13, 1993] in the presence of [defendant] Miloš Stupar, these men were allegedly executed in the following manner: [defendants] Milenko Trifunović, Slobodan Jakovljević, Aleksandar Radovanović, Miladin Stevanović, Petar Mitrović, Branislav Medan, Velibor Maksimović and Dragiša Živanović fired their machine guns at the prisoners; Brano Džinić threw hand grenades at them, while Milovan Matić reloaded the ammunition in the execution.

Stupar and Trifunović were accused as commanders in the operation while the remaining defendants were charged as accomplices. More significantly, from a legal perspective, the killings were described in the indictment as part of a genocide of the non-Serb population of the area, meaning that, under international law, the killings were "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," and not "mere" mass murder.

The trial itself began on 19 May 2006 and lasted over 2 years, concluding with a verdict on 29 July 2008 (though appeals went on much longer). One pre-trial judge reported that the defendants were particularly belligerent under the inspiration of the trial of Saddam Hussein which was happening concurrently with this trial. The judges were Shireen Fisher (USA), Paul Brilman (NL), and the presiding judge, Hilmo Vučinić (Bosnia). There were several noticeable developments over the course of the trial: Witnesses claimed that the warehouse where the killings took place had been cleaned by Serbs in order to cover their tracks. (Kravica warehouse, 23 May 2006) Other witnesses asserted that they had been tracked down and anonymously threatened, requiring the court to postpone their testimony. (Balkan Investigative Reporting Network, 28 Dec 2007) A number of defendants went on a hunger strike during the trial, demanding that they be prosecuted under the old SFRY law, causing a number of headaches for the court (and providing grounds for appeal from the defendants). (Kravica: Poor health, 25 Jan 2007; Special Departments for War Crimes, March 2007) In May 2008, two defendants, Mitrović and Stevanović, had their trials separated from the nine others, meaning that the court ultimately rendered three separate verdicts.

The designation of the killings as genocidal in nature also led to some legal complexities that have since served as grist for the mill of international legal scholarship. As was mentioned above, genocidal acts must be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." (Convention on the Prevention and Punishment of the Crime of Genocide, Article 2) While the defendants' actions clearly showed a great deal of animus toward their victims, none of the defendants in this case planned the Bosnian genocide (this was the work of the leadership, Karadzic, Mladic and Krstić, who were each indicted by the ICTY) and thus it is not clear whether they had the special intent to commit genocide (the *dolus specialis*). Further, while the defendants killed innocent people in Kravica, it was initially unclear if *their* actions were committed with genocidal intent or if they were simply committing the criminal killings that they were ordered to commit. As the court puts it in its judgment: "As instruments for the commission of genocide, [the defendants] are only criminally liable for commission of the underlying crimes, and not for genocide itself, unless they committed the underlying

crimes with the specific genocidal intent to destroy the protected group." In more technical terms, the defendants must have the *dolus specialis*, or special intent to commit genocide when they committed their acts.[22]

The court ruled that the five defendants who were convicted were each guilty of genocide on the basis of a number of factors. Because of the context in which the Kravica murders took place, the court concluded that they must have been engaged in a genocidal campaign and not merely killing on command.

> The underlying criminal act of killing co-perpetrated by five of the Accused constitutes probative evidence from which the Accused's genocidal intent can be inferred beyond doubt when viewed in light of their exposure to the broader context of the events of Srebrenica, and their basic knowledge of the genocidal plan. (29 July 2008, p. 118)

Because of various circumstantial factors, including the methods by which the victims in the warehouses were killed and the use of racist language during the killings, the defendants clearly showed a desire to carry out a genocidal plan. Further, the fact that the defendants killed their victims in a particularly gruesome manner shows that "the Accused did not simply intend to kill the victims; they intended to destroy them." "[A]cts in which the Accused participated for around an hour and a half were the most physically destructive acts imaginable, committed and experienced at close range, within the sight and smell of the carnage and of the sounds of the dying." (27 Sept 2009, p. 39) As a result, genocidal intent was clear for the judges. "The intent with which the Accused acted was the intent to destroy all Bosniaks—as a group—as such. The only limitation to their achieving the destruction of all Bosniaks as an entire group was the limitation imposed by the number of Bosniaks actually within their control."[23] (p. 122)

In the Trial Chamber's judgment, six of the defendants were convicted of genocide on the basis that they had committed killings with genocidal intent. Another (Miloš Stupar) was convicted of genocide based on the theory of command responsibility, "because he was found to have a superior-subordinate relationship with those who participated in the *actus reus* of the crimes, he had knowledge of the crimes committed by the accused persons, and he failed to take the measures necessary under the law to punish the crimes." (p. 135) Three others, Maksimović, Živanović, and Matić, were acquitted. One of the two defendants who had severed their trials from the nine others, Mitrović, was convicted while Stevanović was acquitted. Sentences for those convicted ran from 38 to 42 years imprisonment.

Both the prosecutors and the defendants appealed the judgment for a variety of reasons, and several of the defendants successfully had their convictions overturned on appeal. Miloš Stupar, the alleged commander of the Kravica unit, appealed the judgment on the grounds that the judgment lacked a clear statement of the factual grounds for convicting the defendant, and the Trial Chamber had committed "essential violations of the provisions of criminal procedure entailing mandatory revocation of the Trial Verdict." (Appeals Judgment, p. 16) At the retrial,

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[22] For an examination of this issue at the ICTY in relation to Bosnia, see: *Prosecutor v. Jelisić*, (Judgment, 14 Dec 1999).

[23] For a deeper analysis of the Judgment's analysis of genocidal intent, see Srippoli (2009).

conducted by the Appellate Panel, Stupar was acquitted on account of a lack of evidence. (5 May 2010) The remaining appellants had their sentences reduced by the Appellate Panel by about a decade while the prosecutor's effort to have the acquittal of Matić reversed was rejected. (Appellate Verdict, 9 Sept 2009)

Major Cases Before the UNMIK Courts

Unlike the other tribunals that we have studied in this text, there were a large number of acquittals and vacated decisions in Kosovo. There were few war crimes cases presented to the court, and, as we will see, they were plagued by questionable legal decisions at both the trial and appellate level. In addition, there were accusations of political tampering with law enforcement and criminal investigations conducted by the Kosovo Force (KFOR), which cast a further shadow over UNMIK. As the Swiss NGO "Trial" reported, "The Kosovar tribunals faced multiple problems, such as lack of professional training, the assignation of international staff for short periods, the inability to collect evidence, communication difficulties with local staff and inaccurate translations." (TRIAL, 13 Jan 2015) All of this means that many of the cases we will examine here will have some slightly muddled outcomes. Moreover, as Turns points out, "the lack of systematic reporting of judicial decisions in the Kosovo courts makes it impossible to comment in detail on any cases," meaning that our analysis here will at times be sketchier than the ones involving the other hybrid courts. (Turns, 2001, p. 145)

Milos Jokic

The first individual to be put on trial for international crimes before the Kosovo court was Milos Jokic. Jokic, a Montenegrin nationalist was accused of committing various acts of genocide against the Kosovar Albanian population in February 2000, including rape, murder, and forcibly expelling approximately 2000 Albanians from the village of Verban. The indictment charged that Jokic, active among the paramilitary units in Kosovo, ordered his compatriots to execute an ethnic Albanian in April 1999, shot and killed another man himself and raped an Albanian woman in May 1999. (Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, Sept 2002, p. 17)

The *first* trial for Jokic took place between May and September 2000, in the Gjilan/Gnjilane District Court, before a panel of five judges, the majority of which were local, and the remainders were international (the prosecutor was also local). One day after the trial ended on 19 September, the court returned a guilty verdict and sentenced Jokic to 20 years imprisonment. However, an Appellate Panel of Kosovo's Supreme Court overruled the verdict on April 26, 2001 and ordered a retrial for Jokic. According to the Appellate Court decision, the trial court made

its ruling based on wrongly interpreted and insufficient evidence. (Legal Systems Monitoring Section, Sept 2002, p. 17) During the second trial (a Regulation 64 panel with an international prosecutor), which ran from September 2001 to May 2002 and included an international majority of judges, the District Court acquitted Jokic of all charges against him.

The Racak Massacre

During the ethnic fighting between the Serbs and Albanians in Kosovo, an established pattern to much of the violence had developed. As the British journalist Misha Glenny described it, "Albanian guerrillas in the Kosovo Liberation Army kill a Serb policeman or two. Serb forces retaliate by flattening a village." (20 Jan 1999) It was this dynamic and violent overreaction on the part of the Serbs that eventually led NATO to intervene in the conflict and force the government of Yugoslavia to withdraw from the region. The events in the village of Racak fit just such a pattern: small scale violence on the part of Albanian rebels with a vicious and indiscriminate response from Yugoslav forces.

The violence began with the murder of four Serbian police officers by members of the Kosovo Liberation Army in early January 1999. In response, Serbian forces began shelling the village of Racak in western Kosovo for several days before Serb police and military units attacked. Reportedly the villagers hid inside a building, but were discovered by Serb forces who killed 45 Albanian men and boys who were located there. Shortly thereafter, William Walker, the head of the Kosovo Verification Mission of the Organization for Security and Co-operation in Europe (OSCE), described the violence as an attack on innocent civilians. According to many, these killings marked a turning point in negotiations between Yugoslavia and NATO forces: "The Racak massacre can thus be seen as either the final straw, testing Western resolve with regard to Kosovo, or the start of a new initiative that would soon lead to war between NATO and the federal republic of Yugoslavia (sic.). In all likelihood, it was probably both." (Totten and Bartrop, 2007, p. 350) The violence ultimately created the conditions for the NATO bombing campaign which began 3 months later and ultimately ended with Kosovo's independence.

It is worth noting that there are a number of prominent skeptics who claim that the Racak massacre was a hoax fabricated by the KLA and supported by NATO officials in order to justify their intervention in the conflict.[24] (Johnstone, 2003, pp. 240–241) The Yugoslav government denied that the massacre occurred (describing it as "a series of lies and fabrications" [New fighting, 19 Jan 1999]) and this interpretation remains the view of many Serbs, and many conspiracy-minded

[24] On the other hand in its report on the incident, Human Rights Watch, "categorically rejected Yugoslav government claims that the victims of the January 15 attack on Racak were either Kosovo Liberation Army soldiers killed in combat, or civilians caught in crossfire." (Human Rights Watch, 1999).

researchers have pointed to inconsistencies between the evidence and claims of Albanian partisans. These accusations prompted the creation of the German documentary, *Es begann mit einer Lüge* (*It Began With A Lie*) (Angerer and Werth, 2001), which leveled similar charges and was entered as evidence in the trial of Slobodan Milosevic over the loud objections of Racak witnesses. (Kraja, 14 Feb 2002)

There were several different investigations prompted by different authorities (some backed by the FRY government) that produced contradictory findings about the violence, fueling further speculation of a cover up in Racak. Two different investigations, one by Serbian authorities, and the other by investigators from Belarus concluded that the Albanians killed in Racak were KLA fighters who died in combat. (Pathologist, 19 Jan 1999b) A Finnish led EU report concluded that "there were no indications of the people being other than unarmed civilians," and argued that there was no evidence that the bodies were tampered with. (Gall, 18 March 1999)

Despite some of these complications and contestations, those accused of participating in the Racak massacre were targeted for prosecution by both the international and the domestic criminal tribunals. The ICTY prosecutor was interested in investigating the event shortly after it took place but was denied access by Yugoslav officials. (UNMIK Prosecutor, 20 Jan 1999) Racak ultimately wound up in the Milosevic indictment along with the indictments of several others who were prosecuted by the ICTY. According to Milosevic's indictment, the Serb forces were "acting at the direction, with the encouragement, or with the support" of Milosevic when they attacked the village. (16 Oct 2001, para. 66) However, at the national level, in the UNMIK courts, prosecutors targeted one solitary individual for the massacre: Zoran Stojanović.

Witnesses had stated that they had seen Stojanović, a police officer, shoot at a number of people who had tried to flee the village, killing one of them. As a result, Stojanović was arrested and tried by an internationalized panel in Pristina in 2001. There were claims that the trial had been politicized and that the evidence against Stojanović was weak, leaving the judges in the case doubtful as to whether or not the trial should actually take place. Nonetheless, they reportedly continued out of a fear of repercussions were they to halt the trial. According to one unnamed UN source, "The people of Racak would have been furious [if the case were abandoned]. Racak is a symbol of what happened during the war for all Albanians. They gave in to pressure, pressure that was exerted throughout the case." (Woods, 19 June 2001) An attempt to reconstruct the events in Racak had to be halted because of threats from armed gunmen who did not want any Serbians in the village and a second attempt was abandoned after villagers blocked access to the site.

Stojanović was arrested in August of 1999 and was charged by the court in May 2000. However, there were numerous troubles that overshadowed the initial attempts to run the trial and there were numerous cancellations, including a power shortage which caused the cancellation of a *second* attempt to start the trial. (UN Human Rights Committee, 24 July 2003, p. 205) The actual trial began with a third attempt in February 2001 (after 17 months of pre-trial detention) and ran for 5 months with many interruptions. By all accounts, the trial itself was convoluted and chaotic and there were many starts and stops to the hearing. The presiding judge

(Judge Agnieszka Klonowiecka-Milart of Poland, who would later join the ECCC) expressed her frustrations with the logistics of the hearings. There was difficulty coordinating the testimony times of witnesses, and the fact that all of the Serbian defendants in Pristina were using the same attorney made scheduling the hearings enormously complicated. (Institute for War and Peace Reporting, 25 July 2001)

In June 2001, Stojanović was convicted of the killings in Racak and sentenced to 15 years for the crime—the harshest sentence given by the Kosovo court. (Nikolic-Ristanovic, 2008, p. 167) However, there was a great deal of frustration about the sentence from the survivors of the Racak killing, many of whom considered the punishment too light. On the other hand, Amnesty International expressed disappointment at the verdict and argued that there were too many procedural irregularities and dubious evidence (including blatantly contradictory testimony) for the trial's outcome to be considered fair. As they put it, "despite the appointment of international prosecutors and judges to the Kosovo courts, the judicial system in Kosovo continues to be seriously flawed…From cases of unlawful pre-trial detention to procedural breaches in the conduct of trials, the administration of justice fails to be conducted in a manner consistent with international human rights standards." (Woods, 19 June 2001) While it is ultimately difficult to determine the veracity of these claims, as few of the trial materials are publicly available, the trial clearly failed to put to rest the skepticism that some have about the events in Racak in 1999.

The Nis Express Bombing (Florim Ejupi)

On February 16, 2001, an unknown number of Albanian partisans attacked a civilian bus that was carring a group of Serbs. The Serbs were on a pilgrimage to visit family graves in the town of Gracanica in eastern-central Kosovo. They had fled the region with the withdrawal of Yugoslav forces and were only returning with the support of NATO, which had guaranteed their safety: They were guarded by Swedish KFOR troops who had accompanied the six buses with a number of their own armored vehicles. Despite this protection, after the first bus crossed over the border between Serbia and Kosovo, near the town of Podujevo, an approximately 100 pound bomb detonated underneath the first bus, launching it in the air and causing extensive damage to the bus and carnage inside it. This attack killed 11 Serbs, including a 2-year-old child, and injured 40 others in what one NATO official described as "ruthless, premeditated murder." (Buza, 17 Feb 2001) The violence was seen by some as payback for the previous violence as well as an indication that the Albanian population of Kosovo was not done with its Serb enemies. As NATO Secretary General Lord Robertson said in response to the attack, "NATO did not conduct its air campaign in order to see ethnic cleansing by one group replaced by the ethnic attacks and intimidation of another." (In Memoriam, 17 Feb 2007)

UNMIK officials began their investigation and in late March 2001, five ethnic Albanians were arrested in Podujevo by NATO and blamed for the attacks. (Jennings, 28 March 2001) All five suspects were members of "the Kosovo Protection

Corps," a civil defense organization that was backed by the west, and which had been linked to violence and crime in the region (the KPC was deactivated in 2008 [Human Rights Watch, 2004, p. 10]). Despite obviously being the work of a coordinated group of terrorists, only one individual, Florim Ejupi, was ultimately charged with the crime. The rest of those arrested were quickly released due to a lack of evidence.

There were a number of fascinating and bizarre twists that occurred between Ejupi's arrest and his eventual trial. After he was taken into custody by KFOR, he was transferred to the custody of US forces and was held at the US military base at Camp Bonsteel. However, while being held by US troops Ejupi successfully carried out an improbable escape from the base, fueling widespread rumors that he had previously been providing intelligence to the CIA and had been allowed to escape in order to avoid public revelations that would be embarrassing to the USA (Phillips, 2004, p. 2).[25] However, he was finally located and rearrested in 2004 in Albania where he was also charged, along with five others, for the killing of two police officers (one from Kosovo and one from UNMIK) in an ambush after the March 2004 riots. (US Department of State, Aug 2008, p. 1621)

A Regulation 64 panel was convened in the District Court of Pristina, with three international judges and two domestic judges, the lead judge being Hajnalka Karpati of Hungary. The trial held 10 hearings to evaluate the evidence against Ejupi, including the testimony of six witnesses, four of which were victims, along with 17 witness statements. There was strong physical evidence against the defendant, despite some serious missteps by the NATO investigators, including a cigarette butt with his DNA on it next to the spot where the bomb's detonator had been placed. (King and Mason, 2006, p. 100) Of particular note among the nonphysical evidence was the testimony of "Witness Alfa" who claimed that Ejupi had stated to him that the defendant had set off the bomb as the bus went by. The defendant himself chose to remain silent and did not present a case. (Humanitarian Law Center Report, 24 June 2011) Ejupi was initially convicted of 11 counts of murder as well as charges of terrorism, racial discrimination, causing general danger, and the unlawful possession of explosives. He was sentenced to 40 years imprisonment—the maximum sentence available to the court.

However, in March 2009, Ejupi was released from prison by the order of the Supreme Court of Kosovo. The court had determined that there was insufficient evidence to convict Ejupi and ordered his release. In its opinion, the court, led by three European Union Rule of Law Mission in Kosovo (EULEX) judges and three Kosovar judges, concluded that the material facts were insufficient to support the reasoning from the Trial Chamber. The aforementioned material evidence failed to provide any link to the crimes, and that

> the first instance judgement determined properly the material facts but that having regard to the determination of the factual situation, *in cause* the absence of convincing evidence

[25] The story of Ejupi's escape is absurd: Reportedly he was able to escape with the help of wire cutters that were baked inside a pie that was given to him by his family. See King and Mason (2006, pp. 99–100).

> against the accused, a judgement of acquittal (not guilty) should have been passed according to the application of the law. (Supreme Court of Kosovo, 12 March 2009, para. 5.1)

Further, the court argued that, given that the alleged crime had occurred 9 years previously, "sending back the case to the First Instance Court would not have any legal or real objective and contrary to the administration of justice." (para. 6.1) The case against Ejupi was thereby closed.

Unsurprisingly, there was a strong reaction to the court's ruling, particularly among Serbian officials. The Serbian interior minister Ivica Dačić declared that "the decision is scandalous. EULEX has freed an Albanian terrorist who is guilty of murdering Serbs and other citizens, although there was clear evidence against him." (Dačić, 14 March 2009) Another Serbian politician declared that the ruling "causes a lot of doubt, mainly about the objectivity of EULEX's court and the EU mission as a whole." (Dačić, 14 March 2009) Meanwhile, the Humanitarian Law Center in Belgrade, which had previously declared that the trial, "was conducted in accordance with fair trial standards and that the court handed down a just verdict which has brought the victims justice," (Humanitarian Law Center, 6 June 2008) argued that, the Supreme Court's opinion was "incomprehensible from a legal standpoint and unacceptable for victims' families and survivors, who have waited for years to see justice done." (Humanitarian Law Center, 15 March 2009) The consensus among the critics was that, though there were some clear inconsistencies in the testimony of a witness ("Witness Alfa"), the proper course of action would have been to re-hear the case in a lower court.

Conclusions

This chapter has been intended to provide a brief overview of some of the major cases undertaken by the various hybrid courts. Overall, the track record of these institutions is inconsistent at best. Some of the hybrid tribunals have had a measure of success in prosecuting at least most of the surviving major players in the conflicts under their jurisdiction. In the case of Sierra Leone, a tightly restricted list of targets allowed the prosecutor to effectively dispatch his mandate to pursue those most responsible for the violence in the war. (Even if some of the prosecutorial targets were controversial, the prosecutor's approach was at least economical.) While the Kosovo and Bosnia courts had a more open-ended mandate, they too had some notable successes, supporting the ICTY's effort to prosecute many people who were responsible for some of the worst violence of the Balkan wars. While these two tribunals largely failed to change minds about who was responsible for the violence in the region, they nonetheless dispensed some measure of justice in Kosovo and Bosnia. Others, on the other hand, have failed miserably. The ECCC and the Serious Crimes regime in East Timor were hamstrung by politics and by logistical and fiscal constraints that undermined their ability to carry out their mandates.

One thing that should be kept in mind when looking at these tribunals is that at the international level, the stakes in a criminal trial are quite different than those in

a domestic context. In domestic criminal trials, there are usually only a few individuals affected by an offense. Even a serious crime such as a mass shooting only directly affects a relatively small number of people and a mishandled trial is usually only a tragedy for a small number of individuals. A botched trial at a hybrid court can have far bigger ramifications, including political fallout and a public distrust of justice systems that are only nascent. Had Charles Taylor or Kaing Guek Eav been acquitted by the SCSL or the ECCC, it would probably have ruined any hope of restoring the integrity of the tribunals as well as in the broader political institutions associated with it. All of this means that these courts should not be looked at with the same eye that we use in domestic courts—the stakes are much higher because the circumstances in which they operate are much more fragile.

However, it is important to keep in mind the fact that, while the political stakes are significantly higher at the hybrid courts than in more traditional contexts, in other ways they are significantly lower. In most cases the crimes committed by individuals in these trials took place in a context that has long passed by the time the trials commenced. The war in Sierra Leone was ending as the SCSL was starting and the Khmer Rouge was distant history when the Special Chambers commenced proceedings against its leadership. Indonesia had long since abandoned East Timor when the Serious Crimes Process began. Thus, unlike a traditional criminal trial, it is highly unlikely that a figure like Issa Sesay would return to his criminal activity had he been acquitted at the Special Court. Even a figure like Charles Taylor, who had proven himself capable of committing great deals of mischief while out of power, was probably not a serious threat to stability in Sierra Leone, Liberia, or anywhere else in West Africa when he was handed over to the SCSL. This means that many of the traditional reasons for prosecuting people like Sesay or Stanković, such as incapacitation or specific deterrence, are largely irrelevant in these contexts.

Due to these considerations, the outcomes of the trials discussed in this chapter need to be placed in a broader context than those used for traditional, domestic criminal justice. The verdicts rendered by the hybrid trials, be they convictions or acquittals, are in many ways secondary issues when compared to the other contributions that the tribunals can make to a society. The conduct of the trial itself, either as a representation of the principles of the rule of law in the face of great injustice, or as a historiographic device to impartially determine the facts in highly contentious cases, is more important than the fate of a few people whose political and military relevance has long since waned. The contributions of the hybrid courts are much deeper than simply punishing wrongdoers, no matter how strongly the public may wish to see these people come to harm. With this in mind, we will return to look at the hybrid courts more broadly in the next chapter in order to understand the contributions that they have made, and that they have failed to make, in the broader political, military, and humanitarian dramas of which they have been a part.

Conclusions

Throughout this text it has been clear that each of the hybrid courts have suffered from some very serious flaws—flaws that in some cases have proven fatal to the ambitions of their architects. While there have been some notable successes, overall the failures stand as black marks in the hybrid courts. Further, these failings are too widespread to be mere isolated incidents but rather speak to deeper flaws within the hybrid court system as a whole. Given that the general consensus among scholars is that each of these tribunals was in some ways a "failure," or at least did not do as much good as they could have done, it is worthwhile spending a short amount of time outlining some of the weaknesses in the different hybrid tribunals. In this final section I will examine some of these weaknesses, making suggestions for how future hybrid tribunals may improve on their predecessors. We can learn from the hybrid tribunals more generally about transitional justice, nation-building, and all of the other dimensions of international criminal justice. While this may lead the reader to some measure of pessimism about the prospects of hybrid courts as a route to international justice in the future, it is my opinion that honest criticism is the best means to improvement as well as an antidote to triumphalist narratives regarding the prospects of international justice. (Krever, 2013)

I discuss four primary weaknesses that have plagued all of the different hybrid tribunals to some degree or another. While each institutions has had its own unique failings (and successes) and have failed (and succeeded) in their own idiosyncratic ways, these commonalities point to issues that are either endemic to international criminal justice as a whole, or are found in each of the different tribunals. First, I discuss the problem of *selectivity* in the hybrid tribunals. Then, I discuss the political independence of the different hybrid tribunals; they are only partially successful in their efforts to insulate themselves from international and national political forces. Then, I discuss the input of local professionals and the local community in the hybrid courts. Finally, I examine what I consider the most significant issue for the tribunals: the subject of funding. This will set up a brief discussion about the broader purposes of international justice and the role that the hybrid tribunals play in it.

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Selectivity

There is a recurring and troubling selectivity in the jurisdictions of the different hybrid tribunals: important people were targeted for prosecution but other significant individuals were ignored (such as Muammar Ghadafi or the myriad of parties involved in the Khmer Rouge's terror). There are several reasons why the hybrid tribunals were selective in their choice of targets. The first is technical: Many of the controlling documents of the tribunals limit their jurisdiction in important ways, ensuring that the court would not stray too far into cases that are inessential or otherwise problematic. For prosecutors to target individuals who bear anything less than the "greatest responsibility" for violence is to risk being caught up in a quagmire of prosecutions for relatively small fry. A second reason for selectivity is political: Simply put, leaders who are in power have no interest in seeing themselves or their compatriots prosecuted before these courts—nor do they wish to see an indictment list so thorough that it could destabilize an already fragile political situation. As hybrid courts are a part of the domestic system while being simultaneously independent from it, their prosecutors must choose their targets carefully as limited resources and political imperatives can easily undermine the court's ability to fulfill its mandate. A more thoroughly international court, whose agents were not involved in the conflict, would be better suited to prosecute and punish all individuals responsible for wartime atrocities, but given the limitations of the tribunals and the unique issues they must confront, a measure of selectivity is inevitable.

I have argued elsewhere that a certain measure of selectivity is both an unavoidable part of international criminal justice and that such selectivity is not inherently bad (Fichtelberg, 2009). As I discussed in Chap. 3, in most cases some of this selectivity was the product of a deliberate choice of a prosecutor who sought to use his prosecutorial discretion to promote a particular interpretation of the violence and to determine who bore the most responsibility for it—what I called a prosecutorial strategy. Surely such strategies represent a largely defensible form of selective justice. In the case of the Special Court for Sierra Leone (SCSL), the decision of the prosecutor to target a few people from each group seems to be a defensible form of selectivity; particularly, when he clearly explained the rationale for his actions. However, when selectivity is driven solely by financial concerns, purely political considerations, or mere expedience, this can be deeply problematic for local populations and for international observers. Limitations on the ability of prosecutors to pursue justice are understandable, but when the selection of targets is consistently whittled down for reasons that are not ultimately justifiable, the integrity of a tribunal can be seriously impaired.

One possible solution for the dilemma is for the international community and the international prosecutorial community to develop a series of principles for the prosecution of international offenses.[1] A clear set of ethical guidelines and best practices could serve the tribunals in two ways: First, they could serve as a guide

[1] Something like this has been suggested in Reydams, Wouters, and Ryngaert (2012b, pp. 942–943).

for creating these tribunals, giving those who craft the hybrid tribunals' founding documents guidance for how to structure the jurisdiction of the tribunals. Second, they could better help prosecutors defend their actions to a broader public, allowing the prosecutor to "deflect criticism that his discretionary choices are 'politicized', and strengthen his impartiality, and accountability." (Reydams, Wouters, and Ryngaert, 2012b, p. 942) A document that guides prosecutors and international negotiators in determining who should be prosecuted would be of only limited use in any particular case (as there is an enormous difference between different conflicts), but they can serve a variety of functions in helping prosecutors craft and defend their prosecutorial strategy.

Another less theoretical solution to this problem is for prosecutors to be "up front" about their prosecutorial strategies. Clearly explaining the limitations of international justice to the public and explaining why a set of individuals were prosecuted, while others were not, would go a long way towards helping the public understand the limitations of the prosecutor's activities. Simply put, the public is more likely to accept selective prosecutions if the grounds for the selectivity is presented to them in a clear unambiguous way, shorn of a claim that the decisions to prosecute certain defendants and not pursue others were absolutely necessary ones. This has been done with some success with the prosecutor's outreach office in Sierra Leone. Explaining the complex calculus the prosecutors must make in targeting individuals for prosecution would help give the tribunals more openness and ultimately more integrity. There will always be skepticism towards prosecutors and charges of selectivity in prosecution are easy to make, but their impact can be limited if prosecutors are open and honest about the kinds of decisions that they have made.

Political Support

The support that the international tribunals have received from states has often been fickle. Many governments embraced the hybrid tribunals at their inception, believing that they would provide tangible benefits, such as economic aid and assistance in establishing the rule of law, as well as intangible ones, such as a measure of transitional justice and closure for victims. In Sierra Leone and Cambodia, most notably, justice was embraced when it provided benefits for the political elites or strategic advantage over a political rival. Other times, such as in East Timor, Kosovo, or Bosnia, the hybrid courts bolstered the legitimacy of a new state that was seeking to enter the international community. Many of these governments embraced principles of international justice at the outset for a host of reasons that were both pragmatic and high minded.

However, when the more complex realities of the hybrid courts came out, namely that at times prosecutors would pursue cases that disturbed powerful actors their support evaporated quickly, or at a minimum was significantly more qualified. Some of the tribunals faced outright opposition from individual states or the international community when prosecutors made unpopular decisions or the judges

made unpopular rulings. The government of East Timor's enthusiasm for prosecuting their former tormentors evaporated when prosecutors targeted General Wiranto. When the ECCC sought to expand its caseload beyond Cases 001 and 002, the tribunal faced bitter opposition from the Cambodian government, which expected to close the book on the Khmer Rouge era and move on without further scrutiny. Many backers of the SCSL were skeptical when the indictment against Charles Taylor was unsealed and he was allowed to flee home to Liberia. While many states supported the hybrid tribunals in theory and rhetorically, in practice their support was significantly weaker—their leaders were simply unwilling to expend much political capital to support them.

It is impossible to run an effective criminal tribunal of any kind without some degree of political support from both the country where the court is located and the broader international community. The investigation of cases, the arrest of suspects, and the carrying through of prosecutions are nearly impossible without the support of local governments in a hybrid system. Many defendants have fled across borders and require the cooperation of governments in order to obtain and extradite them (this is leaving aside the financial support discussed below). In situations where there is little political support for a hybrid court, it is likely that the tribunals' tasks will become immeasurably more difficult: Many suspects in the former Yugoslavia were able to flee to pro-Serbian countries such as Russia or Serbia, or evaded the tribunal by sticking to sympathetic Serb communities within Bosnia. These realities present tremendous challenges for the hybrid tribunals which have no police force under their command and even lack the gravitas of the UN Security Council's Chapter VII powers (unlike the ad hoc tribunals) to induce reluctant states to cooperate.

Given the vicissitudes of politics, it is difficult to prepare for all of the political challenges that a new hybrid tribunal might face and therefore the political support for future tribunals is going to be unpredictable. It has been a thesis of this book that the historical and political context of the different tribunals has shaped their structure and their operation and the next tribunal will most likely be created in response to a set of circumstances that are very different than the ones that have been discussed here. It is crucial to understand the high-political cost these tribunals can exact from their supporters. States and other political actors (such as NGOs) must be prepared to expend a great deal of their political and economic capital in order to aid these tribunals and to extract commitments from as many stakeholders as possible in order for the tribunal to be effective. These stakeholders must also be clear-eyed about the trajectory of the tribunals so that cases like the indictment of General Wiranto or Cases 003 and 004 do not happen in the future. These cases, where there is a clear conflict between the interests of states and the imperatives of the tribunal, need to be discussed and resolved ahead of time as much as such things are possible. In many ways, opting to forgo criminal accountability for genocide, war crimes, or crimes against humanity would be preferable to half-hearted or cynical attempts to do so, such as Indonesia's Jakarta court or the sad end of the Serious Crimes regime, and there are always alternative, nonlegal ways to address widespread violence.

Local Input

Perhaps the most appealing feature of the hybrid tribunals is that they combine a local presence on the court with the widely shared principles of international justice. This local element of the court provides a great number of both tangible and intangible benefits to the hybrid system. On one hand, they bring a great deal of local knowledge to the court, helping other judges and attorneys understand the "ins and outs" of what are inevitably very complex local conflicts as well as with more nuanced issues of culture and tradition. Further, local personnel can help to promote the sense of ownership that was mentioned in the introduction—local populations will feel that they are participants in the hybrid courts and this feeling will allow the judgments of the court to have more domestic resonance than they might otherwise have. Finally, of course, these local personnel can be trained in law and criminal procedure, and other aspects of criminal justice, skills that they can then use to promote the development of domestic justice institutions after the hybrid tribunal has closed shop. This domestic presence is what defines the hybrid courts as a unique category of international tribunals and it is in many ways their greatest contribution to international justice.

Ideally at least, local personnel should operate at all levels of the hybrid court: judicial seats, administration, and facilities management should consist of a large number of domestic personnel working closely alongside international staff. However, the local presence in the court has been uneven throughout the different hybrid tribunals and in many cases it has been woefully inadequate.[2] Many of those who participated in and staffed the tribunals were internationals who were paid many times what an average local worker would be paid in a similar position if they were working outside of the hybrid court. There were many reports at different tribunals regarding the high-handedness of the international personnel and flawed training practices undertaken by the courts. There was a great deal to be desired in many of the tribunals in regards to the relations between domestic and international staff.

In some ways, the weak presence of domestic personnel is understandable. Many countries with hybrid tribunals lack citizens trained in the challenging systems of criminal procedure and the arcane rules of international law. Either trained lawyers have been killed in the preceding conflicts, fled to safer places and were reluctant to return, or never existed in the first place. Countries like Sierra Leone, Cambodia, and East Timor are among the poorest in the world with low education and literacy rates, making it difficult to find good candidates to serve as local staff. Finding qualified individuals and training them in the complex administrative and legal tasks that allow the hybrid system to function can be an expensive and time consuming process. Finally, of course, the presence of a large number of domestic personnel has proven problematic in places like Cambodia where ethical violations in staffing practices have been exposed in the press, and local personnel have proven unduly susceptible to the political manipulations of the Cambodian government.

[2] For one example of this in relation to the Serious Crimes Regime see Katzenstein (2003).

While domestic participation and local input is an absolutely necessary part of the hybrid courts, this participation comes with risks and costs and can undermine the work of the court.

In her article on hybrid tribunals, Higonnet has pointed to some ways to improve the local presence in the hybrid tribunals and thereby magnify their impact. Clearly the relationship between the domestic and the international personnel needs to be carefully considered at all levels of the courts' operations, with special attention to the power relations between the two groups. As she states:

> In order to strengthen the local judiciary, hybrid courts need to better address actual power dynamics within the hybrids themselves, focusing on coequality between local and international staff and incorporating training for members of the local judiciary within the mandate of the course. Substantive partnership, advisory, and mentoring programs must consistently be reinforced with a focus on good leadership and management. (Higonnet, 2006, p. 369)

The differing levels of authority must be considered in order for the tribunals to be effective in providing a domestic face to the international justice the hybrid courts provide, as well as for these institutions to contribute to the essential task of nation-building in places that desperately need it. Further, the tribunals must think "long term" in their staffing: The international community must commit to training and supporting these personnel before, during, and after a hybrid tribunal has operated.

Funding

Underlying almost all of the weaknesses of the hybrid courts is money. In many cases (Sierra Leone, Kosovo, and East Timor) the hybrid system was selected as a "second choice" approach, primarily because higher profile institutions such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were deemed too costly to imitate. The states where the hybrid tribunals set up shop are among the poorest in the world and as a result, the funds that the tribunals bring and the financial support that came with them were significant factors in consenting to the creation of the tribunals—local governments hoped to benefit financially from the tribunals either through the creation and staffing of the court or because cooperation with the tribunals was made a prerequisite for other forms of economic aid. Financial considerations shaped these tribunals in ways that are both big and small, as well as both good and bad, and many of the problems these tribunals have faced stem from their financial problems.

Despite being viewed as a cheaper alternative to more "purely" international forms of justice, many of the hybrid tribunals remained cash-starved throughout their existence—and it is understandable that critics have charged the international community with seeking "justice on the cheap" with these courts. (Cohen, 2007) Many of the tribunals, most notably the ECCC, have had significant trouble operating and have had to temporarily halt operations because of a lack of funds. On the other hand, the funding sources of other tribunals, such as the SCSL, have led some observers to charge that the courts were unduly influenced by the agenda of their fi-

nancial backers.[3] Money is not only crucial to the day-to-day operations of the tribunals, it is crucial to maintaining their independence and ultimately their legitimacy.

The lack of a reliable source of funding undoubtedly has had a tremendous impact on the operations of the hybrid tribunals. On a logistical level, long-term planning for cases is difficult if judges, prosecutors, and defense counsel are not clear about the amount of money they will have for investigations and trials or whether their contracts will be renewed when they expire. More deeply, unsteady funding for the tribunals threatens the objectivity and impartiality of trials as personnel may be tempted to alter prosecution targets or even the outcome of trials if they feel that funding may be jeopardized by failing to do so. Even if a tribunal does not alter its decisions with an eye towards funding, the very fact that funding often remains subject to the whims of benefactor states already creates the appearance of impropriety, which itself can be damaging in fragile political situations where distrust in institutions is already extremely high.

The most significant act that can be done to ensure that future tribunals are able to function smoothly is to establish clear reliable funding sources for them, sources that are consistent, realistic, and insulated from the political interests of various states. While tribunals—both hybrid and international—are undoubtedly expensive propositions and waste in UN operations is legendary, the contribution of these tribunals is horribly compromised when financial concerns are seen to be the driving force of the tribunal's activities. A secure pot of money that is insulated from governments and other political actors will assure that the hybrid courts remain capable of operating in a fashion that upholds the rule of law for as long as is necessary to complete their tasks.

Further, the budgeting for each of the (future) tribunals must be set up in such a way as to benefit the local community rather than exclusively going to well-paid international experts and local elites. While justice institutions are not primarily employment opportunities for the population of their host countries, as we have discussed, the inclusion of local personnel in the tribunals is essential to their ability to function. Showing that the tribunals are not dropped into the countries where they pronounce judgments and then make a hasty retreat to the clean, air conditioned comfort of Western Europe is essential to their ability to convince the local population to participate in the courts and to accept their judgments. One way to do this is to show that the tribunals are a part of the community and employ members of the community for both high-profile tasks (outreach, attorney work) and low-level work (clerical work, maintenance). As was already mentioned, local staff can enhance the standing of the courts among the population by helping keep domestic faces squarely in the center of the court and not simply in the dock. Hiring domestic staff at all levels helps show in a very concrete way that the tribunal is there for the local population and not solely for the international community.

All criminal tribunals are in many senses a failure by their very inception. Regardless of how well they operate and how effectively they mete out justice, tribunals cannot prevent harm that has already been done; they can only provide a minor

[3] This is implied, for example by vocal SCSL critic Peter Penfold (2014).

form remedy for those who are victims. Often, critics ask too much from them; they cannot make things "all better" or fundamentally change the balance of good and evil in the universe much less bring back the dead or bring a sense of peace to those who mourn them. They cannot fundamentally change the course of history and they cannot convince the people who were wrong to accept blame for their deeds. Nor can they dispense justice in a way that is so clean that there are no disagreements about the fairness of the procedures and the wisdom of their judgments. In this way, all courts, domestic or otherwise, can only work around the margins of social evil, providing some form of justice for those who remain on earth, and when contrasted with what we often want from criminal justice institutions, this will always be insufficient.

Moreover, while justice is always a high-minded ideal, criminal justice institutions are always human institutions that exist in a world of flawed beings. Courts are not immune to selfish beings seeking to manipulate the proceedings to their own ends. The people who run them are often sober, professional people who mean to do good with their work, but they are sometimes venal, arrogant, or even stupid. The defendants may genuinely believe that they are innocent of the charges against them or they may be cynically working a situation for whatever benefit they can get out of it. Prosecutors may pursue cases out of a genuine sense of outrage at injustice, but they may also be driven by professional ambitions and see justice as a mere tool for self-advancement. Those commenting on a trial in the public sphere may also be seeking to spin or manipulate the facts of a case to highlight a particular issue that benefits them or to promote a political agenda. Despite their idealistic bases, criminal courts, like all other institutions of society, are sometimes prey to the flaws of human beings.

The hybrid courts are not exempted from these problems—given their unique situations, these difficulties are often highly magnified. They have each failed in their own ways outlined above, but in general they have led to the same results; they have not deterred future wrongdoing as continuing human rights violations around the world attest to. They have (for the most part) failed to provide a sense of closure to many of the victims, and they have failed in many ways to significantly change the overarching consensus about what happened in Kosovo, Bosnia, East Timor, Sierra Leone, or Cambodia.

None of this means that the tribunals were not worth the expense or effort. Something must be done in response to mass atrocity, and clearly prosecution and punishment must always be part of the solution. Truth commissions, such as Sierra Leone's or Cambodia's, provide some benefits to the community but in many cases these are simply inadequate. Similarly, amnesties, such as the one provided by the Lomé Accord, are both deeply unsettling for victims and an invitation for the newly exonerated to continue their ravages. There is something undeniable about the pursuit of criminal accountability, whatever the inconvenience and cost of the creation of these criminal justice institutions.

Despite the weaknesses of the hybrid courts, they have in many ways succeeded in one of their most significant tasks; they seek to balance the accountability that the presence of international professionals provides on one hand with the indigenous

values and knowledge that local officials offer on the other. This was always the central goal of the hybrid courts: to have a domestic court that adhered to internationally recognized principles of justice in the face of great adversity and public pressure, but one that was also sensitive to the domestic priorities of desperate populations seeking to improve their lot. Despite their inability to provide a truly satisfying form justice (not that such things are possible in cases of mass atrocity), *none* of the tribunals compromised on this basic duality. Those in either the international community or in the local governments that sought to undermine the tribunals were forced to confront either the principles of international justice or the imperatives of the domestic constituency. Whatever their other weaknesses, all of the hybrid tribunals sought, as institutions, to maintain the balance between international and domestic principles that existed at the core of their mission. They may not have succeeded in their efforts, but, unlike purely domestic courts, which in many of these states were mired in corruption, ethnic partisanship, or political cronyism, they fought for an institutional independence that ultimately proved inconvenient for many.

On the other hand, the international staff in the purely international tribunals, such as the ICTY, did have the power to steamroller domestic, political, and cultural concerns in pursuit of idealized principles of justice. The Latin dictum "Fiat justitia ruat caelum" ("May justice be done, though the heavens fall") is appealing as long as the heavens are not falling on your home country. The fact that the international component of the hybrid courts was frustrated at times by the constant challenges they faced is in some sense a positive dimension of the hybrid system. The countries that the hybrid courts involved themselves in are politically and socially messy and to the extent that a hybrid court has a local component to it, it should also reflect this messiness. The hybrid courts were meant to have both domestic and international features to them and as a result they had the advantages and disadvantages of both.

Even when the tribunals have failed, such as in the most dramatic cases of the collapse of the Serious Crimes regime in East Timor or in the continued dispute between the Cambodian and the international officials at the ECCC, they have done so in a way that is different from other failures. The drama that has unfolded as the international officials fought to pursue a more idealistic agenda in the face of governmental recalcitrance was testimony to the importance of the hybrid system. The only option in the case of East Timor was to destroy the tribunal because it could not be co-opted—to essentially force the UN to abandon it. The only choice in the case of Cambodia was to ceaselessly badger the international staff to force them to submit them to the demands of Hun Sen's government. It is in the irresolvable tension between the demand for an impartial, idealized form of justice and the worldly demands of local governments that real justice is found, and it is this tension that the hybrid system has sought, however unsuccessfully, to maintain.

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