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THE MIXED SPECIALIZED COURT AS A MECHANISM OF REPRESSION OF INTERNATIONAL CRIME IN THE DEMOCRATIC REPUBLIC OF THE CONGO: LESSONS LEARNED FROM CAMBODIA, EAST TIMOR, KOSOVO, AND BOSNIA

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DEDICATION

TO ALL THE VICTIMS OF THE GRAVEST CRIMES OF INTERNATIONAL LAW COMMITTED IN THE DEMOCRATIC REPUBLIC OF THE CONGO.

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Introduction

The pursuit of justice and accountability for grave violations of human rights faces a unique set of challenges in countries emerging from extended periods of conflict and turmoil. In post-conflict situations, transitional justice approaches that rely on either purely domestic or purely international mechanisms suffer from undeniable shortcomings in both legitimacy and capacity. In response, some have suggested that employing hybrid or mixed chambers might provide a compromise approach. This report reviews the practice of hybrid or mixed chambers and evaluates the prospects for applying the model within the Democratic Republic of the Congo.

CHALLENGES ASSOCIATED WITH DOMESTIC PROSECUTIONS

Ensuring the legitimacy of domestic criminal prosecutions remains problematic in post-conflict contexts due to the severely limited resources, gaps in institutional knowledge and the potential for the politicization of transitional justice mechanisms in these contexts.[1] In many cases, the physical infrastructure of domestic judicial systems in post-conflict contexts, including courtrooms and law libraries, were damaged or destroyed during the course of the war.[2] Additionally, the human capital of these judicial systems may have been compromised during the course of the conflict or its aftermath, presenting concerns about the legitimacy of any prosecutions carried out within a completely domestic process.

In many post-conflict contexts, sitting judges and prosecutors were part of systems which failed to prosecute or convict those committing crimes against humanity during the course of the conflict. Alternatively, many of these contexts suffer from serious gaps in institutional memory since the newly appointed judges and prosecutors come from groups who were historically excluded from political and judicial institutions. As a result, these newly appointed officials may lack the specialized skills and experience necessary to maintain complex prosecutions.

Further, an adequate legal framework reflecting the definitions of the crimes, modes of liability, and procedural issues such as fair trial rights for the accused, is a prerequisite for successful domestic prosecutions. However, historically most post-conflict contexts lack the appropriate judicial infrastructure and domestic framework to deal with these issues.[3] Finally, in the aftermath of conflicts between two or more distinct ethnic groups in cases where the representation of these groups in the new governmental structure is unequal, certain segments of the local population might be distrustful of prosecutions due to concerns about ulterior motives of bias or retribution.[4]

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[1] A Chance for Justice: War Crimes Prosecutions in Bosnia's Serb Republic, Human Rights Watch, 21-37 (2006); Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 N. Eng. L. Rev. 1059, 1064 (2002)

[2] Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 N. Eng. L. Rev. 1059, 1065 (2002)

[3] Marieke Wierda, *Stocktaking: Complimentarity*, ICTJ BRIEFING, International Center for Transitional Justice, 3 (June 2010) Available at http://www.ictj.org/static/Publications/ICTJ_RSRC-Complementarity_bp2010.pdf

[4] *Id.,* 1066

Challenges Associated with International Mechanisms

On the other hand, reliance upon purely international institutions creates another set of legitimacy problems and tends to perpetuate gaps in capacity and institutional knowledge at the domestic level. In situations where justice mechanisms are managed entirely by international actors, the local population may never engage with the process out of distrust of the imposition of "foreign" justice or a feeling of exclusion from the process. Many have criticized the Special Tribunal for Sierra Leone, for its inability to gain the support of the local population despite the fact that it was situated within the domestic context. Similarly, both the ICTY and the ICTR rely upon outreach activities to ensure that domestic constituencies remain informed about the proceedings.

Reliance on purely international actors likewise creates a capacity problem. If the judicial system is run entirely by international actors there is no opportunity for local actors to learn the skills and develop the experience needed to rebuild domestic institutions. Building responsible and sustainable mechanisms for justice requires engagement with the local population that these mechanisms seek to serve. Indeed, unless the local population has a stake in the accountability process, there is a high probably that an accountability vacuum will be created when the international missions disengage from the situation.

Mixed Chambers

As a result of the challenges associated with solely domestic or solely international mechanisms, some have hailed hybrid courts as a vehicle to draw on each model's strengths while addressing its inherent weaknesses. By sharing the responsibility for criminal justice and accountability for human rights violations between domestic and international actors, hybrid courts can potentially present the impartial face of the international judicial system while allowing the local population to have a stake in the process. Shared responsibility through a hybrid process also provides opportunity for on-the-job training for inexperienced local actors, while the tribunal itself benefits from the greater experience of international judges and prosecutors.[5]

This report considers the practical experiences of Kosovo, East Timor, Bosnia, and Cambodia in establishing and utilizing hybrid or mixed chambers to pursue criminal prosecution and accountability for those responsible for grave violations of human rights. We conclude that mixed chambers are an important vehicle for pursuing accountability, particular in post-conflict contexts. However, we note that many of these mixed chambers have faced problems of their own, both with legitimacy and capacity. Consequently, as the Ministry of Justice considers establishing a mixed chamber within the Democratic Republic of the Congo, we suggest that it consider lessons learned from the experiences of these other states.

[5] *Id.,* 1069-70

1 Kosovo

1.1 Background

1.1.1 Conflict

By the summer of 1998, tensions between the ethnic Albanian Kosovo Liberation Army (KLA) and Serbian authorities had escalated from isolated incidents of violence into a full-fledged armed conflict between the two groups. In response to what it characterized as an impending humanitarian crisis, the North Atlantic Treaty Organization (NATO) intervened in Kosovo in March 1999, bombing Serbia from the air. After a protracted aerial campaign, both sides finally consented to an uneasy peace in June 1999 under the terms of the NATO-Serbian Military Technical Agreement, which called for the withdrawal of the Serbian military and police from Kosovo within 11 days.

1.1.2 Consequences

Following NATO's intervention and the withdrawal of Serbian forces, many Albanians who had fled during the hostilities began to return to Kosovo. In some cases, those who returned 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 abduction 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."[6]

1.1.3 Prior Legal Arrangements

A UNMIK

On June 10, 1999, the United Nations (UN) Security Council adopted Resolution 1244 under Chapter VII of the UN Charter. Security Council Resolution 1244 established an "international civil presence," the UN Interim Administration Mission in Kosovo (UNMIK), and an "international security presence," the Kosovo Force (KFOR). This resolution essentially turned Kosovo into a UN protectorate until the international status of Kosovo was resolved in favor of independent statehood in February 2008.
UNMIK was entrusted with a very broad mandate, including "maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo."[7] It operated under four pillars: Police and Justice (Pillar I), Civil Administration (Pillar II), Democratization and Institution Building (Pillar III), and Economic Reconstruction (Pillar IV). Pillar I and Pillar II were led by the UN. Pillar III fell under the auspices of the Organization for Security and Cooperation in Europe (OSCE). Pillar IV fell under the auspices of the European Union (EU).
In Resolution 1244, the Security Council declared: "All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special

[6] Strohmeyer, Hansjörg. "Collapse and Reconstruction of a Judicial System: The UN Missions in Kosovo and East Timor." American Journal of International Law 95 (2001): 46, 48 (footnote omitted).

[7] UN SC Res. 1244, at para.11(i).

Representative of the Secretary-General"[8] (SRSG) – the head of UNMIK. Indeed, the SRSG was vested with "maximum civilian execution powers"[9] which involved sole executive and legislative authority to "change, repeal, or suspend existing laws to the extent necessary" [10] and "issue legislative acts in the form of regulations."[11] The SRSG also had the authority to appoint and remove any person to the interim civil administration in Kosovo, including the judiciary.[12]

The task of re-establishing the rule of law and criminal justice in Kosovo was shared by the UN and the OSCE, under both Pillars I and III. The mandate for UNMIK and the Department of Justice – brought into one administration to maximize coordination – was to build and oversee the functioning of an independent and impartial judiciary.[13]

UNMIK first attempted to rebuild the local criminal justice system entirely with local staff. On June 28, 1999, two weeks after the arrival of the first UNMIK staff, UNMIK established a panel of local and international legal experts, the Joint Advisory Council on Judicial Appointments (subsequently replaced by the Advisory Judicial Commission), including two ethnic Albanians, one Bosniak and one Serb – all with previous experience in administration of justice in Kosovo, and three international lawyers from different international organizations, to assist with the appointment of judges and prosecutors.[14] Throughout July and August 1999 local judges and prosecutor selected by this panel were appointed to the Kosovo Interim Judiciary.[15]

While observers for the Organization for Security and Cooperation in Europe (OSCE) suggested from the outset that there was a need to introduce international experts, the dominant view in UNMIK was that the judiciary was best re-built using members of the local legal and judicial community.[16] This was in part due to fears of appearing "colonial" in its approach and in part due to the fact that no established, easily deployable body of international judicial personnel existed.[17]

a) Lack of Infrastructure and Legal Professionals

Much of the infrastructure of the judicial system, such as court buildings and law libraries, had been destroyed or severely damaged during the conflict. Most local lawyers and judges fled as Serbian forces withdrew from Kosovo, and those who remained often refused to serve under UNMIK. Most legal professionals under Serb sovereignty were ethnic Serbs, as Kosovar Albanians had been forced out of the judiciary in the 1990's as a result of "[p]olitically-motivated and ethnically one-sided appointments, removals and training" under Milosevic.[18] For instance, in the 1990's law classes were offered only in Serbian, and the bar exam offered

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[8] *Id.*

[9] Report of the Secretary-General to the Security Council of June 12, 1999, UN Doc. S/1999/779, para. 44.

[10] *Id.*, para. 39.

[11] *Id.*, para 41.

[12] *Id.*.,para. 40.

[13] Periello, Tom and Marieke Wierda, "Lessons from the Deployment of International Judges and Prosecutors in Kosovo." *The International Center for Transitional Justice* (March 2006): 9

[14] "Kosovo (Serbia): The Challenge to Fix a Failed UN Justice Mission," *Amnesty International Report* (Jan. 2008): 9-10

[15] *Id.*, 10

[16] Hartmann, Michael. "International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping." *United States Institute of Peace Special Report* (October 2003): 4

[17] *Id.*, 4

[18] Secretary-General report to Security Council, "On the Interim Administration Mission in Kosovo," S/1999/779, 12 July 1999, para. 66.

only in Belgrade. As a result, the UN Secretary-General noted, "out of 756 judges and prosecutors in Kosovo only 30 were Kosovo Albanians" at the time UNMIK assumed its functions.[19]

Moreover, the few Kosovar Albanian jurists who had worked in the judiciary in the 1990s were widely regarded by ethnic Albanian Kosovars as being collaborators with an oppressive Serb regime. Therefore, the majority of Kosovar Albanian appointed to the judiciary in the early days of UNMIK's administration had no experience in the judiciary or prosecutor's office; or at least had not worked as judges or prosecutors since 1989, when Kosovo was still part of Yugoslavia. Even then, however, under Marshall Tito, "telephone justice," i.e. the practice of judges "calling up" Communist party bosses to decide how to rule in court cases, was a favored mechanism by which the reigning political party controlled judicial and prosecutorial actions. Those ethnic Albanian legal professionals who had practiced under the Yugoslav judicial system thus lacked experience in an impartial judicial system.

b) Lack of Judicial Capacity

As a result of the broader lack of infrastructure and human capital, the local legal system itself severely lacked the capacity for ordinary judicial processes. UNMIK was under mounting pressure as detainees suspected of committing atrocities were crowding in prison facilities, with little prospect for a speedy trial. Meanwhile, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia made clear that the tribunal could try only those suspected of having committed the worst atrocities on the widest scale.

In December 1999, when the six-month deadline for pretrial detention was approaching for many of the detainees, the SRSG simply used his legislative power to amend the law and allow a pre-indictment detention period of up to one year. This, however, did nothing to depopulate the prisons.

Other measures KFOR used included the "COMKFOR hold," a procedure for extrajudicial detentions used when KFOR authorities believe that the detainee posed a danger to public safety and security.[20] The SRSG also commenced using "Executive Detentions."[21] In addition to providing the "quick fix" to the lack of judicial capacity, both measures were used as a way to bypass the Albanian Kosovar judges and prosecutors whom KFOR and UNMIK increasingly perceived as being heavily politicized and partial. However, both measures were decried by the OSCE's Legal Systems Monitoring Section (LSMS) and human right activists as unjustified and in violation of international norms.[22]

c) Lack of Impartiality and Legitimacy

Since under Security Council Resolution 1244 Kosovo was still "within the Federal Republic of Yugoslavia," albeit with "substantial autonomy," UNMIK Regulation 1999/1 declared that the pre-1989 FRY laws, as well as laws introduced between 1989 and 1999 under Milosevic, continued to be applicable, unless they contained an element of ethnic discrimination or otherwise violated standards of international law.[23]

This decision offended much of the Albanian population and legal community, for both political and practical reasons. [24] Politically, the laws passed under Milosevic's rule were perceived by the Albanian population as the laws of the oppressor, and while none of these laws were discriminatory on their face, they had been applied in a discriminatory fashion against ethnic Albanians under Milosevic's rule, especially after ethnic Albanians were excluded from the criminal justice administration. At a practical level, Kosovar Albanian legal

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[19] *Id.*

[20] Periello and Wierda, 5

[21] *Id.*

[22] Hartmann, 5-6.

[23] Periello and Wierda, 6

[24] *Id.*, 10

professionals were not familiar with the post-1989 laws, since most of them had been driven out of the profession under Milosevic's rule.[25]

As a result, the new Kosovar judiciary often refused to apply the March 1999 "Serb" criminal laws, and instead based their decisions upon the earlier March 1989 criminal laws, including the 1989 Kosovo Criminal Code enacted by the then-existing Kosovo Assembly. This caused UNMIK to reconsider its choice, and less than five months later, UNMIK replaced the 1999 law with the 1989 law.[26]

However, problems of legitimacy persisted in the new Kosovar judicial system. Once they were introduced back into the local legal and judicial system, the impartiality of Kosovar Albanians toward ethnic Serbs accused of crimes was often questioned. This, along with overcrowded prison facilities, contributed to mounting frustration among Serbs in Kosovo. This ultimately resulted in hunger strikes by Serb detainees.[27]

Michael Hartmann highlighted three main reasons for the Albanian Kosovar jurists' partial actions. First, some Kosovar Albanian jurists actually showed bias against Serbs, due to the fate of ethnic Albanians under the Milosevic regime. Second, social pressure from neighbors and fellow ethnic Albanians sometimes influenced the jurists, many of whom feared social ostracism and the end of employment advancement if their decisions went against the results desired by their Albanian Kosovar community. In particular, former KLA fighters were often perceived in the jurists' community as "war heroes" while Serbs were seen as cruel murderers. Finally, threats against Kosovar judges and prosecutors were a reality known to the entire judicial community. Because the existence of some of these threats was known among the judicial community, there was no need to threaten jurists in every case. Merely the fear of being threatened could also control judges and prosecutors with high-profile or notorious defendants.[28]

Finally, besides actual partiality was the problem of the appearance of partiality when mono-ethnic Albanian Kosovar judges decided cases of Serbs accused of war crimes so soon after the conflict.[29]

1.2 CREATION

1.2.1 Proposals & Alternatives

In late 1999 UN and member state officials, along with the national judiciary, began negotiations for the creation of the Kosovo War and Ethnic Crimes Court (KWECC). This standalone criminal court was to be an international-led, ad hoc tribunal largely modeled on the ICTY. It was to have concurrent, primary jurisdiction with domestic courts of Kosovo over serious violations of international humanitarian law as well as other serious crimes committed on political, ethnic, or religious grounds since January 1, 1998, including: war crimes, genocide, crimes against humanity, and other serious crimes committed on the basis on race, ethnicity, religion, nationality, or association to a minority ethnic or political group. While the KWECC would have simultaneous jurisdiction with the ICTY, the ICTY would have primacy and the KWECC was to focus on the *lower-profile offenders* that the ICTY lacked the capacity to try.

The KWECC was to have panels composed of international and local multi-ethnic judges, but its President, Vice President, Chief Prosecutor, Deputy Chief Prosecutor, Registrar and staff would all be international. Local staff was to be provided by the Department of Judicial Affairs while the international personnel would be seconded by donor countries and organizations. A Witness Protection Unit and an Office for the Defense

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[25] Hartmann, 4

[26] *Id.*

[27] Periello and Wierda, 10

[28] Hartmann, 6-7.

[29] *Id.,* 7

were to be established. KWECC was expected to be functional in the summer of 2000, and after SRSG Bernard Kouchner signed the regulation, the process of appointing the president and other international and local judges began. However, the project was abandoned in September 2000, due to lack of support and events on the ground.

A Reasons for Failure

a) Lack of Consultation with Civil Society

UNMIK did not consult civil society in the drafting of the proposal, which has never been made public, despite attempts by Amnesty International to obtain a copy. Secret preparations for the Court continued well into 2000. It was not until a press release issued on 17 May 2000 that UNMIK announced the project's main features to the Kosovar civil society.[30]

b) Opposition Amongst Local Legal Professionals

Some among the Kosovar Albanian legal community feared a potential drain the establishment of KWECC might cause to the fledging Kosovar judicial system, and the potential complications of having an additional judicial layer between the domestic system and the ICTY. Others, including the Kosovar bar, were skeptical of an international tribunal that might be less likely to employ local lawyers. Moreover, some of those with ties to the political party feared a system that would be "too independent" and thus more likely to prosecute Albanians. Finally, there were also fears that the KWECC would exacerbate ethnic tensions.

c) International Concerns

Initially, the proposal to create the KWECC enjoyed good support and the UNMIK Department of Judicial Administration spent much time and effort in developing operational plans to establish the court. While opposition to the court was growing domestically, however, concerns over the financial burden the KWECC would represent led UN member states to withdraw their support to the court. Member states also feared that it would be impossible to provide the necessary security. In particular, the United States refused to house the court within its high-security base. United States opposition also stemmed from its fears that an independent court might investigate war crimes committed by NATO forces during its "humanitarian intervention" of 1999. Ultimately, the international judge and prosecutors (IJP) program, which started functioning in September 2000, dealt the final blow to the KWECC project.

1.2.2 Enactment of Regulation 64

A Precursors to Regulation 64

While planning for the KWECC, UN authorities also set up an interim program to bolster trust in the judiciary by taking controversial cases out of the hands of Serb or Albanian judges without building a new international court. A wave of violence in Mitrovica in February 2000 prompted this action. Riots and inter-ethnic violence broke out following an attack on 1 February 2000 on a UN High Commission for Refugees (UNHCR) bus carrying Serbs into Serb-dominated northern Mitrovica. The UNMIK police arrested several Kosovar Albanian suspects, but a Kosovar Albanian judge released them the next day. The incidents shed light on the ethnic-based partiality of judges in the local system.

As a response, and with virtually no consultation with the local population, the UN issued UNMIK Regulation 2000/6 (February 15, 2000). This regulation provided for the appointment of one international

[30] "Kosovo (Serbia): The Challenge to Fix a Failed UN Justice Mission." *Amnesty International Report* (Jan. 2008): 14

judge and one international prosecutor to work within the existing domestic judiciary along with their local counterparts to try criminal cases (not limited to war crimes cases). It also gave the SRSG the power to make such appointments. The SRSG then acted with unprecedented speed to place internationals into the Kosovo judicial system. This was the first time in history that international judges or prosecutors (IJPs) had ever been appointed to serve within a domestic judicial system, alongside their existing counterparts, and operating under existing law and procedure.

The IJPs had the same competencies, powers, and functions as their Kosovar colleagues, although their service was limited to criminal cases. Moreover, the IJPs each had the authority to "select and take responsibility for new and pending" criminal investigations and cases, which was the only extraordinary power they had. Regulation 2000/6 thus led the way in the establishment of hybrid courts.

Initially, this arrangement was meant only for the Mitrovica District Court and Prosecutor's Office and other courts within its territorial jurisdiction. However, as Serb and other minority detainees initiated hunger strikes to protest against their prolonged pretrial detention and as UNMIK realized that the problem of Kosovar Albanian judges' lack of perceived impartiality was a general issue, UNMIK extended the program to all five judicial districts in Kosovo, as well as the Supreme Court, on May 27, 2000 (Regulation 2000/34).[31] International judges and prosecutors' subject matter jurisdiction, however, remained restricted to criminal cases and investigations.

IJPs were and continue to be selected through an UNMIK recruiting process, sometimes through recommendations by nations or international organizations. They are appointed by the SRSG for six-month renewable terms, which is the standard term for all mission personnel with the UN Department of Peacekeeping Operations.

"While KWECC was conceived as an independent transitional justice mechanism to boost the rule of law, the temporary introduction of international judges was motivated primarily by pragmatic and immediate security needs."[32] The hope was that the infusion of foreign experts would jump-start the judicial reform process. In fact, many welcomed this solution to biased trials and violent upsurges.

The criticism concerning the regulations allowing for the appointment of IJPs was that they did not go far enough. This was the position of the OSCE and numerous NGOs. Specifically, the existing regulations did not ensure a majority of international judges in a given case, which many thought was a necessary measure to ensure the appearance of impartiality in trials involving allegations of serious war crimes.[33]

The UNMIK administration itself found three critical problems inherent in its minimalist approach, especially when the cases involved war crimes, inter-ethnic crime, or organized crime. First, the international judges were being outvoted by the lay and professional Kosovar judges, resulting in unsubstantiated verdicts of guilt against some Serbian defendants and questionable verdicts of acquittal against some Albanian Kosovan defendants. Second, the Kosovan prosecutors "over-charged" Serbs; they would initiate criminal investigations and propose detentions based on insufficient evidence, while abandoning cases and refusing to investigate against ethnic Albanians. Third, unlimited IJP subject matter jurisdiction resulted in increased case volume beyond the capacity of the IJP, which negatively affected their ability to spend appropriate time for case and verdict preparation, research, and drafting. Moreover, not all cases could be tried before panels including IJPs.[34] The first problem was the most urgent, and the main impetus for expanding the role of the IJP.

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[31] UNMIK Regulation 2000/34, Amending UNMIK Regulation 2000/6, On the Appointment and Removal from Office of International Judges and Prosecutors, May 27, 2000.

[32] Periello and Wierda, 13

[33] See OSCE LSMS, "Kosovo's War Crimes Trials: A Review," Sept. 2002, at 11.

[34] Hartmann, 10

B Regulation 64

In response to this criticism, on December 15, 2000, UNMIK issued Regulation 2000/64, granting the SRSG the authority to appoint special panels of three judges with international majority (a minimum of two international judges). This led to the establishment of the so-called "Reg. 64 panels." Regulation 64 also granted the SRSG the authority to assign international prosecutors and/or single international investigating judges. As a result, the mixed panel formation of Regulation 6 was virtually abandoned.
A special section, the International Judicial Support Section (IJSS), was established within the Department of Justice in order to support this initiative. Subsequently, a Criminal Division was also created to support the international prosecutors, leaving the IJSS to support the international judges only.

1.3 STRUCTURE

1.3.1 Jurisdiction

The appointment of a "Regulation 64 panel" does not occur automatically. Regulation 64 allows the prosecutor, accused, or the defense counsel to request appointment of international judges or prosecutors at any stage in the criminal proceedings "where [it] is considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice."[35] The Department of Judicial Affairs then submits a recommendation to the Special Representative of the Secretary-General (SRSG) based on that petition.[36] The SRSG then may review and approve or reject the petition.[37] The DOJ and SRSG may also recommend the appointment of international judges and prosecutors on their own motion.[38] International judges and prosecutors may take cases at their own discretion.[39] The designation of a Reg. 64 panel may take place at any time in the criminal proceedings except (1) if a trial session has already commenced (though a Reg. 64 panel may be appointed to hear the case on appeal)[40], or (2) for appellate review, if the appellate session has already begun.[41] The Reg. 64 panels are not limited to only hearing cases involving human rights abuses or war crimes, but can take on any case that might be politically explosive or prone to partiality from domestic judges.[42]

1.3.2 Judiciary

Under Regulation 64, cases may be heard by a tribunal of three professional judges, of which at least two must be international judges.[43] One of the international judges must be the presiding judge.[44] The UN

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[35] UNMIK Regulation 2000/64 (1.1)

[36] *Id.* (1.2)

[37] *Id.* (1.3)

[38] Perriello and Wierda, 14

[39] *Id.*, 15

[40] UNMIK Regulation 2000/64 (2.4(a))

[41] UNMIK Regulation 2000/64 (2.4(b))

[42] Hartmann, 3

[43] Carolan, Robert F. "An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Kosovo Experiment." Transnational Law and Contemporary Problems 17 (2008): 19

[44] UNMIK Regulation 2000/64(2.1(c))

mission appoints the two international judges, while the local court appoints the domestic judge.[45] The UN mission also appoints an international prosecutor to work alongside domestic prosecutors.

By December 2000, there were 10 international judges in Kosovo; as of 2006 there were places for 17 international judges, though only 11 places were filled as of November 2006.[46] Judges are appointed after a series of interviews with UNMIK authorities and sitting judges.[47] UNMIK authorities have had difficulty filling judicial placements in Kosovo, especially from Western Europe and North America, because judges often cannot take long leaves of absence from their domestic placements.[48] Bilateral arrangements, such as an arrangement with the state of Minnesota's judicial system to allow Minnesota judges to take up office in Kosovo, have been helpful in this regard.[49] The complexity of Kosovar law has also made it difficult to recruit quality personnel. International judges are given little to no training on Kosovar law, and often only hear one to two cases during their tenure, making it difficult to develop institutional memory.[50] International judges are paid by the UNMIK, and often earn more than their domestic counterparts.[51]

1.3.3 Prosecution & Defense

In 2001 there were 11 international prosecutors working in Kosovo[52] but by 2005 the number had dropped to 9.[53] UNMIK follows a similar procedure for appointing international prosecutors and faces similar problems recruiting quality international prosecutors as in appointing and recruiting quality international judges. International prosecutors operate with only superficial collaboration with national prosecutors, though most parties would prefer more open collaboration, because of limited time and security concerns.[54]

1.4 FUNCTIONING

Regulation 64 panels, as described above, have broad discretion to take cases "necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice,"[55] which has led to criticism that the SRSG has too much control over the Kosovar criminal justice system.[56]

Structural adjustments to the hybrid court system have been made to allow more strategic assignment of cases. A Chief International Judge and Prosecutor are now in place, and a Criminal Division closely monitors the developments in and importance of pending cases. In 2005, a Kosovo Special Prosecutor's Office was implemented to eventually take over the Criminal Division's high-profile cases, to expand the training received by international judges and prosecutors, and to eventually train local prosecutors.[57]

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[45] Carolan, 19

[46] Perriello and Wierda, 15

[47] *Id.*

[48] *Id.*

[49] *Id.,* 16

[50] *Id.*

[51] *Id.*

[52] Hartmann, 12

[53] Perriello and Wierda, 18

[54] *Id.*

[55] UNMIK 2000/64(1.1)

[56] Perriello and Wierda, 20

[57] *Id.*, 21

The selection of which law to apply in the hybrid courts was the subject of some controversy. Law promulgated after the rise of the Serbian government in 1989 was thought by many ethnic Albanians to be discriminatory – though the laws were not discriminatory on their faces, they had been used discriminatorily by the Serb oppressors. The hybrid courts therefore applied pre-1989 domestic law, as well as some tenets of post-1989 law that have been found to be non-discriminatory and to not conflict with international human rights standards.[58] UNMIK regulations incorporating the "Constitutional Framework" made directly applicable international human rights instruments such as the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms to Kosovo trials. Regulation 64 panels have concurrent jurisdiction with Kosovar domestic courts.[59] Decisions of the Reg. 64 panels were criticized for not referring to any law beyond the domestic civil and criminal procedure statutes and UNMIK regulations, not even ICTY decisions which may be viewed as persuasive, though not binding authority.[60]

In 2004, a working group consisting of a wide array of legal practitioners promulgated a new Criminal Code[61] and Criminal Procedure Code of Kosovo.[62] These codes bring offenses illegal under international law into the domestic code of Kosovo. They also increase protections for defendants' rights, including the right to know the nature of and reasons for the charges against the defendant when liberty is deprived[63], the right to defense in person or by a member of the bar[64], and the right to speak one's own language in trial[65]. This transition raised questions of insufficient training for Kosovar lawyers who had no previous experience in cross-examination or guilty pleas, which were foreign to the Kosovar civil law tradition,[66] but observers have seen improvements in the adversarial skills of local lawyers in prosecution and in defense.[67]

Reg. 64 panels are incorporated into the local court system and make use of domestic facilities. Court administration is run by the Department of Judicial Affairs, which schedules and deploys cases.[68] Considerable effort is devoted to protecting victims and witnesses. UNMIK regulations allow "anonymous" witnesses for both the prosecution and defense, but witness intimidation, injury, and death remains a pressing issue. UNMIK regulation established a Witness Protection Unit (WPU) to provide physical protection for witnesses, but it is underfunded and poorly run.[69]

The relationship between ICTY and the Kosovo hybrid courts is "complementary," and "collaborative," and the ICTY has concurrent jurisdiction with national courts. Several cases at the ICTY have involved atrocities committed in Kosovo, including some cases that were initiated in the Kosovo hybrid courts. UNMIK often assists with ICTY investigations. However, the lines drawn between the ICTY's focus on the most senior perpetrators of the most egregious crimes, and the Kosovo hybrid courts' focus on lower-level offenders, are clear and accepted by both ICTY and UNMIK.[70]

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[58] Dickinson

[59] Perriello and Wierda, 22

[60] *Id.*, 22

[61] UNMIK Reg. No. 2003/26, On the Provisional Criminal Code of Kosovo, amended by UNMIK Reg. No. 2004/19, June 16, 2004.

[62] UNMIK Reg. No. 2003/25, On the Provisional Criminal Code and the Provisional Criminal Procedure Code for Kosovo.

[63] Criminal Code of Kosovo Art. 14(1) (2003)

[64] *Id.*, Art. 12(2)

[65] *Id.*, Art. 15(2)

[66] Perriello and Wierda, 24

[67] *Id.*

[68] *Id.*, 25

[69] *Id.*, 26

[70] *Id.*, 29

1.4.1 Conclusion

The hybrid courts in Kosovo have been an effective bridge between the fully-international ICTY and the low-capacity Kosovar domestic courts. The unique hybrid structure merits careful consideration and balancing of local and international interests. Key among the findings of those who have studied the operation of the Kosovo hybrid courts are (1) the need for adequate funding for the courts and for adequate investment in the human capital of the system (judges, prosecutors, and witnesses), and (2) the challenges of cooperation between the international and domestic communities in choice of law, sharing of responsibility, and capacity building, given the uniqueness of each post-conflict situation. These considerations should be foremost in the minds of those working to develop a hybrid court system to prosecute propagators of atrocity elsewhere in the world.

2 East Timor

2.1 BACKGROUND

2.1.1 Conflict

In 1975, a decade after the UN placed East Timor on the list of non-self-governing territories, the Southeast-Asian state declared independence from its historic colonizer, Portugal. Preparing for autonomy, newly formed political parties split over the future of East Timor's relations with Portugal, leading to the eruption of infighting. Taking advantage of its neighbor's instability, Indonesia invaded East Timor in late 1975 and annexed it as its 27th province in mid-1976. "Indonesia's occupation was the beginning of almost a quarter century of immense atrocities and human rights abuses, during which almost one-third of the population of [East Timor], some 200,000 people, lost their lives."[71]

In 1998, Indonesia's long-time president Soeharto fell. The resulting instability gave East Timor a brief window of opportunity for self-determination, and the new Indonesian president agreed in late 1999 to hold a popular consultation on an "autonomy package" for the territory, under the supervision of the UN.[72] In the lead-up to the consultation, however, the Indonesian military aggressively promoted the creation of pro-integration Timorese militias in an effort to persecute pro-independence organizations and intimidate the populace. Notwithstanding this systematic campaign of violence against civilians, 98% of the Timorese voting population turned out to vote in the popular consultation, with 80% of the population rejecting autonomy *within* Indonesia.[73] The military and militias retaliated brutally. "In the days following the referendum, the [Indonesian military] and Timorese militias embarked on a scorched-earth policy, burning down Dili and other towns and killing hundreds, in addition to committing many other types of atrocities. This was a well planned attacked, involving all levels of civil and military administration, that resulted in the displacement of more than 50 percent of the population … [,] at least 1,300 people dead and many more raped or seriously injured."[74]

The violence prompted the intervention of a UN-backed, Australian-led military force to restore order. Thereafter, the threat of economic sanctions from the international community caused Indonesia to cede control of East Timor in September of 1999, nearly a month after violence began.

2.1.2 Prior Legal Arrangements

"The judicial structure that existed prior to the referendum had been destroyed. Virtually all of the judges and lawyers capable of operating the justice system had fled to Indonesia after the referendum … Even the buildings, court equipment, furniture, and written legal resources were demolished or despoiled."[75]

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[71] Reiger, Caitlin, and Marieke Wierda, "The Serious Crimes Process in Timor-Leste: In Retrospect." International Center for Transitional Justice, Prosecutions Case Studies Series. March 2006: 4.

[72] *Id.*, 5.

[73] *Id.*

[74] *Id.*

[75] Bowman, Herbert D. "Letting the Big Fish Get Away: The UN Justice Effort in East Timor." Emory International Law Review, Vol. 18, 2004: 384.

2.2 CREATION

2.2.1 Purpose

Asked to respond to the massive human rights violations, the UN eventually settled on establishing a hybrid tribunal. "Designed partly in response to criticisms of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), the hybrid model is a system that shares judicial accountability jointly between the state in which it functions and the UN."[76] A hybrid tribunal presents many advantages. However, given its reportedly poor results in East Timor, it is important to examine why the UN chose this particular model there.

2.2.2 Proposals & Alternatives

The UN considered several alternatives in deciding how to adjudicate human rights abuses in East Timor. Indeed, the UN did not initially set up an international tribunal at all, despite recommendations by the UN Human Rights Commission, as well as Indonesian human rights groups.[77] Instead, Secretary-General Kofi Annan first gave Indonesia the opportunity to prosecute the human rights violations itself. It was only after results proved unsatisfactory that the UN decided to establish an international tribunal in East Timor. The UN could have chosen then to establish a full-blown international criminal tribunal similar to those created in Rwanda and Yugoslavia, but it ultimately opted against a full-scale ad hoc international tribunal for several reasons. First, the cost and the duration of the preceding International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for Yugoslavia (ICTY) proved too daunting for the UN.[78] Furthermore, the UN seemed to be suffering from "tribunal fatigue," "the disappointment and disillusionment with the high cost and low return of the former Yugoslavia and Rwanda ad hoc tribunals."[79] They, therefore, sought to create a cheaper, more effective model.

The UN also had to consider Indonesia's status in the international arena. Far from being a rogue or failed state, like Yugoslavia and Rwanda had been, Indonesia was a legitimate global player. "In terms of size, population, and political influence in its region, Indonesia is a giant."[80] The UN, therefore, had larger interests to consider when setting up an international tribunal in East Timor. "If the UN established an international criminal tribunal that targeted the military leadership, it would soon be banging heads with the Indonesian government and, perhaps, the international interests that supported it."[81] Some argue that it was this deference to Indonesia—and its global connections—that played the greatest role in the UN's decision to give Indonesia a chance to try its human rights violators before finally establishing a tribunal as part of the UN Transitional Administration in East Timor (UNTAET).

While attuned to the interests of Indonesia, the UN nevertheless did not want its reputation damaged by a complete lack of response to the human rights violations in East Timor. The UN, therefore, chose a hybrid tribunal model. This particular model, which incorporates elements of both national and international law,

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[76] Katzenstein, Suzanne. "Hybrid Tribunals: Searching for Justice in East Timor." Harvard Human Rights Journal, Vol.16, Spring 2003: 245.

[77] Bowman, 379-380.

[78] Cohen, David. "Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?" AsiaPacific Issues, No.61, August 2002: 2.

[79] Bowman, 381.

[80] *Id.*

[81] *Id.*, 382

"lends the court some legitimacy as a fair mechanism for holding perpetrators responsible for their crimes. As is the case with national courts, the hybrid model is cheaper to operate than the ad hoc tribunals. It is considered to be politically less divisive, more meaningful to victim populations, and more effective at rebuilding local judicial systems."[82] Furthermore, this model encourages domestic institution building necessary for infrastructural stability. "Its long-term objectives…involved establishing a viable system of self-government, which would require an inclusive, decentralized state-building approach that emphasized the training and participation of East Timorese."[83] However, once chosen, the hybrid tribunal faced immediate, widespread challenges in East Timor.

2.3 STRUCTURE

UNTAET established the Special Panels of the Dili District Court (SPSC) in mid-2000 to try "serious criminal offenses" (i.e. genocide, crimes against humanity, rape, war crimes, torture, sexual violence and murder) that had occurred in 1999.[84] Each special panel would have two international judges and one national judge.

2.3.1 Jurisdiction

The SPSC was designed to incorporate both international law as provided under the Rome Statute of the International Criminal Court (Rome Treaty) and use Indonesian law as a subsidiary when international provisions fell short. Indonesian law was picked as a default because virtually all Timorese lawyers and judges involved in the tribunals were trained in it.[85]

2.3.2 Prosecution & Defense

The Serious Crimes Unit (SCU), which UNTAET established under the auspices of the Prosecutor General of East Timor's public prosecution service, was responsible for prosecuting the cases.[86] "At its peak, the SCU had more than 130 staff, including prosecutors, case managers, investigators and forensic staff. The Unit was downsized in 2003, and before the final closure in May 2005, it had 88 staff members, comprising UN international staff working as prosecutors, investigators, forensic experts, and translators."[87]
Among the international prosecutors, "only a small number … had experience from other international tribunals, particularly from the [International Criminal Tribunal – Rwanda]."[88]

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[82] Katzenstein, 246

[83] *Id.*, 249 (laying out an argument made by Joel Beauvais in "Benevolent Despotism: A Critique of UN State-Building in East Timor," NYU Journal of International Law. 33 (Summer 2001): 1101

[84] Reiger, 12

[85] Cohen, 8

[86] Cohen, 8

[87] Reiger, at 18.

[88] *Id.*

2.4 FUNCTIONING

One critic of the hybrid model has described its "greatest risk" as incorporating the worst aspects of international and local judicial systems, rather than reflecting the best of both.[89] The East Timor tribunals, unfortunately, exemplified this critique. They suffered from poor resources, a lack of clear ownership or accountability over the proceedings, disillusionment of the local population with the tribunal process, and operational problems stemming from the lack of resources and unclear accountability of the proceedings.[90]

2.4.1 Problems in the Formation of the SPSC and SCU

Because hybrid tribunals are, by definition, located in the region where the conflict took place, one of their expected advantages is greater local participation and ownership of the proceedings.[91] In that regard, however, East Timor has been perhaps "the most spectacular example of the failures of hybrid courts from the perspective of local populations."[92] This began from the tribunals' roughshod establishment.

The UN established the panels with effectively no local collaboration – even though the SPSC was designed to be located within the Timorese judicial system.[93] Timorese judges were angered by UNTAET's usurpation of cases they had been expecting to decide themselves.[94] Local authorities and NGOs felt shut-out of the decision-making process. Not surprisingly, the complete lack of local consultation foreordained the transitional government's ambivalent involvement with support of the tribunals.[95]

"The creation of the Special Panels and what became the SCU was not an integrated process based on any prior planning; it was a series of ad hoc responses to a crisis situation. The two developed separately and never functioned as a single institution."[96] The two units had different staffing, salary scales, and the SCU operated not as an "organ of the court" but rather as a "quasi-separate institution."[97] Moreover, UNAET did not, at the time of creating SPSC and SCU, create a public defender function. Only in 2003, after the problems associated with using an ad hoc group of Timorese and international defenders this function reached crisis levels, was the Defense Lawyers Unit established within the UN Mission of Support in Timor-Leste (UNMISET), the renamed UNTAET mission.[98]

2.4.2 Legal Challenges

Legal issues added to the UN's difficulties. First, it was unclear at the outset of the tribunal whether the East Timorese courts would even be given authority over the human rights violations.[99] The UN's ultimate decision to institute provisions from the International Criminal Court within the Timorese judicial system may have been overly-ambitious. In doing so, the hybrid tribunal "bound itself to completing an extremely

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[89] Katzenstein 246

[90] Raub 1031

[91] Cohen, 5

[92] Ramji-Nogales, 31

[93] Cohen 10

[94] Reiger 12

[95] *Id.*, 13

[96] Reiger, 13

[97] *Id.*, 13

[98] Cohen, 9

[99] Bowman, 384.

costly and complex process that would seem to be beyond its capacity."[100] Further problems arose when it became clear that the regulation employed did not include political groups in its definition of genocide, recognized two definitions of torture, and did not include rape as a crime within marriage. Finally, older human rights offenses raised questions with regard to the rule *nullem crimen nulla poena sine*—"no one can be tried for acts that were not criminal at the time they were committed."[101] Some of the crimes, then, could not be tried. Given the wide-ranging difficulties, East Timor's hybrid tribunal was severely handicapped from the start.

2.4.3 Outreach

Researchers doing surveys and interviews into the local population's attitudes on the tribunals show a distinct dissatisfaction with the SPSC's failure to integrate local Timorese dispute resolution traditions and traditional leaders into its processes.[102] "For example, public apology is extremely important in resolving disputes in [East Timor]; this step would have been simple to include but it was not."[103] Moreover, some Timorese expressed chagrin that while they were struggling to provide themselves with food and housing, prisoners were receiving both for free. In general, the Timorese public wanted a greater opportunity for victims to directly confront their victimizers and to design the sort of justice meted out.[104]

2.4.4 Jurisdiction

The East Timor tribunal also faced jurisdictional challenges. First, "rather than merely 'involving East Timorese counterparts,' UN legal officer Strohmeyer decided in early January 2000 to transfer complete control of the judiciary, [including] jurisdiction over ordinary crimes, to East Timorese officers."[105] These local officers had little guidance on what were, from the start, enormous tasks and responsibilities. More problematic, however, was the Indonesian government's complete lack of cooperation. "The basic problem is that although much of the evidence concerning the atrocities themselves [was] in East Timor, the key high-level defendants and witnesses who [could] testify about the complicity of civilian authorities and the higher command levels of the Indonesian Army [were] in Indonesia."[106] Yet Indonesia refused to comply with extradition requests, and would not assist in investigations. This lack of cooperation functionally immunized those responsible for many of the most severe human rights crimes from justice.

Moreover, the local population's desire to bring certain perpetrators to justice was not matched by that of the government– senior government officials thwarted SPSC proceedings and SCU investigations into high-level perpetrators located in Indonesia.[107] It has been suggested that such government interference with the functioning of the tribunal was motivated by a desire to re-establish economic ties with Indonesia.[108] Others have argued that this calculation is not so simple: "The posture of senior politicians should be seen in

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[100] Linton, Suzannah, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice'." Criminal Law Forum. 12, (2001): 205-206.

[101] *Id.*, 220

[102] Ramiji-Nogales, 32

[103] *Id.*

[104] *Id.*, 33

[105] Katzenstein, 254

[106] Cohen, 6.

[107] Ramiji-Nogales, 33

[108] Reiger, 33

conjunction with the constant refrain of the same people who at earlier stages argued that the international community should have led the justice-seeking process through the creation of an international court."[109] Moreover, such ambivalence was not limited to the Timorese government – the UN also had a limited will to bring high-level perpetrators located in Indonesia to justice.[110] The consequences of the Timorese government's and UN's dual disinterest in these prosecutions "meant that only low level Timorese, mostly village militia members, ever appeared before the SPSC."[111]

2.4.5 Unclear Ownership

A theme in the problems with SPSC and SCU is one that Chief Justice Philip Rapoza, the Coordinating Judge of SPSC from 2004 to 2005, has termed "ownership."[112] It was unclear how the UN and Timorese government were meant to share responsibilities and mandates for the SPSC and SCU (likely precipitated by the ad hoc and without local consultation way in which the UN created the SPSC and SCU).[113] Lack of ownership led to basic and embarrassing operational problems, e.g., "the SPSC did not have reliable electricity until mid-2004[, a full four years into the trial process,] because UNMISET and the Timorese Government could not agree on who should repair the generator or pay for fuel."[114]
Unclear ownership also created serious problems in retaining and managing tribunal personnel.[115] East Timor's highest court in did not operate for 21 months because of a prolonged disagreement on appointments between the UN and Timorese government – meaning that "with one exception, no appeals from convictions or illegal pretrial detentions were heard for this entire period."[116] In general, there were significant delays in the appointment of international judges to the SPSC – and while the UN and the Timorese government pointed fingers at each other, it is hard to establish either party as more blameworthy.[117] The UN did not engage in targeted advertising for the judgeships, and these positions were at a significantly lower UN pay and prestige level than ICTY, ICTR and SCSL posts. Furthermore, the East Timor Minster of Justice was adamant that candidates come from civil law countries and have Portuguese language skills. This resulted in a very limited candidate pool of judges—judges who generally lacked experience in the application of international criminal and humanitarian law.[118]

2.4.6 Funding

Recruitment problems naturally led to trial delays, and insufficient funding contributed to high international judge turnover. This meant even further delay because of the persistent recruitment problems and because many trials had to be restarted owing to an international judge's departure.[119]

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[109] *Id.*, 32
[110] Cohen, 10
[111] *Id.*, 10
[112] *Id.*, 9
[113] *Id.*, 9
[114] *Id.*, 9-10
[115] *Id.*, 10
[116] *Id.*, 10-11
[117] Reiger, 15
[118] *Id.*, 14
[119] *Id.*, 15

Critics rightly charge the UN with severely underfunding the tribunals. Judges, at varying points, lacked legal clerks, secretaries, court reporters and stenographers and had only a limited library to do research.[120] The lack of stenographers or audio equipment meant that there was no transcript or recording of the first thirteen trials. Trials began to be video-recorded but were not transcribed, leading to problems on appeal as judges' own notes were the "official" trial record.[121] Transcripts were only made available two years into the trials.[122] Though translation was in up to five languages, the SPSC was without professional translators until 2004. Many of the initial translators had no experience at all. [123]

These funding constraints and the unclear ownership of the tribunals heavily prejudiced the defendants. Recall that defendants were tried without an institutional unit for defense lawyers for the first three years of the SPSC; that the highest court shut down for twenty-one months over appointment disputes; and that none of the high-level Indonesian perpetrators were ever tried. Instead, the focus was entirely on low- to mid-level Timorese perpetrators. These factors, combined with inadequate transcripts and translation, severely prejudiced defendants.

Worse yet was the inadequacy of the defense. Before DLU was created in 2003, the defense function was an ad hoc group that was not housed within UNTAET.[124] "It appears simply to have not occurred to the UN administration that provision had to be made for a defense, particularly in the post-conflict situation where no experienced lawyers were available."[125] With no budget for basic investigation, the quality of the defense suffered: in the first fourteen trials and in some of the later trials, no defense witnesses were called.[126]

2.4.7 Prosecution

Both outside influence and resource constraints also limited the efficacy of the SCU's prosecutorial strategy. First, early SCU investigations were "criticized for failing to focus on the systematic nature of the violations that had occurred during 1999 and the role played by the Indonesian military apparatus, focusing instead on treating them as individual criminal cases."[127] Second, to the extent that the investigations did focus on "priority cases" (as judged by "the number and type of victims, the seriousness of the crimes, and their political significance"), the vast majority of the accused remained at large, forcing the SCU to focus on individuals indicted alone for ordinary murder charges.[128] Several early prosecutors resigned, complaining of outside influences determining where prosecutorial efforts should be directed. Indeed, early prosecutorial strategy was largely determined by outside political influence and funding constraints.

While the arrival of Norwegian Siri Frigaard (who had served as a prosecutor in Albania in the late-1990s) as Deputy General Prosecutor for Serious Crimes significantly re-oriented the prosecutorial efforts towards investigating those in positions of greater responsibility, problems persisted. For one, the SCU faced considerable pressure from families to investigate individual deaths; because SCU had deliberately elected to pursue a strategy of focusing on a small number of the most serious crimes, it only investigated 40% of the

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[120] Katzenstein, 259-260

[121] *Id.*, 260

[122] Cohen, 15

[123] *Id.*, 16

[124] Cohen, 15

[125] *Id.*

[126] *Id.*, 16

[127] *Id.*, 18

[128] *Id.*, 19

deaths. Its failure to adequately explain its narrow strategy through a focused outreach program reduced trust and credibility among the Timorese.[129]

In sum, the SCU's prosecutorial strategy suffered from the tension between, on the one hand, the need to hold those in custody, usually lower level defendants, accountable and the desire, on the other hand, to bring the architects of violence, many of whom were difficult to exercise jurisdiction over.

The disparities in legal training between international prosecutors and national public defenders also likely prejudiced defendants beyond the already serious disparities in resources. "As an indication of the dire state of the inequality, in the first 14 trials before the Special Panels, not a single witness was called for the defense." Indeed, in 2008, several years after the SCU's mandate ended, only 13 Timorese judges, 13 national prosecutors, and 11 national public defenders had been assigned to East Timor's judicial system, and "the limited capacity of Timorese judicial personnel meant that the system continued to rely on international judicial personnel. From September 2007 to June 2008, five international judges, three international prosecutors, and four international public defenders were working in the Timorese justice sector."[130]

2.4.8 Judiciary

Professional relations between international and Timorese judges were strained at times. Independent observers criticized international judges, for example, for interrupting their Timorese colleagues during questioning and for an instance when a dissenting Timorese judge's opinion went unpublished. [131] International judges have also been criticized for a lack of cultural sensitivity during the proceeding, especially when questioning witnesses, likely because they never received specific cultural awareness training. Worse yet was their absence of social integration. International judges had no knowledge of Indonesian law or the Bahasa language and were reluctant to learn it or other local languages.[132] There was "virtually no social or professional interaction" between the Timorese and international judges, and "one public defender described the international judges as operating in a professional, social and cultural vacuum."[133]

But it was not simply that international judges did not receive cultural awareness training; rather, they hardly received any training at all. "Judicial training sessions were generally conducted only for national judges, despite a demonstrated lack of consistency between the decisions of international judges, further exacerbated by the absence of a functioning superior court to standardize jurisprudence."[134] Like much of the CSPC and CSU's operations, even trainings for national judges were poorly planned and underfunded and failed to consider the local circumstances.[135] None of the Timorese appointees to the SPSC had prior experience as judges because they were predominantly recent law school graduates.[136] The main problem, therefore, was that trainings were too specific and assumed a foundational level of legal knowledge that the Timorese judges did not have. [137]

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[129] *Id.*

[130] Office of the High Commission for Human Rights, 2008. Web. <http://www.ohchr.org/Documents/Countries/UNMIT200808.pdf>

[131] Reiger, 15-16

[132] Cohen, 8; Reiger 15

[133] Reiger, 16

[134] *Id.*, 16

[135] *Id.*

[136] Cohen, 8

[137] *Id.*, 17

2.4.9 Conclusion

SPSC trials began in 2001 and ended in 2005. In all there were fifty-five trials in which eighty-four defendants were convicted. Twenty-four of the defendants pleaded guilty and four were acquitted.[138] The conviction rate for murder trials was especially high, with 97.7% of defendants convicted.[139] While some might laud the high conviction rate and relative efficiency of the SPSC compared to other tribunals, insufficient funding severely prejudiced the defendants.

Security Council Resolutions of 2004 required SCU to cease investigations by November 2004.[140] Inadequate funding meant that their investigations were artificially terminated, and the results were decidedly unfinished:

The UN ceased funding the process and the mandate of the SCU formally terminated at the end of UNMISET on May 20, 2005, leaving behind 514 cases for which investigations had been conducted but no indictments issued and 50 cases for which investigations had not been completed. These outstanding cases include 828 cases of alleged murder, 60 alleged cases of rape or gender-based crimes, and possibly hundreds of cases of torture and other acts of violence. In particular, very few gender crimes were finally indicted by the SCU.[141]

Moreover, out of those indicted, "339 remained at large outside the jurisdiction."[142]

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[138] *Id.*, 28

[139] Cohen, 17

[140] Reiger, 37

[141] *Id.*

[142] *Id.*, 18

3 Bosnia

3.1 BACKGROUND

3.1.1 Conflict

The Bosnian War was an international armed conflict that occurred between April 1992 and December 1995. The war followed the breakup of the former Yugoslavia; after the secession of Slovenia and Croatia from Yugoslavia in 1991, the Republic of Bosnia and Herzegovina passed a referendum for independence in 1992. However, due to the multiethnic nature of Bosnian society not all elements of the population were in favor of creating an independent state for Bosnia-Herzegovina. At the time that the referendum was passed, Bosnia-Herzegovina consisted of 44% Muslim Bosniaks, 31% Orthodox Serbs (who established their own Republika Srpska and were supported by the Serbian government of Slobodan Milosevic), and 17% Catholic Croats. NATO eventually intervened in 1995 against the Army of Republika Srpska. A peace agreement, referred to as the Dayton Agreement, was finalized on December 21, 1995. As a result of the peace agreement Bosnia consists of two main "entities," the Federation of Bosnia-Herzegovina (mainly composed of Bosniaks and Bosnian Croats) and Republika Srpska (mainly composed of Bosnian Serbs). Each entity has its own government, parliament, and judiciary, and the nation as a whole has a shared presidency consisting of one Croat, one Bosniak, and one Serb overseeing each of the entities.

There were widespread allegations of war crimes committed during the conflict, including many instances of sexual violence, ethnic cleansing, and genocide. Throughout the war civilian populations were specifically targeted, and "[a] key objective of most armed groups was to create ethnically homogeneous territories through forced displacement and other violence that came to be known as 'ethnic cleansing,' which constituted crimes against humanity."[143]

A 1995 CIA report found Serbian forces responsible for 90% of the war crimes committed during the conflict.[144] The Muslim Bosniaks were the victims of most of these crimes, including the Srebrenica Massacre in which more than 8,000 Bosniak men and boys were killed by units of the Army of Republika Srpska. Recent research estimates the total number of deaths due to the conflict at around 100,000-110,000,[145] including 16,000 children.[146] Approximately 2.2 million people became refugees; 1.3 million were internally displaced, and up to 15,000 people are still believed missing.[147] Additionally, estimates of the number of women raped during the conflict – again primarily Bosniaks, although many women were victims of sexual violence on all sides – range from 20,000 to 50,000.[148] Both Bosnia-Herzegovina and the international community took steps to ensure that these crimes against humanity would be punished, thereby creating the International Criminal Tribunal for the Former Yugoslavia and eventually the Bosnian War Crimes Chamber.

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[143] Ivanisevic, Bogdan. *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (2008), International Center for Transitional Jusice.

[144] Cohen, Roger. "C.I.A. Report on Bosnia Blames Serbs for 90% of War Crimes," *The New York Times*, March 9, 1995.

[145] Tabeau, Ewa; Bijak, Jakub. "War-related Deaths in the 1992–1995 Armed Conflicts in Bosnia and Herzegovina: A Critique of Previous Estimates and Recent Results". *European Journal of Population* (Springer Netherlands) 21: 187–215 (2005).

[146] Ivanisevic, Bogdan. *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (2008), International Center for Transitional Jusice.

[147] *Id.*

[148] "Sexual and Gender-Based Violence in Conflict: A Framework for Prevention and Response." UN Office for the Coordination of Humanitarian Affairs (2008).

3.1.2 Prior Legal Arrangements

Before the mixed tribunal was established, war crimes were punished on the international level at the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY was set up by the UN Security Council by Resolution 827 as an *ad hoc* tribunal that would temporarily try cases relating to war crimes committed during the Bosnian War. "The idea behind it was also that it should try mainly the top-level perpetrators, the masterminds and political as well as military leaders of all sides to the conflict."[149] The ICTY has jurisdiction over four categories of war crimes committed in Yugoslavia since 1991: Grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. Cases are heard at the Hague in the Netherlands. The ICTY has indicted 161 individuals, acquitted 5, sentenced 48, transferred 11 to local courts, and terminated another 36 cases. The remaining 61 indicted individuals are either awaiting trial, awaiting appeal, or are still at large.

While the ICTY has accomplished significant work, the sheer number of cases as well as the desire for increased national input has led to the creation of the Bosnian War Crimes Chamber (WCC) which has taken on an increasing role in the prosecution of war crimes cases. The rationales for establishing the WCC will be discussed further below.

3.2 CREATION

3.2.1 Purpose

The WCC was created in response to two primary factors: the need to alleviate some of the pressure caused by the expansive caseload of the ICTY, and the need for a greater sense of accountability by allowing the Bosnian courts to respond to war crimes committed within their nation.

First, creating an alternative venue to the ICTY was necessary because of the sheer number of cases generated by the war crimes committed during the Bosnian War. The ICTY was never intended to be a permanent institution, but instead was meant only to try the highest level perpetrators of war crimes. As a result, "[t]he backlog of cases as well as the length of time it takes to finish an individual case, has spurred the judges to consider ways of finding an 'exit strategy,' and to wind down its operation within a reasonable time-frame."[150] Furthermore, the budget for the ICTY was consuming a large portion of the UN' financial pie.[151] As a result, the ICTY concluded that "[c]ases of lesser importance could, under certain conditions, be tried by the courts of the States created out of the former Yugoslavia, thereby considerably lightening the Tribunal's workload and allowing it to complete its mission earlier. Moreover, it would make the trial of the cases referred to national courts more transparent to the local population and a more effective contribution to reconciling the peoples of the Balkans."[152]

Once it became obvious that some form of a national court system was necessary to address the paucity of resources at the ICTY, the question remained what type of court would be the best to address the types of

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[149] Bohlander, Michael. "The Transfer of Cases from International Criminal Tribunals to National Courts." Paper presented at the Colloquium of Prosecutors of International Criminal Tribunals held at Aruha on 25-27 Nov. 2004, available at http://69.94.11.53/ENGLISH/colloquium04/bohlander/Bohlander.pdf.

[150] Bohlander, Michael. "The Transfer of Cases from International Criminal Tribunals to National Courts." Paper presented at the Colloquium of Prosecutors of International Criminal Tribunals held at Aruha on 25-27 Nov. 2004, available at http://69.94.11.53/ENGLISH/colloquium04/bohlander/Bohlander.pdf.

[151] *Id.*

[152] *Id.*

issues that would come before a national court in Bosnia. There were four main solutions proposed, each of which will be addressed below.[153]

3.2.2 Proposals & Alternatives

A Extant National System with Training in International Law for Local Judiciary

One option was to train the local judiciary in international law and try war crimes within the extant national judicial system. The perceived advantages to this system were that it would make it possible to use the law and criminal procedure already in force, and that local lawyers and judges would have already been familiar with the system. Additionally it could have been set in place immediately.
The disadvantages to this system were that it would not have encouraged any efforts to reform the judicial institutions, and that it could have been seen as ethnically biased without the participation of international observers. Additionally, the use of the current system could have been strained by the need to try complex human rights violations and to incorporate international law, both of which were unfamiliar to local judges and lawyers. Additionally, the local court system organized in Bosnia before the WCC was fragmented amongst the various ethnic groups, which would likely have made it difficult to adjudicate some disputes against Bosnian Serbs in the Republika Srpska.

B Existing National System with International Observers

A second alternative system was to incorporate international observers into the existing national judicial system. The theoretical advantages to this option were that it would have preserved the existing criminal law and procedure so that the system could have been implemented quickly, while also promoting the effective application of international norms through the use of foreign observers.
On the other hand, the primary disadvantages to this system were that it would not have encouraged any efforts to reform the judicial system, and that it could have led to an awkward role for the observers in that they would have been forced to function as purely passive actors.

C Special International Court

A third proposal was to form a special international court. One advantage to this option was that it would have made it possible to have a judicial structure perfectly adapted to the transfer of cases from the ICTY since the court would have been created anew. Additionally, a special international court would have ensured that international norms were applied effectively, particularly with regard to witness protection. Finally, it could have ensured that prosecutions are carried out professionally by making judges and qualified court personnel available.
However, there were also substantial disadvantages to this proposal. It would have required that an additional court be set up without any reliance on past institutions, which could have been costly and time-consuming. In addition to drafting laws to set up the court itself, this proposal would have required the adoption of a UN Security Council resolution and an amendment to Bosnia's national constitution. Furthermore, it would have likely employed a criminal procedure very different from the one then employed in Bosnia, so that local lawyers and judges might have had difficulty participating in the process. Third, it would have compelled the international community to assume a considerable financial burden. Fourth, the court would have practically

[153] The discussion that follows is drawn from Bohlander, Michael. "The Transfer of Cases from International Criminal Tribunals to National Courts." Paper presented at the Colloquium of Prosecutors of International Criminal Tribunals held at Aruha on 25-27 Nov. 2004, available at http://69.94.11.53/ENGLISH/colloquium04/bohlander/Bohlander.pdf.

discouraged Bosnia from adopting necessary local reforms. Finally, this solution would have required national judges to defer to international judges in trying national crimes; this would likely have undermined public support for the court, since Bosnian nationals would have little input into the proceedings of the court.
As a result, while creating a purely international court posed some advantages, it would not have represented the type of reform of the Bosnian judicial system necessary for the long-term development of the courts. Furthermore, it would have irrevocably committed the international community to adjudicating war crimes cases in Bosnia, a process that could ultimately take decades and will involve substantial financial outlays in order to remain effective.

D Mixed Chamber Tribunal

Bosnia ultimately selected the mixed chamber model. One advantage to this option was that it made it possible to use local judicial institutions, albeit ones that would still need to be created. Furthermore, it encouraged the state to build up its institutional capacity by itself, rather than purely relying upon international assistance; thus, it could simultaneously build capacity while also taking advantage of the expertise of international actors. Additionally, this solution made it possible to set in place a uniform practice for punishing perpetrators of war crimes on a national level, thereby alleviating the potential ethnic-bias problems associated with using the entity courts. It was also thought that the inclusion of foreign members would lead to a better application of international norms, and that international members could contribute to reestablishing the public's confidence in the local judicial system and alleviate some of the concerns over ethnic bias and favoritism.
In spite of the many advantages of this system, there were also some recognized drawbacks to this approach. For one, there was the potential for the international members to bring foreign legal concepts to their decisions antithetical to the local legal culture. Furthermore, the creation of new courts required national legislation in order to be implemented, and the courts were forced to take time and financial resources to set up.
In spite of these difficulties, Bosnia determined that utilizing a State Court with international members best served its purposes. The most important factors seemed to be the enhanced public prestige that attended a court with international members, as well as the fact that this ameliorated many of the problems posed by the unique ethnic makeup of Bosnian society particularly since many of the war crimes were perpetrated along ethnic lines. Creating a State-wide court with international participants retains many of the advantages of the other options considered, while minimizing the potential costs of their disadvantages. As a result, this is the system that was ultimately adopted by Bosnia and led to the creation of the WCC.

3.3 STRUCTURE

The WCC is part of the Supreme Court of Bosnia and Herzegovina and is constituted as Section I for War Crimes. The WCC has four first-instance court panels and one second-instance court panel. Two of the first-instance panels are composed of four judges, one of whom is international, and the second-instance panel is composed of three judges—two international and one national. The national judge is the president of the panel. [154] Since the founding of the WCC the ratio of national to international judges has changed. (See below).

[154] Court of Bosnia and Herzegovina, Jurisdiction, Organization and Structure of the Court, http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=3&id=3&jezik=e

3.3.1 Jurisdiction

The WCC has supreme jurisdiction over the most serious war crimes cases in Bosnia, with cantonal and district courts handling other war crimes cases. The WCC also has jurisdiction over cases referred to it by the ICTY, "Rules of the Road"[155] cases, and also cases with incomplete investigation which the Office of the Prosecutor (OTP) of the ICTY submits to the WCC. [156]

The WCC is found in Section I of the Criminal Division of the Court of BiH; it is a part of the state court system, meaning that it has jurisdiction over the Republic of Bosnia-Herzegovina and Republika Srpska. It has jurisdiction over crimes including "genocide, crimes against humanity, war crimes, violations of laws of war and individual criminal responsibility for these acts as defined by the Criminal Code of Bosnia and Herzegovina, and issues involving international and inter-entity law enforcement like extradition, surrender, and the transfer of persons requested by Bosnian authorities, authorities of foreign states or international courts and tribunals."[157] The WCC can hear cases at the request of any court of Bosnia's two entities (the Republic of Bosnia-Herzegovina and Republika Srpska), the Brcko District (the neutral entity within Bosnia), or it may initiate its own proceedings. Additionally, the ICTY may refer cases to the WCC.

War crimes committed in BiH between 1992 and 1995 originally could have been tried in three different venues: at the international level in the ICTY; at the state level in the WCC; or at the entity level before the local courts. However, investigations that began after March 2003 can no longer be adjudicated in the entity courts and instead must be tried in the State Court; this rule followed legislative reform that removed provisions on war crimes from the entity courts' laws.[158] Concerns over arbitrary arrests after the war in retaliation for prior war crimes led to the passage of the Rome Agreement, which introduced a procedure for international oversight of prosecutions for war crimes in BiH.[159] As a result, each of the aforementioned courts must be governed by international norms regarding the requisite amount of evidence necessary to bring forth charges; this is important because it prevents "legally sanctioned" retaliation against ethnic groups who committed atrocities during the war.

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[155] "Rules of the Road" is explained below

[156] Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, vol.18, no. 18 D (February 2006), 6

[157] "Introduction to Balkan War Crimes Courts." *Institute for War and Peace Reporting.* Available at: <http://iwpr.net/programme/international-justice-icty/introduction-balkan-war-crimes-courts.>

[158] Ivanisevic, Bogdan. *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (2008), International Center for Transitional Jusice.

[159] *Id.*

3.3.2 Judiciary

The WCC was intended from the beginning as a national institution and the policy of the WCC has been to emphasize the presence of national judges and the transition to a purely domestic system. [160] Initially, the court had five judicial panels, each panel with two international judges and one local judge who was presiding the panel. [161] By the end of 2008, the ratio changed, with each panel consisting of one international judge and two domestic judges. [162]

3.3.3 Prosecution & Defense

The Special Department for War Crimes of the Office of the Prosecutor is responsible for bringing forward cases. Given their role, the prosecutors have had a higher profile than judges. International prosecutors also have a higher profile as they tend to prosecute cases of high-level officials referred to the WCC by the ICTY. The prosecutors have faced the challenge of a broad mandate for the court, which translates into an overwhelming caseload.

The prosecutors work on four categories of cases: cases referred by the ICTY to the national judiciary (the ICTY confirmed the indictment but the main trial has not started); cases reviewed by the ICTY under the Rules of the Road process; cases referred by the ICTY's prosecutor, in which the ICTY conducted the investigation but did not file an indictment and all new cases initiated before the close of ICTY's Rules of the Road unit in October 2004. [163]

The WCC's Criminal Defense Office (OKO) is responsible for assisting defense counsel. In its 2006 report, the HRW stated that "the establishment of an office devoted exclusively to defense support in war crimes cases at this early stage represents a step forward from the practice of the ICTY where, for example, an arrangement to assist defense counsel previously did not exist." [164] The ICTJ described OKO as a positive example of national-international cooperation that could be replicated elsewhere." [165] OKO keeps a roster of defense lawyers, organizes their training, provides legal advice, research and support.[166] According to HRW, in 2005 OKO organized training for 75 lawyers on the international law of armed conflict and new elements of the domestic criminal law.[167]

OKO employs only Bosnian staff and by June 2008. The office employed five lawyers and two administrative staff. Three international lawyers with experience at the ICTY spent a few months at OKO, sharing their knowledge with the staff. [168] Typically, defense attorneys are nationals, and seven years of experience are required to be lead counsel, although, in "exceptional circumstances," trial panels allow foreign lawyers to represent the defendants. [169]

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[160] Ivanisevic, Bogdan, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court (2008)*, International Center for Transitional Justice, 11

[161] Human Rights Watch, *Looking for Justice*

[162] Ivanisevic, *From Hybrid to Domestic Court*, 7

[163]The Prosecutor's Office of Bosnia and Herzegovina, Departments,

http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=2&id=4&jezik=e

[164] Human Rights Watch, 22

[165] Ivanisevic, 15

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

3.3.4 Administration

The Registry provides administrative, legal and other support services to the WCC. The Registry has five departments: the Legal Department, the Court Management Section, the Witness Support Section, the Public Information and Outreach Section and Administration.[170]

3.4 FUNCTIONING

3.4.1 Judiciary

In its 2008 report, the International Center for Transitional Justice (ICTJ) indicated that international judges "played a behind-the-scenes role," refraining from interfering in the control of the public proceedings "as a result of an agreed policy and because they had no necessity to intervene."[171] The ICTJ noted that through "their mostly silent participation in public proceedings, international judges may have bolstered a perception of fairness and independence and helped to address any perceived ethnic bias."[172] According to the ICTJ report, an international judge at the WCC agreed their role was "to bring the expertise of conducting trials and to give the assurance to the international community and to Bosnians that judges are not susceptible to (outside) influence or threats."[173] However, in September 2009, the ICTJ reported that the role of international judges and prosecutors had "increasingly become a cause of discord between the authorities of *Republika Srpska* and Bosnian politicians of other entities."[174]

International judges have short-term, renewable contracts, usually for one or two years.[175] Some judges serve more than two years while others serve less. According to the ICTJ, the short duration of the mandate is a disadvantage. An unnamed official with the State Prosecutor's Office quoted by the ICTJ, said that internationals serving with the WCC should be more accountable: "If I can give advice for the future, the work at the Court for internationals must not be (tantamount to) a well-paid holiday. There must be a code of conduct (for internationals), a contract of two to three years minimum, and (they must be) responsible under the same laws (as nationals of the Court). Otherwise the difference created between nationals and internationals is too big. Lesson two: Internationals should never say that they are implementing the policies of their government. They must be responsible under the High Judicial and Prosecutorial Council."[176]

The quality of judges also varies, and—while all of them receive some legal training when they start—understanding the culture and history of the country poses difficulties.[177] Nonetheless, Dorothee Marotine, the head of the ICTJ's Balkan program, indicated in an October 15, 2008 *Bosnian Daily* article that "Bosnian and international judges have worked well together."[178]

Overall, public criticism of the WCC did not directly target the judges, as much as it targeted the Prosecutor's Office, and the WCC's overall lack of transparency, discussed further below.

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[170] *Id.*

[171] *Id.,* 11

[172] *Id.*

[173] *Id.*

[174] *Id.,* 1

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] Bosnia Daily, International Center for Transitional Justice, ICTJ in the News: *ICTJ Warns Bosnian War Crimes Chamber's Early Success at Risk*

3.4.2 Prosecution

In 1996, the Bosnian government established the Rules of the Road process through which Bosnian authorities submitted potential war crimes cases to the ICTY, which reviewed the cases to determine whether they warranted further investigation and possible indictment.[179] The ICTY marked the cases with letters from A to H. "A" cases have sufficient evidence regarding the defendant and the crime whereas B cases have insufficient evidence.[180] The responsibility to review Rules of the Road cases was transferred to the Prosecutor's Office in 2004.[181] The prosecutors determine whether the state or the local authorities have the authority to prosecute based on whether a case is "highly sensitive" or "sensitive." In 2005 and 2006, the prosecutor's office reviewed 877 A cases, referring the majority of these cases to local prosecutors.[182] According to Human Rights Watch, "this review process has been instrumental in getting cantonal and district prosecutors to undertake prosecutions in a more serious and concerted manner."[183]

A February 2006 Human Rights Watch report indicated that the prosecutorial team included five international prosecutors, one international acting prosecutor, and eight local prosecutors; one international and one local prosecutor were assigned to each team.[184] In its February 2007 report, HRW indicated that under a plan adopted in October 2005, the phasing out of international prosecutors was scheduled during the period of August 2006-August 2009.[185] The department's Web site shows that as of January 2010, it employed 14 national prosecutors and only one international prosecutor.[186] (The transition period was extended until December 2012. See below.) The HRW report indicated that the inclusion of international prosecutors was "viewed as a good method for local legal professionals to increase their knowledge about the applicability of international instruments, such as the European Convention of Human Rights, to ensure compliance with international standards."[187] Additionally, the cooperation with international prosecutors was very important given that in 2003 the Bosnian Criminal Procedure was reformed making the criminal justice system in Bosnia more adversarial, and national prosecutors lacked experience with the adversarial system.[188]

Regarding cooperation between the international and national prosecutors prior to the gradual phasing out of the international prosecutors, the HRW found that the pressure of the caseload pushed the prosecutors toward working separately.[189] According to the report, cases were assigned based on practical considerations, such as the language of the file, which meant that cases referred by the ICTY, which were in English, tended to be assigned to international prosecutors.[190] Nonetheless, HRW also found that the nature and complexity

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[179] Human Rights Watch, *Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts* (July 2008)

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] Human Rights Watch, *Looking for Justice*, 8

[185] *Id.,* 7

[186] The Prosecutor's Office of Bosnia and Herzegovina, Departments http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=2&id=4&jezik=e

[187] Human Rights Watch, *Looking for Justice*, 10

[188] *Id.*

[189] *Id.,* 6

[190] This was both because the files were in English and because the cases referred by the ICTY tended to involve higher-level defendants and involved more complex legal issues.

of some cases fostered cooperation between the national and international prosecutors.[191] Prosecutors interviewed by the HRW described the collaboration between national and international prosecutors as good. HRW attributed this in part to the two-year commitment made by the team of international prosecutors.[192]

An overwhelming caseload and the lack of a clear prosecutorial strategy have been the main problem that prosecutors confronted. In 2006, HRW reported that officials in the Special Department for War Crimes were concerned that the number of prosecutors was not sufficient to address the caseload.[193]

A 2007 HRW report indicated that between January 2005 and October 2006, the department increased its activities to a total of 18 indictments involving 32 defendants before the court.[194] Even though the HRW report indicated that the department received approval to hire six additional prosecutors to help manage the caseload, the number of prosecutors has only increased by two since then. The Web site shows no vacancies currently. The department's Web site shows six indictments in 2005, 23 in 2006, 18 in 2007, 15 in 2008, 27 in 2009, and seven in 2010.[195] Note that some of these cases may be more complex than others and may involve varying numbers of defendants.

In 2007, the HRW indicated that thousands of cases needed to be addressed.[196] In 2008, the ICTJ warned that the WCC risked "being overwhelmed by its caseload and undermined by perceptions of ethnic bias" without a national prosecutions strategy and outreach efforts.[197] According to the ICTJ, from September 2005 to June 2008, the court tried 84 defendants in 48 cases, resulting in 27 convictions and five acquittals.[198] The HRW indicated that "the criteria used to judge the sensitivity of cases at the state prosecutor's office are not widely understood by many cantonal and district prosecutors or by the public at large."[199]

The factors that the department considered included "the sensitivity of the case, availability of suspects, strength of evidence, potential impact a conviction would have on return of displaced persons, and the availability of witnesses."[200] Even though the creation of a War Crimes Strategy was announced in 2006, it was only in 2007 that the Prosecutor's Office started a mapping exercise and a Crime Catalog to develop an estimate of cases.[201] The Crime Catalog summarizes "each of the known crimes committed in every municipality of Bosnia during every month of the conflict."[202] Each regional prosecution team had a list of the most serious incidents and in some instances the investigations had led to indictments by the time the paper was published.[203] In late 2008, the National Strategy for processing war crimes was established.[204] The National Strategy referred to an estimated 10,000 suspects, of whom about 6,000 were under active

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[191] *Id.,* 6

[192] *Id.*

[193] Human Rights Watch, *Looking for Justice*, 11

[194] Human Rights Watch, *Narrowing the Impunity Gap*, 5

[195] Court of Bosnia and Herzegovina, Indictments and Verdicts, http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=3&id=3&jezik=e

[196] Human Rights Watch, *Narrowing the Impunity Gap*, 10

[197] Bosnia Daily, International Center for Transitional Justice, ICTJ in the News,: *ICTJ Warns Bosnian War Crimes Chamber's Early Success at Risk*

[198] Human Rights Watch, *Narrowing the Impunity Gap*, 10

[199] *Id.,* 18

[200] Karwande, Maya, *Failure to Engage: Outreach at the Bosnian War Crimes Chamber*, Honors Thesis, Tufts University, 2009. Tufts Digital Library, 87

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] International Center for Transitional Justice, *Bosnia and Herzegovina: Submission to the Universal* Periodic Review of the UN Human Rights Council Seventh Session: February 2010 (September 8,2009), 4

investigation in 2009.[205] The National Strategy gives priority to "the most responsible perpetrators for the most serious crimes," setting seven years as the time required to prosecute the most complex and high priority cases and 15 years to prosecute the other cases.[206]

Prior to unveiling a strategy, "the mystery behind the case selection process contributed to confusion and negative public opinion."[207] On September 8, 2006, a Balkan Investigative and Reporting Network article reported that politicians criticized the WCC for indicting only Serbs.[208] At the time, the prosecution had filed 18 indictments.[209] One politician criticized the court, alleging that "more than 90 percent of those tried under the suspicion of committing war crimes are Serbs."[210] While the WCC dismissed these statements as political rhetoric on the eve of elections, Branko Todorovic, president of the Helsinki Commission of Republic Srpska averred that the WCC should take some responsibility: "There is no longer cooperation with the media, non-governmental organizations and simple citizens. Because of this lack of information, people have the feeling that these institutions do not serve justice any more, which immediately gives politicians the opportunity to politicize information and use it for their purposes."[211]

The ICTJ found that even though politicians in the Srpska Republic complained that the department ignored crimes against ethnic Serbs, the ratio of prosecuted crimes against ethnic Serbs did not appear disproportionate when measured against the numbers of civilian and military casualties of the Bosnian conflict.[212] However, "most of the early cases concerned Bosnian Serbs accused of crimes against Bosniak civilians."[213] This does not appear to have been the result of bias so much as the lack of a coherent strategy because the cases were "in part the result of the transfer from the ICTY of several Rule 11 cases pertaining to Eastern Bosnia."[214]

3.4.3 Investigations

The War Crimes Unit of the Bosnian State (WCU) and the Investigation and Protection Agency (SIPA) have primary responsibility for investigations in war crimes before the WCC. In its 2007 report, the HRW found that SIPA was "critically understaffed" because it had difficulty in attracting quality candidates as SIPA investigators were not remunerated at a higher level than law enforcement officials in the Ministries of Interior. Similarly, the report found that the effectiveness of the WCU was undercut by a shortage of investigators.

Furthermore, the report found that there were inconsistencies in the training and experience of investigators, which hampered the investigations. For example, the report indicated that some statements lacked precise language and sufficient detail, making it necessary to take additional statements. According to the report, some investigators relied "too heavily on the prosecutor to do direct every action required in an investigation which slows down the investigative process."[215] The HRW indicated this may occur because under previous

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[205] *Id.*

[206] *Id.*

[207] Karwande, *Failure to Engage*, 88

[208] Bosnia Daily, *ICTJ Warns Bosnian War Crimes Chamber's Early Success at Risk*

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] International Center for Transitional Justice, *Submission to the Universal Periodic Review of the UN Human Rights Council Seventh Session*, 3

[213] Ivanisevic, From Hybrid to Domestic Court, 10

[214] *Id.*

[215] Human Rights Watch, *Narrowing the Impunity Gap*, 15

criminal codes "prosecutors and investigators did not play as central a role in building a successful case for trial, as this was the responsibility of the investigative judge."[216]
Overall, the HRW report found that collaboration between prosecutors and investigators had improved.

3.4.4 Defense

Despite finding that the WCC has been more successful than other hybrid tribunals in providing defendants with representation, the ICTJ also found in its 2008 report that there were several obstacles to defendants receiving fair representation: absence of experienced lawyers; insufficient time to prepare; and insufficient resources for defense investigation.[217] According to the ICTJ, Bosnian lawyers with extensive experience at the ICTY rarely appear before the WCC given their continuing presence in The Hague where they receive higher fees. Bosnian lawyers do not have extensive knowledge of international humanitarian law, ICTY jurisprudence or foreign languages and lack experience in conducting direct examination and cross-examination.[218] This puts the defense attorneys at a serious disadvantage when international prosecutors, who come from adversarial systems, prosecute the case.
With the transition from the inquisitorial to the adversarial system, the responsibility for the investigation shifted from the investigating magistrate to the prosecutor. The ICTJ pointed out that "no provisions reflect the fact that the defense has to do its own investigations in an adversarial judicial system." [219] There is no specific budged allotted for defense investigations; at the end of the trial, panels can grant compensation of "necessary expenditures" incurred by the defense attorney but this does not include expenses related to interviews with persons who did not actually appear as witnesses in the trial.[220] A judge told the ICTJ that "the defense attorneys play [it] safe and contact only those witnesses whose testimony they know in advance will benefit the defendant."[221]
HRW also expressed similar concerns over the quality of defense representation. In its 2007 report, HRW welcomed a change in the law requiring the payment of defense counsel at regular intervals during the course of proceedings, rather than only at the end of proceedings.[222] HRW indicated that "overall, the assessment of OKO's work has been positive," although it noted that OKO needed to make more efforts to inform defense attorneys of the range of services it provides. [223]

3.4.5 Trials

From September 2005 to June 2008, the WCC rendered 32 trial judgments.[224] During this period 84 accused were tried in 48 cases. [225] Ivanisevic noted in the 2008 ICTJ report that the WCC "processed cases much more quickly than the ICTY," but cautioned that "a direct comparison has limitations."[226] One such

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[216] *Id.*

[217] *Id.,* 16, 17

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] Human Rights Watch, *Narrowing the Impunity Gap*, 21

[223] *Id.*

[224] Ivanisevic, *From Hybrid to Domestic Court*, 10

[225] *Id.*

[226] *Id.*

limitation that was the WCC cases were less complex than those tried before the ICTY, mainly dealing "with direct perpetrators and suspects at lower levels of the military, police or political hierarchy."[227] Ivanisevic found that only one case was comparable to trials before the ICTY.[228] In 2009, the ICTJ assessed that the WCC and the Special Department for War Crimes of the Prosecutor's Office "operated with efficiency."[229] Between 2005 and July 2009, the WCC issued 48 judgments, of which 30 became final in 2009, according to the ICTJ. [230] The ICTJ reported that the staff "displayed competence and professionalism."[231]
The WCC's Web site lists 41 cases completed by a final decision.[232] The decisions posted on the WCC's Web site show the following breakdown of decisions by year: one first instance decision and one appeal decision in 2005; seven first instance and five second-instance decisions in 2006; 10 first instance and 12 second instance decisions in 2007; 23 first instance and 11 second instance decisions in 2008; 17 first instance decisions and 19 second instance decisions in 2009; and 13 first instance and 18 second instance decisions in 2010.[233]

3.4.6 Victims

The legal provision providing for legal representation of victims was used only in 2006 and 2007 briefly "because of lack of resources."[234] Victims can participate in trials before the WCC either as witnesses or as injured parties seeking compensation. However, Ivanisevic found that in practice "they appear only as witnesses."[235]
The law provides for direct compensation to victims in either capacity, but the WCC typically does not address compensation claims, pointing to the large number of victims and the delay that in proceedings if the panel addressed the compensation claim. [236] According to Ivanisevic, the OSCE Mission to Bosnia Herzegovina "expressed the concern that even when material damage could be assessed concretely and promptly, the trial panels refrained from addressing the compensation claim and the prosecution did not appear to try to gather such information."[237] The OSCE Mission also found that some panels did not explain to victims that they had the right to seek compensation in criminal proceedings or in a civil action; when the panel does give the instructions, it is not easy for the victims to understand how to pursue the compensation claims.[238] Because of this and because victims "rarely have the financial means to hire lawyers to assist them in civil proceedings," their right to compensation "remains largely unrealized."[239]

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[227] *Id.*

[228] *Id.* The case referenced is *Momčilo Mandić* which involved the former justice minister in the Bosnian Serb Republic. Mandic was acquitted "for lack of evidence."

[229] International Center for Transitional Justice, *Submission to the Universal Periodic Review of the UN Human Rights Council Seventh Session*,4

[230] *Id.*

[231] *Id.*

[232] Court of Bosnia and Herzegovina, http://www.sudbih.gov.ba/?jezik=e, accessed March 23, 2011

[233] Court of Bosnia and Herzegovina, Verdicts, http://www.sudbih.gov.ba/?jezik=e, accessed March 23, 2011

[234] Ivanisevic, From Hybrid to Domestic Court,22

[235] *Id.*

[236] *Id.*

[237] *Id.,* 22

[238] *Id.*

[239] *Id.*

3.4.7 Specific Constituencies

A Bosnian-Serbs

The Bosnian Serb population was the most skeptical of the development of the WCC. One commentator noted, before the WCC was set up, that one solution for winding down the ICTY was to "return[] cases to the national judicial systems of the former Yugoslavia, and here especially to the Muslim/Croat Federation of Bosnia-Herzegovina, from where the co-operation had been most forthcoming, compared to Republika Srpska, Serbia and Croatia."[240] The fact that the Serb population was generally opposed to creating a war crimes court is not surprising considering that a majority of war crimes were committed by Bosnian-Serbs.

The division between the Republika Srpska and the Republic of Bosnia-Herzegovina regarding the WCC flared up again when the mandate for international judges and prosecutors was extended from December 2009 to December 2012. The Republika Srpska strongly opposed any extension of international support for the WCC. The Serbian member of Bosnia's tripartite presidency stated that the country would not be taken seriously as an international player until it begins to manage its own affairs: "[The international staff's] time is up and they should leave the country.... Because of the presence of internationals, BiH is not equal to other states in the region."[241] The State Parliament failed to extend the mandate due to the Republika Srpska's objections, but it was extended by the Office of the High Representative over the objection of the Bosnian-Serbs.[242]

Additionally, there have been allegations from the Serbian community that the WCC has specifically targeted them. In the first 13 trials against Bosnian nationals, 23 of 24 defendants were Bosnian Serbs.[243] Serb victims groups have complained about the lack of prosecution of crimes committed against Serbs, and the predominance of Bosniaks amongst the Court staff has been invoked as proof of ethnic bias. However, "[t]he perceived or real flaws in the work of the Court and the Prosecutor's Office may not reflect ethnic bias. The predominance of cases concerning crimes against Bosniaks mirrors the fact that Bosniaks constituted the majority of victims during the war."[244] Considering that most of the victims of war crimes were Bosniaks, and that 90% of the offenses were committed by Serbs it is not surprising that the WCC has focused upon these cases.[245] Additionally, a representative of one local NGO "remarked that even among the majority Serb population where he lives, the Court of BiH is more trusted than the ICTY. He also warned, however, that the Special Department for War Crimes should do more to convince skeptics that justice is the only objective guiding the department's work."[246] Additionally, the presence of international judges has lent an important aura of legitimacy to the court; "[t]hrough their mostly silent participation in public proceedings, international judges may have bolstered a perception of fairness and independence and helped to address any perceived

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[240] Bohlander, Michael. "The Transfer of Cases from International Criminal Tribunals to National Courts." Paper presented at the Colloquium of Prosecutors of International Criminal Tribunals held at Aruha on 25-27 Nov. 2004, available at http://69.94.11.53/ENGLISH/colloquium04/bohlander/Bohlander.pdf.

[241] Saric, Velma. "Bosnia: Future of International Judges and Prosecutors in Doubt." *International Justice*. Issue 613, 16 Sep. 2009.

[242] "OHR Extends International Judges' Mandate." *BalkanInsight*. Available at: http://www.balkaninsight.com/en/article/ohr-extends-international-judges-mandate

[243] Bohlander, Michael. "The Transfer of Cases from International Criminal Tribunals to National Courts." Paper presented at the Colloquium of Prosecutors of International Criminal Tribunals held at Aruha on 25-27 Nov. 2004, available at http://69.94.11.53/ENGLISH/colloquium04/bohlander/Bohlander.pdf.

[244] *Id.*

[245] Cohen, Roger. "C.I.A. Report on Bosnia Blames Serbs for 90% of War Crimes," *The New York Times*, March 9, 1995.

[246] Ivanisevic, Bogdan. *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (2008), International Center for Transitional Jusice.

ethnic bias."[247] Thus, while Bosnian Serbs have been the most skeptical of the WCC's work, the Court has taken important steps to ensure that it remains a respected public institution that stands above ethnic division and discord.

B Women

Many women's groups have been particularly supportive of the WCC's work and have actively cooperated with the court in bringing the perpetrators of sexual violence against women to justice. According to one observer, "[t]hese associations provide critically important help to the prosecutors in the preparation of cases."[248] However, at the same time many women's groups have criticized the WCC because "victims consider most sentences too lenient."[249] Furthermore, women's groups have echoed the criticism of others that their ethnic groups have been ignored by the WCC and that it selectively enforces the law.

3.4.8 Witnesses

In 2008, the ICTJ estimated that security risks diminished significantly given that 13
years passed since the end of the conflict. The WCC uses several security measures to protect witnesses: using pseudonyms for witnesses, permitting witnesses to testify behind a screen or using electronic distortion of the voice or image, or excluding the public from court room.[250] The prosecutor usually files the written requests for protection during the investigation when the witness expresses security concerns.[251] According to the ICTJ, representatives of the OSCE mission to Bosnia and Herzegovina "pointed out that trial panels sometimes appear to use protective measures in an excessive manner, as when stricter measures have been ordered without explaining why less-stricter ones would not suffice or without examining witnesses' circumstances on a case-by-case basis."[252]
In February and March 2006, the WCC drew the ire of local NGOs and victims' groups when the judges decided to hold two trials which dealt with sexual violence against Bosniak women *in camera* (i.e. in the judge's chambers). [253] According to the ICTJ report, "even the State Court's registrar at the time, Michael Johnson, wanted to keep the courtrooms open." The ICTJ indicated the court's decision raised three main concerns: some of the witnesses had reportedly not asked for protection; "the chamber failed to explain persuasively why less-extreme protective measures (including anonymity and voice and image distortion) would not achieve the protective purpose"; "the decision to hold hearings behind closed doors might have been taken to protect the image of the War Crimes Chamber rather than witnesses" after one of the defendants was removed from the courtroom "because of his disruptive behavior." [254]

3.4.9 International Response

The international community, represented primarily by the UN, has been intimately involved with the creation and functioning of the WCC. Indeed, "[o]ne of its defining features has been the support of

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[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] Ivanisevic, *From Hybrid to Domestic Court*, 18

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

international personnel in building this domestic court."[255] There are two primary reasons for the international community's support: First, the WCC has alleviated the vast caseload faced by the ICTY and substantially reduced the financial burden of the international community; second, the WCC has effectively allowed Bosnia-Herzegovina to adapt international human rights standards to their own national institutions, thereby ensuring that crimes against humanity are punished within the framework of the Bosnian State.

The international community has been steadfast in its support of the WCC, and continues to provide support in the form of international legal experts and financial assistance. The UN Security Council was unanimous in its support for the WCC when it was first proposed; according to a Security Council press release, "Council members strongly supported the efforts and priorities of the High Representative, as well as the establishment of the Special War Crimes Chamber."[256] At the same meeting, the WCC received supportive statements from such varied countries as Germany, Syria, France, Chile, Guinea, Pakistan, the United Kingdom, Spain, Mexico, Russia, China, Bulgaria, Angola, Cameroon, Italy, and the United States.[257] As a result, the international community has been amongst the WCC's most ardent supporters.

3.4.10 Outreach

Victims and "civil society more broadly were not consulted on the establishment of the BWCC. However, this omission has not had significant negative impact on the legitimacy of the process. First, a strong appetite exists in Bosnian society for criminal prosecutions of war crimes."[258] According to a June 2005 UN Development Program opinion poll, 65% of BiH respondents said that individuals who caused unjustifiable harm should be held accountable without exception.[259] Another 19% of respondents said that only those who committed actual war crimes should be held accountable.[260] In other words, 84% of respondents felt that war criminals should be held accountable for their actions.

Nevertheless, the WCC faced criticism over its relationship with the media and the public. Even though the Registry includes the Public Information and Outreach Section (PIOS), the office has not managed to create a coherent long-term strategy for outreach that would involve the public in the work of the WCC. "One aspect that has been particularly lacking is outreach to the communities from which the perpetrators come. Most of the Bosnian victims have some knowledge of the crimes committed in their part of the country, but perpetrators' communities often live in a continuing state of ignorance or outright denial." The fact that perpetrators' communities are not cognizant of the reasons for the charges against their members may further exacerbate claims of ethnic bias. Since most of the perpetrators were Bosnian Serbs, these communities may feel particularly targeted; the WCC could easily and inexpensively reach out to these societies to explain the charges against their members. This solution would solve two problems: first, it would explain to the local community that their citizens have been targeted because of the offenses that they committed and not because of their ethnic background; second, it could lead to victims from the Bosnian Serb community understanding their right to bring cases to the WCC, which could alleviate some of the allegations of ethnic bias in prosecutions.

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[255] *Id.*

[256] Security Council 4837th Meeting, Press Release SC/7888.

[257] *Id.*

[258] *Id.*

[259] UN Development Program Opinion Poll (June 2005).

[260] *Id.*

On February 26, 2009, a BIRN article reported that "war-crime trials bore public in Bosnia."[261] According to the article, even though trials are open to the public, the courtrooms were empty. While several factors accounted for the public's lack of interest in WCC proceedings, the article indicated that people were not informed about the way the court functioned and the WCC did not reach out to victims' organizations. The lack of funding and staff was responsible for the discontinuation of efforts to reach out to victims' organizations, according to the article. The main outreach issues are the lack of transparency in the selection of cases, the difficulty of following proceedings through the press releases posted on the Web site, unsatisfactory communication with the media and the lack of prosecutors' availability for interviews.[262]
That is not to say that the WCC has undertaken no outreach work in order to educate the citizenry. There are currently four regional outreach centers run by NGOs that inform the local citizens of the work done by the Court in a variety of ways. These centers are now being sponsored by various European governments. While the regional centers are a good start, more work should be done to inform the citizens of the work done by the WCC both in order to encourage more victims to come forward with evidence and to assure perpetrators' communities that the charges against their citizens are legitimate and not ethnically motivated. The Court itself needs to do more work in this regard. The Public Information and Outreach Section of the Court "employs only three persons and does not have the capacity to carry out this task."[263] In 2006 the BiH received a grant to organize public presentation of final judgments in the areas where the crime was committed in order to facilitate greater public awareness, but it abandoned the project when the Court refused to send judges to participate. One judge explained, "We don't have time to leave here." Thus, the public outreach problems also stem from a lack of adequate funding and a lack of qualified judges to carry out the substantial work that the WCC still has to do. Nonetheless, it seems that there is no reason that the judges themselves have to travel into the interior of the country to present their rulings; one proposed solution was to have law students present the WCC's rulings, but one PIOS representative explains, "If we wished to hire students to do it, there would be no space for them in the existing offices." So again, the problem comes down to a lack of funding and adequate facilities for the WCC to carry out its mission. In spite of the obstacles that the WCC faces in getting its message to the public, effective public outreach seems to be a simple and cost effective way to garner public support for the WCC's work and thereby assure the citizens of Bosnia-Herzegovina that war crimes will not go unpunished and justice will be done within the confines of the nation.

3.4.11 Legal Concerns

In 2003, a new Criminal Procedure Code was introduced in Bosnia Herzegovina.[264] As noted above, the new code introduces certain features of the adversarial model of criminal justice by "eliminating the office of investigative judge and by shifting much of the responsibility for investigation and the preparation and conduct of trials to prosecutors."[265] The introduction of the new procedures was not accompanied by any provisions regarding the changed role of the defense attorneys.
The code also introduced plea bargaining and the availability of immunity for testifying witnesses, but HRW found that "many prosecutors and judges have been slow to adopt their use" as they do not have any

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[261] Balkan Investigative and Reporting Network, *War-Crime Trials Bore Public in Bosnia*

[262] Karwande, *Failure to Engage*

[263] Ivanisevic, Bogdan. *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (2008), International Center for Transitional Jusice.

[264] Ivanisevic, *From Hybrid to Domestic Court*

[265] *Id.*

precedent in Bosnian law.[266] HRW also found that defense attorneys are "relatively unfamiliar with these new procedures" and "have sometimes had difficulty" with negotiating plea offers.[267] Using plea bargaining and giving perpetrators a lighter sentence in exchange for testimony can also draw the ire of victims.

There have been some complaints that the WCC still remains too influenced by its international members. According to one judge, "[t]he introduction of the adversarial procedure [a U.S. based approach that is antithetical to the civil law system generally followed in Bosnia-Herzegovina] has not led to time saving because too many witnesses testify about the same facts, and the panels cannot prevent this."[268] While this may seem like a trivial complaint, in a system that is so strapped for time and resources, any source of unnecessary delay should be examined and, if possible, eliminated. Moreover, the judge's complaint should be viewed as a critique of the adversarial approach adopted by the WCC and representative of a cultural difference between the typical Bosnian approach and that adopted by the WCC.

Additional complaints center around the fact that the WCC has considered ending its trials after a confession. For Bosnian judges, part of the purpose of the trial is to ascertain the principal material truth, a concept which has deep roots in the Bosnian legal system.[269] The adoption of some foreign legal concepts has led commentators to criticize the WCC for being too reliant on foreign legal systems: "This is yet another example of legal colonialism, supplemented by ignorance of the civil law approach, by representatives of the common law systems, as it is clearly intended to steer the judiciary towards embracing an adversarial model of some kind."

However, these complaints that the adversarial system has not taken into account the realities of Bosnia-Herzegovina's legal history may be exaggerated, "In fact the hybrid nature of the proceedings implies that important elements of the accusatorial civil law system continue to exist alongside those of the adversarial system." For example, the judges in the WCC may still take a lead role in examining witnesses, a feature of the civil law incorporated into the procedure of the WCC.

3.4.12 Transition to Domestic Control

The mandate of the internationals was initially set to expire by the end of 2009.[270] The ICTJ, however, found that the presence of internationals proved "to be of crucial importance" and a fixed deadline "will not take into account actual developments and needs."[271] In December 2009, the Office of the High Representative extended the transitional period until December 31, 2012. [272] According to the decision, the president of the court and the chief prosecutor requested extension of the international mandate. The decision noted "the failure of the authorities in BiH over the last two years to provide the Court and Prosecutor's Office of BiH the budgetary means necessary to ensure the recruitment of national judges and prosecutors to gradually

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[266] *Id.*

[267] *Id.*

[268] Ivanisevic, Bogdan. *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (2008), International Center for Transitional Jusice.

[269] Bohlander, Michael. "The Transfer of Cases from International Criminal Tribunals to National Courts." Paper presented at the Colloquium of Prosecutors of International Criminal Tribunals held at Aruha on 25-27 Nov. 2004, available at <http://69.94.11.53/ENGLISH/colloquium04/bohlander/Bohlander.pdf>.

[270] International Center for Transitional Justice, *Submission to the Universal Periodic Review of the UN Human Rights Council Seventh Session*,2

[271] *Id.*

[272] Office of the High Representative and EU Special Representative, Decisions, Decision Enacting the Law on Amendments to the Law on Court of Bosnia and Herzegovina, December 14, 2009, <http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=44283>

replace international judges and prosecutors whose mandates were due to expire in the course of 2009." The decision also noted that "the lack of extension of the current tenure of international judges could lead to the reinitiating of several ongoing first instance trials, with a serious financial impact and the consequence of considerable number of witnesses needing to testify again, which would lead to an immeasurable loss for the confidence in the justice system of Bosnia and Herzegovina."[273] The ICTY, the International Criminal Law Services Experts, and the High Judicial and Prosecutorial Council of Bosnia Herzegovina all supported the extension of the transition period.[274]

3.5 CONCLUSIONS

The WCC has largely been successful with its mixture of international and national judges and prosecutors. The inclusion of foreign judges who remain "mostly silent" has "bolstered a perception of fairness and independence and helped to address any perceived ethnic bias."[275] This is particularly important with respect to the Bosnian Serb community, who have generally been the least supportive of the WCC and have made allegations that it is ethnically biased. Furthermore the Court has successfully transitioned from having two international judges and one national judge on its panels to now having predominantly national judges.[276] While the international judges were supposed to have been phased out of the WCC by December 2009, the mandate for international judges and prosecutors was expanded until December 31, 2012 in spite of the strong protests of the Bosnian-Serb controlled Republika Srpska.

[273] *Id.*

[274] *Id.*

[275] Ivanisevic, Bogdan. *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (2008), International Center for Transitional Jusice.

[276] ICTJ Report 2008

4 Cambodia

4.1 BACKGROUND[277]

The Extraordinary Chambers in the Courts of Cambodia (ECCC) are the result of years of negotiations between the Cambodian government and the UN. The tribunal was convened to assign responsibility for the crimes committed during the rule of the Khmer Rouge (1975-1979), including the nearly two million deaths that occurred. The delay in forming the tribunal resulted from years of war and political instability in Cambodia, culminating in UN control of the country between June 1992 and May 1993. After elections in 1993, Cambodia reinstated a constitutional monarchy and achieved a measure of political stability which made the possibility of a tribunal possible.

The Cambodian co-Prime Ministers formally requested help from the UN in June of 1997. Roughly one month later, there was a violent coup and Hun Sen, leader of the Cambodian People's Party (CPP), took power from the ruling government. The coup upset the Cambodian people and spurred public investment in the Khmer Rouge accountability process. The process was further helped by Hun Sen, the new Prime Minister, who was able to consolidate power after leading the coup. Finally, the deterioration of the Khmer Rouge, which had sustained an insurgency since losing control of the government, helped the blossoming accountability process.

In April of 2007, the UN Commission on Human Rights requested that the Secretary General examine Cambodia's informal requests for assistance in bringing accountability to the Khmer Rouge. Secretary General Kofi Annan assembled a group of experts and sent them to Cambodia with three tasks: to evaluate the evidence against the officials accused of perpetrating the atrocities that occurred during the Khmer Rouge regime, to assess the practical feasibility of bringing those officials to trials, and to analyze various ways in which the tribunal might be organized.

4.2 CREATION[278]

4.2.1 Purpose

From the beginning of the process, the Cambodian government and the UN had different purposes for the tribunal and different conceptions of how the trials would proceed. Hun Sen and the CPP, the ruling party, wanted to use the tribunals as a method to break up the remaining Khmer Rouge insurgents in order to secure their allegiance and create peace in Cambodia. The opposition parties in Cambodia accused the sitting government of seeking pacification instead of justice in order to maintain control of the government. The UN recognized the tribunals as a path toward dismantling the remaining Khmer Rouge factions by discrediting them, but also saw the tribunal process as a means of fostering a flourishing, multi-party democracy. As such, the UN was less concerned with possible political turnover.

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[277] Ciorciari, John D. "History and Politics Behind the Khmer Rouge Trials." *On Trial: The Khmer Rouge Accountability Process*. Ed. John D. Ciorciari and Anne Heindel. Documentation Center of Cambodia, 2009. 33-84. Print.

[278] *Id.*

4.2.2 Proposals & Alternatives

The UN envisioned an international process with many defendants and proposed a tribunal at the Hague. The Cambodian government wanted a different structure for the tribunal, with a limited number of trials and substantial local judicial participation. Cambodia invoked national sovereignty and reminded other countries of their roles in helping the Khmer Rouge. This tension was exacerbated by the report from the UN experts in Cambodia, which found that a prima facie case existed against some Khmer Rouge members for genocide and crimes against humanity, and that it would be possible to go forward with criminal trials. However, the report stated that Cambodia lacked the trained personnel, infrastructure, and general culture of respect for human rights that were necessary for an effective domestic tribunal.

The Cambodian government reacted to this report by reasserting its desire for a Truth and Reconciliation Commission, which the United States promptly dismissed. Shortly after the report was issued, the last major Khmer Rouge leader was captured. Hun Sen announced that the leader would be tried domestically and accused Western countries of hypocrisy, asking where these countries had been during the worst of the Khmer Rouge insurgency. He offered to permit foreign observers, but insisted that the proceedings be domestic. Though Hun Sen and the CPP favored domestic trials, international governments and NGOs, as well as other domestic political groups preferred that there be more formal international participation.

To assuage the concerns of both the Cambodian government and the UN, the United States, led by Senator John Kerry, suggested a mixed tribunal that would combine international and domestic tribunals. The US hoped that there would be advantages to a hybrid tribunal over previous international war crimes tribunals—in particular, that lower costs, less bureaucracy, and a proximity to the victims of the atrocities would enhance local participation.

4.2.3 Enactment

In order to create the ECCC, the Cambodian government had to ratify a law establishing the tribunal. The first law drafted by the Cambodian government called for a majority of Cambodian judges, as well as Cambodian and international co-prosecutors and co-investigating judges. The draft was vague as to dispute resolution between Cambodian and international judges. Secretary General Annan countered this draft by demanding that there be a majority of international judges and foreign prosecutors, as well as no possible amnesties or pardons. The United States again stepped in and mediated a compromise. The result was a five judge panel comprised of three Cambodian judges and two foreign judges who would adjudicate disputes between co-prosecutors and co-investigating judges. This panel would also use supermajority rules to govern the other judges. The UN team in Cambodia was skeptical, but nonetheless drafted a Framework Agreement that would give the UN the authority to convene a court. Under this agreement, the UN would have the authority to appoint international judges, the international co-prosecutor, and two new officials—a deputy international prosecutor and a director of administration. The UN insisted that the Cambodian law not materially differ from this agreement, but when the Cambodian national assembly approved a bill creating the ECCC in 2001, it indeed differed greatly from the Framework Agreement. In response, the UN threatened to withhold international money until Cambodia passed a law better comporting with international standards. In 2002, with Cambodia making no attempt to change its law, the UN team returned home, citing concerns that the government would have too much power and that the entire tribunal would be susceptible to political interference. The UN team believed that *no* trial would be better than a flawed process with no credible justice. However, the UN General Assembly disagreed and passed a resolution forcing the team to return to Cambodia.

The next year of negotiations yielded little progress, but slowly a new draft of the law took shape. This draft hewed fairly close to the 2001 ECCC law passed by the Cambodian national assembly, but it did rescind prior amnesties or pardons. The UN continued to have reservations about the law's limitations on international involvement, but ultimately, the ECCC was "established by Cambodian law pursuant to [the] 2003 framework agreement between the UN and the Royal Government of Cambodia, setting out the 'legal basis and principles and modalities of … [their] cooperation.' This Framework Agreement was approved by the Cambodian legislature and implemented by it through a 2004 law."[279]

4.3 STRUCTURE

The new ECCC law established the Extraordinary Chambers according to a tripartite chamer structure with a pretrial chamber, a trial chamber, and an appeals chamber. The pretrial chamber, which would hear any dispute before the criminal trial began, and the trial chamber, which would hear the actual criminal charges, would be comprised of three Cambodian judges and two international judges. The appeals chamber would have four Cambodian judges and three international judges. The Cambodian government would appoint all domestic judges and would have the power to approve all international appointees. All chambers would require a supermajority for any decision, effectively granting a veto to the international judges but also preventing the international judges from prevailing with a swing vote from a single Cambodian judge.[280]
The law also provided that the director of the Office of Administration, the International Deputy Director, and Chief of Public Affairs be Cambodian, a provision that deviated from a previous UN demand. However, the prosecutors and the defense teams are relatively evenly split and the defense is led by an international appointee. The UN passed a substantively similar resolution, which resulted in the creation of the tribunal. [281]

4.3.1 Jurisdiction

One of the first questions to be addressed was where the tribunals would take place. Ultimately, it was determined that the trials be held in special chambers within the extant Cambodian judicial system. "[T]he ECCC [was] formally part of the Cambodian court system, [but] it also has some of the features of an international court."[282] There were several features of the ECCC that differentiated it from other tribunals: first, it has jurisdiction to prosecute international crimes committed in the 1970s, and thus was the first international criminal tribunal required to determine what principles of criminal law obtained during that period (after the Nuremberg trials, but before ICTY and ICTR); second, the ECCC is "the only internationalized court that is mandated to follow domestic criminal procedural rules."[283]
The ECCC's jurisdictional mandate is narrowly focused on the responsibility of the senior Khmer Rouge leadership and those most responsible for serious crimes committed between 1975 and 1979; as such, it was not intended to reach all crimes, nor lower-level persons who committed the actual atrocities.[284]
Finally, the ECCC Law "empowers the Court to hear charges pertaining to five international offenses (genocide, crimes against humanity, grave breaches, destruction of cultural property, and crimes against

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[279] Heindel, Anne. "Overview of the Extraordinary Chambers." *On Trial: The Khmer Rouge Accountability Process*. Ed. John D. Ciorciari and Anne Heindel. Documentation Center of Cambodia, 2009. 85. Print.

[280] Ciorciari, 77

[281] *Id.*, 74

[282] *Id.*, 87

[283] *Id.*, 87

[284] *Id.*, 88

diplomatically protected persons) and three offenses under the 1956 Cambodian Penal Code (homicide, torture, and religious persecution)."[285]

4.3.2 Prosecution & Defense

The question of personal sovereignty was also critical. Though both sides agreed that there would be a limited universe of defendants, Cambodia wished to limit the number of defendants to 4 or 5, citing fears of destabilization and regression. However, certain high-level members of the government, including Hun Sen, had been fairly high ranking members of the Khmer Rouge. Should the universe of defendants be as wide as the UN wished (up to thirty defendants, including senior leaders and those most responsible for the atrocities), current members of the ruling party might be subject to trial. The UN also wished to void past amnesties, a proposal to which the Cambodian government also objected. Ultimately, the "amended ECCC law did not establish a concrete number of defendants, allowing the Cambodian government and UN officials to interpret the provision on personal jurisdiction differently[, …] but [this] deferred an important question that remains a source of dispute at the ECCC today."[286] Both sides also agreed to limit the time frame in which committed atrocities could be considered in the mixed tribunal to the period from April 17, 1975 until January 6, 1979. This time limitation served the interests of foreign governments that had questionably intervened in Cambodian politics later in the 20th century.[287]

4.4 FUNCTIONING

The formation of the ECCC has been widely criticized by commentators, with some finding the hybrid structure problematic. The most common complaints that have arisen during the court's existence are the delay and administrative inefficiencies of having both Cambodian and international personnel for each position. Another concern derives from general distrust of the domestic side of the court's ability to remain independent from the Cambodian government and uninfluenced by its overt disapproval of the tribunal.

4.4.1 Cases

A Case 001 ("Duch")

The first case before the ECCC was the trial of Kaing Guek Eav, also known as "Duch," the former chairman of the Khmer Rouge S-21 Security Center in Phnom Penh. Held (unlawfully) in military detention from 1999 until 2007, Duch was transferred to provisional detention in 2007 and tried between February and September of 2009. The Trial Chamber found Duch guilty of crimes against humanity and grave breaches of the Geneva Convention, and sentenced him to 35 years of imprisonment (reduced to 30 years for his unlawful detention between 1999 and 2007).[288]

One of the more bizarre events that occurred during the trial of Duch was the difference in strategy by his two defense teams. Duch's international and local trial teams "offered up two different, and quite contradictory defenses."[289] The international team requested a reduced prison sentence based on Duch's display of remorse, while his local lawyers challenged the legitimacy of the court and its ability to impose *any*

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[285] *Id.*, 89

[286] *Id.*, 78

[287] *Id.*

[288] http://www.eccc.gov.kh/en/case/topic/1

[289] Curtis, Kimberly. *Cambodia's Struggle for Justice*, Foreign Policy Association- Human Rights Blog, Dec. 1, 2009.

verdict on Duch.[290] Then, right before the judges handed his sentence down, Duch asked for his release claiming his innocence of all the charges.[291]

Some have blamed this disagreement on the Cambodian government's lack of support for the tribunals. Prime Minister Hun Sen has made it clear that he would prefer to see the courts fail than to fulfill their mandate. As a result, some suggest that Duch's local lawyer's refusal to recognize the legitimacy of the court was caused by the lack of political support on the part of the Cambodian government.[292] Duch's international lawyer even hinted that the domestic defense counsel's actions may have been affected by political pressure.[293]

B Case 002

Nuon Chea, former Deputy Secretary of the Communist Party in Kampuchea, Ieng Sary, former Deputy Prime Minister of Foreign Affairs, Kuieu Samphan, former Head of State, and Ieng Thirith, former Minister of Social Affairs, comprise the indicted persons in Case 002. They are charged with crimes against humanity, breaches of the Geneva Convention of 1949, genocide, and, under the Cambodian Penal Code, homicide, torture, and religious persecution.

These defendants have challenged their pre-trial detentions on several grounds that highlight some of the problems faced by the tribunal. First, Ieng Thirith's defense has argued that there is no "well founded reason to believe" that she is guilty of the charged crimes, nor is there evidence that her detention is "necessary," both of which are requirements for pre-trial detention. Similarly, Ieng Sary's defense argued that even if such evidence existed, a higher standard of evidence should be required where the detention exceeds one year, as it has in his case. The Pre-Trial Court disagreed with both assertions, finding that the provisional detention requirements are met throughout the pre-trial proceedings in the absence of exculpatory evidence.[294]

Second, a related concern in light of the length detentions has been the form of detention, detention conditions and the fitness of the accused to stand trial. All of the defendants in Case 002 are more than 78 years old. Ieng Sary, for example, has repeatedly requested house arrest due to his poor health. The Internal Rules of the ECCC do not permit alternative forms of detention, and the Pre-Trial Chamber has denied these requests so far on the grounds that alternative forms of detention fail to satisfy the purposes of detention, in particular the need to prevent pressure on witnesses, to prevent collusion, to preserve evidence, and to ensure the presence of the accused for trial. Nevertheless, the Chamber did permit Ieng Sary and Ieng Thirith, who are married, to meet with one another once per week. This decision was later extended to overturning a co-investigating judge's order prohibiting the communication of the remaining detainees, absent reasonable evidence of a concrete risk of collusion among the defendants.[295]

4.4.2 Jurisdictional

One challenge associated with the unique temporal jurisdiction of the ECCC has been the tension between the crimes and definitions of crimes under ECCC law and the requirement that the tribunals determine whether those acts were also illegal during the period from 1975-1979. In other words, "[t]he Chambers cannot merely assume that each substantive crime and mode of liability placed in the Court's jurisdiction by

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[290] Mydans, Seth. *Khmer Rouge Warden Asks to Be Freed*, NY TIMES, Nov. 27, 2009.

[291] *Id.*

[292] *See* Jain, *supra* note 7.

[293] Brady, Brendan. *Cambodia's first war crimes trial marred by flaws*, L.A. TIMES, Dec. 6, 2009.

[294] Heindel, 130

[295] *Id.*, 139

the 2004 ECCC law complies with the *nullem crimen* principle [i.e. *nullem crimen sine lege* or "no crime without law"], but must consider this principle in each case and define the charged crimes accordingly."[296] A related problem has arisen from the prosecutions of and amnesties granted to Khmer Rouge officials (mostly in the mid-1990s) and their status under international criminal law. For example, the Pre-Trial Chamber determined that the provisional detention of Ieng Sary, was appropriate due to the uncertain international status of his prior amnesty. Both of these issues (temporal jurisdiction and status of amnesty) have dominated the case law of the ECCC; combined with the evidentiary challenges of prosecuting crimes committed decades ago and domestic political interference, this has resulted in slow progress for the judicial process.

4.4.3 Structural

One of the general problems that emerged due to the hybrid structure at the ECCC was the disputes between the domestic and international counterparts at each position. For example, the Co-Prosecutors have recently disagreed over whether to bring further prosecutions, requiring the Pre-Trial Chamber to adjudicate that dispute. Additionally, the defense team of Duch evidently had substantial disagreements about the best trial strategy. The hybrid judicial chambers within the ECCC also have lacked unanimity on certain issues with voting divided along international/domestic lines. Many observers have found that the need to reconcile the two sides of the hybrid chamber before each action slows down the judicial process at the ECCC considerably, adding further delay to an already slow judicial process.[297]

4.4.4 Prosecution

As mentioned above, there have also been prominent disputes between Co-Prosecutors as to whether or not to continue to bring prosecutions beyond Cases 001 and 002. The International Co-Prosecutor has wanted to start more trials, but the Domestic Co-Prosecutor has argued against this for non-legal reasons.[298] Many believe that the Domestic Co-Prosecutor's reluctance to persist has been due to the local Cambodian government's general opposition to the tribunals, since the Co-Prosecutor's objections mirror the Cambodian government's frequent criticisms of the trial.[299] Some experts have noted, however, that in hybrid courts generally, differing incentives between national and international actors are endemic. The international co-prosecutor is legitimately "more interested in prioritizing the long-term purpose of international criminal law in achieving retribution and deterrence, at the expense of the local short-term purpose of reconciliation, and thus aims to cast the prosecutorial net fairly widely in the name of impartiality and the creation of a historical record."[300] On the other hand, national prosecutors have different incentives. They are influenced by the political climate and are catering to a national audience instead.[301] This could explain the differences between the prosecutors at the ECCC where the domestic prosecutor is aware of the Cambodian government's hostility to the proceedings.

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[296] *Id.*, p. 89

[297] Ramji-Nogales, Jaya. *Panel: The Impending Extraordinary Chambers of Cambodia to Prosecute the Khmer Rouge*, 5 Santa Clara J. Int'l L., 236, 331 (2007).

[298] Jain, Neha. *Khmer Rouge Tribunal Paves the Way for Additional Investigations*, ASIL Insight, Volume 13, Issue 23 (2009).

[299] Mydans, Seth. *Cambodia Tribunal Dispute Runs Deeper*, N.Y. TIMES, Jan. 27, 2009.

[300] Jain, Neha. *Between the Scylla and Charybdis of Prosecution and Reconciliation: the Khmer Rouge Trials and the Promise of International Criminal Justice*, 20 DUKE J. OF COMP. & INT'L L., 247, 281 (2010).

[301] *Id.*

This disagreement about whether to bring a third slate of investigations at the ECCC had to be resolved by the Pre-Trial Chamber after a nine-month impasse.[302] The Internal Rules of the ECCC state that the Pre-Trial Chamber can only put a stop to an investigation if there is a supermajority of the judges voting against it.[303] The Pre-Trial Chamber predictably split along national and international fault-lines with the international judges voting to continue with the investigations, and the domestic judges voting to block the investigations. Since there was no supermajority, the investigations are going forward. However, some experts predict that there will continue to be hold-ups in the process. If the Co-Prosecutors disagree on whether or not to submit prosecutorial indictments, the Pre-Trial Chamber will need to step in to resolve the dispute again in the future.[304]

4.4.5 Judicial

The level of contention between international and domestic judges at the ECCC has varied between each chamber. Although initially the Pre-Trial Chamber initially appeared to make a concerted effort to arrive at a unanimous decisions, that has changed recently. The Co-Investigating Judges have also had disputes, while the Trial Chamber during the Duch trial did not have internal disagreements along national/international grounds.

Split voting between international and domestic judges has been present since the beginning of the tribunal. In 2007, there was a dispute in the Rules Committee between the Cambodian judges and the international judges about the internal rules.[305] The first dispute was about who should admit foreign defense counsel; the Cambodian Bar believed that it had that responsibility, while international officials believed the ECCC should control who was admitted. Another recent dispute involved the ability for an indictment to go through without the support of the Cambodian judges.[306] These disputes have led to further delays.

In addition to the Pre-Trial Chamber's split ruling about whether to proceed with a third investigation, the Pre-Trial Chamber also recently split along international/Cambodian lines in an appeal of the Co-Investigating Judges' conclusion that the Cambodian government had not interfered with witnesses.[307] The three Cambodian judges in the Pre-Trial Chamber voted to dismiss the appeal, effectively preventing further investigation into political interference by the Cambodian government. The two sitting international judges filed a strong dissent. The domestic judges offered a plausible explanation that their decision relied on the unanimity by the Co-Investigating Judges to not pursue the charges, but it is uncertain if the decision was actually motivated by external political forces around the court.[308]

The Trial Chamber itself has relatively been free from national/international disputes, and gridlock in the Trial Chamber did not appear to surface during the Duch trial. To the extent that judges were unable to reach unanimity, it was not due to international/domestic splits.[309]

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[302] Saliba, Michael. *Summary of Pre-Trial Chamber Ruling Regarding New Investigations of Former Khmer Rouge Leaders*, THE TRIAL OBSERVER, September 3, 2009.

[303] *Id.*

[304] Jain, Neha. *Khmer Rouge Tribunal Paves the Way for Additional Investigations*, ASIL Insight, Volume 13, Issue 23 (2009).

[305] Mydans, Seth. *Rules Dispute Imperils Khmer Rouge Trial*, N.Y. TIMES, Jan. 26, 2007.

[306] *Id.*

[307] Scheffer, David. *Making Sense of the Pre-Trial Chamber's Second Decision on an Appeal About Alleged Political Interference*, THE TRIAL OBSERVER, Sept. 15, 2010.

[308] *Id.*

[309] Political Interference at the Extraordinary Chambers in the Courts of Cambodia, Open Society Justice Initiative, 13, July 2010 *available at* http://www.cambodiatribunal.org/images/CTM/political-interference-courts-cambodia-20100706.pdf

4.4.6 Administrative

The Cambodian side of the court has come under attack for its personnel management with many allegations of corruption. A UNDP report published in 2007 found that the Tribunal was hiring unqualified Cambodian staff at inflated salaries without proper procedures. The report even suggested that if the Cambodian side did not reform, the UN should consider withdrawing from the tribunal. However, attempts to implement the suggestions in the UNDP report would most likely require renegotiations of the framework agreements that set up the tribunal.[310]

Administrative flaws and inefficiencies have also been attributed to the hybrid structure of the court. Two UN experts who put together a confidential report on the ECCC around the time of the 2007 UNDP report called the split structure "divisive and unhelpful"[311] and argued that it only "serves only to constantly hinder, frequently confuse and certainly frustrate the efforts of a number of staff on both sides of the operations."[312] Weaknesses in the Office of Administration (OA) at the ECCC are attributable to this divided structure and split leadership. [313] The hybrid structure creates a confusion of roles and responsibilities between the two top officials in the OA. "As a consequence, no OA official has a sufficient mandate to take action essential to the Court's early operations or to be held accountable for his or her failure to do so."[314]

The UN in 2008 appointed an expert advisor to address these concerns. His duties are to streamline the administrative process and institute anti-corruption measures.[315] In 2009 an Independent Counselor was appointed for corruption issues, which was seen as a positive step, although in itself inadequate.[316] Indeed, no steps to improve issues of administrative inefficiencies caused by the hybrid structure itself appear to have been taken.

4.5 CONCLUSION

During the formation of the court, human rights groups expressed concern about the hybrid structure of the court. A UN report at the tribunals' creation stated that maintaining local judicial structures could permit problematic government interference with the tribunal's activities. There were two particular issues expressed: first, that the judges would be controlled by the Cambodian government; and, second, that the Cambodian government's purpose would be different from that of the international community. Questions about the ECCC's ability to operate independently, impartially, and free of political interference still are a large concern today.[317] There are many difficulties for the domestic side of the court to act in an objective manner due to the current government's interference with the court. The safeguards in the Framework Agreement have been inadequate.[318] There is strong evidence that Cambodian and international officials are pursuing objects that are in some respects at odds.

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[310] Byrne, Rory. *UN Reports Call for Changes in the Structure of Khmer Rouge Tribunal*, VOICE OF AMERICA, October 5, 2007.

[311] Kinetz, Erika. *Another Delay for Justice*? NEWSWEEK, October 4, 2007.

[312] International Justice Tribune, *Phnom Penh court accused of poor management,* RADIO NETHERLANDS WORLDWIDE, October 7, 2007

[313] Heindel, Anne. *Why the ECCC Office of Administration Would Benefit from Being Structured More Like a "Registry,"* SEARCHING FOR THE TRUTH, *available at* http://www.cambodiatribunal.org/commentary/38.html

[314] *Id.*

[315] Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, May 2008 Update 4, Open Society Justice Initiative.

[316] Gidley, Rebecca. The Extraordinary Chambers in the Courts of Cambodia and the Responsibility to Protect 31, Aug. 25, 2010.

[317] *Id.*, 10.

[318] *Id.*, 28.

Indeed, no further evidence of the lack of local governmental support for the work of the tribunal need be sought than Cambodian Prime Minister Hun Sen's 2010 decision to terminate the work of the ECCC after the conclusion of Case 002. Hun Sen "has repeatedly warned that further prosecutions at the court could destabilize Cambodia, saying that he would prefer to see the court fail than indict more suspects."[319] Thus, while Cases 003 and 004 appear to still be under investigation, it is unclear what their fate will be.

[319] "Cambodian PM Hun Sen says no third Khmer Rouge trial." Channel News Asia. <http://www.channelnewsasia.com/stories/afp_asiapacific/view/1089665/1/.html>

5 Lessons Learned

In the wake of the 2005 discovery of three mass graves in North Kivu by UN officials, the international concern about accountability for the crimes against humanity occurring in the Congo escalated. In response, the UN set up a task force to map the human rights violations that occurred in the region in the preceding decade. The result of that work was published in the "Report of the Mapping Exercise" published in June 2010. This report mapped human rights violations that occurred from 1993 and the Ntoto Market massacre to 2003 and the advent of a transitional government of "national unity"[320].

In addition to mapping and documenting human rights abuses during the preceding period, the Mapping Report recommended a hybrid court be set up to address human rights violations that occurred over that period of time. Others advocated that rather than a hybrid court that would operate parallel to the Congolese national judicial system, a mixed chamber be set up to operate within that very system[321]. The set up of an *ad hoc* international court is nowadays seen as too costly and lacking an exit strategy given the sheer number of cases it would have to hear to exhaust its potential docket[322].

In the months following the publication of the mapping report, both civil society and the Congolese government have rallied around the idea of a mixed chamber to deal with the alleged war crimes. The Congolese government took the first steps towards the formation of a mixed chamber by introducing a draft bill at the parliament. The government's draft legislation currently specifies that the specialized mixed court will have jurisdiction over the most serious international crimes committed in the DRC between 1990 and 2003. We note that while this time frame complements the existing jurisdiction of the ICC, there are still many crimes that would be relevant for the mixed chamber's consideration that fall outside of the ICC's mandate and the 1990-2003 window.

Past and current experiences with hybrid and mixed systems in Bosnia, Cambodia, East Timor and Kosovo provide useful insight into what makes a quasi-international tribunal a success or a failure. We argue that the establishment of the Court (I), its organization (II), its administration (III), its transitional nature (IV) and perhaps as importantly, as it is often overlooked, its outreach to the community (V), are key elements of the success of such an enterprise.

5.1 CREATION OF THE TRIBUNAL

5.1.1 Consideration for the local judicial culture and process

Our review of the past experiences of mixed chambers highlights the need for considering the cultural specificities of a legal order when designing a hybrid tribunal. In order to be effective, mixed chambers must draw upon the existing legal traditions and local language skills of the population. For example, given the local experience with the language, East Timor's Minister of Justice insisted that international professionals joining the court be fluent in Portuguese.[323] Without these types of requirements, language issues can burden

320 UN, "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003", June 2010, p.2 fn.3

321 Human Rights Watch, Tackling Impunity in Congo: Meaningful follow-up to the UN Mapping Report: A mixed chamber and other accountability measures, October 2010

322 Cohen, *supra* [Timor/Creation fn 3]

323 Reiger, 14

the court and slow its processes. In Bosnia, some case files are in English including those sent by the ICTY or originally referred to it for support, the "Rules of the road cases," while others are in the local language. This posed significant difficulties for local professionals who were unfamiliar with English. The language barrier has also been an issue when it has prevented international personnel from integrating in the local society during their mandate.[324]

The procedure retained by the court also has its importance, as the introduction in a civil law country of adversarial proceedings can challenge local prosecutors or defense attorneys, as it has for instance in Bosnia.[325] We note that the DRC's legal tradition hails from Belgium, and while there are four national languages, most of the proceedings could take place in French, the official language. Even in cases where depositions would be taken in another national language, international and national judges and prosecutors would likely share French as a common working language. The predominance of Francophone judges from Africa and other international legal traditions should facilitate a French system for the chamber. In fact, Francaphone Africans with specific expertise in prosecution of international crimes (for example at the International Criminal Tribunal for Rwanda or the Special Court for Sierra Leone) could be specially invited to participate. These professionals would be able to draw on similar legal traditions to inform their participation in the proposed Congolese courts.

5.1.2 Necessary constitutional arrangements and governmental support

The experience of Cambodia and East Timor illustrate the extent to which opposition of a local government to the establishment of an international court can be its biggest challenge.[326] Since constitutional amendment or at least substantive legislation is needed to set up the court, the creation of a mixed tribunal requires popular or at least substantial political support at the national level. Although the debate surrounding the current draft bill is hotly contested, we emphasize that reaching a consensus is indispensible. Further down the line, the tribunal will also need financial commitments from the government, in particular with regards to funding administrative staff, prosecution and defense offices. While the international community can finance international personnel and, if applicable, help with the establishment of the court (e.g. legal research instruments, updating a law library), significant local support is necessary. Since mixed chambers strive gradually transition towards a system independent from international personnel and resources, this commitment has to be understood and accepted by the government from the outset of the enterprise. However, we do note that in some cases, civil society groups prefer a greater internationalization of funding and responsibility at the beginning of the tribunal's life, in order to ensure its neutrality.

Additionally, a successful mixed chamber must avoid government interference in the procedure, and potential corruption. For example, Cambodia has been suspected of attempting to influence the processes of Extraordinary Chambers by imposing restrictions on the conduct on national prosecutors and sometimes judges. In some cases, these restrictions have resulted in stalemates, especially at the pre-trial level. [327] Corruption, especially where it involves the prosecution and investigation can considerably hinder the process of the Court. Currently, reports indicate that bribes allow even convicted perpetrators from escaping punishment for crimes within the domestic Congolese system. In order to allow the tribunal to operate with true independence, in many cases the government needs to be willing to extend protection to court

324 Cohen, 8; Reiger, 15

325 Ivanisevic, 12

326 Claussen, 253; Cohen, 6

327 Open Society Justice Initiative, 13, July 2010, 10; Bowman, 384

personnel: threats against Kosovar judges and prosecutors for instance, pose a considerable threat to the peaceful administration of justice.

5.2 ORGANIZATION OF THE TRIBUNAL

5.2.1 Balance between international and national personnel

A hybrid or mixed system is usually set up because the legitimacy of national courts is in question. There can be issues of ethnic bias, in that the judiciary hails from an ethnic group that either was responsible for human rights abuse in the first place or was victim of such abuse and is subsequently seen as seeking revenge rather than justice. The use of international human rights law may also be an uncommon practice among national judges, and the provisions of their criminal code might be inadequate to effectively judge the crimes they hear. A purely international court, on the other hand, is less likely to gain local support, and can be viewed with distrust by the local population.

An international judge sitting with national judges might grant legitimacy to the court, but their role should not be such that they appear to run the process. Courts have been less successful with international judges who dominate the proceedings, interrupting and even arguing with their national colleagues: this has been a common critique of international personnel in East Timor. Likewise, apparent differences in strategy, for the prosecution as well as the defense, undermines the credibility of the court, making it easier for politicians to deride its processes and harder for the population to accept its rulings. The Duch trial in Cambodia is illustrative of that issue.[328]

Depending on the willingness of the local government to participate openly and fairly in the process, the balance of the court can be of lesser importance. In systems in which the international community does not trust the local government to administer equal justice to all its constituents, or in cases of marked ethnic bias within the national legal community, a super-majority system might prove appropriate.[329] Though this balance was not as essential in places like Bosnia, where transition is well under way, or Kosovo, where the international community was in charge of appointing judicial personnel, it was indispensable in Cambodia for instance.[330] These measures are most necessary at outset of a process, in order to preserve the neutrality of the tribunal. In many cases, the government and the international community are free to reserve the possibility to amend the procedures of the court if it no longer appears necessary.

A super-majority system requiring at least one international judge to join the majority for the decision to carry weight, while not necessarily indispensable at the trial or appellate level, might be helpful at the pre-trial stage. The pre-trial stage is the part of process that governmental interference can be most effective: decisions to further prosecute, or conversely to drop charges against a defendant, are often viewed very differently by national and international lawyers.[331] The former tend to focus on more immediate concerns, such as national unity or personal safety, and potentially ethnic bias, while the latter, more distanced that they are from the case and its cultural context, tend to aim at serving a more abstract notion of justice—one that may even be foreign to the local parties.[332]

Whatever the exact structure of international judicial participation, it seems clear that international participation in the judicial arena should be "immediate and bold, rather than incremental and crisis-

328 Open Society Justice Initiative, December 2010, 2

329 De Bertodano, 289; OSCE LSMS, 11

330 Jain, 255

331 Karwande, 88;

332 Hartman, 10; Jain, 281

driven,"[333] as it was in Kosovo. This is because of initial structure strongly shapes jurisdictional and administrative expectations, and can make it difficult to later shift judicial decision-making authority and norms.[334]

5.2.2 Three-tiered system

Whatever the solution ultimately agreed upon by the DRC government and the international community, it is paramount that a coherent and comprehensive system be put in place from the start, so as to avoid having to make haphazard adjustments such as the one the Kosovo system had to undergo.[335] Drawing from experience, the most coherent system is three-tiered—comprised of a pre-trial chamber, a trial chamber and an appellate chamber. The pre-trial chamber deals with more administrative matters, such as rulings on the appropriate scope of an investigation. It establishes the point at which the prosecution is adequately ready to proceed with its case, or should abandon it to pursue more viable cases. It can also address pre-trial motions, and ensure that the rights of the defense are respected. If needed, it ultimately serves as a buffer to preserve trial-level personnel and proceedings from political interference.

The trial and appellate chamber fulfill the traditional roles one would expect from such institutions in a national court system. A second and supreme level of review might be considered, depending on local and international dynamics as well. If a hybrid tribunal is set up, that review could be conducted at The Hague. If a mixed chamber is set up, the national Supreme Court would be the natural forum to hear final appeals.

5.2.3 Prosecution & Investigation

Experience in Kosovo and East Timor in particular illustrate the challenges of inadequate funding, training and support for prosecutors and investigators. It is critical to the success of a human rights court that an integrated structure exist from the outset. Especially if the local tradition, as in the DRC, is one of civil law, where the prosecution has to work with or under the supervision of an investigative judge, it is particularly important that they coordinate well. Working out of the same building if possible, sharing research resources, and generally being able to build a lasting working relationship are of vital importance. The situation in East Timor, where little if any room was initially left for the defense, and where the office of the prosecutor was initially set up as a completely separate entity should serve as a cautionary tale in that respect. Any prosecutor's office should be designed as an organ of the court.[336]Good working relations with local law enforcement, especially among investigators, are crucial. The example of East Timor, where the Indonesian government was loath to extradite defendants provides yet another indication that political acceptance of the mandate of the court at both domestic and regional level is essential to the success of its missions.

5.2.4 Defense

The part played by criminal defense attorneys in special courts for human rights cases should not be overlooked. Especially if the court docket is destined to extend to lesser-profile cases, with defendants of limited financial needs. A public defender's office should be a necessary addition to the general economy of the court from the start. Depending on cases, the internationality of the defense team might not prove as

333 Hartman, 13

334 Hartman, 13

335 Periello and Wierda, 24-25

336 Reiger, 13

crucial an issue as that of the judging panel. However, it seems that the defender's office should have the capacity to offer such defense when appropriate, especially if it may appear that the attorney on its roster might themselves show bias, ethnic or otherwise towards a defendant.[337]

If foreign defense attorneys may appear before the court, it should be clear how their appearance should be entered. An issue arose in Cambodia when the national bar association insisted that it have the final word on admitting foreign lawyers, thus reserving the option to exert political pressure on the proceedings, while the international community would have given the court the power to make such decisions.[338] It seems simpler to give the court exclusive power to accept appearances *pro hac vice* at the pre-trial stage or grant limited licenses to a roaster of international lawyers.

The funding of defense investigations is also an important issue, to be addressed at the planning stage. Especially if the court adopts an adversarial rather than inquisitorial procedure, examples in Bosnia illustrate the need for adequate investigative capabilities so as to afford a defendant fair representation.[339]

5.2.5 Registry

Provisions should be made for the keeping and filing of adequate and consistent records. Past hybrid courts, have had to rely on judges' notes as official records, while others have videotaped proceedings but not transcribed them. Clear procedures and training should also be provided to prosecutors, and perhaps more importantly local investigators, paying particular attention to precise wording and thorough investigation, so that prosecutors are able to present as complete a picture of the situation as efficiently as possible.[340]Local staff can manage most of these operations, with limited use of international staff if necessary. This can only be achieved through constant adequate funding. Infrastructure and material for record keeping should also be made available from the outset.

5.3 ADMINISTRATION OF THE COURT

5.3.1 Hiring and retaining talent

International members of hybrid or mixed chambers are not destined to spend an extended period of time in the country in which the court is established. In Kosovo, members of the different branches of the court are appointed for six-month renewable terms, while in Bosnia they sign renewable one-year contracts, with judges spending an average of two years in the country.[341] On the other hand, national judges are regular members of the local judiciary, and are destined to serve the hybrid court or mixed chamber for much longer terms.

The DRC court will have a unique opportunity to have a much wider pool of talent to choose its international judges and prosecutors from, than East Timor or Bosnia: language and legal tradition will be less of a barrier in this case than in most. It may be opportune to fix slightly longer terms for sitting judges and prosecutors, from one to two years renewable, for instance, to confer greater stability of the bench and give judges the chance to get a better sense of and develop a unified jurisprudence.

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337 Hartmann, 6

338 Claussen, 257

339 Ivanisevic, 15

340 Cohen, 14

341 Periello and Wierda, 13; Ivanisevic, 7

The appointment process is a delicate diplomatic question. Unlike in Kosovo, for instance, where the Interim Judiciary was appointed by the UN,[342] appointment of national judges would fall squarely under the purview of the DNC government in the case of a mixed chamber. If a hybrid court where set up, appointments of national to the bench or prosecution would likely be the result of an agreement between the DRC and UN. The UN would wish to freely appoint international personnel, while the DRC government would insist on having the final word. This report suggests that greater UN involvement in the process will increase transparency and perceived neutrality. We suggest allowing the UN to prepare a list of potential personnel and allowing the DRC government final approval, instead of leaving selection in domestic hands.
Differences in pay scale between national and international personnel in other courts have proved problematic, while an absence of such difference between the organs of the court and national equivalents has resulted in difficulties to hire local personnel. Working for the special court system was then not seen as attractive by members of the local judiciary or law enforcement.[343]

5.3.2 Procedure

If a hybrid court is set-up, a special procedure will be drawn up. This procedure might come from Congolese criminal law, or from the rules of procedure used in other international tribunals. The use of international procedures may cause some issues for local lawyers; as such proceedings are likely to diverge significantly from those of the local courts. If a mixed chamber is set up, and especially if it is destined to transition and survive the ultimate departure of international personnel, its procedures should mirror as much as possible those of regular national courts.[344] In effect, the most sensible system for either a hybrid or mixed structure would be to adopt the DRC code of criminal procedure, adapt it to the necessities of the prosecution of human rights violation if needed, and then apply national criminal law, supplemented by international human rights law. Since the ICC's complimentarity standards require effective enforcement of the Rome Statute at the domestic level, domestication of the international criminal legal regime is already a necessity within the Congo.

5.4 TRANSITIONAL NATURE OF THE TRIBUNAL

In the long term, should the court be a success, phasing out of international personnel has to be anticipated. National judges and prosecutors would ultimately be left in charge. This consideration is especially important in cases such as the one at hand where there is but one human rights court involved, which will have to lower-profile offenders as well as major actors of public life. This goes to the mandate of the court: the ICTY for instance, will try leaders that have to answer to the crime of genocide, while the Kosovo panels or the Bosnian chamber focus on individual offences like torture or rape. Given that, unlike in Cambodia, for instance, where leaders are tried for events that occurred more than thirty years ago, the DRC court would be set up to address crimes committed much more recently, and thus would have to continue its mission for a much longer period of time, investigating a great number of individuals.

5.5 OUTREACH OF THE TRIBUNAL

The public perception of the action of the court should remain a constant source of concern for its as well as UN and government officials. While devoting time and money to such efforts may not appear as a priority,

342 Periello and Wierda, 14

343 Ivanisevic, 13

344 Higonnet, 431

setting up a public affairs department is often a crucial step towards ensuring the support of local populations and organizations. It also ensures that local figures will not be able to capitalize on the low profile of the court to use it as a political foil. Making the process as apparent and transparent as possible helps bridge the divide between ethnic groups by demonstrating that a national organization can operate without bias.[345] In a best-case scenario, it fosters national confidence, and prompts the population to bring forward and help with the prosecution of more cases, where silence only begot distrust and potential resentment.

5.6 SEXUAL AND GENDER BASED VIOLENCE

The Congo has been called the rape capital of the world, making the effective redress of issues of sexual and gender based violence particularly important for the legitimacy of the proposed mixed chambers. Without the ability to hold perpetrators to account and assert the rule of law, sexual violence will continue even if fighting does not. Currently, access to justice for victims of crimes of sexual and gender based violence is extremely limited. In North Kivu only 78 of 211 complaints of rape made in 2007 led to judgments, with only 17 of these being convictions. In the exceptional cases where a conviction is obtained, perpetrators often escape or bribe their way to a release from prisons unable to hold them humanely or securely. Courts regularly order the state to give compensation to victims, but to date not a single dollar has been paid out to these victims.[346] Notably, the 2006 amendments to Congolese law criminalizing crimes of sexual violence and recognizing them as crimes of humanity has never been effectively implemented.

In order to combat the cycles of impunity currently plaguing the Congolese justice system, the mixed chamber should include special provisions with a gender sensitive approach to the prosecution and reparation of crimes of sexual and gender based violence. A gender neutral approach will be insufficient to make the changes necessary.

We recommend a national consultative process, integrating perspectives from women's civil society organizations into the discussion on the shape and nature of the proposed chamber, and its corresponding victims support unit. Only a truly open national process will allow women from all parts of Congolese society to contribute and develop a sense of ownership for the tribunal itself.

We note that the President of the National Assembly, Hon. Vital Kamerhe has expressed both an interest and a commitment to developing a gender sensitive approach to the prosecution of rapes and other crimes of sexual and gender based violence within the mixed chambers structure. His office might serve as an important liaison or coordination point for these proposed national consultation period.

The Open Society Justice Initiative's flying or mobile court model presents a model example of international involvement facilitating a consideration of issues of sexual violence in a gender sensitive manner. [347] These courts success show the importance of creating mechanisms that can reach into the Congo's must rural areas to ensure access to justice for victims from all parts of the country.

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345 Karwande, 44

346 Justice, Impunity, and Sexual Violence in Eastern Democratic Republic of Congo, November 2008, http://www.appggreatlakes.org/index.php/document-library-mainmenu-32/doc_view/119-sexual-violence-report?tmpl=component&format=raw

347 http://www.rnw.nl/international-justice/article/fizi-mobile-court-rape-verdicts

6 1 The mixed Specialized Court as a mechanism of repression of international crime in the Democratic Republic of the Congo

The following lines are a study of the Draft Legislation to Establish Specialized Chambers for Prosecution of International Crimes as well as of the amendments from the "Commission permanente de réforme du droit congolais" (permanent commission of reform of the Congolese legislation) on "a specialized hybrid court".

The crimes committed during the two wars in the Democratic Republic of the Congo as well as the crimes committed in a recent past were very serious and widespread. The public authorities have been unable to hold the perpetrators of such crimes accountable. This is why we must work to end impunity.

"Impunity" is understood as "failing to investigate, prosecute and try natural and legal persons guilty of serious violations of human rights and international humanitarian law".

This raises the question of prosecutions against those responsible for such violations but also the question of transitional justice, the goal being the building of a genuine rule of law.

The serious crimes and the absence of prosecutions are at the basis of the UN Mapping Report that reports on the serious violations committed between 1993 and 2003 with the following mandate:

- Conduct a mapping exercise of the most serious violations of human rights and international humanitarian law committed within the territory of the DRC between March 1993 and June 2003.
- Assess the existing capacities within the national justice system to deal appropriately with such human rights violations that may be uncovered.
- Formulate a series of options aimed at assisting the Government of the DRC in identifying appropriate transitional justice mechanisms to deal with the legacy of these violations, in terms of truth, justice, reparation and reform, taking into account ongoing efforts by the DRC authorities, as well as the support of the international community.

There are several judicial options: national tribunals, international criminal tribunals (as in Yugoslavia and Rwanda), hybrid tribunals or specialized chambers (Sierra Leone, Cambodia) or the exercise of universal jurisdiction by national tribunals (Belgium, Germany, etc.).

It is clear that it is necessary to enable internal jurisdictions to hold this judicial responsibility and to take charge of the repression of crimes. It is also necessary to implement mechanisms that guarantee that the trials meet international standards. The option of specialized chambers would make this possible, while building the capacity of Congolese justice professionals through the cooperation with foreign lawyers and judges.

Among the several options of transitional justice presented in the Mapping Report, the Congolese government opted for the creation of specialized chambers within Congolese jurisdictions with the possibility of calling upon "ad litem" judges.

6.1 THE MAPPING REPORT AND INTERNATIONAL CRIMES IN THE DRC

The period covered by this report is probably one of the most tragic chapters in the recent history of the DRC.
The ultimate purpose of this inventory is to provide the Congolese authorities with the elements they need to help them decide on the best approach to adopt to achieve justice for the many victims and fight widespread impunity for these crimes.

6.1.1 Context of the Mapping Report

The discovery by the United Nations Mission in the Democratic Republic of the Congo (MONUC) of three mass graves was a painful reminder that past gross human rights violations committed in the Democratic Republic of the Congo (DRC) had remained largely un-investigated and that those responsible had not been held accountable. It was decided that a human rights team would be dispatched to the Democratic Republic of the Congo to conduct a mapping of the serious violations committed between 1993 and 2003.

6.1.2 Legal nature of Mapping Report

The Mapping Exercise was not aimed at establishing nor at trying to establish individual criminal responsibility of given actors, but rather to expose in a transparent way the seriousness of the violations committed, with the aim of encouraging an approach aimed at breaking the cycle of impunity and contributing to this.

6.1.3 What sense and what impact?

It is the first time the United Nations deeply analyze, compile and report on the crimes committed in the DRC. This proves that the efforts of the civil society were useful.

The Mapping Report almost forced the Congolese government to act and launch the process of creating specialized chambers in the DRC.

6.1.4 The judicial mechanisms provided for in the Mapping Report

The Mapping Report noted that the Government of the DRC must abide by its obligations under international law, namely to prosecute crimes under international law committed on its territory. It must also respond to the many Congolese victims who are seeking justice for the harm they have suffered. The decision as to which judicial mechanism would be most appropriate for dealing with these possible crimes is the exclusive responsibility of the Congolese Government, and this decision should take into account the demands of Congolese civil society.

There were tens of thousands of serious crimes and perpetrators, and hundreds of thousands of victims. In such cases, it is important to establish priorities when embarking on criminal prosecutions, and to concentrate efforts on "those who bear the greatest responsibility". However, prosecution of "those who bear the greatest responsibility" requires an independent justice system which is capable of resisting political and other types of intervention. This is definitely not the case for the current Congolese judicial system, whose independence is seriously undermined and under constant threat.

Based on these observations, the report concludes that a mixed judicial mechanism - made up of national and international personnel - would be the most appropriate way to provide justice for the victims of serious violations. Whether national or international, the exact form and function of such a jurisdiction should be decided upon in detail jointly by stakeholders involved, particularly concerning their participation in the process, in order to provide credibility and legitimacy for the adopted mechanism. In addition, before international resources and stakeholders are deployed, a rigorous planning process is required, as well a precise assessment of the material and human resources available within the national judicial system.

6.2 STUDY OF THE DRAFT LEGISLATION FOR THE CREATION, ORGANIZATION AND FUNCTIONING OF THE SPECIALIZED COURT IN DEMOCRATIC REPUBLIC OF THE CONGO

The Draft Legislation provides for the creation in the Democratic Republic of the Congo of a Specialized Court in charge of the repression of serious violations of international law.

The text was drafted by the "Commission permanente de réforme du droit congolais" and incorporates some of the comments made by NGOs in the common position they wrote at the workshop organized by Human Rights Watch on April 7th-8th, 2011.

The Draft Legislation is divided into six chapters and 74 articles:

- Creation, composition and organization of the Specialized Court;
- Sources of criminal legality and applicable legislation;
- Jurisdiction of the Court (ratione materiae, ratione temporis, ratione loci, ratione personae, and universal jurisdiction);
- Procedure before the Court;
- Cooperation with the Court;
- Final provisions.

It is preceded by a statement of reasons that explains the context of the government's initiative for the creation of the Specialized Court and describes the project.

- Title of the project: "Projet de loi organique portant création, organisation et fonctionnement d'une cour spécialisée" ("Draft legislation for the creation, organization and functioning of a Specialized Court")
- The Court shall have jurisdiction over crimes under international law

- The Specialized Court shall sit in Kinshasa and have jurisdiction over any crime committed in the DRC. It shall have a trial chamber and an appeal chamber. It shall be composed of Congolese and international members;
- Adequacy with the goals of the current program of judicial reform and integration within the new legislative framework.
- Jurisdiction ratione temporis since 1990;
- Foreign judges during the trial and appeal phases;
- Creation of a specialized unit for witnesses and victims and of a unit for investigation and prosecution;
- Creation of a trust fund for victims;
- Guaranteeing the rights of the defence.

Nevertheless, some grey areas and shortcomings remain in this text:
- Lack of consistency between the text of the "specialized hybrid court" and the "draft legislation of implementation of the Rome Statute of the International Criminal Court"
- It is not guaranteed that there will be any foreign staff within the Prosecutor's team
- The issue of this court's jurisdiction with respect to the members of the Armed Forces and the Police who are tried in military courts and tribunals under Article 156 of the Congolese Constitution
- The issue of death penalty

6.2.1 Creation, Composition and Organization of the Specialized Court

A Creation process and legal nature

Under Article 1 of the Specialized Court's draft and in accordance with Article 149 of the Constitution, a Specialized Court is created in the Democratic Republic of the Congo for the prosecution of crimes of genocide, crimes of war and crimes against humanity.

Its jurisdiction encompasses all the Congolese territory and its headquarters are established in Kinshasa.

For the sake of flexibility and proximity, the court has the possibility to sit at traveling courts.

In the case of the Democratic Republic of the Congo, the UN did not negotiate a bilateral agreement for the creation of a Specialized Court; it is a decision from the Congolese government in response to the Mapping Exercise Report of the UN.

In the DRC, we rely on the presence of international judges in this Specialized Court to assert its independence and compliance to international standards.

B Legal foundation of the Specialized Court

According to Human Rights Watch, creating a specialized jurisdiction would help to insulate the institution from perceived and actual potential political interference. In addition, creating a specialized jurisdiction with one registrar, president and prosecutor will help ensure consistent policies and approaches between the different chambers.

A clear definition of the legal basis for the establishment of the specialized chambers is important if their independence is to be guaranteed. The special nature of the jurisdiction is justified by the gravity and sensitivity of the crimes that would come under its jurisdiction.

6.2.2 Composition and organization of the Court

Under article 2 of the draft bill, the Court is made of one or several specialized trial chambers and one specialized appeal chamber.

The Court includes one first president, one or several presidents, judges and ad litem judges. The trial chamber sits with five members, among whom three ad litem judges with at least two of them being of a foreign nationality. Those foreign judges might be appointed to the Prosecutor's team (See Article 7), as well as for any other function within the Court (see Article 11). However, foreign judges will be a minority.

The question of the level of internationality is important because it gives us the opportunity of assessing whether mixed tribunals represent a new model of justice.

The draft bill on the Specialized Court considers the idea of including a military judge in the chamber each time a soldier or a policeman is being prosecuted for crimes within the jurisdiction of the Court. While we fear a restriction of the guarantees granted by the national legislation to soldiers that are tried, we also denounce the "militarization of justice".

6.2.3 Mandate and appointment of judges and organization of the Prosecutor's Office before the Court

The first president, presidents, judges and ad litem judges shall be appointed by the President of the Republic on a proposal of:

(a) the Conseil supérieur de la magistrature (Judicial Services Council) for judges;

(b) the National Council for judges from the Bar;

(c) the minister in charge of justice for judges and ad litem judges from other legal professions (Article 4 of the draft)

Congolese and foreign ad litem judges shall be appointed for a three-year term, renewable once.

An appointment process that guarantees the independence and best qualifications of these international staff (which should include experience in investigating and trying international crimes, knowledge of civil law and the French language and commitment to work with national colleagues to pass on their expertise) should also be devised.

Special prosecutors and general attorneys of the Specialized Court are all Congolese or foreign judges, appointed by the President of the Republic on a proposal of the Conseil supérieur de la magistrature (Judicial Services Council) subject to the opinion of the minister in charge of justice.

The control of Congolese authorities on the composition of the specialized chambers is heavily reinforced by the rules on selection and appointment of international staff.

Article 8 of the draft legislation seems to confuse duties that clearly fall within the remit of the Ministère Public (Prosecutor's Office) with those that ought to be overseen by the Registry. For example, the current version of article 12 of the draft legislation provides that the special investigative units, in addition to duties directly relating to investigations and preparing cases for trial, will be responsible for managing evidence and documents collected at the time of proceedings, in addition to protecting victims, witnesses, and judicial staff. It is particularly important to stress that witnesses for the prosecution and witnesses for the defense may benefit equally from protection.

For all the above reasons, these duties should be overseen by a neutral judicial body with the necessary resources: the registry.

6.3 SOURCES OF LEGALITY AND APPLICABLE LAW

The draft makes a clear distinction in the applicable law between the crimes that were committed before the ICC Rome Statute came into force and those that were committed after July 2002. In doing so, the draft differs from the previous version on specialized chambers which referred to the definitions provided by the Rome Statute for crimes committed before the ICC came into force. That is what infringed the principle of non-retroactivity. Indeed, pursuant to the general principle of non-retroactivity of criminal law, a distinction must be made between acts that were committed after the Rome Statute came into force and may be subject to the definitions and sentences set by the Rome Statute, and those that were committed before.

This law clearly establishes which conducts are prohibited so that anyone can adapt their behavior in good faith and with full knowledge. Article 22 is a reformulation of sexual crimes defined as crimes against humanity. If added to a definition from the Statute, it can be confusing; if it replaces sexual crimes by crimes against humanity, it is ambiguous since it mixes specific aspects of both crimes against humanity and crimes of genocide. It is then redundant and misleading. By trying and covering too many aspects, one ends up repeating oneself less clearly. This is a recurring problem affecting the principle of legality.

This is when the necessity of consistency between the draft bill on Specialized Court and the draft legislation of the implementation of the Rome Statute of the International Criminal Court shall be underlined, since both texts are part of the commitment to end impunity for serious crimes committed in the DRC. Both texts are extremely important and should be adopted by the Parliament. The draft legislation of the implementation of the Rome Statute includes significant provisions which do not exist in the text on the Specialized Court, for instance about judicial cooperation.

Unfortunately, the draft legislation for the implementation of the Rome Statute of the International Criminal Court is not included in the convening notice for the extraordinary session of the Parliament.

6.4 JURISDICTION OF THE SPECIALIZED COURT

6.4.1 Jurisdiction ratione materiae of the Specialized Court

Article 16 of the draft bill provides that the Specialized Court exercises its main jurisdiction over the crimes considered by the present law (war crimes, crimes against humanity and genocide). It should be noted that the jurisdiction and judicial organization recently adopted by the Congolese Parliament gives jurisdiction over crimes against humanity, war crimes and genocide to appeal courts. There is thus a need to make the legal framework for the repression of those crimes in DRC more consistent. The Specialized Court shall alone judge the seriousness of the facts constituting those crimes and reserves the right, in the event those facts appear to be small offences and the perpetrators are not among the most responsible, to transfer them to the ordinary relevant jurisdiction.

The definition of seriousness is ambiguous. Is it about the seriousness of the case or the seriousness of the fact? If the Court assesses the seriousness, then it is a condition of the admissibility of the prosecution. On the contrary, if the seriousness depends on the prosecution policy of the Prosecutor, then the judges do not have anything to do with it.

As for applicable penalties, the Rome Statute provides that life imprisonment is the biggest penalty when, in the DRC, the biggest penalty is the death penalty.

6.4.2 Jurisdiction ratione temporis

The government's draft legislation currently specifies that the specialized mixed court will have jurisdiction over the most serious international crimes committed since 1990. Such crimes are not subject to any statute of limitations.

6.4.3 Jurisdiction ratione loci and ratione personae of the Specialized Court in the DRC

The Court shall have jurisdiction over any crime committed on the territory of the DRC whether committed by Congolese nationals or foreign nationals.
Because of its special nature, the Court has jurisdiction over those crimes even when committed by members of the army or of the police.
Under the draft legislation, not only individuals but also legal persons will be subject to legal action under Congolese criminal law. Given the context in the DRC, it seems clear that this provision is aimed at private companies that have benefited from the exploitation of natural resources, or arms sales, as well as at peacekeeping forces some members of which may have committed serious crimes, such as rapes. It is crucial that justice be done for the grave crimes committed by these categories of actors in the DRC. However, this must not lead to undermining the principle of individual criminal responsibility. Indeed, it will be crucial to identify, within these legal persons, which individuals may have engaged in grave crimes that fall within the jurisdiction of the specialized chambers, as well as to specify the mode of perpetration and the degree of responsibility these individuals bear.

As it only tries individuals, as opposed to legal persons or governments, the ICC rejects immunity. Thus, the directors of big companies who have been involved together with political leaders or members of the army in the perpetration of crimes against humanity may thus be tried.

As for the responsibility of commanders, article 44 of the bill operates a distinction between the responsibility of commanders and that of non-military superiors and imposes on the formers the standard "should have known", as the ICC in the Bemba case applied it. Indeed, those are innovations of the Rome Statute, which, as such, will raise the issue of the legality of prosecutions

Article 48 also constitutes an innovation as it rejects amnesty for these crimes.

6.4.4 Universal jurisdiction

The goal of the universal jurisdiction principle is to fight impunity, especially in the cases where higher State officials have managed to escape justice.

6.5 THE APPLICABLE PROCEDURE BEFORE THE SPECIALIZED COURT IN THE DRC

The government launched a judicial reform for the Congolese rules of criminal procedure to meet international standards.

It provides for the rights of the accused, the rights of victims and witnesses, the protection the witnesses, the organization of the rights of the defence, etc. It also provides for testimonies and judicial remedies.

Only authorized lawyers will be allowed to plead before the Court, as it is the case in the Cour suprême de justice (Supreme Court of Justice).

Moreover, the presence of a lawyer at any stage of the procedure shall be compulsory.

6.5.1 Rights of the defence

The rights of the defence must include some guarantees, including the right to be assisted by a lawyer (a court-appointed lawyer if the accused party is indigent).

The provisions of the Rome Statute (articles 57, 66, and 67) and that of the bill for the creation of a Specialized Court (articles 53 to 56) have some similarities:
• To raise defence without disturbing public order;
• To be tried without undue delay;
• The disclosure to the defence of evidence which shows or tends to show the innocence of the accused or to mitigate the guilt of the accused;
• To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

6.5.2 Rights of victims and witnesses

Under article 58, the Court shall adopt any necessary measure to ensure the safety, physical and psychological well-being, dignity and respect of private lives of every witness and victim.

It is very important to guarantee the participation of victims before the Court, as it is where they will be able to ask for compensations.

The registry shall play a crucial role in protecting the rights of the victims and witnesses as well as the rights of the defence.

6.6 COOPERATION IS NECESSARY FOR THE EFFECTIVENESS OF THE COURT

The text specifies that the Government shall establish with the United Nations, States and other organizations and bilateral and multilateral partners a framework of cooperation to ensure the effectiveness of the Court.

However, it will be harder to convince States to cooperate with those jurisdictions, which will not have any obligation to collaborate, than if the Court was an international Court, independent from the Congolese system.

6.7 ADOPTION PROCESS OF THE BILL

The Senate examined the bill and decided to send it back to the Government, who will have to make decisions on:

- The immunity granted to some authorities, including members of the Parliament
- The status of judges being only granted to Congolese nationals
- The jurisdiction rationa personae of the Court over members of the army and of the police
- The risk of competing jurisdiction between the Specialized Court and the appeal court

For political reasons, the members of the Senate estimated that the creation of such a Court was not appropriate in the current context and advocated for the creation of an international criminal tribunal for the DRC.

It is now for the Government to amend its text to meet the expectations of the members of the Senate.

The bill is still under study at the lower chamber (Parliament).

6.8 SPECIALIZED COURT: ADVANTAGES, CHALLENGES AND CONDITIONS FOR A SUCCESSFUL COURT

At a seminar organized in Kinshasa in June 2005, judges, academics and representatives from civil society and public institutions adopted a declaration recommending the creation of special chambers within the Congolese courts.

The Congolese government submitted a bill for the creation of special chambers in the DRC. The project was amended by the "Commission permanente de réforme du droit congolais" that recommended to use the term "specialized chamber" for consistency with the Constitution (Article 149).

This option has the advantage of being able to be incorporated more readily into the efforts currently underway to reform and rehabilitate the judicial system being made by the Government with the support of the international community. It is in line with the principle that "It remains the rule that States have primary responsibility to exercise jurisdiction over serious crimes under international law."

6.8.1 Advantages

- The lower costs of special chambers compared with a purely international tribunal;

- With sufficient involvement of international actors in key posts, they would offer greater guarantees of independence and impartiality

- More than any other mechanism, they would help to build capacity amongst actors in the Congolese judicial system and could gradually transfer all their responsibilities to them to carry out investigations, prosecutions and trials;

- They would be in line with the current reforms, particularly the proposed bill on the integration of the Rome Statute into Congolese law;

- Their temporal jurisdiction could be longer, in fact open ended, in order to cover the crimes under international law committed to date.

6.8.2 Challenges

The lack of credibility of the national judicial system in the eyes of the Congolese people would probably affect these benches as well.
The chronic lack of capacity in the Congolese judicial system could endanger this new mechanism.

- Significant and consistent support from the international community would be essential for the success of such a mechanism, both in terms of the initial set-up and its ongoing operation;
- It would be more difficult to ensure that third-party States would cooperate with these new chambers, given that they would be under no general obligation to collaborate and would probably be more reticent

to cooperate with them than they would be towards an international body independent of the Congolese judicial system.

The creation of mixed special chambers offers a solution that is less costly and easier to implement in the short or medium term, to deal with the most serious violations of human rights and international humanitarian law committed on DRC territory between 1 March 1993 and 30 June 2003. The inclusion of this mechanism in the Congolese judicial system would have the advantage of being able to contribute directly to capacity building in that field.

6.8.3 Conditions for a successful Court

It is thus important to determine the financing method for those chambers. Will the potential support from the United Nations be taken from the ordinary budget of the United Nations (almost impossible as it is a Congolese court) or financed through voluntary contributions from the UN member states? A tribunal financed by voluntary contributions would not be sustainable.

If the funds were not sufficient, the risks in terms of credibility of the Court would be very high. Moreover, the Prosecutor of the Court may not be able to prosecute the perpetrators of every crime.

The question is: will the Prosecutor be able to issue indictment against the President or his entourage?

A consensus on the creation of the Court will be necessary for it to be able to try those responsible of the crimes. The debates within the Senate and the Parliament show that it is hard to reach the consensus.

7 General Conclusion

The report also brings up the option of the creation of a hybrid court that would be in charge of the prosecutions of violations. This proposal had the merit of launching a debate on which judicial system is the most appropriate for the prosecutions of such violations. Some advocated for a mixed system while others were in favor of an international hybrid system aside from the Congolese system.

In the months that followed the publication of the Report, both the civil society and the Congolese government said they were in favor of a Specialized Court. Not long after, the Congolese government submitted a bill to the Parliament. This bill gives the Court jurisdiction over international crimes committed in the Democratic Republic of the Congo since 1990.

However, even if the jurisdiction ratione temporis of the Court encroaches upon that of the ICC, most of the crimes the Court would have to investigate do not fall within the jurisdiction of the ICC.

In Sierra Leone, in Cambodia, in Kosovo, in Indonesia and in East Timor, the judicial process did not produce the expected results. This shows that the mechanism is not a perfect model of repression of serious crimes but an intermediary between international justice and national justice.

Some of these mixed tribunals have had mitigated results but it should not be forgotten that the model is new and it still must develop.

We analyzed the project of creation, organization and functioning of the Specialized Court in the DRC that was brought up after the publication of the Mapping Report.

This analysis showed that the project includes some good elements, including: jurisdiction ratione temporis over all crimes committed between 1990 and the transfer to ordinary jurisdictions, specialized chambers within the judicial system, first but non exclusive jurisdiction, guarantee of the involvement of international judges both during the trial phase and the appeal phase, special investigation teams, a trust fund for victims, universal jurisdiction, etc.

However, it raises some concerns, both legal and material: jurisdiction over members of armed forces, lack of harmonization between the text for the "Specialized Court" and the draft legislation of implementation of the Rome Statute of the ICC, immunities before the Court, status of international judges, question of the death penalty, lack of legal framework for the protection of witnesses and victims in the DRC, rights of the defence, the chronic lack of capacity of the judicial system as well as the funding of the specialized chambers – that is not mentioned in the draft legislation.

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