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HYBRID AND INTERNATIONALIZED CRIMINAL TRIBUNALS:  
JURISDICTIONAL ISSUES

SARAH WILLIAMS

A DOCTORAL THESIS SUBMITTED TO DURHAM UNIVERSITY  
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE  
DOCTOR OF PHILOSOPHY  
(LAW)

MARCH 2009

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*Decision on the Extradition of Ricardo Miguel Cavallo*, Supreme Court of Justicia, 10 June 2003, 42 ILM 888 (Mexico)  
*Polyukhovich v Commonwealth* (1991) 172 CLR 501 (Australia)  
*R v Bow Street Magistrate, ex parte Pinochet Ugarte* [No. 3] [1999] 2 All ER 97 (UK)  
*R (Al-Saadoon) v Secretary of State for Defence*, [2008] EWHC 3098 (Admin) (High Court)  
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Universal Declaration of Human Rights (10 December 1948)  
Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949)  
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Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949)  
Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949)  
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International Covenant on Economic, Social and Cultural Rights (16 December 1966)  
Vienna Convention on the Law of Treaties (23 May 1969)  
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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977)  
Convention against Torture and other Cruel, Inhuman or Degrading Treatment (10 December 1984)  
Convention on the Rights of the Child (20 November 1989)  
Rome Statute of the International Criminal Court (17 July 1998)  
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000)  
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (8 December 2005)

### *Regional*

Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950)  
European Convention on Extradition (13 December 1957)  
European Convention on Mutual Assistance in Criminal Matters (20 April 1959)  
Arab Convention for the Suppression of Terrorism (April 1998)

### *Bilateral*

Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (6 June 2003)  
Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone (16 January 2002)

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American Journal of International Law	<i>AJIL</i>
British Yearbook of International Law	<i>BYbIL</i>
Canadian Yearbook of International Law	<i>CYbIL</i>
Columbia Journal of Transnational Law	<i>Col JTL</i>
Columbia Law Review	<i>Col LR</i>
Criminal Law Forum	<i>Crim LF</i>
European Journal of International Law	<i>EJIL</i>
Fordham International Law Journal	<i>FILJ</i>
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ILSA Journal of International & Comparative Law	<i>ILSA JICL</i>
International and Comparative Law Quarterly	<i>ICLQ</i>
International Review of the Red Cross	<i>IRRC</i>
Journal of Conflict and Security Law	<i>JCSL</i>
Journal of International Criminal Justice	<i>JICJ</i>
Law and Contemporary Problems	<i>L&amp;CP</i>
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New York University Journal of International Law and Politics	<i>NYJILP</i>
New York University Law Review	<i>NYULR</i>
Proceedings of the American Society of International law	<i>ASIL Proceedings</i>
Stanford Journal of International Law	<i>Stan JIL</i>
Texas Law Review	<i>Tex LR</i>
Virginia Journal of International Law	<i>VJIL</i>
Yale Journal of International Law	<i>YJIL</i>
Yale Law Journal	<i>YLJ</i>
Yearbook of International Humanitarian Law	<i>YbIHL</i>

## INTRODUCTION

In recent years states have endorsed the principle of non-impunity, asserting that individuals should be held accountable for the commission of international crimes. The former Secretary-General of the United Nations has remarked that there must be ‘...an end to the global culture of impunity – the culture in which it is easier to bring someone to justice for killing one person than for killing 100,000’.<sup>1</sup> Support for the principle of non-impunity is based on two factors: the nature of international crimes and the benefits to be gained from trials. The first basis for non-impunity is that ‘[I]nternational Justice is built on the notion that heinous international crimes, such as genocide and crimes against humanity, harm all of us. Therefore, we all have an obligation to prevent such crimes and to punish those responsible for them’.<sup>2</sup> Second, trials may have the important effect of deterring the perpetrators – or future perpetrators – of such crimes and of marginalizing and delegitimizing perpetrators.<sup>3</sup> However, the principle of non-impunity is an idealized notion as politics and other factors will determine those individuals to be held accountable for which crimes and those who will remain immune from prosecution, as well as the forum used to secure accountability.

This thesis examines the response of international and domestic criminal law to atrocities. It will not consider alternatives to criminal justice, such as truth commissions, lustration or traditional justice mechanisms. Criminal law is by its nature coercive. It imposes responsibilities directly on individuals and punishes violations through the imposition of sanctions.<sup>4</sup> Enforcement of criminal law necessitates the power to arrest and detain suspects, to investigate alleged violations, to obtain the testimony of witnesses and victims and to protect witnesses, judges and staff of the tribunal and to punish those found guilty. International criminal courts do not have coercive powers and must rely on the support and cooperation of states. The

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<sup>1</sup> Annual Report of the Secretary-General on the Work of the Organization 1998, 27 August 1998, A/53/1, para. 180. See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, A/Res/60/147.

<sup>2</sup> Gurd, T., ‘Arresting the “Big Fish”’: Lessons on State Cooperation for the International Criminal Court’ in Aegis Trust, ‘Report: The Enforcement of International Criminal Law’ (2009), 28.

<sup>3</sup> Flintoft, C. and Grono, N., ‘The Politics of Ending Impunity’ in Aegis Trust, ‘Report: The Enforcement of International Criminal Law’ (2009), 19. See also Lattimer, M. and Sands, P. (eds), *Justice for Crimes Against Humanity* (2003), Introduction.

<sup>4</sup> Cryer, et al, *An Introduction to International Criminal Law and Procedure* (2007).

willingness to cooperate and the effectiveness of such cooperation will be a major factor in whether the tribunal can successfully fulfil its mandate.

Developments in international criminal law, including the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), and the reliance by states on the principle of universal jurisdiction, have been motivated by the desire to avoid impunity for international crimes.<sup>5</sup> One way of achieving criminal accountability is through national trials, which are generally considered to be the primary forum for accountability. The important role of trials before national courts is also reflected in the principle of complementarity found in the Rome Statute.<sup>6</sup> However, national proceedings may be restricted through the operation of legal principles such as statutes of limitation, amnesties, immunity and insufficient or inadequate provision for such crimes in domestic law. Trials may also encounter a lack of political support and/or insufficient resources.

Another mechanism is the establishment of international criminal tribunals by the United Nations Security Council. This model has the benefit of legal coercion and universality of application by virtue of the near-universal membership of the United Nations. However, this method is also hostage to the priorities and the political dynamics of the Security Council. The five permanent members can veto any decision to establish a tribunal that may affect their own national interests, or the interests of states or individuals closely associated with that state. This means that it is unlikely that individuals within those states, or their allies, will face trials for their actions before an international tribunal. Even amongst states that do not fall within this protected category, the limited attention and resources of the Security Council and the United Nations means that international mechanisms are not established for the majority of situations. Similarly, the ICC seeks to achieve universality, without coercive power, based on participation in the Rome Statute. Its ability to investigate situations and to try offenders is restricted both by its jurisdictional provisions, the limited number of parties to the Rome Statute and the limited resources of the ICC. It also depends on sufficient domestic implementation in the legal systems of states parties.

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<sup>5</sup> For example, see the preamble to the Rome Statute, ‘Determined to put an end to impunity for the perpetrators of these crimes...’.

<sup>6</sup> Article 17. For discussion see Kleffner, J., *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008).

There therefore exists a lacuna in the system of international criminal law enforcement. Hybrid or internationalized tribunals have been developed as a pragmatic solution to the failure of the international community to achieve, at least in part, the utopian ideal of non-impunity. The role of such institutions is to fill the gap between national courts, tribunals established by the Security Council and the competence of the ICC. Such tribunals are not a perfect solution to this lacuna; their creation requires sufficient political will within the community of states, the support of the state(s) most affected and in some cases the backing of the Security Council. Their establishment is on an ad hoc basis, meaning that certain situations will continue to escape accountability. As Brownlie noted ‘[P]olitical considerations, power and patronage will continue to determine who is to be tried for international crimes and who not’.<sup>7</sup> Even where the political will is present both internationally and domestically, some impunity will persist as due to their limited mandates and resources the internationalized tribunals will be unable to prosecute all offenders for all crimes. However, the imperfect and ad hoc nature of such tribunals should not undermine their potential utility in achieving non-impunity. The system of international criminal justice, which is still developing, is far from perfect.

This thesis examines the role of the hybrid and internationalized tribunals in the quest to achieve the principle of non-impunity. There are several past atrocities for which accountability is still to be achieved, and history suggests that atrocities will be perpetrated in future. Given the weakness of some national legal systems, particularly those affected by conflicts, and the jurisdictional and resource constraints of the International Criminal Court and other international tribunals, there will continue to be a demand for the creation of hybrid or internationalized tribunals. These tribunals raise many complex and interesting issues, some of which are relevant to all such bodies, while others are linked to specific national circumstances. Such issues include: the fairness of trials before such institutions and the procedures adopted; the independence and impartiality of the tribunal and its personnel; allegations of corruption; issues of capacity; the selection and qualifications of personnel, in particular judges; the participation of victims and civil parties in proceedings; and the question of the legacy of such tribunals. All these issues are worthy of detailed study. However, this thesis

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<sup>7</sup> Brownlie, I., *Principles of Public International Law* (6<sup>th</sup> edn, 2003), 575. See also Cryer, R., *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005).

adopts a more focussed approach to these tribunals, and concentrates on jurisdictional issues and the impact of such issues on the effectiveness of these tribunals.

The central issue explored is what are the options for the legal and jurisdictional basis for these tribunals, and how does the selection of the legal framework impact upon the operation of the tribunal in question. By examining the practice of states and the United Nations in designing and establishing such tribunals, and the practice and jurisprudence of the tribunals themselves, it is hoped to highlight the key jurisdictional issues that have arisen, most importantly the importance of identifying correctly the legal basis for the tribunal. This study demonstrates that the tribunals have not always adopted a correct, or even consistent, approach to their legal basis, and hence their findings on jurisdictional issues have been in some cases questionable.

The study concludes that there are three models of hybrid and internationalized tribunals, each having a different legal and jurisdictional basis. These are: courts effectively operating as national institutions of the affected state; courts established by treaty; and courts established by the Security Council acting under its powers pursuant to Chapter VII of the Charter. It is submitted that the majority of internationalized tribunals, if not all such tribunals, including those to be established in the future, fall within one of these three categories, despite vast differences in the circumstances leading to their establishment. The study rejects the notion of universal jurisdiction as a basis for such an internationalized or hybrid tribunal. While universal jurisdiction may, of itself, form a basis for the jurisdiction of an international or internationalized tribunal in the future, it is submitted that international law does not support the notion of a 'floating' universal jurisdiction for international crimes. Jurisdiction for such a tribunal is sourced either in a conferral of authority from the Security Council or in the consent of the state(s) concerned, combined with the delegation of jurisdiction from that state(s). The conclusions reached do not preclude further options, including universal jurisdiction, developing over time. Nor do they preclude a role for other entities, such as the General Assembly or other international organisations, from participating in the establishment of future tribunals. However, current concepts of jurisdiction, which remain linked to the notion of state sovereignty, have restricted examples to the three models discussed.

It is important when assessing any aspect of an internationalized tribunal to consider its legal basis and the category into which the tribunal falls. This will in turn determine the appropriate response to jurisdictional questions such as the applicability

of amnesties and immunities. The legal basis and the context within which a tribunal is created will also impact upon the jurisdictional framework to be adopted, including the personal, temporal, territorial and material jurisdiction. This study will also show that, while the blending of international and national elements into a single institution is a relatively new concept, the legal and conceptual framework within which such tribunals operate is not. These tribunals operate within the existing legal framework, which includes areas such as the notion of jurisdiction in international law, the role and powers of the Security Council in the areas of international peace and security, and the notion of state sovereignty. Related concepts such as the rules governing state immunity and the need for a legal basis for state cooperation are also well-established. This thesis aims to assist those designing future such tribunals, and the judges and personnel appointed to them, to consider these issues more carefully and to draw on previous decisions and practice so as to ensure clear and consistent decision-making in future.

The thesis adopts the following structure. In Chapter One, the available options for ensuring criminal trials are examined, including trials before national courts, trials before the courts of other states under the principle of universal jurisdiction, and trials before the international criminal tribunals, namely the ad hoc tribunals and the ICC. The strengths and weaknesses of each model will be assessed. Beyond this, Chapter One turns to the increasing reliance on the hybrid or internationalized tribunal, and the defining characteristics of such institutions.

Chapter Two outlines the background and establishment of the tribunals to be studied: the Special Court for Sierra Leone (SCSL); the International Judges and Prosecutors Programme in Kosovo (IJPP); the Special Panels for Serious Crimes in East Timor (SPSC); the Extraordinary Chambers in the Courts of Cambodia (ECCC); the War Crimes Chamber in the State Court of Bosnia and Herzegovina (WCC); the Iraqi High Tribunal (IHT); and the Special Tribunal for Lebanon (LST). All of these tribunals have been established in difficult and diverse circumstances. As can be seen in Table One (which sets out the key features of the tribunals), while there are some similarities between the tribunals, there are also many differences. Although this may suggest that no common defining features or unifying themes or approaches can be identified, this thesis aims to establish that it is possible to categorise the tribunal based on their legal basis.

Chapter Three studies the legal basis of each tribunal and identifies the three categories of tribunal outlined above. The second section of this chapter builds upon the previous discussion. It assesses the source of the tribunals' competence having regard to the category in which it is placed. Four possible sources of the jurisdiction conferred on the tribunal are examined: the jurisdiction of the territorial state or the state of nationality; a delegation of jurisdiction to the tribunal from a state(s); the competence of the Security Council to take action under article 41 of the Charter for the maintenance or restoration of international peace and security; and the notion of universal jurisdiction supporting the prosecution of international crimes. Of these possible bases, only the fourth is discounted.

Chapter Four examines the jurisdictional competence of the tribunals studied: personal, temporal, territorial and material. This chapter demonstrates how the decisions made in designing the tribunals, in particular their jurisdictional regime, result in only a limited number of individuals facing possible investigation and trial for a similarly limited range of crimes. It also details how the different contexts in which the tribunals were established have impacted upon the mandate and jurisdictional reach of the institutions studied.

Chapter Five considers three legal obstacles to the exercise of jurisdiction: immunity, amnesties, and the requirement to gain custody of the accused. Building upon the discussion in Chapter Three, this chapter suggests that the tribunals studied have not always adopted the correct approach to whether these barriers to the exercise of jurisdiction apply. It is argued that, when determining such issues, the tribunals need to consider the nature of their establishment, their legal basis and the nature and source of the jurisdiction that they are to exercise. This approach would lead to a more principled and consistent basis for such decisions. The final section offers some concluding remarks. The thesis is current as at 31 December 2008.

# CHAPTER ONE

## THE DEVELOPMENT OF THE HYBRID OR INTERNATIONALIZED TRIBUNAL

### 1 Introduction

The internationalized or hybrid international criminal tribunal is one of the latest developments in the evolution of international criminal law. It is an important tool in the quest to end impunity for perpetrators of international crimes. After a brief introduction to the concept of jurisdiction in public international law, this chapter discusses the traditional response to international crimes, trials before the courts of the (normally) territorial state. The recent and more controversial mechanism of trials before the courts of other states on the basis of universal jurisdiction is also considered. The chapter then outlines the trend towards the establishment of international criminal tribunals, culminating in the entry into force of the Rome Statute of the International Criminal Court in 2002. The advantages and disadvantages of trials before national courts and international criminal tribunals are outlined. The chapter next discusses the concept of the hybrid or internationalized tribunal, including the difficulty in identifying a comprehensive definition of the term. A typology of such tribunals, based on the level of international involvement is suggested. The final section recommends a number of guidelines that may assist in determining when to establish an internationalized or hybrid tribunal.

### 2 National jurisdiction for international crimes

#### 2.1 *Jurisdiction for international crimes*

Jurisdiction may be defined as describing ‘the limits of the legal competence of a State or other regulatory authority (such as the European Community) to make, apply, and enforce rules of conduct upon persons’.<sup>1</sup> As Berman notes, ‘[C]riminal jurisdiction is essentially a jurisdiction to prescribe and to punish’.<sup>2</sup> It is common to identify three ‘types’ of jurisdiction: jurisdiction to prescribe, jurisdiction to enforce, and jurisdiction to adjudicate. Jurisdiction to prescribe – or legislative jurisdiction – is the authority of a state to prescribe rules, while jurisdiction to enforce is the authority of a

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<sup>1</sup> Lowe, V., ‘Jurisdiction’ in Evans ed. *International Law*, (2<sup>nd</sup> ed, 2006), 335.

<sup>2</sup> Berman, F., ‘Jurisdiction: The State’ in Capps, P. et al (eds) *Asserting Jurisdiction: International and European Legal Approaches* (2003), 5. Jurisdiction also applies in a civil context, although there is some debate as to whether the rules to be applied are the same. This thesis will only examine criminal jurisdiction.

state to enforce those rules.<sup>3</sup> The third category of jurisdiction, jurisdiction to adjudicate, refers to ‘the right of courts to receive, try and determine cases referred to them’.<sup>4</sup> However, the authority of the courts within a state follows from the jurisdiction to prescribe. The organs of the court in question exercise the jurisdiction conferred on them (either by states or the Security Council) and, as will be seen in Chapter Four, the court will also interpret the jurisdiction conferred. Accordingly, jurisdiction to adjudicate is not required as a separate category of jurisdiction and will not be considered further.

It is now largely accepted that jurisdiction to prescribe must be exercised by a state based on recognised bases of jurisdiction.<sup>5</sup> The most important principle is that of territorial jurisdiction, whereby a state may exercise jurisdiction for acts committed upon its territory. The territorial principle also includes ‘subjective’ and ‘objective’ territorial jurisdiction, so that the state may exercise jurisdiction where one of the constituent elements of the offence occurs within its territory.<sup>6</sup> In recent years, at least in the human rights context, states have also been found to ‘exercise’ jurisdiction where they have control of the territory of another state, either due to military occupation or otherwise.<sup>7</sup> Nationality of the offender is also an accepted basis for the exercise of jurisdiction by a state.<sup>8</sup> Jurisdiction based upon the nationality of the victim – the so-called passive personality principle – may have found acceptance only in relation to certain categories of crimes, in particular terrorism.<sup>9</sup> The protective

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<sup>3</sup> Unlike jurisdiction to prescribe, jurisdiction to enforce is always territorial, unless the consent of the third state is obtained.

<sup>4</sup> Lowe, note 1, 339.

<sup>5</sup> The contrary conclusion of the Permanent Court of International Justice in the *Lotus* case, which provided that states may exercise their jurisdiction to persons, property and acts outside of their territory subject only to a specific rule prohibiting the exercise of such jurisdiction, has been discredited and is now considered not to represent customary international law. See: *Lotus (SS) Case (France v. Turkey)* PCIJ Ser. A. (1927) No. 9, 19. For further discussion see Lowe, note 1; Akehurst, M., ‘Jurisdiction in International Law’ (1973) 46 *BYBIL* 145; Cryer, R., *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005); and Ryngaert, C., *Jurisdiction in International Law* (2008), Chapter Two.

<sup>6</sup> *Lotus* Case, 23. The territorial principle may also include the so-called ‘effects doctrine’ whereby a state may exercise jurisdiction where the act in question has an effect within its territory: see Lowe, V., ‘US Extraterritorial Jurisdiction: the Helms-Burton and D’Amato Acts’ (1997) 46 *ICLQ* 378.

<sup>7</sup> *Bankovic and other v Belgium and others* (Appl. No. 52207/99), Admissibility Decision of 12 December 2001, 11 *BHRC* 435.

<sup>8</sup> Arnell, P., ‘The Case for Nationality-Based Jurisdiction’ (2001) 50 *ICLQ* 955. More recently, states have also relied on other criteria besides nationality, such as residence. See, for example, the International Criminal Court Act 2001 (United Kingdom).

<sup>9</sup> See *United States v Yunis* (1991) 30 *ILM* 403; *United States v Yousef* 327 F.3d 56 (US 2nd Cir., 2002), both concerning terrorist offences. Three judges of the International Court of Justice have noted that ‘[p]assive personality...today meets with relatively little opposition, at least as far as a particular category of offences is concerned’: *Arrest Warrant of 11 April 2000*

principle permits the exercise of jurisdiction where the offence in question is directed at ‘the essential interests of the State’.<sup>10</sup> Offences prosecuted under this principle generally relate to national security or a threat to the existence of the state, but would also include offences such as counterfeiting of currency.<sup>11</sup> The final basis for the exercise of criminal jurisdiction is the principle of universal jurisdiction. The widest view of universal jurisdiction is that it enables a state to criminalise conduct based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.<sup>12</sup> To this list of possible bases for the exercise of extraterritorial jurisdiction must be added the growing reliance upon treaty-based jurisdiction. Several treaties provide that states parties must provide effective penal sanctions for acts prohibited by the treaty, and, where persons accused of such conduct are located within the territory of the state party, must try the individual before domestic courts or extradite the individual for trial elsewhere.<sup>13</sup> This is known as the *aut dedere aut judicare* principle.<sup>14</sup> Such jurisdiction is not universal jurisdiction, as it is based on specific treaty obligations and applies only to those states parties to the relevant international legal instruments.<sup>15</sup>

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(*Democratic Republic of Congo v. Belgium*) ICJ Reports 2002 (hereafter the *Arrest Warrant* case), Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 11.

<sup>10</sup> Lowe, note 1, 347.

<sup>11</sup> *Attorney General of the Government of Israel v Eichmann* (1961) 36 ILR 5.

<sup>12</sup> The Princeton Principles on Universal Jurisdiction, 2001: available at [http://www.law.ac.edu/morgan/newsdir/unive\\_jur.pdf](http://www.law.ac.edu/morgan/newsdir/unive_jur.pdf); Justitia et Pace, Institute of International Law, Krakow Session – 2005, Seventeenth Commission, *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*; Kress, C., ‘Universal Jurisdiction over International Crimes and the *Institut de Droit international*’ (2006) 4 *JICJ* 561; and O’Keefe, R., ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *JICJ* 735.

<sup>13</sup> Treaties that incorporate this principle include: the Geneva Conventions and Additional Protocol I to the Geneva Conventions in relation to grave breaches only, articles 49, 50 (GCI), articles 50 and 51 (GCII), articles 129 and 130 (GCIII), articles 146 and 147 (GCIV) and articles 11, 85, 86 and 88 (API); the Convention Against Torture (article 6); and many terrorism conventions, for example, the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (article 7) and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 (article 7).

<sup>14</sup> For further discussion of this principle, see Bassiouni, M.C. and Wise, E., *Aut Dedere Aut Judicare: The Duty to Prosecute in International Law* (1995). See also the current work of the International Law Commission on the topic: A/CN.4/571 (Preliminary report of the Special Rapporteur, 7 June 2006); A/CN.4/585 (Second Report of the Special Rapporteur, 11 June 2007); and A/CN.4/603 (Third Report of the Special Rapporteur, 10 June 2008).

<sup>15</sup> Broomhall considers that ‘this form of jurisdiction is not truly “universal”, but is a regime of jurisdictional rights and obligations arising amongst a closed set of states parties’: Broomhall, B., ‘Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law’, (2001) 35 *NELR* 399, at 401. See also Brownlie, I., *Principles of Public International Law* (6<sup>th</sup> ed, 2003); Higgins, R., *Problems and Processes – International Law and How We Use It* (1994), 62-65; Lowe, note 1, 349-351.

## **2.2 Exercise of jurisdiction by the territorial state or the state of nationality**

Where a state has exercised its prescriptive jurisdiction so as to criminalize certain conduct occurring within its territory, it will generally confer jurisdiction to try such conduct on its national courts, such jurisdiction to be exercised by those courts in accordance with its national laws. The preference in international law for trials before domestic courts, in particular the courts of the territorial state, reflects certain advantages of domestic proceedings. First, this approach is based in and respects the traditional international law notions of state sovereignty and the principle of non-interference in the internal affairs of a state.<sup>16</sup> Second, domestic trials are generally considered to be the most practical option. Victims, defendants, witnesses and evidence will normally be found within that state. Third, domestic trials are considered to be the best means of conveying a sense that society is questioning the impact of the individual's actions on the local populace – those most directly affected – and that society is dispensing 'justice' to the accused. This permits a sense of ownership of the judicial process, which may make a contribution to rehabilitation of the accused and reconciliation between victim and offender. Fourth, domestic trials, even in respect of cases that are particularly complex or significant, should improve the capacity and confidence of the judicial and legal system. Finally, domestic proceedings enable the territorial state to incorporate a bespoke approach to criminal justice, allowing a greater ability to tailor the design of the system to the needs of the situation. This may include introducing new legal mechanisms, the use of traditional justice approaches, or amendments to the substantive or procedural law.

Instances of states exercising jurisdiction to try crimes considered to be international crimes were rare until the last two decades, and those that did occur largely concerned war criminals from the Second World War. Other examples include trials for genocide in Equatorial Guinea,<sup>17</sup> the convictions in absentia of Khmer-Rouge leaders in Cambodia in 1970,<sup>18</sup> and several trials before national courts in relation to violations of the Geneva Conventions. The 1990s saw an increase in the number of domestic

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<sup>16</sup> Article 2(7), Charter.

<sup>17</sup> In September 1979 Francisco Macias Nguema (the former President of Equatorial Guinea) was tried and convicted by a Special Military Court on charges including genocide, multiple murders and embezzlement. He was subsequently executed. Ten political associates were also tried and convicted. For further discussion, see Quigley, J., *The Genocide Convention: An International Legal Analysis* (2006).

<sup>18</sup> In 1979 the government installed in Cambodia by Vietnam ordered the trial by a revolutionary people's court of Pol Pot and Ieng Sary, the deputy prime minister and minister of foreign affairs. Both men were convicted and sentenced to death in absentia.

trials for conduct that could constitute international crimes, although the majority were tried as ordinary crimes. Domestic trials have in the past occurred in states including Ethiopia, Argentina, Germany, Rwanda, Guatemala, Chile, Indonesia and Hungary and are ongoing in several states of the former Yugoslavia, including Serbia, Croatia and Bosnia and Herzegovina (BiH).<sup>19</sup>

The exercise of territorial or national jurisdiction in respect of international crimes presents many challenges. The model presumes a stable state and justice system; essentially a state of normalcy in the territorial state. Yet in many conflict and post-conflict societies this presumption simply does not hold. The most extreme situation is where the local system has collapsed because of the conflict, leading to a lack of the physical, financial and human resources necessary to operate the judicial system. There is no infrastructure to conduct any trials, let alone complex and sensitive trials. A related concern is that where a conflict has recently ended, or is ongoing, the security situation may not permit the holding of trials, especially those connected to the conflict. Even if the judicial system is operational it may not be able to cope with trials of all offenders where the conflict has produced a significant number of accused. Moreover, some otherwise-functioning systems raise specific concerns. The domestic system may not be capable of functioning either impartially or independently of the government or other key national power groups. The existing system may be tainted by association with a prior regime. Government and key officials may be implicated in the alleged actions and may wish to interfere with or avoid investigation and prosecutions altogether. Alternatively there may be a perceived need to remove judges and officials associated with the previous regime, leading to a loss of vital skills and experience. Members of minority groups alienated by the conflict may be unable or unwilling to participate, and the procedural standards may not meet the minimum standards required by international human rights law. All these factors may lead the local population to struggle to accept the criminal justice system as legitimate, unbiased and fair.

More subtle obstacles to trials before national courts may exist in the domestic procedural or substantive law. For example, the applicable procedural law may not accord with internationally accepted fair trial standards and the resulting convictions or acquittals would therefore be considered suspect. In terms of substantive law, there may be amnesty provisions, domestic immunities or simply an underdeveloped

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<sup>19</sup> Rikhof, J., 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity' (2009) 20 *Crim LF* 1.

substantive law that does not criminalise the activity in question, or else considers the action to constitute a ‘lesser’ crime. Even where a suitable law exists, the judiciary, prosecution and defence may have little or no experience of trials for serious or systematic crimes conducted during the conflict, and limited exposure to principles of substantive international criminal law. Despite the nature and complexity of the crimes committed, local lawyers may treat them as ordinary domestic crimes, or alternatively those lawyers may be uncertain about how to prove or defend such serious charges.

### **2.3 The exercise of universal jurisdiction**

Trials before the courts of a third state may also be an option to end impunity for international crimes. In criminalizing conduct that has occurred outside its territory, a state may be exercising jurisdiction based on principles of nationality of the victim or offender, or the protective principle. However, it is the exercise of universal jurisdiction that has attracted the most attention. Broomhall identifies both normative and pragmatic rationales for the existence of universal jurisdiction in international law. The pragmatic rationale is that other bases of jurisdiction are insufficient to ensure accountability, ‘as these acts are often committed by those who act from or flee to a foreign jurisdiction, or by those who act under the protection of the State’.<sup>20</sup> He argues that this consideration is apparent in particular regarding piracy on the high seas,<sup>21</sup> slavery and terrorism. The normative rationale is that such crimes are of universal concern, ‘deserving condemnation in themselves, and deemed to affect the moral and even peace and security interests of the entire international community’.<sup>22</sup> Thus universal jurisdiction is potentially an important tool to combat impunity.

Universal jurisdiction is said to arise under both treaty and customary international law.<sup>23</sup> So-called ‘true’ universal jurisdiction arises only under customary international law. The category of offences in relation to which universal jurisdiction arises in

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<sup>20</sup> Broomhall, B., *International Justice & The International Criminal Court: Between Sovereignty and the Rule of Law* (2003), 107-8.

<sup>21</sup> Note, however, the concerns of several commentators that the piracy analogy is inappropriate for international crimes such as war crimes, genocide and crimes against humanity. For detailed discussion, see Kontorovich, E., ‘The piracy analogy: modern universal jurisdiction’s hollow foundation’ (2004) 45 *HILJ* 183.

<sup>22</sup> Broomhall, note 20, 107.

<sup>23</sup> For a detailed discussion of universal jurisdiction, see Bassiouni, M.C., ‘Universal Jurisdiction for international crimes: historical perspectives and contemporary practice’ (2002) 42 *VJIL* 81; and Randall, K., ‘Universal Jurisdiction Under International Law’ (1988) 66 *TexLR* 785.

customary international law is limited. It may include offences such as piracy,<sup>24</sup> genocide,<sup>25</sup> crimes against humanity,<sup>26</sup> grave breaches of the Geneva Conventions,<sup>27</sup> slavery,<sup>28</sup> and torture,<sup>29</sup> although it is has been argued that it may also include offences such as other serious violations of international humanitarian law,<sup>30</sup> (such as acts short of torture such as cruel, inhuman and degrading treatment), certain acts of terrorism, apartheid and forced disappearances. Several states have introduced domestic legislation that criminalized crimes committed abroad, based either on jurisdiction deriving from treaty provisions or under customary international law.<sup>31</sup> However, instances of domestic courts relying upon such provisions were rare until relatively recently. Since the 1990s the courts of an increasing number of mainly European states have commenced proceedings concerning acts committed outside the prosecuting state.<sup>32</sup> States where complaints have been filed, investigations

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<sup>24</sup> Commentators and the majority of judges in the *Arrest Warrant* case agree that universal jurisdiction is recognised in relation to piracy, see: Cassese, A., 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case' (2002) 13 *EJIL* 853, 857.

<sup>25</sup> The Genocide Convention does not recognize universal jurisdiction in respect of acts of genocide. However, genocide has subsequently been considered to as giving rise to universal jurisdiction under customary international law: Morris, M., 'Universal Jurisdiction in a Divided World' (2001) 35 *NELR* 337, 347.

<sup>26</sup> *Attorney General of the Government of Israel v Eichmann*, note 11.

<sup>27</sup> *Prosecutor v Tadic*, Decision on Jurisdiction, Appeals Chamber, 2 October 1995 (the *Tadic Jurisdiction Decision*), para. 80. See also Van Elst, R., 'Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions' (2000) 13 *LJIL* 815.

<sup>28</sup> None of the treaties aimed at the suppression of the slave trade explicitly provide for the exercise of universal jurisdiction. However, the majority view appears to support the possibility of the exercise of universal jurisdiction for slavery under customary international law: see, Randall, K., note 23, 798. For the contrary view see Bassiouni, note 23, 114-115.

<sup>29</sup> The argument that customary international law permits the exercise of universal jurisdiction in respect of torture can be made more forcefully since the decision of the ICTY in *Prosecutor v Furundžija*, Judgment, Trial Chamber, 10 December 1995, para. 156. See also *R v Bow Street Magistrate, ex parte Pinochet Ugarte* [No. 3] [1999] 2 All ER 97.

<sup>30</sup> Meron, T., 'International Criminalization of Internal Atrocities' (1995) 89 *AJIL* 569, 568-76; Meron, T., 'Is International Law Moving Towards Criminalization' (1998) 9 *EJIL* 18, 23 and 29. See also Boelaert-Suominen, S., 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts?' (2000) 5 *JCSL* 63; Graditzky, T., 'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts' (1998) 322 *IRRC* 29; Dinstein, Y., 'The Universality Principle and War Crimes' in Schmitt, M.N. & Green, L. (eds) *The Law of Armed Conflict: Into the Next Millennium* (1998); and Kamminga, M., 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences' (2001) 23 *HRQ* 940, 947-8.

<sup>31</sup> For an overview of municipal legal provisions and cases concerning universal jurisdiction, see Reydams, L., *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003).

<sup>32</sup> For the role of European states in advancing the concept of universal jurisdiction, see Human Rights Watch, *Universal Jurisdiction in Europe*, June 2006.

commenced and / or trials conducted<sup>33</sup> include Australia,<sup>34</sup> Belgium,<sup>35</sup> France,<sup>36</sup> Germany,<sup>37</sup> the Netherlands,<sup>38</sup> Spain,<sup>39</sup> the United Kingdom<sup>40</sup> and Senegal.<sup>41</sup>

The detention of General Pinochet by the United Kingdom during a private visit to London in 1998 following a request for extradition from Spain and the subsequent legal proceedings<sup>42</sup> were, at the time, considered to herald a new era for the prosecution of international crimes. Reliance on universal jurisdiction would, it was believed, overcome the twin difficulties of relying upon the territorial state to exercise its jurisdiction and the absence of a functioning international court. This initial optimism may have been misguided, as universal jurisdiction has not proved to be the

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<sup>33</sup> Note that not all of these proceedings are based on universal jurisdiction – some may also rely upon the principle of passive personality.

<sup>34</sup> See *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (trials in respect of crimes against humanity and war crimes committed against Jews in Ukraine).

<sup>35</sup> Successful convictions include the Butare Four case and the case against Rwandan businessmen Etienne Nzabonimana and Samuel Ndashyikirwa, both of which related to the commission of crimes during the Rwandan genocide in 1994. A case is still outstanding in respect of former Chadian dictator, Hissene Habre. Other cases were withdrawn following changes to the relevant law in 2003. For discussion, see: Reydams, L., 'Universal Criminal Justice: The Belgian State of Affairs' (2000) 11 *CrimLF* 183; Reydams, L., 'Belgium's first application of universal jurisdiction: the Butare Four' (2003) 1 *JICJ* 428.

<sup>36</sup> On 1 July 2005, Ely Ould Dah was sentenced in absentia for torturing black African members of the military in Mauritania in 1990 and 1991. Other cases remain ongoing.

<sup>37</sup> German authorities investigated and prosecuted several offences committed in the former Yugoslavia. However, since the relevant legislation was modified in 2002, no complaints have been investigated. This includes cases filed against former US Secretary of State for Defence, Donald Rumsfeld, former Chinese President, Jiang Zemin, and former Uzbek Minister of the Interior, Zokirjon Almatov.

<sup>38</sup> In 2004 a Congolese national was convicted of leading death squads in Kinshasa between 1990 and 1995. In 2005 two Afghans were convicted for their involvement in torture and war crimes.

<sup>39</sup> Spain has relied most frequently on universal jurisdiction in relation to international crimes. Cases initiated in Spain include the following: former Chilean dictator, Augusto Pinochet; former Peruvian President, Alberto Fujimori; Argentine military officer Adolfo Scilingo (see Gil Gil, A., 'The flaws of the *Scilingo* judgment' (2005) 3 *JICJ* 1082; Pinzauti, G., 'An instance of reasonable universality: the *Scilingo* case' (2005) 3 *JICJ* 1092 and Tomuschat, C., 'Issues of universal jurisdiction in the *Scilingo* case' (2005) 3 *JICJ* 1074); Argentine military officer Ricardo Miguel Cavallo; the Guatemalan Generals case (see note 44); and cases concerning events in Tibet (see Bakker, C., 'Universal Jurisdiction of Spanish courts over genocide in Tibet: can it work?' (2006) 4 *JICJ* 595).

<sup>40</sup> The first successful trial under universal jurisdiction legislation occurred in 2005, with the conviction of Faryadi Zardad, an Afghan militia leader, of acts of torture and hostage-taking in Afghanistan in the 1990s. However, the legislation criminalizing the conduct was based on the United Kingdom's treaty-based obligations so it was not an exercise of universal jurisdiction in the sense used in this thesis.

<sup>41</sup> The trial of former Chadian dictator, Hissene Habre will be conducted by a court in Senegal, after repeated requests by the African Union for Senegal to do so. For discussion of the earlier stages of the proceedings, see Brody, R., 'The Prosecution of Hissene Habre – An "African Pinochet"' (2001) 35 *NELR* 321.

<sup>42</sup> For discussion of the proceedings in the United Kingdom, Spain and other European courts, see Roht-Arriaza, N., 'The Pinochet Precedent and Universal Jurisdiction' (2001) 35 *NELR* 311.

‘cure-all’ it was hoped it would be. Instances where a state has exercised universal jurisdiction have highlighted the challenges involved. First, there remains division between states and commentators as to the exact content of the principle of universal jurisdiction and the crimes to which it applies, absent a specific treaty provision.<sup>43</sup> For example, is a link to the prosecuting state – such as custody of the accused – required? Is universal jurisdiction only ever to be a jurisdiction of ‘last resort’?<sup>44</sup> In addition, there are conflicting views as to whether the exercise of universal jurisdiction is permissive or mandatory.<sup>45</sup> Second, trials based on universal jurisdiction have tended to become heavily politicized, with governments concerned that the investigation of foreign government officials may affect diplomatic relations with the state concerned, and be inconvenient or embarrassing to the state where the trial is to be conducted.<sup>46</sup> Such concerns have already led at least one state to revise its laws based on universal jurisdiction.<sup>47</sup> Moreover, universal jurisdiction is more likely to be exercised by an

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<sup>43</sup> The varying views on the scope of universal jurisdiction were apparent in the opinions expressed by the ICJ in the *Arrest Warrant case*. For discussion of the different viewpoints, see: Boister, N., ‘The ICJ in the *Belgian Arrest Warrant case*: arresting the development of international criminal law’ (2002) 7 *JCSL* 293; O’Keefe, note 12; and Cassese, note 24. The International Court of Justice may have further opportunities to address the issue of universal jurisdiction in international law, with proceeding pending between the Republic of the Congo and France with respect to proceedings for crimes against humanity and torture commenced against the Congolese Minister of the Interior, Mr. Pierre Oba, in connection with which a warrant was issued for the witness hearing of the President of the Republic of the Congo, Mr. Denis Sassou Nguesso: *Certain Criminal Proceedings in France (Republic of Congo v France)*. Proceedings are also pending relating to a dispute between Belgium and Senegal concerning Senegal’s obligation to extradite or prosecute Hissene Habre: *Proceedings instituted by the Kingdom of Belgium against the Republic of Senegal (Belgium v. Senegal)*.

<sup>44</sup> This refers to the so-called ‘subsidiarity’ of universal jurisdiction, such that universal jurisdiction should only be exercised where the territorial state or the state of nationality is unable or unwilling to exercise jurisdiction. For discussion of the relevant decisions of the Spanish courts on this issue, see Ascensio, H., ‘The Spanish decision in *Guatemalan Generals*: unconditional universality is back’ (2006) 4 *JICJ* 586, and Ascensio, H., ‘Are Spanish courts backing down on universality? The Supreme Tribunal’s decision in *Guatemalan Generals*’ (2003) 1 *JICJ* 690. See also Cassese, A., ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’ (2003) 1 *JICJ* 589.

<sup>45</sup> For the view that universal jurisdiction is permissive only, see: Scharf, M., ‘The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes’ (1996) 59 *L&CP* 41, 52-59; Meron, note 30 (1995); and Broomhall note 20, 404-6. For the argument that the exercise of universal jurisdiction should be mandatory in certain circumstances, see Bassiouni, M.C., *Crimes Against Humanity in International Law* (2<sup>nd</sup> ed, 1999), 220 (on crimes against humanity) and Bassiouni, M.C., ‘Accountability for International Crime and Serious Violations of Fundamental Human Rights: International crimes: *Jus Cogens* and *Obligatio Erga Omnes*’ (1996) 59 *L&CP* 63.

<sup>46</sup> Morris notes that, as war crimes, genocide and crimes against humanity will often involve official acts, trials of such acts pursuant to universal jurisdiction ‘often will constitute, in effect, the judgment of one state’s policies and perhaps, officials, in the courts of another state. In such instances...universal jurisdiction will become a source and an instrument of interstate conflict’, Morris, note 25, 354. Moreover, prosecutions may be politically motivated.

<sup>47</sup> In 2003 Belgium amended its laws permitting the exercise of universal jurisdiction as a result of direct pressure from the United States following the filing of complaints in Belgium against US military and political leaders. The United States threatened to have the NATO headquarters moved from Brussels. See: Reydam, L., ‘Belgium Reneges on Universality: The

established, Western state, which raises allegations of neo-colonialism.<sup>48</sup> In 2008, the African Union resolved that:<sup>49</sup>

- (i) The abuse of the Principle of Universal Jurisdiction is a development that could endanger International law, order and security;
- (ii) The political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States;
- (iii) The abuse and misuse of indictments against African leaders have a destabilizing effect that will negatively impact on the political, social and economic development of States and their ability to conduct international relations;
- (iv) Those warrants shall not be executed in African Union Member States.

This resolution was in response to the issue and in some cases execution of arrest warrants by France and Spain in respect of Rwandan officials.<sup>50</sup> The African Union intends to bring the issue of the potential abuse of the principle of universal jurisdiction to the attention of the Sixth Committee of the General Assembly and has asked member states not to execute any warrants that may be pending.<sup>51</sup>

Third, there are concerns regarding the resources required to try such cases, which are often complex and raise novel and difficult questions of law for domestic courts. Fears that a legal system may become the forum of choice, leading to great expense and inconvenience for national authorities, has led to some dampening of political enthusiasm for universal jurisdiction. In this context it is significant that most trials have been initiated by complaints lodged by private individuals, including victims and non-governmental organisations. Fourth, the states concerned have found it difficult to obtain custody of the accused and to locate and produce witnesses and evidence because treaties on extradition and mutual legal assistance generally do not specifically contemplate universal jurisdiction for international crimes.<sup>52</sup> There are also concerns that the defendant's right to a fair trial may be adversely affected in a

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5 August 2003 Act on Grave Breaches of International Humanitarian Law' (2003) 1 *JICJ* 679; Cassese, note 47.

<sup>48</sup> Cryer, note 5, 95-7.

<sup>49</sup> Decision On The Report Of The Commission On The Abuse Of The Principle Of Universal Jurisdiction, Doc. Assembly/AU/14 (Xi).

<sup>50</sup> An arrest warrant issued by a French judge in respect of nine Rwandan officials led to the arrest in Germany in November 2008 of the Director of State Protocol, Rose Kabuye.

<sup>51</sup> Statement By His Excellency Jakaya Mrisho Kikwete, The Outgoing African Union Chairman And President Of The United Republic Of Tanzania At The 12th Summit Of The Heads Of State And Government Of The African Union, Addis Ababa, Ethiopia, February 2009.

<sup>52</sup> For discussion, see: Broomhall, note 20, 412-416.

trial located outside the territorial state,<sup>53</sup> or that the courts of other states will not remain impartial.<sup>54</sup> Fifth, the relevant legal provisions may be inadequate: the relevant state may not have appropriate legislation,<sup>55</sup> or defendants may rely on amnesties or immunities.<sup>56</sup> Sixth, many states allow the final decision on initiating prosecutions to be made by the relevant prosecuting authorities, which often possess a wide degree of discretion as to whether such cases are pursued.<sup>57</sup>

Given these challenges, it cannot be said that prosecution of international crimes before the courts of states other than the territorial state presents an effective or reliable mechanism for achieving justice in all cases. Moreover, given the political factors at play, it is doubtful that universal jurisdiction will prove to be the wide-reaching tool to end impunity that was hoped. Accordingly, as outlined in the next section, many states have called for greater reliance on international mechanisms to ensure non-impunity, in particular through the establishment of international criminal courts.<sup>58</sup>

### **3 International criminal law and institutions**

#### **3.1 The Post-war period**

‘Modern’ international criminal law originated from the period following the Second World War, with the creation of the International Military Tribunal (IMT) to prosecute

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<sup>53</sup> Morris, note 25, 352-3; Kissinger, H., ‘The Pitfalls of Universal Jurisdiction’ (2001) *Foreign Affairs* 86; cf Roth, K., ‘The Case for Universal Jurisdiction’ (2001) *Foreign Affairs* 150. Fletcher argues that the failure to preclude trials in violation of the principle of double jeopardy is a fundamental flaw: Fletcher, G., ‘Against Universal Jurisdiction’ (2003) 1 *JICJ* 580, 582. For a rebuttal, see Eser, A., ‘For Universal Jurisdiction: Against Fletcher’s Antagonism’ (2004) 39 *Tulsa Law Review* 955 and Abi-Saab, G., ‘The Proper Role of Universal Jurisdiction’ (2003) 1 *JICJ* 596.

<sup>54</sup> For the contrary argument, see Cryer, note 5, 97-9.

<sup>55</sup> For example, the United States has been hampered in its use of universal jurisdiction by gaps in its own law: Scheffer, D., ‘Opening address to the Conference on Universal Jurisdiction’ (2001) 35 *NELR* 233. For discussion of the gaps and how to address them, see: Cassel, D., ‘Empowering United States courts to hear crimes within the jurisdiction of the International Criminal Court’ (2001) 35 *NELR* 421. For further discussion, see Kamminga, note 30, 951-4.

<sup>56</sup> Kamminga, note 30, 955-9.

<sup>57</sup> For example, in the United Kingdom, the Attorney General, a government-appointed official, must consent to the initiation of a prosecution for an international crime based on universal jurisdiction: section 135, Criminal Justice Act 1988; section 1A(3)(a), Geneva Conventions Act 1957; and section 53(3) ICC Act 2001. Morris argues that allowing a role for those responsible for foreign policy may enable the state in question to avoid undesirable consequences: Morris, note 25, 356. However, it is unlikely that such officials would accept such a role, as they are act independently in the exercise of these types of powers.

<sup>58</sup> Interestingly, the establishment of the ICC (discussed below) has had a positive effect on the possibility of the exercise of universal jurisdiction by national courts, with several states incorporating universal jurisdiction as part of the process of implementing their obligations under the Rome Statute: see Arbour, L., ‘Will the ICC have an Impact on Universal Jurisdiction?’ (2003) 1 *JICJ* 585.

and punish major war criminals. The IMT was established at a conference following the conclusion of the war in Europe, pursuant to an agreement between the four world powers – the United States, the Soviet Union, the United Kingdom and France.<sup>59</sup> The Nuremberg Agreement provided for the establishment of an international military tribunal for the trial ‘of war criminals whose offences have no particular geographical location’.<sup>60</sup> The IMT held its first session in public on 18 October 1945 and delivered its judgment in October 1946, finding nineteen defendants guilty of crimes against humanity, war crimes and crimes against peace.<sup>61</sup> In addition, the four occupying powers established courts in their own zones of operation in Germany to try individuals not falling within the category of ‘major war criminals’.<sup>62</sup>

The allied powers also established a separate tribunal to prosecute and punish ‘major war criminals’ accused of crimes committed in the campaigns in the Asia-Pacific region, the International Military Tribunal for the Far East (Tokyo Tribunal).<sup>63</sup> The Tokyo Tribunal was modelled on the IMT but was a more international body in that its judges were drawn from a wider range of states, including the newly independent states of India and the Philippines.<sup>64</sup> It commenced operations on 3 May 1946, conducted trials over a period of two and a half years, and delivered its final judgement in November 1948 in which it convicted 25 individuals for the offence of crimes against peace and war crimes. ‘Lesser’ criminals were tried by military courts in the territory of the victorious states.<sup>65</sup>

Both the IMT and the Tokyo Tribunal were criticised as imposing ‘victors’ justice’ over the defeated nations. The tribunals were not truly independent, in that the judges

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<sup>59</sup> Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the major war criminals of the European Axis, dated 8 August 1945 (‘Nuremberg Agreement’).

<sup>60</sup> Article 1, Nuremberg Agreement.

<sup>61</sup> Judgment of the International Military Tribunal for the Trial of German Major War Criminals, 1 October 1946.

<sup>62</sup> Control Council for Germany, Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945.

<sup>63</sup> Charter of the International Military Tribunal for the Far East, issued by an executive order of General MacArthur, the Supreme Commander for the Allied Powers, on 19 January 1946. The Tokyo Tribunal was considered necessary to give effect to the Potsdam Declaration of 26 July 1945, which demanded that ‘stern justice shall be meted out to all war criminals’.

<sup>64</sup> Article 2 of the Charter of the Tokyo Tribunal provides for the appointment by the Supreme Commander for the Allied Powers of a maximum of eleven judges from the signatories to the declaration of surrender, India and the Philippines.

<sup>65</sup> Trials were held in The Netherlands, the United Kingdom, Australia, the United States, the Soviet Union, China, France and the Philippines.

and prosecutors were appointed by the victorious allied powers. Moreover, alleged offences committed by allied troops and authorities were not considered, most significantly the atomic bombing of Japan in 1945. Concerns were also raised that the substantive laws of the tribunals violated international law, in particular the principle of *nullum crimen sine lege*. However, the tribunals are significant in that they represent the first occasion upon which international institutions were established to punish war crimes. Their constituent instruments clearly supported the principle of individual criminal responsibility for crimes such as crimes against humanity and crimes against peace and, along with the emerging jurisprudence, have contributed to a body of substantive and procedural rules in international criminal law. The tribunals also assisted in promoting the development of a universal international criminal code and the establishment of a permanent international criminal court.

Building upon the criminal trials undertaken by the IMT and the Tokyo Tribunal, the United Nations was also contributing to an emerging international criminal law. At its first meeting in 1946, the General Assembly adopted a resolution confirming the principles established by the Charter and judgment of the IMT.<sup>66</sup> The following year the General Assembly requested the International Law Commission to formulate the principles of international law recognized in the Charter of the IMT and its judgment, and to prepare a draft code of offences against the peace and security of mankind.<sup>67</sup> Article VI of the Genocide Convention contemplated the future establishment of an international penal tribunal. On the same day as the text of the Genocide Convention was adopted, the General Assembly referred the task of drafting a statute for the contemplated penal tribunal to the International Law Commission.<sup>68</sup> The Commission appointed a special rapporteur to the topic,<sup>69</sup> who provided his first report in 1950.<sup>70</sup> Work on a draft statute for an international criminal court was subsequently assigned to a special committee of the General Assembly,<sup>71</sup> which provided a first draft in 1951, including the draft statute for the proposed court.<sup>72</sup> A further committee established in 1952 issued an amended text in 1953.<sup>73</sup> However, efforts were

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<sup>66</sup> Resolution 19(I), 11 December 1946.

<sup>67</sup> Resolution 177(II), 21 November 1947.

<sup>68</sup> Resolution 260(III) B, 9 December 1948.

<sup>69</sup> Yearbook of the International Law Commission, 30<sup>th</sup> Meeting, 31 May 1949, 221.

<sup>70</sup> Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur, A/CN.4/15, Yearbook of the International Law Commission 1950, Vol II, 3 March 1950.

<sup>71</sup> Resolution 489(V), 12 December 1950.

<sup>72</sup> Official Records of the General Assembly, Seventh Session, Supplement No. 11 (A/2136).

<sup>73</sup> Resolution 687 (VII), 5 December 1952; Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645).

suspended in 1954, pending agreement as to a definition of aggression and the resumption of work on the draft code of offences against the peace and security of mankind.<sup>74</sup> The onset of the Cold War stalled the work of many United Nations bodies, including the General Assembly, and the proposal for an international criminal court was not taken up again until 1989.<sup>75</sup>

### **3.2 *The ad hoc international criminal tribunals***

#### **3.2.1 Establishing the International Criminal Tribunal for the former Yugoslavia**

Following the end of the Cold War, certain events led to a major step in the development of international criminal law. The disintegration of the Socialist Federal Republic of Yugoslavia (SFRY) in 1991 and subsequent declarations of independence by several of its constituent states led to the emergence of conflicts both between and within the former constituent states. The conflict thus had aspects of both an international armed conflict and an internal armed conflict. Various attempts to resolve the conflicts failed and reports emerged of widespread violations of international humanitarian law. In October 1992, the Security Council acted to establish a Commission of Experts to examine the available evidence and to report to the Secretary-General as to whether it considered there was evidence that grave breaches of the Geneva Conventions and other violations of international humanitarian law had been, or were being, committed within the territory of the former Yugoslavia.<sup>76</sup> The Commission of Experts started investigations in November 1992, provided an interim report to the Secretary-General in January 1993,<sup>77</sup> and issued its final report in 1994.<sup>78</sup> The interim report concluded that grave breaches and other

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<sup>74</sup> Resolution 898 (IX), 14 December 1954. The General Assembly had established a special committee of nineteen member states to consider the question of defining aggression: Resolution 895 (IX), 4 December 1954. Work on the draft code of offences against the peace and security of mankind was suspended pending consideration by the General Assembly of the report of the special committee on aggression: Resolution 897 (IX), 4 December 1954. Progress on the draft code and the draft statute was suspended indefinitely in 1957: Resolutions 1186 and 1187 (XII), 11 December 1957.

<sup>75</sup> Resolution 44/39, 4 December 1989. The request for the International Law Commission to revisit the issue of an international criminal court arose in the context of the need for a criminal jurisdiction to consider transnational crimes, in particular drug trafficking. Work on the Draft Code for Offences Against the Peace and Security of Mankind recommenced in 1981: Resolution 36/106, 10 December 1981.

<sup>76</sup> Resolution 780 (1992), para. 2.

<sup>77</sup> Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), S/25274 (Annex 1).

<sup>78</sup> Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), S/1994/674. For discussion of the work of the Commission, see Bassiouni, M.C., 'The United Nations Commission of Experts established pursuant to Security Council Resolution 780' (1994) 88 *AJIL* 784.

violations of international humanitarian law had been committed, including wilful killing, 'ethnic cleansing' and mass killings, rape, torture, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests. It also raised the possibility of the establishment of an international criminal tribunal to try those accused of war crimes, noting that, in the opinion of the Commission of Experts, it would be for the Security Council – or another competent body of the United Nations – to establish such a tribunal.<sup>79</sup> Acting on this suggestion, the Security Council determined that a tribunal should be established and requested the Secretary-General to investigate possible options for the creation of an international tribunal.<sup>80</sup> Based on the recommendation of the Secretary-General that the tribunal be established by a resolution,<sup>81</sup> the Security Council established an international criminal tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.<sup>82</sup> The Security Council used its powers under Chapter VII of the Charter to establish the ICTY, finding that the situation in the former Yugoslavia constituted a threat to international peace and security.<sup>83</sup> Initial doubts from some states and commentators<sup>84</sup> that the Council did not have the authority to establish such a tribunal were largely resolved in the *Tadic* case.<sup>85</sup>

The ICTY may exercise jurisdiction with respect to the crimes of genocide, crimes against humanity and war crimes.<sup>86</sup> It enjoys primacy over national prosecutions and may call for national institutions to transfer defendants being proceeded against in a

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<sup>79</sup> Interim report, para. 74. This was not the first time that the possibility of an international criminal tribunal for atrocities in the former Yugoslavia had been raised. The Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia also advocated the establishment of an international penal tribunal to try individuals accused of violations of international humanitarian law within the former Yugoslavia: Report of the Secretary-General on the Activities of the International Conference for the Former Yugoslavia, S/25221, 2 February 1993, see Annex 1, para. 9. For a more detailed discussion of the background to establishment, see Schabas, W., *The UN International Criminal Tribunals* (CUP), 13-22 and Cryer, R. et al, *An Introduction to International Criminal Law and Procedure* (2007), 102-112.

<sup>80</sup> Resolution 808 (1993).

<sup>81</sup> Report of the Secretary-General Pursuant to Security Council resolution 808 (1993), S/25704, annexing the draft statute of the tribunal. The Secretary-General had recommended that the tribunal be established by a resolution rather than by treaty, as the treaty process would be too lengthy and would not guarantee that the states most affected would become parties.

<sup>82</sup> Resolution 827 (1993).

<sup>83</sup> Resolution 827 (1993).

<sup>84</sup> S/PV.3217. Rubin, A., 'An International Criminal Tribunal for Former Yugoslavia' (1994) 6 *Pace International Law Review* 7.

<sup>85</sup> *Tadic Jurisdiction Decision*. The legal basis of the ICTY will be discussed further in Chapter Three.

<sup>86</sup> ICTY Statute, articles 2 (grave breaches), 3 (violations of the laws and customs of wars), 4 (genocide) and 5 (crimes against humanity).

national system to it.<sup>87</sup> The ICTY took well over a year to become operational, with judges appointed in late 1993 and the prosecutor in July 1994. The first indictments were issued in late 1994,<sup>88</sup> the first trial began in May 1996<sup>89</sup> and the first judgment was issued on 29 November 1996.<sup>90</sup> As at December 2008, the ICTY had indicted 161 individuals and had convicted and sentenced 57 individuals.<sup>91</sup> Cases concerning 45 accused are ongoing, with two accused still at large.<sup>92</sup>

### **3.2.2 Establishing the International Criminal Tribunal for Rwanda**

Both during and following independence in 1963, Rwanda was beset by tension between its two main ethnic groups, the Hutus and the Tutsis, with systematic killings of Tutsis documented in 1963, 1966 and 1973. In 1993, the Arusha Accords established a power-sharing arrangement between the Rwandan government and the Tutsi paramilitary group, the Rwandan Patriotic Force (RPF). The arrangement was supervised by the United Nations Assistance Mission for Rwanda (UNAMIR). The shooting-down of the aeroplane carrying President Habyarimana on 6 April 1994 ended the period of peace that had been secured by the Arusha Accords. Members of the Hutu elite moved to eliminate Tutsis. The killing was not restricted to members of the Tutsi leading class or key opposition figures, but extended to the wider Tutsi population, including women and children. The RPF mounted a counter-offensive. By the time the massacre ended in July 1994, between 500,000 and 1,000,000 Tutsis had been killed, while between 10,000 and 100,000 Hutus were killed in the RPF counter-offensive. The killings had been conducted at great speed, within a three month period. In addition to those killed, millions were internally displaced or became refugees in neighbouring countries. Systematic rape, torture and severe assaults were also reported.

In July 1994, the Security Council requested the Secretary-General to establish a Commission of Experts to examine the evidence and report its conclusions concerning

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<sup>87</sup> Article 9, ICTY Statute.

<sup>88</sup> The ICTY's first indictment was issued on 7 November 1994 in respect of Dragan Nikolić, a commander of Sušica camp in eastern Bosnia and Herzegovina, for crimes committed against non-Serbs in 1992.

<sup>89</sup> *Prosecutor v Tadic*. The trial commenced on 7 May 1996.

<sup>90</sup> *Prosecutor v Erdemovic*, Sentencing Judgment, 29 November 1996. The accused had pleaded guilty to crimes against humanity.

<sup>91</sup> Ten accused were acquitted, 13 accused transferred to national jurisdictions, 20 indictments were withdrawn and 16 individuals died either before transfer to the ICTY or while in custody.

<sup>92</sup> Cases concerning 10 individuals are before the Appeals Chamber, cases concerning six individuals are awaiting trial judgements, a further 20 individuals are currently at trial, and seven are at the pre-trial stage. The two accused at large are Ratko Mladić and Goran Hadžić. All figures have been taken from the ICTY website and are current as at late December 2008.

grave violations of international humanitarian law and the possibility that acts of genocide had occurred in Rwanda.<sup>93</sup> The preliminary report of the Commission of Experts concluded that there was overwhelming evidence that genocide and other widespread, systematic and flagrant violations of international humanitarian law had been committed in Rwanda.<sup>94</sup> It also recommended that the Security Council take action so that those responsible could be brought to justice before an independent and impartial international criminal tribunal, preferably by amending the statute of the ICTY so as to include jurisdiction for crimes committed in Rwanda.<sup>95</sup> The Special Rapporteur for Rwanda, appointed by the Commission on Human Rights, reached a similar conclusion.<sup>96</sup> The Government of Rwanda had requested that the Security Council establish as soon as possible an international tribunal to prosecute those who had committed the genocide, noting that the continued presence of such alleged criminals was disrupting efforts to return refugees and was ‘diluting’ the question of genocide having been committed in Rwanda.<sup>97</sup>

In November 1994 the Security Council established the ICTR, an international tribunal for the purposes of prosecuting the people responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda, and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994.<sup>98</sup> Unlike the conflict(s) in the former Yugoslavia, the genocide in Rwanda was an internal affair. However, the Security Council recognised that the situation in Rwanda constituted a threat to international peace and security. As with Resolution 827 establishing the ICTY, the Security Council expressly relied upon its powers under Chapter VII of the Charter.<sup>99</sup> Rwanda, which had originally supported the establishment of an international tribunal, voted against the resolution due mainly

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<sup>93</sup> Resolution 935 (1994).

<sup>94</sup> Preliminary Report of the Independent Commission of Experts established in accordance with Security Council resolution 935, S/1994/1125.

<sup>95</sup> Ibid, paras 133-142.

<sup>96</sup> Report on the situation of human rights in Rwanda submitted by the Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution S-3/1 and Economic and Social Council decision 1994/223, S/1994/1157.

<sup>97</sup> Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, S/1994/115.

<sup>98</sup> Resolution 955 (1994). For a detailed discussion of the development of the ICTR, see Schabas, note 79.

<sup>99</sup> Resolution 955 was put to a vote in the Security Council, with 13 members voting in favour, one abstention (China) and one, Rwanda – which happened to be a member of the Security Council at the time – voting against.

to the exclusion of the death penalty as a possible sentencing option.<sup>100</sup> The ICTR may exercise jurisdiction in relation to genocide, crimes against humanity, and violations of common article 3 of the Geneva Conventions and of Additional Protocol II,<sup>101</sup> reflecting the non-international nature of the conflict in Rwanda. Like the ICTY, it enjoys primacy in respect of national courts.<sup>102</sup> The first judges were elected by the General Assembly in May 1995 and the first accused arrived in May 1996. The first indictment was issued in November 1995,<sup>103</sup> the first trial started in January 1997<sup>104</sup> and the first judgment was issued in September 1998.<sup>105</sup> As at 3 November 2008, the ICTR has delivered 31 judgments affecting 37 accused. Judgment is pending in five cases affecting eight accused.<sup>106</sup>

### 3.2.3 The development of the completion strategy

The establishment of the ICTY and the ICTR were significant steps in the development of international criminal law, both in terms of its substantive content and enforcement. For the first time since the end of the Second World War, international criminal tribunals were established to investigate, prosecute and try individuals accused of committing international crimes of the most grave and serious nature, including genocide. The ad hoc tribunals promised the highest standards of international criminal justice, being sanctioned, established and supported by the Security Council. Hopes and expectations were high, particularly among the people of Rwanda and the former Yugoslavia. Yet by the fourth or fifth year of the operation of the tribunals there existed a growing sense of disillusionment. Concerns were mounting amongst the member states of the United Nations, the Secretariat and the tribunals themselves about the performance and efficiency of the tribunals.<sup>107</sup> The tribunals proved to be an expensive means of securing accountability.<sup>108</sup> Member states were reluctant to continue paying the vast amounts required for the tribunals

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<sup>100</sup> S/PV.3453.

<sup>101</sup> ICTR Statute, articles 2 (genocide), 3 (crimes against humanity) and 4 (violations of common article 3 and APII).

<sup>102</sup> Article 8, ICTR Statute.

<sup>103</sup> *Prosecutor v Kayishema and Ruzindana*, Original Indictment, issued 22 November 1995 and confirmed 28 November 1995.

<sup>104</sup> *Prosecutor v Akayesu*. The trial commenced on 9 January 1997.

<sup>105</sup> *Prosecutor v Akayesu*, Judgment, Trial Chamber, 2 September 1998.

<sup>106</sup> Closing arguments were also to be heard in two cases (five accused), trials were ongoing in five cases (15 accused), cases concerning five accused were shortly to commence, one case had been submitted for retrial and thirteen accused remained at large: Report on the Completion Strategy for the International Criminal Tribunal for Rwanda as at 3 November 2008, S/2008/729. See also Mose, E., 'Main Achievements of the ICTR' (2005) 3 *JICJ* 920.

<sup>107</sup> See Raab, D., 'Evaluating the ICTY and its completion strategy: Efforts to Achieve Accountability for War Crimes and their tribunals', (2005) 3 *JICJ* 82, 96.

<sup>108</sup> For 2008-2009, the General Assembly approved the ICTR biennial budget of \$267,356,200 gross and the ICTY biennial budget of US\$347,566,900 net.

from assessed contributions on an indefinite basis, at least without any improvement in efficiency. Perhaps more worryingly, trials before the tribunals were very long, beyond the ‘acceptable’ duration of trials required by international human rights standards and jurisprudence. Due to backlogs in reaching trial, many accused faced considerable delay in their case reaching trial, causing many to undergo unacceptable periods of pre-trial detention.<sup>109</sup> The tribunals had delivered few final verdicts and several key figures in the conflicts, particularly those in the former Yugoslavia, remained at large, with little likelihood of apprehension. Those trials that had occurred had tended to focus on lower-level or intermediate perpetrators.

These concerns led to a process of evaluation and review of the tribunals’ performance, seeking to improve the efficiency and effectiveness of the tribunals and to stem the growing criticism of the delays in trials and length of detention. The Security Council turned its attention to the date when the open-ended mandate of the tribunals could (or would) end. The Security Council asked the Secretary-General to submit to it a report containing an assessment and proposals regarding ‘the date ending the temporal jurisdiction’ of the ICTY.<sup>110</sup> The Security Council did not make such a request for the ICTR, although it did refer to the need for both tribunals to expedite their work and to continue progress towards improving their procedures.<sup>111</sup> In August 2003, the strategy to end the temporal jurisdiction of the tribunals was included in the operative part of a Security Council resolution, Resolution 1503, for the first time.<sup>112</sup> The Resolution called upon the tribunals ‘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’.<sup>113</sup> This is known as the ‘completion strategy’ of the tribunals. In a non-operative paragraph the Security Council urged the ICTR to formalise a detailed strategy (modelled on the ICTY strategy) to transfer cases to national jurisdictions in order to allow the ICTR to meet similar completion targets.<sup>114</sup> It also requested the presidents and prosecutors of the tribunals to explain their plans to implement the completion strategy in their

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<sup>109</sup> See Bourgon, S., ‘Procedural Problems Hindering Expeditious and Fair Justice’ (2004) 2 *JICJ* 526, ‘the length of the proceedings, at all stages [which] appears to be uncontrollable’, 527. The judges have addressed the problem of pre-trial detention to some extent by adopting a more flexible policy, with provisional release now the presumption provided certain requirements are satisfied.

<sup>110</sup> Resolution 1329 (2000), para. 6.

<sup>111</sup> *Ibid*, preambular paras 5 and 6.

<sup>112</sup> Resolution 1503 (2003).

<sup>113</sup> *Ibid*, para. 7.

<sup>114</sup> *Ibid*, preambular para. 8. This obligation was included in an operative paragraph in a subsequent resolution: Resolution 1534 (2004), para. 4.

annual reports to the Security Council.<sup>115</sup> In their most recent reports, both presidents indicated that the tribunals would not meet the deadline of end of 2008 for the completion of trial activities and that they would not meet the deadline of the end of 2010 for the completion of all judicial activities.<sup>116</sup>

### **3.3 Towards a permanent international criminal court**

After stalling amidst the tension of the Cold War period, efforts resumed towards developing the basis for a permanent international criminal court.<sup>117</sup> The General Assembly invited the International Law Commission to resume its work on the Draft Code of Offences against the Peace and Security of Mankind in 1981,<sup>118</sup> and the Commission eventually concluded the draft code in 1996.<sup>119</sup> However, the draft code did not include any provision for the body that would have jurisdiction to try such offences. In 1989 the General Assembly requested the International Law Commission to address, as part of its work on the draft code, ‘the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under such a code’.<sup>120</sup> The International Law Commission submitted the final version of its draft statute for an international criminal court to the General Assembly in 1994.<sup>121</sup>

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<sup>115</sup> A further reporting obligation was imposed by Resolution 1534 (2004), which requires each tribunal to provide to the Security Council every six months an assessment by its President and its Prosecutor, ‘setting out in detail the progress made towards implementation of the Completion Strategy’: para. 6.

<sup>116</sup> The President of the ICTY indicated that trials should be completed in the course of 2010, with appeals unlikely to be concluded in 2011: Assessment and Report of Judge Patrick Robinson, President of the International Tribunal for the former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), S/2008/729, para. 42. The President of the ICTR indicated that trials may be completed by the end of 2009: Report (note 106), para 65. See also the Statement by the President of the Council issued on 19 December 2008, S/PRST/2008/47. For a discussion of the measures taken to achieve the Completion Strategy, see Williams, S., ‘The Completion Strategy of the ICTY and the ICTR’ in Bohlander (ed), *International Criminal Justice – A Critical Analysis of Institutions and Procedures* (2007), 153-235.

<sup>117</sup> For an introduction to the background to the ICC, see Schabas, W., *An Introduction to the International Criminal Court* (3<sup>rd</sup> ed, 2007).

<sup>118</sup> Resolution 36/106, 10 December 1981.

<sup>119</sup> Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission, 48<sup>th</sup> Session, (1996) Yearbook of the International Law Commission, Vol II(2), 17.

<sup>120</sup> Resolution 44/39, 4 December 1989, para. 1.

<sup>121</sup> Draft Statute for an International Criminal Court, Yearbook of the International Law Commission, 1994, vol. II (Part Two). See: Crawford, J., ‘The ILC’s Draft Statute for an International Criminal Tribunal’ (1994) 88 *AJIL* 140 and Crawford, J., ‘The ILC Adopts a Statute for an International Criminal Court’ (1995) 89 *AJIL* 404.

Both the draft code and the draft statute were to play a significant role in the development of the Rome Statute some years later. Following adoption of the draft statute, the General Assembly decided to establish an ad hoc committee to review the substantive and administrative issues arising from the draft statute and to consider arrangements for an international conference of plenipotentiaries.<sup>122</sup> The ad hoc committee reported to the General Assembly in 1995.<sup>123</sup> The General Assembly then convened a preparatory committee (known as the PrepCom),<sup>124</sup> which met on several occasions from 1995 to 1998, culminating in the submission of a revised version of the draft statute to the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened on 15 June 1998 in Rome (the Rome Conference).<sup>125</sup> The Rome Conference was attended by representatives of 160 states and many international and non-governmental organisations. Several working groups slowly resolved issues arising from the draft statute, while the Bureau worked closely on issues of key importance, including the role of the Security Council in the jurisdiction and operation of the proposed court. With consensus on several provisions still looking unlikely, the Chairman presented a version of the statute to the Rome Conference as a ‘package’.<sup>126</sup> At the insistence of the United States, the package was put to a vote. The Rome Statute was adopted on 17 July 1998 by 120 states, with 21 abstentions and seven votes against, including the United States, Israel and China.<sup>127</sup> The Rome Conference also adopted a Final Act,<sup>128</sup> which provided for the establishment of a Preparatory Commission charged with numerous tasks including the drafting of the Rules of Procedure and Evidence (RPE) and the Elements of Crimes (which elaborated upon the definition of offences within the jurisdiction of the ICC) and the drafting of a relationship agreement between the ICC and the United Nations.<sup>129</sup> The Preparatory Commission completed its work in July 2002.<sup>130</sup>

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<sup>122</sup> Resolution 49/53, 9 December 1994, para. 2. The International Law Commission had recommended that an international conference of plenipotentiaries be held to study the draft statute and to conclude a convention on the establishment of an international criminal court: Resolution 49/10, 8 November 1994, paras 90-91.

<sup>123</sup> Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, A/50/22.

<sup>124</sup> Resolution 50/46, 11 December 1995.

<sup>125</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, see decision of 3 April 1998. The report included the draft statute and final act (A/CONF.183/2/Add.1).

<sup>126</sup> For further discussion see, Kirsch, P. and Holmes, J., ‘The Birth of the International Criminal Court: The 1998 Rome Conference’ (1998) 36 *CYbIL*, 3-39.

<sup>127</sup> There is no official record of how states voted, as the United States specified that it did not wish the vote to be recorded.

<sup>128</sup> Final Act Of The United Nations Diplomatic Conference Of Plenipotentiaries On The Establishment Of An International Criminal Court, 17 July 1998.

<sup>129</sup> Resolution F.

The ICC was established by a treaty, the Rome Statute. States were given until 31 December 2000 to sign the Rome Statute as an initial step signalling their intent to ratify the treaty.<sup>131</sup> By that date 139 states had signed the treaty, including some like the United States that had opposed the adoption of the Rome Statute at the Rome Conference. Article 126 of the Rome Statute required 60 ratifications or accessions for the Rome Statute to enter into force. This significant event occurred on 11 April 2002, when ten states deposited instruments of ratification simultaneously. The Rome Statute entered into force on 1 July 2002, the date that was the first day of the month following a period of 60 days after the sixtieth ratification or accession.<sup>132</sup> This date is highly significant because the ICC has only prospective jurisdiction; that is, it may only exercise jurisdiction in respect of situations arising after the date of the entry into force of the Rome Statute.<sup>133</sup> The Assembly of State Parties (ASP) convened for a first session in September 2002 and formally adopted the RPE and the Elements of Crimes.<sup>134</sup> Judges were elected in February 2003, and the prosecutor was elected in April 2003. The Prosecutor opened the first investigation in June 2004,<sup>135</sup> the first accused was arrested and surrendered on 17 March 2006<sup>136</sup> and the ICC commenced its judicial activities shortly thereafter.<sup>137</sup> As at 18 July 2008 there were 108 states parties to the Rome Statute.<sup>138</sup>

Although the adoption and subsequent entry into force of the Rome Statute was a significant event in the development of international criminal justice and the fight against impunity, the final version of the Statute reflects several important

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<sup>130</sup> The tenth and final session of the Preparatory Commission was held at United Nations headquarters from 1 to 12 July 2002. Its work included drafts of the following documents: RPE; elements of crimes; a relationship agreement between the UN and the ICC; basic principles concerning a headquarters agreement; financial regulations and rules; an agreement as to the privileges and immunities of the ICC; a budget; rules of procedure for the ASP; proposals for defining the crime of aggression: see PCNICC/2002/3.

<sup>131</sup> Article 125, Rome Statute.

<sup>132</sup> Article 126, Rome Statute.

<sup>133</sup> Article 11, Rome Statute.

<sup>134</sup> See ICC-ASP/1/3, Records of the First Session of the ASP, from 3-10 September 2002.

<sup>135</sup> The first investigation concerned grave crimes allegedly committed on the territory of the Democratic Republic of Congo since 1 July 2002: See, OTP, 'The Office of the Prosecutor of the International Criminal Court opens its first investigation', 23 June 2004.

<sup>136</sup> Mr Thomas Lubanga Dyilo, a Congolese national and alleged founder and leader of the Union des Patriotes Congolais (UPC), was arrested and transferred to the ICC on 17 March 2006. Pre-Trial Chamber I had issued a sealed warrant of arrest against Mr Lubanga on 10 February 2006 and also requested that the Democratic Republic of the Congo arrest and surrender him to the Court.

<sup>137</sup> On 20 March 2006, Pre-Trial Chamber I held an initial public hearing to verify the identity of Thomas Lubanga Dyilo.

<sup>138</sup> Information obtained from the ICC website. For further details, see <http://www.icc-cpi.int/statesparties.html>.

compromises reached at the Rome Conference. The jurisdiction of the ICC is restricted in several ways. First, as noted above, the ICC may only exercise prospective jurisdiction, that is it may only exercise jurisdiction in respect of situations occurring after 1 July 2002.<sup>139</sup> Second, the ICC may only exercise jurisdiction where the alleged crimes occurred on the territory of a state party or where the accused is a national of a state party.<sup>140</sup> This requirement does not apply where the state concerned accepts the jurisdiction of the ICC by lodging a declaration to that effect,<sup>141</sup> or where the Security Council, acting under Chapter VII, refers a situation to the ICC.<sup>142</sup> Third, the ICC is bound by the principle of complementarity, which stipulates that the ICC may only exercise jurisdiction where the territorial state is not currently investigating or prosecuting the case or is unwilling or genuinely unable to do so.<sup>143</sup> Fourth, the jurisdiction of the ICC is restricted to persons accused of the most serious crimes of international concern, that is, it is not intended that the ICC will deal with lower level offenders or less serious crimes.<sup>144</sup> The crimes for which the ICC currently has jurisdiction are war crimes, crimes against humanity and genocide.<sup>145</sup> It is envisaged that the ICC will also exercise jurisdiction in respect of the crime of aggression at a future stage.<sup>146</sup> Finally, the Council, acting pursuant to its powers under Chapter VII, may delay or preclude the commencement of an investigation or prosecution by

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<sup>139</sup> Article 11, Rome Statute. Where a state becomes a party to the Rome Statute after it has entered into force, the ICC only has jurisdiction with respect to crimes committed after the entry into force of the Statute for that state.

<sup>140</sup> Article 12(2), Rome Statute. The ICC would also have jurisdiction if the crime was committed on board a vessel or aircraft and the state of registration of that vessel or aircraft is a party.

<sup>141</sup> Article 12(3), Rome Statute.

<sup>142</sup> Article 13(b), Rome Statute. The Council has made one such referral to date: Resolution 1593, referring the situation in Darfur, Sudan, to the ICC. Sudan is not a party to the Rome Statute. See Cryer, R., 'Sudan, Resolution 1593 and International Criminal Justice' (2006) 19 *LJIL* 195 and Happold, M., 'Darfur, the Security Council, and the International Criminal Court' (2006) 55 *ICLQ* 226.

<sup>143</sup> Complementarity is dealt with as a matter of admissibility. Where a domestic investigation or prosecution is proceeding, the ICC is to determine that the case is inadmissible: article 17, Rome Statute. The Prosecutor is also required to defer to a state's investigation, unless the Pre-Trial Chamber determines otherwise: article 18, Rome Statute.

<sup>144</sup> Article 1 provides that the ICC will only exercise jurisdiction 'over persons for the most serious crimes of international concern'. Article 17(1)(d) provides that the ICC must find a case inadmissible where it is not of sufficient gravity to justify further action by the ICC.

<sup>145</sup> Articles 5, 6, 7 and 8, Rome Statute.

<sup>146</sup> Article 5 includes the crime of aggression as a crime within the jurisdiction of the ICC. However, article 5(2) states that the ICC may only exercise such jurisdiction once a provision defining the crime and setting out the conditions for the exercise of ICC jurisdiction has been agreed. In 2003 the ASP established the Special Working Group on the Crime of Aggression to discuss the definition of aggression and the pre-conditions to its exercise ahead of the review conference scheduled to occur in early 2010.

sending a request to that effect to the ICC. The request for delay is to be for a renewable 12-month period.<sup>147</sup>

Another difficulty that the ICC has encountered, albeit one that did not arise from the provisions of the Rome Statute and one which was largely unforeseen, is the attitude of the United States to the ICC. As already noted, the United States was an initial supporter of the concept of an international criminal court. However, at the Rome Conference the United States was unable to accept the package deal offered, and voted against the adoption of the Rome Statute.<sup>148</sup> Despite this position, the Clinton administration signed the Rome Statute shortly before the 31 December 2000 deadline. However, the successor Bush administration did not favour participating in the treaty and effectively ‘unsigned’ the Rome Statute on 6 May 2002.<sup>149</sup> Not content with not becoming a party to the Rome Statute, the United States then sought to undermine the ICC by concluding bilateral immunity agreements with various states that purported to prevent the state concerned from surrendering United States citizens to the ICC, as to do so would result in a breach of an international agreement. The bilateral agreements were based on a controversial reading of article 98(2) of the Rome Statute. Several states, many not party to the Rome Statute, agreed to sign such agreements. However, a majority of states, including those with a large number of United States residents such as Canada, Mexico and Western European states, refused to participate in what was widely perceived to be an attack on the ICC itself.<sup>150</sup> The

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<sup>147</sup> Article 16, Rome Statute. A request has been made on one occasion concerning jurisdiction regarding peacekeeping forces of non-party states, see note 151. Article 16 has more recently been suggested as a response to the ICC Prosecutor’s request for an arrest warrant in respect of President Bashir of Sudan: see Cryer, R., ‘The Security Council, Article 16 and Darfur’, Oxford Transitional Justice Research Working Paper Series, 29 October 2008 and Ciampi, A., ‘The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute’ (2008) 6 *JICJ* 885.

<sup>148</sup> The concerns of the United States regarding the ICC have been listed in a number of publications. See Bolton, J., ‘The Risks and the Weaknesses of the International Criminal Court from America’s perspective’ (2000) 41 *VJIL* 186; Scheffer, D., ‘The United States and the International Criminal Court’ (1999) 93 *AJIL* 12; the special issue of *Law & Contemporary Problems* (Winter 2001) dedicated to the topic; Forsythe, D., ‘The United States and International Criminal Justice; and Sewall, S. and Kaysen, C. (eds), *The United States and the International Criminal Court: National Security and International Law* (2000).

<sup>149</sup> The Vienna Convention on the Law of Treaties (VCLT) does not contain a mechanism for a state to ‘unsign’ a treaty. Instead, article 18 states that until a state gives notice of its intention not to become a party to the treaty, a state must not act so as to frustrate the object and purpose of the treaty. The communication from the United States government to the Secretary-General of the United Nations indicates that the United States no longer intended to become a party to the Rome Statute. Israel lodged a similar declaration later that year.

<sup>150</sup> For further discussion see: Murphy, S., ‘Efforts to Obtain Immunity from ICC for US Peacekeepers’ (2002) 96 *AJIL* 725; Dietz, J., ‘Protecting the protectors: can the United States successfully exempt US persons from the International Criminal Court with US Article 98 Agreements?’ (2004) 27 *Houston Journal of International Law* 137; Crawford, J. et al, ‘In the

United States also refused to contribute troops to peacekeeping missions unless the Security Council issued a request to the ICC not to investigate or prosecute members of such operations.<sup>151</sup> Finally, the American Service Members' Protection Act of 2002 prohibits United States officials from cooperating with the ICC, authorises the use of force to free any American detained by or on behalf of the ICC and restricts United States participation in peacekeeping missions and military assistance to ICC state parties.<sup>152</sup> Despite these actions, the ICC has continued to function, with many states believing that it has been strengthened by the hostile stance of the United States. In more recent years the United States has adopted a more nuanced approach to the ICC, including permitting the referral of the situation in Darfur by the Council to the ICC.<sup>153</sup> The lack of United States support does weaken the ICC system, as the ICC may require the support of the United States to enforce cooperation with ICC orders and to secure the surrender of suspects, particularly where a situation has been referred to the ICC by the Security Council. Enforcement measures may include conditionality of aid, diplomatic pressure, economic and targeted sanctions or possibly the use of military force, hopefully as sanctioned by the Security Council.

## **4 Hybrid or internationalized tribunals: an alternate mechanism?**

### **4.1 Introduction**

While there is continued recognition that a national accountability mechanism is, in almost all cases, the most appropriate response, it is also clear that national proceedings may be problematic. States utilising universal jurisdiction also face a number of challenges. Where domestic trials appear to face insurmountable obstacles, the alternative is usually to call for the establishment of an international criminal

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matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements sought by the United States under Article 98(2) of the Statute', Joint opinion provided to the Lawyers' Committee on Human Rights and the Medical Foundation for the Care of Victims of Torture, available at [http://www.humanrightsfirst.org/international\\_justice/Art98\\_061403.pdf](http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf); Barnridge, R., 'The American Servicemembers' Protection Act and Article 98 Agreements: A Legal Analysis and Case for Constructive Engagement with the International Criminal Court' (2004) 11 *Journal on Foreign and Comparative Law* 738.

<sup>151</sup> Resolution 1422 (2002). The resolution was adopted due to a specific United States threat to veto a resolution extending the mandate of the United Nations mission to BiH in 2002. The resolution was renewed by Resolution 1487 (2003). However, the United States did not seek its renewal in 2004, largely as evidence of abuse of prisoners in United States detention facilities in Iraq had emerged shortly before Resolution 1487 expired. For further discussion see: El Zeidy, M., 'The United States Dropped the Atomic Bomb of Article 16 of the ICC: Security Council Powers of Deferral and Resolution 1422' (2002) 35 *Vanderbilt Journal of Transnational Law* 1503.

<sup>152</sup> Murphy, S., 'American Servicemembers' Protection Act' (2002) 96 *AJIL* 975.

<sup>153</sup> See note 142. The United States abstained in the vote on Resolution 1593.

tribunal, generally to deal with the most serious offenders. However, the two existing ad hoc tribunals have demonstrated that such tribunals have their own failings. The tribunals and the ICC face the challenge of engaging the affected local populations, particularly as they are located away from the territorial state (and the victims). Moreover, purely international prosecutions do not assist in building local capacity or experience within the local legal system. This has proved problematic recently as both the ICTR and the ICTY are now transferring cases to national jurisdictions. Moreover, both the ICTR and the ICTY are winding down their judicial activities and in the current political climate it is doubtful that the Security Council will act to create any further ad hoc tribunals. As discussed above, the jurisdiction of the ICC is limited, and it is not intended to replace national mechanisms or to try all offenders in all cases. It is to be a selective justice mechanism, exercising its jurisdiction only in respect of the most serious crimes and the worst offenders, where national mechanisms are unavailable. Therefore there exists a gap in international criminal law mechanisms where national mechanisms are non-existent or inadequate and the case does not fall within the jurisdiction of the ad hoc tribunals or the ICC, or where the prosecutor of those tribunals has decided not to investigate the situation in question as the acts in question are not of sufficient gravity. To fill this gap, the international community has turned to a new model of international criminal justice; the hybrid or internationalized criminal tribunal.

#### **4.2 Defining hybrid and internationalized tribunals**

Such tribunals have been described as ‘hybrid’ or ‘internationalized’ courts as ‘both the institutional apparatus and the applicable law consist of a blend of the international and the domestic’.<sup>154</sup> Cassese describes the term ‘internationalized’ tribunals:<sup>155</sup>

‘as encompassing judicial bodies that have a *mixed composition*, consisting of both international judges and of judges having the nationality of the State where trials are held. There may be two versions of these courts and tribunals. First, they may be organs of the relevant State, being part of its judiciary....Alternatively, the courts may be international in nature: they may be set up under an international agreement and not be part of the national judiciary’.

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<sup>154</sup> Dickinson, L., ‘The Promise of Hybrid Courts’ (2003) 97 *AJIL* 295, 295.

<sup>155</sup> Cassese, A., *International Criminal Law* (2003, OUP), 343.

A number of hybrid or internationalized tribunals have been established in recent years to investigate, prosecute and try individuals accused of serious violations of international criminal law. Five such tribunals are now operational: the Special Court for Sierra Leone; the international judges and prosecutors programme in Kosovo; the Extraordinary Chambers in the Courts of Cambodia; the War Crimes Chamber for Bosnia and Herzegovina; and the Iraqi High Tribunal (IHT). The Special Panels for Serious Crimes in East Timor<sup>156</sup> (SPSC) suspended operations in May 2005, while the Special Tribunal for Lebanon (LST) was established on 1 March 2009. Suggestions have been made that this model of tribunal would also be appropriate for prosecution of atrocities committed in, among others, Burundi,<sup>157</sup> Afghanistan,<sup>158</sup> Israel and the Occupied Territories,<sup>159</sup> Chad,<sup>160</sup> Sudan<sup>161</sup> and Liberia,<sup>162</sup> and for drug related and terrorist crimes in other states.<sup>163</sup>

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<sup>156</sup> Until independence in May 2002, the territory was known as East Timor. For convenience, all references will be to East Timor unless the context requires otherwise.

<sup>157</sup> In June 2005, the Security Council requested the Secretary-General to commence negotiations with the Government of Burundi for the creation of a mixed truth commission and special chamber within the court system of Burundi: see Resolution 1606, 20 June 2005. The assessment mission recommended the establishment of a special chamber within the national court structure: see Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi, S/2005/158, 11 March 2005. The United Nations has, as yet, been unable to finalise arrangements for the special chamber. However, these proposals may now be revisited following the signing of an agreement for the establishment of a steering committee on transitional justice issues: see Report of the independent expert on the situation in Burundi, 15 August 2008, A/HRC/9/14, para. 37.

<sup>158</sup> See: Dickinson, L., 'Transitional Justice in Afghanistan: The Promise of Mixed Tribunals' (2003) 31 *Denver Journal of International Law & Policy* 23; Cassese, A., 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality' in Romano et al (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (2004) (hereafter 'Romano'), 10. See also Pellet, A., 'Internationalized Courts: Better than nothing...' in Romano, 441, indicating that internationalized trials could have been used to try Afghan war criminals and possibly also United States combatants who committed war crimes against the Taliban in Afghanistan.

<sup>159</sup> Cassese, *ibid*, 11. Note the contrary view of Pellet, who doubts that this model is appropriate where both parties to a conflict commit international crimes and where a 'tripartite' court would be required, with Israeli and Palestinian judges sitting on the same court: Pellet, *ibid*, 441.

<sup>160</sup> Cassese suggests that Hissene Harbe, the former dictator from Chad, could be tried before a mixed tribunal: note 158, 11. Contrast the view of Pellet, note 158, 441. This suggestion has been overtaken by events, with Senegal (the country where Habre has been in exile some 17 years) establishing in 2007 a special war crimes court to try Habre, due to pressure from the African Union. Belgium has recently commenced proceedings before the International Court of Justice seeking an order that Senegal must extradite Habre to Belgium for trial: Press Release, 'Belgium institutes proceedings against Senegal and requests the Court to indicate provisional measures', 19 February 2009.

<sup>161</sup> The United States had suggested that a mixed tribunal should be established to deal with justice in Darfur. This suggestion was overtaken by the referral of the situation in Darfur to the ICC. The Special Criminal Chamber on the Events in Darfur, established by the Sudanese authorities in June 2005 is purely a national institution: see Human Rights Watch, *Lack of Conviction: The Special Criminal Court on the Events in Darfur*, June 2006.

Although there is currently no universally-accepted definition of an internationalized tribunal, there is some agreement as to their core features. In particular, the tribunal must exercise a criminal judicial function, there must be a mix of international and national elements operating at many levels, and the tribunal must have been created as an ad hoc and temporary response to a specific situation.<sup>164</sup> There are suggestions that the internationalized aspect requires a link to the United Nations, which is manifested in the pursuit of the goals of the United Nations and United Nations participation in the creation of the courts.<sup>165</sup> This requirement for United Nations involvement does not seem borne out by practice; as both the WCC and the IHT have limited or no connection with the United Nations. However, it has been observed that, while common characteristics may be identified, ‘the general “species” of internationalized tribunals is highly heterogeneous; the circumstances of their creation are extremely different; their degree of “internationalization” is far from uniform; the scope of their jurisdiction is varied; their modes of functioning are hardly comparable’.<sup>166</sup> This degree of ‘ad-hocism’ makes it difficult to identify any conclusive definition or normative framework within which to assess existing and future internationalized tribunals.

Despite this difficulty, it is possible to assess these mechanisms on a sliding scale by looking at the extent and degree of international involvement. At the top end are the ‘true’ international criminal tribunals, the ICTY and the ICTR. Established by a Security Council resolution under Chapter VII of the Charter, these tribunals are subsidiary organs of the United Nations and represent justice designed and implemented by the United Nations. The ICC also belongs in this category of tribunals, although it is not as global in its reach. Having been created by treaty, in the absence of a Security Council referral, it imposes obligations only for those states party to the Rome Statute. Yet, the growing number of parties to the Rome Statute and the possibility of Security Council referrals to the ICC confer on the ICC a broader universal character. The next layer of international involvement would be a so-called

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<sup>162</sup> It is likely that the Truth and Reconciliation Commission established for Liberia will recommend the creation of a special war crimes chamber: O’Meara, N., ‘A War Crimes Court for Liberia?’ (2009) *Bulletin of International Legal Developments* 3.

<sup>163</sup> Cassese, note 158, 10, noting that judges and prosecutors in Colombia are reluctant to take action against terrorists or drug trafficking for fear of their own lives. It is possible that this solution could also have been adopted in relation to terrorists and insurgents in Iraq.

<sup>164</sup> Condorelli, L. and Boutruche, T., ‘Internationalized Criminal Courts: Are they necessary?’ in Romano, 428-30.

<sup>165</sup> *Ibid*, 429.

<sup>166</sup> Pellet, note 158, 437.

hybrid tribunal. This is a blending of the national and international in one institution. The SCSL and the LST are possible examples of this model. The third layer would include internationalized tribunals – essentially domestic institutions but with significant input from other states or from other international institutions such as the United Nations. Many of the tribunals to be studied in this thesis fall within this type of tribunal. The final category would be the provision of justice ‘assistance’ by other states or the international community, usually on an ad hoc basis.<sup>167</sup> This would include, for example, the dispatch of forensic experts to assist in an investigation, the secondment of staff to train judges or lawyers, or financial or material contributions toward the operation of a specific institution or a defined project. International assistance does not have to be addressed at supporting an entire court but could instead be targeted at a particular aspect of the process, such as investigation or prosecution.<sup>168</sup> It is suggested that this final category would also include *sui generis* arrangements whereby a state has agreed to host a tribunal or trial conducted by the courts of another state on its territory. Other than the general introduction to the ad hoc tribunals and the ICC provided above, this thesis will examine the institutions falling within the second and third levels on the scale outlined above: hybrid tribunals and internationalized tribunals. The tribunals to be considered are the SCSL, the LST, the IJPP, the SPSC, the ECCC, the WCC and the IHT. Of these tribunals, probably the most controversial tribunal to include is the IHT, with several states and commentators considering the IHT to be a purely national institution, receiving limited international assistance.<sup>169</sup> However, as will be discussed in subsequent chapters, the IHT shares some characteristics of an internationalized criminal tribunal. First, there is an international dimension in that it was established within the context of an international

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<sup>167</sup> An example of international assistance is the OSCE mission to Serbia, which has a mission priority to support the capacity of the domestic system to conduct its own war crimes trials, including support to the War Crimes Chamber and the War Crimes Prosecutor. For further details see: OSCE Mission to Serbia and Montenegro, *War Crimes Before Domestic Courts* (2003); International Centre for Transitional Justice (ICTJ), *Serbia and Montenegro: Selected Developments in Transitional Justice* (2004); and ICTJ, *Against the Current – War Crimes Prosecutions in Serbia* (2007).

<sup>168</sup> Agreement between the United Nations and the Government of Guatemala for the Establishment of a Commission for the Investigation of Illegal Groups and Clandestine Security Organizations in Guatemala, 7 January 2004. This agreement has not been implemented, as it was rejected by the Guatemalan Congress after the Constitutional Court found that certain elements were incompatible with the constitution. It had proposed the creation of an international investigative and prosecutorial capacity, operating under national law. The parties have now entered into the Agreement for the establishment of an International Commission Against Impunity in Guatemala, 12 December 2006.

<sup>169</sup> See Stahn, C., ‘The Geometry of Transitional Justice: Choices of Institutional Design’ (2005) 18 *LJIL* 425, 441; Garraway, C., ‘The Statute of the Iraqi Special Tribunal: A Commentary’ in Breau, S. and Jachec-Neale, A., (eds) *Testing the Boundaries of International Humanitarian Law* (BIICL, London, 2006).

occupation and its design and operation have been heavily influenced by the occupying powers. Second, as originally envisaged, the IHT Statute provided for the possible, although not mandatory, appointment of international personnel and support staff. Even though this provision was never utilised, and was restricted in the 2005 version of the IHT Statute, it was included in the initial design of the tribunal. Moreover, international advisors have had a significant role in advising the organs of the IHT. Third, the IHT Statute incorporates crimes under international law and national law. Fourth, on a practical level, the IHT has received significant assistance from states and international organisations, in particular the United States. The United States has provided a large proportion of the tribunal's funding, and has offered assistance in a number of key areas, including the provision of security to the tribunal's premises, staff and witnesses and in detaining many of the accused. Accordingly, it is included in this study as an internationalized tribunal.

Tribunals that have been excluded from the study are also significant. The trial of the individuals accused of committing the terrorist attack on Pan Am Flight 103 over Lockerbie in Scotland has on occasion been suggested as falling within the category of internationalized tribunals. Following the bombing, criminal proceedings were commenced in Scotland and the United Kingdom and the United States, acting individually and through the Security Council,<sup>170</sup> sought to compel Libya, the state of nationality of the accused, to extradite the accused for trial. Libya refused, arguing that under the relevant international instrument, the 1971 Montreal Convention, it was entitled to try the accused itself. Only if it failed to do so was it required to extradite the accused. Libya referred the dispute to the International Court of Justice in 1992, seeking an order for provisional measures confirming that it was not required to extradite the accused and that the United Kingdom and the United States were in violation of their own obligations under the Convention in attempting to coerce the extradition of the accused.<sup>171</sup>

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<sup>170</sup> See Resolutions 731 (1992), 748 (1992) and 883 (1993), which condemned the bombing, required Libya to comply with requests from the United Kingdom, the United States and France (regarding the bombing of a French airliner) to cooperate fully in establishing responsibility for the acts and imposed a variety of sanctions when Libya failed to do so.

<sup>171</sup> See Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States).

The dispute was ultimately resolved politically, with the Security Council and the Secretary General assisting to negotiate a solution to the impasse.<sup>172</sup> An international agreement provided for the trial to be conducted by a panel of Scottish judges, operating under Scottish law, but sitting in the Netherlands, a neutral country.<sup>173</sup> The agreement was forwarded to the Security Council, and measures against Libya were lifted following the surrender of the accused for trial. Despite the role of the United Nations in the resolution of the dispute, the Lockerbie tribunal is not considered here to be an internationalized criminal tribunal. The tribunal itself was a United Kingdom court. It was established pursuant to United Kingdom law,<sup>174</sup> applied Scottish substantive and procedural law, with some modification to exclude a jury trial, and utilised Scottish judges and personnel. The only international element was the location of the tribunal and the nationality of the accused. The Security Council did not establish the tribunal or require its establishment. It is thus best considered ‘an ad hoc solution for a particular incident’<sup>175</sup> and has not been included in this thesis as an example of an internationalized tribunal.

### **4.3 Benefits and possible limitations of hybrid and internationalized tribunals**

These tribunals are said to offer the advantages of both national and international prosecutions.<sup>176</sup> The addition of international judges and prosecutors in sensitive cases may bolster the capacity of the local judiciary and enhance the perception that the judiciary is independent and impartial. International involvement may allow minority groups greater participation and protection. International judges and prosecutors should be familiar with the relevant international laws and standards, while local judges are familiar with the relevant local law and the territory. If situated in the affected territory, internationalized tribunals may enable a sense of domestic

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<sup>172</sup> For further discussion of the background to the trial, see Plachta, M., ‘The Lockerbie Case: the role of the Security Council in Enforcing the Principle *aut dedere aut judicare*’ (2001) 12 *EJIL* 125 and Andrews, D., ‘A thorn on the tulip – a Scottish trial in the Netherlands: the story behind the Lockerbie trial’ (2004) 36 *Case Western Reserve Journal of International Law* 307.

<sup>173</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Netherlands concerning a Scottish Trial in the Netherlands, 18 September 1998, UNTS Vol. 2062, I-35699.

<sup>174</sup> High Court of Justiciary (Proceedings in the Netherlands) Order 1998.

<sup>175</sup> Cryer et al, note 79.

<sup>176</sup> A number of commentators and non-governmental organizations have reviewed the success or otherwise of the hybrid and internationalized tribunals, as well as their jurisprudence. For example, see Mendez, P., ‘The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?’ (2009) 20 *Crim LF* 53; Dickinson, note 154; Higonnet, E., ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’ (2006) 23 *Arizona Journal of International and Comparative Law* 347.

ownership of and engagement with the criminal justice process.<sup>177</sup> Establishing an internationalized tribunal may enable the revision of national laws to more clearly incorporate international crimes and may encourage the penetration of international norms both within the territory affected and also, potentially, in the wider region.<sup>178</sup> Moreover, internationalized tribunals may lead to trials being started and completed more quickly than rebuilding domestic capacity, so allowing prosecution to be expedited, without compromising standards.<sup>179</sup>

However, it is also possible that internationalized tribunals could replicate the failings of both international and national prosecutions.<sup>180</sup> Incorporating dual aspects might lead to problems with cooperation between national and international elements. National and international judges may operate from different legal philosophies, particularly where there is a mixture of judges from civil and common law systems. Developing capacity amongst the local legal profession requires interaction and mentoring, which is not always a task for which international judges are well-prepared or have sufficient time to undertake. Locating the tribunal in the territory affected may enable greater engagement, but if the security situation deteriorates it may actually threaten the ability of victims and witnesses, defence lawyers and even tribunal personnel to attend, let alone participate in the trials to be conducted.<sup>181</sup> The appointment of international judges and prosecutors may not be sufficient to ensure impartiality, particularly where international judges form a minority on a judging panel.<sup>182</sup> Moreover, the involvement of international actors could create its own concerns regarding the independence of the system and the personnel,<sup>183</sup> or it may

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<sup>177</sup> As Cassese notes, the local population will be familiar with the events that led to the conflict and the atrocities committed. Observing and engaging with the trial process may be a cathartic process for the wider community, and contribute towards long-term reconciliation: note 158, 6.

<sup>178</sup> Dickinson, note 154, 307-8.

<sup>179</sup> Cassese, note 155, 345.

<sup>180</sup> Cockayne, J., 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals' (2005) 28 *FILJ* 616.

<sup>181</sup> The IHT has faced an increasingly hostile security environment since its establishment in 2003, with the situation deteriorating rapidly in 2004. The IJPP has also experienced difficulties operating within the territory of Kosovo.

<sup>182</sup> Of all the tribunals featured in this study that utilise international judges, only the ECCC does not require a majority of international judges: see Table One.

<sup>183</sup> One of the main criticisms of the IJPP is that 'its structure gives to the SRSJ the ultimate executive power to appoint international judges and prosecutors and choose cases in which they are to be involved': ICTJ, *Lessons from the Deployment of International Judges and Prosecutors* (2006), 19.

place a veil of legitimacy on a national system that may lack independence<sup>184</sup> or be corrupt.<sup>185</sup> A suitable body of applicable law may not exist,<sup>186</sup> or the selection of the applicable law may be controversial.<sup>187</sup> Tribunals may not have a clear prosecution strategy and may squander valuable resources on cases concerning lower-level accused or ‘ordinary crimes’.<sup>188</sup> Internationalized tribunals may even face greater challenges in securing international and domestic cooperation than either international or domestic institutions.<sup>189</sup> Perhaps the most significant factor that has impacted upon the performance of all internationalized tribunals to date is the reluctance of the relevant international actors and, in some circumstances, of the state affected, to allocate a sufficient amount and reliable source of funding to the tribunal. The former Secretary-General has expressed his preference for funding from assessed contributions on several occasions, commenting that:<sup>190</sup>

any future financial mechanism must provide the assured and continuous source of funding that is needed to appoint officials and staff, contract services, purchase equipment and support investigations, prosecutions and trials and do so expeditiously. Resort, therefore, to assessed contributions remains necessary in these cases. The operation of judicial bodies cannot be left entirely to the vagaries of voluntary financing.

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<sup>184</sup> There is evidence that trials before the IHT are subject to political pressure and interference: see Human Rights Watch, *Judging Dujail: The First Trial before the Iraqi High Tribunal* (2006), 39-43.

<sup>185</sup> Serious concerns exist as to the independence of the judiciary in Cambodia. There are also allegations that judges, including the national judges appointed to the ECCC, are corrupt and received kickbacks for appointment: Open Society Justice Initiative, *Corruption Allegations at Khmer Rouge Court must be Investigated Thoroughly* (2007). These corruption allegations remain unresolved, with the findings of a recent review by the United Nations of the claims - that has supposedly recommended Cambodia conduct a full investigation and that the United Nations should withdraw from the process if the issue is not resolved- not publicly released. See: Hall, J., ‘Corruption Charges Threaten Khmer Rouge Tribunal’ New America Media, News Report, 16 August, 2008.

<sup>186</sup> When UNTAET and UNMIK arrived in East Timor and Kosovo respectively, they faced a legal system which did not incorporate many of the international crimes that had been committed during the conflicts: See Hartmann, M., *International Judges and Prosecutors in Kosovo* (2003, United States Institute of Peace) and Strohmeyer, H., ‘Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor’ (2001) 95 *AJIL* 46.

<sup>187</sup> One of the problems facing UNMIK upon arrival in Kosovo was the lack of a legal framework. The selection of the pre-existing law offended much of the population, in particular Kosovan Albanian judges and legal professionals, who refused to apply the law. See Lorenz, F., ‘The Rule of Law in Kosovo: Problems and Prospects’ (2000) 11 *CrimLF* 127, 128; Strohmeyer, *ibid*; and ICTJ, note 183, 9-10.

<sup>188</sup> See discussion in Chapter Four.

<sup>189</sup> See the discussion in Chapter Five.

<sup>190</sup> Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, para. 43.

All of the tribunals studied have experienced funding difficulties.<sup>191</sup> This has led to the perception that such institutions are ‘justice on a shoestring’, suffering from chronic under-funding, severe staff and resource shortages, a failure to provide for adequate defence or witness and victim protection schemes, concerns that trials do not meet minimum standards, and many obstacles to having vital materials (including judgements) translated and made publicly available.

The problems that have been encountered by the hybrid and internationalized tribunals suggest that the following guidelines as to when these models should be applied may be of use. First, as these models rely in part on a functioning judiciary there should always be some components of the judicial system left in place, or at least the potential to quickly find and recruit suitable candidates. Second, where the conflict is ongoing or the security situation has deteriorated, planners must assess whether trials within the affected territory are feasible or should be deferred or located outside the affected territory. This consideration may also be relevant to a particular trial, as opposed to relocating the entire tribunal.<sup>192</sup> Third, the internationalized tribunal should be established with the support of the relevant local actors and should not be viewed as ‘imposed’. It is essential that the tribunal has the support, input and cooperation of local authorities.<sup>193</sup> Fourth, it may be beneficial to place the national judiciary (and international personnel) under some form of international scrutiny, such as trial monitoring,<sup>194</sup> and also be subject to international oversight, possibly in the form of a management committee or similar body.<sup>195</sup> Fifth, where the cooperation of

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<sup>191</sup> In relation to Cambodia, see Linton, S., ‘Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers’ (2006) 4 *JCIJ* 327, 335; and Kamhi, A., ‘Private Funding for Public Justice: The Feasibility of Donations to the Cambodian Tribunal’ (2007) 48 *HILJ* 581. See also see Ingadottir, T., ‘Financial Challenges and their Possible Effects on Proceedings’ (2006) 4 *JICJ* 294; Ingadottir, T., ‘The Financing of Internationalized Criminal Courts and Tribunals’ in Romano, 271-290; Roper, S. and Barria, L., *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (Ashgate, 2006), Chapter Five.

<sup>192</sup> The SCSL has utilised the option in article 10 of the SCSL Agreement to sit away from its seat in Sierra Leone ‘if circumstances so require’ so as to host the trial of former Liberian President, Charles Taylor, in the Hague, using the premises of the ICC. The relocation of the trial was justified by reference to the security situation and the concern that the trial may destabilise the situation within Sierra Leone and in neighbouring Liberia.

<sup>193</sup> Beauvais, J., ‘Benevolent Despotism: A Critique of UN State-Building in East Timor’ (2001) 33 *NYJILP* 1101.

<sup>194</sup> The OSCE Legal Systems Monitoring Section in Kosovo and the Judicial System Monitoring Project in East Timor have provided vital information on the functioning of the internationalized process and helped shape reforms to the operation of the tribunals.

<sup>195</sup> Three of the tribunals studied have a dedicated system for oversight, the SCSL, the LST and the WCC. See Mochochoko, P., and Tortora, G., ‘The Management Committee for the Special Court for Sierra Leone’, in Romano, 141; and Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I War Crimes and Section II for Organised Crime, Economic Crime and Corruption of

elements of the affected society or other states is required there should be some possibility of securing that cooperation. In the absence of appropriate legal arrangements or a lack of will to fulfil legal obligations this may require the Security Council to take a role in securing the arrest and surrender / extradition of accused or the transfer of evidence.<sup>196</sup> Sixth, an internationalized tribunal should not be able to utilise the death penalty because this may preclude the involvement of the United Nations and the wider international community.<sup>197</sup> Finally, a tribunal should not be established unless there is a secure and sufficient source of funding.<sup>198</sup>

It has also been suggested that a hybrid or internationalized tribunal should only be established where a purely international tribunal is not possible, either due to a lack of political will to establish the tribunal or to fund the tribunal. However, it is submitted here that this is not necessarily the case, as hybrid and internationalized tribunals may offer many advantages over an international criminal tribunal. It will be interesting to see how the relationship between the ICC and future hybrid or internationalized tribunals develops, as the use of such tribunals may be another facet of the complementarity principle, whereby an internationalized tribunal may operate where the ICC may otherwise have done so, thus freeing up valuable resources at the ICC.

## **5 Conclusion**

This Chapter has outlined the available options to secure criminal accountability for perpetrators of international crimes. It has highlighted that the system of enforcement of international criminal law is by no means comprehensive. States are often reluctant or unable to bring perpetrators to trial for conduct committed by their nationals or on their territory. Other states face numerous political, legal and practical challenges in

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the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, 1 December 2004 and Decision on Ratification of the Annex Amending and Supplementing the Registry Agreement, Decision PA No 318/06, 7 July 2006. Recent concerns as to financial mismanagement by the ECCC have led donor states and various non-governmental organisations to call for the creation of an oversight committee and/or a special international advisory position: Heindel, A. and Ciorciari, J., 'Possible Roles for a Special Advisor or Oversight Committee for the ECCC' (2008).

<sup>196</sup> These issues are discussed in Chapter Five.

<sup>197</sup> The United Nations has stated that it cannot, as a matter of policy, establish or cooperate with a tribunal that permits the death penalty as a possible punishment. The availability of the death penalty is also one of the key reasons why members states of the European Union (which is opposed to the death penalty) were reluctant to lend assistance to the IHT. For discussion as to whether the IHT was lawfully able to apply the death penalty, see: Bohlander, M., 'Can the Iraqi Special Tribunal sentence Saddam Hussein to Death?' (2005) 3 *JICJ* 463.

<sup>198</sup> See the sources cited at note 191.

relying on the principle of universal jurisdiction to bring perpetrators to justice. The two ad hoc tribunals and the ICC are subject to numerous restrictions on their jurisdiction and their capacity, and the ad hoc tribunals are now winding down their activities pursuant to the completion strategy. The ICC will always be a court of last resort, and will not try a large number of cases. Thus there is an ‘impunity gap’ in the international justice system. Hybrid or internationalized tribunals represent another possible mechanism to secure criminal responsibility for international crimes. Although their establishment is ad hoc, and the tribunals have a number of different features, it is possible to envisage categories of such tribunals. These categories will be the subject of further discussion in Chapter Three. Hybrid and internationalized tribunals will not, however, fully close the impunity gap. Due to political factors, a desire to preserve national sovereignty and resource constraints, these tribunals will not be established in every situation where states have failed to act and the ICC or an ad hoc tribunal is unable to act. Moreover, the experience of the tribunals established to date suggests that hybrid or internationalized tribunals are not appropriate in all circumstances. Guidelines for when such bodies should be considered are starting to emerge, and will allow the mechanism to be used in a more effective manner so as to achieve as far as possible the principle of non-impunity.

## **CHAPTER TWO**

### **BACKGROUND TO THE ESTABLISHMENT OF THE HYBRID AND INTERNATIONALIZED TRIBUNALS**

#### **1 Introduction**

The preceding chapter outlined the development of international criminal law, including the establishment of the ICTY, the ICTR and the ICC. It also discussed the difficulties faced in relying on national judicial systems, and traced the increasing reliance on the notion of a hybrid or internationalized tribunal. Given the jurisdictional restrictions and resource limitations of the international criminal tribunals, one may expect that hybrid or internationalized tribunals would have been established wherever states have not exercised or were unable to exercise jurisdiction and where the international criminal courts may not – or chose not – to do so. However, this is not the case. The establishment of internationalized justice mechanisms is also subject to the same criticism of selective enforcement as are national courts and purely international models of criminal justice.

This chapter examines the background to the existing and former hybrid and internationalized tribunals that will be the subject of further study in the remaining chapters. Seven such institutions have been established. The discussion outlines the circumstances surrounding the violations of international humanitarian or human rights law, whether they are an armed conflict of an international or non-international nature, violations committed by a repressive regime, an act of terrorism, or a combination of these situations. It will assess the role of the affected state(s) in the negotiation process – if any – and the domestic political factors at play, as well as the role of other states, the United Nations - in particular the Security Council – and international organisations in establishing the tribunals. The discussion will serve two purposes. First, it will demonstrate the various contexts in which such tribunals have been established, and the political, legal and financial factors that have influenced their design and operation. Second, it will provide the basis for the analysis in the following chapters, which examine how the context in which a tribunal has been created and political, legal and financial factors have influenced the legal and jurisdictional basis of the tribunals, and the conduct and individuals which may be the subject of investigation and trial before them.

## 2 The Special Court for Sierra Leone

In 1967 the All People's Congress (APC) party was successful in general elections but was prevented by a military coup from assuming control of the country.<sup>1</sup> The coup was short-lived, with the APC regaining control through another putsch a year later. The APC ruled the country for almost two decades, with its policies of economic centralisation, marginalisation of certain ethnic groups, widespread institutional corruption, and interference with civil service employment serving to deepen the divide between socio-economic and geographical groups within Sierra Leone society. On 23 March 1991 an armed group comprising Sierra Leone nationals and nationals of other African states attacked a village in the east of Sierra Leone, triggering a civil war that was to claim an estimated 75,000 lives and displace one-third of the population.<sup>2</sup> The group was the Revolutionary United Front (RUF), and its leader, Foday Sankoh, announced his intention to overthrow the APC. In 1992 the APC regime was forced into exile by a military coup and a military government was established. RUF forces and members of the regular Sierra Leone military forces collaborated in undermining the government, leading the population to demand a transfer to democratic rule. In March 1996 Ahmad Kabbah was elected President. The first attempt to negotiate an end to the conflict took place in November 1996, with the signature of a peace agreement between President Kabbah's party and the RUF.<sup>3</sup> The agreement included a call for the end of hostilities and an amnesty for combatants but was never implemented because support for the agreement collapsed soon after its signature. The Kabbah government's rule was short-lived: it was ousted by a violent military coup in May 1997 that triggered a period of violence and terror that lasted for nine months. The leaders of the military coup joined with the RUF to form the Armed Forces Revolutionary Council (AFRC), a military junta that was alleged to have been responsible for violations of human rights. The Civil Defence Force (CDF), consisting of locally-formed armed bands aligned to the Kabbah government and the regular

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<sup>1</sup> This brief outline of the history of the conflict is based on several sources. See: Anthony, 'Historical and Political Background to the Conflict in Sierra Leone' in Ambos, K. and Othman, M. (eds) *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (2003); Stafford, N., 'A Model war Crimes Court: Sierra Leone' (2004) 10 *ILSA JICL* 117; Fritz, N. and Smith, A., 'Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone' (2002) 25 *FILJ* 391; and Human Rights Watch, *The Jury is Still Out*, Briefing Paper on Sierra Leone, 11 July 2002. For further details of the atrocities committed see: Human Rights Watch, *We'll Kill You if You Cry: Sexual Violence in the Sierra Leone Conflict*, January 2003.

<sup>2</sup> International Centre for Transitional Justice, *The Special Court for Sierra Leone: The First Eighteen Months* (2004), 1.

<sup>3</sup> Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, 30 November 1996 (Abidjan Accord).

army, was also involved in the conflict in order to defend civilians against attacks by rebel forces.

International pressure and military intervention by the Economic Community of West African States (ECOWAS) in early 1998 removed the AFRC and restored President Kabbah and the SLLP to power.<sup>4</sup> The AFRC and the RUF fled to the northern region and some eastern regions from where they continued to attack government forces, civilians and peacekeeping forces. In early 1999 the AFRC and the RUF attacked the capital, Freetown, and seized control of diamond mines, killing and maiming thousands of civilians before being repelled by ECOMOG troops.<sup>5</sup> In 1999 the parties participated in a further peace conference in Lomé, Togo,<sup>6</sup> with the assistance of the United Nations, the Government of the Togolese Republic, the Organisation for African Unity, ECOWAS and the Commonwealth. The negotiations resulted in the Lomé Accord between the Government and the RUF, signed on 7 July 1999. The Lomé Accord provided for an immediate and permanent end to the conflict between the parties, the establishment of monitoring commissions for violations of the ceasefire, the transformation of the RUF into a political party, arrangements for a transitional governance structure ahead of national elections, the continued deployment of a United Nations observer mission and a mandate for a regional peacekeeping force. Its provisions were partly implemented, with a partial ceasefire, the establishment of an implementation committee and the dispatch of a peacekeeping mission by the Security Council.<sup>7</sup> The truth and reconciliation commission envisaged by the Lomé Accord was established in February 2000.<sup>8</sup> However, fighting resumed

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<sup>4</sup> See Berger, L., 'State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone' (2001) 11 *Indiana International & Comparative Law Review* 605.

<sup>5</sup> ECOMOG was the military arm of ECOWAS.

<sup>6</sup> This was the parties' fourth attempt at peace negotiations, and the second 'comprehensive' peace agreement signed.

<sup>7</sup> Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, S/1999/836; First Report of the Secretary-General on the United Nations Mission in Sierra Leone (UNAMSIL), S/1999/1223; and Resolutions 1260 (1999) and 1270 (1999). See also Udombana, N., 'Globalization of Justice and the Special Court for Sierra Leone's War Crimes' (2003) 17 *Emory International Law Review* 55, 78-82.

<sup>8</sup> Article XXVI, Lomé Accord; Truth and Reconciliation Commission Act 2000 (SL). There is extensive literature regarding the truth and reconciliation commission and its relationship with the SCSL, for example: Schabas, W., 'Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2 *JICJ* 1082; Hall, L. and Kazemi, N., 'Prospects for Justice and Reconciliation in Sierra Leone' (2003) *HILJ* 287; Schabas, W., 'The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone' (2003) 25 *HRQ* 1035; Tejan-Cole, A., 'The Complementary and Conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission' (2003) 6 *Yale Human Rights & Development Law Journal* 139;

early in 2000, hostilities against civilians continued, and the RUF seized and held hostage United Nations peacekeepers.<sup>9</sup> The end of the conflict was not announced officially until 14 January 2002, with the surrender of approximately 45,000 rebels.<sup>10</sup>

The hostilities between the warring factions were particularly horrendous and included the targeting of civilians. Victims were murdered or maimed through amputation of limbs.<sup>11</sup> Boys were recruited as child soldiers and women and girls were raped, abducted and used as sex slaves. It is estimated that between 100,000 and 200,000 people died during the conflict, with 100,000 more mutilated and seriously injured,<sup>12</sup> and up to one quarter of the population displaced.<sup>13</sup> All parties to the conflict were alleged to have committed violations of international humanitarian law.<sup>14</sup> Soldiers from the Nigerian-led peacekeeping force contributed by the ECOWAS also allegedly committed offences.<sup>15</sup>

In June 2000 the President of Sierra Leone, President Kabbah, wrote to the Security Council requesting its assistance ‘in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace’.<sup>16</sup> President Kabbah stated that Sierra Leone did not have the resources or expertise to conduct trials for crimes of the magnitude and extent of those committed.<sup>17</sup> He attached a suggested legal framework for the intended court, ‘one that will meet international standards for the trial of criminal cases while at the same time having a mandate to administer a blend of international and domestic Sierra Leonean law on Sierra Leone soil’.<sup>18</sup> In Resolution 1315,<sup>19</sup> the Security Council requested the Secretary-General ‘to negotiate an agreement with the Government of Sierra Leone to create an independent

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and Evenson, E., ‘Truth and Justice in Sierra Leone: Coordination Between Commission and Court’ (2004) 104 *Col LR* 730.

<sup>9</sup> See the Reports of the Secretary-General during this period: S/2000/13 (Second Report); S/2000/186 (Third Report); S/2000/455 (Fourth Report); S/2000/751 (Fifth Report); S/2000/832 (Sixth Report); and S/2000/1055 (Seventh Report).

<sup>10</sup> Stafford, note 1, footnote 50.

<sup>11</sup> Miraldi, M., ‘Overcoming Obstacles of Justice: The Special Court of Sierra Leone’ (2003)

19 *New York Law School Journal of Human Rights* 849

<sup>12</sup> Stafford, note 1, footnotes 17 and 18.

<sup>13</sup> Human Rights Watch, note 1.

<sup>14</sup> See Akinrinade, B., ‘International Humanitarian Law and the Conflict in Sierra Leone’ (2001) 15 *Notre Dame Journal of Law, Ethics and Public Policy* 391.

<sup>15</sup> Human Rights Watch, note 1.

<sup>16</sup> Letter from the President of Sierra Leone to the President of the United Nations Security Council, dated 12 June 2000, Annex to Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, S/2000/786.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Resolution 1315 (2000).

special court consistent with this resolution’, and to report to the Security Council on the result of negotiations within 30 days from the date of the resolution.<sup>20</sup> The Security Council made several recommendations as to the subject matter and personal jurisdiction of the proposed court,<sup>21</sup> and asked for recommendations from the Secretary-General on the temporal jurisdiction, the appeals process, the location of the court, the level of assistance required for the court, and funding alternatives.<sup>22</sup> The Secretary-General submitted his report to the Security Council on 4 October 2000,<sup>23</sup> annexing a draft agreement for the creation of the proposed court and a draft statute. The Secretary-General and the Security Council then corresponded in relation to the proposed personal jurisdiction, composition and funding arrangements of the court, with the Security Council suggesting various amendments to the text of the draft agreement and statute.<sup>24</sup>

The Secretary-General indicated that he would not formally enter into the agreement until he had received assurances from states that sufficient funds would be available for the start-up of the court and its later operation.<sup>25</sup> This did not occur until early 2002, with the Secretary-General sending a planning mission to Sierra Leone in January 2002.<sup>26</sup> Following the report of the planning mission,<sup>27</sup> the Secretary-General instructed his representative to formally execute the agreement on behalf of the United

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<sup>20</sup> Paras 1 and 6.

<sup>21</sup> Paras 2 and 3.

<sup>22</sup> Paras 7 and 8.

<sup>23</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915.

<sup>24</sup> Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S/2000/1234; Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, S/2001/40; and Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General, S/2001/95. The final letter from the Security Council to the Secretary-General was dated 31 January 2001 and left only one issue upon which the Security Council and the Secretary-General were not in agreement: Letter, 12 January 2001, paras 4-5. The Security Council’s preferred text was adopted, and was approved by the Government of Sierra Leone by letter dated 7 February 2001.

<sup>25</sup> Letter 12 January 2001, *ibid.*, para. 12. This was confirmed by the Security Council on 31 January 2001: S/2001/95. In July 2001, the Secretary-General indicated that a reduced operating budget had been agreed for the proposed court, and that he intended to collect sufficient funds from donor states before executing the agreement: Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council, 13 July 2001, S/2001/693. See also Letter dated 23 July 2001 from the President of the Security Council to the Secretary-General, S/2001/722.

<sup>26</sup> Press Release, *Sierra Leone: Annan despatches planning team in first step to set up special court*, 3 January 2002.

<sup>27</sup> Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone, submitted to the Security Council as Annex to Letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council, S/2002/246.

Nations.<sup>28</sup> The decision to proceed with the SCSL was ‘approved’ by the Security Council on 19 March 2002, following a briefing by the United Nations Legal Counsel and Assistant Secretary-General for Legal Affairs, although there is no resolution or presidential statement documenting this approval.<sup>29</sup>

The SCSL Agreement entered into force on the day after both parties notified each other in writing that the legal requirements for entry into force had been satisfied.<sup>30</sup> The SCSL functions in accordance with the SCSL Statute, attached as an annex to the SCSL Agreement and forming an integral part of the SCSL Agreement.<sup>31</sup> As Sierra Leone is a dualist system, the SCSL Agreement needed to be implemented into the domestic law of Sierra Leone.<sup>32</sup> As shown in Table One, the SCSL exists as a distinct institution, separate from both the United Nations and the national legal system. It comprises two trial chambers and an appeals chamber, each consisting of a majority of international judges. The SCSL has an international Prosecutor and an international Registrar. The jurisdiction of the SCSL is outlined in more detail in Chapter Four. The Registrar and the Prosecutor were appointed in April 2002,<sup>33</sup> the judges appointed in July 2002<sup>34</sup> and the first indictments issued in March 2003.<sup>35</sup> Trials commenced in June 2004.<sup>36</sup> The SCSL has issued 13 indictments<sup>37</sup> and, as at 31 December 2008, has completed two trials, sentencing five accused to imprisonment for crimes including

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<sup>28</sup> Press Release, *Sierra Leone: UN, Government sign historic accord to set up special war crimes court*, 16 January 2002.

<sup>29</sup> Press Release, *War crimes court for Sierra Leone gets Security Council go-ahead, UN Official says*, 20 March 2002.

<sup>30</sup> Article 21, SCSL Agreement.

<sup>31</sup> Article 1(2), SCSL Agreement.

<sup>32</sup> This occurred in August 2002, with the promulgation of the Special Court Agreement 2002 (Ratification) Act 2002 (the Ratification Act).

<sup>33</sup> Press Release, *Annan names Prosecutor, Registrar of special war crimes court*, 19 April 2002.

<sup>34</sup> Press Release, *Annan, Sierra Leone appoint experienced judges for country’s special war crimes court*, 25 July 2002. Judges were sworn in on 3 December 2002: Press Release, *Judges sworn-in for UN-backed special court for Sierra Leone*, 3 December 2002. Following a request from the President of the SCSL three additional judges were sworn in on 17 January 2005, so as to enable a second trial chamber.

<sup>35</sup> Press Release, *UN-backed Special Court for Sierra Leone indicts seven*, 11 March 2003. The indictments were welcomed by the Security Council: See Press Statement by Security Council President on Indictments by Sierra Leone Special Court, 14 March 2003, Press Release SC/7692.

<sup>36</sup> Press Release, *War Crimes Trials of Three Sierra Leonean Leaders to Start June 3 June*, 11 May 2004.

<sup>37</sup> Indictments in respect of Sam Bockarie and Foday Sankoh were withdrawn following receipt of evidence of the death of the accused: see Orders confirming Withdrawal of Indictment, both issued on 8 December 2003. Sam Hinga Norman died while in the custody of the SCSL, and the charges against him were withdrawn: Decision on Registrar’s submission of evidence of the death of Sam Hinga Norman and consequential issues, 21 May 2007. A fourth accused, Johnny Paul Koroma, remains at large.

war crimes and crimes against humanity.<sup>38</sup> Two other trials continue.<sup>39</sup> In April 2004 the General Assembly invited the SCSL to develop a completion strategy,<sup>40</sup> which it produced in May 2005.<sup>41</sup> Estimates provided by the President of the SCSL to the Security Council in 2007 suggested that all trial activities would be concluded by the end of 2008, with all appeals finalised by the end of 2009.<sup>42</sup> Due to delays in the trial of Charles Taylor, these revised targets will not be met.

### **3 Kosovo and the International Judges and Prosecutors Programme**

#### **3.1.1 The conflict in Kosovo**

Kosovo was an autonomous province of Serbia in accordance with the 1974 constitution of the SFRY.<sup>43</sup> In July 1990 Serbia forced amendments to the Serbian Constitution, effectively revoking the autonomous status of Kosovo. Kosovo Albanians initially responded by adopting a strategy of passive, non-violent resistance, supporting independence, holding elections for a new government and adopting parallel structures. States showed little willingness to recognize Kosovo as independent and, after the conclusion of the Dayton Agreement in 1995, the status of Kosovo as a part of Serbia, and hence the Federal Republic of Yugoslavia (FRY), was not contested.

Due to the increasing number and gravity of human rights abuses within Kosovo and frustration at the perceived failure of the United Nations to address their claims for self-determination, Kosovo Albanians turned to more violent means. The Kosovo Liberation Army (KLA) emerged to oppose Serbian authorities. Although initially

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<sup>38</sup> *Prosecutor v Brima, Kamara and Kanu*, Judgment, Trial Chamber, 20 June 2007; Sentencing Judgment, 19 July 2007; and Judgment, Appeals Chamber, 22 February 2008. *Prosecutor v Fofana and Kondewa*, Judgment, Trial Chamber, 2 August 2007; Sentencing Judgment, 9 October 2007; and Judgment, Appeals Chamber, 28 May 2008.

<sup>39</sup> The SCSL is yet to complete trials in the cases of *Prosecutor v Taylor* (trial commenced in June 2007) and *Prosecutor v Sesay, Kallon and Gbao* (Trial Chamber judgment was expected in early 2009).

<sup>40</sup> Resolution 58/284 (2004).

<sup>41</sup> A/59/816 and S/2005/350. Updated versions of the Completion Strategy were provided to the Management Committee on 12 October 2005, 19 July 2006 and 14 December 2006. The strategy was supplemented by a report by an independent expert, Antonio Cassese.

<sup>42</sup> Statement of President King to the Council, 8 June 2007, S/PV.5690. See updated Completion Strategy, S/2007/338. This strategy was approved by the Security Council: S/PRST/2007/23.

<sup>43</sup> The following discussion is drawn from a number of sources. For further information see: Report of the Independent Commission on Kosovo, *Kosovo: From Crisis to Crisis* (2000) and supplement, available at <http://www.kosovocommission.org>; Amnesty International country reports, available at <http://www.amnesty.org>; Campbell, G., *The Road to Kosovo – A Balkan Diary* (2000); Judah, T., *Kosovo: War and Revenge* (2000); Malcolm, N., *Kosovo* (1998); and O'Neill, W., *Kosovo: An Unfinished Peace* (2001).

small, decentralised and ill-equipped for war, from 1997 the KLA grew in strength, coordination and support. As it became more active, the harassment of the Kosovo Albanian population intensified, targeting not only KLA members, but leading politicians, activists and civilians. Faced with an expanding KLA presence, the FRY army entered Kosovo and began large-scale operations utilising both police and paramilitary units. The campaign targeted both the KLA and Kosovo Albanian civilian populations in rural areas, resulting in significant displacement and violations of human and civil rights. The conflict escalated from early March 1998 to March 1999 and eventually engulfed the entire province. Efforts to secure a peaceful resolution of the situation failed, with the FRY refusing to sign the Rambouillet Accords, which would have granted Kosovo self-government within the FRY.<sup>44</sup> On 24 March 1999 the North Atlantic Treaty Organisation (NATO) commenced an aerial bombing campaign against the FRY and its forces within Kosovo.<sup>45</sup> In response FRY military and paramilitary units attacked the civilian population, with devastating consequences.<sup>46</sup>

Diplomatic efforts continued during the NATO campaign under the auspices of the Contact Group for Kosovo and the European Union and culminated in a peace plan formally approved by the Serbian parliament on 3 June 1999. The peace plan required: the immediate and verifiable end to the violence and repression in Kosovo; the withdrawal of FRY military, police and paramilitary forces; the deployment of an international civil and security presence pursuant to a Council resolution; and the return of all refugees. On 10 June 1999 the Council adopted Resolution 1244, which provided the mandate and the framework for the United Nations Interim Administration Mission in Kosovo (UNMIK). The Council authorized UNMIK to provide ‘an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia’.<sup>47</sup> UNMIK

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<sup>44</sup> Agreement for Peace and Self-Government in Kosovo, UN Doc. S/1999/648. See Weller, M., ‘The Rambouillet Conference on Kosovo’ (1999) 75 *International Affairs* 211.

<sup>45</sup> The legality of this action will not be considered here. However, see: Simma, B., ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 *EJIL* 1; Gowlland-Debbas, V., ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance’ (2001) 11 *EJIL* 361; Henkin, L., ‘Kosovo and the Law of “Humanitarian Intervention”’ (1999) 93 *AJIL* 828; Duursma, J., ‘Justifying NATO’s use of force in Kosovo?’ (1999) 12 *LJIL* 287; and Neuhold, H., ‘Collective Security after Operation Allied Force’ (2000) 4 *Max Planck Yearbook of United Nations Law* 73.

<sup>46</sup> The devastation inflicted upon the Kosovo Albanian population between March and June 1999 has been well-documented (see for example reports by the OSCE, Human Rights Watch and Amnesty International). It is estimated that approximately 10,000 people were killed, mainly Kosovo Albanians, and some 3,000 people missing.

<sup>47</sup> Resolution 1244 (1999), para. 10.

was mandated to perform a wide range of tasks, including the performance of basic civil administrative functions, the maintenance of law and order and the protection and promotion of human rights.<sup>48</sup> UNMIK's first legislative act was to vest itself with 'all legislative and executive authority with respect to Kosovo, including the administration of the judiciary'.<sup>49</sup> Legislative and executive authority was vested in the SRSG,<sup>50</sup> who assumed responsibility for law-making functions and promulgated a series of regulations and administrative directions on a wide range of issues.<sup>51</sup> The legal basis of this extensive role – equivalent to administering the territory – will be discussed in Chapter Three.

As part of their civil administration function, UNMIK sought to reinstate the judicial system, which had been severely affected by the conflict in the territory.<sup>52</sup> The withdrawal of the FRY army, Serbian police and paramilitary units and the Serbian state authorities (including the Serb judiciary), following the suspension of the bombing campaign, left a vacuum in law and order. As many of the displaced population began to return:<sup>53</sup>

An increasing number of returnees resorted to violence and intimidation as a means of retrieving some semblance of their previous lives. Looting, arson, forced expropriation of apartments belonging to Serbs and other non-Albanian minorities, and in some cases, killing and abductions of non-Albanians became daily phenomena. Moreover, organized crime, including smuggling, drug trafficking, and trafficking in women, soon flourished. It was apparent, within the first few days, that the previous law enforcement and judicial system in Kosovo had collapsed.

Consequently, the immediate priority was to establish an emergency justice system to process individuals that had been detained by KFOR and were awaiting investigation

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<sup>48</sup> Ibid, para. 11, sections (b), (i) and (j).

<sup>49</sup> Regulation 1999/1, section 1.1.

<sup>50</sup> Resolution 1244 (1999), para. 6.

<sup>51</sup> Matters the subject of such 'legislation' included the permitted currency, ownership of real property, banking arrangements and tax and customs regimes.

<sup>52</sup> For further discussion of the conditions facing UNMIK on arrival, and efforts to re-establish the judicial system(s), see: Strohmeyer, H., 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *AJIL* 46; Betts, W., Carlson, S. and Gisvold, G., 'The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law' (2001) 22 *Mich JIL* 372; Chesterman, S., 'Justice Under International Administration: Kosovo, East Timor and Afghanistan' (2001) 12 *Finnish Yearbook of International Law* 143; and Lorenz, F., 'The Rule of Law in Kosovo: Problems and Prospects' (2000) 11 *Crim LF* 127.

<sup>53</sup> Strohmeyer, *ibid*, 48 (footnotes omitted).

and trial. The Special Representative of the Secretary-General appointed 55 judges and prosecutors to serve in the emergency justice system, operating as mobile units throughout the territory.<sup>54</sup> Once the emergency justice system had commenced functioning, UNMIK turned its attention to establishing the regular judicial system, promulgating a series of regulations making provision for the structure of the court system and the appointment and removal of judges and prosecutors.<sup>55</sup> In December 1999 301 judges and public prosecutors were appointed. However, only 245 judges and 42 public prosecutors were sworn in, and members of minority groups constituted only a small fraction of these numbers.<sup>56</sup>

### **3.1.2 Accountability for violations of international humanitarian law and human rights law**

Neither the peace plan nor Resolution 1244 made specific reference to a need to secure accountability for violations of international humanitarian law or human rights law. Although UNMIK did not have a specific mandate to do so,<sup>57</sup> it was considered a moral necessity to ensure accountability for the serious violations of international human rights and international humanitarian law that had occurred in the period immediately preceding the deployment.<sup>58</sup> The ICTY was already operational and had jurisdiction in relation to serious atrocities committed within the territory of the former Yugoslavia, including Kosovo. The Prosecutor of the ICTY indicated that the ICTY would investigate and try high level leaders alleged to have committed crimes during the conflict in Kosovo.<sup>59</sup> The ICTY has primacy in respect of national courts in the former Yugoslavia<sup>60</sup> and has considered several charges arising from events in

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<sup>54</sup> See OSCE Report 1, *Material Needs of the Emergency Judicial System* (1999) and OSCE Report 2, *The Development of the Kosovo Judicial System (10 June through 15 December 1999)* (1999).

<sup>55</sup> See, for example, Regulations 5, 6 and 7 of 1999, which provided for the appointment of a public prosecutor, the structure and registration of the judiciary and prosecutorial service and for the appointment of judges. See Betts et al, note 52.

<sup>56</sup> The OSCE reports that only eight professional judges were minorities (including two Serbs), only 13 of the lay judges were minorities (none of which were Serb) and only two of the public prosecutors belonged to a minority community. In August 2000, a further 125 judges, 309 lay-judges and 17 public prosecutors were appointed, although an ethnic breakdown was not made available: OSCE, *Review of the Criminal Justice System: 1 February 2000 to 31 July 2000*, 13.

<sup>57</sup> Resolution 1244 demanded that ‘all concerned’, which includes UNMIK, provide full cooperation with the ICTY: para. 14. There was no statement as to the need to ensure that perpetrators were brought to justice by mechanisms other than the ICTY.

<sup>58</sup> See Strohmeyer, note 52.

<sup>59</sup> ICTY Press Release, ‘Statement by Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, on the Investigation and Prosecution of Crimes Committed in Kosovo’, September 29, 1999.

<sup>60</sup> Article 9, ICTY Statute.

Kosovo.<sup>61</sup> It was, however, noted that UNMIK would have primary responsibility for investigating and prosecuting such crimes.<sup>62</sup> It was envisaged that those violations not investigated or prosecuted by the ICTY would be processed within the domestic judicial system, to be established and operated by UNMIK.

It quickly became apparent that the newly re-established domestic courts were largely incapable of remaining impartial and independent when trying cases concerning violations during the conflict, or those with an ethnic dimension. Nor was it thought that the national judges and prosecutors possessed the necessary experience to conduct trials of such complexity and importance.<sup>63</sup> Moreover, Serbian lawyers and judges had refused to participate in the system, leading to a perception of, if not actual, bias in proceedings concerning Serb defendants.<sup>64</sup> The international administration initially considered proposals for a separate internationalized criminal tribunal, the Kosovo War and Ethnic Crimes Court (KWECC).<sup>65</sup> The KWECC would have comprised international and national personnel, including judges and prosecutors.<sup>66</sup> However, these plans were subsequently abandoned, due to budget restraints, delays and (reportedly) political concerns in various capitals.<sup>67</sup> Instead, UNMIK instituted a system of appointing international judges and prosecutors to sensitive trials. The first international personnel were appointed to the District Court in Mitrovica,<sup>68</sup> following an attack on a bus carrying Serbs in to Serb-controlled northern Mitrovica, which prompted riots and inter-ethnic violence. Demands for the International Judges and

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<sup>61</sup> See *Prosecutor v Milosevic*, 'Kosovo, Croatia and Bosnia'; *Prosecutor v Milutinovic et al*; *Prosecutor v Haradinaj et al*; *Prosecutor v Dordevic*; *Prosecutor v Lamaj et al*.

<sup>62</sup> ICTY Statement, note 59.

<sup>63</sup> See: OSCE Report 2, note 54; OSCE Background Report: *The treatment of minorities by the judicial system*, 13 April 2000; Cady, J. and Booth, N., 'Internationalized Courts in Kosovo: An UNMIK Perspective' in Romano et al (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (2004) ('Romano'); and Amnesty International, *Recommendations to UNMIK on the Judicial System*, February 2000.

<sup>64</sup> International Crisis Group, *Finding the Balance: The Scales of Justice in Kosovo*, September 2002.

<sup>65</sup> See Gall, C., 'UN Mission in Kosovo Proposes to Set Up a War Crimes Court', *New York Times*, 23 June 2000.

<sup>66</sup> For greater detail on the KWECC and the development of the IJPP, see: Baskin, M., *Lessons Learned on UNMIK Judiciary*, Report commissioned by the Department of Foreign Affairs and International Trade of the Government of Canada, Pearson Peacekeeping Centre, 5 June 2001; Betts et al, note 52; Bohlander, M., 'Kosovo: The Legal Framework of the Prosecution and the Courts' in Ambos & Othamn (eds), *New Approaches in International Justice: Kosovo East Timor, Sierra Leone and Cambodia* (2003), 32-34; Cerone, J. and Baldwin, C., 'Explaining and Evaluating the UNMIK Court System', in Romano; and Hartmann, M., *International Judges and Prosecutors in Kosovo* (2003).

<sup>67</sup> OSCE Report, note 56, 71-2; OSCE *Review of the Criminal Justice System, 1 September 2000 – 28 February 2001*, section 8. Events, in particular the development of the IJPP, also overtook the proposed KWECC.

<sup>68</sup> Regulation 2000/6, as amended by Regulation 2000/34.

Prosecutors Programme (IJPP) to be made available to detainees beyond Mitrovica quickly followed and UNMIK extended the IJPP programme to all districts within Kosovo.<sup>69</sup>

Initially Regulation 2000/6 provided for the appointment of only one international judge to a trial panel. However, it was determined that this was not sufficient to address the actual and perceived bias in judicial decisions, as the international judge was in the minority and was frequently overruled by a majority of domestic judges.<sup>70</sup> In December, the SRSG promulgated Regulation 2000/64, which enabled a case to be assigned to an international prosecutor, international investigating judge and/or a panel comprising a majority of international judges where the interests of justice so require.<sup>71</sup> The IJPP is unique amongst the tribunals studied in that there is ‘no fixed internationalized court or panel. Rather the international judges and prosecutors permeate the system, sitting on panels on a case-by-case basis’.<sup>72</sup> An application for the allocation of an IJPP may be made at any stage of the proceedings (including on appeal), although it cannot be made once a trial has started. The accused, the defence counsel, the prosecutor or the Department of Justice itself may make the application to the Special Representative of the Secretary-General. In addition, the IJPP may be requested for any type of case, the criterion for allocation is simply that allocation of an international prosecutor and/or judge(s) is considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.<sup>73</sup> The allocation of cases under the IJPP is under international control, not that of the President of the relevant court.<sup>74</sup> UNMIK also introduced a power for an international prosecutor to resurrect proceedings that had been abandoned by their local counterparts.<sup>75</sup>

The intention was that all cases concerning war crimes, genocide or crimes against humanity would be considered by the IJPP, although this has not always been the practice.<sup>76</sup> The IJPP has also been responsible for cases considered particularly

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<sup>69</sup> Regulation 2000/34.

<sup>70</sup> Amnesty International, *Serbia (Kosovo): The Challenge to Fix a Failed UN Justice Mission*, January 2008, 12.

<sup>71</sup> The IJPP has participated in trials alongside local counterparts, generally as the majority, and, in controversial cases, has sat as all international trial panels.

<sup>72</sup> Cerone and Baldwin, note 66, 41-2.

<sup>73</sup> Regulation 64/2000, section 1.

<sup>74</sup> Cady and Booth, note 63, 61.

<sup>75</sup> Regulation 2001/2, section 1.4.

<sup>76</sup> Amnesty International, note 70, section 4.

sensitive, including cases concerning serious inter-ethnic violence,<sup>77</sup> trafficking, and organized crime and corruption.<sup>78</sup> It is very difficult to obtain accurate information concerning the activities of the IJPP, and judgments and orders are not often publicly available. The most recent report, prepared by Amnesty International, suggests that the IJPP has been involved in 23 cases concerning crimes under international law.<sup>79</sup> The IJPP has been included in this study as its legal basis has both national and international characteristics, the IJPP is staffed by both international and national personnel and its officials apply both national and international law.<sup>80</sup>

### **3.1.3 Postscript: Transition to independence**

Resolution 1244 was silent as to the final outcome of the transitional administration; that is, whether Kosovo would remain an integral part of Serbia or would achieve independence.<sup>81</sup> On 17 February 2008 Kosovo declared its independence. This declaration has been recognised by 51 states, including all neighbouring states with the exception of Serbia. Russia has also protested against the recognition of sovereignty for Kosovo.<sup>82</sup> Many of the functions of UNMIK have been transferred to a European Union Rule of Law Mission in Kosovo, which will assume responsibility for international judges and prosecutors operating in Kosovo. This thesis will not consider the position subsequent to the declaration of independence.

## **4 UNTAET and the Serious Crimes Process**

### **4.1.1 The Indonesian occupation of East Timor, the consultation on independence and the introduction of international administration**

In 1975 Portugal withdrew from East Timor, a territory it had administered for 500 years. On 7 December 1975 the Republic of Indonesia invaded the territory of East Timor and on 17 July 1976 Indonesia purported to annex the territory as its 27<sup>th</sup> province. Despite the United Nations continued condemnation of the invasion,<sup>83</sup> no

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<sup>77</sup> The inter-ethnic violence that erupted as a result of riots in March 2004 has also been a focus of the IJPP: Human Rights Watch, *Not on the Agenda: The Continuing Failure to Address Accountability in Kosovo Post-March 2004*, May 2006.

<sup>78</sup> Cady and Booth note that ‘the fight against organised crime has now become one of UNMIK’s highest priorities’: note 63, 67.

<sup>79</sup> Amnesty International, note 70, Annex Three. Research for the report was carried out between early 2006 and April 2007, with material updated in late 2007.

<sup>80</sup> Cerone and Baldwin, note 66, 56-7.

<sup>81</sup> Resolution 1244 did not provide that Kosovo is being prepared for independence, nor does it recognise the right of self-determination for the people of Kosovo. Contrast Resolution 1272 (1999), establishing the mandate for UNTAET (see below).

<sup>82</sup> Resolution 63/3 (2008), requested an advisory opinion from the International Court of Justice on the question ‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’.

<sup>83</sup> See, for example, Resolutions 384 (1975) (calling for withdrawal by Indonesian forces and the exercise of the right to self-determination) and 389 (1976) (condemning the invasion).

action was taken for several decades,<sup>84</sup> and the annexation of East Timor was never recognised by the United Nations or its member states.<sup>85</sup> In the initial five-year period following the occupation, there were clashes between the Indonesian army and the military arm of the independence movement. This popular resistance continued, albeit at varying levels of intensity, throughout the Indonesian occupation.<sup>86</sup>

Following a change of President in 1998, Indonesia proposed autonomy for East Timor, subject to the condition that East Timor accept integration into Indonesia. That condition was rejected by independence leaders. Indonesia subsequently entered into negotiations with Portugal (the de jure power) and the United Nations, resulting in an agreement that provided for a referendum to be held to assess whether the people of East Timor wished to formalise their de facto status as part of Indonesia or to move towards independence.<sup>87</sup> Under the terms of the agreement the United Nations would conduct the ballot and certify its results while the Government of Indonesia would provide sufficient security to enable the referendum to take place. The Security Council established the United Nations Mission to East Timor (UNAMET) to organise and carry out the referendum,<sup>88</sup> and indicated its understanding that Indonesia was responsible for ensuring a safe and secure environment for the vote.<sup>89</sup>

The results of the referendum conducted on 30 August 1999 were conclusive, with 78.5% of voters in favour of independence and rejecting the option of autonomy within Indonesia. Following the release of the results, Indonesian military and militia forces reportedly initiated and facilitated a widespread and systematic campaign of violence against the civilian population of East Timor. Crimes alleged to have been committed included murder, rape, disappearances, assaults, torture, arson, looting and

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<sup>84</sup> Portugal attempted to bring the matter indirectly before the International Court of Justice by challenging Australia's recognition of the Indonesian occupation. However, this attempt was unsuccessful: *Case Concerning East Timor (Portugal v Australia)*, [1995] ICJ Reports 90.

<sup>85</sup> The exception was Australia, which entered into a treaty with Indonesia in respect of the Timor Gap: *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, 11 December 1989, 29 ILM 269.

<sup>86</sup> The history of the territory of East Timor has been discussed in greater detail in the following works: Dunn, J., *Timor: A People Betrayed* (1983); Taylor, J., *Indonesia's Forgotten War: The Hidden History of East Timor* (1991); Taylor, J., *East Timor: The Price of Freedom* (1999); *International Law and the Question of East Timor* (Catholic Institute for International Relations and the International Platform of Jurists for East Timor, 1995).

<sup>87</sup> Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, 5 May 1999, S/1999/513. For discussion of the terms of the agreement, and East Timor's right to self determination, see Drew, C., 'The East Timor Story: International Law on Trial' (2001) 12 *EJIL* 651.

<sup>88</sup> Resolution 1246 (1999).

<sup>89</sup> *Ibid.*, para. 9.

the forcible transfer of civilians into West Timor. The Security Council condemned the violence and ultimately deemed the situation to be a threat to international peace and security. Acting pursuant to its Chapter VII powers, the Security Council authorised a multinational force, led by Australia and known as INTERFET, to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and to facilitate humanitarian assistance operations.<sup>90</sup>

On 25 October 1999, the Security Council again acted under powers under Chapter VII of the Charter to establish a United Nations Transitional Administration in East Timor (UNTAET).<sup>91</sup> Like UNMIK in Kosovo, UNTAET had an extremely wide mandate; it was ‘endowed with overall authority for the administration’ and was ‘empowered to exercise all legislative and executive authority, including the administration of the judiciary’.<sup>92</sup> On the same day, the Indonesian parliament voted to accept the result of the referendum and Indonesia formally handed over responsibility for East Timor – in whatever capacity it was exercised - to the United Nations. The United Nations was to administer East Timor during a transitional period that would ultimately lead to independence. UNTAET was headed by the Special Representative of the Secretary-General (SRSG), who acted as the Transitional Administrator and was responsible for all aspects of the work of the United Nations in East Timor during the transitional period. The SRSG was also entrusted with all law-making functions, including the power to enact new laws and regulations and to amend, suspend or repeal existing laws.<sup>93</sup>

On 20 May 2002 East Timor became an independent nation, known as Timor-Leste, and was admitted as a member state of the United Nations on 27 September 2002. The newly adopted Constitution provided that laws and regulations in force at the time of transition would continue in effect unless inconsistent with the provisions of the Constitution.<sup>94</sup> UNTAET’s mandate ended on 20 May 2002.<sup>95</sup> Its successor mission, the United Nations Mission of Support in East Timor (UNMISSET), was mandated to provide assistance to core administrative structures, to provide interim law

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<sup>90</sup> Resolution 1264 (1999).

<sup>91</sup> Resolution 1272 (1999). For discussion, see Kondoch, B., ‘The United Nations Administration of East Timor’ (2001) 6 *JCSL* 245; Rothert, M., ‘UN Intervention in East Timor’ (2000) 39 *Col JTL* 257; and Ruffert, M., ‘The Administration of Kosovo and East Timor by the International Community’ (2001) 50 *ICLQ* 613.

<sup>92</sup> *Ibid*, para. 1.

<sup>93</sup> *Ibid*, para. 6.

<sup>94</sup> Section 165, Constitution.

<sup>95</sup> Resolution 1392 (2002).

enforcement and public security, and to contribute to the internal and external security of East Timor.<sup>96</sup> After independence the political climate also changed, with an increasing focus on restoring its relationship with Indonesia.<sup>97</sup>

#### **4.1.2 The quest for accountability for violations in East Timor**

In Resolution 1272 the Security Council had stressed that those responsible for acts of violence in East Timor should be brought to justice.<sup>98</sup> Unlike the situation in Kosovo, there was not an international tribunal with jurisdiction to try the alleged crimes in East Timor. Various inquiries had concluded that human rights violations and crimes were perpetrated before and after the 30 August referendum.<sup>99</sup> Moreover, there was significant evidence that such violations were either directly perpetrated or supported and assisted by the Indonesian armed forces and police, thus potentially engaging the responsibility of Indonesia.<sup>100</sup> The Commission of Inquiry noted that the United Nations had a special responsibility to respond to these violations, which had been committed contrary to a decision of the Council acting under Chapter VII of the Charter, and were in breach of the terms of agreements between the United Nations and Indonesia.<sup>101</sup> Given the culture of impunity that existed in East Timor towards the Indonesian military and supporting militia, and the state of the judiciary within East Timor, it was considered that the appropriate mechanism was to establish an international ad hoc criminal tribunal, preferably – but not necessarily – with the consent of Indonesia.<sup>102</sup> Indonesia dismissed the report of the Commission of Inquiry as biased and rejected the establishment of an international criminal tribunal for several reasons. In particular, Indonesia asserted that it was entitled and willing to exercise jurisdiction, as the violations had occurred at a time when East Timor was part of the territory of Indonesia and subject to Indonesian laws. It confirmed that, where it was established that individual personnel of the TNI and the Indonesian police had committed acts of violence and destruction, ‘the Indonesian Government is determined to bring these individuals to justice through the national judicial

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<sup>96</sup> Resolution 1410 (2002), paras 1 and 2.

<sup>97</sup> Reiger, C., *The Serious Crimes Process in Timor-Leste: In Retrospect* (2006), 8.

<sup>98</sup> Para. 16.

<sup>99</sup> Report on the joint mission of the special rapporteurs and representatives, Situation of human rights in East Timor, A/54/660; Report of the International Commission of Inquiry on East Timor, S/2000/59, A/54/726.

<sup>100</sup> Rapporteurs’ report, *ibid*, paras 135-141; Report of the Commission of Inquiry, *ibid*, paras 135-141.

<sup>101</sup> Report of the Commission of Inquiry, note 99, para. 147 and 153

<sup>102</sup> Rapporteurs’ report, note 99, para. 74(6); Report of the Commission of Inquiry, note 99, para.153.

mechanism'.<sup>103</sup> In the face of significant Indonesian opposition the Security Council did not move to establish an international tribunal. Instead the Security Council welcomed Indonesia's commitment to bring those responsible to justice through domestic means,<sup>104</sup> and continued to reiterate its call for Indonesia to act upon this commitment and to cooperate with East Timorese officials and UNTAET.<sup>105</sup>

The responsibility for the prosecution and trial of suspected perpetrators was therefore shared between the domestic judicial process of East Timor and the process in the Indonesian system. The Indonesian system focused on the National Commission of Inquiry on Human Rights Violations in East Timor (KPP-HAM) and the Ad Hoc Human Rights Court. The KPP-HAM issued a report in early 2000, recommending the prosecution of 33 individuals, including senior officials. The KPP-HAM report was widely recognised as having been conducted in a 'comprehensive, credible and objective manner, in compliance with international standards'.<sup>106</sup> In contrast, valuations of the process before the Ad Hoc Human Rights Court have been almost uniformly negative. As Bertodano concludes, it is 'impossible to resist the conclusion ... that these trials have not been conducted in good faith, and their principal purpose is to placate international donors rather than to provide justice'.<sup>107</sup>

In terms of the East Timorese system, when UNTAET deployed to East Timor in November 1999 it encountered a dire state of affairs. The legal and judicial system was in a state of collapse, with no courts or law enforcement institutions operating. As East Timorese lawyers had not been permitted to hold office under the Indonesian

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<sup>103</sup> Letter dated 26 January 2000 from the Minister for Foreign Affairs of Indonesia to the Secretary-General, S/2000/65, A/54/727.

<sup>104</sup> Letter from the President of the Council to the Secretary-General of 18 February 2000: S/2000/137.

<sup>105</sup> S/PRST/2000/26; Resolution 1319 (2000), para. 3; S/PRST/2000/39; Resolution 1338 (2001).

<sup>106</sup> S/2005/458, summary, para 15. See Dickinson, L., 'The Dance of Complementarity: Relationships Among Domestic, International, and Transnational Accountability Mechanisms in East Timor and Indonesia' in Stromseth, J. (ed), *Accountability for Atrocities: National and International Responses* (2003), 319, 335.

<sup>107</sup> Bertodano, S., 'Current Developments in Internationalized Courts: East Timor Justice Denied' (2004) 2 *JICJ* 910, 925. See also Amnesty International & Judicial System Monitoring Programme, *Indonesia: Justice for Timor-Leste: The Way Forward*, 2004; International Crisis Group, *Indonesia: Implications of the Timor Trials*, 2002; Human Rights Watch, *Justice Denied for East Timor*, 2002; Amnesty International, *Indonesia and Timor-Leste: International Responsibility for Justice*, 2003; Linton, S., 'Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor' (2004) 17 *LJIL* 303; JSMP Press Release, *Court in Jakarta completes theatrical performance*, 6 August 2003; Roper, S. and Barria, L., *Designing International Criminal Tribunals*, (2006) Chapter 4; Cohen, D., *Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta* (2003, International Centre for Transitional Justice); Dickinson, note 106, 344-53.

regime, there were no East Timorese judges, prosecutors or defenders able to fill the vacuum. Although some East Timorese had legal qualifications, they generally had no, or very limited, practical experience. Court buildings, records and other physical infrastructure had been destroyed or severely damaged. UNTAET realised that it would have to construct a functioning judicial system largely from scratch.<sup>108</sup> UNTAET quickly moved to re-establish the judicial system, appointing judges and prosecutors in January 2000. Regulation 2000/11 was promulgated in March 2000 and established a series of district courts. Resolution 1272 did not contain any specific reference to establishing an accountability mechanism for those accused of serious violations of human rights and international humanitarian law. Yet key legal advisers saw the creation of such a mechanism as important.<sup>109</sup> UNTAET established a system of dedicated panels to try individuals accused of committing ‘serious crimes’, known as the Special Panels for Serious Crimes (SPSC).<sup>110</sup> The SPSC were supported by a Serious Crimes Unit (SCU) staffed almost exclusively by international personnel.<sup>111</sup> The SPSC also operated alongside a truth and reconciliation commission.<sup>112</sup>

Following the termination of the mandate of UNTAET, the SPSC process was legally within the purview of the Timorese Department of Justice. UNMISSET did include a serious crimes unit, which assumed responsibility for funding and effective control of the SCU and the SPSC process. The Security Council effectively introduced a completion strategy for the serious crimes process in May 2004, determining that the SCU should complete all investigations by November 2004 and that it should conclude its activities by no later than 20 May 2005.<sup>113</sup> The implementation of such a strategy ‘had no relation whatsoever to the progress of the proceedings’ and was instead linked to the desire of the Security Council to terminate the mission supporting

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<sup>108</sup> For further discussion of the state on arrival and steps taken to re-establish a functioning judiciary see: Strohmeyer, H., ‘Building a New Judiciary for East Timor: Challenges of a Fledgling Nation’ (2000) 11 *Crim LF* 259; Strohmeyer, H., ‘Policing the Police: Post-Conflict Judicial System Reconstruction in East Timor’ (2001) 24 *University of New South Wales Law Journal* 171; Strohmeyer, note 52; and Linton, S., ‘Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor’ (2001) 25 *Melb JIL* 122.

<sup>109</sup> For the suggestion that this was required, see Clanton, S., ‘International Territorial Administration and the Emerging Obligation to Prosecute’ (2006) 41 *Texas International Law Journal* 569.

<sup>110</sup> Regulation 2000/15. For discussion of this approach, see Linton, S., ‘Cambodia, East Timor and Sierra Leone: Experiments in International Justice’ (2001) 12 *Crim LF* 185, 213-4.

<sup>111</sup> Regulation 2000/16, sections 1 and 2. See also Regulation 2000/11, section 24.

<sup>112</sup> Commission for Reception, Truth and Reconciliation, established by UNTAET on 13 July 2001. For discussion see: Stahn, C., ‘Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor’ (2001) 95 *AJIL* 952 and Dickinson, note 106.

<sup>113</sup> Resolution 1543 (2004).

the trial process.<sup>114</sup> The SCU issued its last indictments in December 2004 and then engaged in a handover process from February to May 2005. After UNMISSET's mandate ended, its successor mission had no mandate for justice-related activities. Without United Nations support and personnel, the SPSC were unable to continue and functions were suspended on 20 May 2005, pending any legislative amendment that would enable trials to occur before solely Timorese panels.<sup>115</sup> By April 2005 a total of 95 indictments had been issued, relating to 440 defendants. The SPSC had completed 55 trials of 87 defendants, with the verdict in the last trial announced on 22 April 2005.<sup>116</sup> 84 defendants had been convicted, three had been acquitted, 13 had had their cases withdrawn or dismissed, and one defendant had been declared unfit to stand trial. A total of 339 indicted people remained beyond the jurisdiction of the SPSC.<sup>117</sup>

The SPSC and the trials held in Indonesia have not satisfied calls for accountability for violations committed in East Timor. In 2005, the Secretary-General, with the support of the Security Council, decided to establish a commission of experts to conduct a review of the progress made by the Indonesian judicial process, and the SCU and SPSC process in East Timor.<sup>118</sup> The report of the commission of experts was forwarded to the Security Council in July 2005.<sup>119</sup> While it found that the serious crimes process in East Timor had provided some accountability, it noted that the domestic processes could not be expected to continue without international support and that the Security Council should ensure continued funding and international staffing of the serious crimes process.<sup>120</sup> Moreover, if this and its other recommendations in relation to Indonesian performance were not followed, the commission recommended the creation of an ad hoc tribunal by the Security Council acting under its powers under Chapter VII of the Charter, to be located in a third state, or, failing this, that the Security Council consider utilizing the ICC.<sup>121</sup> To date, the Security Council has not acted upon these recommendations. In addition, a bilateral commission on truth and friendship was formed by the governments of Indonesia and

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<sup>114</sup> Cohen, D., "Hybrid" Justice in East Timor, Sierra Leone and Cambodia: "Lessons Learned" and Prospects for the Future' (2007) 43 *Stan JIL* 1, 13; Katzenstein, S., 'Hybrid Tribunals: Searching for Justice in East Timor' (2003) 16 *HHRJ* 245, 271-2.

<sup>115</sup> Reiger, note 97, 27.

<sup>116</sup> End of Mandate Report of the Secretary-General on the United Nations Mission of Support in East Timor, S/20005/310, para. 20.

<sup>117</sup> JSMP, *Overview of the Justice Sector 2005*, 30-31.

<sup>118</sup> See letters from the Secretary-General to the President of the Council, S/2005/96 and S/2005/104.

<sup>119</sup> Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999, S/2005/458.

<sup>120</sup> *Ibid*, Recommendation A1.

<sup>121</sup> *Ibid*, Recommendations C and D.

East Timor, to provide an alternative to the prosecutorial process.<sup>122</sup> The commission submitted its final report in July 2008, finding that the Indonesian military, police and civilian government bear institutional responsibility for widespread and systematic gross violations of human rights, including crimes against humanity, during the period surrounding the referendum.<sup>123</sup>

## **5 Extraordinary Chambers in the Courts of Cambodia**

The period of Cambodian history from 1975 to 1979 is considered one of the darkest periods of human rights violations in modern history, being ‘marked by abuses of individual and group human rights on an immense and brutal scale’.<sup>124</sup> Historians estimate that the Khmer Rouge killed between 1.5 and 1.7 million people during this period, equivalent to approximately 20 percent of the initial population.<sup>125</sup> In 1953 Cambodia emerged from French colonial control as an independent state under the control of the hereditary monarch, Prince Norodom Sihanouk.<sup>126</sup> The country existed relatively peacefully until the escalation of the Vietnam War in the late 1960s, which resulted in Cambodia’s borders becoming vulnerable and subjected its population to bombing raids by US forces. In 1970, while abroad, Prince Sihanouk was overthrown in a bloodless coup, and a new government, named the Khmer Republic was established. The Khmer Republic maintained strong links to the United States, which stirred up anti-Western sentiments and gave new credibility to the Communist Party of Kampuchea, or the Khmer Rouge. With the withdrawal of United States support to the Khmer Republic, the Khmer Rouge achieved victory in the decade-long power struggle. The regime was only brought to an end following the occupation of Cambodia by Vietnamese forces in 1978/79, which led to the establishment of a puppet government and the declaration of Cambodia as the People’s Republic of Kampuchea. The Khmer Rouge retreated into zones over which it retained control, and continued a civil conflict against the People’s Republic of Kampuchea and Vietnamese forces throughout the 1980s. The conflict ended following a peace

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<sup>122</sup> Hirst, M., *Too Much Friendship, Too Little Truth: Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste* (2008).

<sup>123</sup> *From Remembering Comes Hope*, presented 15 July 2008.

<sup>124</sup> Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, dated 15 March 1999, UN Doc No A/53/850 and S/1999/231, para. 18.

<sup>125</sup> *Ibid.*, para. 35.

<sup>126</sup> This is a short summary of the background to the Cambodian conflict. For a more detailed account see Kiernan, B., ‘Historical and Political Background to the Conflict in Cambodia, 1945-2002’ in Ambos & Othman (eds) *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (2003), 173 –188; Ratner, S. and Abrams, J., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, (2001); and Buckley, A., ‘The Conflict in Cambodia and Post-Conflict Justice’ in Bassiouni, M.C. (ed), *Post-Conflict Justice* (2001).

process in 1991, although smaller-scale acts of violence continued throughout the transitional phases.<sup>127</sup>

The atrocities committed by the Khmer Rouge in Cambodia during the period 1975 to 1979 were largely driven by a political philosophy of achieving a sovereign Cambodia free of interference and domination by foreign interests, in particular Vietnam, and the interests of various social classes within Cambodia. This new social system required a reorganization of Cambodian society, first by the restructuring of the economic and social order of Cambodia and the ‘persecution and physical elimination’ of those elements of society regarded as enemies of the new sovereign state.<sup>128</sup> In order to exercise its control over Cambodian territory, the Khmer Rouge divided Cambodia into seven zones, themselves divided again into 32 administrative regions. The population was organised into co-operatives, supervised by a committee of party members. The atrocities alleged to have been committed included the following acts: forced evacuation of the cities and towns; forced labour and inhumane living conditions; persecution and elimination of enemies; and purges of party members. In achieving their objectives, the Khmer Rouge authorized specific executions, engaged in the practice of ‘disappearing’ their targets, tricked people into confessions, and often tortured their victims. In addition, the Khmer Rouge’s policies of forced relocation and labour and economic restructuring resulted in massive human rights abuses. Due to the absence of comprehensive records, it is impossible to identify the exact number of victims.

There had been little prospect of bringing the leaders of the Khmer Rouge to justice for their role in such atrocities until recently.<sup>129</sup> The process to create the ECCC began in 1997<sup>130</sup> following a request for assistance from the Cambodian government to the

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<sup>127</sup> See Ratner, S., ‘The Cambodia Settlement Agreements’ (1993) 87 *AJIL* 1.

<sup>128</sup> Ratner and Abrams, note 126, 269. In the interest of space, the following discussion is a summary based on the analysis provided therein.

<sup>129</sup> Proposals such as a truth and reconciliation commission have never been seriously considered in the Cambodian context. See: Klosterman, T., ‘The Feasibility and Prosperity of a Truth Commission in Cambodia: Too Little? Too Late?’ (1998) 15 *Arizona Journal of International & Comparative Law* 833; Ramji, J., ‘Reclaiming Cambodian History: The Case for a Truth Commission’ (2000) 24 *Fletcher Forum of World Affairs* 137. For the view that the international community’s failure to address accountability issues undermined the negotiation position of the United States in relation to the ECCC, see Tittmore, B., ‘Evolving Dynamics of Intervention to End Atrocities and Secure Accountability; Securing Accountability for Gross Violations of Human Rights and the Implications of Non-Intervention: The Lessons of Cambodia’ (2001) 7 *ILSA JICL* 447.

<sup>130</sup> The Prime Minister’s office had been a shared position. For more discussion, see Boyle, D., ‘Establishing the Responsibility of the Khmer Rouge Leadership for International Crimes’ (2002) 5 *YbIHL* 167; Donavan, D., ‘Joint UN-Cambodia Efforts to Establish a Khmer Rouge

United Nations to establish a tribunal to prosecute the senior leaders of the Khmer Rouge for the offences committed from 1975 to 1979.<sup>131</sup> A group of experts, convened at the request of the General Assembly,<sup>132</sup> recommended establishing an ad hoc international tribunal to be situated in the Asia-Pacific region, but not in Cambodia.<sup>133</sup> The Cambodian government rejected that proposal, instead requesting assistance in drafting domestic legislation to establish a specialized national court with international participation.<sup>134</sup> Opposition to the proposal increased following developments in internal politics, with Prime Minister Hun Sen taking control of the nation following a coup in 1997. This coincided with the effective end of the Khmer Rouge insurgency.<sup>135</sup> There were also legal, political and financial concerns at the international level regarding establishing an international tribunal. Following negotiations regarding the proposed structure and functions of the tribunal, the Cambodian government introduced the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea (the Special Law).<sup>136</sup> However, in February 2002, after two and a half years of negotiations, the United Nations withdrew from the process, citing a ‘lack of commitment’ to the process on the part of the Cambodian government.<sup>137</sup>

Negotiations for a Cambodian tribunal only resumed following a General Assembly request for the Secretary-General to conclude an agreement on the establishment of the Extraordinary Chambers.<sup>138</sup> During the course of negotiations, the Cambodian

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Trial’ (2003) 44 *HILJ* 551; Etcheson, C., ‘Accountability Beckons During a Year of Worries for the Khmer Rouge Leadership’ (2000) 6 *ILSA JICL* 507; Linton, S., ‘New Approaches to international justice in Cambodia and East Timor’ (2002) 84 *IRRC* 93; and Williams, S., ‘The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?’ (2004) 53 *ICLQ* 227.

<sup>131</sup> Letter from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General, 21 June 1997, A/51/930, S/1997/488.

<sup>132</sup> Resolution 52/135 (1997), para. 16.

<sup>133</sup> Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, A/53/850, para. 219. See: Ratner, S., ‘The United Nations Group of Experts on Cambodia’ (1999) 93 *AJIL* 947.

<sup>134</sup> Letter from Hun Sen, Prime Minister of Cambodia to H.E. Thomas Hammarberg, Special Representative of the UN Secretary-General for Human Rights in Cambodia dated 17 July 1999.

<sup>135</sup> Boyle, note 130.

<sup>136</sup> A Memorandum of Understanding was reached in May 2000, although there is some dispute as to the intended effect of this document and the extent to which it was incorporated into the Special Law: Lynch, C., ‘UN Warns Cambodia on War Crimes Tribunal’ *Washington Post*, 3 February 2001. The Special Law was introduced in December 2000, but was referred to the Cambodian Constitutional Court for approval: ‘Cambodia set for Khmer Rouge Trials’ *BBC Online* 7 August 2001.

<sup>137</sup> Report of the Secretary-General on Khmer Rouge trials, A/57/769, para. 14.

<sup>138</sup> Resolution 57/228 (2003).

government rejected the majority of amendments sought by the United Nations and resisted any changes to the Special Law. Consequently, the Secretary-General concluded that the only option acceptable to the Cambodian government was for a national court with the structure and organization envisaged in the Special Law.<sup>139</sup> An agreement, based on the provisions of the Special Law, was finalised and initialled by both parties on 17 March 2003, approved by the General Assembly on 13 May 2003, and signed on 6 June 2003 (the ECCC Agreement).<sup>140</sup> The ECCC Agreement entered into force in October 2004. Preparations for the ECCC started in 2006, and judicial activities commenced in late 2007.

## **6 War Crimes Chamber for Bosnia-Herzegovina**

### **6.1.1 The conflict in Bosnia and Herzegovina**

The conflict in Bosnia arose from the disintegration of the SFRY during the early 1990s. The SFRY comprised six constituent states and two autonomous provinces.<sup>141</sup> Bosnia faced the choice of remaining in ‘a much smaller Yugoslavia that would be overwhelmingly dominated by Serbia and by implication its own large Serb minority’ or leaving the federation.<sup>142</sup> Bosnia asserted its independence in October 1991,<sup>143</sup> achieving recognition as an independent state by the European Community on 6 April 1992 and by the United States the following day. Despite this international support, for the next three and a half years the fledgling state faced conflict on two fronts. First, its own Serb population, supported by Serbia, sought to establish a separate Bosnian Serb state. Second, the Croat population of Bosnia, supported by Croatia, attempted to gain territory by a campaign of ethnically motivated violence and intimidation. The resultant conflict was the worst in Europe since World War Two. Estimates suggest that close to 100,000 people were killed or remain unaccounted for, including 16,000 children.<sup>144</sup> Civilian populations were deliberately targeted. There were mass executions, many incidents of rape, detention in concentration camps,

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<sup>139</sup> Secretary-General’s Report, note 137, para. 23.

<sup>140</sup> See Press Release, *UN and Cambodia Reach Draft Agreement for Prosecuting Khmer Rouge Crimes*, 17 March 2003, Press Release GA/10135 of 13 May 2003, and Press Release, *UN, Cambodia Sign Agreement to prosecute former Khmer Rouge leaders*, 6 June 2003.

<sup>141</sup> The six constituent states were Serbia, Republic of Macedonia, Bosnia and Herzegovina, Croatia, Slovenia and Montenegro. The two autonomous republics were Kosovo and Vojvodina.

<sup>142</sup> Cousins, E., ‘Building Peace in Bosnia’ in Cousins and Kumar (eds) *Peacebuilding as Politics* (Lynne Rienner, 2001) 118.

<sup>143</sup> Bosnia declared its independence on 6 April 1992. Bosnian Serbs immediately proclaimed a separate state.

<sup>144</sup> Estimates vary significantly. The independent research conducted by the Research and Documentation Centre concluded that the actual figures were probably lower than previously believed. The Centre identified 92,207 persons killed or missing: see RDC, *Population Losses in Bosnia and Herzegovina 92-95*.

forced displacement and discriminatory acts, which came to be known as ethnic cleansing. In the most heinous episode of the conflict some 8,000 Bosniak men and boys were killed in Srebrenica, in an act widely recognized as genocide.

The initial response of the United Nations was limited. NATO threats produced limited withdrawal of Serb troops from Bosnia in 1994. However, Serb forces and paramilitary groups continued to attack Bosnian civilians and external peacekeepers, taking hundreds prisoner and using the peacekeepers as human shields. On 30 August 1995 the United States led a NATO air strike against strategic Serb positions throughout Bosnia. In the face of the NATO military action and sustained international pressure, on 21 November 1995 Serbia agreed to a comprehensive peace agreement between the three warring factions. The Dayton Agreement<sup>145</sup> provides for the state of Bosnia and Herzegovina to consist of two separate entities, the mainly Serb Republika Sprska and the Federation of Bosnia and Herzegovina, consisting of mainly Croats and Bosniaks. It also authorized the deployment of an international peacekeeping force to maintain the peace. Several organizations were charged with implementing the civilian aspects of the peace agreement, with their efforts being coordinated and overseen by an international appointment, the High Representative for Bosnia and Herzegovina (OHR). In 1997 the OHR was endowed with further powers, to the extent that Bosnia and Herzegovina has been called a ‘de facto protectorate’.<sup>146</sup> From 2004, the European Union has been the lead organization in BiH, with the Special Representative of the European Union also serving as the OHR on behalf of the international community.

### **6.1.2 Accountability for violations**

Around 279,000 people were reported dead or missing during the armed conflict. There was evidence of atrocities having been committed on all sides. The ICTY had been established by the Security Council in 1993 to investigate and try those suspected of committing international crimes. Annex 6 to the Dayton Agreement required the competent authorities in Bosnia and Herzegovina to co-operate with the ICTY,<sup>147</sup> and the ICTY also enjoyed primacy in relation to national courts.<sup>148</sup> However, it was always clear that the ICTY would only try a limited number of suspects and that remaining cases would be tried by courts at the entity level. Under the so-called ‘rules

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<sup>145</sup> General Framework Agreement for Peace in Bosnia and Herzegovina, S/1995/999, 14 December 1995.

<sup>146</sup> International Centre for Transitional Justice, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (2008), 4.

<sup>147</sup> Article 8, Annex 6, Dayton Agreement.

<sup>148</sup> Article 9, ICTY Statute.

of the road' it was agreed that the OTP of the ICTY would review case files of war crimes suspects to determine whether the files contained sufficient and credible evidence to support the issue of an arrest warrant.<sup>149</sup> The ICTY performed this function from 1996 to 2004, reviewing 1419 cases against 4985 persons, with approval given for 898 persons to be arrested on war crimes charges.<sup>150</sup> This function was transferred to the Prosecution Office in Bosnia and Herzegovina in October 2004.

While the Dayton Agreement established the Constitutional Court and the Human Rights Chamber, it did not establish other federal level judicial institutions.<sup>151</sup> There were considerable concerns that the judicial systems of the states in the former Yugoslavia lacked the capacity to conduct complex trials. There was also a risk that courts were incapable of providing impartial and unbiased justice in respect of trials arising from the conflict, particularly regarding either defendants or victims of other ethnic groups. As Burke-White notes, the existence of the ICTY and the requirement for the rules of the road procedure impacted upon the development of the Bosnian judicial system and the conduct of national trials.<sup>152</sup> By January 2005, only 54 domestic war crimes prosecutions had reached trial, and of these, only two trials had commenced in the Republika Sprska.<sup>153</sup> The study revealed 'a number of well-founded allegations of arbitrary arrests and unfair trials'.<sup>154</sup>

The WCC was created in 2005, with its establishment closely linked to the completion strategy of the ICTY. The Security Council recognized that the transfer of cases of lesser importance from the ICTY to the courts of states of the former Yugoslavia was a measure vital to achieving the completion strategy of the ICTY. In the absence of appropriate national mechanisms, the ICTY and the OHR proposed the establishment of an internationalized chamber to operate within the existing court structure of

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<sup>149</sup> These principles were agreed at a meeting in Rome, signed on 18 February 1996. For further detail see: Ellis, M., 'Bringing Justice to an Embattled Region – Creating and Implementing the "Rules of the Road" for Bosnia-Herzegovina' (1999) 17 *Berkeley Journal of International Law* 1.

<sup>150</sup> Statistics taken from the ICTY website.

<sup>151</sup> Annexes IV and VI, respectively. For the role of the Human Rights Chamber in war crimes cases, see Garms, U. and Peschke, K., 'War Crimes Prosecution in Bosnia and Herzegovina (1992-2002)' (2006) 4 *JICJ* 258.

<sup>152</sup> Burke-White, W., 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina' (2008) 46 *Col JTL* 279.

<sup>153</sup> OSCE, *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles*, 2005, 6.

<sup>154</sup> *Ibid*, 4.

Bosnia, to be supported by a war crimes department.<sup>155</sup> The President of the ICTY reported to the Security Council in June 2002, recommending this model and discussing some of the perceived problems with referring cases to Bosnia.<sup>156</sup> There was concern that the judicial system was not yet functioning with sufficient impartiality, at least in relation to crimes arising from the armed conflict, and in accordance with applicable human rights norms. The Security Council endorsed this strategy.<sup>157</sup> Amendments were made to Rule 11*bis* of the ICTY RPE to address the concerns of the judges that any referred trials must comply fully with internationally recognised standards of due process and human rights.<sup>158</sup> The Security Council subsequently supported the ‘expeditious establishment’ and ‘early functioning’ of the WCC and encouraged donations from interested states.<sup>159</sup>

The OHR drafted the necessary legislation to establish the WCC within the structure of the federal-level State Court. Unlike the creation of the State Court itself, the OHR did not utilize the powers conferred on him by the DPA,<sup>160</sup> preferring instead to refer the required legislation to the domestic legislatures. However, the Bosnian authorities and the Parliament did not act as swiftly as had been hoped, and the package of legislation required to allow the WCC to receive referrals from the ICTY was not adopted until October 2004.<sup>161</sup> The WCC may try three types of cases: cases referred from the ICTY under Rule 11*bis*; cases referred by the ICTY prosecutor, for which no indictment has been issued; and cases pending before domestic courts that are

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<sup>155</sup> The OHR engaged expert consultants to consider the available options: see Consultants’ Report to the OHR, *The Future of War Crimes Prosecutions in Bosnia and Herzegovina*, discussed in Bohlander, M., ‘The Transfer of Cases from International Criminal Courts to National Courts’ (2004), working paper (on-file with the author); see also Bohlander, M., ‘Last Exist Bosnia – Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts’ (2003) 14 *Crim LF* 59; and Joint Preliminary Conclusions of OHR and ICTY Experts Conference on Scope of BiH War Crimes Prosecutions, ICTY Press Release, 15 January 2003.

<sup>156</sup> Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, S/2002/678.

<sup>157</sup> S/PRST/2002/21.

<sup>158</sup> Rule 11*bis* has been amended on three occasions, during the plenary sessions on 30 September 2002, 10 June 2004 and 28 July 2004. See Mundis, D., ‘Completing the Mandates of the *Ad Hoc* International Criminal Tribunals: Lessons from the Nuremberg Process?’ (2005) 28 *FILJ* 591.

<sup>159</sup> Resolution 1503 (2003), preambular para. 11.

<sup>160</sup> Contrast the Decision Imposing the Law on the State Court of Bosnia and Herzegovina, 12 November 2000.

<sup>161</sup> The package of legislation included the Law on Amendments to the Law on the State Court of Bosnia and Herzegovina; the Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of Bosnia and Herzegovina and the Use of Evidence Collected by ICTY in Proceedings before the Courts in Bosnia and Herzegovina; the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses; and the Law on Amendments to the Criminal Code of Bosnia and Herzegovina.

considered sufficiently sensitive so as to require trial at a federal level institution.<sup>162</sup> The WCC commenced operations in January 2005, and the WCC issued several indictments that year. Its first judgment was delivered in July 2005.<sup>163</sup> The ICTY referred the first case to Bosnia in May 2005, with the Referral Bench noting that it ‘considers that the legal structure of Bosnia & Herzegovina, as it now stands, is sufficient to safeguard the right of the Accused to a fair trial’.<sup>164</sup> Six cases, involving ten accused, have been referred to the WCC.<sup>165</sup> The WCC has been an active institution, issuing indictments in over 80 cases, including indictments in relation to the cases referred by the ICTY.

## 7 Iraqi High Tribunal

### 7.1.1 Hussein’s reign in Iraq

Saddam Hussein seized power in Iraq in 1979. Upon taking power, Hussein initiated a purge of opposition from within his own party, denouncing many senior officials and party members as traitors. It signalled the start of a bloody and brutal reign. In addition to politically-motivated killings and torture, Hussein violated the rights of Iraq’s citizens, targeting in particular minority groups such as the Kurds and those perceived as disloyal. Killings, torture, disappearances and rape became a feature of Iraqi existence. Externally, Hussein conducted an aggressive and violent foreign policy, with Iraq engaged in three international conflicts: the 1980-88 Iran-Iraq war; the 1990-1 invasion and occupation of Kuwait, leading to the use of force by a multinational coalition in defence of Kuwait, authorized by the Security Council under Chapter VII;<sup>166</sup> and the controversial invasion and occupation of Iraq by a coalition of states led by the United States and the United Kingdom in 2003.<sup>167</sup> The final conflict led ultimately to the fall of the Government of Iraq, with coalition troops occupying Baghdad on 9 April 2003. Hussein was arrested and detained by coalition forces in December 2003.

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<sup>162</sup> Mundis, D., ‘The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals’ (2005) 99 *AJIL* 142, 153-4.

<sup>163</sup> *Prosecutor v Maktouf Abduladhim*, First Instance Decision, 1 July 2005.

<sup>164</sup> *Prosecutor v Stankovic*, Corrigendum to Decision on Referral of Case under Rule 11bis, Referral Bench, 27 May 2005, para. 68. This decision was confirmed on appeal. For further discussion of the jurisprudence of the referral bench, see Williams, S., ‘ICTY Referrals to National Jurisdictions: A Fair Trial or a Fair Price?’ (2006) 17 *Crim LF* 177.

<sup>165</sup> S/2008/729.

<sup>166</sup> Resolution 678 (1991).

<sup>167</sup> In the interest of space, it is not possible to discuss the background to or legal justifications for the invasion and occupation of Iraq in 2003.

The Hussein regime was brutal towards its own population. While no actual figures are known, estimates suggest that the regime killed more than 500,000 citizens from 1968 to 2003.<sup>168</sup> The regime was characterised by ‘widespread and systematic disappearances, extrajudicial executions, torture, arbitrary arrests, and detentions’.<sup>169</sup> The more well-known incidents are the forcible removal of the Shia population from the Marshland region and the draining of the marshland area, the Anfal campaign conducted against the Kurds in 1987-88, and the gassing of between 4000 to 5000 Kurds in Halabja. The regime also drained Iraq’s natural resources and was known to be corrupt and to condone embezzlement of public assets by senior officials, including Hussein.<sup>170</sup>

### **7.1.2 Occupation of Iraq – May 2003- June 2004**

On 1 May 2003, the United States announced that major military operations had ended in Iraq. In the absence of any successor government, the United States and the United Kingdom established the Coalition Provisional Authority (CPA).<sup>171</sup> The Security Council promulgated Resolution 1483, which noted the letters to the Security Council from the United States and the United Kingdom, and recognized the obligations of the two states as occupying powers under applicable international law.<sup>172</sup> After determining that the situation in Iraq continued to constitute a threat to international peace and security,<sup>173</sup> the Security Council, acting under Chapter VII of the Charter, called upon all concerned to comply with obligations under international law, in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.<sup>174</sup> The Security Council also indicated its support for the formation of an Iraqi interim administration, to be run by Iraqis until an internationally-recognized representative government is established and assumes the responsibilities of the CPA.<sup>175</sup>

In order to exercise authority in Iraq, the Administrator of the CPA promulgated Regulation Number 1,<sup>176</sup> which provided that the CPA shall exercise the powers of

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<sup>168</sup> Bassioni, M.C., ‘Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal’ (2005) 38 *CILJ* 327, 330.

<sup>169</sup> *Ibid*, 331.

<sup>170</sup> *Ibid*, 331.

<sup>171</sup> The United States and United Kingdom notified the United Nations Security Council of the establishment of the Coalition Provisional Authority on 8 May 2003. See: Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, S/2003/538.

<sup>172</sup> Resolution 1483 (2003), preambular para. 13.

<sup>173</sup> Preambular para. 17.

<sup>174</sup> Para. 5.

<sup>175</sup> Para. 6.

<sup>176</sup> Regulation 1, 16 May 2003.

government during a transitional administration period, and that all legislative, executive and judicial authority necessary to achieve its objectives is vested in the CPA, to be exercised by the CPA Administrator.<sup>177</sup> The authority for this action was stated to be the authority of the CPA as occupying power, relevant Security Council resolutions (including Resolution 1483) and the laws and usages of war.<sup>178</sup> To meet the Security Council's request for the establishment of an interim Iraqi administration,<sup>179</sup> the CPA appointed 25 Iraqis to the Iraqi Governing Council.<sup>180</sup> Although the Iraqi Governing Council was recognized as 'the principal body of the Iraqi interim administration',<sup>181</sup> in practice the body exercised virtually no real authority in Iraq, with the CPA retaining overall authority.<sup>182</sup> Ahead of the transfer of power to Iraq in June 2004, the Iraqi Governing Council passed the Law of Administration for the State of Iraq for the Transitional Period, known as the Transitional Administration Law (TAL). The TAL operated as an interim constitution and set out the provisional structures of the Iraqi system for the transitional period, defined as beginning on 30 June 2004, and ending on 31 December 2005. In accordance with the schedule, the CPA transferred authority to the Interim Iraqi Administration on 28 June 2004.<sup>183</sup>

### **7.1.3 Establishing the Iraqi High Tribunal**

Even before the Iraq invasion, the United States had been considering options to investigate the Iraqi regime's violation of international humanitarian law and human rights law.<sup>184</sup> Resolution 1483 affirmed the need to promote accountability for crimes and atrocities committed by the previous Iraqi regime.<sup>185</sup> The question was which forum should be used. Three alternatives were reportedly considered:<sup>186</sup> (1) an international ad hoc criminal tribunal; (2) a mixed international and national tribunal similar to that of the SCSL; and (3) a national Iraqi tribunal with international

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<sup>177</sup> Section 1.

<sup>178</sup> Preamble to CPA Regulation 1.

<sup>179</sup> Resolution 1483, para. 6.

<sup>180</sup> Regulation Number 6, 13 July 2002. The creation of the Iraqi Governing Council was welcomed by the Security Council as 'an important step towards the formation by the people of Iraq of an internationally recognized, representative government': Resolution 1500 (2003), para. 1.

<sup>181</sup> *Ibid*, section 1.

<sup>182</sup> While Resolutions 1500 and 1511 refer to the Iraqi Governing Council as the 'principal body of the Iraqi interim administration', there is no allocation of specific powers or authority to that body, and the CPA retained the ability to effectively override its decisions.

<sup>183</sup> The transfer occurred two days earlier than scheduled so as to avoid the transfer being disrupted by insurgents.

<sup>184</sup> Bassiouni M.C., 'Post-conflict Justice in Iraq: An appraisal of the Iraqi Special Tribunal' (2005) 38 *CILJ* 327, 340-2.

<sup>185</sup> Resolution 1483, preambular para. 11.

<sup>186</sup> Bassiouni, note 184, 342-3.

assistance.<sup>187</sup> In summary, two conflicting views emerged.<sup>188</sup> Many legal experts and non-governmental organisations felt that the nature of the crimes committed and the fragile state of the Iraqi judiciary required the creation of a specialized international or internationalized criminal tribunal.<sup>189</sup> However, the United States did not support the idea of a tribunal established by the Security Council, fearing that such a body would be as costly and time-consuming as the ICTY and the ICTR. It is also likely that this position was influenced by United States concerns regarding the ICC. France, China and Russia also made known their intention to veto a tribunal for Iraq, as they considered the initial invasion to be unlawful.<sup>190</sup> Moreover, the desire of the Iraqi authorities to retain the death penalty presented a significant barrier to the participation of the United Nations in a hybrid or internationalized option.<sup>191</sup> The Bush Administration considered that an Iraqi tribunal was preferable as: (1) it would allow Iraq to assume responsibility for conducting trials of senior officials from the previous regime; (2) it would provide a basis for developing domestic legal capacity and the rule of law; and (3) it would send a powerful message that systematic repression of civilian populations would no longer be tolerated.<sup>192</sup> The Iraqi Governing Council was also in favour of a national tribunal with international assistance, and research showed that a majority of the Iraqi population also supported that outcome.<sup>193</sup>

A statute for the proposed national tribunal was drafted from September to December 2003. Contrary to early suggestions, there was extensive Iraqi involvement in the

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<sup>187</sup> The use of military commissions was also considered: Frank, M., 'Justice for Iraq, Justice for All' (2004) 57 *Oklahoma Law Review* 303. Another option was trials by third states. Both Iran and Kuwait indicated that they may bring trials against Hussein for crimes committed against their nationals and armed forces. The United States also reserved the right to try Hussein for crimes against US forces and citizens. See Orentlicher, D., 'Venues for Prosecuting Saddam Hussein: The Legal Framework', *ASIL Insights* December 2003. Rubin has suggested that a third state may have been willing to exercise universal jurisdiction: Rubin, A., 'Milosevic and Hussein on Trial' (2005) 38 *CILJ* 1013, 1015.

<sup>188</sup> Detailed in Bassiouni, note 184, 343-44.

<sup>189</sup> For example, Human Rights Watch initially argued for the creation of an international ad hoc tribunal by the Council: *Justice for Iraq: A Human Rights Watch Policy Paper*, December 2002.

<sup>190</sup> Scharf, M., 'The Iraqi High Tribunal: A Viable Experiment in International Justice?' (2007) 5 *JICJ* 259 at 261.

<sup>191</sup> Orentlicher, note 187. Given the role of the UN in the controversial Oil for Food programme, many Iraqis did not 'regard the United Nations as an honest broker' and did not wish to see United Nations involvement: Parker, T., 'Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal' (2005) 38 *CILJ* 899.

<sup>192</sup> Bassiouni note 184, 344.

<sup>193</sup> Several independent reports reached this conclusion: see, for example, International Centre for Transitional Justice, *Iraqi Voices* (2003) and Physicians for Human Rights, *Southern Iraq: Reports of Human Rights and Views on Justice, Reconstruction and Government* (2003).

drafting of the IHT Statute.<sup>194</sup> In December 2003 the CPA made a specific delegation of authority to the Iraqi Governing Council, authorizing it to establish the Iraqi Special Tribunal (as it was then known) by promulgating the statute of the tribunal, which was annexed to the order.<sup>195</sup> The delegation of authority was made conditional upon several terms and conditions, namely: (a) the Iraqi Governing Council was to promulgate a description of the elements of crimes to be applied to the crimes within the tribunal's jurisdiction; (b) the Iraqi Governing Council was to ensure that the IHT met, as a minimum, international standards of justice; (c) in the event that there was a conflict between any promulgation by the Iraqi Governing Council or judgment of the IHT and any promulgation of the CPA, the latter would prevail; and (d) non-Iraqis may be appointed as judges.<sup>196</sup> The Iraqi Governing Council established the IHT by decree on 9 December 2003, and the CPA Administrator signed the order into force on 12 December 2003. The authority of the CPA to establish the IHT is discussed in Chapter Three. Following Hussein's capture a few days later, the CPA announced that he would be tried by the IHT.<sup>197</sup>

The IHT Statute was confirmed by the Iraqi Governing Council when it promulgated the TAL in March 2004.<sup>198</sup> As one of its last legislative acts, the CPA provided for the transition of laws, regulations, orders and directives issued by it.<sup>199</sup> In addition to making general rules for the continuation of legal instruments adopted by the CPA, Order 100 also made specific provision for the IHT,<sup>200</sup> deleting the powers of the Administrator to alter the statute or the elements of crime or rules of procedure and evidence developed for the tribunal<sup>201</sup> and to rescind the order establishing the tribunal.<sup>202</sup> The Iraqi Constitution adopted in October 2005 preserves the role of the

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<sup>194</sup> There was some confusion as to the extent of Iraqi involvement. See Scharf, M. 'Is it International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice', (2004) *JICJ* 330, noting that the IHT is 'a puppet of the Occupying Power', 330. Contrast with Scharf, M., 'Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR and SCSL' (2005) 38 *CILJ* 911, 912, where the author recognized 'that Iraqis had played a much greater role in drafting the Statute... than had been reported in the press'.

<sup>195</sup> Order 48, 10 December 2003.

<sup>196</sup> Section 2.

<sup>197</sup> Scharf, M. and Newton, M., *Enemy of the State* (Macmillan, 2008); Contemporary Practice 'Turmoil in Iraq, Transitional Arrangements, and the Capture of Saddam Hussein' (2004) 98 *AJIL* 190.

<sup>198</sup> Article 48(A) of the TAL provides that 'The statute establishing the Iraqi Special Tribunal is confirmed.' It also notes that it is the IHT Statute that exclusively defines the jurisdiction of the IHT, notwithstanding any contrary provisions of the TAL.

<sup>199</sup> Order 100, 28 June 2004.

<sup>200</sup> Section 3(19).

<sup>201</sup> This right had been reserved in Section 1(6) of Order 48, which was deleted by Order 100.

<sup>202</sup> This right was set out in Section 3 of Order 48, which was partly deleted by Order 100.

IHT, and provides that the Council of Representatives may dissolve it after completion of its work.<sup>203</sup>

An amended version of the IHT Statute was issued on 9 October 2005,<sup>204</sup> which renamed the tribunal the ‘Iraqi High Tribunal’.<sup>205</sup> The reasons appended to the amending legislation shed little light on the need for the amendments, although one suggestion is that the name was changed so as to avoid the characterisation of the IHT as an exception to the ‘normal’ legal system.<sup>206</sup> The timing of the amendments, a matter of days before the commencement of the first trial, was also controversial.<sup>207</sup>

One of the most significant features of the amended IHT Statute was the shift from the internationalization of the original IHT Statute towards a much greater Iraqi national institution.<sup>208</sup> In particular, while the original IHT Statute provided that the ICG or Iraqi Government may appoint international judges ‘if it deems necessary’, this is now limited to situations where a state is a party to a complaint before the IHT.<sup>209</sup> Moreover, the original IHT Statute required the appointment of foreign experts to provide assistance to judges as to international law and the experience of other tribunals.<sup>210</sup> It also required the appointment of foreign experts to provide assistance to the investigative judges with respect to the investigation and prosecution of cases.<sup>211</sup> The adviser in both cases was also required to monitor the protection by the investigating judges and judges of the IHT of due process standards.<sup>212</sup> The IHT Statute now provides that the President of the IHT ‘shall have the right to appoint’

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<sup>203</sup> Article 135 of the Constitution provides that ‘The Iraqi High Tribunal shall continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols...’.

<sup>204</sup> The new law is entitled ‘Law of the Iraqi Higher Criminal Court’. This further version was published in the Official Gazette on 18 October 2005, as Law No. (10) 2005. All references to the IHT Statute will be to this law; references to the previous version will be to the ‘original IHT Statute’.

<sup>205</sup> The tribunal’s Arabic name may be translated as the Higher Iraqi Criminal Tribunal or Supreme Iraqi Criminal Tribunal; however, the tribunal has decided to refer to itself as the Iraqi High Tribunal in English.

<sup>206</sup> Article 95 of the Constitution provides that ‘The establishment of special or extraordinary courts is prohibited’.

<sup>207</sup> As Mettraux notes, ‘[T]he timing of the amendment [a matter of days before the first trial] suggests an urge to “fix” the process before it even starts’: Mettraux, G., ‘The 2005 Revision of Statute of the Iraqi Special Tribunal’ (2007) 5 *JICJ* 287, 293.

<sup>208</sup> For a discussion of these and other amendments, see Mettraux, *ibid*, and Human Rights Watch, *The Former Iraqi Government on Trial*, October 2005.

<sup>209</sup> Article 3(5), IHT Statute, compare article 3(d) of the original IHT Statute. It is difficult to see how this situation will ever arise, as article 1(2) of the IHT Statute limits the tribunal’s jurisdiction to natural persons.

<sup>210</sup> Article 6(b), original IHT Statute.

<sup>211</sup> Article 7(n), original IHT Statute.

<sup>212</sup> Articles 6(b) and 7(n), original IHT Statute,

foreign experts to provide assistance to the judges, that is, it is no longer mandatory for the President to do so.<sup>213</sup> The requirement for foreign experts to monitor compliance with due process standards was omitted from the amended IHT Statute altogether.

## **8 The Special Tribunal for Lebanon**

### **8.1.1 The assassination of Rafik Hariri and the establishment of the UNIIIC**

On 14 February 2005, former Prime Minister Hariri and 22 others were killed when a massive bomb detonated as his motorcade drove through a seafront area in central Beirut. Hariri had close ties with the West, in particular with the United States, France and Saudi Arabia. These links were influential in the adoption by the Security Council of Resolution 1559, which called for the withdrawal of ‘foreign forces’ from Lebanon and for strict respect for the sovereignty, territorial integrity, unity and political independence of Lebanon.<sup>214</sup> Tensions between Hariri, pro-Syrian groups and Syria had been high, following a controversial extension of the term of the term of appointment of pro-Syrian President Lahoud. Elections had also been scheduled for May 2005, in which it was widely believed that the opposition, guided by Hariri, would win a clear majority. Syria denied any involvement in the assassination. The assassination prompted mass demonstrations within Lebanon calling for Syrian withdrawal from Lebanese territory, the creation of an international tribunal to investigate the assassination, the resignation of key security officials and free and democratic elections. As a result of these protests and due to increased international pressure, Syria withdrew its forces from Lebanon in April 2005, ending some thirty years of Syrian military presence.

On 15 February 2005 the Security Council labelled the assassination a terrorist attack, and requested the Secretary-General ‘to follow closely the situation in Lebanon and to report urgently on the circumstances, causes and consequences of this terrorist act’.<sup>215</sup> The Secretary-General deployed a fact-finding mission to Lebanon in late February 2005, which reported to the Security Council at the end of March.<sup>216</sup> The mission conducted a review of the Lebanese investigations and legal proceedings, examined

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<sup>213</sup> Article 7(2), IHT Statute. A similar amendment has been made in relation to experts to assist investigating judges: article 8(9).

<sup>214</sup> Resolution 1559 (2004), paras 1 and 2.

<sup>215</sup> S/PRST/2005/4.

<sup>216</sup> Report of the Fact-finding mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, 24 March 2005, S/2005/203, known as the FitzGerald Report.

the crime scene and locally-collected evidence, spoke to several witnesses and met a number of Lebanese officials and political groups. A key finding of the mission was that the Lebanese investigation process ‘suffered from serious flaws’<sup>217</sup> and had neither the capacity nor the commitment to reach a satisfactory and credible conclusion.<sup>218</sup> The mission’s report recommended that the investigation be entrusted to an international independent commission.<sup>219</sup>

By Resolution 1595, adopted on 7 April 2005, the Security Council condemned the terrorist attack and reiterated its call for the strict respect of Lebanese sovereignty, independence, territorial integrity and unity.<sup>220</sup> It noted the findings of the fact-finding mission and, in particular, the recommendation of that body that an international independent investigation should be established to discover the truth.<sup>221</sup> Resolution 1595 authorised the establishment of the United Nations International Independent Investigation Commission (UNIIC).<sup>222</sup> It also called on all states and all parties to cooperate fully with the UNIIC.<sup>223</sup> The Government of Lebanon welcomed the resolution and pledged to co-operate with the UNIIC.<sup>224</sup> Originally established for a three-month period,<sup>225</sup> the UNIIC became operational in June 2005. It is mandated to assist the Lebanese judicial and police authorities in the investigation of all aspects of the terrorist act<sup>226</sup> and reports to the Security Council on a regular basis.<sup>227</sup> It is expected that, once the LST commences operations, the mandate of the UNIIC will be allowed to lapse.<sup>228</sup>

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<sup>217</sup> FitzGerald Report, para. 62.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid, Executive Summary.

<sup>220</sup> Resolution 1595 (2005), preambular paras 1 and 3.

<sup>221</sup> Preambular paras 5 and 6.

<sup>222</sup> Para. 1.

<sup>223</sup> Para. 7.

<sup>224</sup> The Government of Lebanon had approved the proposed resolution and had pledged to cooperate with the inquiry: Letter from the Mission of Lebanon to the United Nations dated 29 March 2005, S/2005/208.

<sup>225</sup> Resolution 1595 (2005) requested the UNIIC to complete its work within three months of commencing full operations, with an extension for a further three months: para. 8. This deadline has been extended on several occasions, most recently on 17 December 2008 to 28 February 2009: Resolution 1852 (2008).

<sup>226</sup> Resolution 1595 (2005), para. 1.

<sup>227</sup> Ibid, para. 9.

<sup>228</sup> It appears that this may occur in 2009, with the mandate extension to 28 February to be the last. See Eleventh Report of the UNIIC, S/2008/752 and S/PV.6047.

The initial report of the UNIIC implicated Syrian state agents and Lebanese security officials in the assassination of Hariri.<sup>229</sup> The UNIIC suggested that Syrian cooperation had been ‘cooperation in form, not substance’<sup>230</sup> and that several Syrian officials interviewed had attempted to mislead the UNIIC.<sup>231</sup> In response, the Security Council adopted Resolution 1636, by which it determined that the assassination and its implications constituted a threat to international peace and security.<sup>232</sup> Noting the issue of potential Syrian involvement in the assassination, and the lack of substantive cooperation to date,<sup>233</sup> the Security Council, acting under Chapter VII, decided that the UNIIC shall have vis-à-vis Syria the same rights and authorities as it enjoys against Lebanon, and that Syria must cooperate fully and unconditionally with the UNIIC.<sup>234</sup> Resolution 1636 also introduced restrictions on travel for, and the freezing of assets of, individuals suspected of being involved.<sup>235</sup>

### **8.1.2 Further attacks and the establishment of the Special Tribunal**

Several other terrorist attacks were conducted during the course of 2005. These included targeted assassinations of anti-Syrian political figures and non-targeted terrorist attacks aimed at civilians in general. Following the assassination of a prominent member of parliament and a journalist in December 2005, the Government wrote to the Security Council requesting the establishment of a tribunal of an international character to try all those found responsible for the assassination of Hariri. The Government also requested the extension of the mandate of the UNIIC, or the creation of a second independent commission, to investigate other terrorist attacks since 1 October 2004.<sup>236</sup> In Resolution 1644, acting under Chapter VII, the Security Council requested the Secretary-General to ‘negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice’ to try individuals responsible for the assassination of Hariri.<sup>237</sup> The Security Council also authorised the

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<sup>229</sup> The initial report of the UNIIC concluded: ‘There is probable cause to believe that the decision to assassinate former Prime Minister Rafik Hariri could not have been taken without the approval of top-ranked Syrian security officials and could not have been further organized without the collusion of their counterparts in the Lebanese security services: Report of the International Independent Investigation Commission established pursuant to Security Council Resolution 1595 (2005), S/2005/662, para. 124.

<sup>230</sup> Ibid, para. 31.

<sup>231</sup> Ibid, para. 222.

<sup>232</sup> Resolution 1636 (2005), preambular para. 3. See also paras 5 and 6.

<sup>233</sup> Preambular paras 16 to 18.

<sup>234</sup> Para. 11.

<sup>235</sup> Para. 3.

<sup>236</sup> Letter dated 13 December 2005 from the Charge d’affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General, S/2005/783.

<sup>237</sup> Resolution 1644 (2005), para. 6.

UNIIC to extend assistance in relation to terrorist attacks since 1 October 2004.<sup>238</sup> The mandate of the UNIIC has been expanded on several occasions, such that it currently assists Lebanese officials in twenty other investigations into terrorist attacks occurring from 1 October 2004 up to the most recent reporting period in December 2008.<sup>239</sup>

The Secretary-General issued a preliminary report on the nature and scope of the international assistance required on 21 March 2006.<sup>240</sup> It rejected the notion of an exclusively international tribunal, finding that this ‘would remove Lebanese responsibility for seeing justice done regarding a crime that primarily and significantly affected Lebanon’.<sup>241</sup> Instead the report suggested a mixed tribunal, based on an agreement between the United Nations and the Government of Lebanon.<sup>242</sup> The Security Council endorsed this conclusion and requested the Secretary-General to negotiate the agreement with the Government of Lebanon.<sup>243</sup> The Secretary-General issued his Report on the Establishment of a Special Tribunal for Lebanon to the Security Council on 15 November 2006.<sup>244</sup> Attached to the report were a draft agreement (largely based on the SCSL Agreement) and the proposed statute. The President of the Security Council wrote to the Secretary-General on 21 November 2006 endorsing the report and the text of the draft agreement and statute. The President invited the Secretary-General to proceed, in cooperation with the Government of Lebanon, with the final steps for the conclusion of the LST Agreement.<sup>245</sup>

The LST Agreement was signed by the Government of Lebanon on 23 January 2007 and forwarded to the Lebanese parliament for approval and ratification. The United Nations signed the agreement on 6 February 2007. The LST Agreement was stated not to enter into force until the Lebanese authorities had taken the necessary steps required by the Lebanese Constitution for the agreement to be approved and

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<sup>238</sup> Para. 7.

<sup>239</sup> Eleventh report, note 228, para. 34.

<sup>240</sup> Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005), 21 March 2006, S/2006/176.

<sup>241</sup> *Ibid*, para. 5.

<sup>242</sup> *Ibid*, para. 6.

<sup>243</sup> Resolution 1664 (2006), para. 1.

<sup>244</sup> Report of the Secretary-General on the establishment of a special tribunal for Lebanon, S/2006/893, 15 November 2006.

<sup>245</sup> Letter from the President of the Security Council addressed to the Secretary-General, 24 November 2006, S/2006/911.

ratified.<sup>246</sup> However, while the agreement was approved by the Lebanese cabinet, the pro-Syrian parliamentary speaker refused to convene parliament, thus essentially precluding ratification of the agreement. Diplomatic efforts, including the intervention of the United Nations Legal Counsel, were unable to resolve the deadlock.<sup>247</sup> The Prime Minister wrote to the Security Council, requesting it to establish the tribunal unilaterally.<sup>248</sup> On 30 May 2007 the Security Council adopted Resolution 1757, recalling the provisions of the agreement and determining that the terrorist act – the assassination of Hariri – continued to constitute a threat to international peace and security.<sup>249</sup> Acting under Chapter VII of the Charter, the Security Council decided that the LST Agreement would enter into force on 10 June 2007 unless the Government of Lebanon confirmed that it had ratified the agreement prior to that date.<sup>250</sup> This did not occur and on 11 June 2007 the Secretary-General announced that the United Nations had begun taking steps to formally establish the LST.<sup>251</sup> The legal implications of this action will be considered in Chapter Three. On 30 November 2008, following a meeting with Prime Minister Siniora of Lebanon, the Secretary-General announced that the LST was on track to commence functioning on 1 March 2009.<sup>252</sup> The Prosecutor has stated that there will be a two-stage process, with an initial investigatory stage to be followed by a trial stage at a date to be determined.<sup>253</sup>

## 9 Conclusion

This chapter has outlined the background to the seven hybrid or internationalized tribunals to be studied. All were established in difficult and very different circumstances. The IJPP and the SPSC were developed in the midst of an international territorial administration, shortly after the end of an armed conflict. In each situation, the United Nations mission was authorised by the Security Council and exercised complete legislative and executive control of the territory. Both missions

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<sup>246</sup> Article 19, LST Agreement.

<sup>247</sup> Press Release, *Time for Security Council Action on Lebanese Tribunal*, 15 May 2007.

<sup>248</sup> Letter dated 14 May 2007 from the Prime Minister of Lebanon to the Secretary-General, S/2007/281. The President of Lebanon wrote a separate letter, opposing the suggestion that the Security Council take binding action to establish the LST and arguing that constitutional procedures should be followed: Letter dated 15 May 2007 from the President of Lebanon addressed to the Secretary-General, S/2007/286.

<sup>249</sup> Resolution 1757 (2007), preambular para. 13.

<sup>250</sup> Para. 1(a).

<sup>251</sup> Press Release, *Secretary-General launches measures to establish Special Tribunal for Lebanon, in accordance with Security Council Resolution 1757 (2007)*, 11 June 2007, SG/SM/11035L/3117.

<sup>252</sup> Statement of the Secretary-General after his meeting with Prime Minister Fouad Siniora of Lebanon, Doha, 30 November 2008. See also S/2008/734, para 34.

<sup>253</sup> Briefing by Mr Bellemare to the Council, 17 December 2008, S/PV.6047, 3.

also faced a decision as to whether to provide accountability for the actions of a previous repressive regime, to concentrate on violations of international humanitarian law and human rights law committed during the armed conflict, or whether to expend resources on re-establishing a failed judiciary so as to enable accountability for future, ‘ordinary’ crimes committed during the period of administration and beyond. There was no real process of consultation or negotiation with local actors in either territory; instead the decisions reached and the priorities decided by the United Nations missions were imposed on the territory.<sup>254</sup>

The SCSL, the ECCC and the LST represent a more balanced, negotiated process. All three were established in response to a request from the affected state for assistance in providing accountability for crimes alleged to have been committed, yet the situation leading to the request was different in each case. Sierra Leone had suffered a violent armed conflict since 1991, a conflict that was on-going during the negotiation process and which had rendered Sierra Leone one of the poorest states in the world, with a virtually non-existent judicial system. Cambodia sought assistance to provide accountability in relation to the violations of human rights law – and possibly international humanitarian law – committed by a former repressive regime some twenty years prior to the request. However, supporters of the Khmer Rouge were still active, with former members holding senior posts in the then current government, and an insurgency led by the Khmer Rouge coming to an end only during the negotiation process. Cambodia’s courts were functioning, yet were subject to allegations of corruption, partiality and political interference with the judicial process. Lebanon required assistance, at least initially, in response to a single act of violence, the assassination of former Prime Minister Hariri. Yet the politically-motivated violence in Lebanon was ongoing and, as negotiations for a tribunal continued, assistance was also requested for the investigation and trial of those believed to be responsible for further attacks. The Lebanese judicial system was operational, yet there were concerns that it lacked the independence to conduct trials of this nature, which would likely be subject to pressure from key actors in Lebanon and the region.

Despite the affected state exercising the initiative in requesting international assistance, the negotiations revealed varying degrees of willingness on the part of the affected state to cede jurisdiction to the institution to be established. Both the SCSL and the LST were a joint negotiation process, leading to a large degree of United

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<sup>254</sup> Beauvais, J., ‘Benevolent Despotism: A Critique of UN State-Building in East Timor’ (2001) 33 *NYJILP* 1101; Dickinson, note 106, 338-9.

Nations involvement in the design and eventual operation of each tribunal. The establishment of the tribunal had the support of the Security Council in both cases. This support extended, in the case of Lebanon, to establishing the LST by a binding resolution pursuant to its powers under Chapter VII of the Charter when domestic political factors in Lebanon precluded the ratification of the LST Agreement. In contrast, the Cambodian government was less willing to cede sovereignty to the United Nations and refused to allow the United Nations greater control of the ECCC. Negotiations were protracted, and often tense, with the United Nations withdrawing at one stage. The process was conducted without the support of the Security Council, although certain permanent members, in particular the United States, were involved at various stages. Although the General Assembly supported the negotiation process – and requested the Secretary-General to resume talks with Cambodia – it did not present to Cambodia the same political and legal threat as a possible Chapter VII resolution imposing a tribunal would have done.

The IHT was established following a controversial international armed conflict and occupation. Decision-makers also faced the issue of whether a future tribunal should address the violations of the previous regime, which stretched over a thirty-year period. Although the IHT was designed in the context of an occupation, with considerable input and support from the occupying powers, there appears to have been consultation with the relevant national actors in its design, in particular the retention of the death penalty as a sentencing option.

The impetus for the creation of the WCC was the completion strategy of the ICTY and the need for that tribunal to transfer cases to national jurisdictions. The cases to be referred had arisen during a violent armed conflict, with both international and internal elements, some ten years before the creation of the WCC. Designing and establishing the WCC was a negotiated process between the ICTY, the OHR in Bosnia and, to a more limited extent, national actors. The process was supported by the Security Council as an essential component of the completion strategy of the ICTY.

The different circumstances in the design and creation of each tribunal are reflected in their key features. One of the defining characteristics of a hybrid or internationalized tribunal is that it must have international aspects in its structure, personnel and applicable law. These features are summarised in Table One. The following two chapters will discuss other key features that have been affected by the context and

negotiation process: their legal basis and the nature and scope of the jurisdiction conferred upon them.

**TABLE ONE: KEY FEATURES (OTHER THAN JURISDICTION)**

	<b>Regulation 64 Panels</b>	<b>SPSC</b>	<b>SCSL</b>	<b>ECCC</b>	<b>WCC</b>	<b>IHT</b>	<b>LST</b>
<b>Structure</b>							
Trial Chambers	Panels may conduct “any” stage of criminal proceedings (investigative, trial, appeal), unless already in session. Jurisdiction is <i>ad hoc</i> : there is no separate structure with original jurisdiction.	Special panels forming part of the District Court of Dili with exclusive jurisdiction over “serious crimes”.	Two trial chambers.	One trial chamber.	Section I of the Criminal Division of the State Court.	One felony court.	One trial chamber.
Appellate Chamber?		Yes—special panels forming part of the Court of Appeal in Dili.	Yes.	Yes—the Supreme Court Chamber.	Yes—Section I of the Appellate Division of the State Court.	Yes—the Cassation panel.	Yes—the Appeals Chamber.
Investigative judges?		From 2001, all District Courts must include at least one ‘investigating judge’, charged with ensuring respect for the rights of all suspects and all victims. They shall issue warrants for search or seizure but may not	No—but judges may sit alone for pre-trial matters.	Yes—two Co-Investigating Judges, one international and one national, with responsibility for “all investigations”.	No—but judges may sit alone for pre-trial matters.	Yes. Investigative judges are independent, may collect evidence from any source they deem appropriate, and initiate proceedings.	Provision is made for one international pre-trial judge, appointed by the UN Secretary-General. They shall confirm indictments, issue warrants for search or seizure, and make other such orders as necessary for a fair trial.

		interfere with the Public Prosecution Service (PPS).					
Prosecution	An international prosecutor may be appointed at “any” stage of proceedings.	The Deputy General Prosecutor for Serious Crimes of the PPS has “exclusive prosecutorial authority” for serious crimes under the jurisdiction of the special panels.	OTP headed by an international prosecutor, with a national deputy prosecutor.	Two Co-Prosecutors, one international and one national prosecutor.	Special Department for War Crimes, within the Prosecutor’s Office of BiH. During the transitional period, the section is headed by an international prosecutor.	The Public Prosecution, led by a Chief Prosecutor and deputy elected internally.	OTP headed by an international prosecutor, with a national deputy prosecutor.
Registry	No separate registry to support international judges and prosecutors.	Yes, as part of the District Court/Court of Appeal in Dili.	Yes—headed by an international appointee and UN staff member.	Office of Administration, serving both judges and prosecution, headed by a national appointee, with an international deputy.	A separate Registry exists for Section I of the Court, shared with Section II (organised crime). For the transitional period, this shall be headed by an international appointment.	Administration Department, shared by the Court, Public Prosecution, and Defence Office.	Yes—headed by an international appointee and UN staff member.
Defence	No special provision. Legal aid made generally available from	No special provision. Legal aid/public defence made generally available from	No reference in the Statute, but Defence Office established within the Registry.	No legislative reference, but Defence Support Section operative in practice.	No special provision.	The RPE require the establishment of a Defence Office within the Administration	Yes—Defence Office created by Statute, with independent Head.

	mid-2006.	mid-2001.				Department.	
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<b>Composition</b>							
<b>Trial bench</b>	Each panel of three comprises two international judges (one presiding) and one national judge.	Each panel of three comprises two international judges and one national judge. The judge to whom the case was originally assigned presides.	Each chamber comprises two international judges and one national judge. President is elected by judges.	Each trial chamber has three national judges (one presiding) and two international judges.	Each panel comprises three judges. For the initial transitional period two international judges and one national judge (always the President)	The felony court comprises five national judges. President is elected by judges.	The trial chamber comprises two international judges and one national judge. President is elected by judges.
<b>Appellate bench</b>	Each panel of three comprises two international judges (one presiding) and one national judge.	Each panel of three comprises two international judges and one national judge (as for trials). In cases of “special importance or gravity”, panels of five may sit, with three international judges and two national judges.	The chamber comprises three international judges and two national judges. The President of the SCSL presides.	The chamber comprises four national judges (one presiding) and three international judges.	Each panel comprises three judges, both national and international.	The Cassation panel comprises nine national judges. President is elected by judges.	The chamber comprises three international judges and two national judges. President is elected by judges, and also presides over the Tribunal as a whole.
<b>Concurrence of international judge required to form a</b>	Yes.	Yes.	Yes.	Yes—judges must attempt unanimity but otherwise a supermajority is required.	No.	No.	Yes.

majority							
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<b>Organisation</b>							
<b>Funding</b>	Assessed contributions via UNMIK budget, and through DoJA.	Assessed contributions, via UNTAET (and successor mission) budget, and through Ministry of Justice.	Voluntary contributions, subvention from assessed funds in 2004.	Mixed approach—UN 75% from voluntary contributions, Cambodia 25%. In practice, international community has been required to provide the majority of the Cambodian share.	Drawn from the state budget of BiH and from contributions from international donors.	Drawn from the state budget of Iraq. The IHT has received assistance from international donors, mainly the US.	Mixed mechanism. 51% to be provided by the UN from voluntary contributions. 49% to be provided by the Government of Lebanon.
<b>Management / Oversight</b>	Reports to UNMIK on administrative matters. No direct reporting line to Council. SRSG controls exercise of jurisdiction.	Reports to Transitional Administration on administrative matters. No direct reporting line to Council.	Management Committee, comprising contributing states.	No. Recent calls for an oversight mechanism due to concerns regarding financial mismanagement.	Oversight Committee established in 2004 to oversee the operation of the Registry. It consists of international experts, not contributing states.	Judges and Public Prosecutors' Affairs Committee with respect to ethical and disciplinary matters. The President of the Court must report to the Council of Ministers annually. The Presidency Council has considerable informal powers	A Management Committee may be established by the UN and Lebanon in consultation.

						of oversight.	
<b>Seat of Tribunal</b>	International judges and prosecutors may be appointed to courts operating in all districts of Kosovo.	Dili, East Timor.	Freetown, Sierra Leone.	Phnom Penh, Cambodia.	Sarajevo, BiH.	Baghdad, Iraq. May hold sessions throughout Iraq.	Outside Lebanon (The Hague, The Netherlands).

<b>Procedure</b>							
<b>Applicable Law</b>	Law applicable in Kosovo, provided that it is non-discriminatory, does not conflict with international human rights standards, the fulfilment of Council Res. 1244 (1999), or any other UNMIK	Existing law of East Timor, provided that it is non-discriminatory, does not conflict with international human rights standards, the fulfilment of Council Res. 1272 (1999), or any other UNTAET regulation (e.g. Transitional Rules of Criminal Procedure).	RPE of the SCSL.	Cambodian law, with <i>lacunae</i> resolved by reference to international procedural rules.	National law—Criminal Procedure Code of BiH.	Criminal Procedure Law No 23 of 1971 and RPE; otherwise, resort to general principles of Iraqi criminal law.	RPE of the LST.
<b>Rights of the accused</b>	Rights should be consistent with major international	Enumerated fair trial rights.	Enumerated fair trial rights.	Enumerated fair trial rights, and general reference to articles 14 and	Enumerated fair trial rights.	Enumerated fair trial rights.	Enumerated fair trial rights.

	human rights instruments.			15 of the ICCPR.			
Death Penalty available as a sentencing option	No.	No.	No.	No.	No.	Yes. Death penalty imposed and carried out on several occasions.	No.
<i>Trials in absentia</i>	No—but accused may be removed if disrupting proceedings.	No—but trials may proceed where the accused, having made an initial appearance, flees, is voluntarily absent, or is removed as a consequence of their conduct.	No—but trials may proceed where, the accused having made an initial appearance, the judge is satisfied that they expressly or impliedly waive their right to be present.	No—but trials may proceed where, the accused having made an initial appearance, absconds or is removed for disruptive conduct.	No—but accused may be removed if disrupting proceedings and counsel is present.	No—but accused may be removed if disrupting proceedings.	Yes, if the accused has waived in writing their right to be present, if they have not been surrendered by the authorities concerned, or if they have absconded and their apprehension cannot be secured by all reasonable steps.
Provisions on the rights of victims	Yes. Injured parties or their representatives may make submissions in court, including a closing statement. Criminal proceedings may incorporate	Yes. Victims may seek leave from the court to make submissions in criminal proceedings. As of right, they may intervene in reviews conducted by the	No. (Victims may be able to claim compensation under relevant national legislation.)	Not provided for in the Special Law, but RPE provide for a civil party action. The ECCC can order collective and moral reparations to civil parties.	No.	Yes. Iraqi victims and families may file a civil suit before the Court.	Yes. Victims or their representatives may make submissions on matters affecting their personal interests, at any stages of the proceedings

	victims' property claims, including for damages.	investigating judge, and applications for parole. Victims of serious crimes may benefit from a trust fund.					which the Chambers deem appropriate and which do not prejudice the interests of the parties. Victims may also be able to claim compensation under relevant national legislation.
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## CHAPTER THREE

### LEGAL BASIS AND NATURE OF JURISDICTION

#### 1 Introduction

Chapter Two described the background to the seven tribunals studied. It highlighted that the different contexts within which these tribunals have been established, and in particular the manner in which questions of sovereignty and legal, political and financial factors influence the negotiation process – if any – and the design, structure and operation of a tribunal. Table One sets out the key features of these tribunals and highlights the differences between them in terms of structure, composition and funding. The varying circumstances surrounding their creation and design are used to justify considering each tribunal as unique; each tribunal is *sui generis* or an ad hoc response. To utilise the generic term ‘internationalized’ or ‘hybrid’ potentially masks a number of significant differences between such tribunals. For instance, the tribunals may apply, and be governed by, different legal regimes. Some may have the power to compel compliance with court orders by third states and international organisations, including the power to secure the surrender of suspects, while others are restricted to requesting international cooperation utilising existing domestic arrangements as to extradition and mutual legal cooperation. Tribunals may have varying relationships with the domestic legal regime. Certain tribunals may be able to override domestic and international immunities or amnesties, whilst others may not. The unique nature of each tribunal, in turn, arguably precludes the development of a framework or common approach to the legal questions facing the tribunals.

However, this thesis does not accept that position. Given the increasing reliance on such tribunals, it is necessary to examine further the features of these tribunals so as to identify more specific categories, or sub-species, of tribunals. It is submitted here that the most relevant criterion upon which to base any categorization of such tribunals is the legal basis for the creation and operation of the tribunal. Examining the legal basis for each tribunal permits an examination of the key powers and competences of the tribunal and the applicable legal regime. It is directly relevant to the issues outlined above and is one of the most significant indicators of how effective the tribunal will be in the quest to achieve the principle of non-impunity. Accordingly, the first section of this chapter will assess the differing legal bases of the hybrid and internationalized tribunals. It finds that, using the legal basis as the key criterion, three categories of such tribunals can be identified. The second section of this Chapter builds upon these

three categories and examines the related issue of the nature of the jurisdiction that has been conferred on each tribunal by states, and how such authority has been conferred. This thesis considers four possible bases for the jurisdiction of the tribunals: the principle of territorial jurisdiction conferred on a court acting as a national institution of the territorial state; the delegation of jurisdiction from a state – normally the territorial state – to an international tribunal; jurisdiction conferred on the tribunal by the international community, as the crimes within its subject matter jurisdiction are considered to give rise to universal jurisdiction (so-called ‘floating’ universal jurisdiction); and jurisdiction conferred on an international tribunal by the Security Council acting under Chapter VII of the Charter. It concludes, however, that the notion of ‘floating’ universal jurisdiction is not yet an accepted basis of jurisdiction for an international criminal tribunal. An analysis of the nature of the jurisdiction conferred on a tribunal, and the mechanism by which it was conferred, may assist in determining key legal questions, such as whether an amnesty or immunity is applicable.

## **2 Legal Basis**

### **2.1.1 The Special Court for Sierra Leone**

The Secretary-General has commented that ‘the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based *sui generis* court of mixed jurisdiction and composition’.<sup>1</sup> The legal status of the SCSL is determined by its constituent instrument, the SCSL Agreement. Article 1 of the SCSL Agreement clearly states ‘There is hereby established a Special Court for Sierra Leone...’. Moreover, the preamble to the SCSL Statute provides ‘Having been established by an Agreement between the United Nations and the Government of Sierra Leone...’. The Security Council has referred to the SCSL as having been established by the SCSL Agreement.<sup>2</sup> The Appeals Chamber has confirmed this status on several occasions. The SCSL is thus a treaty-based institution.<sup>3</sup> In this sense, the SCSL has more in

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<sup>1</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, para. 9.

<sup>2</sup> Resolution 1688 (2006), preambular para. 2 – ‘*Recalling* that the Special Court for Sierra Leone (“the Special Court”) was established by Agreement between the United Nations and the Government of Sierra Leone on 16 January 2002 (“the Agreement”) pursuant to its resolution 1315 (2000) of 14 August 2000’.

<sup>3</sup> This legal status is widely recognized by commentators: see Beresford, S. and Muller, A., ‘The Special Court for Sierra Leone: An Initial Comment’ (2001) 14 *LJIL* 635, 636; Cerone, J., ‘The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice’ (2002) 8 *ILSA JICL* 379, 381; Frulli, M., ‘The Special Court for Sierra Leone: Some

common with the ICC than the ICTY and the ICTR. It possesses distinct legal personality under international law<sup>4</sup> and is an international – and not a national - institution.

The nature and legal basis of the SCSL has been raised several times in preliminary motions before the Appeals Chambers. It has been suggested that Resolution 1315 and the involvement of the Security Council in the creation of the SCSL indicate that the SCSL was instead established by the Security Council acting pursuant to Chapter VII of the Charter. According to this view, the mere involvement of the Council with the establishment of the SCSL, in combination with its previous role in relation to Sierra Leone and its reference to the situation in Sierra Leone as continuing to constitute a threat to international peace and security, renders the establishment of the SCSL an exercise of the powers of the Security Council acting under Chapter VII of the Charter. However, this assertion is flawed. The Security Council did not establish the SCSL, nor do the orders of the SCSL bind third states.<sup>5</sup> Before acting under Chapter VII of the Charter, the Security Council must make a determination as to whether the situation in question represents a threat to the restoration or maintenance of international peace and security.<sup>6</sup> It had previously determined that the situation in Sierra Leone constituted a threat to international peace and security,<sup>7</sup> and this determination was reiterated in Resolution 1315.<sup>8</sup> The jurisdictional threshold for the operation of Chapter VII of the Charter was satisfied. Therefore, it was open to the Security Council to utilize its powers under article 41 of the Charter to establish an international tribunal as a measure to restore international peace and security. Alternatively, the Security Council could have relied upon its general power for international peace and security under article 24 of the Charter.<sup>9</sup> However, the

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Preliminary Comments' (2000) 11 *EJIL* 857, 858; Jallow, H., 'The Legal Framework of the Special Court for Sierra Leone' in Ambos & Othamn (eds) *New Approaches in International Justice: Kosovo East Timor, Sierra Leone and Cambodia* (2003); Scharf, M., 'The Special Court for Sierra Leone', *ASIL Insights*, 2000.

<sup>4</sup> Article 11, SCSL Agreement.

<sup>5</sup> Both the United Nations and the SCSL do not consider Resolution 1315 to delegate Chapter VII powers to the SCSL: Secretary-General's Report, note 1, para. 10. The Appeals Chamber has stated that the SCSL does not possess the mandatory powers of the Security Council under Chapter VII of the Charter: *Prosecutor v Taylor*, Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004 (*Taylor Immunity Decision*), confirming that Ghana did not have a legal obligation to comply with an arrest warrant issued by the SCSL.

<sup>6</sup> Article 39, Charter.

<sup>7</sup> Resolution 1270 (1999) and Resolution 1132 (1997).

<sup>8</sup> Resolution 1315 (2000), preamble.

<sup>9</sup> The Appeals Chamber has determined that the question of which exact article of the Charter could have formed the basis for the SCSL Agreement was irrelevant: *Prosecutor v Fofana*, Decision on Preliminary Motion on Lack of Jurisdiction *Materiae*: Illegal Delegation of Powers by the United Nations, Appeals Chamber, 25 May 2004, para. 19. It noted that 'there

Security Council did not act under Chapter VII; it merely requested the Secretary-General to negotiate an agreement with Sierra Leone for the establishment of a tribunal. Resolution 1315 can be contrasted with Resolutions 955 and 827, which include the words ‘Acting under Chapter VII of the Charter of the United Nations’. While the inclusion of the term ‘acting under Chapter VII’ is a matter of custom or practice only, the absence of these words in Resolution 1315 creates a strong presumption that the Security Council was not relying upon its powers under Chapter VII of the Charter. Moreover, the Security Council did not establish the SCSL by Resolution 1315. There is not a decision of the Security Council with which Sierra Leone - or other states - could be required to co-operate.<sup>10</sup> At most, Resolution 1315 is a non-binding recommendation from the Security Council acting under article 39 of the Charter. Having been established by a treaty and not by one of the principal organs of the United Nations, the SCSL cannot be, and has not been, considered a subsidiary organ of the United Nations. The assertion that the SCSL is a ‘Chapter VII’ body relies on an overly expansive interpretation of Resolution 1315 and the Council’s powers for international peace and security. This approach is inconsistent with the practice of the Council, which generally requires mandatory language and reference to the Council acting under Chapter VII, to engage the Council’s powers. Moreover, it is highly unlikely that states would be willing to accept that any action of the Council that may have a link to international peace and security is an exercise of the Council’s powers under Chapter VII of the Charter and hence potentially binding on member states. While it is certainly possible that the practice of the Council may develop further to permit such an expansive interpretation, it certainly does not do so yet.

The Appeals Chamber has also rejected suggestions that the request from the Security Council represented an unlawful delegation of powers by the United Nations.<sup>11</sup> It concluded that the question of whether the Security Council has the power to delegate its powers to the Secretary-General was not in issue. Resolution 1315 was clearly a request from the Security Council to the Secretary-General, which he was empowered to perform pursuant to articles 97 and 98 of the Charter. The United Nations is generally accepted to have treaty-making powers so as to enable it to enter into

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is no reason why the Security Council could not have established an international criminal tribunal in a non-coercive way’: para. 21.

<sup>10</sup> Article 25, Charter.

<sup>11</sup> *Fofana*, note 9. See also *Prosecutor v Gbao*, Decision on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Appeals Chamber, 15 May 2004.

agreements with states and other international organizations, this power being implied as necessary for the performance of its functions and as a feature of its legal personality.<sup>12</sup> Fulfilling the request did not require a delegation of power from the Security Council.<sup>13</sup> Similarly, the issue of whether the Secretary-General had the power to conclude the SCSL Agreement of his own volition was also considered irrelevant, as he was requested to do so by the Security Council.<sup>14</sup> Nor did the United Nations act *ultra vires* in entering into the SCSL Agreement, as the Security Council is not required to maintain control of an institution that is not a subsidiary organ<sup>15</sup> and the existence and activities of the SCSL do not restrain the Security Council in the performance of its functions under Chapter VII of the Charter.<sup>16</sup>

Several defendants have challenged the lawfulness of the tribunal's establishment based on an alleged violation of the Constitution of Sierra Leone. Section 120 of the Constitution vests the judicial power of Sierra Leone in the judiciary, established under Chapter VII of the Constitution. Any bill altering the structure of the judicial system may not become law until after it has been passed by parliament and approved at a referendum.<sup>17</sup> It has been suggested that the SCSL Agreement altered the judicial system of Sierra Leone through the creation of a parallel jurisdiction not contemplated by the Constitution and ousting the supervisory jurisdiction of the Supreme Court.<sup>18</sup> These changes arguably required confirmation at a referendum, which did not occur. Instead, the Ratification Act was promulgated pursuant to the general power of the President to enter into treaties, subject to ratification by Parliament.<sup>19</sup> The Appeals Chamber rejected this argument, labelling these submissions as 'erroneous, if not fallacious'.<sup>20</sup> It advanced four reasons for its conclusion.<sup>21</sup> First, the Ratification Act states that the SCSL is not to form part of the judiciary of Sierra Leone.<sup>22</sup> Second, the

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<sup>12</sup> *Reparations for Injuries suffered in the Service of the United Nations* (1949) ICJ Reports 174.

<sup>13</sup> *Fofana*, note 9, para. 16.

<sup>14</sup> *Fofana*, note 9, para. 17.

<sup>15</sup> *Fofana*, note 9, para. 26.

<sup>16</sup> *Fofana*, note 9, paras 27-9.

<sup>17</sup> Section 108(3), Constitution.

<sup>18</sup> Tejan-Cole notes that incorporating the SCSL Agreement into Sierra Leone required 'substantial amendments to entrenched provisions of the Constitution': Tejan-Cole, A., 'The Special Court for Sierra Leone: Conceptual concerns and alternatives' (2001) 1 *African Human Rights Law Journal* 107, 114. See also Bohlander, M., 'The Transfer of Cases from International Criminal Tribunals to National Courts', working paper, November 2004 (copy on file with author), 28; and Beresford, note 1, 641.

<sup>19</sup> Section 40(4), Constitution.

<sup>20</sup> *Prosecutor v Kallon, Norman and Kamara*, Decision on Constitutionality and Lack of Jurisdiction, Appeals Chamber, 13 March 2004, para. 48.

<sup>21</sup> *Ibid*, paras 49-52.

<sup>22</sup> Section 11(2), Ratification Act.

SCSL has separate judicial capacity, including the power to enter into treaties, a power which national courts do not have.<sup>23</sup> Third, as a treaty-based organ, the SCSL does not operate within an existing legal system. Finally, the SCSL is clearly established outside the national court system. The Appeals Chamber concluded that ‘[T]he establishment of the Special Court under Article 1 of the Special Court Agreement fulfils the relevant constitutional requirements and the appropriate procedures were certainly followed.’<sup>24</sup> The Appeals Chamber’s findings on this issue are worrying for several reasons. The first, third and fourth reasons are effectively the same, and the second reason does not resolve the issue of whether constitutional provisions have been complied with. It is also debatable as to whether it is appropriate for the SCSL to review compliance with domestic constitutional provisions, particularly where the states parties have not raised any objection and clearly consider that they are bound by the SCSL Agreement. Although the Appeals Chamber of the ICTY considered that it had the jurisdiction to consider the legality of its establishment in the *Tadic* case,<sup>25</sup> the legal basis of the ICTY is different to that of the SCSL and is based on the authority of the Security Council acting under Chapter VII of the Charter. Where a tribunal is established by a treaty, the power of review should not extend to confirming that states parties have complied with domestic constitutional or other provisions. If this argument was extended to the Rome Statute, it would require the ICC to consider challenges to its authority based on a possible violation of constitutional law by any one of its member states. The Appeals Chamber itself reached this conclusion in a separate decision, where it had been asked to review the legality of article 10 of the SCSL Statute, the provision concerning the applicability of amnesties. It commented that:<sup>26</sup>

[t]he decision in *Tadic* upon which Kallon’s counsel relied as authority for the submission that this Court can pronounce on the lawfulness of its own establishment is not apt. The ICTY is not a treaty-based Tribunal, nor did the *Tadic* case involve the validity of the provisions of a treaty but rather the extent of the powers of the Security Council, an authority established by the UN Charter.

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<sup>23</sup> Article 11, SCSL Agreement.

<sup>24</sup> *Kallon*, note 20, para. 53.

<sup>25</sup> *Prosecutor v Tadic*, Decision on Jurisdiction, Appeals Chamber, 2 October 2005. The Appeals Chamber relied upon the SCSL Agreement, its RPE and the decision in *Tadic* to ‘provide that basic and indispensable mandate’ to determine the legality of its own creation: *Kallon*, note 20, para. 37.

<sup>26</sup> *Prosecutor v Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004, para. 62.

Even if entering into the SCSL Agreement did violate the Constitution, the violation would not render the SCSL Agreement void unless the violation was ‘manifest and concerned a rule of fundamental importance’.<sup>27</sup> While constitutional rules are generally considered to be of fundamental importance, it is certainly not demonstrable that the violation was manifest. The position can also be contrasted with the situation in relation to the LST, where constitutional procedures were clearly not complied with, and looked unlikely to be satisfied in the future. The Security Council addressed the possible violation in that situation by establishing the tribunal pursuant to its powers under Chapter VII of the Charter.

Defendants have also submitted that the SCSL is not an international institution but a court within the judicial system of Sierra Leone. This would require proceedings in the SCSL to comply with the Constitution, including permitting a defendant to make *habeas corpus* applications to the Supreme Court.<sup>28</sup> The argument that the SCSL is a national judicial institution rests on two grounds. First, on the hybrid nature of the SCSL, which, it is submitted, distinguishes the tribunal from the ICC, the ICTY and the ICTR.<sup>29</sup> Second, it is argued that although the SCSL Agreement established the SCSL, the Ratification Act imported the SCSL into the judicial structure of Sierra Leone, rendering the SCSL a national court.<sup>30</sup> This argument may be quickly dispelled. Section 11(2) of the Ratification Act states that ‘the Special Court shall not form part of the Judiciary of Sierra Leone’, and section 13 provides that ‘offences prosecuted before the Special Court are not prosecuted in the name of the Republic of Sierra Leone’. The memorandum of objects and reasons attached to the Ratification Act stresses that the Ratification Act is ‘to make provision for the ratification and implementation of the Agreement’ and to provide ‘the details needed to effectuate the exercise of jurisdiction by the Court’. The Ratification Act functions as implementing legislation only; it does not establish a domestic criminal tribunal with international assistance, nor can it convert an otherwise international institution into a domestic

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<sup>27</sup> Article 46, Vienna Convention on the Law of Treaties. Technically it is the Vienna Convention on the Law of Treaties between States and International Organisations and between International Organisations (1986) which would apply. While this convention has not yet entered into force, many of its provisions are considered to reflect customary international law.

<sup>28</sup> The Supreme Court of Sierra Leone has supervisory jurisdiction over all other courts in Sierra Leone, which includes the power to issue writs of *habeas corpus*: section 125, Constitution.

<sup>29</sup> Oral submissions on behalf of defendant Kamara: *Kallon*, note 20, para. 22.

<sup>30</sup> Various provisions of the Ratification Act were relied upon in support of this argument, including section 2, which grants the SCSL legal capacity in Sierra Leone, and section 20, which provides that orders of the SCSL will have the same effect as an order of a Sierra Leone court.

court. The SCSL has consistently, and correctly, rejected this argument. In *Prosecutor v Brima*, the Appeals Chamber held that, as the SCSL Agreement was created pursuant to international instruments, it could not come into force without an instrument of ratification. However, this instrument of ratification did not transform the SCSL into a domestic court.<sup>31</sup> In conclusion, the SCSL is a treaty-based institution. It is an international tribunal, and operates outside the domestic legal system of Sierra Leone.

### **2.1.2 The legal basis of UNMIK and UNTAET, and the serious crimes processes**

Although there had been precedents for the involvement of the United Nations in governance tasks,<sup>32</sup> the mandates of the civilian components of both UNMIK and UNTAET were considered ‘unprecedented in scope and complexity’.<sup>33</sup> Debate ensued as to whether the Security Council was competent to establish missions with such wide-ranging mandates and, if so, where the legal basis for that competence lay.<sup>34</sup> One suggestion was that both the former Yugoslavia and Indonesia had either consented to or acquiesced in the establishment of an international territorial administration in a territory they had formerly controlled.<sup>35</sup> The Security Council hinted at the presence of consent in both Resolutions 1244 and 1272.<sup>36</sup> However, the Security Council did not rely on consent alone as the basis for the territorial administration as to do so would have tied the continued operation of the missions to

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<sup>31</sup> *Prosecutor v Brima*, Ruling on the Application for the Issue of a Writ of Habeas Corpus Filed by the Applicant, Trial Chamber, 22 July 2003. See also *Prosecutor v Allieu Kondewa*, Decision on the Urgent Defence Application for Release from Provisional Detention, Appeals Chamber, 21 November 2003 and *Prosecutor v Fofana*, Decision on the Urgent Defence Application for Release from Provisional Detention, 21 November 2003.

<sup>32</sup> Stahn, C., ‘The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis’ (2001) 5 *Max Planck Year Book of United Nations Law* 105; and Wilde, R., ‘From Danzig to East Timor and Beyond: The Role of International Territorial Administration’ (2001) 95 *AJIL* 583.

<sup>33</sup> Matheson, M., ‘United Nations Governance of Postconflict Societies’ (2001) 95 *AJIL* 76, 79.

<sup>34</sup> See: Matheson, *ibid*, Wilde, note 32; Stahn, note 32; Kirgis, F., ‘Security Council Governance of Postconflict Societies: A Plea for Good Faith and Informed Decision Making’ (2001) 95 *AJIL* 579; Ruffert, M., ‘The Administration of Kosovo and East Timor by the International Community’ (2001) 50 *ICLQ* 613; Rothert, M., ‘UN Intervention in East Timor’ (2001) 39 *Col JTL* 257; and Kondoch, B., ‘The United Nations Administration of East Timor’ (2001) 6 *JCSL* 145.

<sup>35</sup> The consent of the former Yugoslavia was said to be found in the acceptance of the basic principles of the administration, as set out in Annex 2 to Resolution 1244. The consent of Indonesia (de facto authority) and Portugal (de jure) authority were to be found in the agreement providing for the popular consultation and acceptance of the general principles of the administration at a meeting in September 1999.

<sup>36</sup> See Resolution 1244 (1999), preambular paras 9 and 10; Resolution 1272 (1999), preambular paras 2, 12 and 13.

ongoing consent. For political reasons also, relying on consent was unacceptable.<sup>37</sup> Moreover, a consent-based mission would not ensure that other states would recognize the authority of the mission and cooperate so as to enable the mission to function. Thus the Security Council invoked its powers under Chapter VII of the Charter to establish both missions.<sup>38</sup> It now appears generally accepted that both resolutions were a valid exercise of the Security Council's powers under Chapter VII of the Charter, and that article 41 of the Charter was sufficiently wide so as to support the imposition of international territorial administration as a measure to restore or maintain international peace and security.<sup>39</sup>

The effect of the resolutions was to suspend for the duration of the transitional period the residual powers of the former Yugoslavia in respect of Kosovo and whatever authority Indonesia had exercised in relation to East Timor. During the period of administration, the United Nations assumed full responsibility for the administration of the territories and was effectively to act as the government of each territory. However, the United Nations did not become the sovereign; instead sovereignty was suspended and the United Nations administered the territory on behalf of the local population and the international community.<sup>40</sup> As peacekeeping missions established pursuant to the powers of the Security Council under Chapter VII, UNMIK and UNTAET were subsidiary organs of the Security Council under article 29. As such, the missions were required to report to the Security Council on a regular basis and their mandate was subject to review, modification and termination by the parent organ, the Security Council.<sup>41</sup>

Given the context of their creation, the legal basis of the IJPP and the SPSC during the period of territorial administration is somewhat unclear.<sup>42</sup> As noted in Chapter Two, both the IJPP and the SPSC were established by regulations promulgated by the respective Special Representative of the Secretary-General. It has been observed that

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<sup>37</sup> The validity of the consent of the former Yugoslavia was questioned due to the military air strikes and other measures. To rely on consent alone in East Timor would have validated Indonesia's annexation of the territory as lawful.

<sup>38</sup> Resolutions 1244 and 1272 both provide that the Security Council acted under Chapter VII.

<sup>39</sup> This is the conclusion drawn by the majority of the commentators listed above.

<sup>40</sup> Yannis, A., 'The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics' (2002) 13 *EJIL* 1037, 1048.

<sup>41</sup> Sarooshi, D., 'The Legal Framework Governing United Nations Subsidiary Organs' (1996) 67 *BYbIL* 413.

<sup>42</sup> The legal basis of the SPSC varied after the independence of East Timor in May 2002. This period subsequent to independence will not be considered here.

such regulations have a dual character.<sup>43</sup> The regulations are based on, and their authority flows from, the provisions of the Charter and the powers of the Security Council under Chapter VII of the Charter.<sup>44</sup> In this sense, the regulations are international instruments. However, the regulations are addressed to a specific territory and, in this other sense, constitute domestic laws of that territory. This reflects the dual functions of the Special Representative of the Secretary-General and the missions themselves. At least during the transitional period the missions operated not only as a subsidiary organ of the Security Council but also as the effective government of the territory concerned.

What does this duality mean for the legal basis of the IJPP and the SPSC? At least in theory, these internationalized tribunals may also enjoy the same duality, that is they operate both as instruments of the Council under article 41 of the Charter and as domestic judicial processes. If the tribunals were considered 'Chapter VII' tribunals in this sense, this would suggest that they should be subject to and apply international law, could compel cooperation with their orders and could override immunity both at a national and international level.<sup>45</sup> However, Wilde argues that the correct method of assessing the legal basis of such a regulation potentially possessing a dual character is to consider which role the international organization is fulfilling when it promulgates the regulation and to ask whether the regulation is an exercise of international legal capacity, or a governmental act.<sup>46</sup> Applying this approach, it would appear from the text of the regulations in question that in each case, the Special Representative of the Secretary-General acted in his national, domestic capacity, and did not act to establish the IJPP or the SPSC as international legislative acts. This would base the legal authority of these bodies in domestic law. This conclusion appears to be supported by the practice of the IJPP and the SPSC, which have operated as domestic tribunals. Each tribunal applies the law stipulated by the relevant regulations as the law of the territory concerned, and not as an international tribunal or a domestic court applying international law. Neither the IJPP nor the SPSC have asserted any binding authority based on the Charter in order to enforce their orders or to obtain the cooperation of states, including the former Yugoslavia and Indonesia.

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<sup>43</sup> See discussion in the following sources: Stahn, note 32; Ruffert, note 35; and Wilde, R., 'The Complex Role of the Legal Adviser when International Organizations Administer Territory' (2001) *ASIL Proceedings* 251.

<sup>44</sup> See Cerone, J. and Baldwin, C., 'Explaining and Evaluating the UNMIK Court System' in Romano et al (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (2004), 41.

<sup>45</sup> See Chapter Five.

<sup>46</sup> Wilde, note 43.

This conclusion is also supported by the action - or inaction - of the Security Council regarding the serious crimes process in each territory. The Security Council did not display any sense of ‘ownership’ of the SPSC or the IJPP. Key decisions, including the creation of the processes themselves, were made within the mission hierarchy, and were not instigated by the Security Council. Although the processes operate within restraints set by the Security Council, particularly with regard to the relationship between these processes and other international courts (ICTY in Kosovo) and national courts (accountability process in Indonesia for East Timor), there was not a system of reporting to the Security Council on serious crimes issues outside the normal mission reporting structure. This limited the possibility of obtaining Security Council support for enforcement of orders and issues of cooperation. Even where flaws in the system were identified, for example when the failings in the trials before the Indonesian national mechanism became apparent, the Security Council did not take action to reinforce the serious crimes process in a territory which the United Nations administered under its authority. Thus it appears that the Security Council itself did not consider the tribunals to possess international character or to have a legal basis in Chapter VII of the Charter.

The conclusion that the SPSC and the IJPP are domestic institutions is logical, particularly when one considers other actions taken by the missions. Both UNTAET and UNMIK created transitional governmental institutions and were responsible for establishing institutions to draft interim constitutions.<sup>47</sup> The transitional institutions established by the missions were staffed at least in part by international personnel.<sup>48</sup> There has been no suggestion that the transitional governments or institutions were international in character, or that they drew their authority from the Council’s powers under the Charter. Instead, all transitional institutions are considered to be domestic in nature, albeit institutions which receive significant international assistance. There is no justification for conferring upon the SPSC and the IJPP international character and authority where other governmental institutions are national in nature. Accordingly, the legal basis of these tribunals lies in domestic law and the tribunals operated as national courts with international participation and assistance.

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<sup>47</sup> For East Timor, see Regulation 2001/2 and Regulation 2001/21. For Kosovo, see Regulation 2001/9.

<sup>48</sup> Regulation 2000/1 provided that each administrative department established was to be managed by two Co-heads, one a national, the other a member of UNMIK. Regulation 2000/23 appointed Timorese Cabinet Officers to manage transitional administrative departments. However, all officers were appointed by and reported to the Transitional Administrator.

### **2.1.3 Extraordinary Chambers in the Courts of Cambodia**

The ECCC is a national judicial institution, albeit one that is operating with significant assistance from the United Nations.<sup>49</sup> Personnel at the ECCC indicate that ‘This idea of Cambodian “ownership” is widely accepted by the UN side of the court administration, which views its role as, in essence, one of support for the process, in accordance with international standards’.<sup>50</sup> Having been established by domestic law,<sup>51</sup> the ECCC operates within the existing court structure of Cambodia and forms part of the Cambodian legal order. Other than in limited circumstances, the ECCC is to apply Cambodian, not international, procedural law.<sup>52</sup> Unlike the SCSL, the ECCC does not enjoy separate legal personality under international law.<sup>53</sup>

What then is the significance of the ECCC Agreement for the legal basis of the ECCC? Though the ECCC is the subject of the ECCC Agreement, this does not make it a treaty-based organ; the Special Law and not the ECCC Agreement is the constitutive instrument of the tribunal.<sup>54</sup> The ECCC Agreement is only ‘to regulate the cooperation’ between the United Nations and Cambodia, and to provide ‘the legal basis and the principles and modalities for such cooperation’.<sup>55</sup> Furthermore, although the General Assembly provided the authority for the Secretary-General to negotiate the ECCC Agreement and approved its terms before the United Nations signed the instrument, Resolution 57/225B does not form the legal basis of the ECCC.<sup>56</sup> The Security Council was not involved in the establishment of the ECCC, and it is doubtful that it could have acted to establish a tribunal where there is no threat to international peace and security, the violations in question having been committed some 20 years previously.<sup>57</sup> Thus the ECCC is not a subsidiary organ of either the General Assembly or the Security Council.

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<sup>49</sup> There is general consensus that the ECCC is a national institution: for example, Acquaviva, G., ‘New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers’ (2008) 6 *JICJ* 129, 130, and sources cited.

<sup>50</sup> Cohen, D., ‘“Hybrid” Justice in East Timor, Sierra Leone and Cambodia: “Lessons Learned” and Prospects for the Future’ (2007) 43 *Stan JIL* 1, 28, quoting an interview with Michelle Lee.

<sup>51</sup> Article 2 of the Special Law provides that the ECCC ‘shall be established’ by the law.

<sup>52</sup> Article 12, ECCC Agreement, provides that international procedural rules may be referred to only where Cambodian law does not deal with a particular matter, there is uncertainty regarding the interpretation or application of a relevant rule, or a rule may not comply with international standards.

<sup>53</sup> There is no provision equivalent to Article 11 of the SCSL Agreement.

<sup>54</sup> For the contrary view see Cohen, note 50, 27.

<sup>55</sup> Article 1, ECCC Agreement.

<sup>56</sup> Williams, S., ‘The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?’ (2004) 53 *ICLQ* 227.

<sup>57</sup> Orentlicher, D., ‘International Criminal Law and the Cambodian Killing Fields’ (1997) 3 *ILSA JICL* 705, 710. Boyle, D. ‘Establishing the Responsibility of the Khmer Rouge Leadership for International Crimes’ (2002) *YbIHL* 167, 181, states that a draft Chapter VII

However, the ECCC Agreement is important, and represents a significant improvement on the arrangements initially proposed.<sup>58</sup> The United Nations was concerned with ensuring that the ECCC would satisfy international human rights and fair trials standards, and with safeguarding the institution from external influences to the greatest extent possible.<sup>59</sup> These concerns are reflected in the ECCC Agreement. The Cambodian government must consult the United Nations prior to any amendment to the Special Law,<sup>60</sup> which will provide an opportunity for input into any amendments required due to inconsistency with the Special Law. However, the Cambodian government is not obliged to incorporate changes requested by the United Nations. Article 2(2) of the ECCC Agreement confirms that it is an international treaty, which is to be interpreted in accordance with the Vienna Convention on the Law of Treaties. As such, Cambodia must perform its obligations under the ECCC Agreement in good faith, and cannot rely on domestic legal provisions to avoid its obligations. As Boyle notes: [T]he 2003 Agreement thus provides a legal guarantee that the Extraordinary Chambers will function and exercise their powers as envisaged in the Agreement, as well as providing an indisputable basis for determining breaches by Cambodia'.<sup>61</sup>

In practical terms, though, it is difficult to see what pressure the United Nations could exert if Cambodia does not fulfil its obligations under the ECCC Agreement. Linton has commented that Cambodia has not fulfilled its obligations under other international instruments, in particular the human rights instruments to which it is a party, thus the prospects for compliance with the ECCC Agreement may be low.<sup>62</sup> Article 28 of the ECCC Agreement provides that where the Cambodian government amends the structure or organisation of the ECCC, or causes them to function in a manner that does not accord with the ECCC Agreement, the United Nations may cease to provide assistance. Thus the withdrawal of funding and other assistance is the only sanction for non-performance by Cambodia. Article 28 reflects the weakness of the United Nations position in the negotiations for the ECCC and that this is primarily a

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resolution supporting the establishment of an international tribunal was circulated to the Security Council by the United States delegation in May 1998.

<sup>58</sup> See the terms of the draft Memorandum of Understanding, drafted in July 2000 and discussed in Boyle, *ibid*.

<sup>59</sup> Linton, S., 'Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers' (2006) 4 *JICJ* 327.

<sup>60</sup> Article 2(3), ECCC Agreement.

<sup>61</sup> Boyle, note 57, 113.

<sup>62</sup> Linton, note 59, 340.

Cambodian process. As Bertodano notes: ‘The negotiations had been conducted in an atmosphere of suspicion and mistrust... Article 28 reflects a queasy lack of confidence with which the Agreement is viewed by the UN.’<sup>63</sup> Any dispute as to the interpretation or application of the ECCC Agreement is to be resolved by negotiation, or another agreed mode of settlement.<sup>64</sup> It is also possible that, as the assistance of the United Nations is offered under the authority of the General Assembly, any dispute that could not be resolved by negotiation would be referred to that body, resulting in a political rather than legal determination of the situation.<sup>65</sup> The opposition of several influential states may prevent the General Assembly from taking the drastic action of withdrawing support, even though such action may be justified. The absence of strict legal criteria for the withdrawal of assistance, the lack of a monitoring or reporting mechanism, and the potential exposure of the decision to withdraw to political factors weakens the effectiveness of the enforcement mechanism.<sup>66</sup>

#### **2.1.4 War Crimes Chamber for Bosnia and Herzegovina**

The establishment of the WCC was closely linked to the completion strategy of the ICTY. In the absence of appropriate impartial national mechanisms, the Security Council supported the ‘expeditious establishment’ and ‘early functioning’ of the WCC.<sup>67</sup> However, the Security Council did not take any action to establish the WCC beyond encouraging donations from interested states. Instead, the WCC was established within the structure of an existing national court, the federal-level State Court, by the Office of the High Representative (OHR).<sup>68</sup> The powers of the OHR derive from the Dayton Peace Agreement (DPA),<sup>69</sup> which provided for the appointment of the OHR to carry out the implementation of the civil administration aspects of the peace agreement.<sup>70</sup> It also provided that the OHR shall have the final authority ‘regarding interpretation of this Agreement on the civilian implementation of the peace settlement’.<sup>71</sup> The OHR has interpreted this power as authorising the promulgation of laws for the civil administration of the territory, including the

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<sup>63</sup> Bertodano, S., ‘Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers’ (2006) 4 *JICJ* 285, 289.

<sup>64</sup> Article 29, ECCC Agreement.

<sup>65</sup> Linton, note 59, 340; Williams, note 56, 233.

<sup>66</sup> Williams, note 56, 233.

<sup>67</sup> Resolution 1503 (2003), preambular para 11.

<sup>68</sup> Decision imposing the Law on the State Court of BiH, 12 November 2000.

<sup>69</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995.

<sup>70</sup> Article I of Annex 10, DPA.

<sup>71</sup> Article V, DPA.

judiciary. Although the Security Council has supported the operations of the OHR<sup>72</sup> and has monitored implementation of the DPA, the institution of the OHR was not established by the United Nations, but by the DPA itself. Thus, unlike UNMIK and UNTAET, the OHR is not a subsidiary organ of the United Nations.

What then is the legal basis of the WCC? The OHR had previously established the State Court of Bosnia and Herzegovina by a decision,<sup>73</sup> which was subsequently confirmed by federal and entity level legislation.<sup>74</sup> The creation of the State Court was considered to flow from the powers of the OHR in respect of the judiciary. However, the same legal basis was not used to establish the WCC. Instead, this was achieved by an amendment to the existing law on the State Court, using national procedures and approved by the parliaments of both entities and the federal parliament.<sup>75</sup> Despite the support of the Security Council for the creation of the WCC and its connection to the ICTY completion strategy, it is clear that the Security Council did not establish the WCC by resolution under Chapter VII or otherwise. Whilst the Security Council receives information on the WCC in the reports submitted by the ICTY as part of the completion strategy, that information is focused on the number of referrals from the ICTY. Moreover, the Security Council takes no role in enforcing compliance with the orders of the WCC, which is left to normal domestic mechanisms and international and regional agreements. Thus it is clear that the WCC operates as a national judicial institution, with international assistance for the transitional period of five years.

### **2.1.5 Iraqi High Tribunal**

The legal status of the IHT is connected to the status and powers of the Coalition Provisional Authority (CPA), as the occupying power, and the powers of the Iraqi Governing Council. As Roberts writes '[T]here is no dispute about the fact that between April 2003 and 28 June 2004 there was a foreign military occupation in Iraq'.<sup>76</sup> The Security Council recognised the legal status of the occupation in

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<sup>72</sup> For example, Resolution 1035 (1995), authorizing the involvement of the United Nations in the implementation of the DPA, and Resolution 1088 (1996), reaffirming support for the DPA and calling upon all parties to comply with their obligations.

<sup>73</sup> Decision Imposing the Law on the State Court of Bosnia and Herzegovina, 12 November 2000.

<sup>74</sup> Law on the Court of Bosnia and Herzegovina, Official Gazette BiH 29/00. In 2002 the jurisdiction of the State Court was expanded to include panels for Organized Crime, Economic Crime and Corruption: Law on Amendments to the Law on the State Court of Bosnia and Herzegovina, Official Gazette BiH 24/02.

<sup>75</sup> Law on Amendments to the Law on the State Court of Bosnia and Herzegovina, Official Gazette BiH 9/04.

<sup>76</sup> Roberts, A., 'The End of Occupation: Iraq 2004' (2005) 54 *ICLQ* 27, 30. The existence of an occupation is a question of fact. Article 42 of the Hague Regulations provides that 'territory is considered occupied when it is actually placed under the authority of the hostile army'. The

Resolution 1483.<sup>77</sup> It is permissible for an occupying power to enact legislative measures ‘in order to restore, and ensure, as far as possible, public order and safety’.<sup>78</sup> The assumption is that ‘occupying powers should respect the existing laws and economic arrangements within the occupied territory, and should generally make as few changes as possible’.<sup>79</sup> However, in relation to Iraq, Resolution 1483 and subsequent resolutions advanced wider aims for the occupation, including the restoration of institutions for representative governance and a process leading to an internationally recognised representative government of Iraq.<sup>80</sup> The CPA ‘embarked upon a programme of action involving an extensive transformation in the way Iraq is governed’.<sup>81</sup> It has been suggested that several of the legislative reforms introduced by the CPA exceeded its authority under international law, in particular the reform of the Iraqi economy.<sup>82</sup>

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more widely accepted view is that the ongoing violence between coalition forces and insurgents did not affect the status of the occupation: Roberts, 33-34; Bantekas, I., ‘The Iraqi Special Tribunal for Crimes Against Humanity’ (2004) 54 *ICLQ* 237, 238.

<sup>77</sup> The preamble noted the ‘specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers’. As discussed in Chapter Two, the CPA also recognised its status as an occupying power in promulgating CPA Regulation 1.

<sup>78</sup> Article 43, Hague Regulations. In so doing, the occupying power ‘must respect, unless absolutely prevented, the laws in force in the country’. See also article 64 of the fourth Geneva Convention. For a discussion of these provisions in the context of Iraq, see Sassoli, M., ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16 *EJIL* 661.

<sup>79</sup> Roberts, note 76, 36. Contrast the view of Schwenk, who argued that ‘[E]ven though the legislative power of the military occupant is theoretically limited, practically it includes jurisdiction over the entire civilian life of the enemy population if the occupation extends over a considerable period of time’: Schwenk, E., ‘Legislative Power of the Military Occupant Under Article 43, Hague Regulations’ (1945) 54 *YLJ* 393, 415.

<sup>80</sup> Resolution 1483 (2003), para. 8.

<sup>81</sup> Kaikobad, K., ‘Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003-June 2004’ (2005) 54 *ICLQ* 253, 254. The breadth of the aims of the CPA have led various commentators to suggest that the law of occupation should not apply to Iraq, arguing that it is ill-suited to the tasks undertaken in Iraq: Scheffer, D., ‘Beyond Occupation Law’ (2003) 98 *AJIL* 842; and arguing for a United Nations governance, as in Kosovo and East Timor: Ottonlenghi, M., ‘The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation’ (2004) 72 *Fordham Law Review* 2177, 2214. For the contrary view, see Benvenisiti, E., ‘The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective’ (2003) 23 *Israeli Defence Forces Law Review* 1, 17.

<sup>82</sup> See Murphy, M., ‘A “World Occupation” of the Iraqi Economy? How Order 39 will create a semi-sovereign state’ (2004) *Connecticut Journal of International Law* 445; Bali, A., ‘Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq’ (2005) 30 *YJIL* 347; McCarthy, C., ‘The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq’ (2005) 10 *JCSL* 43; Fox, G., ‘The Occupation of Iraq’ (2005) 36 *Geo JIL* 195.

In terms of the establishment of the IHT, the IHT Statute was annexed to an order of the CPA delegating authority to the Iraqi Governing Council.<sup>83</sup> This delegation of authority was subject to certain terms and conditions,<sup>84</sup> and the CPA Administrator reserved the right to amend the IHT Statute – or any elements of crime or rules of procedure developed for the IHT – where required in the interest of security.<sup>85</sup> Therefore, while the IHT was established notionally by the Iraqi Governing Council, the authority to do so flowed from the CPA. This suggests that the Iraqi Governing Council did not establish the IHT as the representative body of a sovereign state, but as a body operating as a ‘puppet’ of the occupying powers.<sup>86</sup> In this sense, the IHT is a body established by the CPA, on behalf of the occupying powers while the sovereignty of Iraq was suspended during the period of occupation.<sup>87</sup>

The power of an occupying power to establish criminal tribunals is limited by the fourth Geneva Convention,<sup>88</sup> which presumes that the legal system of the occupied territory should continue.<sup>89</sup> Existing penal laws are to remain in force, other than where they constitute a threat to security or an obstacle to the operation of the convention. The occupying power may introduce penal provisions only where essential to fulfil its obligations under the convention, to maintain orderly government and to ensure its own security.<sup>90</sup> Similar to a state party to the Geneva Conventions, an occupying power is obliged to detain and to prosecute persons alleged to have committed grave breaches. This would include the obligation to enact the necessary

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<sup>83</sup> Commentators have suggested that the CPA attempted to bypass the laws of occupation through establishing the Iraqi Governing Council: see Bantekas, note 76. Similarly Paust has argued that ‘the UN Security Council and the occupying powers cannot lawfully dictate that an unelected occupying-power-appointed body, however prestigious, actually represents the authority and sovereignty of the Iraqi people’: Paust, J., ‘The United States as Occupying Power over Portions of Iraq and Special Responsibilities Under the Laws of War’ (2004) 27 *Suffolk Transnational Law Review* 1, 19.

<sup>84</sup> Chapter Two.

<sup>85</sup> Section 1(6), CPA Order 48.

<sup>86</sup> As Zolo states: ‘No one imagines that the Governing Council, which has neither legislative authority nor independent financial resources at its disposal, is actually the power that willed this special Tribunal into existence, and can maintain and finance it’: Zolo, D., ‘The Iraqi Special Tribunal: Back to the Nuremberg Paradigm?’ (2004) 2 *JICJ* 313, 315. See also Scharf, M., ‘Is it International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice’ (2002) 2 *JICJ* 330, 331.

<sup>87</sup> Sovereignty is not exercised by the occupying power during the period of occupation. Instead, there is recognition that the legitimate authority is ‘temporarily displaced’ or suspended: Ottonlenghi, note 81, 2184; Bothe, M., ‘Occupation, Belligerent’ in 4 *Encyclopedia of Public International Law* 64, 65.

<sup>88</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS (1950) 287-417 (GCIV).

<sup>89</sup> Article 64, GCIV

<sup>90</sup> Article 64(2), GCIV.

legislation, should it not exist under the laws of the occupied territory.<sup>91</sup> Where it has done so, the occupying power may utilise its own military courts to enforce its penal provisions,<sup>92</sup> provided those courts comply with specified procedural safeguards.<sup>93</sup> Alternatively, the occupying power may allow enforcement before existing national tribunals.<sup>94</sup> The IHT adopts neither of these options. Instead, it is a new tribunal, established under domestic law, an option that is neither provided for in the fourth Geneva Convention nor required in order to respect international humanitarian law.<sup>95</sup> Moreover, the temporal jurisdiction of the IHT predates the armed conflict, and permits the IHT to try offences committed by the previous regime from 17 July 1968.<sup>96</sup> The material jurisdiction of the IHT is also more extensive than is required by international humanitarian law, as it includes jurisdiction in respect of genocide and crimes against humanity, as well as a number of crimes under domestic law.<sup>97</sup> It is therefore questionable whether the establishment of the IHT as a ‘special tribunal’ was within the scope of international humanitarian law.<sup>98</sup> However, any doubts as to the legality of the IHT were removed following the transfer of authority from the CPA to the Iraqi Interim Government in June 2004. The IHT has subsequently been endorsed by the Iraqi authorities and was confirmed in the 2005 Constitution.<sup>99</sup>

Assuming, for present purposes, that the IHT was lawfully established by the occupying powers, this would suggest that its legal basis lies in domestic law, as the occupying power acts in place of the sovereign authorities in the occupied territory during the period of occupation. In establishing the IHT, the occupying powers were functioning as a domestic actor and accordingly the IHT is a domestic institution, with its authority based in national, and not international, law. It should therefore have the

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<sup>91</sup> This flows from the reference to enact legislation considered essential to ensure respect for GCIV, see article 64. Article 146 imposes an obligation to detain and to prosecute persons suspected of committing grave breaches of the conventions. See the United Kingdom Manual on the Law of Armed Conflict, para. 11.26, note 54. Moreover, each state that is acting as an occupying power has this obligation under both treaty and customary international law: Paust, note 83, 15.

<sup>92</sup> Article 66, GCIV.

<sup>93</sup> Article 67, GCIV.

<sup>94</sup> Commentators generally agree as to the availability of these two options. For example, Sassoli, note 78, 675. Several commentators also mention a third option, requesting the Security Council to establish an international criminal tribunal: Tarin, D., ‘Prosecuting Saddam and Bungling Transitional Justice in Iraq’ (2005) 45 *VJIL* 467, 473.

<sup>95</sup> Sassoli, note 78, 675.

<sup>96</sup> Article 1, IHT Statute.

<sup>97</sup> See Chapter Four.

<sup>98</sup> For example, Doebbler, C., ‘An Intentionally Unfair Trial’ (2007) 5 *JICJ* 264 – ‘the creation of the IST by an occupying power violated international humanitarian law’, 268; Bantekas, note 76.

<sup>99</sup> See Chapter Two.

same status as a national court. This conclusion is even clearer for the period following the transfer of power from the CPA to local Iraqi authorities on 28 June 2004. From the date of transition, the IHT was evidently a national institution, albeit operating with international assistance.

### **2.1.6 Special Tribunal for Lebanon**

As originally envisioned, the legal basis of the LST was to be the LST Agreement, to which the LST Statute would have been attached. This would have meant that the LST was established with the same legal basis as the SCSL: that is, an international treaty. The LST Agreement would have been the source of all legal obligations and the LST Statute the constituent instrument of the LST. As such, the LST Agreement would only have been binding on Lebanon, not third states such as Syria. Moreover, there would be no obligation arising under the LST Agreement for states other than Lebanon to cooperate with the LST.<sup>100</sup> However, the LST Agreement provided that it shall enter into force the day after the Government of Lebanon notified the United Nations that the legal requirements for entry into force have been complied with.<sup>101</sup> This included ratification of the agreement by the Lebanese parliament.<sup>102</sup> Ratification was never secured, and the LST was unilaterally established by Resolution 1757. What then is the effect of Resolution 1757 on the legal basis of the LST?

There are two options. According to the first option, the Security Council brought into force the LST Agreement by virtue of a resolution binding under Chapter VII of the Charter. In this circumstance, the LST Agreement, together with the LST Statute, would remain the constituent instrument of the LST, which is, consequently, a treaty-based institution, similar to the SCSL and the ICC. Alternatively, the second option is that Resolution 1757 incorporated the LST Agreement and the LST Statute and thus it is the resolution itself that provided the legal basis for the LST. As such, the LST would be closer to the ICTY and the ICTR than the SCSL. On either view, what is clear is that Lebanese domestic law does not form the legal basis for the LST. Therefore the LST may be distinguished from the ECCC, the IHT, the IJJP, the SPSC and the WCC, which are all based in national legislation.

Both options depend upon the Security Council's use of its binding Chapter VII powers, as they require a coercive action by the Security Council, namely, the

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<sup>100</sup> Lebanon is subject to a specific obligation to cooperate with the LST: article 15, LST Agreement.

<sup>101</sup> Article 19, LST Agreement.

<sup>102</sup> Article 52, Lebanese Constitution.

imposition of arrangements for the LST in the absence of the consent of Lebanon. The Security Council has determined that terrorist acts,<sup>103</sup> and this terrorist act in particular,<sup>104</sup> are threats to international peace and security, thus satisfying the threshold for the use of its Chapter VII powers. The Security Council had previously issued directions to states under Chapter VII in respect of the United Nations International Independent Investigation Commission.<sup>105</sup> Establishment of an international criminal tribunal has been accepted as a valid measure for the maintenance or restoration of international peace and security under article 41 of the Charter.<sup>106</sup> Thus, at least on a preliminary examination, it appears that the Security Council was entitled to take action under Chapter VII with regards to the situation in Lebanon following the assassination of former Prime Minister Hariri.

The first option poses several interesting questions. Resolution 1757 purports to bring unilaterally into force a treaty negotiated between a member state and the United Nations, and then to amend key provisions of that treaty without the formal consent of one of the parties, Lebanon.<sup>107</sup> The Security Council has thus in effect overridden the requirement for the ratification of the LST Agreement by Lebanon or has substituted its own approval for the consent of Lebanon. As Fassbender notes ‘the Council could be said to have substituted a binding decision made under Chapter VII of the UN Charter for the missing ratification of the [LST] Agreement by Lebanon’.<sup>108</sup> The first question to be asked then is, is Resolution 1757 consistent with the powers of the Security Council, even when the Security Council is acting under Chapter VII of the

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<sup>103</sup> See, for example, Resolution 1373 (2001); Resolution 1566 (2004); Resolution 1805 (2008) preambular para. 1; and, in the context of Lebanon, Resolution 1636 (2005) – ‘terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security’, preambular para. 3.

<sup>104</sup> Resolution 1757 (2007), preambular para. 13; Resolution 1644 (2005) preambular para. 9; and Resolution 1636 (2005), preambular para. 19.

<sup>105</sup> In particular, Resolution 1636 (2005) requires Syria to ‘detain those Syrian officials or individuals whom the Commission considers as suspected of involvement in the planning, sponsoring or perpetrating of this terrorist act’ and imposes the same obligations to cooperate with the UNIIIC as are placed upon the Government of Lebanon pursuant to Resolution 1595: para. 11.

<sup>106</sup> *Tadic jurisdiction decision*, note 25.

<sup>107</sup> Resolution 1757 amends two provisions of the LST Agreement. First, paragraph 1(b) of Resolution 1757 amends article 8 of the LST Agreement, which provides for the negotiation and agreement of a headquarters agreement between the Government of Lebanon, the United Nations and the government of the state to host the LST. This was amended to allow for the headquarters agreement to be concluded between the United Nations and the host state only, although negotiations are to be in consultation with the Government. Second, paragraph 1(c) of Resolution 1757 amends the funding mechanism in article 5(b) of the LST Agreement, such that the Secretary-General may accept voluntary contributions to address any shortfall in the funds to be provided by the Government of Lebanon.

<sup>108</sup> Fassbender, B., ‘Reflections on the International Legality of the Special Tribunal for Lebanon’ (2007) 5 *JICJ* 1091, 1096.

Charter? Imposing and amending treaty obligations is not one of the measures available to the Council as listed in article 41 of the Charter. However, this is a non-exhaustive list. Security Council resolutions concerning the ICC have been suggested as a possible precedent for the Security Council overriding the terms of a negotiated treaty.<sup>109</sup> Yet, in this case, the possibility of such a Security Council resolution is contemplated by the Rome Statute itself.<sup>110</sup> The resolutions in question arguably fell within the scope of Article 16 of the Rome Statute and did not result in a suspension of the treaty regime.<sup>111</sup> The Security Council has on several occasions invited states to become parties to multilateral agreements,<sup>112</sup> to return to treaty arrangements,<sup>113</sup> or to reaffirm its obligations under treaties to which they are already a party.<sup>114</sup> It has also acted to exclude the application of certain treaty obligations.<sup>115</sup> Moreover, the Security Council has incorporated the substance of treaty provisions into its own binding resolutions.<sup>116</sup> In Resolution 1718, perhaps the most extreme instance of the imposition of obligations to date, the Security Council decided that the Democratic People's Republic of Korea 'shall act strictly in accordance with the obligations applicable to parties under the Treaty on the Non-Proliferation of Nuclear Weapons and the terms and conditions of its International Atomic Energy Agency (IAEA)

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<sup>109</sup> Ibid, 1100, footnote 35, referring to Resolutions 1422 (2002) and 1487 (2003).

<sup>110</sup> Article 16, Rome Statute.

<sup>111</sup> There was some debate as to whether the resolutions, which requested the ICC not to investigate or prosecute any alleged violations by nationals of non-party states to the Rome Statute participating in peacekeeping operations, were of a type that was contemplated by article 16. For further discussion, see Chapter One.

<sup>112</sup> In Resolution 687 (1991), the Security Council invited Iraq to ratify the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction: para. 7.

<sup>113</sup> In Resolution 1718 (2006), the Security Council demanded that the Democratic People's Republic of Korea retract its withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons (para. 3) and return to the treaty and the safeguards agreement (para. 4).

<sup>114</sup> In Resolution 687 (1991), the Security Council invited Iraq to 'reaffirm unconditionally its obligations' under the Treaty on the Non-Proliferation of Nuclear Weapons and the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare: paras 11 and 7.

<sup>115</sup> In Resolution 1483 (2003), the Security Council arguably excluded certain aspects of international humanitarian law that would otherwise have been applicable to the situation in Iraq. See: Cryer, R., "The Security Council and International Humanitarian Law" in Breau, S. and Jachec-Neale, A., (ed.), *Testing the Boundaries of International Humanitarian Law* (2006) 245, 268-73.

<sup>116</sup> This recent practice of the Security Council has been described as 'international legislation', in that it imposes obligations of a 'general and abstract character' and is not directed at a single state, individual or organisation: see Talmon, S., 'The Security Council as World Legislature', (2005) 99 *AJIL* 175, 175-7. The most notable example of Security Council legislation is Resolution 1373 (2001), in which the Security Council incorporated several of the substantive obligations contained in the International Convention for the Suppression of the Financing of Terrorism, which at the time was not in force. For further discussion see: Szasz, P., 'The Security Council Starts Legislating' (2002) 96 *AJIL* 901; and Rosand, E., 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism' (2003) 97 *AJIL* 333.

Safeguards Agreement'.<sup>117</sup> However, on no occasion has the Security Council indicated that these obligations apply as a matter of treaty law; that is that the state has become a party to the treaty itself by virtue of a Security Council resolution. It is certainly not generally accepted that the Security Council could impose a treaty regime on a state.<sup>118</sup> Talmon suggests that while the Security Council may impose certain obligations found in a treaty on states, 'it cannot, as a rule, impose whole treaties, since they contain not just substantive obligations, but also purely technical or administrative provisions whose imposition will not be necessary to address a threat to international peace and security'.<sup>119</sup> It would thus be an unprecedented step for the Council to have acted using its powers under Chapter VII to create the LST as a treaty-based body.

Second, does Resolution 1757 violate provisions of the Vienna Convention on the Law of Treaties?<sup>120</sup> It has been suggested that the Security Council may have acted in violation of specific provisions of the law of treaties through 'coercing' the participation of Lebanon.<sup>121</sup> The Security Council must act in conformity with international law, even in pursuance of its objectives of maintaining international peace and security.<sup>122</sup> Articles 51 and 52 of the VCLT provide that a treaty is void where the consent to be bound or conclusion of the treaty has been procured by coercion. However, article 51 relates to coercion of the representative of a state, not coercion of the state itself. Similarly, although article 52 does apply to coercion of the State itself, it refers only to coercion by the use or the threat of the use of force. Thus neither article applies to the situation found in Resolution 1757. Yet, while the

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<sup>117</sup> Resolution 1718 (2006), para. 6

<sup>118</sup> For a contrary view, see Szsaz, note 116, 903 (suggesting that, in principle, Resolution 1373 could have made the Convention binding by making participation in the convention obligatory or by providing that all provisions, rather than the final clauses were binding on all states); and Lopez, L., 'Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts' (1994) 69 *NYULR* 916, 954-7 (suggesting that the Security Council could make the provisions of the Geneva Conventions and their Protocols applicable to specified conflicts or states, including through modifying the provisions in the Conventions concerning applicability).

<sup>119</sup> Talmon, note 116, 186.

<sup>120</sup> Technically, the Vienna Convention on the Law of Treaties between States and International Organisations 1986 would apply, see footnote 27.

<sup>121</sup> See the discussion in Fassbender, note 108, 1101-04.

<sup>122</sup> The Security Council must act in accordance with the provisions of its constituent instrument, the Charter. In particular, under article 24(2) of the Charter, the Security Council must act in accordance with the Purposes and Principles of the Charter, which declare that one of the aims of the United Nations is to resolve international disputes by peaceful means and 'in conformity with the principles of justice and international law'. For judicial recognition of this limit, see *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States) (Provisional Measures)* ICJ Reps (1992) 234, the dissenting opinions of Judge Weeramantry (65) and of Judge Bedjaoui (46).

Security Council may not have violated specific provisions of the law on treaties, it is questionable whether the Security Council can, or should, interfere with such a fundamental principle of international law as the requirement for consent to be bound by treaty obligations.<sup>123</sup> Article 103 of the Charter confers on the Charter - and any binding Security Council resolutions derived from it - priority over the provisions of other agreements. However, this is usually considered to suspend treaty obligations and to 'replace' them by Chapter VII obligations, rather than amending the terms of the treaty itself or to create new treaty-based obligations.<sup>124</sup> While this act of 'coercion' by the Security Council may be damaging to both the integrity of the law of treaties and to the Security Council's credibility, only the Russian Federation appears to have questioned directly the legal basis for unilaterally imposing a treaty.<sup>125</sup>

Third, does Resolution 1757 represent an unauthorised intrusion into the domestic legal and political affairs of a member state in contravention of article 2(7) of the Charter? The resolution intervenes in an internal political disagreement and overrides provisions of the Lebanese constitution and domestic legal procedure. Several members of the Security Council raised this concern during the debate concerning the resolution.<sup>126</sup> For example, China stated that invoking Chapter VII to override internal legislative organs will 'create a precedent of Security Council interference in the domestic affairs and legislative independence of a sovereign state. Such actions are likely to undermine the authority of the Council'.<sup>127</sup> Even Security Council members supporting the resolution appeared to appreciate the gravity of the Council's action, stressing that the action was only taken due to the impasse within Lebanon and with the consent of the Prime Minister and a majority of the Lebanese parliament.<sup>128</sup>

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<sup>123</sup> Fassbender, note 108. See also Shehadi, N. and Wilmshurst, E., *The Special Tribunal for Lebanon: The UN on Trial?* (2007), 9.

<sup>124</sup> Fassbender, note 108, 1100 – 'The Council can break treaties but it cannot make treaties'.

<sup>125</sup> The representative of the Russian Federation commented that: 'The arrangement chosen by the sponsors [of the resolution] is dubious from the point of view of international law. The treaty between the two entities – Lebanon and the United Nations – by definition cannot enter into force on the basis of a decision by only one party.' S/PV.5685.

<sup>126</sup> Indonesia noted that the resolution bypassed constitutional procedures and national processes, and that the Security Council should not be involved in an exercise of interpreting, let alone assuming control of a state's constitutional requirements. South Africa indicated its opinion that the Security Council cannot bypass a state's constitutional procedures. China considered that domestic constitutional procedures should be followed. Russia viewed Resolution 1757 as 'an encroachment upon the sovereignty of Lebanon': S/PV.5685.

<sup>127</sup> S/PV.5865, 4.

<sup>128</sup> The United Kingdom noted that the resolution was a response to a request from the Lebanese Government. Slovakia and the United States emphasised that all other means had been exhausted. Peru commented that the resolution took into account the position of the majority of the Lebanese parliament, reflected 'exceptional political circumstances' and must not constitute a precedent beyond this case: S/PV.5865.

However, while Resolution 1757 may be damaging politically, and is arguably inconsistent with the Security Council's own demands for respect for the territorial sovereignty and independence of Lebanon,<sup>129</sup> article 2(7) does not limit the enforcement powers of the Security Council under Chapter VII of the Charter. Thus, once the Security Council has indicated that a situation constitutes a threat to international peace and security and that it is utilising its powers under Chapter VII of the Charter, the resulting action cannot, at least legally speaking, be considered an undue interference in domestic affairs.<sup>130</sup>

The second option for the legal basis of the LST is that Resolution 1757, rather than the LST Agreement, provides the legal basis of the LST. Resolution 1757 refers to the 'annexed document, including its attachment', rather than naming the LST Agreement. According to this option, the Security Council has incorporated the obligations set out in the LST Agreement into the binding provisions of the resolution, and thus those obligations apply not by virtue of the LST Agreement and the law of treaties, but as directions from the Security Council. In this sense the LST is a tribunal established by the Security Council acting under Chapter VII of the Charter. While it is now accepted that the Security Council has the power to establish an international tribunal under its powers for international peace and security, to date it has established 'purely' international tribunals and only in relation to a small category of crimes, namely genocide, crimes against humanity and war crimes. Can the Security Council establish hybrid tribunals utilising its powers pursuant to Chapter VII of the Charter? It would appear that, provided utilising an internationalized or hybrid tribunal is a measure for the maintenance or restoration of international peace and security, the Security Council may take such action. In addition, the LST may exercise jurisdiction only in relation to specified acts of terrorism under domestic Lebanese law. At least one permanent member of the Security Council has suggested that international tribunals cannot be established for the crime of terrorism, particularly where that crime is prosecuted under national law only.<sup>131</sup> However, as long as the Security

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<sup>129</sup> This demand has been included in several Security Council resolutions concerning Lebanon, for example, Resolution 1595 (2005), preambular para. 1.

<sup>130</sup> Shehadi and Wilmshurst suggest that resolutions in relation to the Lockerbie trial and the conflict in Cote d'Ivoire are also instances of the Council overriding constitutional or legislative arrangements: note 112. However, as is noted, in the Lockerbie case, the resolution was passed with the consent and cooperation of the United Kingdom and the United States. Moreover, the resolutions concerning Cote d'Ivoire were passed as part of an ongoing peace process.

<sup>131</sup> The representative of the Russian Federation stated 'United Nations practice in establishing tribunals shows that Chapter VII has been invoked only for the International Criminal Tribunal for the Former Yugoslavia and for the International Criminal Tribunal for Rwanda, which deal

Council has recognised terrorism as a threat to international peace and security, there does not appear to be any legal impediment that would preclude the Security Council from establishing a tribunal to prosecute individuals accused of terrorism.<sup>132</sup> Of course, as a practical matter, unilaterally establishing a hybrid or internationalized tribunal, which rely to a far greater extent on national involvement and support, may prove to be a futile exercise.<sup>133</sup>

It is difficult to determine which option the Security Council intended. The relevant paragraph of Resolution 1757 provides that ‘The provisions of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless...’ In support of option one, while Resolution 1757 does not refer to the LST Agreement by name, the language used replicates that of the law of treaties, using terms such as ‘enters into force’, referring to article 19 of the LST Agreement and leaving the text of the LST Agreement intact, rather than incorporating key provisions into the text. Moreover, it is difficult to detect an intention to ‘establish’ the LST by Resolution 1757. When the Security Council established the ICTY and the ICTR, it included clear wording to that effect – ‘decides hereby to establish an international tribunal’ – in resolutions 827 and 855. This language is missing from Resolution 1757. In fact the debate surrounding the adoption of the resolution suggests that it was not the intention of the Security Council to establish the LST as a Chapter VII body. For example, the United Kingdom stated that while Resolution 1757 was intended to be binding, the use of Chapter VII powers ‘carries no other connotations’.<sup>134</sup> Was the United Kingdom suggesting that the resolution was not intended to establish the tribunal? Several other states referred to the application of principles of the law of treaties, which would be inapplicable if the LST was established by the Security Council using its Chapter VII powers. States also emphasized the consent to the treaty by some parts of the Lebanese political structure and society. Moreover, Resolution 1757 does not contain the language on state co-operation found in the resolutions establishing the ICTY and the ICTR, and there are key differences between the LST and those tribunals.<sup>135</sup> These factors

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with crimes of genocide, crimes against humanity and war crimes – that is international crimes. The jurisdiction of the Special Tribunal for Lebanon would not cover such crimes’: S/PV.5865, 5.

<sup>132</sup> This is assuming that issues such as an agreed definition of the offence can be resolved. For further discussion see Chapter Four.

<sup>133</sup> The representative of South Africa made this point, noting that Lebanese ownership was essential to the success of the LST: S/PV.5865, 4.

<sup>134</sup> S/PV.5865.

<sup>135</sup> The implications of these differences will be considered in Chapter Five.

suggest that option one was the alternative intended by the Council. Yet, while states did consider the implications of the resolution for the domestic sovereignty of Lebanon, none mentioned the serious concerns that this option raises for the law of treaties. In support of alternative two, as noted above, some of the wording of Resolution 1757 could support the incorporation of the LST Agreement into the provisions of Resolution 1757. The resolution and the debate surrounding its adoption are ambiguous. Given the difficult legal questions the resolution presents, this ambiguity may well be deliberate. It is submitted here that option two should be preferred, as it avoids the possible implications for the law of treaties and the principle of consent to be bound by treaty-based obligations.

What is clear is that without Resolution 1757 and the binding powers of the Security Council, the LST would not exist. Thus it must be said the LST cannot be considered a ‘true’ treaty-based institution. Instead, its legal basis must lie in Resolution 1757. Either the Council has bound Lebanon as a party to the LST Agreement without its consent or it has bound Lebanon to the terms of the agreement by incorporating those terms into the text of a resolution binding upon Lebanon. Both actions require the Council to be acting pursuant to its powers under Chapter VII of the Charter. Therefore, under either option, the LST should be considered a ‘Chapter VII tribunal’, and also a subsidiary organ of the Security Council.<sup>136</sup> The main implication of this approach is to distinguish the LST from the treaty-based tribunals, currently the SCSL and the ICC and to place it into the same category as the ICTY and the ICTR. However, it is submitted that, provided this distinction is recognized, whether option one or option two is preferred makes little difference to resolving the legal issues the LST will face. For example, as is discussed in Chapter Five, issues such as immunity and state cooperation will be determined by reference to the text of resolution 1757 and the LST Agreement (however adopted), with due consideration of the significance of the role of the Council in establishing the tribunal.

### **2.1.7 Conclusion: Three ‘types’ of hybrid and internationalized tribunals**

This section has assessed the legal basis of the tribunals studied so as to determine whether a framework for categorising such tribunals exists. Using the criterion of legal basis, three sub-species of tribunals may be identified. The first category comprises

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<sup>136</sup> Sarooshi suggests that the test that has emerged ‘to determine whether an entity is a subsidiary organ is that it will depend on whether the entity is exercising powers and functions in a manner which is distinct from the internal workings of the principal organ. An additional element is whether the subsidiary organ is performing functions which the principal organ does not itself possess’: Sarooshi, note 41, 417.

national courts, with varying degrees and forms of international involvement in their establishment and operation. Such assistance may be provided under the auspices of the United Nations, or by an international organisation, associations of states, or an individual state. This category would include the SPSC, the IJPP, the WCC, the ECCC and the IHT. These courts should be considered as primarily national institutions. The second category comprises such courts as are established by a treaty, usually, but not necessarily, between the United Nations and the government of the territorial state. Such courts tend to operate outside the 'ordinary' domestic system and outside the United Nations system. The only current example of this model is the SCSL. Courts falling within this category are international in nature, although their establishment by treaty is important when determining whether immunity applies to state officials of third states and other key questions, such as the applicability of an amnesty. The third category includes internationalized tribunals established by the Security Council using its coercive powers under Chapter VII of the Charter. These tribunals are closer in nature to the ICTY and the ICTR, although there may be key differences in their constituent instruments and mandate. As discussed above, the LST is the first and so far the only example of this type of tribunal.

### ***3 The nature of jurisdiction conferred on hybrid and internationalized tribunals***

#### ***3.1.1 Introduction***

The first section of this Chapter has assessed the legal basis of each of the tribunals studied. In this second section, this chapter will examine a related issue: the basis of the jurisdiction conferred on these tribunals. The legal basis and the type of jurisdiction conferred on a tribunal should determine the approach the tribunal should adopt to determining the application of any legal barriers to the exercise of jurisdiction, such as immunity and amnesties, and will also govern the regime for the enforcement of the tribunal's orders.<sup>137</sup> There are several accepted bases for a state's jurisdiction to prescribe in international law.<sup>138</sup> This section considers which basis or bases of jurisdiction provide(s) the source of the jurisdiction conferred on the internationalized and hybrid tribunals, and the means by which such jurisdiction is conferred. The study considers four possible sources of such jurisdiction: the principle of territorial jurisdiction conferred on a court acting as a national institution of the territorial state; the delegation of jurisdiction from a state – normally the

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<sup>137</sup> These issues are considered in Chapter Five.

<sup>138</sup> Chapter One, section 2.1.

territorial state – to an international tribunal; jurisdiction conferred on the tribunal by the international community as the crimes within its subject matter jurisdiction are considered to give rise to universal jurisdiction; and jurisdiction conferred on a international tribunal by the Security Council acting under Chapter VII of the Charter. However, it concludes that the third option, so called ‘floating’ universal jurisdiction is presently not supported as a principle of international law. Thus, given the current state of development of international law, jurisdiction for an international or internationalized tribunal must be found either in accepted bases for the exercise of jurisdiction by a state, or in an exercise of authority by the Security Council.

### **3.1.2 Territorial jurisdiction**

A state may exercise jurisdiction in respect of criminal conduct drawing upon a number of accepted bases of jurisdiction, of which jurisdiction based on the territorial and nationality principles are the most widely accepted. Domestic law may then provide that ordinary national courts shall try any resulting cases. Alternatively the state may also establish specialised courts in relation to particular categories of conduct, such as crimes related to a recent conflict, drug-related offences, terrorist offences, or organised crime. States may also draw on international law in defining the crimes and in designing the procedure to be followed. While principles of sovereignty, in particular that of non-intervention, would normally render unlawful the imposition of international assistance, whether from one or more states or from an international organisation, nothing in international law precludes a state from requesting and receiving such assistance. The provision of international assistance to an otherwise national institution does not affect the nature of the tribunal or the source of the jurisdiction that has been conferred; it remains based in the jurisdiction of the host state. In most situations this will be the territorial state, although it may also incorporate jurisdiction resting on other bases. The previous section concluded that five of the tribunals studied operate as national institutions: the IHT, IJPP, SPSC, WCC, and ECCC. These tribunals therefore represent the exercise of jurisdiction based on the territorial principle by the state concerned and, in limited circumstances, extraterritorial jurisdiction.<sup>139</sup> Jurisdiction based on the territorial principle is not controversial and will not be considered further. More complex issues are raised by the type of jurisdiction that has been conferred on tribunals of a more international nature, in particular the SCSL and the LST, which will be the subject of discussion in the following sections.

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<sup>139</sup> As discussed in Chapter Four.

### **3.1.3 Delegation of jurisdiction from the (normally) territorial state**

As noted in section 2.1, the SCSL is not a national court. Nor is it an international court established by the Security Council. Instead, it is an international tribunal, established by an agreement between the United Nations and Sierra Leone, supported by domestic implementing legislation. This thesis argues that the SCSL Agreement represents a delegation<sup>140</sup> of territorial jurisdiction from Sierra Leone to the SCSL. Sierra Leone as the territorial state had jurisdiction to criminalize the crimes that are within the material jurisdiction of the SCSL where they occur on its territory. To the extent that such acts were not already crimes under domestic law, the SCSL Agreement, combined with the Ratification Act, can thus be viewed as an exercise of Sierra Leone's prescriptive jurisdiction in that it criminalizes this conduct in substantive criminal law. Sierra Leone's courts would ordinarily have had jurisdiction to try breaches of the substantive criminal law. However, Sierra Leone has opted to delegate its jurisdiction to prescribe to the SCSL in limited circumstances; in particular where the offender is a 'high-level' instigator of the offences or the crimes are of a serious nature.<sup>141</sup> The delegation of jurisdiction is not absolute, as the national courts of Sierra Leone retain concurrent, but subsidiary, jurisdiction.<sup>142</sup>

Before examining the issues raised by this transfer of jurisdiction approach, it is also necessary to consider possible alternative bases for the jurisdiction conferred on the SCSL. One such alternative is that Resolution 1315 delegated the powers of the Council to the Secretary General, and that the jurisdiction of the SCSL lies in the powers of the Security Council and the Charter. However, as was concluded above, the Security Council did not establish the SCSL by Resolution 1315. Moreover, the Appeals Chamber has also found, it is submitted correctly, that the Secretary General had not exercised powers delegated to him by the Security Council: '[A]s an executive organ the Secretary-General has to fulfil the orders of the Security Council and does not therefore need a delegation of power to become active as his mandate consists in executing the orders given by the power-bearer, in this case the Security Council'.<sup>143</sup>

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<sup>140</sup> The term used in this section is 'delegation' based on the typology developed by Sarooshi, which notes that a delegation of power is one that generally satisfies three criteria: the State does not have the competence to exert direct control over the way in which the power is exercised by the international organization; the delegation of power is revocable by the State (although not necessarily lawfully); and the State retains the right to exercise the powers concurrently with, and independent of, the organisations exercise of the powers. See Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2007), 54.

<sup>141</sup> Chapter Four.

<sup>142</sup> Article 8, SCSL Statute, and the discussion in Chapter Five.

<sup>143</sup> *Fofana*, note 9, para. 16.

There are several reasons to support the conclusion reached in this thesis that the most appropriate jurisdictional basis for the SCSL is a transfer of jurisdiction from Sierra Leone, and not from the Security Council. First, the wording of Resolution 1315 suggests that the SCSL is to be established on a consensual basis, that is, with the consent of Sierra Leone. The relevant paragraph addressed to the Secretary General is not an order to establish a tribunal, but a request to enter into negotiations for an agreement to establish the tribunal. It clearly contemplates that it is the agreement and not any action of the Council, or even of the Secretary General acting on its behalf that is to establish the SCSL. This is supported by various paragraphs in the preamble, which note the request from Sierra Leone for assistance from the United Nations. Second, there is nothing to indicate any delegation of power to the Secretary General, which is consistent with the conclusion reached by the Appeals Chamber that there was no need for such a delegation. Third, although Resolution 1315 reiterates that the situation in Sierra Leone continues to constitute a threat to international peace and security, it does not refer to Chapter VII of the Charter in its operative part. While this is not necessarily conclusive as to the legal basis for the resolution, it generally does indicate that the resolution is not relying on the Council's powers under Chapter VII of the Charter. This distinguishes Resolution 1315 from those resolutions where the Council has acted to establish an international or internationalized criminal tribunal based on its powers under Chapter VII of the Charter. These situations are discussed in more detail below. Therefore, the better view is that Resolution 1315 did not delegate the powers of the Security Council to the Secretary General and that, while the United Nations is a party to the SCSL Agreement, the jurisdictional basis of the SCSL does not depend on the competence of the Council or the Secretary General under the Charter.

The delegation of jurisdiction from Sierra Leone to the SCSL raises several questions, in particular whether international law permits a state to delegate its jurisdiction to another state or to an international tribunal. The following section considers these issues, and examines the ICC as a valuable precedent for the delegation of jurisdiction from a state to an international criminal court. It then considers whether there are any fundamental differences between the ICC and the SCSL that would render the delegation of jurisdiction from Sierra Leone to the SCSL unlawful.

#### ***3.1.3.1 Lawfulness of a delegation of jurisdiction***

The first question is whether a state may lawfully delegate jurisdiction to another state. For example, could State X request State Y to hold trials in respect of alleged criminal

conduct occurring within State X? It would appear to be accepted that State X could do so and that State Y would be entitled to act upon this request. Precedents for such a delegation include treaties that permit the delegation of criminal proceedings from one state to another.<sup>144</sup> Such instruments provide ‘jurisdiction to prosecute any offence to which the law of another Contracting State is applicable’.<sup>145</sup> Another precedent is the Council Framework on Combating Terrorism, pursuant to which a member state of the European Union may exercise jurisdiction in relation to a terrorist act committed on the territory of any member state.<sup>146</sup> Akande argues that the anti-terrorism treaties are a further example of the delegation of jurisdiction, in this case ‘a delegation of jurisdiction by the states of primary jurisdiction to the state of custody’.<sup>147</sup> While the ability to delegate jurisdiction from one state to another does not appear to be controversial, what has stimulated debate is whether such a delegation must be conditional on the consent of the state of nationality of the accused. The better view is that it need not. A state exercising jurisdiction on the basis of territoriality (or any other basis) does not require the consent of the state of nationality. Neither do any of the instruments suggested as examples require such consent. To date, there has been no protest by the state of nationality regarding the delegation of jurisdiction to another state or at the exercise of jurisdiction by states of custody under the anti-terrorism treaties.

If it is accepted that a state may delegate jurisdiction to another state, is it also accepted that a state – or states – may delegate jurisdiction to an international criminal tribunal? The most pertinent precedent, and the instance in which this question has been most clearly debated, is the establishment of the ICC. The ICC may exercise its jurisdiction only where the crime occurred on the territory of a state party, or where

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<sup>144</sup> Council of Europe, European Convention on the Transfer of Criminal Proceedings in Criminal Matters; UN Model Treaty on the Transfer of Proceedings in Criminal Matters (adopted by Resolution 45/118 of 14 December 1990); and the Agreement between the Member States on the Transfer of Proceedings in Criminal Matters, concluded under the European Political Cooperation arrangements on 6 November 1990.

<sup>145</sup> Explanatory Report to the European Convention on the Transfer of Criminal Proceedings in Criminal Matters, 14.

<sup>146</sup> Article (1)(a), Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

<sup>147</sup> Akande, D., ‘The Jurisdiction of the ICC over Nationals of Non-Parties: Legal Basis and Limits’ (2003) 1 *JICJ* 618, 623. Akande’s interpretation is the most appropriate, however see also the exchange between Professors Scharf and Morris as to whether the anti-terrorism treaties represent universal jurisdiction: Scharf, M., ‘The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position’ (2001) 64 *L&CP* 67; and Morris, M., ‘High Crimes and Misconceptions: The ICC and Non-Party States’ (2001) 64 *L&CP* 13.

the accused is a national of a state party.<sup>148</sup> Controversy arose surrounding the territorial basis of the ICC's jurisdiction which, it was suggested, permitted the ICC to exercise jurisdiction in respect of nationals of non-state parties where the alleged crime had occurred on the territory of a state party.<sup>149</sup> This possible jurisdiction in respect of nationals of states not party to the Rome Statute was, and remains, one of the main hurdles to the ratification by the United States of the Rome Statute.<sup>150</sup> In seeking to resolve the issue, it has been suggested that the Rome Statute represents a delegation by each state party of territorial jurisdiction to the ICC.<sup>151</sup> However, the legality of the delegation of territorial jurisdiction to an international criminal tribunal is contested by the United States and certain academics. While critics accept that there is some support for the notion that a state may delegate its territorial jurisdiction to another state,<sup>152</sup> they argue that a delegation of territorial jurisdiction by a state to an international tribunal would be impermissible under customary international law,<sup>153</sup> as such a delegation would 'fundamentally alter the consequences of that jurisdiction'.<sup>154</sup>

Critics raised several concerns regarding the possible delegation of jurisdiction to the ICC. The first relates to the dual nature of the ICC's jurisdiction: not only does it exercise criminal jurisdiction in relation to individuals, it will also, incidental to its jurisdiction in respect of individuals, be required to adjudicate on issues relating to state responsibility for alleged crimes falling within its subject matter jurisdiction.<sup>155</sup>

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<sup>148</sup> Article 12(2), Rome Statute, see Chapter One, section 3.3. This limitation does not apply where the Security Council refers a situation to the Prosecutor acting under Chapter VII of the Charter: Articles 12(2) and 13, Rome Statute.

<sup>149</sup> Several commentators have debated this issue, for example, see: Akande, Scharf and Morris, all at note 147.

<sup>150</sup> The concerns of the United States have been outlined on several occasions. In particular, see Scheffer, D., 'The International Criminal Court: The Challenge of Jurisdiction' (1999) *ASIL Proceedings* 68; Bolton, J., 'The Risks and Weaknesses of the International Criminal Court from America's Perspective' (2001) 41 *Vanderbilt Journal of Transnational Law* 186; Leigh, M., 'The United States and the Statute of Rome' (2001) 95 *AJIL* 124; and Brown, B., 'US Objections to the Statute of the International Criminal Court: A Response' (1999) 31 *NYJILP* 855.

<sup>151</sup> It has also been suggested that state parties have transferred nationality jurisdiction to the ICC. As similar issues arise as with the transfer of territorial jurisdiction, this is not discussed separately here.

<sup>152</sup> Both Professor Morris and Ambassador Scheffer accept this proposition, despite rejecting territorial jurisdiction as the basis for the ICC: Morris, note 147, 44; Scheffer, note 150, 71. They argue that consent of the state of nationality is required.

<sup>153</sup> Morris, note 147, 51.

<sup>154</sup> Morris, note 147, 29.

<sup>155</sup> This incidental jurisdiction arises due to the nature of the crimes within its subject matter jurisdiction: many of the crimes, such as genocide and crimes against humanity, have a state or official element and a determination of individual guilt or innocence will necessarily reflect upon the State(s) concerned. Further, when the ICC eventually acquires jurisdiction in respect of the crime of aggression, it is argued that it will be required to directly pronounce upon the lawfulness of state action.

Second, it is argued that to permit the ICC to exercise its jurisdiction without the consent of the state of nationality is contrary to the VCLT in that it will ‘abrogate the pre-existing rights of non-parties’.<sup>156</sup> Third, prosecution before an international court is said to restrict the availability of compromise options in interstate disputes, as a finding that implies state responsibility will restrain diplomatic options. Fourth, international prosecution will increase the political impact of the decision for the state(s) concerned, as well as potentially providing impediments to the diplomatic protection of nationals. Fifth, an international court has greater influence in shaping the development of customary international law, as the decisions of international tribunals generally have wider exposure and significance than those of national courts. Finally, the delegation of jurisdiction to an international criminal tribunal breaks ‘the crucial linkage between territorial jurisdiction and the legitimate prosecutorial interests of the territorial state’<sup>157</sup> and exposes the trial to the risk of abuse. Moreover, Professor Morris considered that there was no precedent for such delegation of jurisdiction, which together with the cumulative effect of these concerns, led her to conclude that ‘delegability to an international court is not entailed in the existing customary law of territorial jurisdiction’.<sup>158</sup> Nor was the delegation of territorial jurisdiction to an international tribunal permissible as an innovation in customary international law, as it would ‘materially alter the legal relationships constituting the customary law of jurisdiction, and would do so to the detriment of non-party states without their consent’.<sup>159</sup>

Some of these concerns certainly have merit: the nature and consequences of prosecution before international courts does differ from prosecution before national courts. However, do these concerns warrant the outright rejection of the capacity of states to delegate territorial jurisdiction to international courts in all circumstances? States do not require the consent of the state of nationality in order to exercise territorial jurisdiction, and, as Professor Scharf asserts, ‘there are no special features of territorial jurisdiction that would as a matter of policy preclude the delegation of territorial jurisdiction to an international court’.<sup>160</sup> Akande concludes that ‘there are important reasons of principle and sufficient precedents to suggest that delegations of national jurisdiction to international courts, in general, and to the ICC, in particular,

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<sup>156</sup> Morris, note 147, 26.

<sup>157</sup> Morris, note 147, 45.

<sup>158</sup> Morris, note 147, 47.

<sup>159</sup> Morris, note 147, 51-52.

<sup>160</sup> Scharf, note 147, 113.

are lawful'.<sup>161</sup> Danilenko points to the provisions in the Genocide Convention and the Apartheid Convention which call for an international penal tribunal to be created as evidence that the state parties to those conventions 'agreed that they have a sovereign right to combine their jurisdictions and to cede this combined jurisdiction to a future criminal court'.<sup>162</sup> Professor Orentlicher also notes that certain hybrid tribunals, including the SCSL, 'rely principally on territorial jurisdiction', suggesting that a delegation of territorial jurisdiction is the main jurisdictional basis for such tribunals.<sup>163</sup> It is therefore submitted that academic opinion and state practice support the lawfulness of the delegation of territorial jurisdiction from state parties to the ICC.

### ***3.1.3.2 Do the differences between the ICC and the SCSL preclude a delegation of jurisdiction to the SCSL?***

The next issue is whether the differences between the SCSL and the ICC would preclude a similar delegation of jurisdiction from Sierra Leone to the SCSL. The SCSL Prosecutor has asserted that '[T]he creation of the Special Court is analogous to the creation of the International Criminal Court'.<sup>164</sup> However, although both the SCSL and the ICC are established by treaty, there are many differences between the two tribunals. An obvious point of distinction is the bilateral nature of the SCSL Agreement as compared to the multilateral basis of the Rome Statute. The main consequence of the bilateral basis of the SCSL is that it will have limited influence over third states, as it creates legal obligations in respect of Sierra Leone only.<sup>165</sup> The SCSL Statute is also unlikely to generate a 'norm-creating' effect as the Rome Statute will do, as a result of the wide ratification of the Rome Statute and its implementation into national law. The influence of the judicial decisions of the SCSL will be more limited than decisions of the ICC, as the SCSL has neither a wide consensual basis nor a general mandate for the creation of customary international law.<sup>166</sup> The SCSL Agreement is between the United Nations and a single state, and is not an agreement

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<sup>161</sup> Akande, note 147, 625.

<sup>162</sup> Danilenko, G., 'The Statute of the International Criminal Court and Third States' (2000) 21 *Mich JIL* 445, 465. Danilenko also cites the Nuremberg Tribunal as 'the most important precedent supporting the legitimacy of the principle of "ceded jurisdiction"', 464-5, as does Professor Scharf, note 147, 103-106. The author distinguishes the Nuremberg Tribunal as a precedent on the same basis as Professor Morris, Ambassador Scheffer and Mr Akande: the four powers establishing the Nuremberg Tribunal exercised sovereign power at the time: see Morris, note 147, 37-40; Scheffer, note 150, 71; and Akande, note 147, 627-8.

<sup>163</sup> Orentlicher, D., 'Striking a Balance: Mixed Law Tribunals and Conflicts of Jurisdiction', in Lattimer and Sands (eds), *Justice for Crimes Against Humanity* (2003), 213 – 235, at note 1.

<sup>164</sup> *Kallon*, note 20, para 9(d).

<sup>165</sup> States other than Sierra Leone may choose whether or not to co-operate with orders of the Special Court. See this chapter, footnote 6, and the discussion in Chapter Five.

<sup>166</sup> This is not to suggest that the SCSL does not have some role to play in the formation of international criminal law, just that the acceptance of decisions of the SCSL as a source of law may not be as wide as the acceptance of the jurisprudence of the ICTY and the ICC.

between several states as with the Rome Statute.<sup>167</sup> Arguably, this distinction has no legal effect other than to preclude any reciprocity arising from the delegation of jurisdiction. There cannot be an identical delegation of jurisdiction as to that contained in the Rome Statute, as the United Nations does not have the same territorial jurisdiction as a state.

A second distinction between the ICC and the SCSL is the concurrent jurisdiction with, and primacy in respect of, the national courts of Sierra Leone.<sup>168</sup> This distinction has been relied upon by at least one defendant to challenge the legality of the SCSL's establishment.<sup>169</sup> In contrast, the jurisdiction of the ICC is subject to the principle of complementarity, requiring the ICC to defer to national prosecutions unless the state concerned fails to act or is unwilling or unable genuinely to carry out the investigation or prosecution.<sup>170</sup> However, this is best viewed as a difference in the terms of the delegation of jurisdiction: it was certainly possible legally, if not politically, that the state parties to the Rome Statute could have agreed to the ICC having primacy in respect of national courts.<sup>171</sup>

The mixed applicable law of the SCSL is a third distinction between the SCSL and the ICC. The Rome Statute does not confer jurisdiction to prosecute persons under national laws, whereas the SCSL has competence to prosecute persons under domestic law.<sup>172</sup> However, there appears to be no rule precluding this position, and it should be available to international courts to apply domestic laws of an affected state. In fact, international courts are frequently called upon to apply national legislation in various areas, for example nationality. The main concern is ensuring that equally favourable legal and procedural standards apply to the accused as a consequence of prosecuting

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<sup>167</sup> The relationship between the United Nations and the ICC is governed by a separate agreement, the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004, ICC-ASP/3/Res.1.

<sup>168</sup> Article 8(1) provides that 'The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction', while Article 8(2) provides that 'The Special Court shall have primacy over the national courts of Sierra Leone'.

<sup>169</sup> This issue was raised by the defendant Norman in the *Kallon*, note 20, paras 63 to 71. Both the Trial Chamber and the Appeals Chamber of the ICTY in the *Tadic Jurisdiction decision* rejected a challenge to the jurisdiction of the ICTY based on the primacy in relation to national courts enjoyed by the ICTY by virtue of article 9 of the ICTY Statute. The Appeals Chamber held that the primacy accorded did not violate the sovereignty of the states concerned (which had in fact co-operated with and consented to the exercise of jurisdiction by the ICTY). Nor was there a right under international law to be tried exclusively by national courts: see *Tadic Jurisdiction Decision*, note 25, 25-34.

<sup>170</sup> Article 17, Rome Statute.

<sup>171</sup> See Sadat, L. and Carden, R., 'The New International Criminal Court: An Uneasy Revolution' (2000) 88 *Georgetown Law Journal* 381, 408-9.

<sup>172</sup> See Chapter Four, section 3.3.

the act as an international or domestic crime. Thus the mixed nature of the applicable law and material jurisdiction of the SCSL does not preclude the delegation of jurisdiction. Indeed, it is submitted that the hybrid nature of the applicable law of the SCSL supports the delegation of jurisdiction approach, as there is a more direct link between the SCSL and the state delegating jurisdiction.<sup>173</sup>

The differences between the SCSL and the ICC actually reduce, although do not eliminate, the concerns raised by Professor Morris. The SCSL retains a link with the territorial state, as it is established partly by the government of the state concerned, and sits within the territory of Sierra Leone. Thus it has proximity to the affected population and the evidence. As the result of a treaty between the United Nations and a single state, it has a more restricted basis, and is less likely to generate or shape customary international law. However, the bilateral basis of the SCSL Agreement *may* increase the potential for abuse,<sup>174</sup> a risk that will be minimal provided that the SCSL continues to remain immune from pressure by Sierra Leone as to how the delegated jurisdiction is to be exercised.<sup>175</sup> In any event, the exercise of jurisdiction by the SCSL is less open to abuse and political pressures than a trial of a foreign national by a domestic court due to the involvement of international personnel.<sup>176</sup> However, the delegation of territorial jurisdiction approach risks ignoring the hybrid nature of the SCSL. The Secretary-General considered the SCSL to be a *sui generis* institution,<sup>177</sup> a blend of the national and international and a partnership between Sierra Leone and the United Nations. The delegation of jurisdiction approach reduces the role of the United Nations in ratifying the SCSL Agreement to little more than providing funding and co-operation, although the SCSL Agreement clearly extends

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<sup>173</sup> This does not mean that an international criminal court's jurisdiction in respect of crimes under domestic law is dependent upon adopting the transfer of jurisdiction approach, rather that in these circumstances, the mixed law supports the transfer of jurisdiction approach.

<sup>174</sup> Morris, note 147, 45. Professor Morris suggests that a transfer of territorial jurisdiction by one state to another could result in abuse, as states may use the prosecution for political reasons. However the potential for abuse may be reduced where 'the jurisdiction is transferred not to an individual state but, rather, to an international court. Where that international court is controlled by a large number of states, the various states parties may provide checks and balances against abuse being perpetrated in the interests of one state or a small group of states'.

<sup>175</sup> The Government of Sierra Leone participates in the Management Committee established by article 7 of the SCSL Agreement, and receives a report from the President of the SCSL on an annual basis (Article 25, Statute). It also has obligations under the Agreement to cooperate with the SCSL: article 17, SCSL Agreement. Other than this involvement, the SCSL is intended to operate independently of the Government: Secretary-General's Report, note 1, para 9.

<sup>176</sup> See Table One.

<sup>177</sup> Secretary-General's Report, note 1, para 9.

beyond the provision of assistance. Moreover, the SCSL is established by the United Nations and Sierra Leone acting jointly.<sup>178</sup>

Although it is suggested here that the better view is that the SCSL exercises delegated territorial jurisdiction, the SCSL has itself explicitly rejected such a delegation of jurisdiction as its jurisdictional basis. In a challenge to the validity of the SCSL, the defence asserted that an international criminal court has jurisdiction only when the state delegating power to it has the sovereign power to prosecute. By granting an amnesty to combatants in the Lome Accord, Sierra Leone had restricted its personal jurisdiction to prosecute the defendants, and thus could not transfer jurisdiction in respect of affected individuals to the SCSL. The Appeals Chamber held that:<sup>179</sup>

[t]he establishment of the Special Court did not involve a transfer of jurisdiction or sovereignty by Sierra Leone. The Special Court is a completely new organisation established by an international treaty...It does not operate on the basis of transferred jurisdiction but is a new jurisdiction operating in the sphere of international law.

Consequently, the jurisdiction of the Court was not dependent upon the personal jurisdiction of Sierra Leone for the crimes within the Statute, and the amnesty provision did not preclude prosecution by the Court.<sup>180</sup> This categorical rejection of the transfer of territorial jurisdiction as a basis for jurisdiction is regrettable. The decision was driven by the need to avoid the application of the amnesty in question. The Appeals Chamber did not consider the academic views of the jurisdictional basis of the ICC outlined above, and its judgment on this issue is somewhat cursory, a response to the immediate assertions raised by the defence rather than a considered analysis of the merits of transfer of jurisdiction as a possible basis of jurisdiction. In focussing on the issue of the amnesty, the Appeals Chamber was examining the terms of the transfer of jurisdiction and whether Sierra Leone's ability to transfer jurisdiction was limited by the amnesty it had previously granted under national law. It did not give proper consideration as to whether the concept of transfer of jurisdiction was an appropriate way of characterising the jurisdictional basis of the SCSL. As will be

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<sup>178</sup> Article 1, SCSL Statute.

<sup>179</sup> *Gbao*, note 11, para 6.

<sup>180</sup> This decision was subsequently confirmed in another preliminary motion in which the defence asserted, again based on the amnesty provision, that there had been an unlawful delegation of power from Sierra Leone to the Special Court: See *Fofana*, note 9.

discussed in Chapter Five, it was not necessary to dismiss the delegation of jurisdiction argument to avoid the application of the amnesty provision.

### **3.1.3.3 *Specific concerns regarding possible delegation of universal jurisdiction***

One area of confusion that arose in the context of the debate of the jurisdictional basis of the ICC was whether the ICC would be exercising universal jurisdiction. While this suggestion was clearly misguided, universal jurisdiction having been explicitly rejected as a basis for jurisdiction in the Rome Statute,<sup>181</sup> it did lead to discussion as to whether states could delegate universal jurisdiction to another state or to an international criminal tribunal. Professor Scharf has suggested the delegation of universal jurisdiction from states as one possible basis of the jurisdiction of the ICC.<sup>182</sup> Whilst recognising that delegates to the Rome Conference rejected a broad notion of universal jurisdiction for the ICC, Professor Scharf notes that:<sup>183</sup>

where the territorial state gives its consent (as expressed by ratifying or acceding to the Rome Treaty or by special consent on a case-by-case basis), in addition to the principle of territoriality, the ICC has a legitimate interest on the basis of the universal jurisdiction of the crimes to prosecute the nationals of non-party states. In this limited context, the jurisdiction of the ICC can be deemed to be based concurrently on the universal and territorial bases of jurisdiction.

Professors Sadat and Carden also consider the ICC to exercise a new form of universal jurisdiction. They describe the ICC as operating upon the universality principle where the Council has referred the complaint, noting that, where the Prosecutor or a state refers the complaint ‘although the universality principle does not disappear, layered upon it is a State consent regime based on two additional principles (which are

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<sup>181</sup> The German delegation at the Rome Conference introduced a proposal to grant wide universal jurisdiction to the ICC, that is jurisdiction over any offence committed anywhere, irrespective of whether the suspect was present in the territory of a state party to the Rome Statute. This proposal was rejected, in the face of harsh criticism, in particular from the United States: Wilmshurst, E., ‘Jurisdiction of the Court’ in Lee (ed) *The International Criminal Court: Issues, Negotiations, Results* (1999, Kluwer), 127; and Kaul, H. and Kress, C., ‘Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises’ (1999) 2 *YbIHL* 143.

<sup>182</sup> Scharf, note 147, 76. This also appears to have been the view of Ambassador Scheffer, the head of the United States delegation to the Rome Conference, see: Scheffer “US Policy and the International Criminal Court”, (1999) 32 *CILJ* 529 at 532 (asserting “the universal jurisdiction created by the Rome Conference would mean something new, at least for US troops stationed abroad”) and Scheffer, “The United States and the International Criminal Court” (1999) 93 *AJIL* 12, at 20 (‘the dangerous drift of Article 12 toward universal jurisdiction over nonparty states’).

<sup>183</sup> Scharf, note 147, 76.

disjunctive) of jurisdiction: the territoriality principle and the nationality principle'.<sup>184</sup> This argument relies upon the precedent of the IMT, which it is suggested asserted universal jurisdiction based on the notion that where crimes give rise to universal jurisdiction, states may create international tribunals 'to do together what any one of them could have done separately'.<sup>185</sup> Professor Scharf also argues that the ICTY and ICTR 'represent a collective exercise of universal jurisdiction of states' based on the underlying authority of the Charter. As the ICTY purported to bind a Serbian national at a time when the FRY was not considered a member state of the United Nations, Professor Scharf argues that the tribunals must exercise universal jurisdiction in order to bind nationals of non-party states.<sup>186</sup>

This issue does not arise in relation to the SCSL, as all crimes within its jurisdiction must have been committed within the territory of Sierra Leone, thus it is clear that territorial jurisdiction only has been delegated. However, it may arise in respect of future tribunals. There are a number of difficulties concerning this possible basis of jurisdiction. The value of the IMT as a precedent for an international criminal tribunal exercising universal jurisdiction is doubtful, given that the tribunal was most likely operating in the capacity of the territorial state, not on the basis of universal jurisdiction. Further, the ICTY and the ICTR do not operate on the basis of universal jurisdiction: their universality flows from the extensive powers of the Security Council acting under Chapter VII of the Charter to restore international peace and security and from the obligation of members to comply with decisions of the Security Council under Chapter VII, not from universal jurisdiction.<sup>187</sup> To equate the powers of a court established by the Security Council under Chapter VII with universal jurisdiction is to conflate two distinct concepts: the enforcement jurisdiction of the Security Council (as an institution that can compel all member states to comply with its decisions) with the prescriptive universal jurisdiction of states. Moreover,

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<sup>184</sup> Sadat & Carden, note 171, 412-413. See also Paust, J., 'The Reach of ICC Jurisdiction over Non-Signatory Nationals' (2000) 33 *Vanderbilt Journal of Transnational Law* 1, 7 (arguing that 'the ICC will be able to exercise a form of limited universal jurisdiction' and 'it would be improper to assume that Article 12 obviates any universal jurisdictional competence that signatory states have under customary international law and can delegate to a newly created institution').

<sup>185</sup> Trial of the Major War Criminals Before the International Military Tribunal, 461, 466. For a discussion of Nuremberg and universal jurisdiction, see: King, H., 'Universal Jurisdiction: Myths, Realities, Prospects, War Crimes and Crimes Against Humanity: The Nuremberg Precedent' (2001) 35 *NELR* 281.

<sup>186</sup> Scharf, note 147. For a critique of this analysis see Akande, note 147.

<sup>187</sup> Morris, note 147, 35-6. It is also arguable that as a growing number of states ratify or accede to the Rome Statute, the ICC may have close to universal application: Olasolo, H., 'Reflections on the International Criminal Court's Jurisdictional Reach' (2005) 16 *Crim LF* 279. However, this is different to exercising universal jurisdiction.

Professor Morris has commented that ‘the delegation of states’ universal jurisdiction to an international court would fundamentally alter the consequences of that jurisdiction. The exercise of delegated universal jurisdiction by an international court would have very different implications, involving a different set of state interests, than would the exercise of universal jurisdiction by a state’.<sup>188</sup>

Perhaps the greatest objection to the delegation of universal jurisdiction from states is the absence of any custom supporting such a delegation. States rejected such a proposal when drafting the Rome Statute. The principle of prescriptive universal jurisdiction for states is relatively embryonic, a principle that is still emerging and remains relatively undefined. There is disagreement as to which international crimes give rise to universal jurisdiction, and uncertainty as to the circumstances in which universal jurisdiction may be exercised, including whether there is a requirement to defer to the territorial state or whether custody is a precursor to the exercise of universal jurisdiction.<sup>189</sup> Arguably, while customary international law has accepted universal jurisdiction existing in some form for states, it has not developed to the point that states may delegate universal jurisdiction to international criminal tribunals.<sup>190</sup> Moreover, even if such a principle did exist, it is suggested that states may only delegate jurisdiction in relation to crimes giving rise to universal jurisdiction. This was not problematic regarding the ICC, as the majority of crimes within the ICC’s jurisdiction are, for the most part, crimes giving rise to universal jurisdiction.<sup>191</sup> However, it may have been an issue for tribunals such as the LST (assuming for present purposes that it relied on a delegation of universal jurisdiction) as it has jurisdiction only in respect of a domestic law offence and it is not clear that terrorist acts give rise to universal jurisdiction under customary international law.

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<sup>188</sup> Morris, note 147, 29.

<sup>189</sup> Chapter One, section 2.3.

<sup>190</sup> For the contrary view, see Akande, arguing that the rationale behind the exercise of universal jurisdiction by states is that the prosecuting state ‘is in effect acting on behalf of the international community as a whole’. This is because customary international law confers universal jurisdiction only in respect of those crimes judged to be detrimental to the values of the international community as a whole. As Akande concludes ‘it would be extraordinary and incoherent if the rule permitting prosecution of crimes against the collective interest by individual states – acting as agents of the community – simultaneously prevented those states from acting collectively in the prosecution of these crimes’: Akande, note 147, 626. Bekou and Cryer also consider that states would be entitled to transfer universal jurisdiction: Bekou, O. and Cryer, R., ‘The International Criminal Court and Universal Jurisdiction: A Close Encounter?’ (2007) 56 *ICLQ* 49, 50-51.

<sup>191</sup> Ambassador Scheffer has argued that ‘not all of the crimes within the subject-matter jurisdiction of the Court are in fact exposed to universal jurisdiction under customary international law’. He uses as an example, the provisions in article 8 of the Rome Statute that are based on the Hague Regulations or from the laws and customs of war: Scheffer, note 150, 70.

### **3.1.4 Universal jurisdiction arising from the nature of the crimes**

In the *Lome Amnesty Decision*, the Appeals Chamber considered whether the crimes arising under the SCSL Statute gave rise to universal jurisdiction, as the amnesty would not be ‘universally effective’ in relation to ‘grave international crimes for which there exists universal jurisdiction’.<sup>192</sup> It concluded that ‘The crimes mentioned in Articles 2-4 of the Statute are international crimes and crimes against humanity...One consequence of the nature of grave international crimes against humanity is that States can, under international law, exercise universal jurisdiction over such crimes’.<sup>193</sup> This statement is not of itself controversial, although it may not be accurate in relation to all of the international crimes within the material jurisdiction of the SCSL. However, the Appeals Chamber then extrapolated from the universal jurisdiction possessed by states a similar power for international criminal tribunals such as the SCSL where the crimes within the substantive jurisdiction of the court give rise to universal jurisdiction. Based upon this extension, the Appeals Chamber concluded that the amnesty provision is ‘ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of such crimes. It is also ineffective in depriving an international court such as the Court of jurisdiction’.<sup>194</sup> In another decision considering the amnesty provision the Appeals Chamber stated that ‘Article IX of the Lome Agreement cannot constitute a legal bar to the exercise of jurisdiction over international crimes by an international court *asserting universal jurisdiction*’.<sup>195</sup> Thus the Appeals Chamber clearly considered that it exercised universal jurisdiction. However, it did not fully articulate how this universal jurisdiction arose. Sierra Leone, as both the territorial state and the state of nationality of the majority of the accused and victims, has superior bases of jurisdiction and need not rely on universal jurisdiction.

There are two remaining possibilities. First, the SCSL Agreement delegated universal jurisdiction from member states of the United Nations to the SCSL. Second, universal jurisdiction arises solely from the nature and gravity of the crimes within the jurisdiction of the SCSL. The first possibility is to say that member states, through their membership of the United Nations and their acceptance of the Charter, have delegated universal jurisdiction to the United Nations, and that that organization may then delegate universal jurisdiction to an international tribunal. This argument is too

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<sup>192</sup> *Kallon*, note 26, para. 67.

<sup>193</sup> *Kallon*, note 26, paras 69-70.

<sup>194</sup> *Kallon*, note 26, para. 88.

<sup>195</sup> *Gbao*, note 11, para. 8.

great a stretch, particularly where other, stronger, bases of jurisdiction are available.<sup>196</sup> Moreover, as is discussed below, the ‘universality’ of courts created by the Security Council derives from the obligation of member states to co-operate with decisions of the Security Council,<sup>197</sup> and not from any delegation of universal jurisdiction by member states.

The SCSL, in the comments quoted previously, has hinted that it considers universal jurisdiction to exist without the need for a delegation of jurisdiction: universal jurisdiction is automatically conferred on a tribunal purely due to the nature of the crimes and regardless of how the tribunal has been established. If this is what the SCSL was suggesting, it is highly problematic. This conjures the image of a ‘floating’ universal jurisdiction, once a tribunal is created to try crimes giving rise to universal jurisdiction under customary international law, that jurisdiction simply exists and is vested in the tribunal, with no need for a delegation of jurisdiction from states. This simply cannot be the case: universal jurisdiction is exercised by *states*. States may delegate their own competencies for crimes subject to universal jurisdiction to an international or internationalized tribunal. Alternatively, the United Nations may establish a tribunal to try crimes subject to universal jurisdiction. However, these tribunals derive their jurisdiction either from delegation of jurisdiction of some sort or from the competence of the United Nations for international peace and security: there is no independent basis of universal jurisdiction. To take this argument to its extreme, if two non-governmental organizations combined to create an international court to try individuals accused of genocide, could this court be said to possess universal jurisdiction due only to the fact that genocide is a crime giving rise to universal jurisdiction? As was discussed in Chapter One, the boundaries of the concept of universal jurisdiction are uncertain, even in relation to the exercise of universal jurisdiction by states. Given that the international legal system is still largely governed by the notion of state sovereignty, it is highly unlikely that states would accept that an international criminal jurisdiction could exist in the absence of either a delegation of authority from a state with an accepted jurisdictional nexus or the exercise of the Council’s powers for international peace and security. This is not to say that such a principle will not develop in the future; rather that it is not yet found as a matter of contemporary international law. Thus, in conclusion, although several crimes giving rise to universal jurisdiction under customary international law fall within the remit of the SCSL, this does not of itself mean that the SCSL exercises universal jurisdiction.

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<sup>196</sup> This argument is discussed further in the next section.

<sup>197</sup> Article 25, Charter.

### **3.1.5 Jurisdiction based on the powers of the Security Council under Chapter VII**

This thesis submits that the final basis of jurisdiction is the appropriate jurisdictional basis for the LST, as the tribunal was established by the Council acting pursuant to its powers under Chapter VII of the Charter. However, Chapter VII of the Charter is also the source of the jurisdiction conferred on the ICTY and the ICTR. What then is the nature and source of this jurisdiction? The debate as to the jurisdictional basis of the ICC also revealed two conflicting views as to the jurisdictional basis of the ICTY and the ICTR. In considering whether the ICTY and the ICTR were a precedent for the exercise of delegated universal jurisdiction by an international court, Professor Morris concluded that ‘the tribunals’ jurisdiction is more properly viewed as arising from the powers of the Security Council to take such steps as are necessary to restore or maintain international peace and security’. The ICTY and the ICTR could therefore be distinguished from the ICC.<sup>198</sup> Professor Scharf and Mr Akande disagreed with this conclusion, arguing that, while the tribunals were established pursuant to a resolution under Chapter VII of the Charter, the ‘underlying authority for the Council’s action was a treaty – the UN Charter’.<sup>199</sup> The Security Council, when exercising its authority under Chapter VII, exercises powers delegated to it by the member states of the United Nations collectively. Thus, Akande concludes, the tribunals ‘constitute examples of the delegation by states of criminal jurisdiction to international tribunals’.<sup>200</sup> While this thesis does not dispute that the Security Council exercises delegated powers under the Charter, it is submitted that this argument does not consider sufficiently the nature of the authority conferred on the Security Council by member states. Member states, acting collectively, have conferred upon the Security Council via the Charter powers for the maintenance and restoration of international peace and security, as set out in Chapter VII of the Charter.<sup>201</sup> This meaning is confirmed by article 24(1) of the Charter, which provides that the member states ‘agree that in carrying out its duties under this responsibility, the Security Council *acts on their behalf*’.<sup>202</sup> As Sarooshi notes, member states delegated to the Security Council ‘not sovereignty *per se* but an international police power of States’.<sup>203</sup> Thus it is inappropriate to refer to member states delegating jurisdiction (based on sovereignty) to the Security Council, jurisdiction which is then delegated to the

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<sup>198</sup> Morris, note 147, 36.

<sup>199</sup> Scharf, note 147, 108; See also Akande, note 146, 628 – ‘the ultimate legal basis for their creation is the UN Charter (Article 25)’.

<sup>200</sup> Akande, note 147, 628.

<sup>201</sup> See discussion in Sarooshi, D., *The United Nations and the Development of Collective Security* (1999), 25-32.

<sup>202</sup> Article 24(1), Charter, emphasis added. See Sarooshi, *ibid*, sources cited at footnote 107.

<sup>203</sup> Sarooshi, note 201, 28.

tribunals. The better view is that the Security Council was exercising this ‘international police power’ when it established the tribunals. Moreover, the Security Council is not restrained by the jurisdictional bases relied upon by states to justify prescriptive jurisdiction, nor is it restrained by the limits as to the exercise of enforcement jurisdiction.

That something more than a delegation of jurisdiction has occurred is evident, if it is accepted that ‘the powers which can be exercised by the collective totality of sovereign States is greater than the sum of the individual powers of these States’.<sup>204</sup> The ICTY has recognised that the Security Council can confer powers on a subsidiary organ which it could not exercise itself. The Security Council may not exercise a judicial function determining individual criminal responsibility, yet it has established two institutions that may do so.<sup>205</sup> Moreover, the tribunals may take steps that a state acting individually could not, such as lifting the immunity of a head of state of another state or requiring cooperation in the absence of an agreement.<sup>206</sup> Thus the Security Council is not exercising jurisdiction delegated by member states in the traditional sense. Therefore, it can be concluded that the jurisdiction of the LST is based on the powers for the maintenance of international peace and security delegated to the Security Council by member states.

#### **4 Conclusion**

This Chapter has considered the legal basis of the tribunals studied as the most appropriate criterion for a comparison of the tribunals, with the object of determining whether categories of such tribunals can be established, or whether the tribunals truly are *sui generis*. Three categories of hybrid or internationalized tribunals were identified, while the notion of a tribunal established by means of floating universal jurisdiction was rejected. The first category concerns tribunals operating primarily as national institutions with international assistance, and with varying degrees of reliance on international law, both procedural and substantive. These tribunals rely predominantly upon the territorial jurisdiction of the affected state, as well extraterritorial jurisdiction in limited circumstances. The IHT, ECCC, WCC, SPSC and IJPP fall within this category. When the legal basis is considered in light of the discussion in Chapter Two, it is evident that this mechanism is adopted in one of two circumstances. First, where either the United Nations or certain states are acting

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<sup>204</sup> Sarooshi, note 201, 29.

<sup>205</sup> *Tadic Jurisdiction Decision*, note 25, paras 37-8.

<sup>206</sup> See Chapter Five.

effectively as the governing authority within the affected territory, as is the case with the IJPP, the SPSC and the IHT. The process leading to the establishment of the WCC may also fall within this first situation, as it was decided by the OHR and the ICTY that a new chamber in Bosnia was desirable so as to enable transfer of cases from the ICTY. Although the process was done with some collaboration with national actors and relied on domestic law-making procedures, the OHR directed the process within Bosnia, and always had the option of establishing the WCC using the powers under the Dayton Agreement. Second, the mechanism may be appropriate where the affected state is reluctant to relinquish state sovereignty to the United Nations (or other ‘partner’) and where it is unlikely, for political or legal reasons, that the Security Council will impose an international tribunal on the state concerned. This latter situation is illustrated by the history of the negotiations for the creation of the ECCC.

The second category of tribunals is the treaty-based model. A treaty between the territorial state and the United Nations, or possibly another international organisation or a number of states acting collectively, forms the legal basis for the institution. The SCSL is the only example of this model to date, although the LST would also have fallen within this category had the ratification of the LST Agreement not been affected by domestic factors. This suggests that the model is appropriate where the affected state is likely to provide the cooperation required by the tribunal, and is not opposed to conferring its jurisdiction on a tribunal that will operate outside its judicial system or preoccupied with preserving its sovereignty. The agreement will set out the structure and key features of the tribunal, including the cases it may try. The better view is that the basis of the jurisdiction conferred on the tribunal is that of the territorial state, and is normally jurisdiction based on the territorial principle. Nationality could also form the basis of a transfer of jurisdiction, depending on the terms of the agreement. The agreement will also regulate the terms of the conferral of jurisdiction on the tribunal, for example, whether jurisdiction to be conferred exclusively on the tribunal, so that the state itself may no longer exercise that jurisdiction through its national courts. The agreement is also vital in determining the scope of the jurisdiction conferred on the tribunal: which crimes may be tried, and is the conferral of jurisdiction subject to legal restrictions on the exercise of jurisdiction by that state, such as head of state immunity or domestic amnesties. These issues will be considered in greater detail in Chapters Four and Five.

The third, and final, category of tribunals is a hybrid or internationalized tribunal established by the Security Council utilizing its powers under Chapter VII of the

Charter. It is the Security Council resolution - and any documents incorporated into the resolution - that forms the legal basis of the tribunal. In establishing a tribunal in this category, the Security Council is conferring jurisdiction based on its powers for the maintenance of international peace and security. It is submitted that the use of this legal and jurisdictional basis is not available or appropriate in all circumstances. First, the Security Council may only act where there is a threat to international peace and security, and the creation of a tribunal would be a means to maintain or restore international peace and security. Thus, it is submitted that this model would not have been available in relation to Cambodia, where there was no longer an armed conflict or insurgency, and the violations in question had occurred some 20 years previously. Second, as a practical matter, the Security Council will only act in this manner where there is the requisite level of political support for the establishment of a tribunal using this method. A situation will only lead to a tribunal based on this model where it is considered 'important' by Council members, in particular the permanent members. However, the situation must not be too important and directly impact upon national interests of the permanent members or significant member states. For example, the reluctance to impose a tribunal of this model in relation to East Timor is attributed to the importance to the United States of Indonesia's participation in its counter-terrorism operations. In addition, this model will only be used where the Security Council considers that sufficient resources are available to support the establishment of the tribunal. Finally, it is submitted that imposition of a hybrid or internationalized criminal tribunal may raise greater practical issues than imposition of an ad hoc international criminal tribunal, as the tribunal will depend to a greater extent on the assistance and cooperation of the state concerned. Accordingly, the consequences of the imposition for the effective operation of the tribunal should be considered.

## CHAPTER FOUR

### THE SELECTION OF TEMPORAL, PERSONAL, TERRITORIAL AND MATERIAL JURISDICTION

#### 1 Introduction

The previous chapter outlined the legal bases for the tribunals studied and examined the source of the jurisdiction conferred on the tribunals. The decision as to the legal basis and the source of the jurisdiction of a tribunal is an important one. The legal basis upon which a tribunal is established is a key indicator as to how effective the tribunal is likely to be in achieving accountability. The jurisdictional reach of a tribunal refers to jurisdiction in a different sense to that studied in the previous chapter. Here, the term refers to the competence of a specific tribunal to adjudicate cases brought before it. Tribunals ‘cannot prosecute cases involving individuals, territories and crimes that are not either explicitly or implicitly within their powers, that is, their jurisdiction’.<sup>1</sup> The jurisdiction of a tribunal comprises four elements: *ratione personae* (personal jurisdiction); *ratione loci* (territorial jurisdiction); *ratione temporis* (temporal jurisdiction); and *ratione materiae* (substantive or material jurisdiction).

If a tribunal is to end impunity, it is necessary to consider carefully the conduct and individuals that may be examined by the tribunal. Defining the ‘jurisdictional reach’ of a criminal tribunal is also significant as this can affect the legitimacy and effectiveness of the tribunal. Restrictions as to the temporal, territorial and material jurisdiction of a tribunal will limit the conduct that may be the subject of proceedings before the tribunal. Similarly, a limited personal jurisdiction may exclude key individuals or groups from the tribunal’s reach, while choice of the material jurisdiction will dictate the conduct that is to be criminalized and how that conduct is classified, whether as an international or ‘serious’ crime, or as an ‘ordinary’ crime under domestic law. For example, a tribunal that is to concentrate on offences committed by only one party to a conflict may give rise to allegations of bias or, where the tribunal is established by or with the support of the victorious party, the suggestion that the tribunal is dispensing ‘victor’s justice’. Focussing on a certain time period, geographical location or type of crime may mean that the tribunal does

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<sup>1</sup> Schabas, W., *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (2006), 123.

not provide a comprehensive examination of the conflict or its context and may preclude from consideration significant incidents or offences committed against or by certain groups. This may alienate some elements of the affected society and detract from the tribunal's contribution to reconciliation.

To achieve the principle of non-impunity, ideally the tribunal's jurisdictional reach should be as wide as possible and cover all relevant time periods, geographical locations, conduct and individuals. However, the tribunals studied do not operate in an ideal context, and the designers of the internationalized and hybrid tribunals have had to make many compromises. The aim of achieving accountability for serious crimes has had to be balanced against other important considerations. First, the tribunals are faced with limited financial and material resources, and it would not be feasible for the tribunal to try each individual and each offence committed during an armed conflict. The alleged perpetrators may number in the hundreds, or even the thousands, and any legal institution would struggle to resolve such a large number of cases. This necessitates difficult choices as to which conduct and individuals should be the focus of the tribunal's activities so as not to overstretch the available resources. Second, the tribunals depend on the political will of the United Nations and member states. They also depend on the support of the territorial state, in which much of the evidence will be found, and the majority of the victims, witnesses and perpetrators are located. Domestic politics and sensitivities, and assertions of state sovereignty, will also impact upon the jurisdictional regime that is adopted. Finally, the selection of the jurisdictional regime will be determined in part by the applicable legal framework. This requires designers to consider the following issues. Do the conduct and its context satisfy the required elements of relevant international crimes? If not, can crimes under domestic law be utilised? Was the conduct in question criminalised under international law (either treaty-based or customary international law) at the relevant time, and is the affected state a party to the relevant legal instruments? Alternatively, was the conduct criminalised under domestic law? Have the international crimes been incorporated into domestic law, or do international crimes apply directly in the legal system of the affected state? Are the required theories of criminal responsibility available? Which body should resolve uncertainties as to the legal framework – the tribunal or its designers? This Chapter examines the issues concerning the selection of the jurisdictional reach of the tribunals studied. For ease of reference, Table Two summarises the temporal, territorial, personal and material jurisdiction of the tribunals.

## 2 Temporal jurisdiction

Temporal jurisdiction refers to the period of time in respect of which a tribunal may exercise its jurisdiction. The decision as to the temporal jurisdiction of a tribunal demonstrates how the extent of the tribunal's jurisdiction must be balanced against competing considerations, such as resources, the applicable legal framework and the political will to support the tribunal. The designers of the tribunals studied have adopted different approaches to this issue, often reflecting different priorities. The IHT has the most extensive temporal jurisdiction, ranging from 17 July 1998 to 1 May 2003. While this time period will capture many of the main incidents that occurred during the regime, it excludes consideration of events during the occupation of Iraq. The extensive jurisdiction raises concerns as to the resource implications and the risk of overloading the IHT. Recognising this, the prosecution has decided to concentrate on a limited number of mini-trials concerning significant events during the regime. The ECCC has a restricted temporal jurisdiction, limited to the period from 17 April 1975 to 6 January 1979. This period coincides exactly with the duration of the Khmer Rouge regime. It does however, exclude from the jurisdiction of the tribunal acts of the Khmer Rouge up to and after the regime seized power, including the insurgency that was conducted for several decades after the regime was ousted. It also excludes potential examination of acts of other states in relation to Cambodia, for example the bombing of Cambodia by the United States in 1962, and crimes alleged to have been committed by Vietnamese nationals during the Vietnamese occupation of Cambodia.<sup>2</sup> The temporal jurisdiction of the IHT and the ECCC has led to criticism that the crimes included in the material jurisdiction may violate the *nullum crimen sine lege* principle, as the conduct in question was not criminalised at the relevant times.<sup>3</sup> Both tribunals may also encounter difficulties regarding the availability and reliability of evidence.<sup>4</sup>

The WCC and the IJPP are not subject to restrictions as to temporal jurisdiction. The WCC is a permanent national structure and as such will continue to operate after the five year transitional period. The IJPP has considered cases concerning events

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<sup>2</sup> Prime Minister Hun Sen had suggested a wide temporal jurisdiction from 1970 to the present. This was, however, considered to be a negotiating ploy: Boyle, D., 'Establishing the Responsibility of the Khmer Rouge Leadership for International Crimes' (2002) *YbIHL* 167.

<sup>3</sup> See Material Jurisdiction, this chapter, section 5.

<sup>4</sup> See Ali Lejmi, M., 'Prosecuting Cambodian Genocide, Problems Caused by the Passage of Time since the Alleged Commission of Crimes' (2006) 4 *JICJ* 300.

occurring after the conflict,<sup>5</sup> although it has not tried cases concerning violations committed during the previous Serbian regime. There was no restriction as to the commencement date of the jurisdiction of the SPSC in relation to international crimes,<sup>6</sup> and the SPSC could have exercised jurisdiction in respect of offences committed before the international administration, including acts committed during the Indonesian occupation of East Timor. However, although the Serious Crimes Unit did investigate some earlier incidents,<sup>7</sup> it decided to focus on the events of 1999 so as to best utilise scarce resources.<sup>8</sup> While this strategy has been criticized as leaving the period from 1975 to 1998 un-investigated and outside the historical record provided by the serious crimes process, it was perhaps the only choice practically available in East Timor due to the limited resources allocated to the Serious Crimes Unit and the SPSC.

Selecting the commencement date of the temporal jurisdiction of the SCSL was controversial. Four possible dates were considered: 23 March 1991 (the date the conflict is generally accepted to have commenced); 30 November 1996 (the date of the Abidjan Agreement); 25 May 1997 (the date of the coup d'état by the AFRC against the Government); and 7 January 1999 (the date the offensive against Freetown was launched by the RUF/AFRC). The first date was rejected as it 'would create a heavy burden for the prosecution and the Court'.<sup>9</sup> The third possibility was considered to have a political connotation and would suggest that the SCSL was aimed at the coup d'état. Similarly, the last option would concentrate efforts on the attack on Freetown and would exclude from consideration attacks on rural areas and the

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<sup>5</sup> Cases have been heard or are currently pending for alleged crimes committed during the March 2004 riots (see the *Esmir Hamza and minor AK* case, and the *Kurteshi and Sylejmani* case), serious criminal offences (the *Ejupi* case), terrorism and terrorist related offences (the *Morina* case) and criminal acts committed during the self-determination / independence demonstrations in February 2007 (the *Kurti* case). For further details of individual cases, see Humanitarian Law Centre, *Trials for ethnically motivated crimes and war crimes in Kosovo*, 2007.

<sup>6</sup> The District Court in Dili has exclusive jurisdiction in respect of the domestic crimes of murder and sexual offences only where those crimes committed in the period between 1 January 1999 and 25 October 1999: Regulation 2000/11, section 10.2; Regulation 2000/15, section 2.3. This restriction was also applied to the crime of torture in Regulation 2000/11, but was not duplicated in Regulation 2000/15, so presumably torture was not subject to the same restriction.

<sup>7</sup> The Serious Crimes Unit abandoned an investigation of the Santa Cruz massacre of 1991. It also investigated instances occurring in late 1998 that were closely related to the later violence: Reiger, C., *The Serious Crimes Process in Timor-Leste: In Retrospect* (2006, ICTJ), 8.

<sup>8</sup> All indictments issued related to events occurring between 1 January 1999 and October 1999. Events occurring after October 1999 were left to be dealt with by the ordinary criminal justice system: *ibid.*

<sup>9</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, para. 26.

countryside. Accordingly, the temporal jurisdiction of the SCSL commenced on 30 November 1996 as it was felt that this date ‘had the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court. It would also ensure that the most serious crimes committed by all parties and armed groups would be encompassed’.<sup>10</sup> However, the selection of the commencement date ‘represents a significant limitation’,<sup>11</sup> as it excludes from the reach of the SCSL perpetrators of crimes committed in the five year period from the commencement of the conflict to the signing of the Abidjan Agreement.<sup>12</sup> Moreover, it creates the perception that Freetown is more important than attacks on rural areas.<sup>13</sup> As the conflict was ongoing when the SCSL was established, the end date for the temporal jurisdiction of the SCSL was left unspecified, although the prosecution has not issued indictments for acts committed beyond the end of the conflict. Furthermore, as the SCSL upheld the Lomé Accord amnesty,<sup>14</sup> there was - in theory - a dual start date for the temporal jurisdiction of the SCSL. In respect of the international crimes, jurisdiction commences on 30 November 1996, whereas jurisdiction in respect of national crimes commences on 7 July 1999, the date the amnesty was granted.<sup>15</sup> However, this was never a practical issue, as the prosecutor did not include charges under domestic law in any indictment.

The LST is intended to investigate a single event, the assassination of Prime Minister Hariri.<sup>16</sup> Its temporal jurisdiction is theoretically restricted to a single date, 14 February 2005. However, the Security Council recognized that its mandate should extend also to related attacks, and consequently, the LST Statute provides for the tribunal to exercise jurisdiction for ‘connected attacks’ occurring in Lebanon between 1 October 2004 and 12 December 2005 which are of a similar nature and gravity. In considering whether an incident is connected, the LST is to take into account, among other factors, the motive for the attacks, the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks and whether they involve the same or

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<sup>10</sup> Ibid, para. 27.

<sup>11</sup> Stafford, N., ‘A Model war Crimes Court: Sierra Leone’ (2004) 10 *ILSA JICL* 117, 127.

<sup>12</sup> See Fritz, N. and Smith, A., ‘Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone’ (2002) 25 *FILJ* 391, 411-12.

<sup>13</sup> Ibid, 411-2.

<sup>14</sup> *Prosecutor v Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004. See discussion of this decision in Chapter Five.

<sup>15</sup> Article 5 is omitted from the list of offences to be covered by the exclusion of the amnesty in article 10 of the SCSL Statute. See: Fritz and Smith, note 11, 412; Frulli, M., ‘The Special Court for Sierra Leone: Some Preliminary Comments’ (2000) 11 *EJIL* 857, 859; and Tejan-Cole, A., ‘The Special Court for Sierra Leone: Conceptual concerns and alternatives’ (2001) 1 *African Human Rights Law Journal* 107, 116.

<sup>16</sup> Article 1, LST Statute.

related perpetrators.<sup>17</sup> The tribunal's jurisdiction may also extend to attacks committed after 12 December 2005 and up to any later date that may be agreed between the United Nations and the Government of Lebanon, with the consent of the Security Council.<sup>18</sup>

### 3 Territorial jurisdiction

As discussed in the previous chapter, territorial jurisdiction is most frequently relied upon as a basis for the exercise of jurisdiction by states, and is reflected in the constituent instruments of the SCSL<sup>19</sup> and the IHT.<sup>20</sup> The territorial jurisdiction of the SCSL has been criticised given the suggested involvement of persons from neighbouring countries in the conflict and 'the reality of modern day conflicts that are not neatly contained within the territorial confines of one particular State'.<sup>21</sup> However, the indictment in respect of Charles Taylor, former President of Liberia, is based on the objective territorial approach, as Taylor has been charged with acts committed in Liberia, but carried out in Sierra Leone.<sup>22</sup>

Two of the tribunals are authorized expressly to try crimes alleged to have been committed outside the territorial state. The SPSC held that it was limited to exercising territorial jurisdiction in relation to the national crimes within its material jurisdiction.<sup>23</sup> Although the SPSC was able to exercise universal jurisdiction in relation to the crimes under international law, no indictments were issued on this basis.<sup>24</sup> The IHT may exercise extra-territorial jurisdiction on the bases of nationality

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<sup>17</sup> Article 1(1), LST Agreement; Article 1, LST Statute. The Secretary-General annexed a list of 14 other attacks, identified by the UNIIC, that it accepts would satisfy these criteria, which includes six targeted attacks and eight 'general' terrorist bombing incidents: Report of the Secretary-General on the establishment of a special tribunal for Lebanon, S/2006/893.

<sup>18</sup> Article 1, LST Statute. This may include several incidents that have occurred after the adoption of Resolution 1757, which were included in the mandate of the UNIIC.

<sup>19</sup> Article 1(1), SCSL Statute requires that the crimes must have been committed within the territory of Sierra Leone.

<sup>20</sup> Article 1(b), IHT Statute.

<sup>21</sup> Fritz & Smith, note 12, 417.

<sup>22</sup> *Prosecutor v Charles Ghankay Taylor*, Indictment, 7 March 2003. The indictment was subsequently reduced to 11 counts: Prosecutor's Second Amended Indictment, 29 May 2007. See Cerone, J., 'The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice' (2002) 8 *ILSA JICL* 379, 383.

<sup>23</sup> Regulation 2000/11, section 7.3; Regulation 2000/15, section 2.5. The SPSC has held that it had no jurisdiction to try an accused alleged to have raped a woman in West Timor: *Prosecutor v Leonardus Kasa*, 9 May 2001.

<sup>24</sup> Regulation 2000/15, section 2.1. The regulation defines 'universal jurisdiction' as 'jurisdiction irrespective of whether: (a) the serious criminal offence was committed within the territory of East Timor; (b) the serious criminal offence was committed by an East Timorese citizen; or (c) the victim of the serious criminal offence was an East Timorese citizen': section 2.2.

and permanent residency.<sup>25</sup> Extraterritorial jurisdiction was included so as to enable the investigation of crimes committed by Iraqis outside Iraqi territory as part of the wars against Iran and Kuwait. However, to date no indictments have relied on extra-territorial jurisdiction.

For the remaining tribunals, their territorial application is unclear. The LST Statute focuses on acts, in particular the assassination of Hariri. However, the acts in question occurred in the territory of Lebanon. Moreover, the LST may only expand its jurisdiction in relation to connected terrorist attacks where such acts occurred in Lebanon.<sup>26</sup> The LST could rely upon the objective territoriality principle to try those accused of committing preparatory acts outside Lebanese territory, adopting a similar approach to the SCSL in relation to Taylor. As UNMIK may only issue regulations in respect of the territory of Kosovo, the territorial jurisdiction of the IJPP should be restricted to conduct committed within Kosovo itself.<sup>27</sup> The Law on the State Court is silent as to the territorial reach of the WCC. As a national institution, territorial jurisdiction would be resolved by relevant domestic provisions, which include extra-territorial jurisdiction in limited circumstances.<sup>28</sup> Similarly, the ECCC Agreement and the Special Law do not contain a provision as to the territorial jurisdiction of the ECCC, and jurisdiction is presumably restricted to events occurring within the territory of Cambodia.

#### **4 Personal Jurisdiction**

Restrictions as to the individuals within a tribunal's jurisdiction may include the exclusion of corporate defendants,<sup>29</sup> prohibitions against the prosecution of minors and juveniles, a requirement as to the nationality of the accused, and a stipulation that the accused must have, or has had, a particular political allegiance. These restrictions are not without controversy, and may have the effect of excluding - or including - an

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<sup>25</sup> Article 1(b), IHT Statute. See the next section for the nationality requirement.

<sup>26</sup> Article 1, LST Statute

<sup>27</sup> Resolution 1244 (1999), see Bohlander, M., 'The Legal Framework of the Prosecution and the Courts' in Ambos & Othman (eds), *New Approaches in Transitional Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (2003).

<sup>28</sup> For example, Article 12 of the Criminal Code of Bosnia and Herzegovina provides for the exercise of extra-territorial jurisdiction in a number of circumstances, in particular where the accused is alleged to have committed an offence that Bosnia is obliged to punish in accordance with the provisions of international law or international agreements.

<sup>29</sup> This may preclude consideration of the actions of private military and security companies utilised in a conflict, for example, Executive Outcomes, a private company engaged by the Government of Sierra Leone at various stages of the conflict. See: Webster, J., 'Sierra Leone – Responding to the Crisis, Planning for the Future: The Role of International Justice in the Quest for National and Global Security' (2001) 11 *Indiana International and Comparative Law Review* 731, 766-9.

important group of offenders. For example, the restriction of the personal jurisdiction of the IHT to Iraqi nationals or residents of Iraq excludes several groups of potential defendants.<sup>30</sup> These include members of coalition forces alleged to have committed crimes during the Gulf wars and the subsequent occupation of Iraq,<sup>31</sup> and nationals of any state involved in international armed conflicts with Iraq, for example nationals of Iran or Kuwait. It would also exclude members of Al Q'aeda or other terrorist organisations that may have assisted in the commission of crimes within the jurisdiction of the tribunal,<sup>32</sup> and nationals of western powers who are alleged to have acted in support of the previous regime and to have been complicit in the crimes committed by the regime. Alvarez notes that the exclusion of such individuals will provide 'a skewed historical account' of the period of the regime,<sup>33</sup> while Bassiouni suggests that the exclusion of the acts of coalition troops 'adds to the perception of politicized justice'.<sup>34</sup>

The inclusion of jurisdiction in respect of individuals aged between 15 and 18 years at the time of commission of the offence in the SCSL Statute triggered a vigorous debate.<sup>35</sup> The issue arose due to the large numbers of children forcibly recruited as child soldiers, many of whom then committed crimes potentially within the jurisdiction of the SCSL. The inclusion of juveniles within the personal jurisdiction of the SCSL raised a moral dilemma for designers of the tribunal. On the one hand, critics argued that children should not be punished as they were also victims of the conflict.<sup>36</sup> On the other hand, other interest groups, particularly within Sierra Leone itself, considered that all perpetrators of serious crimes should be held to account, even if they were minors at the time of the offence.<sup>37</sup> Ultimately this provision was not relied upon, as the Prosecutor announced that the prosecution would not prosecute

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<sup>30</sup> Article 1(2), IHT Statute.

<sup>31</sup> Consider, however, CPA Order 17 (2003).

<sup>32</sup> Other tribunals in Iraq may consider such conduct: Frank, M., 'Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq' (2006) 18 *Florida Journal of International Law* 1.

<sup>33</sup> Alvarez, J., 'Trying Hussein: Between Hubris and Hegemony' (2004) 2 *JICJ* 319, 321.

<sup>34</sup> Bassiouni, M.C., 'Post-conflict Justice in Iraq: An appraisal of the Iraqi Special Tribunal' (2005) *Cornell International Law Journal* 327, 359.

<sup>35</sup> Article 7, SCSL Statute. While the SCSL may try juvenile defendants, it may not sentence convicted offenders to a term of imprisonment: article 19. For further discussion, see Amann, D., 'Calling Children to Account: The Proposal for a Juvenile Justice Chamber in the Special Court for Sierra Leone' (2002) 29 *Pepperdine Law Review* 167; Bald, S., 'Searching for a Lost Childhood: Will the Special Court for Sierra Leone Find Justice for Its Children?' (2003) 18 *American University International Law Review* 537; Stafford, note 11; McDonald, A., 'Sierra Leone's shoestring Special Court' (2002) 84 *IRRC* 121, 133-6.

<sup>36</sup> Report, note 9, para. 32. The Secretary-General referred to the issue as a 'terrible dilemma', para. 33.

<sup>37</sup> Report, note 9, para. 35.

individuals younger than 18 years at the time of commission of the offence, as children cannot be considered to be among those who bear the greatest responsibility from crimes and thus did not satisfy the seniority criterion.<sup>38</sup> Instead, any information on offences committed by minors was passed to the Truth and Reconciliation Commission.

The SCSL is the only tribunal to include a provision concerning jurisdiction with respect to conduct by peacekeepers. Criminal acts allegedly committed by peacekeepers remain within the primary jurisdiction of the sending state, unless that state is unwilling or unable to prosecute, in which case the SCSL, with the authorization of the Security Council, may do so.<sup>39</sup> The Security Council reinforced the primary jurisdiction of the sending state by stating that it is the sending state that is responsible for investigating and prosecuting any crimes that may have been committed.<sup>40</sup> This provision in the SCSL Statute has not been utilised. Other tribunals have been excluded from investigating acts of peacekeeping forces, either by restrictions as to their personal jurisdiction (for example a nationality requirement as in the IHT Statute) or by the provisions of the applicable status of forces agreement or relevant national law.<sup>41</sup>

A further form of restriction on the personal jurisdiction of a tribunal is the criterion of seniority and/or the requirement that the accused bears the ‘greatest responsibility’ for the crimes committed. This criterion requires the prosecutor to focus on commanders, rather than direct perpetrators, and enables a targeted strategy, which allows more effective use of limited resources. It is also suggested to provide a better sense of the overall extent of and context to the conflict. In circumstances where available resources dictate that not all perpetrators can be punished, this approach requires that the ‘masterminds’ of the crimes should be the focus of trials, often leaving mid-level and low-level offenders to be considered by other accountability mechanisms, such as the ordinary courts or a truth and reconciliation commission. However, victims may

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<sup>38</sup> Press Release, *Special Prosecutor says he will not Prosecute Children*, 2 November 2002. See also Tejan-Cole, note 15, 118; and Schabas, W., ‘Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court’ (2004) 2 *JICJ* 1082, 1090.

<sup>39</sup> Cerone, note 22, 384.

<sup>40</sup> Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S/2000/1234. For further discussion, see Cryer, R., ‘A “Special Court” for Sierra Leone?’ (2001) 50 *ICLQ* 435, 440-1; and McDonald, note 35, 132-3.

<sup>41</sup> For example, CPA Order 17 (2003) excluded all personnel of the Coalition Provisional Authority and the multinational force from the exercise of jurisdiction by the Iraqi courts. UNMIK Regulation 47 (2000) similarly excluded UNMIK, KFOR and their personnel from the jurisdiction of the courts in Kosovo.

struggle to understand why only senior perpetrators are being tried. Often it is the direct perpetrator that victims wish to see punished, particularly as the perpetrator may remain at liberty and be encountered by the victim on a regular basis.<sup>42</sup> Moreover, the limited number of trials and accused result in limited coverage of incidents or certain crimes,<sup>43</sup> and may lead to the concern that too few individuals are being tried.<sup>44</sup> A seniority requirement also demands greater reliance on theories of criminal responsibility, such as joint criminal enterprise and command responsibility, and the use of indirect evidence. This may be problematic where the applicable law is not adequately developed, or give rise to questions of legality where international theories of responsibility are to be relied upon. To illustrate, as the SFRY Criminal Code did not include a comparable theory of command responsibility, both the WCC and the IJPP have had to consider whether customary international law on this issue has been incorporated into domestic law. In Kosovo, the Supreme Court determined that ‘in the application of Article 142 of the CC FRY it would not be legitimate to resort to international customary law in such areas as defining prohibited conduct, defining basis of individual responsibility and the punishment’.<sup>45</sup> The incorporation of international theories of responsibility in relation to a crime defined in domestic law in the LST Statute may also raise legality issues.<sup>46</sup>

The development of the seniority criterion can be traced to the early stages of the ICTY. Neither the ICTY nor the ICTR was subjected originally to any limit as to the level of offender that may be prosecuted and initial efforts were concentrated on low-level offenders.<sup>47</sup> As part of the completion strategy, the Security Council imposed a

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<sup>42</sup> Siriam, C., ‘Wrong-sizing International Justice? The Hybrid Tribunal in Sierra Leone’ (2006) 29 *FILJ* 472, 492-3.

<sup>43</sup> A survey of the jurisprudence of the hybrid tribunals suggests that sexual offences may not have received adequate attention in certain tribunals, for example the IHT and the SPSC.

<sup>44</sup> ICTJ, *The Special Court for Sierra Leone Under Scrutiny*, March 2006, 28-9.

<sup>45</sup> *Kolasinac case*, Supreme Court of Kosovo, Decision of 9 January 2004, para. 21, quoted from Hartmann, M., ‘Kosovo’ (2004) 7 *YbIHL* 514. In contrast, the WCC appears to have relied upon the concepts of joint criminal enterprise and command responsibility, although the basis for doing so is not clear: see, for example, *Prosecutor v Pekez et al*, Judgment, 15 April 2008. The applicability of these principles in Bosnia was also discussed in several decision of the ICTY Referral Bench, as discussed in Williams, S., ‘ICTY referrals to national jurisdictions: A *fair trial* or a *fair price*?’ (2006) 17 *Crim LF* 177-222.

<sup>46</sup> The applicable law, the Lebanese Criminal Code, does not include international theories of criminal responsibility: Milanovic, M., ‘An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon’ (2007) 5 *JICJ* 1139.

<sup>47</sup> See Johnson, L., ‘Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity’ (2005) 99 *AJIL* 158, 162-3; Wald, P., ‘ICTY Proceedings: An Appraisal from Within’ (2004) 2 *JICJ* 466; Cassese, A., ‘The ICTY: A Living and Vivid Reality’ (2004) 2 *JICJ* 585. For a defence of the strategy, see Piacente, N., ‘Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy’ (2004) 2 *JICJ* 446, 447-8.

seniority criterion, which called upon the tribunals to ensure that any new indictments ‘concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal’.<sup>48</sup> Despite the experience of the ICTY, the SCSL and the ECCC are the only tribunals studied that are subject to a seniority requirement. The personal jurisdiction of the SCSL is limited to those ‘persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leone law’,<sup>49</sup> which includes ‘those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone’.<sup>50</sup> The phrasing of this provision generated several exchanges between the Secretary-General and the Security Council, with the Secretary-General calling for the term ‘persons most responsible’, which, he suggested, would allow the Prosecutor greater discretion in determining who to prosecute. The Security Council preferred the formulation eventually adopted, arguing that this provided a clearer mandate for the tribunal. The SCSL has issued indictments involving 13 individuals, all of whom were considered to be senior leaders or commanders.<sup>51</sup>

The personal jurisdiction of the ECCC was ‘one of the most persistent sources of disagreement between Cambodia and the United Nations’ during negotiations.<sup>52</sup> Cambodia’s initial request for assistance indicated Cambodia’s preference that only senior leaders and the United Nations eventually accepted this limitation in order to reach agreement for the tribunal.<sup>53</sup> The personal jurisdiction of the ECCC is restricted to senior leaders of Democratic Kampuchea and those most responsible for the crimes falling within the ECCC subject matter and temporal jurisdiction.<sup>54</sup> This seniority requirement is set out in the Special Law and is reflected in the guidance provided to

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<sup>48</sup> Resolution 1534 (2004), para. 5. Previous resolutions recognized the importance of concentrating on the prosecution and trial of the most senior leaders, but had only done so in non-operative paragraphs: see Resolution 1503 (2003), preambular para. 7.

<sup>49</sup> Article 1, SCSL Agreement.

<sup>50</sup> The Security Council had indicated its preference that the SCSL have a limited personal jurisdiction – to those ‘who bear the greatest responsibility’: Resolution 1315, para. 3.

<sup>51</sup> See Crane, D., ‘Dancing with the Devil: Prosecuting West Africa’s Warlords: Building Initial Prosecution Strategy for an International Tribunal after Third World Armed Conflicts’ (2006) 37 *Case Western Reserve Journal of International Law* 1.

<sup>52</sup> Boyle, note 4.

<sup>53</sup> Prime Minister Hun Sen reportedly wished to exclude middle and lower level former officials, many of whom performed important roles in the government. The United Nations was also keen to restrict the funds required for the ECCC: Cohen, D., ‘“Hybrid” Justice in East Timor, Sierra Leone and Cambodia: “Lessons Learned” and Prospects for the Future’ (2007) 43 *Stan JIL* 1, 30.

<sup>54</sup> Article 2, Special Law. This phrasing was suggested by the Group of Experts, which accepted that the term would not cover all persons at the senior levels, but only those senior leaders with the most responsibility for the violations, as well as lower-level perpetrators directly implicated in the most serious atrocities: Report of the Group of Experts established pursuant to General Assembly Resolution 52/135, A/53/850, S/1999/231, para. 110.

the co-investigating judges and the co-prosecutors in the ECCC Agreement.<sup>55</sup> Suggestions that a wider personal jurisdiction should be granted, allowing greater prosecutorial discretion in deciding which individuals to investigate, were rejected by Cambodia.<sup>56</sup> The five accused currently in the custody of the ECCC were all senior leaders of the Khmer Rouge.<sup>57</sup> However, the delay in establishing the tribunal has meant that other key leaders have died, in particular Pol Pot, while those defendants facing trial are very old and in poor health.<sup>58</sup>

The experience of the SPSC replicated the early stages of the ICTY. Lacking a restriction as to the level of accused, most persons indicted were lower level offenders, often charged with single crimes unrelated to the political violence. The General Prosecutor concentrated on instances of murder, identifying ten priority cases.<sup>59</sup> The arrival of an international deputy-prosecutor general facilitated a more selective strategy with increased resources dedicated to investigating more serious offenders and those with the greatest responsibility. However, although many of the East Timorese accused held positions of authority within the militia organisations, the majority were low in the overall chain of command. From 2003 onwards, the prosecution moved to indict more senior figures within the Indonesian military and police structures, including several of those not indicted by the Ad Hoc Court in Indonesia.<sup>60</sup>

The personal jurisdiction of the IHT is not restricted to persons most responsible or the most serious offenders. The prosecutorial strategy has focused on several mini-trials, each examining a major incident or campaign. The IHT has tried and convicted several senior and high-profile officials, most notably the former President, Saddam Hussein, the former head of the General Intelligence Directorate, the former Vice-President, the Chief Judge of the Revolutionary Court, the former defence minister and the former deputy Prime Minister. While the intention was that only the highest-

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<sup>55</sup> Articles 5(3) and 6(3), ECCC Agreement.

<sup>56</sup> Boyle, note 4.

<sup>57</sup> The Statement of the Co-Prosecutors of 18 July 2007 identified five suspects, although, reportedly, the ECCC may charge a maximum of eight individuals, all considered senior leaders: Associated Press, 13 February 2008, 'Cambodian genocide tribunal to try up to 8 defendants, hire more staff'. For discussion of the leadership structure of the Khmer Rouge and possible defendants, see Bunyanunda, M., 'The Khmer Rouge on Trial: Whither the Defence' (2001) 74 *Southern California Law Review* 1581.

<sup>58</sup> Darcy, S., 'Dilemmas of Delayed Justice for the Crimes of the Khmer Rouge', Oxford Transitional Justice Research Working Paper Series, 4 November 2008.

<sup>59</sup> The Serious Crime Unit applied the following criteria: the number and type of victims; the seriousness of the crimes and their political significance; and the availability of evidence.

<sup>60</sup> See discussion in Chapter Two, in particular sources cited at note 108.

level perpetrators were to be prosecuted,<sup>61</sup> with intermediate and lower level offenders to be prosecuted before the ordinary Iraqi courts, some ‘low-level’ accused have been tried and convicted by the IHT.<sup>62</sup>

The LST Statute does not contain a seniority criterion. However, as it is assumed that the actual assassin was killed in the explosion, the investigation and prosecution strategy will be focused on those who planned and ordered the attack, rather than the actual perpetrators. This will include individuals participating in the criminal network identified by the UNIIC.<sup>63</sup>

Neither the WCC nor the IJPP are restricted as to the level of the offender. This reflects the role that the ICTY exercises in the region. The WCC hears only the most sensitive war crimes cases, including cases of intermediate level accused referred by the ICTY.<sup>64</sup> Before granting a request for referral, the Referral Bench must consider the gravity of the crimes charged and the level of responsibility of the accused.<sup>65</sup> The Referral Bench has interpreted the phrase ‘most senior leaders’ to cover individuals ‘who, by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the “most senior” rather than “intermediate”’.<sup>66</sup> The Referral Bench considered criteria such as the permanence and duration of the leadership role, the levels of superior leadership (if any), any political positions of responsibility of the accused (for example negotiating with international elements), and the number of individuals under the command and control of the accused. Cases concerning senior level accused must not be referred to national jurisdictions and will remain at the ICTY for trial. Thus the cases transferred to the WCC are not the most serious cases arising from the conflict. However, this does not mean that the offences

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<sup>61</sup> Coalition Provisional Authority advisers recommended that the IHT should follow the lead of the SCSL and concentrate on high-level offenders, limiting numbers to no more than 20 to 25 offenders. The Iraqi Governing Council had originally suggested hearing some 6,000 cases before the IHT: Parker, T., ‘Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal’ (2005) 38 *Cornell International Law Journal* 899, 903.

<sup>62</sup> For example, the ‘lesser accused’ in the Dujail trial were Ba’th Party officials from Dujail, and did not hold significant rank or office in the Hussein regime.

<sup>63</sup> Evidence collected by the UNIIC confirms that the assassination of Hariri was carried out by a network of individuals acting in concert and that this criminal network, or part of it, remains active and is connected to other more recent attacks within Lebanon. The UNIIC is concentrating its efforts on gathering information about this network, its scope, the identity of its participants, their links with outsiders and their role in other attacks.

<sup>64</sup> The ICTY has referred six cases involving ten accused to Bosnia to be tried before the WCC. No more requests for referral will be made.

<sup>65</sup> Rule 11*bis*(C), ICTY RPE.

<sup>66</sup> *Prosecutor v Dragomir Milošević*, Decision on Referral of Case Pursuant to Rule 11*bis*, Referral Bench, 8 July 2005, para. 22. See further, Williams, note 47.

are not serious, or that the accused did not hold any position of responsibility or command; rather the accused are not the senior commanders. Similarly, the majority of the defendants before the IJPP in cases connected to the conflict have not held any position of seniority or command, with trials concerning senior leaders conducted by the ICTY.<sup>67</sup>

For the tribunals that are subject to a seniority criterion, an interesting question is whether the requirement is a jurisdictional restriction or mere guidance as to how prosecutorial discretion is to be exercised. In a preliminary motion, a Trial Chamber of the SCSL determined that ‘the issue of personal jurisdiction is a jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion...’.<sup>68</sup> The Appeals Chamber rejected this approach, and held that the only workable interpretation of article 1(1) of the SCSL Statute is that it merely guides the prosecutor.<sup>69</sup> Moreover, the Appeals Chamber held it to be ‘inconceivable’ that an indictment could be struck out on this basis ‘after a long and expensive trial’.<sup>70</sup> A similar controversy developed in the ICTY in April 2004, following an amendment to Rule 28(A) of the RPE that required the Bureau to confirm that every indictment issued by the Prosecutor satisfied the seniority criterion.<sup>71</sup> It is submitted that the requirement in article 1(1) of the SCSL Statute is a jurisdictional requirement that may be considered by the SCSL. This is supported by the drafting history of the SCSL Statute itself.<sup>72</sup> The test concerning the seniority criterion should be that, *prima facie*, the individual in question falls within the category of the most senior accused (or those most responsible, if this is the

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<sup>67</sup> For example, *Prosecutor v Slobodan Milosevic*, Second Amended Indictment – ‘Kosovo’, 16 October 2001; *Prosecutor v Limaj et al*, Judgment, Trial Chamber, 30 November 2005; *Prosecutor v Haradinaj et al*, Judgment, Trial Chamber, 3 April 2008; and *Prosecutor v Milutinovic et al*, Third Amended Joinder Indictment, 21 June 2006.

<sup>68</sup> *Prosecutor v Fofana*, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on behalf of Accused Fofana, Trial Chamber, 3 March 2004, para. 27. This finding was restated by the Trial Chamber in its final judgment in the CDF case: *Prosecutor v Fofana and Kondewa*, Judgment, Trial Chamber, 2 August 2007, para. 91.

<sup>69</sup> *Prosecutor v Brima, Kamara and Kanu*, Appeals Chamber, Judgment, Appeals Chamber, 22 February 2008, para 282. The Trial Chamber in that case had reached the same conclusion: *Prosecutor v Brima, Kamara and Kanu*, Judgment, Trial Chamber, 20 June 2007, para. 653

<sup>70</sup> *Ibid*, para. 283.

<sup>71</sup> For more detailed discussion see Williams, S., ‘The Completion Strategy of the ICTY and the ICTR’ in Bohlander, M. (ed.) *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May, 2007), 170-3; Johnson, note 49, 167; and Mundis, D., ‘The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals’ (2005) 99 *AJIL* 142.

<sup>72</sup> Various exchanges between the Security Council and the Secretary-General demonstrate that the Council was concerned to limit the jurisdiction of the SCSL to those who played a leadership role, and ultimately led to the inclusion of the words ‘persons who bear the greatest responsibility’: see S/2001/40; S/2001/85; and S/2001/693.

applicable standard). The court should take into account the facts as pleaded in the indictment sought or the request for confirmation of charges and should not require additional evidence.<sup>73</sup> Discretion should be allowed to the prosecution to establish those facts during the trial phase. Only where the seniority criterion can not be satisfied on a prima facie basis should the Court intervene, including, if necessary, referring the case back to the prosecutor for reconsideration. Concerns as to the stage at which such a review may occur may be resolved by providing that any review of the seniority of an accused must occur at a preliminary stage, before the confirmation of an indictment. Any challenge to admissibility on this ground must be made and heard before the confirmation of charges. This is the case with Rule 28(A) of the ICTY RPE, which requires the Bureau to review the indictment for seniority when the indictment is submitted by the Prosecutor. It is also consistent with the requirement in the Rome Statute that the pre-trial chamber must confirm the admissibility of any case for which an indictment is sought, including a review of whether the case is of sufficient gravity.<sup>74</sup> A trial chamber has indicated that any challenges to an indictment on the basis of gravity must take place before the decision on the confirmation of charges is filed, other than in exceptional circumstances.<sup>75</sup> Moreover, there is an obligation on a State wishing to challenge the admissibility of a case to do so at the earliest opportunity.<sup>76</sup>

## 5 Material jurisdiction

The following section examines the difficult decisions involved in determining which individuals are to be included within the personal jurisdiction of an internationalized or hybrid criminal tribunal. Cryer notes that ‘selectivity bubbles to the surface in a more subtle way, in the parameters of criminal responsibility’.<sup>77</sup> Choosing which law is to be enforced is an important step in the design of an internationalized or hybrid tribunal. It requires deciding first which conduct is to be subjected to criminal

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<sup>73</sup> This is the approach adopted by the ICTY in referral cases under Rule 11*bis*, see: *Prosecutor v Stankovic*, Decision on Referral of Case Under Rule 11*bis*, 17 May 2005.

<sup>74</sup> Articles 17 and 18, Rome Statute. See also article 19, which enables the ICC to satisfy itself as to its jurisdiction in any case brought before it and to determine the admissibility of a case in accordance with article 17.

<sup>75</sup> *Prosecutor v Katanga and Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Trial Chamber II, 16 June 2009, in particular para. 49. This finding was not disturbed upon appeal, although the Appeals Chamber stressed that in refraining to comment on the finding of the Trial Chamber on this issue, it did not necessarily mean that it agreed with the Trial Chamber’s interpretation: *Prosecutor v Katanga and Chui*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009, para. 38.

<sup>76</sup> Article 19(5), Rome Statute.

<sup>77</sup> Cryer, R., *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005), 232.

enforcement and, second, which law(s) will be used. In many ways, the latter task is more complex in an internationalized or hybrid tribunal, as both domestic and international legal provisions must be considered. However, the ability to rely on domestic legal provisions aids the selection process, as it enables recourse to domestic law where international law is insufficient, uncertain or fails to criminalize the conduct in question.

This section will consider these issues. It suggests that the following questions are relevant, although they need not necessarily be addressed in the order presented here. First, is the conduct in question likely to satisfy the key elements of the crimes that drafters would like to be included in the material jurisdiction of the tribunal? Second, what is the available legal framework? This entails considering whether the conduct is criminalized by customary international law, by a treaty to which the affected state is a party or by the domestic law of the affected state. If conduct is not criminalized at the time of commission of the offence, its inclusion within the material jurisdiction of the tribunal risks violating the *nullum crimen sine lege* principle. The available legal framework will, in many cases, dictate the balance between international and domestic crimes included in the legal instruments of the tribunal. Third, where the crime is criminalized by international law only, does international law as it pertains to international crimes have direct application in domestic law? Finally, where there is any doubt as to whether the responses to these questions justify the inclusion of a particular crime, which entity is able to make the final decision as to its inclusion? Is it the drafters of the constituent instruments, or is the question left to the prosecution or the tribunal itself? These issues are all worthy of study, and will be considered by reference to the legal instruments and practice of the tribunals featured in this thesis. However, it has not been possible within the constraints of this study to provide a comprehensive assessment of the substantive jurisprudence of the tribunals.

It should also be recalled that the legal issues discussed below are not the sole consideration in determining the balance of national and international crimes to be included within the material jurisdiction of a particular tribunal. As noted above, domestic and international politics and sensitivities, and assertions of national sovereignty, will also impact upon the regime adopted. For example, a state may consider it an assertion of its national sovereignty for an act to be tried in accordance with its own domestic law, rather than international law that has been imposed by the international community and may extend beyond the obligations that state has accepted as a matter of treaty law. This may be important to secure domestic support

for the tribunal, particularly where there is a sense that the government, in agreeing to a tribunal, has conceded too much authority to the United Nations or other states. Of course, it may also be a condition of the provision of assistance by the United Nations or states that the crimes committed be recognised as international crimes and tried as such, thus precluding the use of domestic legal provisions. Linked to this is the perception that characterising acts as international crimes is somehow superior to characterising the same behaviour as a crime under domestic law, even though from a legal and practical perspective, using national criminal provisions may offer important advantages in terms of likelihood of successfully establishing the crime in question, as well as shorter, less complex and ultimately less costly trials.

### **5.1 *Whether the conduct in question is likely to satisfy the key elements of the offence***

Chapter Two demonstrated that the tribunals studied were established in very different contexts. In designing the substantive jurisdiction of a tribunal, it is necessary to consider what evidence is likely to be available to the tribunal, and whether that evidence suggests that the conduct in question will satisfy the key elements of the crime that may be included. It should be recalled that, in making this decision, those designing the tribunal will not have all the evidence available to them, and will need to be satisfied that there is sufficient evidence to suggest that the crimes in question were possibly committed. Designers may be assisted in this regard – but are not bound – by the reports of previous investigative commissions, expert groups or rapporteurs, or by information made available by the United Nations, states, and other organisations.<sup>78</sup> In relation to international crimes, this decision requires examining whether the evidence would satisfy the so-called ‘threshold’ or context elements of the crimes. Here we will examine the approaches adopted by the drafters of the tribunals and the practice of the tribunals in relation to three international crimes: genocide, war crimes and crimes against humanity.

#### **5.1.1 *Genocide***

Five of the seven tribunals studied may try defendants in respect of acts of genocide. Problematic elements are establishing that the group targeted was a protected group and that the prohibited acts were committed with the necessary special intent. Genocide was not included within the material jurisdiction of the SCSL due to the ‘lack of evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an

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<sup>78</sup> For example, designers of the LST were assisted by the evidence collected by the UNIIC.

intent to annihilate the group as such'.<sup>79</sup> Similarly, it is unlikely that genocide was committed in Cambodia, as the crimes committed by the Khmer Rouge were directed at political or economic groups, which are not groups protected by the definition of genocide found in the Genocide Convention.<sup>80</sup> However, it may be possible to establish genocide in respect of acts committed against specific groups, such as the Cham, Chinese and Vietnamese and Buddhist monks.<sup>81</sup> In addition, the element of intention to destroy a particular national, ethnic, racial or religious group may be difficult to establish in relation to the Khmer Rouge.

While it has been suggested that genocide occurred in East Timor during the period of Indonesian occupation, there is some doubt as to the legal basis for such claims. Attacks against the civilian population were mainly targeted at the independence movement and those in political opposition to the occupation, and did not target the East Timorese as a national, ethnic, racial or religious group as such.<sup>82</sup> It may also be difficult to establish the special intent to commit genocide on the part of the Indonesian government or military, as the acts in question could have been 'justified' by military or security objectives.<sup>83</sup> As Saul notes, '[T]he immediate military objective throughout the period was to secure territorial and political control of East Timor. The continuing Indonesian military presence was arguably a response to the resistance of the FALINTIL intended to suppress the East Timorese opposition to Indonesian rule, but *not* intended physically to destroy the population'.<sup>84</sup> It is also unlikely that the conduct of the Indonesian forces and militia in the aftermath of the referendum constituted genocide.<sup>85</sup>

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<sup>79</sup> Report, note 9, para. 13. The Security Council did not include the crime of genocide in its recommendation to the Secretary-General in Resolution 1315.

<sup>80</sup> For further discussion, see Schabas, W., 'Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?' (2001) 35 *NELR* 287; Abrams, J., 'The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide' (2000-01) 35 *NELR* 303, 307; Williams, S., 'Genocide: The Cambodian Experience' (2005) 5 *International Criminal Law Review* 447; and Hurst, H., 'International Law and Cambodian Genocide: The Sounds of Silence' (1989) 11 *HRQ* 82; Bunyanunda, note 59.

<sup>81</sup> See also Ratner, S. and Abrams, J., *Accountability for Human Rights Atrocities in International Law* (2<sup>nd</sup> ed, 2001), 284–288; Linton, S., 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' (2001) 12 *Crim LF* 185, 194; and Abrams, *ibid*, 305-6.

<sup>82</sup> Saul notes that the one exception to this was the ethnic Chinese population, which was targeted for systematic destruction: Saul, B., 'Was the Conflict in East Timor "Genocide" and Why Does It Matter?' (2001) 2 *Melb ULR* 477, 502.

<sup>83</sup> See Clark, R., 'Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor' (1981) 8 *Ohio Northern University Law Review* 321 and discussion in Saul, *ibid*.

<sup>84</sup> Saul, note 79, 513. Emphasis in original.

<sup>85</sup> *Ibid*.

It is also now accepted that genocide did not occur in Kosovo, despite initial reports to the contrary. While the Kosovo Albanians would constitute a national or ethnic group protected by the Genocide Convention, and many of the acts committed against the Albanian population would have been prohibited acts, it is questionable whether the Serb forces or the Serb government possessed the necessary special intent. As Abrams concludes, '[t]he intent of the Serb attacks appears, for the most part, to have been to root out the KLA and to drive the Albanian population from the areas they inhabited – in other words, ethnic cleansing'.<sup>86</sup> This conclusion is supported by the practice of the IJPP. In the seven years of UNMIK's operation, the national courts in Kosovo issued four indictments for genocide.<sup>87</sup> None resulted in convictions. In the *Vuckovic* case, two Kosovo Serbs were indicted for genocide for events from 22 March 1999 to the beginning of May 1999.<sup>88</sup> While the accused were convicted of genocide at first instance by a panel comprising a majority of national judges, the Supreme Court, with a majority of international judges, reversed the verdict on the basis that the facts established at trial did not support a conviction for genocide. It stated that 'the exactions committed by the Milosevic's [sic] regime in 1999 cannot be qualified as criminal acts of genocide, since their purpose was not the destruction of the Albanian ethnic group in whole or in part, but its forceful departure from Kosovo as a result of [sic] systematic campaign of terror including murders, rapes, arsons and severe maltreatments'.<sup>89</sup> The international prosecutor substituted a charge of war crimes for the retrial. In *Jokic*, the panel convicted the accused of war crimes.<sup>90</sup> Charges of genocide were amended<sup>91</sup> or abandoned<sup>92</sup> in two other cases. The OSCE trial monitoring section noted that '[t]he initial charges were, in light of the trial

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<sup>86</sup> Abrams, note 80, 308. See also Schabas, note 80.

<sup>87</sup> Given that indictments and judgments are not made a matter of public record, it is very difficult to obtain accurate information concerning cases before local courts and the IJPP. UNMIK does not maintain a comprehensive list of cases involving international judges and prosecutors, nor is there a database detailing cases concerning acts committed during the conflict. The information in this thesis is taken from Annex Three to the report by Amnesty International, *Serbia (Kosovo): The Challenge to Fix a Failed UN Justice Mission*, February 2008. Research for the report was conducted in 2006 and 2007. This report details 26 cases. However, other sources, such as the United States State Department, indicate that there may be as many as 40 cases: State Department, *Country Report on Human Rights Practices 2005: Serbia and Montenegro*, March 2006.

<sup>88</sup> *Prosecutor v Miroslav Vuckovic and Bozur Bisevac*, Indictment, 29 November 1999.

<sup>89</sup> *Prosecutor v Vuckovic*, Supreme Court of Kosovo, 31 August 2001, quoted from Schabas, W., 'National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes"' (2003) 1 *JICJ* 39 at 63. See also OSCE Mission in Kosovo, *Kosovo War Crimes Trials: A Review*, September 2002, 50.

<sup>90</sup> *Prosecutor v Jokic*. The prosecutor had submitted the case based on a charge of genocide.

<sup>91</sup> *Prosecutor v Juvenile X*, the international prosecutor amended to the charge of causing general danger and grave acts against general security.

<sup>92</sup> *Prosecutor v Igor Simic et al*, the international prosecutor abandoned the genocide prosecution for lack of evidence.

evidence, inflated, not grounded by serious legal considerations and solid analysis'.<sup>93</sup> It is also supported by the charging practice of the ICTY, where the prosecution has characterised the acts committed in Kosovo as war crimes or crimes against humanity.<sup>94</sup>

In contrast, in Iraq and Bosnia, evidence supported the inclusion of the crime of genocide. The ICTY had determined that events in Srebrenica constituted genocide.<sup>95</sup> The International Court of Justice concurred with the finding that the mass killing in Srebrenica constituted genocide,<sup>96</sup> determining that while Serbia had not been complicit in the acts of genocide, it had violated the obligation to prevent and to punish the commission of acts of genocide.<sup>97</sup> As at 31 December 2008, six indictments including charges of genocide had been issued by the WCC in relation to the atrocities committed at Srebrenica: one was included in a case referred by the ICTY,<sup>98</sup> while the remaining indictments were issued by the national Prosecutor.<sup>99</sup> The Trial Chamber delivered judgment in one of the latter cases on 29 July 2008, finding the accused guilty of acts of genocide in relation to the killing of more than 1,000 Bosniak men in Kravica on 13 July 1995.<sup>100</sup>

There was also sufficient evidence to support the inclusion of the crime of genocide in the IHT Statute. The second major trial held before the IHT, the Anfal trial, charged seven defendants with genocide. The charges focused on a series of coordinated attacks by Iraqi forces in 1988-1989, which targeted the Kurdish population in northern Iraq and included the use of chemical weapons. It is estimated that between

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<sup>93</sup> OSCE Mission in Kosovo, *Kosovo War Crimes Trials: A Review*, September 2002, 34.

<sup>94</sup> See the cases and indictments referred to in note 70.

<sup>95</sup> *Prosecutor v Krstic*, Judgment, Trial Chamber, 2 August 2001, para 595. This finding was confirmed by the Appeals Chamber in April 2004. For discussion of this decision, see Schabas, W., 'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia' (2002) 25 *FILJ* 23 and Southwick, K., 'Srebrenica as Genocide? The *Krstic* Decision and the Language of the Unspeakable' 8 *Yale Human Rights & Development Law Journal* 188.

<sup>96</sup> [\*The Application of the Convention on the Prevention and Punishment of the Crime of Genocide \(Bosnia and Herzegovina v. Serbia and Montenegro\)\*](#), Judgment, 26 February 2007, para. 297.

<sup>97</sup> *Ibid.*, para. 438 (prevention) and para. 449 (punishment).

<sup>98</sup> *Prosecutor v Milorad Trbic*, Indictment issued 25 July 2007.

<sup>99</sup> *Prosecutor v Mitrovic et al.* The indictment was subsequently amended into three separate indictments, in the cases of *Prosecutor v Mitrovic*, *Prosecutor v Stevanovic*, and *Prosecutor v Stupar et al.* *Prosecutor v Vukovic*, Indictment issued 2 September 2008. *Prosecutor v Gavic*, Indictment issued 11 June 2008; *Prosecutor v Tomic*, indictment issued 25 August 2008; *Prosecutor v Todorovic*, amended indictment issued 13 October 2008, the accused pleaded guilty to aiding and abetting crimes against humanity and violations of international humanitarian law and the genocide charge was withdrawn; and *Prosecutor v Pelimis and another*, Indictment issued 28 November 2008.

<sup>100</sup> *Prosecutor v Stupar et al.*, First Instance Decision, 29 July 2008.

50,000 and 100,000 Kurds were killed, 1.5 million Kurds were resettled and 60,000 Kurds fled to Turkey as refugees.<sup>101</sup> The IHT convicted five of the defendants for genocide.<sup>102</sup> The Trial Chamber held that the Kurds were a national and ethnic group, targeted for their ethnicity.<sup>103</sup> The accused committed or instigated prohibited acts against the Kurds in Anfal, in particular killings, causing severe mental or physical damage and subjecting the community to harsh conditions of living. These acts were committed with the necessary special intent.<sup>104</sup> Of the other atrocities committed during the Hussein regime, two instances may constitute genocide and could form the basis of future trials for genocide: the campaign against the Marsh Arabs in southern Iraq<sup>105</sup> and the attacks against the town of Halabja.<sup>106</sup>

### 5.1.2 War Crimes

The main determinant in the inclusion of war crimes in the material jurisdiction of a tribunal is the existence of an armed conflict, as all war crimes must have been committed in connection with an armed conflict. The nature of that armed conflict, whether international or non-international, will govern the type of war crime that is

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<sup>101</sup> For further details see Human Rights Watch, *Genocide in Iraq: The Anfal Campaign Against the Kurds* (1993).

<sup>102</sup> Charges against one defendant were dropped for lack of evidence. Saddam Hussein was removed from the indictment following his execution on 30 December 2006. For criticism of the decision to remove Hussein from the proceedings, see Kelly, M., 'The Anfal trial against Saddam Hussein' (2007) 9 *Journal of Genocide Research* 235. The judgment confirmed widely held opinion that the acts against the Kurds in Anfal constituted genocide: Kelly, M., 'The Tricky Nature of Proving Genocide Against Saddam Hussein Before the Iraqi Special Tribunal' (2005) 38 *Cornell International Law Journal* 983. Unlike the first judgment of the IHT in the Dujail trial, the Anfal judgment, despite its significance as the first genocide conviction to be given in the Middle East and to be presented in Arabic, has attracted little attention from the media or commentators.

<sup>103</sup> Special Verdict Pertaining to Case No 1/ CSecond/2006, *Al Anfal*, 24 June 2007 (Unofficial English translation), (*Anfal judgment*) 489-90.

<sup>104</sup> The Trial Chamber rejected submissions on behalf of the accused that the special intent was lacking. The genocidal intent was inferred from the acts committed, the systematic manner in which they were conducted, and evidence produced by witnesses and in official documents from the period.

<sup>105</sup> Several commentators consider that this may have constituted genocide: see Schwabach, A., 'Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Armed Conflicts' (2004) 15 *Colorado Journal of International Environmental Law & Policy* 1, 8; Nesiha, V., 'From Berlin to Bonn to Baghdad: A Space for Infinite Justice' (2004) 17 *HHRJ* 75, 97; and Nicholson, E., *Case for Genocide: The Decimation of the Marsh Arabs*, (available at <http://www.emmanicholson.org.uk>). However, as Kelly notes, the case for the genocide of the Marsh Arabs will be difficult for the prosecution to establish, particularly as the act was the result of a more indirect method – draining the marshes – and there are other possible justifications for the policy against the Marsh Arabs.

<sup>106</sup> This charge would concern the use of multiple chemical weapons by the Iraqi military against the Kurdish town of Halabja in March 1988. Up to 7,000 Kurds perished in the attack. See: Kelly, note 99, 237 and Kelly, M., *Ghosts of Halabja: Saddam Hussein's Trial for the Kurdish Massacre* (2008, Praeger Security International). It appears that the IHT has not charged genocide in this case: Jurist, 'Court begins new trial for "Chemical Ali"' 22 December 2008.

included in the statute. The conflict in Sierra Leone was generally considered to be a non-international armed conflict, despite the suggested involvement of foreign elements.<sup>107</sup> Accordingly, the SCSL Statute includes jurisdiction only in respect of serious violations of Common Article 3 and Additional Protocol II to the Geneva Conventions, which regulate internal armed conflicts.<sup>108</sup> Sierra Leone was a party to these instruments at the relevant time.<sup>109</sup> The SCSL Statute also confers jurisdiction in respect of three specific offences as serious violations of international humanitarian law:<sup>110</sup> intentionally directing attacks against the civilian population as such or against civilians not taking direct part in hostilities;<sup>111</sup> intentionally directing attacks against protected personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations;<sup>112</sup> and conscripting or enlisting children under the age of 15 into armed forces or groups or using them to participate actively in hostilities.<sup>113</sup> The final provision addresses the issue of the recruitment and use of child soldiers, which was widespread in Sierra Leone. Charges under this article have been included in all indictments issued by the SCSL. However, there were concerns that this provision did not represent customary international law.<sup>114</sup> The Appeals Chamber has confirmed

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<sup>107</sup> The conflict in Sierra Leone has been linked with the conflict in Liberia. Charles Taylor, the former President of Liberia, was alleged to have been a principle supporter of the conflict in Sierra Leone. It has also been suggested that Burkina Faso provided military assistance to the RUF: see Akinrinade, B., 'International Humanitarian Law and the Conflict in Sierra Leone' (2001) 15 *Notre Dame Journal of Law, Ethics and Public Policy* 391, 406.

<sup>108</sup> The Appeals Chamber and both Trial Chambers have held that 'it is immaterial whether the conflict is internal or international in nature' for the application of articles 3 and 4 of the SCSL Statute: *Prosecutor v Norman, Fofana and Kondewa*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 68; *Prosecutor v Fofana*, Appeals Chamber, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Nature of the Armed Conflict, 25 May 2004, para. 31; *Prosecutor v Brima, Kamara and Kanu*, Judgment, 20 June 2007, para. 249; and *Prosecutor v Norman, Fofana and Kondewa*, Judgment, 2 August 2007, para. 696.

<sup>109</sup> See Table Three.

<sup>110</sup> Article 4. Contrast Article 3 of the ICTY Statute, which has been held to give residual jurisdiction in respect of other violations of international humanitarian law not contained in the other provisions of the ICTY Statute.

<sup>111</sup> This provision is identical to Article 8(b)(i) of the Rome Statute in relation to international armed conflict and to Article 8(e)(i) for non-international armed conflicts.

<sup>112</sup> The provision is drawn from Article 8(b)(iii) of the Rome Statute for international armed conflict and 8(e)(iii) for non-international armed conflicts. For discussion see Frulli, note 15, 864-5.

<sup>113</sup> This duplicates Article 8(b)(xxvi) of the Rome Statute which is applicable to international armed conflict and is largely the same as Article 8(e)(vii) for non-international armed conflicts.

<sup>114</sup> The provision as included in the SCSL Statute was not the original proposal. Concerned that the provision in the Rome Statute did not reflect customary international law, the Secretary General had recommended that the offence be restricted to 'abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities': Report, note 9, paras 17-18. It was the Security Council that insisted that the provision be amended so as to conform to the text of the Rome Statute: see S/2000/1234.

that the prohibition against the recruitment of child soldiers had customary international law status before 30 November 1996, the date the SCSL's temporal jurisdiction commenced.<sup>115</sup> Moreover, the Appeals Chamber held that child recruitment was criminalized under customary international law before it was set out as a criminal provision in treaty law, and certainly by November 1996, thus there was no issue concerning the retroactive application of article 4(c).<sup>116</sup>

The IHT has jurisdiction in respect of crimes committed in connection with both international armed conflicts and non-international armed conflicts. There are three international armed conflicts within the temporal jurisdiction to which the grave breaches provisions of the Geneva Conventions would apply: the Iran-Iraq war,<sup>117</sup> the invasion of Kuwait and the first Gulf War,<sup>118</sup> and the 2003 invasion of Iraq. However, there have been no trials in relation to these armed conflicts, although it appears that the IHT may be investigating possible war crimes committed during the invasion and occupation of Kuwait. There have been charges and convictions in relation to non-international armed conflicts. In the Anfal judgment, the Trial Chamber determined that there was a non-international armed conflict between the Government of Iraq and Pishmarga forces during the relevant time<sup>119</sup> and that the campaign in Anfal was connected with that armed conflict and was directed against the civilian population.<sup>120</sup> The accused were convicted of various crimes under article 13(4) of the IHT, characterised as other serious violations of the laws and customs of war applicable in a non-international armed conflict.

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<sup>115</sup> *Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Appeals Chamber, 31 May 2004, paras 17 to 23. For discussion, see Happold, M., 'International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone's Decision in *Prosecutor v Samuel Hinga Norman*' (2005) 18 *LJIL* 283; Smith, A., 'Child Recruitment and the Special Court for Sierra Leone' (2004) 2 *JICJ* 1141; La Haye, E., *War Crimes in Internal Armed Conflicts* (2008), 145-6. Both trial chambers have subsequently relied upon the decision of the Appeals Chamber on the customary status of this provision.

<sup>116</sup> *Ibid*, para. 53. Judge Robertson issued a strongly-worded dissenting opinion and was the only judge to address the hesitant position taken by the Secretary General during the drafting of the SCSL Statute: Dissenting opinion of Justice Robertson, 31 May 2004, paras 4 to 6.

<sup>117</sup> Iran became a party to the Geneva Conventions on 20 February 1957. Neither Iran nor Iraq is a party to Additional Protocols I or II.

<sup>118</sup> Kuwait became a party to the Geneva Conventions on 2 September 1967. It is also a party to Additional Protocol I (as at 17 January 1985).

<sup>119</sup> Although the trial chamber did not refer to the decision in *Tadic*, it appeared to adopt its criteria, noting that the Pishmarga forces were organised in military units having their own command and that 'the situation in Northern Iraq must not be considered an internal disturbance': *Anfal judgment*, 579.

<sup>120</sup> *Ibid*, 579.

Determining whether the threshold requirement of an armed conflict has been satisfied and the nature of the armed conflict was particularly difficult in East Timor. As Kress notes, ‘this threshold issue cannot be satisfactorily explored without touching upon the question of the international legal status of Indonesia’s presence in East Timor since 7 December 1975’.<sup>121</sup> East Timor became an occupied territory when it was ‘placed under the authority of the hostile army’.<sup>122</sup> The International Court of Justice has found that, following the departure of the Portuguese authorities from East Timor, ‘Indonesia has occupied the Territory, and the Parties acknowledge that the Territory has remained under the effective control of that state’.<sup>123</sup> From December 1975, East Timor was under Indonesian occupation, as provided for in common article 2 to the Geneva Conventions<sup>124</sup> and in customary international law.<sup>125</sup> The Geneva Conventions, in particular the grave breaches provisions set out in the fourth Geneva Convention, applied.<sup>126</sup> The Indonesian occupation subsisted until the withdrawal of Indonesian forces from East Timor sometime after 20 September 1999,<sup>127</sup> as did the application of the conventions.<sup>128</sup> The situation constituted one of international armed conflict. Evidence suggests that the majority of the violence during the relevant period was carried out by pro-integration militia. It is probable that the actions of such groups could be attributed to Indonesia and would be connected with the occupation, thus may have formed the basis of war crimes charges. There have also been suggestions that a non-international armed conflict existed in East Timor, between the pro-independence militia and pro-integration militia, acting with or under the control of the Indonesian military. Such a finding would have been controversial, as it would suggest that the Indonesian occupation was lawful, and that East Timor had become part of Indonesian territory. Alternatively, it would require a determination that the pro-integration forces were not attributable to Indonesia, that the militia were

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<sup>121</sup> Kress, C., ‘The 1999 Crisis in East Timor and the Threshold of the Law on War Crimes’ (2002) 13 *Crim LF* 409, 421.

<sup>122</sup> Article 42, Regulations to Hague Convention IV, 1907.

<sup>123</sup> *East Timor (Portugal v Australia)* ICJ Reports (1995), para. 13.

<sup>124</sup> Article 2, Fourth Geneva Convention indicates that the convention applies ‘to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance’.

<sup>125</sup> Kress, note 121, 426. See also Linton, S., ‘Prosecuting Atrocities at the District Court of Dili’ (2001) 2 *Melb JIL* 414, 441.

<sup>126</sup> For discussion, see Kress, note 121, 429-434; Linton, *ibid*, 444.

<sup>127</sup> The status of occupation ends when the occupying power withdraws its forces from the occupied territory. Kress notes that in Indonesia this occurred sometime between 20 September 1999 (the date of deployment of INTERFET) and 4 October 1999, by which time Indonesian had substantially reduced the number and role of its forces: Kress, note 121, 445-447.

<sup>128</sup> Arguably, the full protection of the fourth Geneva Convention would have lapsed one year after the close of military operations, although key provisions would have continued to apply: article 6, Fourth Geneva Convention.

organised and that the instances of violence between the two groups was of a sufficient intensity so as to constitute a non-international armed conflict. The available evidence suggests that it is unlikely that these elements would be satisfied. If they were, the provisions of Common Article 3 would have applied, violations of which give rise to criminal responsibility.<sup>129</sup>

The Commission of Inquiry report did not refer to the inclusion of war crimes in the material jurisdiction of the proposed tribunal. The SPSC have not been required to determine whether an armed conflict existed, and the nature of that conflict, as no indictments were issued including charges of war crimes. Interestingly, the SPSC did determine, in obiter, that:<sup>130</sup>

[D]uring 24 years of Indonesian rule in East Timor, there was an armed conflict between paramilitary groups openly supported by Jakarta and others dedicated to the independence of this half-island territory since the Portuguese colonial period. That conflict heightened in the second half of late 1990's with the persecution against civilian population when the international community addressed its concerns about the autonomy or independence of this territory....The Panel notes that the parties agreed that, at least some months before and after the popular consultation on 30 August 1999, there was an armed conflict in East Timor.'

This finding has been criticised, as it demonstrates a misunderstanding of the elements required to establish crimes against humanity, with the panel indicating – incorrectly – that a connection to an armed conflict was required.<sup>131</sup> Moreover, the conclusion as to the existence of an armed conflict was reached without any reference to the applicable jurisprudence of the ICTY, including the test developed in *Tadic*. The finding also does not consider the effect of Indonesia's unlawful occupation of East Timor, nor the implications of the peace agreement between the Indonesian military and FALINTIL on 21 April 1999.

The ICTY has held that there existed an international armed conflict in Bosnia from 1992 to 1995 and that a situation of armed conflict existed from 1992 to the signing of

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<sup>129</sup> See Amnesty International, *East Timor: Demand for Justice*, 28 October 1999, 13-4. As Indonesia is not a party to Additional Protocol II, the provisions of Additional Protocol II would apply only to the extent they were considered to be reflected in customary international law: Greenwood, C., 'Customary Law Status of the 1977 Additional Protocols' in Delissen & Tanja (eds) *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven* (1991) 93.

<sup>130</sup> *General Prosecutor v Joni Marques and 9 others (The Los Palos Case)*, Judgment, 11 December 2001, paras 680-1 (footnotes omitted).

<sup>131</sup> For further discussion, see JSMP Trial Report, *The Los Palos Case*, March 2002.

the Dayton Agreement in 1995.<sup>132</sup> The ICTY generally does not specify the nature of the armed conflict, due to its finding that violations of Common Article 3 gave rise to individual criminal liability in both international and non-international armed conflicts. The Criminal Code of Bosnia and Herzegovina criminalises war crimes against civilians (Article 173), war crimes against the wounded and sick (Article 174) and war crimes against prisoners of war (Article 175). These provisions are based on those found in the SFRY Criminal Code and partially implement Bosnia's obligations arising from the Geneva Conventions and the first and second Additional Protocols. The WCC has issued a number of indictments and rendered several convictions for war crimes, in particular violations of Articles 173 and 175.

It is generally accepted that the period in Kosovo from 24 March to 10 June 1999 (the NATO bombing campaign) constituted an international armed conflict. The ICTY has held that a non-international armed conflict existed in Kosovo between the Kosovo Liberation Army (KLA) and the armed forces of the FRY<sup>133</sup> and continued until at least the commencement of the bombing campaign.<sup>134</sup> This is reflected in the charging practice of the ICTY, where all indictments concerning Kosovo have charged acts as war crimes pursuant to Article 3 of the ICTY statute, rather than under Article 2, the grave breaches provision. As with the genocide cases discussed above, many of the earlier cases in Kosovo to consider war crimes charges reflected apparent overcharging in relation to alleged acts by Serbs, resulting in several convictions being overturned by the Supreme Court.<sup>135</sup> The Supreme Court has determined that 'the armed conflict in Kosovo between March 24 1999 and June 1999 consisted of an

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<sup>132</sup> *Prosecutor v Tadic*, Judgment, Appeals Chamber, 2 October 1995, paras. 84-86 and *Prosecutor v Kordic*, Judgment, Trial Chamber, 26 February 2001, para. 66 (between the FRY - having 'overall control' of the Army of the Bosnian Serb military and paramilitary units - and the Army of Bosnia) and *Prosecutor v Furundzija*, Judgment, Trial Chamber, 10 December 1998, paras 51-59 (between the Croatian Defence Council and the Army of BiH); *Prosecutor v Rajic*, Review of the Indictment pursuant to Rule 61 of the RPE, Trial Chamber, 13 September 1996, paras. 13, 26, 32 and *Prosecutor v Blaskic*, Judgment, Trial Chamber, 3 March 2000, paras 83-123 (Croatian control over Bosnian Croats). See also the discussion in Schabas, note 1, 243-246.

<sup>133</sup> *Prosecutor v Limaj*, Judgment, Trial Chamber, 30 November 2005, para. 171 ('before the end of May 1998 an armed conflict existed in Kosovo between the Serbian forces and the KLA'); *Prosecutor v Haradinaj et al*, Judgment, Trial Chamber, 3 April 2008, para. 100 (armed conflict existed from and including 22 April 1998). For discussion of the analysis of the ICTY in the *Limaj* case, see La Haye, note 115, 11-12.

<sup>134</sup> *Prosecutor v Slobodan Milosevic*, Decision on Motion of Acquittal, 16 June 2004, paras 14-40. The Trial Chamber determined that there was sufficient evidence of an armed conflict in Kosovo between 1 January 1999 and 24 March 1999.

<sup>135</sup> For example, in the *Apostolovic case*, four Serbs were charged with war crimes under article 142 of the FRYCC. An international prosecutor amended the indictment, dropping the war crimes charges and including instead a charge of causing general danger. The accused was acquitted. See Hartmann, M., 'Kosovo' (2003) 4 *YbIHL* 514.

international armed conflict [ie FRY-NATO] alongside an internal one [ie FRY-LKA]’.<sup>136</sup> The Court rejected the suggestion that the NATO intervention had transformed the character of the conflict from a non-international armed conflict to an international armed conflict, finding that there was no evidence that NATO had overall control of the KLA ‘even applying the most lax “overall control” test’.<sup>137</sup>

### **5.1.3 Crimes against humanity**

Perhaps the most difficult element to establish in relation to crimes against humanity is that the attack against the civilian population must have been widespread or systematic. It is now generally accepted that a connection to an armed conflict is not an element of a crime against humanity and that customary international law does not require a discriminatory motive other than for the offence of persecution. The offence of crimes against humanity is included in the material jurisdiction of all the tribunals studied, with the exception of the LST. Article 2 of the SCSL Statute incorporated crimes against humanity.<sup>138</sup> All indictments issued by the SCSL included counts of crimes against humanity. The Appeals Chamber has held that the general elements of crimes against humanity had been established in relation to the activities of the CDF in Sierra Leone.<sup>139</sup> Similarly, the Trial Chamber in the AFRC trial found that a widespread or systematic attack by AFRC/RUF forces was directed against the civilian population of Sierra Leone at all times relevant to the indictment.<sup>140</sup> It also found evidence that preconceived plans or policies for the execution of the attack existed both in the period where the AFRC/RUF were the government and in the post-intervention period.<sup>141</sup>

The Special Law includes crimes against humanity in the material jurisdiction of the ECCC. All individuals subject to investigation will most likely be charged with crimes against humanity. On the evidence that was available to the Group of Experts, it appears that the most difficult element of the crime to establish would be the systematic nature of the attacks, as it has been argued that many atrocities ‘lacked

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<sup>136</sup> *Kolasinac case*, Supreme Court of Kosovo, Decision of 9 January 2004, para. 21, quoted from Hartmann, M., ‘Kosovo’ (2004) 7 *YbIHL* 568, 561. In so doing, the Court endorsed the approach of pairing of conflicts, as opposed to the so-called global view, whereby the intervention of a foreign state changes the overall nature of the existing conflict.

<sup>137</sup> *Ibid.*

<sup>138</sup> See Udombana, N., ‘Globalization of Justice and the Special Court for Sierra Leone’s War Crimes’ (2003) 17 *Em ILR* 55.

<sup>139</sup> *Prosecutor v Fofana and Kondewa*, Judgment, Appeals Chamber, 28 May 2008, paras 232-322.

<sup>140</sup> *Prosecutor v Brima, Kamara and Kanu*, Judgment, Trial Chamber, 20 June 2007, paras 232 and 237.

<sup>141</sup> *Ibid.*, paras 230-2 and para. 238.

direction and amounted effectively to random cruelty'.<sup>142</sup> Assuming that state action was required as of 1975, the Group of Experts also noted that 'many of the acts appeared part of a deliberate, widely known governmental policy'<sup>143</sup> and the State must have been involved as 'only the Government ... had the control of the country needed to engage in these acts'.<sup>144</sup>

The reports of the Commission of Inquiry and the Special Rapporteurs highlighted that the violence committed in East Timor during 1999 was on a large scale, one that was widespread or systematic or both.<sup>145</sup> Given the difficulties with establishing genocide and war crimes, most acts in East Timor were charged as crimes against humanity or as crimes under domestic law. Section 5 of Regulation 2000/15 largely adopts the definition of crimes against humanity found in the Rome Statute,<sup>146</sup> including the requirement to establish the policy element of the crime. The first trial including charges of crimes against humanity commenced in July 2001.<sup>147</sup> Notably, the SPSC found that it was 'satisfied beyond reasonable doubt that there was an extensive attack by pro-autonomy groups supported by Indonesian authorities targeting the civilian population in the area, namely those linked with political movements for self-determination in East Timor'.<sup>148</sup> In reaching this finding, the SPSC relied upon the conclusions of the Commission of Inquiry, which had been admitted without challenge, and witness testimony. Subsequent decisions before the SPSC have confirmed the existence of a widespread and systematic attack.<sup>149</sup> However, as all of the members of the Indonesian military and its command indicted by the SPSC

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<sup>142</sup> Report of the Group of Experts, note 54, para. 68.

<sup>143</sup> Report, note 54, para. 68.

<sup>144</sup> Report, note 54, para. 70. For a discussion of the prospects of a conviction for crimes against humanity, see Bunyanunda, note 57, 1591-1601.

<sup>145</sup> Report on the joint mission of the special rapporteurs and representatives, Situation of human rights in East Timor, A/54/660, 10 December 1999, para. 71; Report of the International Commission of Inquiry on East Timor, S/2000/59, A/54/726, para. 123.

<sup>146</sup> For a discussion of the textual differences between section 5 and article 7 of the Rome Statute, see Ambos, K. and Wirth, S., 'The Current law of Crimes Against Humanity: an analysis of UNTAET Regulation 15/2000' (2002) 13 *Crim LF* 1.

<sup>147</sup> The *Los Palos* case, filed in December 2000, comprised seven charges of crimes against humanity, including murder, torture, persecution and forced deportation. The indictment related to ten East Timorese men, alleged to have been members or supporters of a militia group.

<sup>148</sup> *The General Prosecutor v Joni Marques et al* (the *Los Palos* case), Judgment, 11 December 2001, para. 686.

<sup>149</sup> For example, see *Prosecutor v Jose Cardoso*, Judgment 5 April 2003, paras 314-321, 'the events that took place in Lolotoe were a systematic attack against the civilian population', 314.

remained at large, it was not possible to scrutinise the relationship between the East Timorese militia and the TNI and the role of the TNI in the violence.<sup>150</sup>

Article 172 of the Criminal Code of Bosnia and Herzegovina largely duplicates the definition of crimes against humanity found in the Rome Statute.<sup>151</sup> The WCC may, at the request of a party or *proprio motu*, accept as proven facts that have been established by legally binding decisions in proceedings before the ICTY or documentary evidence from proceedings of the ICTY.<sup>152</sup> The WCC has relied upon the jurisprudence of the ICTY to establish the existence of a widespread and systematic attack on the civilian population in Bosnia.<sup>153</sup> There was initial confusion as to the requirement for a nexus to an armed conflict, which is not required by Article 172, although it is a requirement under Article 7 of the ICTY Statute. Early decisions of the WCC referred to the existence of an armed conflict and the fact that the attack occurred within this context. This confusion may have been created by the reliance by various panels on the jurisprudence of the ICTY. Subsequent decisions have largely recognised this confusion.<sup>154</sup>

While the IJPP has been conferred jurisdiction in respect of crimes against humanity, no indictments have been issued that include charges of crimes against humanity. A public justification for the omission of charges of crimes against humanity has not been provided. It may be that the reluctance to utilise the crimes against humanity provision stems from the difficulties the ICTY has faced in proving the existence of

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<sup>150</sup> This was one criticism that the JSMP directed at the decision in *Cardoso* (above). While the three East Timorese accused were convicted, the Indonesian officer also indicted remained at large, thus there was no opportunity to document the relationship between the TNI and militia: JSMP, *The Lolotoe Case: A Small Step Forward*, July 2004, 32-3.

<sup>151</sup> There is a slight difference in the provision concerning sexual violence, with article 172 attempting to define rape: see article 172(1)(g).

<sup>152</sup> Article 4, Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence Collected by ICTY in Proceedings before the Courts in Bosnia and Herzegovina.

<sup>153</sup> For example, in the first judgment concerning crimes against humanity, the WCC accepted judgments of the Trial Chambers and Appeal Chamber in the *Kunarac* and *Krnjelac* cases, referring specifically to the findings of the ICTY in those judgments referring to 'the existence of a widespread and systematic attack of the Army of Bosnian Serbs against civilian Bosniak population in the territory of the Municipalities of Foca, Kalinovik and Gacko': *Prosecutor v Samardzic*, Judgment, 7 April 2006, 14

<sup>154</sup> *Prosecutor v Kovacevic*, Judgment, 3 November 2006. This finding has been repeated in several subsequent cases. See: *Prosecutor v Todorovic*, note 98, 24-26; *Prosecutor v Mihaljevic*, Judgment, 16 April 2008, 15; *Prosecutor v Fustar*, Judgment, 21 April 2008, 10; *Prosecutor v Vukovic*, Judgment, 4 February 2008, 11; and *Prosecutor v Jankovic*, Judgment, 16 February 2007, 31.

the general elements of the crime.<sup>155</sup> To date it has not found the existence of a widespread and systematic attack against a civilian population, at least in relation to the crimes alleged to have been committed by the KLA.<sup>156</sup>

The LST Statute is the first constituent instrument of an internationalized or international criminal tribunal not to include jurisdiction in respect of crimes against humanity. The Security Council did consider including crimes against humanity within the substantive jurisdiction of the LST and early drafts of the LST Statute had included crimes against humanity in Article 3. The decision to remove this provision reflected a lack of support amongst Security Council members, concerned that it would be too difficult for the prosecution to demonstrate the general elements required to establish the assassination of Hariri as a crime against humanity.<sup>157</sup> The failure to include crimes against humanity has also been attributed to specific requests from Russia and China.<sup>158</sup> However, it is certainly arguable that the assassination and related attacks could constitute a crime against humanity.<sup>159</sup>

## **5.2 Applicable legal framework**

In addition to whether the evidence could potentially satisfy the elements of the crimes to be included within the material jurisdiction of a tribunal, it is also necessary to examine the applicable legal framework. First, was the conduct in question a crime under international law at the relevant time? Conduct may be criminalised either by a treaty to which the state in question is a party, or under customary international law. Table Three details the treaties to which the states relevant to this study are party. All states, with the exception of Sierra Leone, were at the relevant time party to the Genocide Convention. Genocide is also recognized as a crime under customary international law.<sup>160</sup> All affected states were parties to the Geneva Conventions at the

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<sup>155</sup> However, the jurisdiction of the ICTY in respect of crimes against humanity in Kosovo is more restricted due to the requirement for a connection to armed conflict. This may make it problematic to charge crimes against humanity in relation to events occurring before the commencement of the armed conflict in Kosovo.

<sup>156</sup> *Prosecutor v Limaj et al*, Judgment, 30 November 2005, para. 228; *Prosecutor v Haradinaj et al*, Judgment, 3 April 2008, para. 122. An appeal from this decision is pending as at 31 December 2008, although it is not clear whether the Prosecutor will challenge the finding as to the failure to establish a widespread and systematic attack against the civilian population.

<sup>157</sup> Report, note 17, para. 23

<sup>158</sup> See Naharnet, 'UN to Finalize Hariri International Tribunal Monday', 24 October 2006 and Raghida Dergham, 'Talks of Deals between Washington, Damascus and Tehran', Dar Al Hayat, 3 November 2006.

<sup>159</sup> Report, note 17, para. 24; Jurdi, N., 'The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon' (2007) 5 *JICJ* 1125, 1127, footnote 11.

<sup>160</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports (1951), para. 24; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and*

relevant time, so the inclusion of grave breaches is also consistent with treaty-based obligations. However, the inclusion of provisions imposing individual criminal responsibility for violations of international humanitarian law in internal armed conflicts is more difficult. Cambodia was not a party to Additional Protocol II during the relevant period, thus inclusion of crimes committed during a non-international armed conflict during this period would rely upon violations of Common Article 3 giving rise to individual criminal responsibility. The extension of war crimes to situations not involving an international armed conflict has been a relatively recent development, and the date from which war crimes in an internal armed conflict formed part of customary international law is uncertain. As the Group of Experts concluded, it is very difficult to argue that customary international law recognised such criminality by 1975.<sup>161</sup> Thus the Special Law does not confer subject matter jurisdiction on the ECCC in relation to violations of international humanitarian law committed in a non-armed conflict.<sup>162</sup>

Similarly, Iraq is not a party to Additional Protocol II and there is some concern as to the application of article 13(4) of the IHT Statute to the situation in Anfal in 1987-88 and to other situations in Iraq. The provision criminalizes serious violations of the laws and customs of war applicable in a non-international armed conflict. Several commentators have criticised the basis for the inclusion of war crimes in non-international armed conflicts within the subject matter jurisdiction for this reason.<sup>163</sup> The IHT has rejected submissions that this violates the *nullum crimen* principle,

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*Montenegro*), *Preliminary Objections*, ICJ Reports (1996), 616; *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, ICJ Reports (2006), para. 64; *Case Concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ Reports (2007), para. 161

<sup>161</sup> Report, note 54, para. 75. This was two years before the International Committee of the Red Cross elaborated the laws of internal armed conflict in Additional Protocol II, which does not include any provisions on criminality. Moreover, although the ICTY has recognised that criminal responsibility for violations of Common Article 3 existed by the time of the Yugoslav war, this statement was most likely premature, and did not reflect the existing state practice: La Haye, note 1125 170-172; Schabas, note 1, 231-236. In any event, this recognition is still some 15 years after the events in Cambodia.

<sup>162</sup> Even if criminality could be established, it is arguable that the rebellion and other acts of violence in Cambodia may not have crossed the threshold of intensity required: see Ratner and Abrams, note 81, 293-4.

<sup>163</sup> Bantekas, I., 'The Iraqi special tribunal for crimes against humanity' (2004) 54 *ICLQ* 237-53, 242; Shany, Y., 'Does One Size Fit All?' (2004) 2 *JICJ* 338; and Olusanya, O., 'The Statute of the Iraqi Special Tribunal for Crimes Against Humanity – Progressive or Regressive?' (2004) 5 *Geo LJ* 859, 868-7 and 874.

finding that these crimes constituted customary international law.<sup>164</sup> However, the discussion was in general terms, and did not address this particular issue.

Until the adoption of the Rome Statute, there has not been a treaty-based definition of crimes against humanity. However, all of the tribunals other than the LST have included crimes against humanity within their substantive jurisdiction. The Special Law and the IHT Statute adopt the definition of crimes against humanity found in Article 7 of the Rome Statute.<sup>165</sup> The inclusion of crimes against humanity based on the Rome Statute may potentially have breached the *nullum crimen* principle. The ECCC will be considering acts committed in the period from 1975 to 1979, during which time Cambodian law did not criminalise crimes against humanity as such. In particular, if the nexus to an armed conflict was required in customary international law as at 1975, ‘the vast majority of the Khmer Rouge’s atrocities would not be crimes against humanity; historians have not linked the bulk of the atrocities of the Khmer Rouge to the armed conflicts in which it engaged’.<sup>166</sup> However, the Group of Experts concluded that the inclusion of crimes against humanity was ‘legally justified’, finding that the nexus to an armed conflict appeared to have been severed by 1975.<sup>167</sup> Moreover, many of the acts the Khmer Rouge is accused of committing clearly gave rise to individual criminal responsibility under international law by 1975.<sup>168</sup>

Article 12 of the IHT Statute incorporates most of the definition of crimes against humanity found in Article 7 of the Rome Statute. The use of this definition raises several issues. First, Iraq is not a party to the Rome Statute, thus reliance on Article 7 of the Rome Statute implies the imposition of a definition it has not accepted, let alone incorporated into domestic law. Second, Iraqi law did not criminalise crimes against humanity before the promulgation of the IHT Statute. This raises the possible retroactive nature of the inclusion of crimes against humanity in the IHT Statute, due

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<sup>164</sup> *Al-Dujail Lawsuit*, Case No. 1/9 First/2005, Judgment Decision, 5 November 2006, unofficial English translation, 35-44 (*Al-Dujail Case*).

<sup>165</sup> For criticism of using the Rome Statute definition in the Cambodian context, see Horsington, H., *The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal* (2004) 5 *MJIL* 462, 473-4.

<sup>166</sup> Report, note 54, para. 71.

<sup>167</sup> *Ibid.* The Group of Experts relied upon the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and the 1954 International Law Commission Draft Code. For the contrary view: Bunyanunda, note 57, 1591-2; Luftglass, S., ‘Crossroads in Cambodia: The United Nations Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge’ (2004) 90 *Virginia Law Review* 893, 922-4.

<sup>168</sup> Ratner and Abrams note murder, forced labour, torture, imprisonment and other inhumane acts: note 81, 290. The inclusion of other acts (such as enslavement, extermination and deportation) in the likely charges may be more problematic.

to the application of principles that may not have crystallised as part of customary international law until the 1990's to acts and events from Iraq occurring several decades previously.<sup>169</sup> In particular, Article 12 does not require a nexus to an armed conflict for crimes against humanity, yet this link was arguably a requirement for a crime against humanity under customary international law prior to the 1990's.<sup>170</sup> All trials to date have included charges of crimes against humanity. The first decision of the IHT - the *Dujail* trial - addressed the issue of the possible retroactive application of the IHT Statute, finding that the inclusion of crimes against humanity did not violate the *nullum crimen* principle.<sup>171</sup> In particular, the Trial Chamber concluded that crimes against humanity committed during peacetime were a crime under customary international law sometime before 1982.<sup>172</sup>

In Bosnia and Kosovo, one issue was whether crimes against humanity have direct application in domestic law, as the criminal codes of the SFRY and the FRY did not criminalise this offence. Several accused before the WCC have argued that the use of Article 172 of the Criminal Code of Bosnia and Herzegovina violates the *nullum crimen* principle.<sup>173</sup> The accused have suggested that conduct alleged to be a crime against humanity may only be prosecuted before the WCC if the acts in question would have constituted the offence of war crimes against civilians, criminalised by Article 142 of the SFRY Criminal Code.<sup>174</sup> The WCC has consistently rejected this argument, finding that crimes against humanity had been criminalised under customary international law at the time of commission.<sup>175</sup> The WCC's reasoning has

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<sup>169</sup> Several commentators have raised this concern. See, for example, Swift, R., 'Occupational Jurisdiction: A Critical Analysis of the Iraqi Special Tribunal' (2006) 19 *New York International Law Review* 1, 6-7; Bassiouni, note 34, 373-74; Olusanya, note 160, 868. As Bassiouni observes, this concern can be overcome with respect to genocide and war crimes (at least in relation to international armed conflicts) as Iraq was a party to the relevant treaties during this period and possibly in relation to crimes against humanity as many of the offences are found as ordinary crimes within domestic law: Bassiouni, note 34, 376-7.

<sup>170</sup> See the criticism of the IHT Statute on this ground in Shany, note 160, 344.

<sup>171</sup> *Al-Dujail* Case, 35-44. This finding was confirmed by the Appeals Chamber and followed in the *Anfal* case.

<sup>172</sup> *Ibid*, 43-4. The IHT relied upon numerous sources, including the 1950 report of the International Law Commission and article 2 of the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity 1968. It also noted that many of the acts in question had also been criminalised under Iraqi law.

<sup>173</sup> This principle is incorporated in the law of Bosnia by article 3 of the Criminal Code. Article 4(1) provides that the applicable law is the law in force at the time of commission of the offence. Where that law has been amended, the WCC is to apply the provisions most favourable to the accused.

<sup>174</sup> This argument was made on behalf of the accused in *Samardzic*, note 150.

<sup>175</sup> See, for example, *Samardzic*, note 150, 28-30. This aspect of the decision was confirmed by the Appeals Chamber, which noted that, in addition to forming part of customary international law, the conduct itself had been criminalised under the SFRY Criminal Code,

been based on customary international law, relevant treaties and general principles of international law.<sup>176</sup> Consequently, the WCC has held that use of Article 172 as the applicable law does not constitute a violation of the *nullum crimen* principle.<sup>177</sup> In Kosovo, Article 117 of the Kosovo Provisional Criminal Code criminalises crimes against humanity, based on the definition in the Rome Statute. A panel of District Court at Gjilan, which included an international judge, convicted the accused of crimes against humanity, although he had been indicted for war crimes and attempted murder.<sup>178</sup> The court found that Article 142 of the SFRYCC incorporated the customary international law crime of crimes against humanity into Kosovo's legal framework. The conviction was cancelled by the Supreme Court of Kosovo, comprising a majority of international judges, following a submission by the international prosecutor that the charges were not supported by the facts and that there had been violations of the applicable procedural law.<sup>179</sup> The case was referred for retrial, which did not include charges of crimes against humanity.<sup>180</sup> The decision of the District Court and, by implication, the approach adopted by the WCC has been criticised as violating the *nullum crimen* principle. Bohlander argues that the provisions in the constitutional orders of both Bosnia and Kosovo would take precedence over clauses that purport to incorporate customary international law. Where an offence is to be tried before a national court, it is essential that any crimes found in customary international law, in this case crimes against humanity, have been incorporated into domestic law.<sup>181</sup> It appears that the issue has not been raised before the IJPP since this decision, as no indictments have been issued including charges of crimes against humanity.

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albeit not as a crime against humanity: *Samardzic*, Appeal Chamber, note 150, page number not identifiable.

<sup>176</sup> Arguably the most detailed discussion of this issue is found in *Prosecutor v Palija*, Judgment, 28 November 2007, 18-21 and *Prosecutor v Damjanovic*, Judgment, 15 December 2006, 55-59.

<sup>177</sup> This is consistent with the jurisprudence of the ICTY on this point, with the Referral Bench concluding that, while the question of the applicable law was one for the national court, the possible options for the applicable law in Bosnia satisfied the requirements of Rule 11*bis* and would not violate the *nullum crimen* principle. See Williams, note 45.

<sup>178</sup> *Prosecutor v Trajkovic*, Decision, District Court of Gjilan, 6 March 2001, (2001) 4 *YbIHL* 12.

<sup>179</sup> *Prosecutor v Trajkovic*, Supreme Court of Kosovo, 30 November 2001, (2001) 4 *YbIHL* 12. The Supreme Court was not required to address the issue of direct application as it reversed the conviction on other grounds.

<sup>180</sup> Hartmann, M., (2002) 5 *YbIHL* 408

<sup>181</sup> Bohlander, M., 'The Direct Application of International Criminal Law in Kosovo' (2001) 1 *Kosovo Legal Studies* 7; Bohlander, note 27.

### 5.3 Crimes under domestic law

Much of the conduct criminalised by international law is also criminalised as an ordinary crime under domestic law, for example murder, torture, rape and assault. There are a number of reasons that may justify including crimes under national law within the jurisdiction of an internationalized or hybrid tribunal. First, the inclusion of offences under domestic law enables the tribunal to exercise jurisdiction where international law does not fully criminalize the conduct in question. Jurisdiction under domestic law was included in the SCSL Statute as the conduct in question was identified as ‘a specific situation or aspect of it was considered to be either unregulated or inadequately regulated under international law’.<sup>182</sup> The SCSL has jurisdiction in respect of two specific types of offences, the abuse of girls under the Prevention of Cruelty to Children Act 1926 and the wanton destruction of property under the Malicious Damage Act 1861, including arson.<sup>183</sup> However, the Prosecutor has elected not to issue any charges based on the national legal provisions, instead charging the conduct as international crimes.<sup>184</sup> This strategy has resulted in acquittals on some charges. For example, in the CDF trial, the accused were charged with pillage as a war crime. However the Trial Chamber held that ‘an essential element of pillage is the unlawful appropriation of property’ and that the destruction by burning of property does not constitute pillage’.<sup>185</sup> The Appeals Chamber confirmed this finding, noting that if pillage included wanton destruction, there would have been no need to include jurisdiction in respect of the Malicious Damage Act 1861.<sup>186</sup>

Second, drafters may include an offence as defined under national law where there is no consensus as to whether the crime, or an accepted definition of the crime, exists at the international level. This was perhaps the main reason justifying the use of the definition of terrorism under the Lebanese Criminal Code in the LST Statute. The Security Council may have adopted this approach due to the current disagreement amongst member states as to whether a definition of the international crime of

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<sup>182</sup> Report, note 9, para. 19. This is also the intent of the provision expanding the jurisdiction of the IHT in respect of offences under international law where international criminal law does not fully cover the situation or the conduct in question.

<sup>183</sup> Fritz and Smith suggest that the inclusion of domestic crimes was not essential, as both of these offences ‘fall within the ambit of CDF international crimes included in the Statute’, note 12, 409.

<sup>184</sup> The Prosecution has not provided any explanation of the reasons supporting this strategy. It is possible that the strategy may reflect concerns that crimes under national law may be covered by the terms of the amnesty included in the Lome Accord, which is discussed in more detail in the next chapter.

<sup>185</sup> *Prosecutor v Fofana and Kondewa*, Judgment, Trial Chamber, 2 August 2007, para. 166.

<sup>186</sup> Judgment, note 136, para. 408.

terrorism exists.<sup>187</sup> Relying on the domestic definition of the crime avoids the use of a definition of terrorism or terrorist acts as found in the various terrorism conventions<sup>188</sup> or a definition based on custom.<sup>189</sup> A reference to the definition of terrorism in Article 1 of the Arab Convention for the Suppression of Terrorism 1998, to which Lebanon is a party,<sup>190</sup> was included in a preliminary draft of the LST Statute but was later deleted, reportedly at the request of a permanent member of the Security Council.<sup>191</sup> As a result, the accused will be tried pursuant to the definition of terrorism under domestic law.

In relation to Iraq, Kress has criticised the inclusion of the domestic offence of ‘the abuse of position and the pursuit of policies that were about to lead to the threat of war or the use of the armed forces of Iraq against an Arab country’ in the IHT Statute.<sup>192</sup> He argues that this provision represents a failure to include the crime of aggression as an international crime within the jurisdiction of the IHT. Whilst this provision presumably does incorporate the domestic crime of using force against an Arab country, Kress asserts that this provision is not a codification of international principles on the crime of aggression, but a more limited provision aimed at criminalizing conduct that may threaten the security of other Arab states.<sup>193</sup> As such, it would not extend to the use of force against Iran, a non-Arab state, or attacks against Israel during the Gulf War and complicity in Palestinian violence against Israeli civilians.<sup>194</sup> Further, Kress laments the ‘downgrading’ of waging a war of aggression into a domestic crime.<sup>195</sup> However, as is demonstrated by the experience of the ICC, a generally accepted definition of aggression may not yet exist as a matter of customary international law.<sup>196</sup> Thus, as the experience of the LST with regard to terrorism

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<sup>187</sup> Member states have been engaged in debate for several decades as to whether there is a common definition of terrorism, with the main cause for division the issue of whether the actions of ‘freedom fighters’ should be included in the definition of terrorism, or whether the definition should require an examination of the underlying cause of the attack. While this dispute remains unresolved, states have been reluctant to accept that a generally accepted definition of terrorism exists.

<sup>188</sup> Few treaties contain a comprehensive definition of terrorism, avoiding the political difficulties by instead listing specific acts that are considered terrorist acts.

<sup>189</sup> For the argument that a definition of terrorism exists as a matter of customary international law, see Cassese, A., ‘The Multifaceted Criminal Notion of Terrorism in International Law’ (2006) 4 *JCIJ* 933; and Saul, B., *Defining Terrorism in International Law* (2006).

<sup>190</sup> Lebanon ratified this convention on 31 March 1999.

<sup>191</sup> Jurdi, note 156, 1128, in particular footnote 18.

<sup>192</sup> Kress, C., ‘The Iraqi Special Tribunal and the Crime of Aggression’ (2004) 2 *JICJ* 347.

<sup>193</sup> *Ibid*, 348.

<sup>194</sup> Alvarez, ‘Trying Hussein: Between Hubris and Hegemony’ (2004) 2 *JICJ* 319, 321.

<sup>195</sup> Kress, note 192, 348.

<sup>196</sup> While the crime of aggression was included in the subject matter jurisdiction of the ICC, the court’s jurisdiction in respect of the crime of aggression has been deferred until agreement can

shows, it may have been very difficult to incorporate the crime of aggression as an international crime into the IHT Statute.

Reliance on national provisions may eliminate a possible violation of the *nullum crimen* principle, which is particularly important when the temporal jurisdiction was a number of years ago or the applicable criminal law did not criminalise the conduct in question as an international crime. As we have seen, several of the tribunals studied, in particular the IHT and the ECCC, have heard arguments in respect of possible violations of this principle.

The inclusion of offences under national law may enable a full record of the context and range of crimes that have been committed during the conflict. The original approach towards the IHT Statute was criticised for minimising the emphasis placed on ‘everyday’ crimes committed by the Hussein regime against its own people, focusing instead on the armed conflicts in which Iraq engaged during the regime. Many of these crimes would not meet the threshold or the specific intent required for genocide, or would lack the ‘widespread or systematic’ attack element required for crimes against humanity. Yet, if one of the objectives of the IHT is to create a full record of the abuses perpetrated by the previous regime, exclusion of these everyday crimes would obscure the true nature of the crimes committed by the regime. Shany, commenting on the original version of the IHT Statute, argued that to include more domestic crimes within the jurisdiction of the IHT would have ‘produced a more complete picture of the criminal practices allegedly committed by the Ba’ath regime’.<sup>197</sup> In particular, he noted that the domestic offences of murder, sexual offences, torture<sup>198</sup> and destruction of and damage to property should have been included, given the apparent frequent commission of these crimes during the Hussein regime.<sup>199</sup> Shany also suggested that utilizing more provisions from domestic criminal law, subject to modifications, to fill gaps and to render the law compliant with international human rights standards, would have been more consistent with the

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be reached on a definition of the crime. The issue will be considered at a meeting of the ASP in 2010. For further discussion, see, Gaja, G., ‘The Long Journey towards Repressing Aggression’ in Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary*, Volume I (2003, OUP), 431.

<sup>197</sup> Shany, note 163, 343.

<sup>198</sup> Note, however, that as Iraq has not ratified the Convention Against Torture, it may have been considered that the offence did not form part of Iraqi law or customary international law at the relevant times, thus presenting a possible *nullum crimen* issue.

<sup>199</sup> Shany, note 164, 343.

domestic staffing and constitution of the IHT.<sup>200</sup> The revised jurisdiction of the IHT appears to have partly addressed these concerns.

Finally, there is often a perception, justified or otherwise, that offences under domestic law will be easier for the prosecution to establish than international crimes. Proving an isolated instance of murder under domestic law does not require the prosecution to prove the existence of a widespread or systematic attack against the civilian population, as would be required to establish a crime against humanity. This has the advantages of ensuring successful convictions, more 'easily' and, most likely, more quickly, and with less expense, and may explain why the SCU and the SPSC concentrated on charging lower-level offenders with single incidents under the Indonesian Penal Code in the initial phases. The ability to avoid the evidentiary burdens of proving some of the international crimes has also been advanced as justifying the inclusion of a greater number of offences under national law in the jurisdiction of the IHT.<sup>201</sup> Similarly, the national approach to the subject matter jurisdiction of the LST may have been warranted by the nature of the attack and its circumstances rendering it difficult to categorise the act as falling within the definition of any recognised international crimes.

Against these possible advantages must be balanced certain risks. First, a too-great reliance on national crimes risks minimising the impact of events and a failure to present the wider context, such as the systematic nature of the incidents and the involvement of the state or senior leaders. The prosecution strategy of the SCU was questioned, including by certain members of the SPSC, as risking trial records being focused on individual acts and failing to place the act within the wider context of the violence in East Timor. As noted above, after the first indictment for murder as a crime against humanity was issued in the *Los Palos* case, prosecutorial strategy shifted so that the majority of killings were charged as crimes against humanity. Several earlier indictments were also amended to charge murder as a crime against humanity instead of a domestic crime under the Indonesian Penal Code.<sup>202</sup>

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<sup>200</sup> Ibid, 342.

<sup>201</sup> Shany, note 163.

<sup>202</sup> For example, in *Prosecutor v Lino do Carvalho*, the accused was originally charged with one charge of murder and three counts of maltreatment. The SPSC granted leave to amend the indictment, and a new indictment was filed in May 2001 charging the accused with crimes against humanity, including one count of murder and two counts of inhumane acts.

Second, there may be several deficiencies in the national legal provisions to be applied. For example, Jurdi has highlighted several deficiencies in the Lebanese definition of terrorism,<sup>203</sup> in particular its excessive breadth and the requirement that the terrorist act must utilize explosive devices, inflammable materials, poisonous or incendiary products or infectious or microbial agents or other means that cause public hazard. This would preclude the prosecution of assassinations using guns, as although the impact of the assassination would be to terrorize the population, a gun of itself does not cause a public hazard.<sup>204</sup> Similarly, the SPSC faced a number of problems in utilising the definition of rape under the Indonesian Penal Code<sup>205</sup> and only one indictment charged the accused with rape under domestic law.<sup>206</sup>

Third, there may be significant practical problems in applying national legal provisions. For example, the use of the 1956 Penal Code of Cambodia creates a number of problems. Primary and secondary sources on the Penal Code are scarce, and fail to update the law from its adoption until 1975. Moreover, the extent to which its contents remained in force during subsequent governments is not clear. Judges, prosecutors and defenders have not applied the law for a considerable time, and are likely to be unfamiliar with its provisions and their application, and provisions of the law may be inconsistent with more recently developed international standards.<sup>207</sup> Similar difficulties were encountered in East Timor and Kosovo. The use of international personnel requires translation of legal texts, working papers, trial proceedings and judgements, which was frequently unavailable, unreliable, or subject to significant delays. Moreover, international personnel are unfamiliar with the national legal provisions, including both substantive and procedural law.

#### **5.4 Which body should decide?**

Where there is doubt as to whether the evidence justifies including a particular crime within the subject matter of the tribunal, or as to whether the applicable legal framework criminalizes the conduct in question, a related question is who should determine this issue. One approach is for the drafters of the constituent instrument to

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<sup>203</sup> Article 314 of the Lebanese Penal Code defines terrorist acts as ‘all acts designed to create a state of alarm which are committed by means such as explosive devices, inflammable materials, poisonous or incendiary materials or infectious or microbial agents likely to create a public hazard’.

<sup>204</sup> Jurdi, note 159, 1136.

<sup>205</sup> There are a number of relevant provisions under the Indonesian Penal Code, all located in the section concerning crimes against decency. Rape is criminalised by article 285. For discussion, see Linton, S., ‘Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor’ (2001) 25 *Melb ULR* 122, 169-170.

<sup>206</sup> *Prosecution v Francisco Soares*, 15 January 2001.

<sup>207</sup> See Linton, note 81 and Ratner and Abrams, note 81.

pre-determine the issue and to not include crimes where doubt exists. This can be seen in the approach to drafting the SCSL Statute and the LST Statute, and the Special Law with regards to violations of international humanitarian law in internal conflicts. This approach has been criticised, with commentators suggesting that a broad subject matter jurisdiction should have been granted to the SCSL, leaving determination as to whether those crimes could be substantiated to the prosecutor and ultimately the judges.<sup>208</sup> Similarly, terrorism as a crime against humanity could have been retained in the LST Statute, leaving it to the prosecution to determine whether establishing this offence would be possible.

The other approach is to leave it for the prosecution, and the judges of the tribunal, to determine which charges are substantiated. The study of existing practice suggests that in many circumstances, prosecutors will not prosecute offences where there is doubt that the elements of a crime will be satisfied or that the legal framework is inadequate. For example, no indictments have been issued in respect of genocide in the ECCC or the SPSC. The Serious Crimes Unit in East Timor did not support indictments in respect of war crimes, given the uncertainty as to whether an armed conflict existed, and the nature of that conflict. The Serious Crimes Unit and the General Prosecutor appear to have taken the view that the violence surrounding the transition did not constitute an armed conflict, or else that the legal status of the territory – and hence the applicable legal regime – was too uncertain. Where dubious indictments are issued, perhaps as a result of bias or unfamiliarity with the law, tribunals have refused to convict or appellate panels have overturned convictions, as shown by the practice of the IJPP regarding genocide. Prosecutors in Kosovo have not indicted individuals with crimes against humanity, perhaps due to the uncertainty as to whether the crime has been incorporated in domestic law. However, the greater risk is when proceedings are commenced and convictions entered, despite concerns as to whether the applicable law supports the inclusion of such charges. Perhaps the most worrying instances of this are the convictions by the IHT for offences in non-international armed conflicts, and charges based on the definition of crimes against humanity in the Rome Statute being applied to conduct over twenty years before its adoption.

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<sup>208</sup> Beresford, S. and Muller, S., ‘The Special Court for Sierra Leone: An Initial Comment’ (2001) 14 *LJIL* 635, 642; Fritz and Smith, note 12, 408-9; McDonald, note 35, 141 – noting that as a result the conflict will not be seen in the context of the regional conflict. Amnesty International stated that the decision as to whether the evidence supported inclusion of genocide charges should have been left to the prosecutor: McDonald, note 35, 140.

Cryer suggests that the decision as to which entity shall make this determination is governed, at least in part, by whether the drafters perceive the tribunal in question to be a 'safe' tribunal. He argues that '[T]he trend is for the creators of international criminal courts to take a wider view of the definitions of crimes when they are not to be subject to their jurisdiction than when they are'.<sup>209</sup> It is difficult to see to what extent this theory is validated in the practice of the internationalized and hybrid tribunals. The personal and temporal jurisdiction of the tribunals and their context often effectively preclude nationals of states other than the territorial state. The horizontal model that is applied to these tribunals in respect of immunity and state cooperation, also acts to minimise the possibility of trials of nationals of other states, at least in the absence of a binding resolution of the Security Council.<sup>210</sup> Thus one would expect that the tribunals would have been conferred with extensive material jurisdiction. However, while this is arguably so in relation to the IHT, the SPSC, the IJPP and the WCC, it is true to only a limited extent as to the ECCC, and incorrect for the SCSL and the LST. There are two possible views of this finding. First, this may suggest that states are more willing to subject their nationals to uncertain and potentially expansive material jurisdiction before internationalized courts, particularly where restrictions as to the personal jurisdiction will focus efforts on leaders of a previous regime. Alternatively, this may speak more to the caution of the Security Council in enabling the establishment of hybrid or internationalized tribunals, the political factors at play and the need to limit resources.

## **6 Conclusion**

This Chapter has considered the emerging practice of the internationalized and hybrid tribunals in respect of their jurisdiction, temporal, territorial, personal and material. It has not been possible within the confines of this thesis to provide an exhaustive discussion of the interesting and important jurisprudence that has been emerging from the tribunals. However, this Chapter has drawn some conclusions as to the various jurisdictional issues considered. First, the three negotiated tribunals – the ECCC, the LST and the SCSL – have narrower mandates. These tribunals are subject to a limited temporal jurisdiction and are more likely to be subject to a seniority requirement and to have a restrictive material jurisdiction. Moreover, any issues as to the crimes to be included have in many cases been pre-determined during drafting of the relevant instruments, and are not left to the prosecution or the tribunal. This reflects both the temporary nature of such institutions and that they are intended to hear only a limited

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<sup>209</sup> Cryer, note 77, 233.

<sup>210</sup> See Chapter Five.

number of trials. These are the terms upon which the international community (whether the Security Council, the United Nations or member states) is prepared to offer assistance and, most importantly, funding. The remaining tribunals have more expansive mandates. However, given the volume of cases that may fall within their jurisdiction and the scarce resources they possess, such tribunals often do, and should be encouraged to, adopt a focused prosecutorial strategy. As the tribunals are also able to try suspects accused of a far wider range of crimes, prosecutors and the tribunals themselves may have to determine whether the evidence and the applicable legal framework enable trials for certain crimes. It is important for the rights of the accused, the development of consistent and accurate jurisprudence in international criminal law and the integrity of the international criminal justice system that they reach correct, or at least justifiable, decisions on such issues.

**TABLE TWO: KEY FEATURES - JURISDICTION**

	<b>Regulation 64 Panels</b>	<b>SPSC</b>	<b>SCSL</b>	<b>ECCC</b>	<b>WCC</b>	<b>IHT</b>	<b>LST</b>
<b>Temporal</b>	Unlimited.	Unlimited with respect to genocide, crimes against humanity, and war crimes. Limited to the period 1 January 1999 to 25 October 1999 for murders, sexual offences, and torture.	Crimes must have been committed since 30 November 1996.	Crimes must have been committed in the period 17 April 1975 to 6 January 1979.	Unlimited.	Crimes must have been committed in the period 17 July 1968 to 1 May 2003.	Crimes must have contributed to the assassination of Rafiq Hariri on 14 February 2005, or to other attacks in the period 1 October 2004 to 12 December 2005 which the Tribunal is satisfied are “connected”.
<b>Territorial</b>	Restrictions applicable to the courts of Kosovo in general.	No restriction—universal jurisdiction for genocide, crimes against humanity, war	Crimes must have been committed in the territory of Sierra Leone.	No restriction.	Crimes must have been committed in the territory of Bosnia and Herzegovina, unless	No restriction.	No restriction.

		crimes, and torture. In all other respects, panels have jurisdiction through all East Timor.			universal jurisdiction conferred by relevant treaty.		
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<b>Personal</b>							
Natural persons	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.
Nationality	No restriction.	No restriction.	No restriction.	No restriction.	No restriction.	No restriction.	No restriction.
Political Affiliation	No restriction.	No restriction.	No restriction.	If not fulfilling the general seniority criterion, accused must be leaders of “Democratic Kampuchea”.	No restriction.	No restriction.	No restriction.
Seniority	No restriction.	No restriction.	Only “persons who bear the greatest responsibility for serious violations” of the law.	Condition varies according to offence: certain offences appear to require the accused to be the “most	No restriction.	No restriction.	No restriction.

				responsible” for crimes”; others require them to be the “most responsible” or a “senior leader” of the country.			
Juveniles	Yes—but only juveniles of 14 years or more at the time of the crime.	Yes—but only juveniles of 12 years or more at the time of the crime.	Yes—but only juveniles of 15 years or more at the time of the crime.	No express restriction—Cambodian law applies.	Yes—but only juveniles of 14 years or more at the time of the crime.	No express restriction—regime under Criminal Procedure Law No 23 of 1971 applies.	No restriction.
Peacekeepers	No restriction.	No restriction.	Yes—if the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, and the Security Council so authorises.	N/A	No restriction.	N/A	N/A

<b>Material</b>							
Genocide	Yes. Panels can exercise jurisdiction in any “criminal” proceedings.	Yes.	No.	Yes.	Yes.	Yes.	No.
War Crimes – Grave Breaches	Yes.	Yes.	No.	Yes.	Certain offences.	Yes.	No.
War Crimes – Common Article 3 and Additional Protocol Two	Yes.	Yes.	Yes.	No.	Certain offences.	Yes.	No.
War Crimes – Other Serious Violations	Yes.	Yes.	Yes.	No.	Yes.	Yes.	No.
Crimes Against Humanity	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	No.
Other treaty-based provisions	Yes.	Yes (with regard to torture).	No.	Yes (with regard to cultural property and diplomatic protections).	Yes.	No.	No.

Domestic law crimes	Yes—all crimes.	Yes—but offences relating only to murder and sexual violence.	Yes—but offences relating only to arson and female child abuse.	Yes—but offences relating only to homicide, torture, and religious persecution.	No.	Yes—but offences relating only to interference with the judiciary, the squander of national resources, aggression against an Arab nation, and analogies to international crimes over which the Court exercises jurisdiction.	Yes. Provisions of the Lebanese Criminal Code relating to terrorism, offences against life and the person, illicit associations, failure to report crimes, and ancillary matters; and Articles 6 and 7 of the 1958 law on sedition and civil war.
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**TABLE THREE: TABLE OF RATIFICATIONS**

	Bosnia-Herzegovina	Cambodia	Serbia <sup>1</sup>	Indonesia	Iraq	Lebanon	Portugal	Sierra Leone	Timor-Leste
Genocide Convention	29.12.92	14.10.50	12.03.01	No	20.01.59	17.12.53	09.02.99	No	No
Geneva Conventions	31.12.92	08.12.58	11.09.01	30.09.58	14.02.56	10.04.51	14.09.61	10.06.65	08.05.03
Additional Protocol I	31.12.92	14.01.98	11.09.01	No	No	23.07.97	27.05.92	21.10.86	12.04.05
Additional Protocol II	31.12.92	14.01.98	11.09.01	No	No	23.07.97	27.05.92	21.10.86	12.04.05
Protection of Cultural Property	12.07.93	04.04.62	11.09.01	No	20.01.59	01.06.60	09.02.99	No	No
CAT	01.09.93	15.10.92	10.09.91	28.10.98	No	05.10.00	09.02.89	25.04.01	16.04.03
ICCPR	01.09.93	26.05.92	06.09.01	23.02.06	25.01.71	03.11.72	15.06.78	23.08.96	18.03.03
CRC	01.09.93	15.10.92	12.03.01	05.09.90	15.04.94	14.05.91	21.09.90	18.06.90	16.04.03
OP to CRC	10.10.03	16.07.04	31.01.03	No	24.07.08	No	19.08.03	15.05.02	02.08.04
CEDAW	01.09.93	15.10.92	12.03.01	13.09.84	13.08.86	16.04.97	30.07.80	11.11.88	16.04.03
Rome Statute	11.04.02	11.04.02	06.09.01	No	No	No	05.02.02	15.09.02	06.09.02
ECHR	12.07.02	N/A	03.03.04	N/A	N/A	N/A	09.11.78	N/A	N/A

<sup>1</sup> Several international legal instruments applied in Kosovo by virtue of Regulation 1999/24, which provides that all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards: section 1.3. Kosovo itself is not a party to any of the relevant treaties.

## **CHAPTER FIVE**

### **LEGAL BARRIERS TO THE EXERCISE OF JURISDICTION**

#### **1 Introduction**

Chapter Three identified the legal basis for the establishment of the tribunals studied, and suggested the possible source of the authority they exercise. Chapter Four examined the judicial competence of the tribunals studied, in particular their personal, temporal, territorial and substantive jurisdiction. This chapter analyzes barriers to the exercise of that jurisdiction, specifically legal obstacles to the exercise of personal jurisdiction in respect of certain accused. Three such barriers will be studied: the immunity of the head of state and other senior state officials; the applicability and legality of amnesties; and the requirement to obtain custody of the accused for a trial, which depends to a large extent on the co-operation of national authorities and third states. Resolving these issues correctly is important. Even in situations where the affected state, the United Nations and the wider international community have recognised that a particular situation requires an internationalized criminal justice mechanism, and the political will to establish and finance such an institution exists, the possibility of barriers to the exercise of jurisdiction operates to potentially reduce the scope of the tribunal's jurisdictional basis and operation. Designers of a criminal justice mechanism need to consider the possible application of legal barriers and, if considered appropriate, incorporate specific provisions into the constituent instrument of the tribunal. Ultimately, it may be necessary to select a different mechanism where the barrier in question cannot be overcome by applying either domestic or international legal principles. This chapter will assess the selected issues – immunity, amnesty and co-operation – in the practice of the tribunals studied. It will attempt to determine whether the available practice in these newly developing institutions can give rise to any general framework that may assist states when designing such tribunals, and the tribunals themselves when they are called upon to determine the applicability of the barrier in question.

#### **2 Immunity**

##### **2.1 Introduction**

The personal jurisdiction of the tribunals studied is often restricted to those most responsible for the commission of serious crimes, which may include current or

former state officials.<sup>1</sup> This raises the possibility that the tribunals will encounter arguments based on the official status of the accused and the immunity to be accorded to state officials under international law. It is a well-established principle of international law that states and state agents are immune from the jurisdiction of other states in certain circumstances. In particular, states and their agents cannot be the subject of criminal proceedings in foreign states.<sup>2</sup> For the purpose of this thesis, there are three situations in which issues of immunity are most likely to arise. First, state officials may be tried before the courts of their own state. Immunity under international law does not arise. However, individuals may be accorded immunity under the constitution or domestic legal instruments of their own state. The application of national immunities will be a matter of interpreting the relevant domestic legal instruments. Second, state officials may be tried before the domestic courts of another state based on principles of extra-territorial jurisdiction, including universal jurisdiction. Immunities accorded by international law will be relevant and, in such ‘horizontal’ cases, the nature of the immunity accorded will be important. Immunity extended under the laws of the state of nationality of the accused may not be relevant, as immunity accorded under domestic law cannot preclude the exercise of jurisdiction by another state. The third – so-called ‘vertical’ - situation is a trial before an international criminal court, which has been established either by a treaty or a Security Council resolution. Again, immunities accorded under international law will be relevant, and immunity accorded by domestic law irrelevant. This section will outline the nature of immunity in international law, examine the relevant principles and apply those principles to the tribunals studied.

## **2.2 Nature of immunity in international law**

The exact scope of protection offered by the laws of immunity, in particular in relation to international crimes, remains somewhat obscure. Unlike diplomatic immunity, there is no comprehensive treaty regulating state immunity and head of state immunity, so that the area is largely left to the provisions of customary international law.<sup>3</sup> There are two types of immunity granted to state officials under international law: functional immunity (*ratione materiae*) and personal immunity (*ratione personae*). Functional immunity attaches to the acts of officials while they are in office. This type of

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<sup>1</sup> Chapter Four, section 4.

<sup>2</sup> This chapter addresses immunity in criminal proceedings only. States and state officials may, in limited circumstances, be the subject of civil proceedings in foreign courts.

<sup>3</sup> European Convention on State Immunity, ETS No 74; United Nations Convention on the Jurisdictional Immunities of States and their Property, adopted by the General Assembly on 2 December 2004.

immunity is limited, in that it only applies to those official acts carried out during the period of office. Officials may still be the subject of legal proceedings in respect of acts committed in a personal capacity, even where such acts were committed before or after their appointment. However, immunity *ratione materiae* will survive the cessation of office, and thus may be claimed by former state officials. The second type of immunity enjoyed by state officials is known as immunity *ratione personae*. This immunity 'is conferred on officials with primary responsibility for the conduct of the international relations of the state'.<sup>4</sup> It protects the office holder in the exercise of their representative functions and is intended to facilitate the conduct of international relations. The rationale for immunity *ratione personae* is that the state requires certain state officials to be free to operate in the sphere of international relations, so as to allow the state to conduct effectively its international affairs and to maintain peaceful relations among states.<sup>5</sup> This freedom would be restricted if such officials were susceptible to legal proceedings before foreign courts, including arrest and detention. Therefore, the immunity enjoyed when in office is absolute, even in relation to international crimes,<sup>6</sup> and extends to all acts committed in a private or personal capacity,<sup>7</sup> whether committed before or during the period of official service.<sup>8</sup> However, as the immunity is that of the state and not the individual, it does not survive the termination of office.<sup>9</sup> Although the category of officials entitled to personal immunity has not been defined, practice and academic opinion suggest that it would include heads of state and government, foreign ministers and possibly others.<sup>10</sup>

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<sup>4</sup> Akande, D., 'International Law Immunities and the International Criminal Court' (2004) 98 *AJIL* 407, 409.

<sup>5</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports (2002) (*Arrest Warrant case*), Joint Separate Opinion Higgins, Koojijmans and Buergenthal, para 75. See Akande, *ibid*, 409-10; Fox, H., 'The Resolution of the Institute of International Law on the Immunities of Heads of State and Government' (2002) 51 *ICLQ* 119.

<sup>6</sup> *Arrest Warrant case*, para 58: the International Court of Justice held that it could not find 'under customary international law any form of exception to the rule according immunity from criminal responsibility and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity'. Akande notes that this principle has been applied by several national courts, and that '[J]udicial opinion and state practice on this point are unanimous': Akande, note 4, 411, and the material cited in footnotes 26 and 27. See also Tunks, M., 'Diplomats or Defendants? Defining the Future of Head of State Immunity' (2003) 52 *DLJ* 651, 663.

<sup>7</sup> *Arrest Warrant case*, para 54.

<sup>8</sup> *Arrest Warrant case*, para 54-55.

<sup>9</sup> Akande, note 4, 410; Fox, note 5.

<sup>10</sup> It is accepted that heads of state and government possess functional immunity, as do diplomats, consular officials and officials on special missions: see Watts, A., 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 *RdC* 13; Vienna Convention on Diplomatic Relations 1961; Vienna Convention on Consular Relations 1963; United Nations Convention on Special Missions 1969. The International Court of Justice has held that foreign ministers also enjoy immunity,

Personal immunity is thus one of the key ‘procedural bars to the exercise of jurisdiction’.<sup>11</sup>

The International Court of Justice has confirmed that the personal immunity of serving heads of state is absolute and that individuals cannot be prosecuted in foreign national courts or arrested while travelling abroad as long as they remain in office.<sup>12</sup> However, the Court noted that ‘immunity from jurisdiction ... does not mean that they enjoy impunity in respect of any crimes they might have committed’.<sup>13</sup> The Court accepted an exception to this general rule in four circumstances.<sup>14</sup> First, immunities accorded under international law do not bar criminal prosecution of such persons in their own state. Second, the state may always waive the immunity of an incumbent senior official. Third, a senior state official may be subject to criminal prosecution once they have left office, subject to any subsisting immunity *ratione materiae*. Finally, the Court suggested that serving heads of state may be prosecuted before ‘certain international courts, where they have jurisdiction’. Providing only limited material in support of this statement, the Court was satisfied merely to refer to the relevant provisions in the Statutes of the ICTY and the ICTR and article 27(2) of the Rome Statute.

Although this statement is dictum, as the International Court of Justice was not required to determine the immunity applicable before an international criminal tribunal,<sup>15</sup> it has been the subject of extensive debate.<sup>16</sup> The implication from the paragraph is that the absolute nature of immunity *ratione personae* exists only in relation to criminal prosecution before foreign national courts, and may not be pleaded before international criminal courts. This view has received general support and is

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as may other senior state officials: *Arrest Warrant* case, paras 51 and 53. A British court has recognised the immunity of a defence minister: *Application for Arrest Warrant Against General Shaul Mofaz*, reprinted in (2004) 53 *ICLQ* 769.

<sup>11</sup> Frulli, M., ‘The Question of Charles Taylor’s Immunity: Still in Search of a Balanced Application of Personal Immunities’ (2002) 2 *JICJ* 1118, 1126

<sup>12</sup> *Arrest Warrant* case, para. 58.

<sup>13</sup> *Arrest Warrant* case, para. 60.

<sup>14</sup> *Arrest Warrant* case, para 61.

<sup>15</sup> The *Arrest Warrant* case concerned the immunity of the foreign minister of the Democratic Republic of the Congo before a national court.

<sup>16</sup> For example, see: Akande, note 4; Orakhelashvili, A., ‘Case Report: Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)’ (2002) 96 *AJIL* 677; Cassese, A., ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case’ (2002) 13 *EJIL* 853; Wirth, S., ‘Immunity for Core Crimes? The ICJ’s Judgment in the *Congo v Belgium* Case’ (2002) 13 *EJIL* 877; and Wouters, J., ‘The Judgment of the International Court of Justice in the *Arrest Warrant* Case: Some Critical Remarks’ (2003) 16 *LJIL* 253.

consistent with the practice of the international criminal tribunals.<sup>17</sup> However, the International Court of Justice's reference to 'certain international criminal tribunals' suggests that not all international criminal tribunals may exercise jurisdiction in respect of current heads of state. This statement is correct; it is not sufficient to remove the immunity of an incumbent head of state merely to assert that a tribunal is international in nature.<sup>18</sup> Yet the International Court of Justice provided no guidance as to the criteria to be applied, beyond referring to the three existing international criminal tribunals. The approach adopted also fails to take into account the different legal bases of the tribunals considered.<sup>19</sup> For instance, where a tribunal is established by a treaty, the international nature of a court does not, in itself, allow for the exercise of jurisdiction over nationals of a non-party state.<sup>20</sup> It is submitted that the better approach to determining the applicability of immunities is to consider the nature of the court, its method of establishment and its constituent instruments. It must also be determined whether the provisions of the instrument creating jurisdiction on the tribunal expressly or implicitly remove immunity and whether the state concerned is bound by that instrument. The following section examines this question for the tribunals studied, adopting the three categories of such tribunals suggested in Chapter Three.

## **2.3 The 'national' Courts**

### **2.3.1 *The International Judges and Prosecutors Programme in Kosovo***

Although information concerning proceedings before the IJPP is scarce, it appears that immunity has not been raised before an IJPP panel, most probably due to the following reasons. First, the ICTY may exercise primary jurisdiction in respect of the conflict in Kosovo,<sup>21</sup> and has exercised that jurisdiction in respect of the senior officials of the FRY and Serbia most likely to have been entitled to immunity. Second, until the formal declaration of independence in 2008, Kosovo was still, de jure at least, considered part of the territory of Serbia. Thus no question of immunity

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<sup>17</sup> Examples of the prosecution by international tribunals include the trial of Karl Donitz, acting head of state following Hitler's suicide, by the IMT; the trial of Jean Kambanda, the Interim Prime Minister of Rwanda during the 1994 genocide, by the ICTR; the indictment of Slobodan Milosevic, the then President of the FRY, together with the then President of Serbia, Milan Milutinovic, by the ICTY; and the indictment of Charles Taylor before the SCSL, discussed below.

<sup>18</sup> Schabas, W., 'Is an International Tribunal Equivalent to an International Criminal Court?' (2008) 21 *LJIL* 513, 523-534.

<sup>19</sup> This may be dealt with by the requirement that such courts must have jurisdiction: see Schabas, W., *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (2006), 329.

<sup>20</sup> Akande, note 4, 418.

<sup>21</sup> Article 9, ICTY Statute.

under international law would have arisen, only immunities under domestic law. Moreover, it would have been inconsistent with its claim to continuing sovereignty in respect of Kosovo for the FRY or Serbia to have raised immunity before the IJPP, or to have supported a claim to immunity by a senior official. UNMIK too would have been reluctant to avoid a situation where the question of sovereignty arose directly. If the immunity of FRY officials had arisen before the IJPP, the issue should have been considered as one arising under domestic law before a national tribunal. It is submitted that the internationalized nature of the IJPP does not alter the position regarding immunities. The Security Council conferred power on UNMIK to make regulations concerning the territory of Kosovo only.<sup>22</sup> UNMIK did not have competence to issue regulations that would affect the immunity of officials of the FRY or Serbia.<sup>23</sup> Nor do the Security Council resolutions regarding obligations to cooperate with the ICTY, or noting the need to ensure accountability for violations committed in Kosovo, alter this conclusion.

### **2.3.2 The Special Panels for Serious Crimes in East Timor**

The potential for immunity to be raised before the SPSC was considerable, as the SPSC indicted several senior Indonesian military and political figures.<sup>24</sup> Regulation 15/2000 duplicates article 27 of the Rome Statute, with section 15(2) providing that ‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising its jurisdiction over such a person’. The SPSC was a national institution. However, it was not clear what its legal status had been before independence in May 2002. As Indonesian authority in respect of East Timor has never been generally recognised, it cannot be said that the SPSC was an Indonesian institution, thus rendering immunity a question of national law. The best view is that the SPSC were courts of an administered territory, and thus the immunity of Indonesian officials should have been considered in accordance with international law. Prosecution of Indonesian officials would be equivalent to prosecution of an official of a foreign state before a national court, subject to any waiver of immunity by Indonesia, which was

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<sup>22</sup> Resolution 1244 (1999). See Chapter Four, section 3.

<sup>23</sup> None of the regulations issued by UNMIK contain a provision on immunity. Neither do the Provisional Criminal Code of Kosovo, the SFRY Criminal Code or the FRY criminal code.

<sup>24</sup> For example, the SPSC indicted General Wiranto, who at the time of the indictment was contemplating standing for election as President of Indonesia.

not forthcoming.<sup>25</sup> Senior officials could potentially claim personal immunity while in office.

As with the conclusion with regards to Kosovo, it is submitted that the authority of UNTAET and its regulations do not affect this conclusion. Regulation 2000/15 is a domestic legal instrument only, and cannot affect the immunity to which a third state, such as Indonesia, is entitled under customary international law; any attempt to do so would be ineffective and potentially a violation of international law. Neither do the Security Council resolutions in relation to East Timor remove immunity. In fact, Security Council resolutions support the conclusion that the immunity to which Indonesia was to be entitled was not to be affected, as the Security Council considered that Indonesian officials were to be investigated by Indonesian mechanisms for accountability. This may have occurred if the trials before the Ad Hoc Court had been conducted in a more impartial and independent manner.<sup>26</sup>

### **2.3.3 The War Crimes Chamber in Bosnia and Herzegovina**

Immunity could be raised as an issue before the WCC, with potential defendants including senior officials from the FRY, Serbia and Croatia. However, as has been the case in Kosovo, the concurrent jurisdiction of the ICTY in relation to the conflict in Bosnia has largely side-stepped the issue of immunity, with the ICTY exercising its jurisdiction in relation to senior leaders from the FRY, Serbia and Croatia. The increase in trials for crimes arising in the conflict before the courts in Serbia and Croatia and the improvements in co-operation in the region<sup>27</sup> also render it unlikely that the WCC will face an argument based on immunity, as either Bosnia could elect to extradite the individual concerned to the state concerned or that state may elect to waive immunity. Moreover, in none of the cases referred to the WCC from the ICTY was the defendant likely to raise immunity, so the interesting question of whether the referral from the ICTY would in some way impact upon immunity under national law has been avoided. As a national institution, the immunity of senior officials from these states should be considered as the immunity of officials of third states before a national institution. In accordance with the principles of immunity under international law outlined earlier, those officials would be immune while in office, and after leaving

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<sup>25</sup> This is confirmed by the approach to issues of co-operation between Indonesia and UNTAET, in particular the memorandum of understanding providing for judicial assistance in criminal matters, discussed in section 4 of this Chapter.

<sup>26</sup> See the discussion and criticism of these mechanisms in Chapter Two, in particular the sources cited at footnote 107.

<sup>27</sup> See various reports produced by the Humanitarian Law Centre concerning Transitional Justice in the former Yugoslav countries; ICTJ, *Against the Current – War Crimes Prosecution in Serbia (2007)* (2007); and reports of the OSCE Mission to Croatia.

office, immune in respect of official acts. It is submitted that the Security Council resolutions concerning the situation in Bosnia and Herzegovina do not alter this position.

The Law of the State Court does not contain a provision concerning the immunities of state officials, nor does the Law on Transfer. However, article 180(1) of the Criminal Code of Bosnia and Herzegovina provides that ‘The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.’ It is submitted that this provision is directed toward official position as a substantive defence, and not immunity. Even assuming that this provision is directed towards immunity, it must be applicable only to the extent that the provision is consistent with international law. Otherwise any attempt to rely on this provision to try a senior official of a third state who would normally be entitled to immunity would represent a possible excessive exercise of jurisdiction by Bosnia and Herzegovina.

It would also be open to a third state to waive the immunity of the official concerned. It could be argued that the parties to the Dayton Agreement have waived immunity as the Dayton Agreement requires parties to ‘cooperate fully with all entities involved in implementation of this peace settlement...pursuant to the obligations of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law’.<sup>28</sup> It also requires relevant national authorities to cooperate with the ICTY.<sup>29</sup> However, it is submitted that this obligation to co-operate does not constitute a waiver of immunity in respect of trials before the courts of other parties to the Dayton Agreement, including the WCC.

#### **2.3.4 The Iraqi High Tribunal**

An accused before the IHT must be either a national of Iraq or a resident.<sup>30</sup> This renders the possibility of the official of a third state being the subject of proceedings before the IHT virtually non-existent. Immunity has been raised by accused based on their position in the previous regime. Several of the accused were senior state officials of the former Iraqi regime, including the former President, Vice-President, foreign and defence ministers. Saddam Hussein, as head of the Revolutionary Command Council, together with his deputy and members of that Council, enjoyed immunity in respect of

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<sup>28</sup> Article IX.

<sup>29</sup> Article XIII(4), Annex 6.

<sup>30</sup> Table Two.

any procedure under national law.<sup>31</sup> Accordingly, in this context the IHT is required to investigate the immunity of officials under Iraqi law, not under international law.

Article 15(3) of the IHT Statute provides that ‘The official position of any accused person, whether as president, chairman or a member of the Revolution Command Council, prime minister, member of the counsel of ministers, a member of the Ba’ath Party Command, shall not relieve such person of criminal penalty, nor mitigate punishment. No person is entitled to any immunity with respect to any of the crimes stipulated in Articles 11, 12, 13, and 14 of this law.’ This provision is an unambiguous statement as to the non-applicability of domestic immunities.<sup>32</sup> In the *Dujail* case,<sup>33</sup> the IHT refused to recognise any immunity. It based this decision on two grounds. First, the defendant was accused of having committed crimes against humanity and customary international law precludes the grant of immunity for such crimes. The reasoning of the IHT on this ground displayed some confusion. The IHT supported its conclusion by reference to the IMT, the ICTY and the ICTR, which are all international tribunals. In contrast, the IHT is a national court considering immunity under domestic law. It is certainly doubtful that a rule of customary international law rule presently exists such that states are prohibited from granting immunity under domestic law regarding criminal proceedings before domestic courts. The second ground for denying the immunity was that the successor Iraqi government, by establishing the IHT to investigate the crimes alleged to have been committed by the former regime, had repudiated the immunity that would otherwise have existed. This, it is submitted, was the preferable approach as it is more appropriate to the legal status and nature of the IHT.

### **2.3.5 The Extraordinary Chambers in the Courts of Cambodia**

The jurisdiction of the ECCC is restricted to senior leaders of the Khmer Rouge.<sup>34</sup> Jurisdiction therefore will not extend to officials of neighbouring states, including Vietnam, Laos or Thailand, and the immunity of state officials of third states should not be raised before the ECCC. The ECCC is a national institution and, as the accused will be Cambodian nationals, the situation is one of trials of state officials before a national institution. Immunity of former state officials should not apply, as any immunity that had previously applied under national law has been removed by the

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<sup>31</sup> Article 240 of the Iraqi Constitution of 1970.

<sup>32</sup> *Al-Dujail Lawsuit*, Case No. 1/9 First/2005, Judgment, 5 November 2006 (unofficial English translation), 32.

<sup>33</sup> *Ibid.*

<sup>34</sup> Table Two.

Special Law. Moreover, the Special Law removes the official position of an accused as a substantive defence.<sup>35</sup> The more interesting issue for the ECCC is that of amnesty.

#### **2.4 The 'treaty-based' institutions – the Special Court for Sierra Leone**

Article 6(2) of the SCSL Statute provides 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'. This provision is identical to that contained in the Statutes of the ICTY and the ICTR. The SCSL has considered the issue of the immunity of an incumbent head of state in relation to an arrest warrant issued in respect of then Liberian President, Charles Taylor, on 7 March 2003.<sup>36</sup> The sealed indictment was transferred, together with the arrest warrant, to Ghanaian authorities on 4 June 2003, as Taylor was present in Ghana for peace talks concerning the conflict in Liberia. Ghana declined to execute the arrest warrant. Taylor, relying on his immunity as an incumbent head of state, challenged both the issue of the indictment and the exercise of jurisdiction by the SCSL. An application to quash the indictment was filed jointly by counsel for Taylor and the Government of Liberia, which asserted that the issue of the indictment and the circulation of the arrest warrant were violations of the sovereignty of Liberia.<sup>37</sup> However, the Trial Chamber approved a request by the Prosecutor to strike out Liberia's application.<sup>38</sup> In the interim, Taylor had stepped down as President of Liberia in return for asylum in Nigeria, although the cancelling of the indictment and the arrest warrant was not part of the arrangement. Nigeria indicated that it would not surrender Taylor to the SCSL.<sup>39</sup>

The Appeals Chamber rejected the application to quash the indictment, finding that it was competent to exercise jurisdiction in respect of the accused, and that the immunity

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<sup>35</sup> Article 29new, Special Law.

<sup>36</sup> *Prosecutor v Charles Ghankay Taylor*, Indictment, 7 March 2003. Taylor was initially charged with 17 counts of crimes against humanity, violations of Common Article 3 and Additional Protocol II, and other serious violations of international humanitarian law. The indictment was subsequently reduced to 11 counts: Prosecutor's Second Amended Indictment, 29 May 2007.

<sup>37</sup> *Prosecutor v Taylor*, Applicant's Motion made under Protest and without waiving of Immunity requesting that the Trial Chamber do quash the approved indictment against the person of President Charles Ghankay Taylor, 23 July 2003.

<sup>38</sup> Order Pursuant to Rule 72(E) – Defence Motion to Quash The Indictment and to Declare the Warrant of Arrest and All Other Consequential Orders Null and Void, Trial Chamber, 19 September 2003

<sup>39</sup> Nigeria's initial decision to offer asylum and not to transfer Taylor to the SCSL was challenged in the Nigerian Federal High Court: *David Anyaele and Emmanuel Egbuna v. Charles Ghankay Taylor and Others*. The proceedings were declared moot on 13 April 2006, following Taylor's arrest by Nigerian authorities.

normally accorded to an incumbent head of state did not apply.<sup>40</sup> In doing so, the Appeals Chamber relied upon the dictum of the International Court of Justice in the *Arrest Warrant* case, arguing that, provided the SCSL was a ‘certain international criminal court’, head of state immunity would not operate as a bar to prosecution. The Appeals Chamber recognised that ‘the issues in this motion turn to a large extent on the legal status of the Special Court’.<sup>41</sup> After concluding that the SCSL was an international criminal tribunal, the SCSL then stated that ‘the sovereign equality of states does not prevent a head of state from being prosecuted before an international criminal tribunal or court’,<sup>42</sup> thus omitting the qualifying word ‘certain’ from the dicta of the International Court of Justice in the *Arrest Warrant* case.

It is not disputed that the SCSL is international in nature. However, it is submitted that the Appeals Chamber failed to recognise the significance of the method of establishment and the legal basis of the SCSL when determining the applicability of immunities under international law. It held that the SCSL was ‘established in the framework of Chapter VII of the UN Charter’<sup>43</sup> and thus was similar to the ICTY and the ICTR. The SCSL could therefore rely on article 6(2) of the SCSL Statute as having removed the head of state immunity. There are several difficulties with this statement. As a preliminary point, article 6(2) and the comparable provisions in the Statutes of the ICTY and ICTR are directed to the issue of criminal responsibility, and arguably do not relate to immunities at all.<sup>44</sup> More importantly, by focusing on the involvement of the Security Council, the Appeals Chamber mischaracterised the legal basis of the SCSL. As Nouwen notes:<sup>45</sup>

The Council did not “forget” to give the Special Court the Chapter VII powers enjoyed by the ICTY and the ICTR. Both the Secretary-General in the establishment phase and the previous President of the Special Court in the operational phase of the Court have requested the Council to grant the Court Chapter VII powers, but that never occurred.

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<sup>40</sup> *Prosecutor v Taylor*, Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004 (*Taylor Immunity Decision*). The application was adjudged to be a preliminary motion and was referred to the Appeals Chamber pursuant to Rule 72(E) of the RPE. The Appeals Chamber considered the issue to be one of jurisdiction, which could be raised as a preliminary challenge, and not a substantive defence based on superior orders: Schabas, note 19, 328.

<sup>41</sup> *Taylor Immunity Decision*, para 34.

<sup>42</sup> *Taylor Immunity Decision*, para. 52.

<sup>43</sup> Frulli, note 11, 1119.

<sup>44</sup> It has been suggested that this provision, which duplicates a provision found also in the statutes of the ICTY and the ICTR, is not intended to address the issue of international law immunities at all. Rather, the provision is intended to remove the substantive defence that an official acted in an official capacity when committing a crime: Schabas, note 19.

<sup>45</sup> Nouwen, S., ‘The Special Court for Sierra Leone and the Immunity of Taylor: The *Arrest Warrant* Case Continued’ (2005) 18 *LJIL* 645, 649.

As a result, the SCSL failed to address the crucial question, which is whether an international court, established by a treaty, may exercise jurisdiction with respect to a sitting head of state of a third state if the claim to immunity is otherwise supported by international law. The SCSL was created by treaty and is therefore in fact closer to the ICC than to the ICTY and the ICTR. The Appeals Chamber did not dispute that a court in Sierra Leone would have been required to uphold Taylor's immunity or else risk a finding that Sierra Leone had violated the sovereignty of Liberia. By establishing a tribunal by agreement with the United Nations, the SCSL is purporting to do what Sierra Leone could not do alone, that is, to allow a court to exercise jurisdiction with respect to an incumbent head of a foreign state. If the SCSL Agreement does represent a delegation of jurisdiction to SCSL from Sierra Leone, then Sierra Leone cannot transfer greater powers than it enjoys. Sierra Leone could not have exercised personal jurisdiction in relation to Taylor so long as Liberia claimed immunity, therefore it could not transfer such a power to the SCSL by entering into the SCSL Agreement. Even if it were directed to immunity, reliance on article 6(2) of the SCSL Statute in relation to Taylor also neglects the principle that a treaty cannot create obligations or remove rights for a non-party state without the consent of that state. The SCSL Agreement may only create obligations for the parties to it, namely Sierra Leone and the United Nations.<sup>46</sup> An agreement between Sierra Leone and another state(s) to establish a tribunal would not affect the immunity to be accorded to an official of a non-party state such as Liberia, even though the tribunal established would be international in nature.<sup>47</sup>

Although the United Nations is a party to the SCSL Agreement, and not another state, it is submitted that this does not modify the position regarding immunity. The United Nations has separate legal personality from its members.<sup>48</sup> As Frulli notes, '[T]herefore, the Agreement establishing the Special Court (with the annexed SCSL Statute), like any other agreement concluded by the United Nations, is binding on the Organisation as such and not on individual Member States, which remain third parties

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<sup>46</sup> Article 34, Vienna Convention on the Law of Treaties 1969.

<sup>47</sup> See Nouwen, note 45, 656. Similar issues have been raised in relation to the effect of article 27(2) of the Rome Statute on the officials of non-state parties. The better view is that, the article cannot affect the rights and obligations of states that are not party to the Rome Statute without their consent: Akande, D., 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *JICJ* 618, 621; Scharf, M., 'The ICC's Jurisdiction over Nationals of Non-Party States' (2001) 64 *LCP* 67; and Danilenko, G.M., 'The Statute of the International Criminal Court and Third States' (2000) 21 *MJIL* 445.

<sup>48</sup> *Reparations for Injuries suffered in the Service of the United Nations* ICJ Reports (1949).

in this respect'.<sup>49</sup> The suggestion that, by accepting the Charter, member states have also accepted that the United Nations may waive the immunity of any state by entering into an agreement to which that state is not a party is simply not credible.<sup>50</sup> Moreover, the United Nations is required to respect rules of international law in all its activities,<sup>51</sup> including the personal immunity of a serving head of state. Only decisions taken by the Security Council acting under Chapter VII of the Charter are binding on member states. The Security Council resolutions dealing with the SCSL have not imposed upon third states – on Liberia in particular – any obligation to co-operate with the SCSL that could possibly be interpreted as removing immunity.<sup>52</sup> The SCSL also failed to consider what significance, if any, should be given to the fact that it was not included in the relevant paragraph of the judgment in the *Arrest Warrant* case as an example of a 'certain international criminal court'.<sup>53</sup>

It must be concluded that Liberia asserted correctly that the indictment and arrest warrant were violations of its sovereignty. Moreover, Ghana and other states were not obliged to give effect to the indictment and arrest warrant issued by the SCSL, although the issue of the arrest warrant per se was not a violation of the sovereignty of Ghana.<sup>54</sup> Similarly, Sierra Leone was not entitled to take steps to enforce the arrest warrant, had it chosen to do so. It is an interesting point as to which entity had violated the immunity of Liberia in issuing the arrest warrant, as the SCSL Agreement provides that the SCSL has separate legal personality.<sup>55</sup> The question is whether this is opposable to other states, or may other states look to the parties establishing the SCSL, namely Sierra Leone and the United Nations. This appears to have been the

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<sup>49</sup> Frulli, note 11, 1124. See also Deen-Racsmány, Z., 'Prosecutor v Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity' (2005) 18 *LJIL* 299 and Nouwen, note 45, 657.

<sup>50</sup> The Appeals Chamber commented that the SCSL Agreement 'is an agreement between all members of the United Nations and Sierra Leone': *Taylor Immunity Decision*, para. 38.

<sup>51</sup> Article 1(1), Charter.

<sup>52</sup> This can be contrasted with the obligation to co-operate placed on Sudan in the context of the referral of the situation in Darfur to the ICC: Resolution 1593 (2005), para 2. In the light of the decision by the ICC to issue an arrest warrant in respect of President Bashir of Sudan, it has been suggested that this obligation removes the immunity of the President or, alternatively, obliges the Government of Sudan to waive the immunity of its head of state. For further discussion see: Williams, S. and Sherif, L., 'The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court' (2009) *JCSL* forthcoming; Akande, D., 'The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?', Oxford Transitional Justice Research Working Paper Series, 30 July 2008; and Sluiter, G., 'Obtaining Cooperation from Sudan – Where is the Law?' (2008) 6 *JICJ* 871.

<sup>53</sup> The SCSL was established shortly before the judgment in the *Arrest Warrant* case: Schabas, note 19, 329.

<sup>54</sup> The Appeals Chamber rejected the assertion by the accused that the issue of the arrest warrant and its transmission to Ghana violated that state's sovereignty: *Taylor Immunity Decision*, para. 57.

<sup>55</sup> Article 11, SCSL Agreement.

approach adopted by Liberia, which filed an application against Sierra Leone before the International Court of Justice requesting the court to declare that the issue of the indictment and the arrest warrant its and circulation violated the immunity to be accorded to Liberia under international law.<sup>56</sup> The International Court of Justice is precluded from taking any further steps unless Sierra Leone accepts its jurisdiction in relation to this dispute. Taylor's counsel also filed proceedings against the SCSL and the Liberian Ministry of Justice in the Liberian Supreme Court challenging the legality of searches conducted against his home, and those of his associates.<sup>57</sup>

Of course, once Taylor stepped down as President of Liberia in August 2003, he became a former head of state and was entitled to immunity only in respect of official acts committed while in office. The SCSL would have been entitled to issue a further indictment and arrest warrant.<sup>58</sup> It is also likely that that the actions surrounding Taylor's transfer to the SCSL in 2006 may have constituted either a waiver by Liberia of any residual immunity enjoyed by Taylor,<sup>59</sup> or a removal of such immunity by the Security Council.<sup>60</sup>

The SCSL has also indicted former officials of Sierra Leone, including the Minister of the Interior, Sam Hinga Norman. The issue of immunity under domestic law has not been raised by the accused, and it is arguable that, by entering into the SCSL Agreement, Sierra Leone has waived the immunity of its own state officials under both domestic law and international law. This has been done either expressly, if it is accepted that article 6(2) of the SCSL Statute is addressed to immunity, or implicitly, because it has delegated jurisdiction to the SCSL and has given a mandate to the SCSL to pursue those most responsible, which would include senior leaders. However, the SCSL Agreement is not directly incorporated into domestic law by the Ratification Act. Thus article 6(2) may not have direct application in national law, and

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<sup>56</sup> Press Release, *Liberia applies to the International Court of Justice in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberian President*, 5 August 2003.

<sup>57</sup> Sriram, C., 'Wrong-sizing International Justice? The Hybrid Tribunal in Sierra Leone' (2006) 29 *FILJ* 472, 487-8.

<sup>58</sup> This was recognised by the Appeals Chamber, *Taylor Immunity Decision*, para. 59.

<sup>59</sup> Taylor was arrested in Nigeria in March 2006, and then transferred to Liberia, where he was detained by UNMIL and transferred to the SCSL. See Frulli, M., 'A Turning Point in International Efforts to Apprehend War Criminals: The UN Mandates Taylor's Arrest in Liberia' (2006) 4 *JICJ* 351.

<sup>60</sup> Resolution 1638 (2005) had authorised UNMIL to apprehend and detain Taylor in the event of his return to Liberia and to transfer him, or to facilitate his transfer, to the SCSL for prosecution: para. 1. The Security Council also issued requests and binding directions to specified states and the Secretary-General so as to facilitate the transfer of Taylor to the Netherlands for trial and the conduct of the proceedings: Resolution 1688 (2006).

may require further legislation to remove any immunity that may exist under national law, which Sierra Leone would be required to do due to its international obligations under the SCSL Agreement.

## **2.5 Tribunals established by the Security Council: the Special Tribunal for Lebanon**

Immunity may prove to be a key issue for the LST. Evidence obtained by the UNIIC suggests that the assassination of former Prime Minister Hariri enjoyed support from both the Syrian and Lebanese intelligence services. There is also some suggestion that Syrian involvement was authorised at the highest levels of government.<sup>61</sup> The LST was established by the Security Council pursuant to its powers under Chapter VII of the Charter and, in this sense, is not a treaty-based tribunal but an international one. Yet the International Court of Justice dictum in the *Arrest Warrant* case suggests that being ‘international’ is not sufficient to guarantee that immunities will not apply. Thus it is necessary to examine the legal basis, nature and constituent instruments of the LST to determine whether immunities must be accorded to the officials of other states, including Syria.

Having been established by the Security Council, it is arguable that the ICTY and the ICTR constitute the closest precedents for the issue of immunity before the LST. The ICTY and the ICTR are not required to respect the immunity of state officials, as it is accepted that the Security Council may establish an international criminal tribunal to prosecute senior officials acting pursuant to its powers under Chapter VII of the Charter, and may also remove the immunity of such officials.<sup>62</sup> The International Court of Justice implicitly confirmed this in the *Arrest Warrant* case. However, it is submitted that there are key differences between the ICTY and the ICTR and the LST. First, the officials indicted or tried by the ICTY and the ICTR have been nationals of the state that is the ‘target’ of the relevant Security Council resolutions. The ICTY and the ICTR have tried senior officials of the territorial state, the territory of the former Yugoslavia and Rwanda respectively. Neither has prosecuted senior officials of states other than the target state. To conclude that Resolution 1757 has removed the

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<sup>61</sup> See the Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005), S/2005/662, para. 124 – ‘the decision to assassinate former Prime Minister Rafik Hariri could not have been taken without the approval of top-ranked Syrian security officials’.

<sup>62</sup> Slobodan Milosevic asserted that the ICTY lacked competence ‘by reason of his status as former President’. The Trial Chamber interpreted this as a challenge to article 7(2) of the ICTY Statute. The Trial Chamber concluded that ‘[T]here is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law’: *Prosecutor v Slobodan Milosevic*, Decision on Preliminary Motions, Trial Chamber, 8 November 2001, para. 28-34.

immunity of Lebanese officials would therefore not be controversial. In contrast, for the LST to prosecute an official of Syria would be to proceed further than the ICTY or the ICTR have done. Though this is not to say that the ad hoc tribunals could not do so; in fact this appeared to be contemplated when the Prosecutor considered whether to investigate alleged violations of international humanitarian law by NATO forces in Kosovo.<sup>63</sup> It is also similar to the resolution of the immunity of President Bashir before the ICC, as the basis for the ICC's jurisdiction in respect of President Bashir is a referral from the Security Council acting under Chapter VII of the Charter.<sup>64</sup>

Second, the LST Statute does not contain a provision that purports to remove immunity. A provision on immunity in early drafts of the LST Statute was removed, reportedly at the request of the Russian Federation. In contrast, the Statutes of the ICTY and ICTR contain provisions which are considered by some to remove immunity.<sup>65</sup> However, the absence of an explicit removal of immunity is not conclusive as to the position regarding immunity. It could be argued that the act of establishing the LST, in circumstances where the Security Council was aware that senior officials of both Lebanon and Syria were potentially implicated, implicitly removed immunity. However, unlike the position with the creation of the ICTY and the ICTR, it is not clear that the Security Council intended to establish the LST through the use of its powers under Chapter VII of the Charter. It is therefore more difficult to suggest that it was the intention of the Security Council to deal with immunity outside of the provisions of the LST Agreement attached to Resolution 1757.

Third, Resolution 1757 does not contain the general obligation on member states to co-operate as is found in the resolutions establishing the ICTY and ICTR.<sup>66</sup> Nor is the general obligation for member states to co-operate that is found in the Statutes of the ad hoc tribunals duplicated in the LST Statute.<sup>67</sup> Obligations under the LST Statute are addressed to Lebanon only, not member states. This obligation could be said to extend

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<sup>63</sup> Final Report to the Prosecutor of the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000.

<sup>64</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the Prosecutor's Application for a Warrant of Arrest, Pre-Trial Chamber, 4 March 2009, pars 40-45. For discussion of the issue of immunity, see the sources cited at note 50.

<sup>65</sup> For the contrary view, that this is directed only at superior orders as a substantive defence, see Schabas, note 19.

<sup>66</sup> Resolution 827 (1993), para. 4; Resolution 955 (1994), para. 2. Both resolutions require member states to co-operate with the tribunal and to take all steps required under domestic law to implement the provisions of the resolution and the statute, including to comply with requests from the Trial Chambers.

<sup>67</sup> Article 29, ICTY Statute; Article 28, ICTR Statute.

to a requirement for Lebanon to waive the immunity of its officials. However, it would be difficult to establish that Syria is similarly required to waive immunity. Syria may be obliged to waive immunity by virtue of the resolutions of the Security Council regarding terrorism, several of which impose binding obligations on member states.<sup>68</sup> Yet these resolutions contemplate co-operation with other states, and not co-operation with an international criminal tribunal.

Finally, the subject matter jurisdiction of the ICTY and the ICTR is very different to that of the LST. The jurisdiction of the LST is restricted to the crime of terrorism, as defined in Lebanese law. This raises several issues. First, does international law recognise an exception to the general rules of state immunity for acts of terrorism? This is doubtful, particularly as the *Arrest Warrant* case appears to reject an exception from immunity in respect to international crimes. The French Cour de Cassation has held that terrorism does not fall within the class of international crimes permitting an exception to state immunity.<sup>69</sup> Second, does the Security Council have the power to remove immunity in respect of the crime of terrorism? At least one permanent member of the Security Council has suggested that the Security Council does not have power to establish an international tribunal in respect of terrorism.<sup>70</sup> It could follow from this that the Security Council would not have the competence to remove immunity. It is unlikely that this suggestion is correct, as the Security Council has indicated on several occasions that terrorism is a threat to international peace and security,<sup>71</sup> thus it is open to the Security Council to act in relation to terrorism. Third, Syria is a party to several terrorism conventions.<sup>72</sup> Such conventions impose only the obligation to extradite or prosecute, and, unlike the Genocide Convention, they do not require or contemplate proceedings before an international criminal tribunal. Nor do they consider the issue of immunity. Accordingly, Syria cannot be considered to have waived the immunity of state officials when ratifying these treaties. Moreover, Syria has indicated its willingness to prosecute its own nationals, which is a permissible

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<sup>68</sup> For example, Resolution 1373 (2001) provides that states shall ‘Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts’: para. 2(f).

<sup>69</sup> Zappala, S., “Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation” (2001) 12 *EJIL* 595.

<sup>70</sup> Russian Federation, S/PV.5685.

<sup>71</sup> See, for example, Resolution 1373 (2001); Resolution 1566 (2004); Resolution 1805 (2008); and, in the context of Lebanon, Resolution 1636 (2005) – ‘terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security’, preambular para. 3

<sup>72</sup> For example, Syria is a state party to the Convention on the Suppression of the Financing of Terrorism and the Convention on the Suppression of Terrorist Bombings.’

option under these conventions.<sup>73</sup> Finally, does it matter that the LST exercises jurisdiction in relation to terrorism as a crime under Lebanese law? Schabas suggests that it does, rendering the LST less likely to be considered a ‘certain international criminal tribunal’ and more likely that the Security Council intended that immunities in international law would be applied.<sup>74</sup>

Thus it appears that should the LST attempt to try senior state officials of Syria it will face numerous challenges. The argument that immunity is not applicable is not as clear as it is before the ICTY and the ICTR. However, these difficulties would not be overcome by adopting the treaty-based approach to the jurisdiction of the LST; as was seen with the discussion above in relation to the SCSL, this would not affect the issue of immunity of officials of third states. Assuming senior officials are targeted, it would, of course, be open to the Security Council to issue further resolutions dealing more clearly with the issue of immunity. This could include a resolution featuring specific wording on immunity, imposing a general obligation to co-operate on Syria (as it has done so with the UNIIC) or requiring Syria to arrest and surrender to the LST named senior officials.<sup>75</sup> Unless this occurs, it is unlikely that the LST will be able to exercise jurisdiction in relation to sitting senior officials, unless Syria surrenders such individuals voluntarily or waives immunity. Moreover, other states, which have no obligation to co-operate with the LST, may decline to execute any arrest warrant, especially when to do so may violate an obligation owed to Syria under international law.

## **2.6 Conclusion**

This examination of the practice of the tribunals studied as regards immunity reveals that immunity under international law will not be a major concern for many hybrid or internationalized tribunals. This is particularly so where the situation leading to the establishment of the tribunal is mainly a domestic one, such as an internal armed conflict or the actions of a prior repressive regime. Even where the situation does have international dimensions, such as the international armed conflicts that may be

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<sup>73</sup> Note that this argument did not preclude the Security Council from acting to secure a trial before a court outside of Libya of the individuals accused of committing the 1998 bombing of Pan Am Flight 103 over Lockerbie. See: Resolution 748 (1992) and Resolution 883 (1993); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, 27 February 1998, *ICJ Reports* (1998).

<sup>74</sup> Schabas, note 18.

<sup>75</sup> For example, in Resolution 1267 (1999), the Security Council demanded that ‘the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted...or to appropriate authorities in a country where he will be arrested and effectively brought to justice’.

considered by the IHT, the ECCC or the WCC, questions of immunity under international law will be effectively precluded where the personal jurisdiction of the tribunal is restricted to nationals of one state (Iraq) or a particular political affiliation (Cambodia) or there is an international criminal tribunal able to try senior leaders of any state, regardless of immunity (Bosnia). The main issue for those designing the tribunal is to ensure that issues of immunity under domestic law have been resolved, perhaps through the use of a clause such as article 15(3) of the IHT Statute or by a separate law repealing any immunity under the constitution or other instrument.

Immunity will be a serious potential issue where there are international aspects to a situation, such as the alleged support of President Taylor for the conflict in Sierra Leone, the role of Indonesia in the violence committed in East Timor and the possible involvement of Syrian officials in the assassination of Hariri in Lebanon. In this context, the legal basis of the tribunal in question is vital to resolving questions of immunity under international law. First, where the tribunal operates as a national institution - as did the SPSC - it will be required, in accordance with customary international law, to respect the immunity of senior state officials of third states, even where they have been accused of committing international crimes. This is regardless of any provision in national law or its constituent instrument that purports to remove this immunity: any attempt to rely on such provision would arguably constitute a violation of the sovereignty of the state concerned. The use of a national institution thus has serious disadvantages if the immunity of a third state is likely to be an issue. Second, adopting a treaty-based approach will also be ineffective in resolving the immunity issue unless the state in question is a party to the treaty or waives immunity. The approach adopted by the SCSL in the *Taylor Immunity Decision* was in some respects flawed and did not take into account the treaty-based nature of that institution. Instead, the SCSL should have confirmed that Taylor retained immunity while in office, unless Liberia had waived that immunity.<sup>76</sup> Finally, even a tribunal established by the Security Council does not automatically remove the immunity of a third state: whether it does will depend on the terms of the resolution, the context to the resolution and the provisions of the constituent instruments of the tribunal. If state immunity is likely to be an issue, the Security Council should consider including specific wording removing immunity in either the resolution or the constituent instruments of the tribunal. Alternatively, it could include in the resolution wording imposing an obligation to co-operate on third states generally, or addressed to named states, or

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<sup>76</sup> Deen-Racsmány reaches the same conclusion: note 49, 319.

could include wording as to a named individual, which would, by implication, remove the immunity ordinarily accorded to that individual.

The difficulties with the reasoning of the Appeals Chamber in *Taylor Immunity Decision* have led some commentators to suggest that the criterion advanced by the International Court of Justice in the *Arrest Warrant* case – the distinction between a national and international court - is problematic. Critics suggest that the nature of the conduct in question, should be used instead.<sup>77</sup> The approach adopted by the International Court of Justice is problematic, as it is not always clear on which side of this line a tribunal will fall. As has been seen in this study, it is not always easy to classify courts with an international element as either national or international. This does not provide much certainty for states and the United Nations in establishing such tribunals, the judges that must determine whether immunity applies, and the defendants that are, or may be, the subject of proceedings before such institutions. However, the International Court of Justice was firm in its rejection of the nature of the conduct as the determining factor for immunity. It is submitted here that some of the uncertainty may be overcome by considering potential issues of immunity when deciding the legal basis of the tribunal and drafting its constituent instruments.

### **3 Amnesties**

#### **3.1 Introduction**

Mallinder notes that '[A]mnesty has traditionally been understood in a legal sense to denote efforts by governments to eliminate any record of crimes occurring, by barring criminal prosecutions and / or civil suits.'<sup>78</sup> Amnesties are '[f]requently, evenly routinely, endorsed during transition from one regime to another, or as part of a peace settlement',<sup>79</sup> and are often perceived as a vital tool to ensure the end of a conflict or a peaceful transition. As with immunity, an amnesty may restrict the personal jurisdiction of a court and also possibly the substantive jurisdiction where the amnesty is granted in respect of specified crimes. The jurisdiction of several of the tribunals studied is potentially affected by amnesties. However, before considering the legality and scope of particular amnesties, it is necessary to consider briefly the lawfulness of

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<sup>77</sup> For example, Nouwen, note 45, 658.

<sup>78</sup> Mallinder, L., *Amnesty, Human Rights and Political Transitions* (2008, Hart), 5.

<sup>79</sup> Broomhall, B., *International Justice & the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), 93.

amnesties under customary international law.<sup>80</sup> The permissibility of an amnesty is often linked to the existence of an obligation to prosecute certain crimes either under treaty law or in customary international law. Treaties that incorporate an obligation to prosecute include the Geneva Conventions (in respect of grave breaches), the Convention Against Torture and the Genocide Convention. Certain commentators have also suggested that international human rights law requires prosecution of offenders and thus precludes amnesty<sup>81</sup> and it has also been argued that customary international law may require prosecution in respect of crimes against humanity. However, there is disagreement amongst scholars as to whether there exists an obligation to prosecute beyond specific treaty obligations.<sup>82</sup> An examination of recent state practice does not support the existence of a general duty to prosecute. In fact, as Scharf concludes, ‘to the extent any state practice in this area is widespread, it is the practice of granting amnesties or de facto impunity to those who commit crimes against humanity’.<sup>83</sup> United Nations practice is also inconclusive. Despite issuing guidelines for negotiators that oppose the inclusion of amnesties in negotiated settlements,<sup>84</sup> the United Nations has been involved in brokering several peace agreements containing amnesties, including in Sierra Leone.<sup>85</sup>

However, this does not mean that amnesties are desirable or permissible in all circumstances. It is possible that a rule prohibiting blanket, unconditional amnesties, which in effect provide total impunity to offenders, may be emerging in customary

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<sup>80</sup> Amnesties are not expressly prohibited or permitted in any treaty, with the exception of Article 6(5) of APII. This provision, however, has been interpreted as applying to the principle of not prosecuting combatants for their role in an armed conflict and not amnesties in the broader sense.

<sup>81</sup> See Orentlicher, D., ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100 *YLJ* 2537 and Roht-Arriaza, N., ‘The Developing Jurisprudence on Amnesty’ (1998) 20 *HRQ* 953. It is submitted that the obligation extends only to the investigation of the violation, and does not require criminal measures such as prosecution.

<sup>82</sup> For a good discussion of the arguments, see Scharf, M., ‘The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes’ (1996) 59 *LCP* 41; Orentlicher, *ibid*; Roht-Arriaza, *ibid*; Ratner, S., ‘New Democracies: New Atrocities: An Enquiry in International Law’ (1999) 87 *Geo LJ* 707; and Scharf, M., ‘Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?’ (1996) 31 *TILJ* 1.

<sup>83</sup> Scharf, *ibid*, *LCP*, 57.

<sup>84</sup> In 1998 the United Nations issued a series of guidelines to staff engaged in negotiating peace settlements. While the text of the guidelines are not publicly available, it is understood that they provide that no person representing the Secretary-General may support an amnesty for crimes against humanity, genocide or war crimes, or which would encourage a state to breach treaty obligations. This policy was reiterated in the Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 3 August 2004, S/2004/616.

<sup>85</sup> Stahn, C., ‘United Nations Peace-Building: Amnesties and Alternative Forms of Justice: A Change in Practice?’ (2002) 84 *IRRC* 191.

international law.<sup>86</sup> Various criteria for ‘acceptable’ amnesties have been advanced, including: the availability of complementary mechanisms, such as a truth commission, lustration or the payment of compensation to victims; the purpose of the amnesty (to facilitate peace); the proponents of the amnesty (ie, is the amnesty a ‘self-excusing’ amnesty, or is it introduced by a democratically elected government as part of a transition or as part of a United Nations negotiated settlement); and the target of the amnesty (are all sides to a conflict accorded the same treatment; does the amnesty exclude senior leaders and those most responsible for the commission of crimes).<sup>87</sup> Limited and more focused amnesties are more likely to be accepted as valid by the affected communities, other states and the international community.

The question of the validity and lawfulness of an amnesty may be raised in several different fora: the courts of the territorial state; the courts of states exercising extraterritorial criminal jurisdiction; international human rights monitoring bodies; and international or hybrid criminal tribunals. While the decisions of human rights monitoring bodies may be influential in determining whether the grant of an amnesty is considered to be a violation of a state’s international obligations, such decisions are not directly relevant to the issue of whether the tribunals studied are required to give effect to an amnesty. Accordingly, the decisions of such bodies will not be considered further. The next section will assess amnesties before the tribunals studied.

### **3.2 Amnesties and the internationalized and hybrid tribunals**

Chapter Three identified three different legal bases for the tribunals studied. The previous section showed that this categorisation affects the applicability of immunity provisions before the different tribunals. It is also relevant to whether a particular tribunal is required to give effect to an amnesty provision. None of the ‘national’ tribunals studied are exercising extraterritorial jurisdiction – except in very limited circumstances. In general, courts of a state exercising extraterritorial jurisdiction, including universal jurisdiction, are not required to give effect to an amnesty granted elsewhere.<sup>88</sup> In deciding whether or not to give effect to an amnesty granted by the

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<sup>86</sup> Scharf, M., ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’ (1999) 32 *CILJ* 507, 512; Williams, S., ‘Amnesties in International Law: The Experience of the Special Court for Sierra Leone’ (2005) 5 *HRLR* 271, 293.

<sup>87</sup> Mallinder, note 78, Chapter 4.

<sup>88</sup> Courts in France have held that a Mauritanian law granting amnesty to members of the armed forces and the security forces did not preclude the prosecution in French courts of Ely Ould Dah, a Mauritanian general, as it had no legal effect in France: Trial Watch: Ely Ould Dah. Similarly, Mexican courts have held that the amnesty granted under Argentine law had no legal effect internationally and cannot bind the courts of another state: *Decision on the*

territorial state, the courts of third states often examine whether the amnesty is precluded by international law, or would be inconsistent with the obligation of that state under treaty or customary law to extradite or to prosecute.<sup>89</sup> However, such decisions are not directly relevant to the present discussion.

The ‘national’ tribunals studied – the IJPP, the SPSC, the WCC, the ECCC and the IHT – all function as courts of the territorial state and can be equated to national courts for the purpose of the application of an amnesty provision. As outlined by Mallinder,<sup>90</sup> national courts tend to approach the treatment of amnesties from several perspectives. First, a national court may assess the legality of the amnesty provision against pre-existing national laws, including constitutional rules. It will then be a question as to whether the amnesty provision complies with those rules or, if not, which system of laws enjoys primacy within the domestic legal system. Second, a national court may approach the legality of an amnesty from the perspective of international law, and the state’s obligations under both relevant treaties and customary international law. This in turn is influenced by the court’s opinion as to where international law lies within the domestic legal system. Moreover, it requires an examination as to whether amnesties, and the particular amnesty in question, are compatible with obligations under international human rights law and international humanitarian law. However, the issue has been largely avoided in the internationalized tribunals, as the amnesty arrangements in question are designed or have been interpreted so as to exclude from their scope the international crimes that may be tried before the tribunals in question. Alternatively, amnesty has not been recommended or granted in relation to senior figures that would most likely be the target of such tribunals.

For example, in East Timor, the SPSC operated concurrently with the truth and reconciliation commission which investigated those who had committed minor offences during the relevant period, effectively providing an amnesty from prosecution. Other offences were retained by the Office of the General Prosecutor for investigation and trial.<sup>91</sup> There have been two attempts to introduce formal amnesty

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*Extradition of Ricardo Miguel Cavallo*, Supreme Court of Justicia, 10 June 2003, 42 ILM 888 (Mexico). See the discussion in Mallinder, note 78, 294-304.

<sup>89</sup> The exception would be where the amnesty is endorsed or imposed by the Council, see Naqvi, Y., ‘Amnesty for war crimes: Defining the limits of international recognition’ (2003) 85 *IRRC* 583, 591.

<sup>90</sup> Mallinder, note 78, Chapter 5.

<sup>91</sup> See Regulation 2001/10 On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, in particular section 27.

laws in East Timor, although neither attempt has been successful.<sup>92</sup> In addition, the Commission of Truth and Friendship had the power to request amnesty for persons responsible for violations of international humanitarian law, but only where such individuals have acknowledged their actions and apologised to the victims. However, in its final report, the Commission of Truth and Friendship elected not to recommend amnesty for any individual, finding that none of the individuals concerned had fully co-operated with its investigation.<sup>93</sup>

In Bosnia, the Dayton Agreement included an amnesty from prosecution for returning refugees or displaced persons charged with a crime, other than those accused of committing a serious violation of international humanitarian law. The Dayton Agreement also included an obligation to cooperate with the ICTY. Both the Federation of Bosnia and Herzegovina and the Republic Srpska introduced broad amnesty laws, excluding from their scope crimes within the jurisdiction of the ICTY.<sup>94</sup> This would also exclude from the scope of the amnesty crimes within the jurisdiction of the WCC. Amnesty is also unlikely to be an issue for the IHT. On 13 February 2008, the Iraqi Parliament adopted a law on amnesty.<sup>95</sup> By the end of 2008, some 125,000 Iraqis were released from custody pursuant to the amnesty.<sup>96</sup> However, the amnesty does not extend to crimes against humanity, genocide, terrorism and other serious crimes that form the material jurisdiction of the IHT.

The ECCC has been the only tribunal in this category to have considered the application of an amnesty. The ECCC Agreement includes a provision precluding the Government of Cambodia from requesting ‘an amnesty or pardon for any persons who may be investigated or convicted of crimes referred to in the present Agreement’.<sup>97</sup> In

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<sup>92</sup> A proposed amnesty law was passed by the parliament in 2004, but was never promulgated. The amnesty law would not have applied to offences with a possible sentence exceeding five years, but would allow a sentence reduction for such crimes. A second amnesty law – the Law on Truth and Measures of Clemency for Diverse Offences – was passed by parliament on 4 June 2007, but subsequently found unconstitutional by the Court of Appeals. This law was directed at offences committed during the 2006 elections, and their aftermath, not at the 1999 referendum or at the period of the Indonesian occupation.

<sup>93</sup> *From Remembering Comes Hope*, presented 15 July 2008.

<sup>94</sup> Law on Amnesty of the Federation of Bosnia and Herzegovina (30 June 1996), replaced by Law on Amnesty of the Federation of Bosnia and Herzegovina (3 December 1999). See also Amnesty Law of the Republika Srpska (4 July 1996), as amended by Law on Changes and Amendments to the Law on Amnesty (1999), and the Law on Amnesty of the Republic of Bosnia and Herzegovina (23 February 1996).

<sup>95</sup> Rubin, A., ‘Ending Impasse, Iraq Parliament Backs Measures’, *New York Times*, 14 February 2008.

<sup>96</sup> The actual figures of detainees released pursuant to the amnesty are unclear, this is the figure released by Chief justice Abdelsattar al-Berqadar on 14 December 2008.

<sup>97</sup> Article 11(1), ECCC Agreement.

relation to the one case in which the Government indicated that a pardon had been granted before entering into the ECCC Agreement, it was agreed that the ECCC would decide the scope of this pardon.<sup>98</sup> This is reflected in the Special Law, which provides ‘The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be determined by the Extraordinary Chambers’.<sup>99</sup>

The amnesty in question was granted on 14 September 1996<sup>100</sup> to Ieng Sary in relation to a conviction in absentia in 1979 on the charge of genocide<sup>101</sup> and under a 1994 law to prohibit the Khmer Rouge as an organisation.<sup>102</sup> In an appeal against the order for provisional detention, Ieng Sary raised the issue of the amnesty.<sup>103</sup> The relevant provision of the amnesty states:

An amnesty to Mr Ieng Sary, former Deputy Prime Minister in charge of Foreign Affairs in the Government of Democratic Kampuchea, for the sentence of death and confiscation of all his property imposed by order of the People’s Revolutionary Tribunal of Phnom Penh, dated 19 August 1979; and an amnesty for prosecution under the Law to Outlaw the Democratic Kampuchea Group, promulgated by Reach Kram No. 1, NS 94, dated 14 July 1994.

The Pre-Trial Chamber interpreted this provision such that there were two amnesties granted by the Royal Decree. The first was in relation to sentence only (technically a pardon). The Pre-Trial Chamber held that its validity was uncertain and it most likely would not preclude a conviction for genocide before the ECCC.<sup>104</sup> The second amnesty was an amnesty from prosecution under the Law to Outlaw the Khmer Rouge.<sup>105</sup> The Pre-Trial Chamber noted that the offences listed in this law were not the same as the crimes within the jurisdiction of the ECCC and thus did not preclude prosecution.<sup>106</sup> Thus the chamber did not consider the effect of the amnesty further, or

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<sup>98</sup> Article 11(2), ECCC Agreement.

<sup>99</sup> Article 40.

<sup>100</sup> Royal Decree No. NS/RKT/0996/72.

<sup>101</sup> Judgment of the People’s Revolutionary Tribunal, August 1979.

<sup>102</sup> Law to Outlaw the Democratic Kampuchea Group, promulgated by Reach Kram No. 1, NS 94, 14 July 1994.

<sup>103</sup> See Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008.

<sup>104</sup> Paras 57-58. The Pre-Trial Chamber also rejected an argument based on the *ne bis in idem* principle.

<sup>105</sup> Para 59.

<sup>106</sup> Para 61.

the validity of the amnesty under international law. However, it did leave scope for this question to be revisited at a later stage of proceedings.<sup>107</sup> The ECCC has otherwise not been expressly granted jurisdiction to consider the legality of the 1994 amnesty law, and should not be called upon to do so, as the amnesty excludes leaders of the Khmer Rouge.<sup>108</sup>

The final forum to be considered is an international criminal court. Into this category would fall the ad hoc tribunals, the ICC, the SCSL and the LST. Again, it is suggested that it is not enough merely to recognise the international status of the tribunal, but rather the legal basis, nature and constituent instruments of the tribunal must be examined. The ICTY and the ICTR would not be required to give effect to amnesty laws passed by the relevant territorial states, despite the absence of an express provision in their statutes to this effect. This is because their jurisdiction flows from the authority of the Security Council acting under Chapter VII of the Charter. The Security Council has given the tribunals primacy in respect of national laws and courts, and any amnesty would be inconsistent with the intention of the Security Council to render offenders accountable.<sup>109</sup> The ICTY has confirmed that amnesty would not preclude prosecution before the tribunal, at least in relation to the crime of torture.<sup>110</sup> It is also important to recall that, since the imposition of the completion strategy, both tribunals are focused on those most responsible, thus amnesty remains an option for lower level offenders who would not be targeted by the ICTY or the ICTR.<sup>111</sup>

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<sup>107</sup> The Pre-Trial Chamber noted that not making submissions at this stage cannot be considered a waiver of the right to do so at a later stage, para 23.

<sup>108</sup> Slye, R., 'The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violations of Human Rights' (2004) 22 *Wis ILJ* 100. Slye suggests that the ECCC should issue an opinion on the validity of the 1994 amnesty law, arguing that 'the tribunal judges might piece together a limited amnesty that contributes to both truth and justice', 123. However, it is submitted that this would exceed the jurisdiction of the ECCC.

<sup>109</sup> Naqvi, note 89, 615-616.

<sup>110</sup> *Prosecutor v Furundzija*, Judgment, Trial Chamber, 10 December 1998. Note here that the ICTY reached this conclusion based on the *erga-omnes* nature of torture, para 153. It did not address the issue based on the legal basis of the ICTY.

<sup>111</sup> Both Rwanda and the states of the former Yugoslavia have passed amnesty laws, excluding from the scope of the amnesty crimes within the jurisdiction of the ICTR and the ICTY. For example, in Rwanda, offenders in the lowest two categories would be prosecuted before national gacaca courts, with the lower level offenders not liable to imprisonment, but punishment comprising community service or some sort of arrangement with the victim. See: Schabas, W., 'Genocide Trials and Gacaca Courts' (2005) 3 *JICJ* 879; Fierens, J., 'Gacaca Courts: Between Fantasy and Reality' (2005) 3 *JICJ* 896; and Kirby, C., 'Rwanda's Gacaca Courts: A Preliminary Critique' (2006) 50 *JoAL* 94.

The position regarding amnesties before the ICC is deliberately ambiguous. During the negotiation of the Rome Statute, two positions emerged. Certain delegates advocated that permitting amnesties for crimes within the jurisdiction of the ICC would enable perpetrators to absolve themselves of responsibility.<sup>112</sup> Other states suggested that as amnesties were not prohibited by international law and can be a valuable tool for achieving peace in situations of conflict, the ICC should take account of domestic amnesties when deciding whether to exercise jurisdiction.<sup>113</sup> This difference of opinion was never resolved and, as a result, the Rome Statute is silent on the issue. It has been suggested that the ICC could accommodate a domestic amnesty provision in a number of ways.<sup>114</sup> The ICC's approach to amnesty has been discussed following the issue of indictments and arrest warrants in respect of leaders of the Lord's Resistance Army in northern Uganda in 2005. The leaders are eligible for amnesty under a 2000 act which provided a blanket amnesty in order to encourage the LRA to surrender.<sup>115</sup>

The SCSL Statute and the LST Statute contain a provision concerning the applicability of amnesties. Article 10 of the SCSL Statute provides 'An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution'. The provision is directed at article 9 of the Lome Accord, which extended a blanket amnesty to 'all combatants and collaborators' and in particular that 'no official or judicial action' be taken in respect of any member of the RUF, AFRC, SLA or CDF for their actions from March 1991 up to the date of signature of the Lome Accord. In the *Lome Amnesty Decision*,<sup>116</sup> the accused argued that the Government of Sierra

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<sup>112</sup> For a discussion of the negotiations see Roht-Arriaza, N., 'Amnesty and the International Criminal Court' in Shelton, D. (ed) *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (2000, Transnational Publishers); Gavron, J., 'Amnesties in the Light of Development in International Law and the Establishment of the International Criminal Court' (2002) 51 *ICLQ* 91; and Wedgwood, R., 'The International Criminal Court: An American View' (1999) 10 *EJIL* 93.

<sup>113</sup> See, in particular, the non-paper circulated by the United States Delegation to the Preparatory Commission, 'State practice Regarding Amnesties and Pardons' (August 1997).

<sup>114</sup> Several provisions of the Rome Statute are said to allow the ICC to defer to domestic amnesties: article 15 (prosecutorial discretion); article 16 (deferral at the request of the Council); article 17 (complementarity); article 20 (*non bis in idem*); and article 53 (prosecutorial discretion). For further discussion, see: Scharf, M., 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 *CILJ* 507; Robinson, D., 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *EJIL* 481; and Mazjub, D., 'Peace or Justice? Amnesties and the International Criminal Court' (2002) 3 *Melb JIL* 248; Mallinder, note 78, Chapter 6.

<sup>115</sup> See discussion in Mallinder, 78, 280-282, and case study 2.

<sup>116</sup> *Prosecutor v Kallon and Kamara*, Decision on Challenge to Jurisdiction, *Lome Accord Amnesty*, Appeals Chamber, 13 March 2004 (*Amnesty Decision*). Counsel for two other

Leone was bound by the Lome Accord, as an international agreement, which could not be amended without the consent of all the parties to the agreement, including the RUF. The Appeals Chamber rejected this argument, finding that although international actors, including the United Nations, had signed the agreement as mediators, this did not render the agreement international in nature.<sup>117</sup> Moreover, the Appeals Chamber considered it to be unlikely that the parties to the conflict, in particular the RUF, had the capacity to enter into international agreements.<sup>118</sup> The Appeals Chamber then considered whether it had the competence to review the legality of the SCSL Statute, in particular article 10, and the SCSL Agreement. It concluded that it did not, unless it considered the provisions in question to be void for being inconsistent with a peremptory norm of international law.<sup>119</sup>

The Appeals Chamber then considered whether amnesties may lawfully be granted in respect of international crimes. Having reached the conclusion it did with respect to the jurisdictional issue, the SCSL did not have to consider the validity of the amnesty further, so this discussion was technically dicta. The Appeals Chamber held that, where international crimes are subject to universal jurisdiction, ‘a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of an amnesty’.<sup>120</sup> It also indicated that this principle would apply to prosecution before an international tribunal.<sup>121</sup> While the Appeals Chamber recognised that ‘not every

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accused – Fofana and Gbao - submitted briefs as interveners. The amnesty provision was also raised in three other decisions: *Prosecutor v Kondewa*, Decision on Lack of Jurisdiction / Abuse of Process: Amnesty Provided by the Lome Accord, Appeals Chamber, 25 May 2004; *Prosecutor v Gbao*, Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone, Appeals Chamber, 25 May 2004; and *Prosecutor v Fofana*, Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, Appeals Chamber, 25 May 2004. In all three cases, the SCSL adopted the reasoning in the *Amnesty Decision*.

<sup>117</sup> *Amnesty Decision*, paras 41-42. For the view that negotiated settlements in respect of internal armed conflicts can constitute treaties, see Kooijmans, P., ‘The Security Council and Non-State Entities as Parties to the Conflict’, in Wellens, K. (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (1998, Kluwer Law International), 333-346, discussed by the Appeals Chamber, paras 38-9, and Cassese, A., ‘The Special Court and International Law: The Decision Concerning the Lome Agreement Amnesty’ (2004) 2 *JICJ* 1130, 1134-35.

<sup>118</sup> *Amnesty Decision*, para. 48.

<sup>119</sup> *Amnesty Decision*, para 62, relying upon articles 53 and 64, of the Vienna Convention on the Law of Treaties. The Appeals Chamber distinguished the decision of the ICTY in the *Tadic Jurisdiction Decision* based on the status that the SCSL is a treaty-based institution. For criticism of this aspect of the decision, see Meisenberg, S., ‘Legality of Amnesties in international humanitarian law: The Lome Amnesty Decision of the Special Court for Sierra Leone’ (2004) 86 *IRRC* 837, 841-2 and Williams, S., ‘Amnesties in International Law: The Experience of the Special Court for Sierra Leone’ (2005) 5 *HRLR* 271, 282-286.

<sup>120</sup> *Amnesty Decision*, para 67.

<sup>121</sup> *Amnesty Decision*, para 72.

activity that is seen as an international crime is susceptible to universal jurisdiction’,<sup>122</sup> it concluded that the crimes in articles 2 to 4 of the SCSL Statute ‘are international crimes and crimes against humanity’<sup>123</sup> and that States can exercise universal jurisdiction in respect of such crimes.<sup>124</sup> The Appeals Chamber also endorsed the submission of the amicus curiae that ‘given the existence of a treaty obligation to prosecute or extradite an offender, the grant of amnesty in respect of such crimes as are specified in Articles 2 to 4 of the Statute of the Court is not only incompatible with, but is in breach of an obligation of a State towards the international community as a whole’.<sup>125</sup> The Appeals Chamber noted that a prohibition against amnesties in relation to serious violations of international law was a ‘crystallising international norm’<sup>126</sup> and that ‘this court is entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such an amnesty’.<sup>127</sup> It therefore concluded that, regardless of any affect the amnesty may have had in domestic law, ‘it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction’.<sup>128</sup>

The *Lome Amnesty Decision* has been heavily criticised, and rightly so. Most importantly for the present study, the decision failed to consider the legal basis of the SCSL as a court established by a treaty. The SCSL operates on the basis of delegated territorial jurisdiction from Sierra Leone and does not operate on the basis of universal jurisdiction. If Sierra Leone by granting an amnesty has relinquished the jurisdiction its courts could otherwise have exercised, it could not have delegated that jurisdiction to the SCSL. Similarly, the analogy made between the SCSL and the position of a foreign state is not appropriate in these circumstances. Accordingly, there is some merit in the arguments of the accused on this point. Second, the Appeals Chamber reached a sweeping conclusion that all the international crimes within its material jurisdiction were subject to universal jurisdiction. This is not necessarily so, particularly regarding the commission of war crimes in internal armed conflicts. As

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<sup>122</sup> *Amnesty Decision*, para 68.

<sup>123</sup> *Amnesty Decision*, para 69.

<sup>124</sup> *Amnesty Decision*, para 70.

<sup>125</sup> *Amnesty Decision*, para 73. Submissions were filed on behalf of Redress and by Professor Diane Orentlicher.

<sup>126</sup> *Amnesty Decision*, para 82, quoting the submission by the Prosecutor.

<sup>127</sup> *Amnesty Decision*, para 84.

<sup>128</sup> *Amnesty Decision*, para 88.

Cassese notes, ‘the Court did not corroborate [this proposition] with any authority’.<sup>129</sup> Third, the Appeals Chamber referred to treaties imposing an obligation to prosecute or extradite, but did not examine whether such an obligation existed in the circumstances in question, particularly having regard to Sierra Leone’s treaty obligations. There is no treaty obligation on Sierra Leone to prosecute the crimes within the SCSL Statute.<sup>130</sup> Fourth, the reasoning of the Appeals Chamber ‘appears obscure and unnecessarily torturous’.<sup>131</sup> Finally, the position adopted by the SCSL was not supported by customary international law.<sup>132</sup> The SCSL itself accepted that there was at present no norm precluding the grant of an amnesty, accepting that ‘such a norm is developing under international law’. The better view is that no such rule presently exists.<sup>133</sup> Moreover, the rule applied is an absolute one, which would remove amnesty as a possible tool in all circumstances. As Schabas notes, ‘Peace and reconciliation are both legitimate values that should have their place in human rights law. They need to be balanced against the importance of prosecution rather than simply discarded’.<sup>134</sup> The Sierra Leone truth and reconciliation commission adopted a different approach to the amnesty provision. While not required to pronounce as to the legality of the provision, the truth and reconciliation commission indicated its sympathy for the reasons justifying the grant of an amnesty, commenting that the amnesty ‘provided the framework for a process that pacified the combatants and, five years later, has returned Sierra Leoneans to a context in which they need not fear daily violence and atrocity’.<sup>135</sup> As a practical matter, the approach adopted by the SCSL is problematic as Sierra Leone remains bound by the amnesty,<sup>136</sup> yet the SCSL depends on the authorities to arrest and surrender the accused.<sup>137</sup> As Meisenberg notes, such acts are ‘undoubtedly of a judicial and official character’ and would be within the scope of the amnesty provision.<sup>138</sup>

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<sup>129</sup> Cassese, note 117, 1133.

<sup>130</sup> As discussed in Chapter Four, the material jurisdiction of the SCSL is restricted to violations of Common Article 3, APII, other serious violation as set out in the SCSL Statute and crimes against humanity. Obligations under the grave breaches provisions of the Geneva Conventions, the CAT and the Genocide Convention are not relevant. See Schabas, W., ‘Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone’ (2004-05) 11 *UC Davis JIL&P* 145, 161-2; Williams, note 86, 291-293.

<sup>131</sup> Cassese, note 117, 1131.

<sup>132</sup> *Amnesty Decision*, para 82.

<sup>133</sup> Schabas, note 130, 168, suggesting that the Appeal Chamber’s conclusions ‘most certainly go beyond existing law, as is evident from even a cursory reading of the judgment’.

<sup>134</sup> Schabas, note 130, 168.

<sup>135</sup> Commission Report, quoted from Schabas, note 3130, 164.

<sup>136</sup> The Appeals Chamber did not declare the amnesty to be unlawful for the purpose of the domestic legal system: *Amnesty Decision*, para 50.

<sup>137</sup> Article 17(2), SCSL Agreement.

<sup>138</sup> Meisenberg, note 119, 847.

Apart from the approach adopted by the Appeals Chambers, there are several ways in which the application of the amnesty provision could have been avoided. It has been suggested that the grant of the amnesty was conditional upon the support of the peace process by the accused, and that the Lome Accord became void due to the continued material breaches of its terms.<sup>139</sup> The agreement, and its implementing legislation, would then be considered void and would not apply, including before the domestic courts of Sierra Leone.<sup>140</sup> Thus the Lome Accord would not have restricted the capacity of the Government of Sierra Leone to establish the SCSL. Alternatively, it could be argued that by entering into the SCSL Agreement, which delegated jurisdiction to the SCSL, and by passing the Ratification Act, the government repudiated the amnesty, at least in relation to a limited category of offenders, senior leaders and those most responsible. Successor governments are entitled to vary or extinguish an amnesty, although presumably such action must comply with domestic legal requirements. However, the Appeals Chamber unfortunately rejected this approach, finding that: ‘No reasonable tribunal will hold that the Government of Sierra Leone has reneged on its undertaking by agreeing to Article 10 of the Statute which is consistent with the developing norm of international law and with the declaration of the representative of the Secretary-General on the execution of the Lome Agreement’.<sup>141</sup> A final option would have been for the SCSL to have precluded the application of the amnesty to the accused by interpreting the terms of the amnesty strictly.

Article 16 of the LST Agreement provides that the Government of Lebanon shall not grant an amnesty to any person for a crime falling within the jurisdiction of the LST, and that any such amnesty granted will not be a bar to prosecution. Thus the Government of Lebanon is under a clear obligation not to grant an amnesty. The second part of article 16 is reflected in article 6 of the LST Statute, which provides

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<sup>139</sup> Cassese, note 117, 1135-39, noting that although some aspects of implementation of the Lome Accord did continue, this was merely paying lip service to its provisions. Judge Robertson adopted a similar approach in his separate opinion: *Prosecutor v Kondewa*, Decision on Lack of Jurisdiction / Abuse of Process: Amnesty Provided by the Lome Accord, Separate Opinion of Justice Robertson, 25 May 2004. See also Williams, note 86, 296-300. For the view that amnesty provisions cannot be conditional, see Schabas, note 130.

<sup>140</sup> Cassese reaches this conclusion, but also recognizes that it is possible that the implementing legislation may continue to have effect within the domestic legal system of Sierra Leone: note 117, 1139-1140. However, he concludes that this would not bar the exercise of jurisdiction by the SCSL. Given the legal nature of the SCSL, it is submitted that this would bar the exercise of jurisdiction by the SCSL, for the reasons noted above.

<sup>141</sup> *Amnesty Decision*, para 62. Schabas notes that this statement was surprising and odd, particularly given the statements of the President of Sierra Leone on the amnesty provision: Schabas, note 130, 159-160.

that ‘An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution’. To date, no amnesty has been granted in relation to the assassination of former Prime Minister Hariri or the connected acts of terrorism. The Secretary-General did not indicate why the amnesty provision was included in the LST Statute. Perhaps there had been concerns that, given the supposed high-level involvement of Lebanese officials and the possibility of changes in government, an amnesty might have been granted in the future. Lebanon does have a history of adopting amnesties, having granted a general amnesty law in relation to crimes committed during the conflict in Lebanon from 1975 to 1990.<sup>142</sup> However, that amnesty excluded prosecutions against individuals accused of the assassination or the attempted assassination of religious and political leaders and foreign diplomats.<sup>143</sup> Wierda et al note that ‘this exception opened the door to selective prosecutions for those opposed to the Syrian hegemony’. Thus a study of previous Lebanese practice reveals that amnesties have been granted in the past, and have become politicized.<sup>144</sup>

It would be a violation of Resolution 1757 if Lebanon were to grant an amnesty, as the terms of the LST Agreement were incorporated into the resolution. Yet it is not clear what action the Security Council would – or could - take in response to the violation. Assuming sufficient political support, it could possibly condemn the grant of the amnesty, withdraw support for the LST and/or impose a sanction of some description under article 41 of the Charter. The LST could also determine the applicability of any amnesty granted in accordance with article 6 of the LST Statute. Interesting questions would also be raised if Syria were to grant an amnesty to any of its nationals in respect of the terrorist attacks within the jurisdiction of the LST. Amnesties issued in relation to terrorist offences may raise different considerations than those raised in relation to international crimes, such as crimes against humanity, genocide and war crimes. First, terrorism is not accepted as an international crime that would be included in any emerging rule of customary international law prohibiting amnesty for international crimes. This difficulty is compounded in the LST Statute, as the crime is defined solely by reference to domestic law. Second, as Saul notes, terrorist crimes tend to target a smaller part of the population and are not widespread. Therefore, ‘amnesties for terrorism may not be justifiable as necessary to achieve national reconciliation or

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<sup>142</sup> Amnesty Law, passed by the Lebanese Parliament on 26 August 1991.

<sup>143</sup> Article 3(3) Amnesty Law.

<sup>144</sup> Wierda, M., Nassar, H. and Maalouf, L., ‘Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon’ (2007) 5 *JICJ* 1065, 1070-71.

to restore harmony between rival ethnic or religious groups'.<sup>145</sup> However, 'amnesties for terrorism may be appropriate where it is sectarian and affects significant parts of the population or in specific cases where life is at imminent risk'.<sup>146</sup> Third, the effect of the various terrorism conventions and the resolutions of the Security Council on terrorism must also be considered. To the extent that such instruments establish for a particular state a duty to prosecute or to extradite, they may preclude the grant of an amnesty, particularly where terrorism affects victims or perpetrators from more than one state.<sup>147</sup> As the Security Council has indicated that the terrorist acts that form the substantive jurisdiction of the LST constituted threats to international peace and security, and the Security Council has acted to establish the LST with jurisdiction in respect of those acts, arguably any grant of amnesty would be inconsistent with Resolution 1757. Accordingly, the LST would be entitled to not apply the amnesty provision.

### **3.3 Conclusion**

What does the above practice demonstrate? The experience of the SPSC, the WCC, the IHT and the ECCC in some respects supports the assertion that a principle is developing in customary international law such that amnesty should not be granted in respect of serious crimes. The national parliaments have passed general amnesty laws, yet all exclude from the scope of the amnesty either high-level offenders or those accused of committing serious crimes. Where an internationalized tribunal is established as part of the national judicial system, the United Nations or the state(s) providing the assistance should to the extent possible, commit the affected state to an obligation not to grant an amnesty in respect of crimes within the subject matter jurisdiction of the tribunal or, at least should ensure that senior leaders are excluded from the scope of the amnesty. Where an amnesty has already been granted to either senior leaders or a named individual that is the target of investigation, as is the case in Cambodia, it is submitted that there are three options. First, the tribunal could be allowed to determine the validity and/or applicability of the amnesty provision. This is the approach adopted in the ECCC Agreement and the Special Law. Second, the government of the affected state could repeal the amnesty in question, if this was possible under domestic law and would not be problematic politically. Third, a decision could be taken to recognize the amnesty for a particular individual or individuals. However, this option would raise issues for United Nations involvement

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<sup>145</sup> Saul, B., *Defining Terrorism in International Law* (2006, OUP), 125.

<sup>146</sup> *Ibid*, 125.

<sup>147</sup> Saul, note 145, 126-7.

in the tribunal and may violate any rule of customary international law precluding the grant of amnesties that may emerge.

Similarly, where a tribunal is established by a treaty, the agreement should oblige the government of the affected state to not grant a future amnesty in respect of crimes or individuals within the tribunal's jurisdiction. In terms of amnesties already granted, such as the amnesty in the Lome Accord, the affected state should be encouraged to revoke the amnesty in relation to those crimes and individuals within the tribunal's jurisdiction. Where this is not possible, the parties may elect to leave the applicability of the amnesty to the tribunal to resolve, either by finding the amnesty to be invalid by reference to international or domestic law, by limiting the scope of the amnesty through a restrictive interpretation or by upholding the amnesty. Alternatively, the parties could attempt to pre-determine the issue by including a provision, similar to article 10 of the SCSL Statute, in the constituent instrument of the tribunal. However, as has been seen in proceedings before the SCSL, this will not preclude the court facing arguments based on the amnesty law.

Where the tribunal is to be established by the Security Council, an amnesty that would apply to senior leaders in respect of international crimes may be inconsistent with any obligations placed on the affected state(s) to co-operate with the tribunal. The affected state should ensure that any amnesty laws passed exclude individuals and crimes within the jurisdiction of the tribunal. If an amnesty has already been granted, the Security Council could consider including a provision excluding the application of the amnesty in respect of proceedings before the tribunal. Alternatively, the Security Council could leave the issue to the tribunal to resolve. As has been shown in relation to Lebanon, an amnesty provision in respect of terrorist attacks may raise particular issues.

## **4 Securing custody of the accused**

### **4.1 Introduction – co-operation and international criminal tribunals**

All of the tribunals studied recognise the right of the accused to be present during the trial.<sup>148</sup> They also restrict this right in varying circumstances.<sup>149</sup> This means that, in

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<sup>148</sup> Article 17(d) SCSL Statute; Article 35(d) Special Law; Article 7 Criminal Procedure Code Bosnia and Herzegovina; Article 20(1)(4) IHT Statute; Article 16(4)(d) LST Statute; sections 6(2) and 5(1) of UNTAET Regulation 2000/30.

<sup>149</sup> Rule 60, RPE SCSL; Articles 247 and 242 Criminal Procedure Code Bosnia and Herzegovina; Rule 81, RPE ECCC; UNMIK Regulation 2000/1, On the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law; Section 5, UNTAET

most situations, it will be necessary to secure the custody of the accused before a trial can commence. As none of the tribunals studied have their own enforcement mechanism, they depend on the co-operation of the relevant national authorities and those of other states to enforce their orders.<sup>150</sup> In some situations, peacekeeping forces may also play a role in detaining and transferring the accused to the custody of the tribunal.<sup>151</sup>

International law presently recognizes two models of co-operation: the vertical, or supra-state model, and the traditional, state-based horizontal model. The vertical model is characterised by an international judicial authority, vested with sweeping powers as regards both subjects within the state and the state itself. The court has the power to issue binding orders and to enforce its orders, and states may not rely on national security or other grounds to withhold co-operation. In contrast, the horizontal model is based on consensus, and the sovereign equality of states. Co-operation is generally provided for in a treaty, and is based on reciprocity. The normal exceptions to extradition apply and co-operation may be refused on the basis of national security and other grounds. Disputes as to the interpretation of the obligation to co-operate are to be resolved by dispute settlement measures, including diplomatic channels.<sup>152</sup>

The ICTY and the ICTR fall within the first model of co-operation, the supra-state model. Both were established by the Security Council acting pursuant to its powers under Chapter VII of the Charter, and states have an obligation to comply with their orders.<sup>153</sup> The general obligation to co-operate with the tribunal is confirmed in the

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Regulation 2000/30; Article 19(4)(D), IHT Statute; Article 22, LST Statute. Article 22 of the LST Statute is the most expansive provision, as, unlike the other tribunals, the accused is not required to have been present at any stage of the proceedings. For further discussion, see Gaeta, P., 'To be (Present) or Not to Be (Present): Trials in Absentia before the Special Tribunal for Lebanon' (2007) 5 *JICJ* 1165 and Aptel, C., 'Some Innovations in the Statute of the Special Tribunal for Lebanon' (2007) 5 *JICJ* 1107.

<sup>150</sup> The tribunals also require co-operation in gaining access to evidence, including physical and documentary evidence and witness testimony, and in enforcing sentences following conviction. While such co-operation is essential if the tribunal is to perform its mandate, these forms of co-operation will not be considered separately here.

<sup>151</sup> For example in the former Yugoslavia, the NATO-led SFOR assisted in the arrest and surrender to the ICTY of several accused. For discussion, see Zhou, H., 'The Enforcement of Arrest Warrants by International Forces' (2006) *JICJ* 202 and Gaeta, P., 'Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?' (1998) 9 *EJIL* 174.

<sup>152</sup> Sluiter, G., 'Legal Assistance to the Internationalized Criminal Tribunals' in Romano et al (eds) *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (2004, OUP), 382.

<sup>153</sup> Para. 4 of Resolution 827 (1993) (ICTY) and para. 2 of Resolution 955 (ICTR) state that the Council 'decides that all States shall cooperate fully with the International Tribunal and its organs...'. This is binding on member states by virtue of article 25 of the Charter. See also

statutes of both tribunals.<sup>154</sup> In terms of enforcement of its orders, the President may inform the Security Council of a judicial finding of non-compliance by a state, and the Security Council may then choose to take action.<sup>155</sup> However, securing the co-operation of states has proved to be one of the greatest challenges of the ad hoc tribunals, particularly for the ICTY in relation to the states of the former Yugoslavia. The President of the ICTY has in the past reported non-co-operation to the Security Council in relation to Croatia<sup>156</sup> and the Federal Republic of Yugoslavia.<sup>157</sup> The Security Council responded merely by issuing further calls for co-operation and confirming that states are under a general obligation to co-operate with the ICTY<sup>158</sup> The authorities of the Republika Sprska have also largely failed to cooperate with the ICTY, although co-operation has improved in recent years.<sup>159</sup>

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*Prosecutor v Blaskic*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, with the Appeals Chamber confirming that the ICTY has the power to issue binding orders to states, paras 26-31; and Chaumette, A., 'The ICTY's Power to Subpoena Individuals, to Issue Binding Orders to International Organisations and to Subpoena Their Agents' (2004) 4 *ICLR* 357.

<sup>154</sup> Article 29, ICTY Statute; Article 28, ICTR Statute. This provision states that member states shall cooperate with the ICTY/ICTR in the investigation and prosecution of crimes and shall comply without undue delay with a request for assistance or an order of the ICTY/ICTR. This would include a request for the arrest and surrender of an accused. For further details see Warbrick, C. and McGoldrick, D., 'Co-operation with the International Criminal Tribunal for Yugoslavia' (1996) 45 *ICLQ* 947 and Sarooshi, D., 'The Powers of the United Nations International Criminal Tribunals' (1998) 2 *MPYBIL* 141.

<sup>155</sup> Rule 7bis, RPE of both tribunals.

<sup>156</sup> See Letter from President Gabrielle McDonald to the President of Security Council, 2 November 1999, reporting the failure of Croatia to arrest Ivica Rajic and Mladen Naletilic, and the failure by Croatia to recognise the tribunal's jurisdiction in respect of Operations Storm and Flash.

<sup>157</sup> See: Letter from President Gabrielle McDonald to the Security Council 8 September 1998 (S/1998/839) and Letter from President Gabrielle McDonald to the President of the Security Council 22 October 1998 (S/1998/990), concerning the failure of the FRY to arrest Mile Mrksic, Miroslav Radic and Veselin Slijvanec; Letter from President Gabrielle McDonald to the Security Council 6 November 1998 (S/1998/1040) (refusal of the FRY to grant visas to ICTY investigators in order to conduct investigations in Kosovo); Letter from President Gabrielle McDonald to the President of Security Council 2 November 1999 (failure to arrest the three suspects in the Vukovar case, and Mladic and Karadzic); and Letter from President Claude Jorda of the ICTY to President of the Security Council 23 October 2002 (non-cooperation in arresting and transferring remaining suspects).

<sup>158</sup> See Resolution 1160 (1998) (noting the FRY is required to co-operate with ICTY investigations); Resolution 1199 (1998) (calls upon the FRY to co-operate regarding the ICTY investigation in Kosovo); Resolution 1207 (calling upon the FRY to implement its obligation to co-operate with the ICTY into domestic law and condemning the FRY for its failure to execute outstanding arrest warrants); Statement of the President of the Security Council, 18 December 2002 (reiterating the Council's support for the ICTY and recalling the mandatory obligation of member states to co-operate with the ICTY).

<sup>159</sup> The President of the ICTY reported to the Council the failure of the authorities of the Republika Sprska to arrest and surrender Dragan Nolic: Letter from President Gabrielle McDonald to the President of Security Council 2 November 1999.

The ICC adopts a different model of co-operation, which is ‘a mixture of the “horizontal” and the “vertical”’.<sup>160</sup> As a treaty-based institution, the ICC relies on state consent, and lacks the support provided by a mandate from the Security Council acting under Chapter VII of the Charter. As Broomhall comments, the ‘cooperation provisions reflect a balance between the needs of an effective Court and the prerogatives of the sovereign States whose support for the Statute will underlie its success’.<sup>161</sup> Article 86 of the Rome Statute imposes a general obligation on states to cooperate with the ICC, while article 87 enables the ICC to issue requests for assistance – not orders – to states. States must also provide the necessary procedures under domestic law required for co-operation with the ICC.<sup>162</sup> Where a state has failed to co-operate, and that failure affects the ability of the ICC to exercise its powers and functions, the ICC may make a judicial finding to that effect and refer the matter to the Assembly of State Parties.<sup>163</sup> It is important to recall that, other than in the specific cases of the referral of a situation to the ICC by the Security Council<sup>164</sup> or by a state that is not party to the Rome Statute,<sup>165</sup> these obligations apply to state parties only.<sup>166</sup> Moreover, the framework adopted also ‘entails that the Contracting Parties may not assume reciprocal obligations that would infringe upon rights of third States under treaties or general international law’.<sup>167</sup>

#### **4.2 Co-operation and the internationalized tribunals**

The following section will assess the co-operation model(s) that apply to the tribunals studied. There are three situations to consider: first, securing co-operation from the territorial state; second, the co-operation of states ‘directly affected’; and third, co-

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<sup>160</sup> Swart, B., ‘International Co-operation and Judicial Assistance: General Problems’ in Cassese et al (eds) *The Rome Statute of the International Criminal Court* (2002, OUP), 1590. See also Oosterveld, V., Perry, M. and McManus, J., ‘The Co-operation of States with the International Criminal Court’ (2001) 25 *FILJ* 767.

<sup>161</sup> Broomhall, note 79, 155.

<sup>162</sup> Article 88, Rome Statute.

<sup>163</sup> Article 87(5). The Assembly of State Parties is required to ‘consider...any question relating to non-cooperation’, Article 112(2)(f). In the case of referral of a situation to the ICC by the Security Council, the ICC will inform the Security Council: Article 87(7).

<sup>164</sup> It is not clear which framework for co-operation will apply in the event a situation concerning a non-party state is referred to the ICC by the Security Council. Paragraph 2 of Resolution 1593, referring the situation in Darfur to the ICC, imposes an obligation on Sudan (a non-party state) to co-operate with the ICC. For a discussion of the difficulties in applying the framework adopted in Part 9 of the Rome Statute to a non-party state, see Sluiter, note 152.

<sup>165</sup> Article 12(3), Rome Statute. States accepting the jurisdiction of the ICC in this manner ‘shall cooperate with the Court without any delay or exception in accordance with Part 9’.

<sup>166</sup> The Rome Statute permits the ICC to accept co-operation from non-party states, international organizations and other international bodies on an ad hoc basis: see articles 87(5), 87(6) and 54(3)(c). For further discussion, see Ciampi, A., ‘The Obligation to Cooperate’ in Cassese et al *The Rome Statute of the International Criminal Court* (2002, OUP) 1607.

<sup>167</sup> Swart, note 160, 1594, citing articles 73, 90, 93 and 98 of the Rome Statute.

operation from other states. Both UNTAET and UNMIK acted as the national authority when establishing and operating the SPSC and the IJPP. In relation to individuals located outside Kosovo or East Timor, the horizontal model should have been applicable, as the SPSC and the IJPP are to be considered national institutions. The better view is that the obligation upon member states to assist UNTAET and UNMIK in the performance of their mandate<sup>168</sup> did not extend to a general obligation to co-operate with the SPSC and the IJPP, including extradition and the provision of legal assistance.<sup>169</sup> This appears to have been the model that was applied in practice. In East Timor, UNTAET entered into a Memorandum of Understanding with Indonesia to govern co-operation on criminal matters.<sup>170</sup> As Sluiter notes, the memorandum was ‘not based on the assumption of a full and unconditional obligation incumbent upon Indonesia to provide UNTAET with all necessary assistance’.<sup>171</sup> Ultimately, co-operation with UNTAET was extremely limited, with Indonesia refusing to extradite any suspect to East Timor for trial.<sup>172</sup> Following independence, East Timor entered into negotiations with Indonesia in a number of areas, including co-operation in legal and judicial measures, but the two states are yet to enter into a general bilateral agreement on this topic. UNTAET also exercised its capacity to enter into international agreements and to negotiate agreements with third states if required for judicial co-operation. Following independence, East Timor needed to negotiate new bilateral agreements with third states to allow for extradition and mutual legal assistance in criminal matters.

The position of UNMIK concerning the FRY authorities was more problematic, as until independence, Kosovo remained legally part of the FRY and requests for extradition and judicial assistance technically came from the same jurisdiction.<sup>173</sup> However, both the FRY and UNMIK appear to have treated the court systems as

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<sup>168</sup> In Resolution 1244 (1999), the Security Council demanded that ‘all states in the region cooperate fully in the implementation of all aspects of this resolution’, para 18. Resolution 1272 (1999) states that the Security Council ‘Stresses the importance of cooperation between Indonesia, Portugal and UNTAET in the implementation of this resolution’, para 7.

<sup>169</sup> See Sluiter, note 152, 385-6, noting that it was possible that the Security Council had intended a general obligation to co-operate with the SPSC and the IJPP.

<sup>170</sup> Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Co-operation in Legal, Judicial and Human Rights Related Matters, 5 April 2000.

<sup>171</sup> Sluiter, note 152, 391. For detailed discussion of the relevant provisions of the MoU, see 391-393.

<sup>172</sup> Indonesia relied upon the provisions of the MoU itself, which allow for refusal of extradition and cooperation in a number of situations, and on the provision in its domestic law prohibiting the extradition of nationals. By the conclusion of the SPSC’s activities, a total of 339 indicted people remained beyond the jurisdiction of the SPSC, many believed to be at large in Indonesia: JSMP, Overview of the Justice Sector, 2005, 30-1.

<sup>173</sup> Sluiter, note 152, 390.

distinct, and adopted a horizontal model of co-operation, entering into arrangements for extradition and legal assistance in criminal matters on an ad hoc basis.<sup>174</sup> The ambiguous legal status of Kosovo during the transitional administration also impacted upon the ability of the IJPP to secure co-operation from other states. UNMIK could request assistance on behalf of the IJPP, but there would be no legal obligation for the requested state to comply. Similarly, without the support of the Government of the FRY, the IJPP was unable to rely upon the treaties to which the FRY was a party. Requests to extradite suspects to and from Kosovo were made on an ad hoc basis between UNMIK and the state concerned.<sup>175</sup> UNMIK did negotiate a number of memoranda with states such as Albania, the Federal Yugoslav Republic of Macedonia and Montenegro providing for co-operation in criminal justice matters and bilateral agreements with states to enable extradition.

The WCC adopts a horizontal model of co-operation in relation to the states of the former Yugoslavia and other states. As a national court, the WCC relies on requests for extradition and legal assistance made by the relevant national authorities either on an ad hoc basis or in accordance with treaties for extradition and mutual legal assistance. Co-operation with other states in the region has improved following ratification by Bosnia of the European Convention on Extradition.<sup>176</sup> Co-operation from the authorities of the Republika Sprska also appears to have improved, and any difficulties in obtaining co-operation with the constituent entities have been considered a matter of domestic law. The WCC also enjoys a relationship with the ICTY and has received several cases referred to it by the ICTY, with the accused transferred from the ICTY to the Bosnian authorities, and then to the WCC. Rule 11*bis* of the ICTY RPE also contemplates the transfer of an indictment to the WCC;

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<sup>174</sup> For example, in 2004, the War Crimes Prosecutor of Serbia entered into an agreement with UNMIK's Prosecutors' Office which enabled the investigation of witnesses located in Kosovo by Serb authorities, with reciprocal access for witnesses located in Serbia. UNMIK has issued requests for extradition to authorities in Serbia. However, both UNMIK and the Serbian authorities maintained that Serbia was not a foreign jurisdiction. See 'UNMIK Requests Serbia to Extradite Serb Leader from Northern Kosovo' *Yugoslav Daily Survey*, 22 August 2002.

<sup>175</sup> UNMIK has received requests for extradition from the national authorities of the former Yugoslav Republic of Macedonia and Rwanda. UNMIK has issued requests on behalf of the IJPP for extradition to the national authorities of Austria, which refused extradition. In light of concerns that the law in Kosovo did not provide an acceptable basis for the extradition of suspects, UNMIK introduced UNMIK Regulation 2003/34, Amending the Applicable Law on Procedures for the Transfer of Residents of Kosovo to Foreign Jurisdictions. The Regulation depended on a bilateral agreement between UNMIK and the requesting country being in place prior to transfer.

<sup>176</sup> CETS No. 024. Bosnia ratified on 25 April 2005, with the treaty entering into force for Bosnia on 24 July 2005. Croatia, Serbia, the FRY Macedonia and Montenegro are also parties to this treaty. All are also parties to the European Convention on Mutual Assistance in Criminal Matters, CETS No. 030.

that is where the accused is not yet in custody, the ICTY can determine that once the accused is arrested, the arresting state must surrender the accused to the WCC. As Bohlander notes, this potentially allows the WCC to bypass bilateral or multilateral agreements, and to call on the custodial state to transfer the accused even in the absence of a treaty arrangement.<sup>177</sup>

The IHT may draw upon the resources of the Iraqi police, court and penal system. Article 39 of the IHT Statute provides that the Council of Ministers, in conjunction with the President of the IHT, shall issue instructions to facilitate the implementation of the IHT Statute. This presumably would include instructions to other national institutions to assist and to co-operate with the IHT. The IHT relies on a horizontal co-operation model in relation to other states, with requests for arrest and surrender to be issued by Iraqi authorities in accordance with Iraqi law and agreements to which Iraq is a party. The IHT has been heavily dependent on the assistance of the forces of the United States, the United Kingdom and other coalition partners in securing custody of and detaining suspects.<sup>178</sup> For example, the former President, Saddam Hussein, was detained by US forces. He remained in US custody during his trial and was released to Iraqi authorities for his execution. The availability of the death penalty as a potential sentence before the IHT has produced difficulties for some states, such as the United Kingdom, in transferring suspects to the custody of the IHT for trial.<sup>179</sup> It also raises the issue, relevant to all the tribunal studied, of whether the tribunals satisfy minimum fair trial standards and ensure basis human rights.<sup>180</sup> If this standard is not satisfied, states may be obliged by international agreements to which

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<sup>177</sup> Bohlander, M., 'Referring an Indictment from the ICTY and ICTR to another Court – Rule 11bis and the Consequences for the Law of Extradition' (2006) 55 *ICLQ* 219.

<sup>178</sup> See CPA Memorandum 3 of 18 June 2003, as amended and supplemented by the TAL (article 26). This provides for national contingents of the multinational force in Iraq to arrest and to detain criminal and security detainees and for the transfer of detainees to Iraqi authorities. See also the Memorandum of Understanding regarding criminal suspects between the United Kingdom and Ministries of Justice and the Interior of Iraq, 8 November 2004.

<sup>179</sup> In 2003 the United Kingdom contingent arrested two Iraqi nationals, suspected of involvement in the murder of British troops. The Central Criminal Court of Iraq commenced an investigation, but in December 2007, the IHT requested the British forces to transfer the accused to the IHT, as the conduct constituted a war crime. The possible transfer to the IHT was the subject of legal proceedings in the United Kingdom on the basis of article 3 of the ECHR. See *R (Al-Saadoon) v Secretary of State for Defence*, [2008] EWHC 3098 (Admin) (High Court) and [2009] EWCA Civ 7 (Court of Appeal). Following the dismissal of the appeal by the Court of Appeal, the United Kingdom authorities transferred the suspects to the IHT, despite an order for interim measures issued by the European Court of Human Rights precluding the transfer.

<sup>180</sup> It is not possible to explore the issue of fair trial standards in this thesis.

they are party not to extradite or transfer individuals to the custody of the tribunal concerned.<sup>181</sup>

The ECCC Agreement imposes an obligation on the Government of Cambodia to co-operate with the ECCC. This obligation, which appears to have been based on the co-operation provisions in the Statutes of the ICTY and ICTR, ‘appears to result in the imposition of far-reaching duties on the Cambodian authorities vis-à-vis the Extraordinary Chambers’.<sup>182</sup> Failure to co-operate could result in the United Nations claiming that the ECCC Agreement has been violated, although as there is no third party dispute resolution mechanism the only sanction appears to be the withdrawal of United Nations funding and assistance.<sup>183</sup> The inclusion of a specific provision on co-operation also results in the ECCC having a separate procedure for relying on the national authorities than national courts. This is not necessarily a negative result, as the ECCC may still rely directly on the national authorities, but have a separate means of ensuring that requests for assistance are met.<sup>184</sup> The position is less clear in relation to co-operation from other states. The ECCC Agreement has not created obligations for states other than Cambodia, consistent with the principle that a treaty cannot create obligations for third states. The ECCC lacks separate legal personality and cannot negotiate agreements with states to secure their co-operation. Instead, it is dependent on the existing bilateral agreements to which Cambodia is a party and on the Government of Cambodia to issue the necessary requests for assistance.<sup>185</sup> This may not prove to be a major issue, as to date all of the accused have been located within the territory of Cambodia and have been arrested and transferred to the ECCC by the Cambodian authorities.

The SCSL is an entity separate to the domestic legal system, and cannot rely directly upon the national authorities of Sierra Leone. Instead, the SCSL Agreement imposes an obligation on the Government of Sierra Leone to co-operate with the court.<sup>186</sup> This includes requests for the arrest, detention and transfer to the SCSL of persons within

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<sup>181</sup> Article 6 of the European Convention on Human Rights has been interpreted as requiring contracting parties to not extradite an individual to a state in which the accused is unlikely to obtain a fair trial.

<sup>182</sup> Sluiter, note 152, 398.

<sup>183</sup> Chapter Three.

<sup>184</sup> Sluiter, note 152, 398.

<sup>185</sup> Note Sluiter’s view that while the ECCC Agreement would extend to the Government of Cambodia issuing requests to other states, it would not require the Government to negotiate new bilateral agreements, 403-4.

<sup>186</sup> Article 17, SCSL Agreement.

the territory of Sierra Leone.<sup>187</sup> The Ratification Act incorporated this obligation in national law and provides the mechanisms for such co-operation. The RPE also regulate co-operation with the national authorities.<sup>188</sup> There are two mechanisms for obtaining co-operation.<sup>189</sup> First, the SCSL may issue a request to the Attorney-General of Sierra Leone, who is then obliged to ensure the request is satisfied. Second, the SCSL may issue an order that has a direct binding effect in domestic law. It is the ability to issue such orders binding as a matter of national law that distinguishes the SCSL from the ICTY and the ICTR. In the event of non-cooperation, there is no enforcement mechanism, although the President, after a judicial finding of non-cooperation, may 'take appropriate action'.<sup>190</sup> This may include drawing the matter to the attention of the relevant authority in Sierra Leone, such as the Attorney-General, or notifying the Secretary-General. Any dispute between the Government of Sierra Leone and the United Nations as to co-operation is to be resolved by negotiation between the parties.<sup>191</sup>

In relation to third states, as with the ECCC Agreement, the SCSL cannot create obligations for non-parties. As a general matter, states are not under an obligation to co-operate with the SCSL. However, unlike the ECCC, the SCSL has separate international legal personality and has been able to negotiate bilateral arrangements with states and international obligations as and when required.<sup>192</sup> It need not rely on the Government of Sierra Leone to issue requests to third states on its behalf. Yet, as a court outside the domestic legal system, it cannot rely on the existing treaty arrangements of Sierra Leone. While the Security Council did not establish the SCSL, it maintains an interest in its activities and has, in resolutions subsequent to Resolution 1315, called upon and urged states to co-operate with the SCSL.<sup>193</sup> Such requests are not binding, but may encourage states to co-operate. The Security Council has issued binding resolutions regarding the SCSL in one situation, in relation to the transfer of former President of Liberia, Charles Taylor, to The Hague for trial.<sup>194</sup> The legal basis

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<sup>187</sup> Article 17(2), SCSL Agreement.

<sup>188</sup> Rule 8(A), SCSL RPE.

<sup>189</sup> See discussion of the provisions of the Ratification Act in Sluiter, note 152.

<sup>190</sup> Rule 8(B), SCSL RPE.

<sup>191</sup> Article 20, SCSL Agreement.

<sup>192</sup> Article 11, SCSL Agreement provides that the SCSL shall possess the juridical capacity 'to enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court'. Rules 8(C) and (D) of the SCSL RPE enable the SCSL to request assistance from third states on the basis of an ad hoc arrangement, a bilateral agreement with the state or any other basis.

<sup>193</sup> Resolution 1508 (2003), para 6, and Resolution 1537 (2004), para 9.

<sup>194</sup> Resolution 1688 (2006), paras 7 and 8, deciding that the Netherlands shall not exercise its jurisdiction in relation to Taylor while he is in the custody of the SCSL and that the

of the SCSL has posed a legal obstacle to some states otherwise willing to assist the tribunal, where domestic legislation requires either a treaty basis for extradition or assistance, or a binding decision of the Security Council. For example, the United Kingdom agreed to accept Taylor in the event that he was convicted. Yet the relevant legal basis for such co-operation was not in place<sup>195</sup> and took some time to enact.<sup>196</sup> While the delay was not significant in relation to enforcement of a possible sentence of an accused whose trial had not concluded, it may have been if the request had been for the arrest and surrender of an accused.

The LST is also to operate as an institution separate from the domestic legal system. The Government of Lebanon is subject to an obligation to co-operate with the LST, as set out in article 15 of the LST Agreement.<sup>197</sup> This obligation was incorporated into Resolution 1757 and thus binds Lebanon as a decision of the Security Council under article 25 of the Charter. However, unlike the ICTY and the ICTR, there is no mechanism by which the LST may report non-compliance to the Security Council, although this may be included in the RPE when drafted. That the LST Statute includes provisions regulating the relationship between the LST and the Lebanese authorities and with the UNIIC is ‘an interesting innovation’.<sup>198</sup> The co-operation of the national authorities will be essential, particularly as the Lebanese authorities shall ‘as appropriate’ assist the Prosecutor in investigative activities.<sup>199</sup> The provisions regulating the use by the LST of evidence collected by the national authorities and the UNIIC duplicate in many respects the arrangements for the use by the WCC of evidence collected by the ICTY.<sup>200</sup> Reports of the UNIIC suggest that ‘a practice of large-scale and systematic cooperation has developed between Lebanon and the

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Netherlands ‘shall facilitate the implementation of the decision of the Special Court to conduct the trial of former President Taylor in the Netherlands’.

<sup>195</sup> The legal basis for co-operation with the ICTY and the ICTR is the United Nations Act 1946, supplemented by the United Nations (International Tribunals) (Former Yugoslavia) Order 1996 and the United Nations (International Tribunals) (Rwanda) Order 1996. The United Nations Act allows the United Kingdom to implement resolutions of the Council under article 41 of the Charter only. The International Criminal Court Act 2001 was limited to co-operation with that institution.

<sup>196</sup> The International Tribunals (Sierra Leone) Act 2007 entered into force on 18 June 2007. See also the International Tribunals (Sierra Leone) (Application of Provisions) Order 2007, which permits the implementation of the sentence enforcement agreement entered into between the United Kingdom and the SCSL.

<sup>197</sup> Article 15 requires the Government of Lebanon to cooperate with all organs of the LST and to allow access to sites, persons and relevant documents. The Government is also required to comply, without undue delay, with requests for assistance from the LST.

<sup>198</sup> Aptel, note 149, 1115.

<sup>199</sup> Article 11(5), LST Statute, discussed in Aptel, note 149.

<sup>200</sup> Article 19, LST Statute. See discussion by Aptel, note 149, 1113-4.

[UNIIC]’.<sup>201</sup> It is to be hoped that this level of cooperation will continue once the LST commences its operations.

In relation to the obligations of third states, neither the LST Agreement nor Resolution 1757 impose an obligation to co-operate with the LST in respect of states other than Lebanon, including Syria. This is in contrast to the resolutions establishing the ICTY and the ICTR, which direct states to co-operate fully with the ad hoc tribunals.<sup>202</sup> Security Council resolutions require member states, and specifically Syria, to cooperate fully with the UNIIC.<sup>203</sup> The Secretary-General had suggested that a similar obligation to co-operate be considered for the benefit of the LST but the Security Council did not act on this suggestion.<sup>204</sup> As a tribunal that operates outside the domestic legal system, the LST will not be able to rely on existing agreements between Lebanon and other states or organisations in such areas as extradition or mutual legal assistance. However, as it will possess separate legal personality,<sup>205</sup> the LST will be able to negotiate bilateral agreements with states as necessary. Thus the co-operation of third states with the LST ‘depends on three factors: the ability, the duty and the willingness of those states to provide it’.<sup>206</sup>

It may be argued that the existing terrorism conventions to which Lebanon or the requested state are a party may give rise to a duty to co-operate with the LST. However, these treaties contain only an obligation to extradite or to prosecute. As Syria has indicated that it will try any of its nationals implicated in the attacks, it would be entitled to refuse to extradite those individuals. Moreover, these conventions are restricted to co-operation between state parties, and do not extend to co-operation with an international court.<sup>207</sup> The LST could rely on the Security

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<sup>201</sup> Swart, B., ‘Cooperation Challenges for the Special Tribunal for Lebanon’ (2007) 5 *JICJ* 1153, 1155. See also the reports of the UNIIC.

<sup>202</sup> *Ibid.*

<sup>203</sup> Resolutions 1595 (2005), 1636 (2005) and 1644 (2005). In relation to Syria, see Resolution 1636 (2005), para 11.

<sup>204</sup> Report of the Secretary-General on the establishment of a special tribunal for Lebanon, S/2006/893, para 53.

<sup>205</sup> The separate legal personality is based on article 7 of the LST Agreement, which provides for the juridical capacity of the tribunal, and includes the capacity to enter into agreements with states as is necessary. Alternatively, the separate legal personality could be based in the establishment of the LST by the Security Council, thus characterizing the LST as a subsidiary organ of the Security Council.

<sup>206</sup> Swart, note 201, 1157.

<sup>207</sup> The terrorism conventions contain obligations to extradite or prosecute and to afford assistance in investigations and extradition. Lebanon is not a party to the International Convention for the Suppression of Terrorist Bombings or the International Convention for the Suppression of Terrorist Bombings. However, both Lebanon and Syria are party to the Arab Convention for the Suppression of Terrorism.

Council's resolutions regarding terrorism as establishing a duty to co-operate in terrorism matters. This approach is suggested by Resolution 1636, which states that, in the context of co-operation with the UNIIC, 'Syria's continued lack of cooperation to the inquiry would constitute a serious violation of its obligations under relevant resolutions, including 1373 (2001), 1566 (2004) and 1595 (2005)'.<sup>208</sup> However, again it may be argued that such instruments are directed at co-operation between states and not with an international tribunal.<sup>209</sup> As with the terrorism conventions, these resolutions also contemplate prosecution by the state of nationality as an alternative to extradition. It is possible that the Security Council could adopt further resolutions – as it did regarding the UNIIC – requiring Syria in particular, or member states in general, to co-operate with the LST. The Security Council has issued such requests for the arrest and extradition of suspects accused of committing terrorist offences in the past.<sup>210</sup> However, in the absence of a further resolution from the Security Council, the LST will be in a worse position than the Lebanese authorities to secure the co-operation of third states and the extradition of suspects.<sup>211</sup>

### **4.3 Conclusion**

The ability to obtain the custody of the accused has been a major issue for the ad hoc tribunals, despite the statutes for the tribunals adopting a vertical co-operation model. It appears as if state co-operation will also be vital to the success of the ICC, and already several arrest warrants have not been executed. Perhaps the most important issue is to secure the co-operation of the affected state, in which the majority of the accused would normally be located. This may be done in an informal, non-binding manner, by engaging the national authorities in the design and establishment of the tribunal, and allowing normal domestic provisions to govern the assistance provided to the tribunal. This appears to have been the model adopted in Bosnia. This may not be an issue when the United Nations retains control of the territory and the national authorities as in East Timor and Kosovo. Alternatively, the obligation may be formalised as a treaty obligation by inclusion in the agreement establishing the tribunal (SCSL) or governing the terms under which assistance is to be provided (ECCC). The final option is to issue a binding order to co-operate addressed to the affected state in a Security Council resolution (LST). Even where such obligations to

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<sup>208</sup> Resolution 1636 (2005), para 5.

<sup>209</sup> Swart dismisses this option, arguing that the terrorism resolutions create obligations only between states. However, this is a limited interpretation of the obligations imposed, and does not appear to be shared by the Security Council. See: Swart, note 201, 1159.

<sup>210</sup> Resolutions 748 (1992) and 1192 (1998) (Libya), Resolution 1267 (1999) and 1333 (2000) (Afghanistan) and Resolution 1070 (1996) (Sudan).

<sup>211</sup> Swart, note 201, 1159.

co-operate are created, such obligations may not be enforced, either because the only option is to withdraw funding, or because there is insufficient political will to take action against the affected state.

All of the tribunals studied – even those established by the Security Council - have adopted a horizontal co-operation model in relation to third states, and are to an extent therefore dependent on the co-operation of such states to fulfil their mandate. This will not be a significant issue where the majority of accused are located within the territory of the affected state, as in Cambodia. However, it may undermine the effectiveness of the tribunal where the majority of the accused, particularly the senior level accused, are located outside the territory of the affected state, as occurred in East Timor. In such circumstances, impunity will only be avoided if the state in which the accused are present is prepared to co-operate by extraditing the accused to the tribunal or is willing and able to try the accused before its own courts, or where there is an international tribunal able to exercise jurisdiction in respect of the accused. Of course, the Security Council may be prepared to support the tribunal to obtain custody of the accused using its binding powers under Chapter VII of the Charter, either by imposing a general obligation to co-operate with the tribunal addressed to all member states, or a specific instruction to a named member state. However, it is noted that the Security Council has not opted to do so in support of any of the tribunals studied, despite requests that it do so. It is thus vital to consider the potential location of the accused when designing a hybrid or internationalized criminal tribunal. Where obtaining custody of the accused looks unlikely, one possible option is to allow trials in absentia in a wider range of circumstances, as has been done in relation to the LST, or adopting a procedure similar to Rule 61 of the ICTY RPE. Another approach is that adopted by the SPSC in its later stages, issuing indictments containing a large number of defendants, so that while there is no prospect of obtaining custody of the defendants, the evidence is available as a matter of historical record.

## **5 Conclusion**

This Chapter has considered three potential barriers to the exercise of jurisdiction by the tribunals studied: immunities under customary international law; amnesties; and obtaining the custody of the accused. Each has the potential to undermine the effectiveness of the tribunal in question and to render the tribunal an imperfect solution to impunity for a particular situation. Immunities and amnesties may exclude key individuals from the scope of the tribunal's operations. Similarly, difficulties in obtaining custody of an accused may protect senior leaders and force the tribunal to

concentrate on lower and mid-level offenders. This may frustrate the affected population and does not serve as a warning to future offenders in other contexts. Examining the possible application of these three potential barriers to the tribunals studied has highlighted the importance of identifying where one or all of these barriers may be an issue in a particular situation and possibly to attempt to pre-empt the issue in the design of the tribunal, in particular its legal basis, and in the terms of its constituent instrument and supporting agreements. However, it is also essential that the tribunals themselves, in the event they are called upon to determine the applicability of an amnesty or immunities, must respect the legal basis adopted for the tribunal and the terms of the relevant instruments, even when to do so may result in a trial being halted. It is submitted that this has not always occurred, which, as well as potentially violating rules of international law, risks undermining the authority of the tribunal in question and respect for the model as part of the system of international criminal law enforcement.

## CONCLUSIONS

Recent practice demonstrates that some crimes – in particular genocide, crimes against humanity and certain war crimes – are of concern not just to the immediate victims and their society, but also to all states and the wider international community. There is a trend towards requiring accountability for these crimes; however, weaknesses in the available mechanisms of accountability have been revealed. The traditional mechanism for enforcement of criminal law – the courts of the territorial state – fails to provide accountability in a number of situations. These include circumstances where the territorial state has effectively collapsed as the result of armed conflict and there is no capacity in the judicial system to try individuals accused of committing serious crimes. Similar difficulties exist where the judicial system lacks independence from the government or major political factions, or is (or is perceived to be) partial to particular groups within society. The conflict may be ongoing, presenting domestic tribunals with serious security threats and practical limitations. There may be no political will to conduct trials, as the offending authorities may remain in power or retain their influence at the national level. Accountability may be traded for other aims, such as securing a peace agreement or improving relations with a neighbouring state that was formerly a party to the conflict. Domestic law may be underdeveloped and may not incorporate international crimes and theories of criminal responsibility, or its application may be hindered by domestic provisions such as immunity, amnesty or statutes of limitation.

As a result, states have turned to other mechanisms to secure accountability. States, acting both through the Security Council and collectively on the basis of the Rome Statute, have established international criminal tribunals to try alleged perpetrators. Yet these tribunals are not a panacea: they have limited jurisdictional reach and finite resources. Such tribunals will only consider a fraction of the crimes that have been committed in a given context, and they are highly selective in their enforcement of violations. They have tended to be expensive, to encounter long delays, and to be isolated from the communities affected. Moreover, the International Criminal Court is intended to complement national accountability mechanisms and will only act where the territorial state or the state of nationality does not investigate or prosecute or is unable or unwilling to do so genuinely.<sup>1</sup> In light of these weaknesses, states other than the territorial state have conducted trials based on the principle of universal

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<sup>1</sup> Article 17, Rome Statute.

jurisdiction. However, such attempts have also faced many difficulties, both legal and political, and the scope of the principle of universal jurisdiction itself is under review.

A further mechanism used to achieve accountability has been the creation of hybrid tribunals or the internationalization of national institutions. This study has concentrated on the hybrid and internationalized tribunals and has examined the practice of seven such courts. These tribunals can be distinguished from situations in which states or international organisations offer assistance to national institutions: for example, the support of war crimes trials in Serbia. Much of the assessment of these tribunals is negative.<sup>2</sup> Criticisms include: a lack of resources; structures and procedures that do not ensure independence or impartiality; allegations of corruption and political interference; difficulties in securing the custody of the accused; failing to engage with the affected population; security concerns; procedural rules and practices that do not meet international fair trial and due process standards; and failure to develop local judicial capacity. To this list may be added concerns that the jurisprudence adopted is not consistent with relevant international legal principles and serves to fragment and undermine the integrity of international criminal law.<sup>3</sup> While it has not been possible to examine all of these concerns within the scope of this study, it is clear that the hybrid and internationalized tribunals have to date not been perfect institutions, and each tribunal has had its flaws, both in its design and in its practice. It has been commented that:<sup>4</sup>

The increased interest in criminal responsibility for perpetrators of gross violations of humanitarian law and human rights has stimulated a remarkable multiplication of international judicial fora. As institutional mechanisms to sanction atrocity flourish, ranging from domestic trials to hybrid tribunals and international courts, it is becoming imperative to hone and develop more effective accountability mechanisms.

This study has attempted to develop the potential of the hybrid or internationalized tribunal as a model for international criminal justice. It has done so by focusing on the context of the creation of the tribunals, and the legal basis and jurisdictional reach of the tribunals established to date. It has explored the central issue of the available

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<sup>2</sup> A number of commentators and non-governmental organizations have reviewed the success or otherwise of the hybrid and internationalized tribunals, as well as their jurisprudence. For example, see: Mendez, P, 'The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?' (2009) 20 *Crim LF* 53; Dickinson, L., 'The Promise of Hybrid Courts' (2003) 97 *AJIL* 295; and Stromseth, J., 'Pursuing Accountability for Atrocities After Conflict: What Impact Upon Building the Rule of Law' (2007) 38 *Geo JIL* 251.

<sup>3</sup> Higonnet, E., 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform' (2006) 23 *Arizona Journal of International and Comparative Law* 347.

<sup>4</sup> *Ibid*, 413-4.

options for the legal and jurisdictional basis for these tribunals, and how the selection of the legal framework impacts upon the operation of the tribunal in question. Concentrating on the legal basis has allowed the identification of three categories of hybrid or internationalized tribunals: courts effectively operating as national institutions of the affected state; courts established by treaty; and courts established by the Security Council acting under its powers pursuant to Chapter VII of the Charter. The study rejects the notion of universal jurisdiction as a basis for such an internationalized or hybrid tribunal. The study has demonstrated that it is important when assessing any aspect of an internationalized tribunal to consider its legal basis and the category into which the tribunal falls. This will in turn determine the appropriate response to jurisdictional questions such as the applicability of amnesties and immunities. The legal basis and the context within which a tribunal is created will also impact upon the jurisdictional framework to be adopted, including the personal, temporal, territorial and material jurisdiction.

The first category comprises those institutions operating effectively as national courts, although with international elements. Into this category were placed the International Judges and Prosecutors Programme in Kosovo, the Special Panels for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the War Crimes Chamber for Bosnia and Herzegovina and, more controversially, the Iraqi High Tribunal. Each of these tribunals was established in a different context. The creation of the IJPP followed a previous repressive regime and an internal armed conflict, and was imposed on Kosovo as part of an international territorial administration in circumstances where the future status of the territory was – and to an extent remains – uncertain. The SPSC were similarly established as part of an international territorial administration, but in this case it followed almost 25 years of unlawful occupation of East Timor by Indonesia and establishment took place in the context of severe violence during and after the referendum on independence. Unlike in Kosovo, it was clear that the transitional administration was to prepare East Timor for statehood.<sup>5</sup> The IHT was the product of an occupation by coalition forces after the controversial invasion of Iraq in March 2003. The tribunal was an attempt to provide accountability for a previous oppressive regime which had also engaged in a number of international armed conflicts with neighbouring states. The WCC resulted from the need to wind down the activities of the ICTY and was a co-operative venture between that institution and the Office of the High Representative. Finally, the ECCC followed

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<sup>5</sup> Resolution 1272 (1999).

a request from the Government of Cambodia for assistance in securing accountability for the acts of the Khmer Rouge, another oppressive regime, some 20 years earlier.

The process leading to the creation of these tribunals has impacted upon the design of the tribunals, as can be seen in Table One. It has also resulted in different legal structures. Some are clearly based in national law (the ECCC and the WCC), albeit supported in some cases by obligations contained in an international agreement (the ECCC). The legal basis of other tribunals is not so clear and requires consideration of complex and often unresolved questions of international law. For example, what is the legal authority of legislation adopted by an international territorial administration? And in what capacity does an occupying power act when it, or a body it has created, establishes a criminal tribunal? In each situation the international community, acting mainly through the United Nations and in some situations states as in Iraq, has performed a different function – occupier, administrator, partner, and/or supporter – which makes it difficult to assess the legal basis of the tribunals established. The approach adopted here has been functional: where the authority in question acts as a national actor, the tribunal has been considered a national institution. Other factors support the conclusions reached, such as the absence of separate legal personality for the tribunal and the lack of the direct involvement of the Security Council in the tribunal's establishment and operation.

The second category comprises tribunals established by an agreement between the territorial state and the United Nations. This is not the only possible formulation, and there is no reason in principle why a tribunal could not be established by an agreement between a state and an international organisation other than the United Nations, or between two or more states acting collectively. The ICC, after all, is an example of a tribunal established in this manner. It is not yet established that jurisdiction based on recognised principles of jurisdiction other than territoriality may form the basis of such a tribunal. However, it is submitted that the nationality principle would also support such a delegation, while more controversial bases, in particular universal jurisdiction, would not. The SCSL is the only tribunal currently to fall within this category. Such tribunals enjoy separate legal personality and operate outside both the national and international legal systems. The agreement forms the constituent instrument of the tribunal, and its terms govern both the nature of the international community's involvement and the obligations of the territorial state. Being based on a treaty, such courts may only be established with the consent of the territorial state, and represent a limited delegation of sovereignty from that state to the tribunal.

Accordingly, these tribunals would normally – but not always – follow a request for assistance from the territorial state.

The final category is that of hybrid or internationalized tribunals established by the Security Council utilizing its Chapter VII powers in relation to international peace and security. The LST is the only tribunal to date to have been established in this manner, although its inclusion in this category – and not as a treaty based institution – may be seen as controversial. The Security Council may only establish a tribunal as a response to a threat to international peace and security.<sup>6</sup> While in most cases this may be easily established, given the expansive interpretation the Security Council has accorded to that term, it may not be so readily satisfied in situations such as Cambodia where the violations occurred several decades before. Hybrid and internationalized tribunals have been said to be supportive of state sovereignty, in that the tribunals are established in co-operation with and with the consent of the state concerned.<sup>7</sup> However, the experience of the LST suggests that this may not necessarily be the case.

This study has shown that it can be very difficult to classify accurately tribunals in the first place. For example, the IHT is considered by some to be a purely national institution, and by others to be a national institution receiving international assistance, although not an internationalized tribunal. It is impossible to define a conclusive set of criteria. Similarly, even when considered to be a hybrid or internationalized tribunal, placing a tribunal into one of the three categories identified in this study also presents challenges, often because the circumstances leading to its establishment do not clearly suggest that the tribunal has a particular legal basis. For example, it is doubtful whether the members of the Security Council would reach the same conclusion as the author or one another when considering the legal basis of the LST.

Does this ambiguity or uncertainty matter? It is argued that it does. The legal basis of a tribunal is relevant to several key issues. This study has considered several of these issues: the source of the tribunal's authority, the applicability of immunities under both international and national law, the enforceability of amnesties granted under national law, and the arrangements for securing custody of the accused and other forms of state co-operation. In all cases the legal basis is an important factor in

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<sup>6</sup> For the argument that international peace and security should not be the sole criterion, see Knopps, G., 'International and Internationalized Criminal courts: the new face of international peace and security' (2004) 4 *ICLR* 527.

<sup>7</sup> Broomhall, B., *International Justice & The International Criminal Court: Between Sovereignty and the Rule of Law* (2003), 103.

resolving the issue. For example, in relation to whether immunities under international law may be pleaded before a tribunal, whether a court is international or national in nature is, following the decision in the *Arrest Warrant* case,<sup>8</sup> said to be the key factor. The International Court of Justice recognized that in relation to incumbent heads of state and other senior officials, there is no exception to immunity in respect of international crimes before national courts.<sup>9</sup> However, the Court suggested that immunities of any type would not be applicable before certain international criminal courts.<sup>10</sup> Thus, as the SCSL did in the *Taylor Immunity Decision*,<sup>11</sup> it is necessary to consider whether a tribunal is national or international to resolve a plea of head of state immunity. As has been seen, it can be difficult in the context of the hybrid and internationalized tribunals to resolve this issue, as it is not certain as to how a particular tribunal will ultimately be characterised.

While this thesis asserts that evaluating the legal basis of a tribunal is important, it has also demonstrated that ascertaining the legal status is not by itself sufficient to resolve issues such as immunity. It is also necessary to examine the terms of the constituent instrument and to assess whether the state in question is bound by the provision. For example, a provision in a treaty cannot remove the immunity of a state that is not a party to that agreement. Similarly, just because a tribunal has been established by the Security Council it does not automatically follow that states may no longer claim immunity before the tribunal established, or that all states must co-operate with that tribunal. The LST demonstrates this point well. The legal basis is important but will not always be determinative: states and the Security Council are to an extent able to modify the general position in international law through the provisions of the relevant legal instruments. Moreover, states may adopt a position inconsistent with the general propositions at the international level and even with particular rules. For example, a state may agree to provide co-operation when required in the absence of an obligation to do so or may adopt a more expansive interpretation of material jurisdiction where its own nationals are concerned. Thus states should study the emerging practice to enable them to create tribunals with the legal powers they consider appropriate to a given situation and which they are prepared to support.

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<sup>8</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* ICJ Reports (2002).

<sup>9</sup> Para. 58.

<sup>10</sup> Para. 61.

<sup>11</sup> *Prosecutor v Taylor*, Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004.

This thesis assists those designing future such tribunals, and the judges and personnel appointed to them, by studying the existing decisions and practice so as to promote clear and consistent decision-making in future. It also examines the existing examples of such tribunals and suggests the scenarios in which such tribunals are likely to be established in the future. It also makes recommendations as to the lessons that should be learned from the existing practice, for example, the difficulties faced when evidence or suspects are located within the territory of a third state.

What are some of the conclusions and concrete suggestions to emerge from this study of practice? First, this study rejects the proposition that hybrid or internationalized tribunals should be established only where an international tribunal does not have jurisdiction for the conduct in question or where it is unlikely that an international tribunal will be established.<sup>12</sup> While it is true that some of the tribunals studied were established following unsuccessful calls for the establishment of an international criminal tribunal, in particular in East Timor and Cambodia, that was certainly not always the case. In fact, two tribunals, the IJPP and the WCC, were established in circumstances where the ICTY was operational and had jurisdiction. Their creation assisted the ICTY in performing its mandate, by enabling cases involving lower and mid-level defendants to be dealt with at the national level.<sup>13</sup> Moreover, even though none of the tribunals established would have been within the jurisdiction of the ICC, this does not mean that a hybrid or internationalized tribunal cannot or should not be established in circumstances where the ICC may also exercise jurisdiction.<sup>14</sup> It is possible that such a tribunal could operate to support the activities of the ICC and may, in some cases, be subject to its 'supervisory' jurisdiction.<sup>15</sup> Hybrid and internationalized tribunals thus represent another face to the complementarity principle: they can complement the efforts of both international institutions and also

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<sup>12</sup> For instance, Cassese suggests that hybrid or internationalized courts should only be established where the political will required to establish an international tribunal is lacking, or the resources unlikely to be available: Cassese, A., 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality' in Romano et al (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (2004) (hereafter 'Romano'), 5.

<sup>13</sup> For discussion of the relationship between the WCC and the ICTY, see Burke-White, W., 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina' (2008) 46 *Col JTL* 279.

<sup>14</sup> Contrast, Turns, D., "'Internationalized' or Ad Hoc Justice for International Criminal Law in a Time of Transition: The Cases of East Timor, Kosovo, Sierra Leone and Cambodia' (2001) 6 *Austrian Review of International and European Law* 123, 178-9.

<sup>15</sup> Stahn, C., 'The Geometry of Transitional Justice: Choices of Institutional Design' (2005) 18 *LJIL* 425, 463-4; Benzig, M. and Bergsmo, M., 'Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court' in Romano, 407.

those of domestic institutions. These tribunals may offer several advantages to trials before international tribunals, not least the fact that they tend to require fewer resources. The hybrid and internationalized tribunals can therefore be viewed as part of a multi-layered approach to international criminal justice.<sup>16</sup>

The study of the available practice reveals that hybrid or internationalized tribunals are most likely to be established where the United Nations or third states are already involved in the situation in the affected state. In Kosovo and East Timor, the United Nations was administering the territory and, in East Timor, had been instrumental in securing agreement for and conducting the referendum on future independence. In Bosnia, the OHR had been exercising powers under the Dayton Agreement to manage the state for almost a decade and the Security Council, through the ICTY, had been concerned with accountability for violations committed during the conflict for an even longer period. Iraq was occupied by the United States, the United Kingdom and other states from 2003 to 2004. The occupation was supported if not authorized by the Security Council in Resolution 1483, and the abuses committed by the Hussein regime was one of the reasons given by the occupying states in support of the invasion and occupation of Iraq. Even where the assistance has been provided in response to a request from the affected government, the United Nations was either operating, or had been operating, in the country concerned.

Most of the tribunals have been created during or after an armed conflict or to provide accountability for the acts of a previous repressive regime. However, the creation of the LST suggests that the use of these mechanisms may now be extended to other contexts, in particular terrorist acts, which may be of concern to the international community. Related to the context of their creation is the material jurisdiction of the tribunals. With the exception of the LST, all of the tribunals have jurisdiction in relation to the 'core' crimes: crimes against humanity, war crimes and genocide. While there are differences between the definitions adopted for each tribunal, the crimes are as defined in international law, and are based on the relevant treaty obligations of the state concerned or customary international law. Other crimes under international law have been included where relevant, but only where there is a sufficient treaty basis for the inclusion of the crime.<sup>17</sup>

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<sup>16</sup> Burke-White, W., 'A Community of Courts: Toward a System of International Criminal Law Enforcement' (2002) 24 *Mich JIL* 1; Rikhof, J., 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity' (2009) 20 *Crim LF* 1.

<sup>17</sup> For example, the Special Law incorporates violations of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954.

Definitions of the term hybrid or internationalized tribunals tend to include a requirement that the substantive jurisdiction of the tribunal include both crimes under international law and crimes under national law. While this is certainly the case for six of the seven tribunals studied, the LST Statute includes the crime of terrorism as defined under national law only. Thus there are no international crimes within the jurisdiction of the LST and this criterion can no longer be said to be a requirement for a tribunal to be considered internationalized. The fact that the jurisdiction of the LST extends only to the crime of terrorism under national law does not render the LST a national institution,<sup>18</sup> as too many other features, including its legal basis, support the internationalized nature of the LST.

The hybrid and internationalized tribunals display an element of selectivity in the jurisdiction conferred upon them. The selection of the temporal, territorial, personal and material jurisdiction requires important choices, and is often driven by resources and political factors. Designers of the tribunals must also consider the other accountability mechanisms, both international and domestic, that will operate alongside the tribunal. In light of the limited resources allocated to such tribunals, it would assist each tribunal to have a focused strategy, which should be included as a jurisdictional requirement. When selecting the material jurisdiction, there are numerous factors to be considered, including whether the conduct was criminalized at the time of commission, whether under international or national law, and other factors in respect of both substantive criminal law and theories of criminal responsibility. Where the tribunal is a national institution, have the relevant international crimes been incorporated into domestic law? Does the likely evidence substantiate including a particular crime, in particular whether the context elements of the international crimes are satisfied? Unlike purely international tribunals, when designing a hybrid or internationalized tribunal it is also necessary to consider whether to include crimes under domestic law. Domestic crimes have been included in the following circumstances: where international law does not criminalize the conduct in question or the full range of conduct; where there is not an accepted definition of the crime in international law; and where the evidence may not satisfy the elements of the international crimes.

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<sup>18</sup> Consider the views on this issue in Schabas, W., 'Is an International Tribunal Equivalent to an International Criminal Court?' (2008) 21 *LJIL* 513.

All of the tribunals rely upon the co-operation of the territorial state. Thus, whichever legal basis is selected, there must be clear obligations for that state to co-operate with and to support the tribunal. This may be achieved by integrating the tribunal into the domestic system and relying on the national authorities in accordance with normal provisions (as is the case with the WCC, and to an extent the IJPP and the SPSC), or it could be achieved by an agreement moderating the terms of the assistance to the tribunal (the ECCC Agreement), or by a binding resolution under Chapter VII of the Charter (the LST). However, even where the obligation to co-operate is legally binding, it is not clear what can be done in the event the state violates the obligation to co-operate. It appears that the only legal option is to withdraw international support for the tribunal.

The tribunals have all adopted a horizontal model of co-operation with respect to states other than the affected state. Even the LST, which was established by a resolution of the Security Council acting pursuant to its powers under Chapter VII of the Charter, does not create binding obligations for states other than Lebanon. The Security Council has never acted to enforce the orders of a hybrid or internationalized tribunal through a binding resolution under Chapter VII of the Charter. Thus it must be considered whether this model is appropriate where the accused are located outside the territorial state. The difficulty in ensuring co-operation in such circumstances is demonstrated by the experience of the SPSC, where a number of those considered most responsible for the atrocities committed in East Timor were in Indonesia and could not be extradited for trial. The situation may not be so serious where the custodial state is prepared genuinely to prosecute the accused; however, where this does not happen, as in Indonesia, impunity remains. In such circumstances an international tribunal may be the only option.

The question of whether a tribunal must give effect to immunities under international law raises similar issues. Where senior offenders are located in and are nationals of the territorial state, international immunities should not be an issue. However, where senior officials of a third state are to be likely subjects of investigation, a horizontal relationship between the tribunal and the third state will not preclude the state from pleading sovereign immunity. This thesis suggests that a horizontal relationship regarding immunity is found in relation to the five 'national' institutions and also the SCSL in relation to officials of states that are not a party to the SCSL Agreement. It is also submitted that, given the absence of a provision on immunity in the LST Statute and the omission of an obligation on states to co-operate with the LST in Resolution

1757, it may also include the LST. Again, this may not be an issue where the state is willing to waive immunity or to try the official before its own courts, or where an international tribunal may exercise jurisdiction in respect of that official and the immunity will not apply. However, in other circumstances relying on a hybrid or internationalized model may involve recognizing that immunity is an important principle of international law and that some individuals will escape immunity until they are no longer in office or until the relevant state waives the immunity and surrenders the person concerned.

The practice of the hybrid or internationalized tribunals supports the suggested trend towards accepting only limited amnesties. Several of the territorial states granted amnesties that were either explicitly or implicitly excluded from the scope of the amnesty crimes within the jurisdiction of the internationalized tribunals. The practice could also be said to support the principle that there can be no amnesty for international crimes. However, it is submitted that this principle is not established yet. The decision of the Appeals Chamber in the *Lome Amnesty Decision*<sup>19</sup> relied upon a principle that arguably has not yet crystallized in customary international law. It is submitted that the SCSL, which operates on the basis of a transfer of jurisdiction from the territorial state, was bound by the amnesty, but it was open to the Court to interpret its terms strictly. Similarly, the decision of the ECCC Pre-Trial Chamber on the amnesty accorded to Ieng Sary is based on the terms of the amnesty itself, and did not find that the amnesty was invalid, either under national or international law.<sup>20</sup> States emerging from conflicts will continue to grant amnesties. Arrangements to establish a tribunal should include an obligation on the affected state not to grant future amnesties to those within the jurisdiction of the tribunal. It will also be necessary to determine how to deal with amnesties already granted that may impact upon the jurisdiction of the proposed tribunal. Can the amnesty be repealed under national law, at least in relation to senior offenders? Can the terms of the amnesty be interpreted strictly? If they cannot, a national or treaty-based jurisdiction may be inappropriate.

This thesis has identified several of the key issues concerning the design of the hybrid and internationalized tribunals, in particular their legal basis and jurisdictional features. While there are variations between the tribunals, it is still possible to identify some common principles and emerging practice. In light of the probable future role of

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<sup>19</sup> *Prosecutor v Kallon and Kamara*, Decision on Challenge to Jurisdiction, *Lome Accord Amnesty*, Appeals Chamber, 13 March 2004.

<sup>20</sup> Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008

such tribunals in the system of international criminal justice, this practice warrants continued study by states and the wider international community so as to ensure that tribunals are established with the powers and framework required by a particular context. Such a study will not address other weaknesses in the practice of such tribunals, in particular the failure to provide adequate resources and the selectivity inherent in the creation and design of such tribunals. However, it should render these tribunals more effective mechanisms in the trend to ending impunity for international crimes.

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