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From Yugoslavia to Sierra Leone: Advantages and Shortcomings of the Ad-hoc Tribunals and the Hybrid Courts

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Abstract

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In this minithesis, I compare the advantages of the hybrid courts with the international ad-hoc tribunals, arguing that the potential of the hybrid courts to work successfully is much greater than that of the ad-hoc tribunals. I present five case studies and provide an overview over the historical background as well as the legal framework for the respective courts. These case studies are the two international ad-hoc tribunals, the International Tribunal for the former Yugoslavia (ICTY) and the one for Rwanda (ICTR), and three hybrid court models, the Special Panels in East Timor, the Special Court in Sierra Leone and the Extraordinary Chambers in Cambodia.

I measure the ad-hoc tribunals against their goals in order to evaluate their success and to compare them with the work of the hybrid courts.

My findings are that the international ad-hoc tribunals failed to reach their goals of ensuring prosecution and promoting reconciliation (both ICTY and ICTR) and establishing regional stability (ICTR only). I discuss the term "reconciliation" and develop a five-tier model in order to measure whether and to what extent reconciliation has been reached. This model includes a sociological, political, economic and demographic approach as well as an assessment of how the respective societies reckon with their past. I apply this model to the work of the ICTY and the ICTR and state that they were not successful in promoting reconciliation.

Furthermore, I describe the contributions of the ICTY and the ICTR to the field of international criminal law and show some legal problems regarding the work of the two tribunals.

Regarding the three hybrid courts, of which two (East Timor and Sierra Leone) are currently operating and one (Cambodia) is yet to be established, I analyze their potential and the problematic aspects.

Examining the potential, I enumerate the geographical proximity of the hybrid court, its possibility to contribute to the process of capacity-building for both legal and administrative staff and the chance of increasing the acceptance of international criminal law norms and human rights as well as the trust in the rule of law within the local population.

Regarding problematic aspects, I discuss the international perception and legitimacy of the hybrid courts as well as their possibility of contributing to international criminal law. I show the problematic funding of the hybrid courts, the struggle to win over the local population, as well as the need for support from both the UN and the national government. I look at the role that hybrid courts can play in future, considering the establishment of the International Criminal Court and how the two bodies could cooperate.

I describe the concepts of retributive and restorative justice with the model of a truth commission and how a society which has to deal with massive human rights violations can benefit from the ideas of restorative justice and the combined use of a hybrid court and a truth commission. I conclude the minithesis with an outlook of when and how hybrid courts are a suitable measure for a society to reckon with its past.

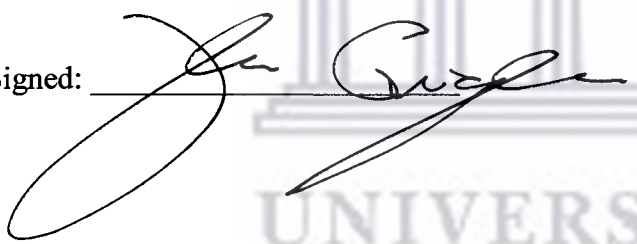
November 2004

Declaration

I declare that *From Yugoslavia to Sierra Leone: Advantages and Shortcomings of the Ad-hoc Tribunals and the Hybrid Courts* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Jan Geigenmüller

November 2004

Signed: 

Contents

Introduction

In the 20th century, the world faced horrific crimes that became more and more to be seen as crimes against the international community. After World War II, some of the main perpetrators were sentenced at the Nürnberg Trials, but soon after these trials the beginning of the Cold War stalled the prosecution of many other dictators and their henchmen, as many of them enjoyed the protection of either superpower.

In the era of the stalemate between the Soviet Union and the USA, not much progress was made in the field of international criminal law, although there were some 250 conflicts in various regions of the world.[1] But after the end of the Cold War in the 1990s, the situation of international human rights improved by a quantum leap with the instalment of the ad-hoc tribunals for Yugoslavia and for Rwanda. Since the UN Security council was not stalled by the face-off between the two superpowers anymore, the international community responded to the horrible crimes committed in Yugoslavia and Rwanda with the establishment of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

The tribunals' main goal is to ensure prosecution of the perpetrators who seriously violated international human rights,[2] but for example the ICTR also focuses on promoting reconciliation and regional stability.[3]

The tribunals have to work under different circumstances: While the new government of Rwanda originally asked for the instalment of an international tribunal after the genocide of 1994[4], the Yugoslav and then Serbian government was very unwilling to work with the ICTY – especially when asked to extradite Serbian nationals or Bosnian Serbs.[5]

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[1] M. Cherif Bassouni, Preface, in: Geert-Jan Alexander Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (2003), Ardsley: Transnational Publishers, p. XXV.
[2] Cf. ICTR website, http://www.ictr.org/default.htm, accessed on 21/09/2004, and ICTY website, http://www.un.org/icty/glance/index.htm, accessed on 21/09/2004.
[3] ICTR website, http://www.ictr.org/default.htm, accessed on 21/09/2004.
[4] Yacob Haile-Mariam, The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court, in: *Hastings International and Comparative Law Review* 22, 4 (Summer 1999), p. 667, p. 696.
[5] Human Rights Watch 1998 report on the Federal Republic of Yugoslavia, on website http://www.hrw.org/worldreport/Helsinki-12.htm#P595_146794, accessed on 21/09/2004.

The ICTY and the ICTR, which are both staffed by international judges only and are located outside the country in which the crimes were committed, have been criticised for slow procedure, for spending too much money, and for not being locally rooted.

As criticism of the proceedings of the tribunals grew, a new model to deal with grave violations of international human rights was introduced: The mixed or hybrid courts.
This model includes both national and international elements in the organization, structure and functioning of the judicial system.[6] Through the employment of judges with the nationality of the country where the crimes were committed, this model might be able to increase the acceptance of the judicial process with the local population since local expertise is included.

Furthermore, hybrid courts might be able to provide legal training as well as overall job opportunities that are desperately needed in countries often devastated by long and brutal internal or cross-border conflicts.

I will try to assess the potential advantages of the hybrid court system in comparison to the model of the ad-hoc tribunals, while not denying its shortcomings and potential trap-falls. The fact that the ad-hoc tribunals are much longer in operation than the hybrid courts has to be taken into account. The ad-hoc tribunals have been much more closely examined and evaluated than the hybrid courts, since for example the Special War Crimes Court in Sierra Leone has only gone into operation in March 2004,[7] while the ICTY for Yugoslavia has been established in 1993.[8]

One way to compare the two models is to examine different country studies in which one of the models has been applied. Two country studies for the model of the ad-hoc tribunal, Yugoslavia and Rwanda, will be examined.

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[6] Kai Ambos/Mohamed Othman, Introduction, in: Kai Ambos, Mohamed Othman (eds.), *New Approaches in International Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (2003), Freiburg im Breisgau: Edition Iuscrim, p.4.
[7] Article on CNN website, "S. Leone war crimes court opens", dated 10/03/2004, http://www.cnn.com/2004/WORLD/africa/03/10/sleone.tribunal/index.html, accessed on 22/07/2004.
[8] ICTY website, http://www.un.org/icty/glance/index.htm, accessed on 23/07/2004.

For the other model, the hybrid courts, two cases where the model has gone into operation will be evaluated: The Special Panels in East Timor[9] and the War Crimes Court in Sierra Leone.[10]

Finally, a country study where the hybrid court model has been the subject of negotiations for a long time but has not yet been established will be assessed: Cambodia which faces the question of how to deal with the crimes of the Khmer Rouge.[11]

In order to be able to conduct the country studies, it will be necessary to give a brief historical background of each of the countries concerned. The historical context is especially important in order to be able to assess the impact of the respective model on the political, sociological, economical, judicial and psychological situation (to name some of the relevant fields) of the society in which grave violations of human rights have been committed.

By taking into account the historical background, it will be easier to establish the success of the various tribunals in the different countries. Nonetheless, the examination of the different models in the country studies, which is a central part of the paper, will be difficult to undertake. How can the success of the tribunals and the hybrid courts be measured, since they are working with volatile transitional societies and are still in operation, while their full success – or their failure - may only be visible in the years to come?

One possible method is to measure the tribunals and the courts against their goals, which have for example been stated in the statutes of the ad-hoc tribunals.[12] But by doing this, new questions may arise while old ones might be answered. For example, all of the tribunals and hybrid courts are established to prosecute criminal offenders, but some have others goals as well. The goals of the ICTR include promoting reconciliation[13] and to ensuring regional stability.[14]

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[9] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 249.
[10] John Cerone, The Special Court for Sierra Leone: Establishing a new Approach to International Criminal Justice, in: *ILSA Journal of International and Comparative Law* 8 (2002), p.379, p. 383.
[11] Theresa Klosterman, The Feasibility and Propriety of a Truth Commission in Cambodia: Too little? Too late?, in: *Arizona Journal of International and Comparative Law* 15 (1998), p. 833, p. 846.
[12] ICTR website, http://www.ictr.org/default.htm, accessed on 21/09/2004, and ICTY website, http://www.un.org/icty/glance/index.htm, accessed on 21/09/2004.
[13] Website of the ICTR, http://www.ictr.org/default.htm, accessed on 21/09/2004.

These goals might be difficult to examine, since the extent to which a country has been reconciled is hard to put down in numbers, not to speak of the various and differing definitions of the word "reconciliation".[15]

When measuring and examining the success, one might encounter various difficulties, especially when it comes to goals such as reconciliation. How does one measure reconciliation when even the definition of the term to be examined differs enormously from author to author? I will try to show instruments to measure the success, without denying that these instruments are by no means perfect and remain open for discussion and improvement.

The different institutions do not operate in a vacuum but in a context where their goals are not reached through a single cause such as a tribunal or a hybrid court, but through a variety of factors and circumstances.[16] It may not be easy to establish whether a tribunal or a hybrid court was successful in reaching its goals and what amount of success or failure may be due to circumstances that are not within the reach of the court, such as a destabilizing war in a neighbouring country.

For example, a core goal of all of the examined institutions is to prosecute the perpetrators who have committed grave violations of international human rights. One obvious indicator to establish whether a court or tribunal was successful would be to examine how many individuals were indicted and how many of these were tried over a set period of time. But while one court may operate in a favourable setting where the accused are readily brought to court, another one – such as the ICTY – may have difficulties in arresting the alleged perpetrators because they are protected by the government of their own or a foreign country. This is equally valid for the hybrid courts, as the case of the former Liberian dictator Charles Taylor shows. The warlord has enjoyed the hospitality of the Nigerian government since he fled his country, although the War Crimes Court in Sierra Leone has repeatedly asked the Nigerian government for his extradition.[17]

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[14] UN Security resolution 955 of 1994, on ICTR website, http://www.ictr.org/ENGLISH/Resolutions/955e.htm, accessed on 21/09/2004.
[15] Erin Daly, Transformative Justice: Charting a Path to Reconciliation, in: *International Legal Perspective* 12 (2001/2002), p. 73, p. 86.
[16] Erin Daly, Transformative Justice: Charting a Path to Reconciliation, in: *International Legal Perspective* 12 (2001/2002), p. 73, p. 77.
[17] Article on CNN website, "S. Leone War Crime Court opens", dated 10/03/2004, on website http://www.cnn.com/2004/WORLD/africa/03/10/sleone.tribunal/index.html, accessed on 21/09/2004.

Recently, the idea and models of restorative justice have had more and more proponents, especially since South Africa installed its Truth and Reconciliation Commission. Restorative justice focuses on promoting reconciliation between victim and perpetrator rather than prosecution of the perpetrator by the state, which often leaves the victim behind to deal with his or her experiences alone.[18]

Ad-hoc tribunals and hybrid courts, on the other hand, are instruments of retributive justice. In the system of retributive justice, which is the main idea in criminal law in most countries, one of the main goals is deterrence. But in transitional societies, criminal prosecution might not be able to fulfil the goal of deterrence[19] for reasons that will be discussed below.

Since the establishment of the ICTY did not deter the perpetrators in Rwanda, Sierra Leone, Kosovo and East Timor from committing the same crimes as in Yugoslavia again and again, the argument that it is more important to promote reconciliation than to prosecute in order to aid the process of democratization gained more weight than before in the eyes of many.

Therefore, the prospects of combining elements of retributive justice – such as a hybrid court or an ad-hoc tribunal – with elements of restorative justice such as a truth commission will be explored in this paper. The possibility of combining elements of both schools might lead to better results in form of stable, democratic societies than the utilization of elements of only restorative or retributive justice.

Another field that will be examined is the development of international criminal law in such fields as violence against women,[20] crimes against humanity[21] and genocide[22] through the rulings of the two ad-hoc tribunals for Yugoslavia and Rwanda.

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[18] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p.1221, p. 1255.
[19] Erin Daly, Transformative Justice: Charting a Path to Reconciliation, in: *International Legal Perspective* 12 (2001/2002), p. 73, p. 106.
[20] Cf. Alexandra A. Miller, From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to include Rape, in: *Penn State Law Review* 108 (2003), p. 349 – 373.
[21] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (2003), Ardsley/USA: Transnational Publishers, p. 32.
[22] Arguing against the ICTR's findings in *Prosecutor v. Akayesu* is William A. Schabas, Groups protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda, in: *ILSA Journal of International and Comparative Law* 6 (2000), p. 375, p. 378.

The question whether hybrid courts are able to contribute similarly to international criminal law remains to be seen in the future. Nonetheless, by showing what important improvements have been made through the rulings of the ad-hoc tribunals, the vital role such rulings played and continue to play in the long dormant field of international criminal law can be understood.

As has already been said, neither the ad-hoc tribunals nor the hybrid courts operate in a vacuum, but in a complex environment where legal questions sometimes are the smallest problems that the courts have to deal with. But from a legal point of view, there is one important factor that cannot be left out when examining the future role of the ad-hoc tribunals and the hybrid courts: The International Criminal Court (ICC) in The Hague. After coming into operation on July 1st 2002,[23] the court has taken up its work and is presently preparing its first hearings.[24]

This has changed the prospects of future perpetrators to escape prosecution dramatically. Although not signed by all nations of the world -one of the most prominent persistent objectors to the authority of the ICC are the United States under its present government[25] - the ICC statute has reduced the chance of dictators and warlords all around the world to get away with their crimes as happened so often in the past century, when enough states were willing to provide a safe haven for dictators and their entourage.

The fully operational ICC poses the question whether – after a transitional period – there will be a need for ad-hoc tribunals or hybrid courts. Why should money be spent on temporary courts, which need time to be set up and may not function well because of domestic problems, insufficient financial or political support or the judges' inadequate legal expertise? On the other hand, the ICC might not be designed for nor capable of dealing with thousands of alleged perpetrators, which would be the case if grave violations of international human rights in present conflicts such as the war in the Democratic Republic of Congo[26] or in southern Sudan[27] were prosecuted in a courtroom.

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[23] International Criminal Court website, http://www.icc-cpi.int/ataglance/whatistheicc/history.html, accessed on 23/07/2004.
[24] Website of the International Criminal Court, http://www.icc-cpi.int/newspoint/latest.html, accessed on 21/09/2004.
[25] BBC, article on website, dated 16/07/2004, "Court boycott hits US aid budget", on website http://news.bbc.co.uk/1/hi/world/americas/3899825.stm, accessed on 21/09/2004.
[26] Article on CNN website, "Annan: More troops needed for DRC", dated 16/08//2004, on website http://www.cnn.com/2004/WORLD/africa/08/16/un.congo/index.html , accessed on 21/09/2004.
[27] Article on CNN website, "UN says Darfur clashes hinder access to refugees, dated 20/09/2004, on website http://www.cnn.com/2004/WORLD/africa/09/20/sudan.darfur.reut/index.html, accessed on 21/09/2004.

Hopefully, it will be possible to evaluate whether the relatively new model of the hybrid court is better suited than the much criticized model of the ad-hoc tribunal to deal with future serious violations of international criminal law. Although some questions may remain unanswered and there may be room for improvement when measuring the success of the different models, one certainty unfortunately remains: It will be necessary in the future to deal with grave violations of international human rights. By examining the alternatives, I will try to develop a model that might be able to contribute to the prevention of serious human rights violations in future.

Chapter 1: The Ad-hoc Tribunals

In this chapter, the historical background, the basic legal framework and the actual work of the ad-hoc tribunals will be described, while the same will be done for the hybrid courts in chapter number two.

1.1 The Historical Background

1.1.1 The International Criminal Tribunal for (the former) Yugoslavia (ICTY)

After the breakdown of the Soviet Union in 1991, its former satellites and allies were freed from ideological pressure from Moscow, but also left without economic and military support. In Yugoslavia which had pursued independent politics since the 1960s, this newly acquired freedom led to the disclosure of strong national sentiments that had been carefully suppressed under the decade-long rule of Jozip Tito.[28]

Often, these national sentiments were incited and increased by members of the former communist parties who saw the sign of the times and therefore quickly learned to play a nationalist tune. In countries with multiple ethnicities, such as Yugoslavia, this proved to be fatal. In the Yugoslav republic of Serbia, Slobodan Milosevic, a former communist party member who had started his new nationalist career in the late 1980s, led his country into brutal wars against the dissident Yugoslav republics of Slovenia, Croatia and Bosnia-Herzegovina.[29]

From 1990 until the Peace Agreements of Dayton[30] in 1995, hundreds of thousands of people were killed, raped, tortured, held in concentration camps or forcibly driven from their homeland, a procedure that came to be known as "ethnic cleansing".[31] While most of the

[28] Article on BBC website, "Country Profile: Serbia and Montenegro", dated 14/07/2004, http://news.bbc.co.uk/1/hi/world/europe/country_profiles/1039269.stm, accessed on 21/09/2004.
[29] Article on BBC website, "Country Profile: Serbia and Montenegro", dated 14/07/2004, http://news.bbc.co.uk/1/hi/world/europe/country_profiles/1039269.stm, accessed on 21/09/2004.
[30] Article on BBC website, "Over a million Bosnians back home", dated 21/09/2004, http://news.bbc.co.uk/1/hi/world/europe/3675968.stm, accessed on 21/09/2004.
[31] Article on BBC website, "Kosovo clashes ethnic cleansing", dated 20/03/2004, on website http://news.bbc.co.uk/2/hi/europe/3551571.stm, accessed on 21/09/2004.

victims were Croatians or especially Bosnian Muslims, Serbians also had to endure crimes committed by Croatians or Bosnian Croats or Muslims.[32]

The international community has long refrained from actively preventing the massive human rights violations in Yugoslavia and only issued toothless protests. One of the worst tragedies of this conflict was the fall the Muslim enclave of Srebrenica, where UN peace-enforcing troops did nothing to prevent the murder of 7000 Bosnian Muslims by Bosnian-Serb militias.[33]

Facing mounting pressure by the public, the UN Security Council established the International Criminal Tribunal for Yugoslavia with Security Council Resolution 827 in 1993 in order to prosecute the massive human rights violations committed during the conflict.[34]

After wreaking havoc in Slovenia, Croatia and the worst in Bosnia-Herzegovina, Slobodan Milosevic went against the Albanian population in Serbian province of Kosovo, which led to massive bombings by NATO forces in 1998.[35] Milosevic managed to hold on to power until May 2000. The new Serbian government was much more cooperative in dealing with the ICTY. In June 2001, the Serb authorities surrendered him to the International Criminal Tribunal for the former Yugoslavia.[36] Nonetheless, such key figures as the former President of the Republika Srpska (the Serbian part of Bosnia-Herzegovina) Radovan Karadzic and his military commander Goran Mladic still seem to be hiding in Serbia, enjoying protection by at least parts of the authorities.[37]

Croatia – although progress has been made in 2004[38] - and especially the Croat part of Bosnia-Herzegovina as well as the Bosnian Muslims were not open to prosecute crimes committed by their combatants, since particularly the Bosnian Muslims saw themselves as

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[32] Article on BBC website, "Timeline: Bosnia-Herzegovina", dated 23/07/2004, http://news.bbc.co.uk/1/hi/world/europe/country_profiles/1066981.stm, accessed on 21/09/2004.
[33] Article on BBC website, "Srebrenica Timeline", dated 20/02/2003, http://news.bbc.co.uk/1/hi/world/europe/675945.stm, accessed on 21/09/2004.
[34] ICTY website, http://www.un.org/icty/glance/index.htm, accessed on 28/07/2004.
[35] Article on CNN website, "NATO rushes troops to Kosovo", dated 18/03/2004, http://www.cnn.com/2004/WORLD/europe/03/18/kosovo.violence/index.html, accessed on 10/09/2004.
[36] Claire De Than/Edwin Shorts, *International Criminal Law and Human Rights* (2003), London: Sweet and Maxwell, p. 289.
[37] Article on CNN website, "Karadzic fans taunt NATO", dated 14/01/2004, http://www.cnn.com/2004/WORLD/europe/01/14/bosnia.karadzic/index.html, accessed on 23/08/2004.
[38] Amnesty 2004 report on Croatia, on website http://web.amnesty.org/report2004/hrv-summary-eng, accessed on 21/09/2004.

victims and not as perpetrators in the conflict.[39] This will be described in more detail in chapter 3 when examining the success of the ICTY.

1.1.2 The International Criminal Tribunal for Rwanda (ICTR)

Rwanda, a former Belgian colony in the Great Lakes area of Central Africa, has experienced tensions between the Hutu and the Tutsi groups ever since gaining independence in 1959.[40] Tensions between the two population groups, which lived side by side with intermarriage common between the two groups in the small hilly country of about eight million inhabitants prior to 1994,[41] were at least increased, if often not created by the Belgian colonial power, which favoured the Tutsi group over the Hutu group – partly for pseudo-scientific reasons: The Tutsi were supposed to be more closely related to the Europeans according to diffuse racist theories and thus more suited for ruling than the Hutus.[42]

Shortly before granting independence to Rwanda, the Belgians made a 180-degree turn in their politics and installed Rwandan Hutus in power, which left the country in turmoil and led to pogroms against the Tutsis, especially in 1959 and 1973.[43] Tens of thousands of Tutsis left Rwanda for neighbouring countries such as Uganda.[44]

In the beginning of the 1990s, a particularly extremist Hutu regime came to power, and tensions rose. After an invasion by a Tutsi militia called Rwandan Patriotic Front (RPF) from neighbouring Uganda, efforts for peace talks were ultimately shattered when unknown attackers shot down the plane of Hutu president Habyarimana on April 6, 1994.[45]

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[39] Amnesty 2004 report on Bosnia Herzegovina, on website http://web.amnesty.org/report2004/bih-summary-eng, accessed on 21/09/2004.
[40] Article on BBC website, "Timeline: Rwanda", dated 20/07/2004, http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1070265.stm, accessed on 21/09/2004.
[41] Paul Magnarella, Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases, in: *Florida Journal of International Law* 11 (1997), p. 517, p. 519.
[42] Human Rights Watch publication, "Leave none to tell the story", on HRW website: http://hrw.org/reports/1999/rwanda/Geno1-3-09.htm#P196_82927, accessed on 21/09/2004.
[43] Human Rights Watch publication, "Leave none to tell the story", on HRW website: http://hrw.org/reports/1999/rwanda/Geno1-3-09.htm#P196_82927, accessed on 21/09/2004.
[44] Article on BBC website, "Timeline: Rwanda", dated 20/07/2004, http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1070265.stm, accessed on 21/09/2004.
[45] A French report (dated January 30, 2004) claims that the Tutsi-dominated RPF under its leader Paul Kagame was responsible for the assassination: *LeMonde,* article on website, "L'enquête sur l'attentat qui fit basculer le Rwanda dans le genocide", dated 10/03/04, http://www.lemonde.fr , accessed on 15/08/2004.

Immediately, mass killings of Tutsis and moderate Hutus followed, apparently well planned beforehand. Between 500.000 and one million people were killed in a period of little over three months, often hacked to death by their neighbours.[46]

Despite being heavily outnumbered, the well – organized Tutsi-dominated RPF managed to defeat the troops of the Hutu-dominated old regime and drive the organizers of the genocide with its Interahamwe militia out of the country in mid-July 1994.[47]

Again, the UN did nothing to stop the genocide until it was too late; to the contrary, the number of UN peacekeepers in Rwanda was drastically decreased after the murder of ten Belgian members of the force in the first days of the genocide, while the remaining rest was ill-equipped and had orders not to intervene in the massacres.[48]

Furthermore, the UN established refugee camps in the neighbouring Zaire – now Democratic Republic of Congo (DRC) – for the Hutus leaving Rwanda in panic while the Tutsi-dominated RPF was establishing control over large parts of the country. Arriving with these refugees and often forcing them to leave Rwanda, the defeated Rwandan army and its paramilitary allies quickly took over the refugee camps,[49] creating a power base that has been destabilizing the region until today.[50]

Rwanda today is different from Yugoslavia, where "ethnic cleansing" has been committed successfully in many parts of the region, be it Bosnian Muslims, Croats, Albanians or Serbs that were forced to leave their homes or even killed. In Rwanda, the former oppressor group – the Hutus - did not succeed in "cleansing" its society of the presence of the victim group. Drumbl calls this situation a "dualist postgenocidal society",[51] opposed to the homogenous

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The black box of the plane was discovered in UN custody ten years after the genocide of 1994 – Article on CNN website, "UN discovers foul-up in Rwandan probe", dated 11/03/2004, http://www.cnn.com/2004/WORLD/africa/03/11/un.rwanda.probe.ap, accessed on 21/08/2004.

[46] Philipp Gourevitch, *We wish to inform you that tomorrow we will be killed with our families* (2000), London: Macmillan, p. 39.

[47] William A. Schabas, Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems, in: *Criminal Law Forum* 7 (1996), p. 523, p. 525.

[48] Article on BBC website, "Rwanda remembers Genocide Victims", dated 07/04/2004, http://news.bbc.co.uk/1/hi/world/africa/3606487.stm, accessed on 21/09/2004.

[49] William A. Schabas, Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems, in: *Criminal Law Forum* 7 (1996), p. 523, p. 525.

[50] Article on CNN website, "Tensions build between Rwanda, DRC", dated 20/06/2004, http://edition.cnn.com/2004/WORLD/africa/06/20/congo.rwanda.tension/index.html, accessed on 27/10/2004.

[51] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p. 1221, p. 1233.

postgenocidal society in which the perpetrators were successful.[52]

In Rwanda, the perpetrators were not successful, and the country is one of the rare examples where the targeted minority group managed to take over power without pursuing the goal of splitting geographically from the majority. But the situation remains unstable, and refugees coming back to Rwanda find their homes occupied by people who claim it to be their land. Hutus and Tutsi do not trust each other, and the Tutsi-dominated government was and frequently is accused of severe human rights violations.[53]

1.2 The Legal Framework for the Ad-hoc Tribunals

The charter of the United Nations does not specifically call for establishing international criminal tribunals in order to prosecute serious violations of international human rights.

However, the UN Security Council is given wide powers under Art. 29 UN Charter according to which it can establish subsidiary organs necessary for the performance of its functions.[54]

As the UN Security Council is supposed to ensure international peace and security, it is assumed that under Art 29 UN charter the Security Council can create a criminal tribunal to prosecute individuals who pose a threat to peace and security in violation of international law under Chapter VII UN charter.[55]

The UN Security Council established the ICTY with Security Council Resolution 827 in 1993[56] and the ICTR with Security Council Resolution 955 in November 1994.[57]

This reliance on the UN charter (especially Chapter VII) to create the statutes of the ad-hoc tribunals is very important, because the powers of the ICTY and the ICTR are based upon the broad authority granted to the Security Council. This leads to the conclusion that under international law, all UN members have to follow the orders of the ad-hoc tribunals –

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[52] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p. 1221, p. 1237.
[53] Gerard Prunier, *The Rwandan Crisis – History of a Genocide* (2002), London: C. Hurst, p. 382.
[54] Art. 29 UN Charter; Claire de Than/ Edwin Shorts, *International Criminal Law and Human Rights* (2003), London: Sweet & Maxwell, p.279.
[55] Claire de Than/ Edwin Shorts, *International Criminal Law and Human Rights* (2003), London: Sweet & Maxwell, p.279.
[56] ICTY website, http://www.un.org/icty/glance/index.htm, accessed on 28/07/2004.

theoretically.[58] But as the cases of the alleged Serbian war criminals Mladic and Karadzic show, the ad-hoc tribunals themselves have little to no means to force UN member nations to obey their orders. It has been reported repeatedly that both are moving freely in Serbia and enjoy the protection of Serbian officials, although the ICTY has issued an arrest warrant for them (and for others).[59]

1.2.1 The Statute of the International Criminal Tribunal for (the former) Yugoslavia

The International Criminal Tribunal for (the former) Yugoslavia, seated in The Hague, has the power to prosecute individuals for a range of crimes, if the perpetrators have committed the crimes in the territory of the former Yugoslavia after January 1st, 1991.[60]

The ICTY has three trial chambers (composed of three judges each) and the Appeals Chambers (composed of five judges), while no two judges may be of the same nationality.[61]

Firstly, war crimes, consisting of grave breaches of the Geneva conventions of 1949 against protected persons and property, violations of the laws or customs of war can be prosecuted by the ICTY.[62]

Secondly, the crime of genocide is included in the group of crimes that are to be dealt with by the tribunal.[63]

Thirdly, crimes against humanity, including murder, enslavement, deportation, and any other inhuman acts against any civilian population as well as persecutions on political, racial or religious grounds are within the jurisdiction of the tribunal.[64]

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[57] ICTR Website, http://www.ictr.org/ENGLISH/geninfo/intro.htm, accessed on 28/07/2004.
[58] David Tolbert, The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, in: *Fletcher Forum of World Affairs* 26 (Summer/Fall 2002), p. 7, p. 9.
[59] Article on BBC website, "At a glance: Hague tribunal", dated 05/07/2004, http://news.bbc.co.uk/1/hi/world/europe/1418304.stm, accessed on 12/10/2004.
[60] ICTY website, http://www.un.org/icty/glance/index.htm, accessed on 28/07/2004.
[61] Sanja Kutnjak Ivkovic, Justice by the International Criminal Tribunal for the former Yugoslavia, in: *Stanford Journal of International Law* 37 (Summer 2001), p. 255, p. 260.
[62] Article 2, 3 of the Statute for the International Criminal Tribunal for the former Yugoslavia (SYIT). Cf. ICTY website, http://www.un.org/icty/legaldoc/index.htm, accessed on 28/07/2004.
[63] Article 4 SYIT.
[64] Article 5 SYIT.

It is noteworthy that the statute does not set a ratio tempore, meaning that the ICTY is able to prosecute the above mentioned crimes even if they are committed today – as long if they are committed in the territory of the former Republic of Yugoslavia. The international criminal tribunal and the national courts of the different states in the territory of the former Yugoslavia have concurrent jurisdiction to prosecute alleged perpetrators, but the ICTY can request a national court to defer the case to its jurisdiction.[65]

The goals of the ICTY as stated on the tribunal's website are to bring to justice the persons responsible for serious violations of international humanitarian law, to render justice to the victims, to deter further crimes and to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia.[66]

1.2.2 The Statute of the International Criminal Tribunal for Rwanda

The ICTR is seated in Arusha, Tanzania. 14 independent judges (three judges per trial chamber and five judges in the appeals chamber) are elected by the United Nations General Assembly.[67] The Appeals Chamber is seated in The Hague.[68]

Although both tribunals were installed by the Security Council in the 1990s after the international community realized that Yugoslavia and Rwanda, respectively, were unwilling or unable to prosecute the crimes committed on their territory themselves, the statutes for the ICTY and the ICTR differ in some important aspects.

While the ICTR can prosecute individuals who have allegedly committed crimes in neighbouring countries of Rwanda and/or in Rwanda itself, its statute sets a ratio tempore and limits the prosecutional powers of the ICTR to the time between January 1st and December 31st 1994.[69] The jurisdiction of the ICTY, on the other hand, is limited ratio loci to the

[65] Mark Drumbl, Looking up, down and across: The ICTY's place in the international legal Order, in: *New England Law Review* 37 (2003), p. 1037, p. 1040. See also Art. 9 (2) of the Statute of the ICTY (SITY), on website: http://www.un.org/icty/legaldoc/index.htm, accessed on 28/07/2004.
[66] Cf. ICTY website, http://www.un.org/icty/glance/index.html, accessed on 28/07/2004.
[67] Articles 10-12 of the Rwandan Statute.
[68] Claire de Than/Edwin Shorts, *International Criminal Law and Human Rights* (2003), London: Sweet and Maxwell, p. 295.
[69] Article 1 of the Statute of the ICTR (in the following: The Rwandan Statute)

territory of former Yugoslavia, but concerning the ratio tempore the ICTY can prosecute crimes committed after January 1st, 1991 until today.[70]

Like the ICTY, the ICTR has concurrent jurisdiction with the national courts, but can exercise its primacy when necessary.[71] The statute of the ICTR obliges the tribunal to prosecute the same crimes as the ICTY: Genocide,[72] crimes against humanity[73] and war crimes.[74]

The powers of the ICTR to prosecute crimes against humanity differ from the Statute for the ICTY (SYIT) in three aspects: The crimes against humanity mentioned in Article 3 of the Rwandan statute (murder, extermination, torture etc.) must be committed as part of a widespread or systematic attack,[75] an expression which is not included in the SYIT.

Furthermore, the Rwandan Statue requires that crimes against humanity must be committed against any civilian population on "national, political, ethnic, racial or religious grounds."[76] a restriction that does not apply for the ICTY. And finally, the SYIT states in Article 5 that crimes against humanity shall be punishable "whether international or internal in character",[77] while such a definition was not included in the Rwandan statute.

1.2.3 Legal Problems regarding the Statutes

Regarding both tribunals, the ICTY and the ICTR, it was argued that the statutes violated the principle of nulla poene sine lege. Since this could be a major problem for all ad-hoc tribunals as well as hybrid courts, the problematic points will be shortly highlighted.

1.2.3.1 The ICTY Statute and Legal Problems

The defendants in the ICTY cannot raise a strong objection that the SYIT violates the principle of nulla poene sine lege, for the simple reason that the SYIT does not create crimes

[70] Article 1 SYIT.
[71] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (2003), Ardsley/USA: Transnational Publishers, p. 6; cf. Articles 8, 9 of the Rwandan Statute.
[72] Article 2 of the Rwandan Statute.
[73] Article 3 of the Rwandan Statute.
[74] Article 4 of the Rwandan Statute.
[75] Article 3 of the Rwandan Statute.
[76] Article 3 of the Rwandan Statute.
[77] Article 5 SYIT.

but holds an enumeration of crimes that already existed in international conventional and customary laws.[78] The conventions and customs were in use before the conflict in Yugoslavia broke out in the early 1990s. Furthermore, former Yugoslavia ratified the conventions, incorporated them into its national Criminal Code and was not a persistent objector to the relevant international customary laws.[79]

At the beginning of the operation of the ICTY, it was discussed whether the Geneva Conventions for the Protection of War Victims were applicable to the conflict in the former Yugoslavia because for the applicability of the Geneva conventions the conflict had to be an international and not internal one. The Trial Chamber of the ICTR found (in the case *Prosecutor vs. Tadic*) that grave breaches of the Geneva Conventions and thus prosecution under Article 2 of the ICTY statute are not limited to international armed conflict but include internal armed conflicts as well.[80] The Appeals Chamber denied this view of the Trial chamber and argued that the victims of Tadic were of the same nationality as Tadic and thus he was not taking part in an international armed conflict.[81] But the Appeals Chamber declined to determine whether the conflict in Yugoslavia was an international or internal one and concluded that in the case of the conflict in Bosnia – Herzegovina, it was of both types. Thus the burden to establish whether the conflict in which the perpetrator took part was international or national was put on the Prosecutor.[82]

1.2.3.2 The Rwandan Statute, Genocide, and the Problem of Ex Post Facto Law

Since the ICTR was established after the horrible crimes had been committed in Rwanda in 1994 and the Rwandan national penal code did not mention the crime of genocide, it was doubted by the new Rwandan government that the crimes could be prosecuted as the international crime of genocide.

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[78] Sanja Kutnjak Ivkovic, Justice by the International Criminal Tribunal for the former Yugoslavia, in: *Stanford Journal of International Law* 37 (Summer 2001), p. 255, p. 268.
[79] Sanja Kutnjak Ivkovic, Justice by the International Criminal Tribunal for the former Yugoslavia, in: *Stanford Journal of International Law* 37 (Summer 2001), p. 255, p. 268.
[80] Sanja Kutnjak Ivkovic, Justice by the International Criminal Tribunal for the former Yugoslavia, in: *Stanford Journal of International Law 37* (Summer 2001), p. 255, p. 269.
[81] Sean Murphy, Progress and Jurisprudence of the International Criminal Tribunal for the former Yugoslavia, in: *American Journal of International Law 93* (1999), p. 57, p. 68.
[82] Sanja Kutnjak Ivkovic, Justice by the International Criminal Tribunal for the former Yugoslavia, in: *Stanford Journal of International Law* 37 (Summer 2001), p. 255, p. 269.

Rwanda had ratified the relevant international treaties, notably the Convention for the Prevention and Punishment of the Crime of Genocide, the Geneva Convention of 1949 relative to the Protection of Civilians and its two additional protocols, and the Convention in the Non-applicability of Statutory limitations to War Crimes and Crimes against Humanity, but the old penal code did not provide penalties for these crimes.[83] The new Rwandan penal code concluded in its preamble that it was therefore impossible for Rwandan courts to try defendants under international law; rather, the crimes had to be treated as ordinary crimes under domestic criminal law, otherwise the principle of nullum crimen sine lege would be violated.[84]

Contrary to the view of the preamble of the Rwandan national penal code, a prosecution for the above-mentioned crimes is possible for both the Rwandan national courts and the ICTR. Neither international criminal law nor the Rwandan constitution prohibits retroactive offences, provided they are recognized as criminal offences under national or international law or according to international customary law.[85]

The crimes that were committed in Rwanda in 1994 constitute crimes against humanity and genocide, which were all recognized as penal offences under international law with the establishment of the Nürnberg trials and are therefore binding to all states.[86] But even if one argues that these crimes are not punishable under international customary law, Rwandan courts (and the ICTR) can prosecute the atrocities of 1994 according to international criminal law since Rwanda was a member of the Geneva Conventions and the Optional Protocols before 1994.[87]

[83]William A. Schabas: Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems, in: *Criminal Law Forum* 7 (1996), p. 523, p. 536.
[84]William A. Schabas: Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems, in: *Criminal Law Forum* 7 (1996), p. 523, p. 536.
[85] William A. Schabas: Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems, in: *Criminal Law Forum* 7 (1996), p. 523, p. 537.
[86] William A. Schabas: Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems, in: *Criminal Law Forum* 7 (1996), p. 523, p. 537.
[87] Machteld Boot, Genocide, *Crimes Against Humanity, War Crimes: Nullum crimen sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2002), Antwerpen: Intersentia, p. 277 – 278.

Chapter 2: The Hybrid Courts

The conflicts in East Timor, Sierra Leone and Cambodia have different historical and political backgrounds, but what is common to them is that brutal human rights violations were committed in all three of them. None of the three countries had the financial capacities and sufficient staff with legal expertise to prosecute the crimes by themselves; furthermore, the delicate situation of the transitional societies made prosecution impossible to realize without international help.

2.1 The Special Court in Sierra Leone

2.1.1 The Historical Background

The civil war in Sierra Leone is considered to be one of the most brutal ones in modern history.[88] It is estimated that of Sierra Leone's 4.2 million citizens, over one million were internally displaced, 500,000 still are refugees and about 400,000 people have survived the amputation of one or more limbs.[89] Between 100,000 and 200,000 people were killed in the course of the conflict.[90]

Especially horrifying in this conflict is the massive and systematic abuse of children, who were killed, raped, mutilated, or conscripted as child soldiers. Both rebel and government forces committed grave atrocities and massive human rights violations after the conflict began in March 1991.[91]

Sierra Leone, a former British colony, is rich in natural resources and especially known for its lucrative diamond mines.[92] The struggle for control of the natural resources fuelled the war and also provided for financial resources for the rebels, who controlled some of the mines.[93]

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[88] Article on CNN website, "S. Leone war crimes court opens", dated 10/03/2004, http://www.cnn.com/2004/WORLD/africa/03/10/sleone.tribunal/index.html, accessed on 26/08/2004.
[89] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 436.
[90] Nancy Kaymar Stafford, A model War Crimes Court: Sierra Leone, in: *ILSA Journal of International and Comparative Law* 10 (Fall 2003), p. 117, p. 119.
[91] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p.141.
[92] Claudia Anthony, *Historical and Political Background to the Conflict in Sierra Leone*, in: Kai Ambos/Mohamed Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p.131, p. 133.

The conflict started with attacks of the Revolutionary United Front (RUF) in March 1991, led by former Army Corporal Fofay Sankoh, in March 1991. The rebels had their operating bases in neighbouring Liberia and were believed to be supported by the then Liberian dictator Charles Taylor.[94] Taylor wanted to take revenge because the president of Sierra Leone Joseph Momo had ordered Sierra Leonean forces to support the Economic Community of West African States Cease Fire Monitoring Group (ECOMOG) in its intervention in Liberia against the civil war in this West African country.[95]

In the summer of 1999, the government and the rebels concluded – after a series of failed attempts – the Lomé Peace agreement, according to which the RUF was to participate in the government.[96] The agreement also called for the establishment of a Truth and reconciliation commission and granted a blanket amnesty to the rebels, notably naming their leader Sankoh individually.[97] The UN Secretary General's special representative made a reservation to the amnesty provision, noting that in the opinion of the UN it did not apply to the crimes against international human rights law, such as genocide, crimes against humanity, and war crimes.[98]

Even before the signing of the Lomé agreement, the ECOMOG, which had also intervened in the civil war in Sierra Leone, was repeatedly involved in battles with armed forces of Sierra Leone's Junta government.[99] After the ECOMOG had won control over the capital and the legitimate President returned to office, the UN Security Council established the United Nations Missions in Sierra Leone (UNAMSIL) after terminating a previous observer mission (UNOMSIL).[100]

The UNAMSIL could not prevent the collapse of the Lomé peace agreement, and it took three more years of fighting and mounting pressure from reinforced UN troops and a better trained

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[93] Elizabeth Evenson, Truth and Justice in Sierra Leone: Coordination between Commission and Court, in: *Columbia Law Review* 104 (2004), p. 730, p. 735.
[94] Laura R. Hall/Nahal Kazemi, Prospects for Justice and Reconciliation in Sierra Leone, in: *International Harvard Law Journal* 44 (2003), p. 287, p. 288.
[95] Elizabeth Evenson, Truth and Justice in Sierra Leone: Coordination between Commission and Court, in: *Columbia Law Review* 104 (2004), p. 730, p. 735.
[96] John Cerone, The Special Court for Sierra Leone: Establishing a new Approach to International Criminal Justice, in: *ILSA Journal of International and Comparative Law* 8 (2002), p.379, p. 380.
[97] Nancy Kaymar Stafford, A model War Crimes Court: Sierra Leone, in: *ILSA Journal of International and Comparative Law* 10 (Fall 2003), p. 117, p. 125.
[98] Nicole Fritz/Alison Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, in: *Fordham International Law Journal* 25 (2001), p. 391, p. 397.
[99] Marissa Miraldi, Overcoming the Obstacles of Justice: The Special Court for Sierra Leone, in: *New York Law School Journal of Human Rights* 19 (2003), p. 849, p. 850.
[100] Marissa Miraldi, Overcoming the Obstacles of Justice: The Special Court for Sierra Leone, in: *New York Law School Journal of Human Rights* 19 (2003), p. 849, p. 850.

government army to persuade the rebels to agree to a disarmament program in order to bring a fragile peace to Sierra Leone in the beginning of 2002.[101]

2.1.2 The Legal Framework for the Special Court

With resolution 1315 of August 2002, the UN Security Council mandated the Secretary-General to negotiate an agreement with Sierra Leone's government in order to create an independent Special Court.[102] After prolonged negotiations, the UN and the government of Sierra Leone signed a treaty creating the Special Court for Sierra Leone on January 16th, 2002.[103] The Court is seated in the city of Freetown, the capital of Sierra Leone.[104]

Contrary to the ICTR and the ICTY, which are UN subsidiary organs established by UN Security Council resolutions, the Special Court for Sierra Leone is a treaty-based court sui generis of mixed composition and jurisdiction, created by the agreement between the UN and the government of Sierra Leone.[105] The Court is thus not imposed on a state, but established by the request of the government of Sierra Leone.

The Court currently employs a total of eight judges.[106] It consists of a trial chamber with currently three judges of which two are appointed by the government of UN and one by the government of Sierra Leone, and an appeals chamber with five judges, three of them appointed by the UN and two by the government of Sierra Leone.[107] The prosecutor is appointed by the UN General Secretary, the deputy prosecutor by the government of Sierra

[101] Elizabeth Evenson, Truth and Justice in Sierra Leone: Coordination between Commission and Court, in: *Columbia Law Review* 104 (2004), p. 730, p. 738.
[102] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 143.
[103] Nancy Kaymar Stafford, A model War Crimes Court: Sierra Leone, in: *ILSA Journal of International and Comparative Law* 10 (Fall 2003), p. 117, p. 126.
[104] Article on CNN website, "S. Leone war crimes court opens", dated 10/03/2004, http://www.cnn.com/2004/WORLD/africa/03/10/sleone.tribunal/index.html, accessed on 27/08/2004.
[105] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 442 – 443.
[106] Basic Fact Pamphlet for the Special Court for Sierra Leone (Publication of the Special Court), on website: http://www.sc-sl.org/basicfactspamphlet.pdf, accessed on 30/08/2004.
[107] Basic Fact Pamphlet for the Special Court for Sierra Leone (Publication of the Special Court), on website: http://www.sc-sl.org/basicfactspamphlet.pdf, accessed on 30/08/2004.

Leone.[108] This is one of the main differences to the ICTR and the ICTY, where the judges all are appointed by the UN.[109]

The funding of the Special Court could prove to be a problem. Initially, the UN planned to fund the court with US $ 104.6 million, a sum that was almost halved later on; the Court will now only receive US $ 57 million for the first three years.[110] This budget appears especially meagre when comparing it to the US $ 96.4 million that the ITCY spent in 2001 and the US $ 80 million that the ICTR can spend each year.[111]

The Special Court was not established by the UN under Chapter VII UN Charta.[112] This means that the Special Court only enjoys primacy over the Sierra Leonean courts and not over courts of other countries, as the ICTY and the ICTR do, meaning that the court cannot force the extradition of perpetrators from other countries.[113] The Liberian ex-president Charles Taylor, who has been indicted by the Special Court for backing the rebels, remains in Nigeria in relative safety.[114] Since the Court is treaty-based it relies on voluntary contributions from UN member states and the donor community rather than on the regular budget of the UN, as the ICTY and the ICTR do.[115]

The Special Court's temporal jurisdiction – its ratio temporis – is limited to violations that were committed after November 30th, 1996, which is a compromise between not overburdening the prosecutor and ensuring prosecution.[116] Nonetheless, this means that there will be no prosecution for the crimes committed between the beginning of the conflict in 1991 and November 1996.

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[108] Basic Fact Pamphlet for the Special Court for Sierra Leone (Publication of the Special Court), on website: http://www.sc-sl.org/basicfactspamphlet.pdf, accessed on 30/08/2004.
[109] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 443.
[110] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 453.
[111] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 453.
[112] Nicole Fritz/Alison Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, in: *Fordham International Law Journal* 25 (2001), p. 391, p. 408.
[113] Nsonguara Udombana, Globalization of Justice and the Special Court for Sierra Leone's War Crimes, in: *Emory International Law Review* 17 (2003), p.55, p. 83.
[114] Article on CNN website, "S. Leone war crimes court opens", dated 10/03/2004, http://www.cnn.com/2004/WORLD/africa/03/10/sleone.tribunal/index.html, accessed on 27/08/2004.
[115] Hassan B. Jallow, *The legal framework of the Special Court for Sierra Leone*, in: Kai Ambos/Mohamed Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p. 149, p. 159.
[116] Nancy Kaymar Stafford, A model War Crimes Court: Sierra Leone, in: *ILSA Journal of International and Comparative Law* 10 (Fall 2003), p. 117, p. 126.

The territorial jurisdiction of the court is limited to the territory of Sierra Leone.[117] This may cause problems since the first attacks by the RUF were started from neighbouring Liberia.[118] Sierra Leonean perpetrators who violated international or national law outside Sierra Leone can thus not be tried by the Special Court. This is similar to the Yugoslavian statute, but different from the Rwandan Statute, which allows the ICTR to prosecute Rwandan nationals who committed crimes connected to the genocide of 1994 in neighbouring countries.[119] Considering the missing supremacy of the Special Court over the – often malfunct – judicial system of Sierra Leone's neighbours, the fact that the Court can only prosecute crimes committed inside Sierra Leone makes little difference in reality.

The subject matter jurisdiction of the Special Court is defined by its statute (in the following: SC Statute), giving the court the power to prosecute crimes against humanity[120] as well as violations of the Common Article 3 of the Geneva Conventions of 1949 for the Protection of War Victims and of Additional Protocol II of 1977.[121] The SC Statute also empowers the Special Court to prosecute other serious violations of international humanitarian law such as intentionally directing attacks against the civilian population and forcing children under the age of 15 to be part of armed forces.[122] All of the crimes are offences under international customary law or are included in treaties to which Sierra Leone is a party, which is important according to the principle nullum crimen sine lege.[123]

Furthermore, the SC Statute gives the Special Court the competence to apply Sierra Leonean criminal law in such cases as rape and mistreatment of girls and arson.[124]

The crime of genocide was not included in the prosecutional powers of the Special Court, since the attacks in Sierra Leone did not contain the ethnic element that the conflicts in Yugoslavia and Rwanda had.[125]

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[117] Laura R. Hall/Nahal Kazemi, Prospects for Justice and Reconciliation in Sierra Leone, in: *International Harvard Law Journal* 44 (2003), p. 287, p. 295.
[118] Laura R. Hall/Nahal Kazemi, Prospects for Justice and Reconciliation in Sierra Leone, in: International *Harvard Law Journal* 44 (2003), p. 287, p. 295.
[119] Article 1 of the Rwandan Statute.
[120] Art. 2 SC Statute.
[121] Art. 3 SC Statute.
[122] Art. 4 SC Statute.
[123] John Cerone, The Special Court for Sierra Leone: Establishing a new Approach to International Criminal Justice, in: *ILSA Journal of International and Comparative Law* 8 (2002), p. 379, p. 384.
[124] Art. 5 SC Statute.

It is notable that the SC Statute provides that crimes committed by peace-keeping forces sent to Sierra Leone shall be prosecuted in the sending state.[126] This clause was added because of the fact that even ECOMOG soldiers committed atrocities against supposed rebels and their supporters.[127] On the other hand, members of the UN peace-keeping troops who stood aside when the Bosnian Serbs conquered the UN protection zone of Srebrenica and murdered thousands of Bosnian Muslims could be prosecuted by the ICTY for aiding the genocide, but this will most probably never happen.

According to the Statute of the Court, individuals "who bear the greatest responsibility" shall be tried by the court, while the others shall appear in front of the Truth and Reconciliation Commission of Sierra Leone.[128] This is due to the limited resources of the Court, otherwise thousands of perpetrators would have to be prosecuted.[129]

No persons under the age of fifteen shall be prosecuted by the Special Court.[130] Alleged perpetrators between the age of fifteen and eighteen may be brought before the Special Court, although convicted juvenile offenders cannot be sentenced to imprisonment (only to correctional care) and the prosecutor is directed to resort to alternative truth and reconciliation mechanisms in these cases, when appropriate.[131] This represents a break from the ICC statute (as well as the statutes for the ICTY and the ICTR), which regulates that the ICC has no jurisdiction over a person who was younger than eighteen when committing the crime, and has provoked protests from human rights organizations such as amnesty international, fearing the rehabilitation of juvenile perpetrators would be endangered.[132]

In Rwanda and especially in Yugoslavia, the use of child soldiers was not common, but in Sierra Leone all sides made extensive use of teenagers and even younger children as soldiers.

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[125] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 448 – 449.
[126] Art. 1 SC Statute.
[127] Elizabeth Evenson, , Truth and Justice in Sierra Leone: Coordination between Commission and Court, in: *Columbia Law Review* 104 (2004), p. 730, p. 738.
[128] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 148.
[129] Marissa Miraldi, Overcoming the Obstacles of Justice: The Special Court for Sierra Leone, in: *New York Law School Journal of Human Rights* 19 (2003), p. 849, p. 854 – 855.
[130] Art. 7 SC Statute.
[131] Nicole Fritz/Alison Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, in: *Fordham International Law Journal* 25 (2001), p. 391, p. 414.
[132] Nicole Fritz/Alison Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, in: *Fordham International Law Journal* 25 (2001), p. 391, p. 414 – 415.

There are different opinions whether the government of Sierra Leone[133] or the UN[134] initiated this novelty in international criminal law, but the solution that teenagers are not to be put into prison, but are subject to measures of reconciliation, is a good compromise between the need to hold these adolescents accountable and the rights of the juvenile perpetrators, who were often victims themselves and forced into service for the governmental troops or the rebels.

The signing of the Lomé Peace Agreement in July 1999 brought a blanket amnesty by the Sierra Leonean government for all crimes committed in relation to the conflict in Sierra Leone until July 1999.[135] This was deemed necessary in order to have the agreement signed by the rebels, but heavily criticized. The UN representative to Sierra Leone issued a reservation that the amnesty would not be valid for such crimes under international law.[136] This may lead to the problematic solution that the Court, operating partly under Sierra Leonean law, might not be able to prosecute crimes such as sexual slavery before July 1999. In a landmark ruling on June 1, 2004, the Appeals Chamber of the Court ruled that the recruitment of child combatants is a crime under international law.[137]

The court will probably rule in future that other crimes that would otherwise be subject to the Sierra Leonean amnesty are crimes under international law and thus not subject to the blanket amnesty, thus contravening the problematic amnesty regulations. Otherwise, horrific crimes could not be prosecuted and leave the victims – and the perpetrators – with the sentiment that justice could not be brought to Sierra Leone.

2.1.3 The Legal Framework for Sierra Leone's Truth and Reconciliation Commission

The Truth and Reconciliation Commission of Sierra Leone (TRC) was established by the government of Sierra Leone with the Truth and Reconciliation Act 2000,[138] making only

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[133] Nancy Kaymar Stafford, A model War Crimes Court: Sierra Leone, in: *ILSA Journal of International and Comparative Law* 10 (Fall 2003), p. 117, p. 127.
[134] Nicole Fritz/Alison Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, in: *Fordham International Law Journal* 25 (2001), p. 391, p. 415.
[135] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 443.
[136] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 440 – 441.
[137] Press Release of the Special Court, dated 01/07/2004, on Special Court website http://www.sc-sl.org/Press/pressrelease-060104.html, accessed on 10/10/2004.
[138] Laura R. Hall/Nahal Kazemi, Prospects for Justice and Reconciliation in Sierra Leone, in: *International Harvard Law Journal* 44 (2003), p. 287, p. 289.

Sierra Leonean law the legal basis for the TRC.[139] Nonetheless, the TRC and the Special Court have somewhat overlapping jurisdiction.[140] While the Court's jurisdiction is limited to serious violations of international criminal law and certain crimes under Sierra Leonean law,[141] the TRC can investigate any abuses and violations of international human rights and international humanitarian law related to the conflict in Sierra Leone.[142]

While the Court shall only those people bearing the greatest responsibility for human rights violations since November 30, 1996, the TRC can investigate crimes from the beginning of the conflict in March 1991 up to the signing of the Lomé Peace agreement on July 7, 1999.[143] It would be very helpful to extend the mandate of the TRC to the end of the conflict in 2002,[144] because then the mandate would cover the whole time period in which atrocities were committed.

Its mandate empowers the TRC to investigate and report on the causes, nature and extent of the crimes and human right violations and to establish whether these violations were the result of a deliberately planned strategy by the government or the rebels.[145]

Another objective of the TRC is to restore the human dignity of the victims and to promote reconciliation by giving victims a platform to tell their suffering, while perpetrators have the opportunity to acknowledge their wrongdoings, thus creating a constructive interchange between these two groups.[146] Special attention is to be given to the crimes related to sexual

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[139] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 145.
[140] Hassan B. Jallow, *The legal framework of the Special Court for Sierra Leone*, in: Kai Ambos/Mohamed Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p. 149, p. 169.
[141] See above, chapter 2.1.2.
[142] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 146 – 147.
[143] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 150.
[144] Elizabeth Evenson, Truth and Justice in Sierra Leone: Coordination between Commission and Court, in: *Columbia Law Review* 104 (2004), p. 730, p. 738.
[145] Hassan B. Jallow, *The legal framework of the Special Court for Sierra Leone*, in: Kai Ambos/Mohamed Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p. 149, p. 169.
[146] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law* Journal 6 (2003), p. 139, p. 146.

abuse and to the experiences and the sufferings – as well as the committed crimes – of the children soldiers.[147]

The biggest difference to the South African Truth and Reconciliation Commission is that the TRC of Sierra Leone does not have the power to grant an amnesty. But since the Lomé Peace Agreement in July 1999 granted a hotly discussed blanket amnesty for crimes until July 1999,[148] the power to grant an amnesty would have made no difference.

2.2 The Special Panels for Serious Crimes in East Timor

2.2.1 The Historical Background

East Timor (now officially called Timor-Leste) is situated between the Indonesian islands of Java and Sulawesi and Australia[149] and has a population of approximately 600,000 people.[150] The former Portuguese colony was occupied by Indonesia from December 1976 until November 1999.[151] It is estimated that more than 200,000 people from East Timor, about a third of the population, were killed during the Indonesian occupation.[152]

The decolonization process in East Timor gained momentum shortly after a decade-long dictatorship in Portugal was overthrown in the Carnations Revolution of April 1975.[153] But after the major independence movement Fretilin (Frente Revolucinaria do Timor Leste Independente) won control over much of the island, Indonesian armed forces invaded East Timor in December 1976 and established a regime of terror, killing hundreds of thousands in

[147] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law* Journal 6 (2003), p. 139, p. 146.
[148] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 440.
[149] Mario von Battara (ed.), *Der Fischer Weltalmanach 2004* (2003), Frankfurt/Main: Fischer, p. 410.
[150] Monika Schlicher/Alex Flor, *Historical and Political Background to the Conflict in East Timor*, in: Kai Ambos/Mohamed Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p. 73, p. 75.
[151] Article on CNN website, "Timeline: East Timor's long path to nationhood", dated 04/10/2002, http://www.cnn.com/2002/WORLD/asiapcf/southeast/04/10/timor.timeline/index.html, accessed on 31/08/2004.
[152] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 248.
[153] Monika Schlicher/Alex Flor, *Historical and Political Background to the Conflict in East Timo*r, in: Kai Ambos/Mohamed Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p. 73, p. 74.

search of a few hundred ill-equipped guerrilla rebels.[154] Six months later, Indonesia – provoking only weak international protest – incorporated East Timor as its 27th province and held the territory in an iron grip until the 1990s.[155]

In the 1990s, the Indonesian regime relaxed its tight control to some extent, although massive human rights violations remained common. Following the Asian economic crisis, the Suharto regime in Djakarta collapsed, and in January 1999 the new President Habibie, responding to mounting international pressure, announced a plan to hold a referendum in East Timor, allowing the population to choose between autonomy and transition to self-rule.[156]

In May 1999, Indonesia, the former colonial power Portugal and the UN agreed that the people of East Timor were to cast a direct ballot to accept or reject the Indonesian offer of autonomy, while Indonesia should be responsible for maintaining peace and security during the process.[157]

Despite a massive campaign of intimidation, the majority of East Timorese (78 percent with a participation of 96 per cent) rejected a special autonomous status and voted for independence in August 1999. Indonesian military and pro-Indonesian militia practiced a scorched-earth policy while withdrawing. At least 1000 people were killed and approximately 600,000 people, three quarters of the population of East Timor, were chased away from their homes or left them because of the conflict.[158] The UN Mission in East Timor (UNAMET) was ill-equipped to stop the violence, it was unarmed and undermanned and its mandate prevented the use of force to defend the civilian population.[159]

After the intervention of international peacekeepers (INTERFET) in September 1999, the UN Security council established the Transitional Administration in East Timor (UNTAET) with

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[154] Dianne Criswell, Durable Consent and a Strong Transitional Peacekeeping Plan: The Success of UNTAET in light of the lessons learned in Cambodia, in: *Pacific Rim Law and Policy Journal* 11 (2002), p. 577, p. 583.
[155] Monika Schlicher/Alex Flor, *Historical and Political Background to the Conflict in East Timor*, in: Kai Ambos/Mohamed Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p. 73, p. 75.
[156] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 248.
[157] Suzannah Linton, Rising from the Ashes: The Creation of a viable criminal Justice System in East Timor, in: *Melbourne University Law Review* 5 (2001), p. 122, p. 126 – 127.
[158] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 249.
[159] Monika Schlicher/Alex Flor, *Historical and Political Background to the Conflict in East Timor*, in: Kai Ambos/Mohamed Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p. 73, p. 80.

Security Council Resolution 1272 in October 1999, giving UNTAET the mandate to administer East Timor until independence.[160] East Timor lay in ruins, the Indonesian armed forces and their allied militias had destroyed the infrastructure of the East Timor: Schools, courthouses, public administration buildings, power facilities were largely burned to the ground.[161]

With regulation 15/2000 of June 2000, the UNTAET established the Serious Crimes Panels of the District Court of Dili to prosecute past human rights violations.[162] On May 20th 2002, East Timor gained full independence.[163]

2.2.2 The Legal Framework for the Special Panel for Serious Crimes

With Security Council Resolution 1272 of 1999, the UNTAET was given power to exercise all legislative, executive and judicial authority.[164] Under Regulation 15/2000, two Special Panels were established at the Dili District court, each to be staffed with two international and one East Timorese judge.[165]

The Special Panels for Serious Crimes (in the following: the Special Panels) have exclusive jurisdiction for crimes under international as well as crimes under national law.[166] The crimes to be prosecuted under international law include genocide,[167] crimes against humanity,[168] war crimes[169] and torture,[170] while murder[171] and sexual offences[172] as penalized under the East

[160] Sylvia de Bertodano, Current Developments in Internationalized Courts, in: *Journal of International Criminal Law* 1 (2003), p. 226, p. 229.
[161] Suzannah Linton, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, in: *Criminal Law Forum* 12 (2001), p. 185, p. 203.
[162] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (2003), Ardsley/USA: Transnational Publishers, p. 9.
[163] BBC, Article on website, dated 11/08/2004, "Timeline: East Timor", http://news.bbc.co.uk/1/hi/world/asia-pacific/country_profiles/1504243.stm , accessed on 01/09/2004.
[164] Mohamed Othman, *The Framework of Prosecutions and the Court System in East Timor*, in: Kai Ambos/Mohamed Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p. 85, p. 85.
[165] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 251.
[166] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 251.
[167] Sec. 4 of UNTAET Regulation 15/2000 (hereafter: Regulation 15/2000), available at http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf, accessed on 02./09/2004.
[168] Sec. 5 Regulation 15/2000.
[169] Sec. 6 Regulation 15/2000.
[170] Sec. 7 Regulation 15/2000.
[171] Sec. 8 Regulation 15/2000
[172] Sec. 9 Regulation 15/2000.

Timorese penal code (which is the Indonesian penal code, as amended through UNTAET regulations)[173] are also to be prosecuted by the Special Panels.

The ratio tempore for the prosecution by the Special Panels for the crimes under national East Timorese law is the time frame from January 1st, 1999 to October 25th,1999,[174] while the ratio loci (territorial jurisdiction) for these crimes (murder and sexual offences) is limited to the territory of East Timor.[175]

Regarding the crimes under international law, the Regulation 15/2000 states that the Special Panels shall have universal jurisdiction for these crimes (genocide, crimes against humanity, war crimes and torture). The Special Panels have the power to prosecute these crimes no matter if they were committed in East Timor and whether or not East Timorese nationals were involved.[176]

The parts of Regulation 15/2000 regulating the subject matter jurisdiction were taken from the Rome statute of the International Criminal Court (ICC), thus the Special Panels were the first court to apply provisions of the Rome Statute[177] even before the ICC went into operation in July 2002.[178]

The legal construction of the prosecuting power of the Special Panel was a consequence of the fact that the UN Security council had ruled out the possibility of establishing an ad-hoc tribunal for the human rights violations committed in East Timor.[179] Therefore, the prosecution of crimes under international law, such as genocide and crimes against humanity, had to be incorporated into the statute of a national East Timorese judicial body. It is insofar similar to the War Ethnic Crimes Court established by the UN in Kosovo, dealing with similar crimes.[180]

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[173] Suzannah Linton, Rising from the Ashes: The Creation of a viable criminal Justice System in East Timor, in: *Melbourne University Law Review* 5 (2001), p. 122, p. 136 – 137.
[174] Sec. 2.3 Regulation 15/2000.
[175] Sec. 2.4 Regulation 15/2000.
[176] Sec. 2.1 Regulation 15/2000.
[177] Gert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (2003), Ardsley/USA: Transnational Publishers, p. 9.
[178] Cf. ICC website, http://www.icc-cpi.int/php/show.php?id=history, accessed on 02/09/2004.
[179] Mohamed Othman, *The Framework of Prosecutions and the Court System in East Timor*, in: Kai Ambos/Mohamed Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p. 85, p. 111.

Given the almost total destruction of the East Timorese judicial system, the UNTAET also had to ensure that the accused had proper access to legal counsel. In East Timor, the defence lawyers are on public payroll, but in 2003 there were only twelve public defenders, facing a massive workload of cases of both national and international crimes.[181]

Since no interpretative document accompanied Regulation 15/2000 and since this regulation relies heavily on the Rome Statute of the ICC, it was proposed that the travaux préparatoires for the Rome Statute should be used for Regulation 15/2000, as well as the jurisprudence of the ICTR and the ICTY and the ruling of national courts regarding the application of international criminal law.[182] But considering the enormous lack of education in the East Timorese legal community, it was unclear from the start who would have the capacity to do so, especially since international experts were either mostly unwilling to work on this tropical island with little or no infrastructure or the funding was insufficient.[183]

The funding of the Special Panels is a problematic point. The total budget for the Special Panels and the prosecutional body, the Serious Crimes Unit, was US $ 6.3 million, of which US $ 6 million were to be spent by the prosecutional unit and the rest was almost entirely needed for the salaries of the international judges.[184] The annual budgets for the ICTR was US $ 178 million in 2003 and the 2003 budget for the ICTY was even higher at US $ 223 million.[185]

The political situation in Indonesia and the apparent unwillingness of the Indonesian government and the courts to prosecute Indonesian nationals may pose a problem for the Special Panels in East Timor, especially with regard to the ne bis in idem rule stated in Sec. 11.3 of Regulation 15/2000.[186] If the courts in Indonesia open a case against an accused and

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[180] Suzannah Linton, Rising from the Ashes: The Creation of a viable criminal Justice System in East Timor, in: *Melbourne University Law Review* 5 (2001), p. 122, p. 146.
[181] Mohamed Othman, *The Framework of Prosecutions and the Court System in East Timor*, in: Kai Ambos/Mohamed Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p. 85, p. 81.
[182] Suzannah Linton, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, in: *Criminal Law Forum* 12 (2001), p. 185.
[183] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 251 – 252.
[184] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 258.
[185] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 258.
[186] Suzannah Linton, Rising from the Ashes: The Creation of a viable criminal Justice System in East Timor, in: *Melbourne University Law Review* 5 (2001), p. 122, p. 170 – 171.

rule that there will be no or little punishment for him, he is safe from prosecution by the Special Panels in East Timor.

Another interesting point is that the Special Panels may prosecute crimes prior to 1999, according to Sec. 2.4 of Regulation 2000/15, at least in case of serious crimes under international law according to Sections 4 –7 of Regulation 2000/15. Linton comes to the same conclusion, although using a different argumentation.[187] If this opportunity to prosecute pre-1999 crimes will be taken up by the Special Panels remains to be seen. Since the Special Panels are poorly staffed, equipped and funded and the prosecution of pre-1999 crimes – in the last consequence up to the beginning of the Indonesian occupation in 1976 – would mean a major confrontation with neighbouring Indonesia, it is doubtful whether the Special Panels will be willing to prosecute crimes committed prior to January 1st, 1999.

Like South Africa and Sierra Leone, East Timor has established a Truth, Reception and Reconciliation Commission, investigating the violations of human rights since 1974 and giving the perpetrators responsible for less serious crimes such as arson and property damage the chance to openly show shame and apologize to their victims.[188] The perpetrators are to work in community service (already known in traditional conflict-solving mechanism in East Timor) as part of the process, which is bitterly needed in the devastated country. This is to be determined by the community to which the perpetrator returns; if the agreement is approved by court the perpetrators is safe from prosecution.[189]

This model of reconciliation differs from the South African model, where the truth commission itself had the power to grant amnesty even for more serious crimes, and the Sierra Leonean model, where the power to grant amnesty would be partly useless since the government agreed to a blanket amnesty for crimes committed before July 1999[190] and the Sierra Leonean TRC therefore could only issue an amnesty for crimes committed after this date, a power which it has not been given. The new Tutsi-dominated government of Rwanda

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[187] Suzannah Linton, Rising from the Ashes: The Creation of a viable criminal Justice System in East Timor, in: *Melbourne University Law Review* 5 (2001), p. 122, p. 171 – 172.
[188] Suzannah Linton, Rising from the Ashes: The Creation of a viable criminal Justice System in East Timor, in: *Melbourne University Law Review* 5 (2001), p. 122, p. 148.
[189] Suzannah Linton, Rising from the Ashes: The Creation of a viable criminal Justice System in East Timor, in: *Melbourne University Law Review* 5 (2001), p. 122, p. 148.
[190] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 440.

has ruled out the establishment of a truth and reconciliation and relies solely on criminal prosecution.[191]

2.3 The Extraordinary Chambers in Cambodia

2.3.1 The Historical Background

The regime of the Khmer Rouge under their leader Pol Pot lasted for only four years from 1975 to 1979, but the brutal realization of a crypto-communist regime, aimed at turning Cambodia into a nation of subjugated peasants, cost the lives of at least 1.7 million Cambodians. The Khmer Rouge above all prosecuted academics, people considered to be intellectuals and members of ethnic minorities and religious groups.[192]

What makes the situation in Cambodia unique and very different from the ones in Yugoslavia, Rwanda, Sierra Leone and East Timor is the fact that the Khmer Rouge kept record of all prisoners, their executions as well as their forcibly extracted "confessions."[193] A vast amount of written evidence such as minutes of party meetings, reports from the killing fields and official files carry proof that top-level Khmer Rouge members organized and supervised the killings.[194] After conquering the capital Phnom Penh in April 1975, the Khmer Rouge deported the two million inhabitants of the city into labour camps in the countryside and established the Democratic Republic of Kampuchea.[195]

In the following years, the Khmer Rouge killed nearly one fourth of the Cambodian population, brutally sacrificing millions of lives in order to reshape the Cambodian society according to their obscure ideological ideas. The major powers, especially the West, looked aside; the USA regarded the Khmer Rouge as helpful in their fight against Vietnam, which

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[191] Jeremy Sarkin, The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide, in: *Journal of African Law* 45, 2 (2001), p. 143, p. 154.

[192] Teresa Klosterman, The Feasibility and Propriety of a Truth Commission in Cambodia: Too little? Too late?, in: *Arizona Journal of International and Comparative Law* 15 (1998), p. 833, p. 846.

[193] Scott Luftglass, Crossroads in Cambodia: The United Nation's (sic) Responsibility to withdraw involvement from the Establishment of a Cambodian Tribunal to prosecute the Khmer Rouge, in: *Virginia Law Review* 90 (2004), p. 893, p. 958.

[194] Gerald May III, An (Un)likely Culprit: Examining the UN's counterproductive Role in the Negotiations over a Khmer Rouge Tribunal, in *Boston College International and Comparative Law Review* 27 (2004), p. 147, p. 150.

[195] Ben Kiernan, *Historical and Political Background to the Conflict in Cambodia, 1945 –2002*, in: Kai Ambos/Mohamed Othman,(eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p 173, p. 175.

had been unified under communist rule in 1975.[196] In the meantime, the Khmer Rouge regime wiped out the country's minorities, which were regarded to be not "pure Khmer people."[197] In 1975, over 100,000 Vietnamese residents were expelled from Cambodia, the remaining 10,000 were all killed in 1977-78, and from the 250,000 people of the Muslim Cham group, approximately 100,000 were killed, died of starvation or were worked to death in labour camps.[198] In 1979, the Khmer Rouge were ousted by a Vietnamese invasion, and Vietnam installed a pro-communist puppet regime.[199] During the 1980s, the Khmer Rouge continued to fight the Vietnamese from their jungle strongholds, enjoying support from Western powers, especially the USA, as well as from Thailand and China.[200] The USA and China recognized the Khmer Rouge as the legitimate government of Cambodia until the early 1990s, although their atrocities were well known.[201] No country invoked the Genocide Convention on behalf of the victims, filed a case against Cambodia at the International Court of Justice or extradited senior Khmer Rouge leaders; the (Western) World focused on the Vietnamese occupation of Cambodia during the 1980s.[202]

The UN have been involved in Cambodia since the Vietnamese troops left in 1989 in order to stabilize the war-torn country. After the Paris Peace Agreement of 1991, regulating the final withdrawal of Vietnam from Cambodia, the UN Security Council, with resolution 745 of February 1992, established the United Nations Transitional Authority in Cambodia (UNTAC).[203] The mandate of the UNTAC was a novelty in the history of the UN; it included

[196] Ben Kiernan, *Historical and Political Background to the Conflict in Cambodia, 1945 –2002*, in: Kai Ambos/Mohamed Othman,(eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p 173, p. 179.
[197] Ben Kiernan, *Historical and Political Background to the Conflict in Cambodia, 1945 –2002*, in: Kai Ambos/Mohamed Othman,(eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p 173, p. 178.
[198] Ben Kiernan, *Historical and Political Background to the Conflict in Cambodia, 1945 –2002*, in: Kai Ambos/Mohamed Othman,(eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p 173, p. 178.
[199] Daniel Kemper Donovan, Joint UN – Cambodian Efforts to establish a Khmer Rouge Tribunal, in: Harvard *International Law Journal* 44 (2003), p. 551, p. 553.
[200] Dianne Criswell, Durable Consent and a Strong Transitional Peacekeeping Plan: The Success of UNTAET in light of the lessons learned in Cambodia, in: *Pacific Rim Law and Policy Journal* 11 (2002), p. 577, p. 579.
[201] CNN, article on website, dated 25/05/2003, "Sowing Justice: Tribunal in Cambodia has lessons for Iraq", http://www.cnn.com/2003/LAW/05/26/findlaw.analysis.leavitt.tribunals/, accessed on 03/09/2004.
[202] Scott Luftglass, Crossroads in Cambodia: The United Nation's (sic) Responsibility to withdraw involvement from the Establishment of a Cambodian Tribunal to prosecute the Khmer Rouge, in: *Virginia Law Review* 90 (2004), p. 893, p. 903.
[203] Dianne Criswell, Durable Consent and a Strong Transitional Peacekeeping Plan: The Success of UNTAET in light of the lessons learned in Cambodia, in: *Pacific Rim Law and Policy* Journal 11 (2002), p. 577, p. 578.

very ambitious civilian components such as state building as well as difficult military tasks such as ensuring the departure of all foreign forces from Cambodian territory.[204]

In 1997, the UN officially brought up the idea of a Khmer Rouge tribunal.[205] In 1999, a group of UN experts unanimously agreed that an ad-hoc tribunal according to the model of the ICTY and the ICTR should be established.[206] It was the common opinion of the group of experts that the Cambodian judicial system was too corrupt and subject to political influence.[207] The group explicitly declined to recommend a mixed tribunal for Cambodia, since this body would also be in danger of being influenced by the Cambodian government.[208] The Cambodian government disagreed, as was expected, and demanded a body with at least equal amount of Cambodian input, especially regarding the staffing of the tribunal. According to Jarvis, this was hardly surprising, as the proposed trial would have met outside the country, with no Cambodians participating, except as witnesses or accused perpetrators. [209] Luftglass, on the other hand, argues that the Cambodian government asked for an international tribunal itself[210] and in 1999 rejected the idea and demanded that the international community was to provide only legal expertise.[211] This, according to Luftglass, shows that the Cambodian government wanted in fact to control the tribunal and use it for its political goals.[212]

In the meantime, the mastermind of the genocide, Pol Pot, died in 1998 in his jungle hideout, while many other senior Khmer Rouge members brokered an amnesty with the Cambodian

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[204] Dianne Criswell, Durable Consent and a Strong Transitional Peacekeeping Plan: The Success of UNTAET in light of the lessons learned in Cambodia, in: *Pacific Rim Law and Policy Journal* 11 (2002), p. 577, p. 581.
[205] Daniel Kemper Donovan, Joint UN – Cambodian Efforts to establish a Khmer Rouge Tribunal, in: *Harvard International Law Journal* 44 (2003), p. 551, p. 555.
[206] Sylvia de Bertodano, Current Developments in Internationalized Courts, in: *Journal of International Criminal Law* 1 (2003), p. 226, p. 227.
[207] Sylvia de Bertodano, Current Developments in Internationalized Courts, in: *Journal of International Criminal Law* 1 (2003), p. 226, p. 227.
[208] Suzannah Linton, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, in: *Criminal Law Forum* 12 (2001), p. 185, p. 188.
[209] Helen Jarvis, Trials and Tribulations: The Latest Twists in the Long Quest for Justice for The Cambodian Genocide, in: *Critical Asian Studies* 34 (2002), p. 607, p. 608. Available at http://www.yale.edu/cgp/Cambodia_Docs_Oct16.pdf .
[210] Scott Luftglass, Crossroads in Cambodia: The United Nation's (sic) Responsibility to withdraw involvement from the Establishment of a Cambodian Tribunal to prosecute the Khmer Rouge, in: *Virginia Law Review* 90 (2004), p. 893, p. 906.
[211] Scott Luftglass, Crossroads in Cambodia: The United Nation's Responsibility to withdraw involvement from the Establishment of a Cambodian Tribunal to prosecute the Khmer Rouge, in: *Virginia Law Review* 90 (2004), p. 893, p. 910.
[212] Scott Luftglass, Crossroads in Cambodia: The United Nation's Responsibility to withdraw involvement from the Establishment of a Cambodian Tribunal to prosecute the Khmer Rouge, in: *Virginia Law Review* 90 (2004), p. 893, p. 910.

government as a part of their surrender.[213] The last Khmer Rouge leaders had either been captured or had surrendered at the end of 1998, and the Cambodian government pressed charges against some of them under national Cambodian law.[214]

In July 2001, Cambodia's National Assembly enacted a law to establish the Extraordinary Chambers in the Courts of Cambodia; this legislation did not satisfy the UN, which is why the three-year-long negotiations were interrupted in February 2002.[215]

The UN returned to the talks six months later, and the parties reached an agreement in March 2003.[216] The "Agreement between The United Nations and The Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea"[217] (in the following: the March Agreement) was endorsed by the United Nations General Assembly a few days later.[218] However, the ratification of the agreement by the Cambodian parliament was stalled due to the fact that after the elections in Cambodia in June 2003, Hun Sen, himself a brief member of the Khmer Rouge, could not find a majority in Parliament for his government until July 2004.[219] After months of negotiations, the Cambodian Parliament finally ratified the agreement with the UN in the beginning of October 2004.[220]

[213] Article on CNN website, "Khmer Rouge Trial Deal agreed" , dated 17/03/2003, http://www.cnn.com/2003/WORLD/asiapcf/southeast/03/17/cambodia.trial/index.html, accessed on 03/09/2004.
[214] Ben Kiernan, *Historical and Political Background to the Conflict in Cambodia, 1945 –2002*, in: Kai Ambos/Mohamed Othman,(eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p 173, p. 187.
[215] Ben Kiernan, *Historical and Political Background to the Conflict in Cambodia, 1945 –2002*, in: Kai Ambos/Mohamed Othman,(eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p 173, p. 187.
[216] Article on CNN website, "Khmer Rouge trial deal agreed", dated 17/03/2003, http://www.cnn.com/2003/WORLD/asiapcf/southeast/03/17/cambodia.trial/index.html, accessed on 02/09/2004.
[217] Available at website of the Cambodian government, http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf, accessed on 06/09/2004.
[218] Scott Luftglass, Crossroads in Cambodia: The United Nation's Responsibility to withdraw involvement from the Establishment of a Cambodian Tribunal to prosecute the Khmer Rouge, in: *Virginia Law Review 90* (2004), p. 893, p. 915.
[219] Article on BBC website, "Profile: Hun Sen", dated 15/07/2004, http://news.bbc.co.uk/1/hi/world/asia-pacific/138761.stm, accessed on 06/09/2004.

2.3.2 The Legal Framework

Unlike the ICTR and the ICTY, the Extraordinary Chambers will be staffed with both national and international members and will combine foreign judicial participation with the existing domestic judicial establishment in Cambodia.[221]

The envisaged Extraordinary Chambers in Cambodia will be seated in Cambodia, most probably in Phnom Penh.[222]

The March Agreement between the UN and the government of Cambodia provides that there will be two extraordinary chambers, the Trial Chamber and the Supreme Court Chamber.[223] While the trial chamber shall have three Cambodian judges and two international judges, the Supreme Court Chamber will consist of four Cambodian and three international judges.[224] The international judges will be selected by the Cambodian Supreme Council of the Magistracy out of a list submitted by the UN Secretary-General.[225]

To balance the Cambodian domination of the Extraordinary Chambers, the March Agreement stipulates that each decision has to be made by a so-called "supermajority" of four judges at the Trial Chamber and five judges at the Supreme Court level.[226] This means that at least one international judge has to vote in any majority, which is a response to international concerns over Cambodian control of the Extraordinary chambers.[227]

The investigating body of the Extraordinary Chambers consists of one international and one Cambodian investigating judge,[228] which is also valid for the prosecutional power, divided

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[220] Article on BBC website, „Khmer Rouge tribunal approved", dated 04/10/2004, on website http://news.bbc.co.uk/2/hi/asia-pacific/1773601.stm, accessed on 12/10/2004.
[221] Gerald May III, An (Un)likely Culprit: Examining the UN's counterproductive Role in the Negotiations over a Khmer Rouge Tribunal, in: *Boston College International and Comparative Law Review* 27 (2004), p. 147, p. 150.
[222] Scott Luftglass, Crossroads in Cambodia: The United Nation's Responsibility to withdraw involvement from the Establishment of a Cambodian Tribunal to prosecute the Khmer Rouge, in: *Virginia Law Review* 90 (2004), p. 893, p. 916.
[223] Art. 3 March Agreement.
[224] Art. 3(2) March Agreement.
[225] Art. 3(5) March Agreement.
[226] Art. 4 March Agreement.
[227] Scott Luftglass, Crossroads in Cambodia: The United Nation's Responsibility to withdraw involvement from the Establishment of a Cambodian Tribunal to prosecute the Khmer Rouge, in: *Virginia Law Review* 90 (2004), p. 893, p. 917.
[228] Art. 5 March Agreement.

between one Cambodian and one international prosecutor.[229] All international members of the Extraordinary Chambers are also to be chosen by the Cambodian Supreme Court of Magistracy from a list submitted by the UN Secretary-General.[230]

The funding of the Extraordinary Chambers has also been regulated by the March Agreement. Cambodia shall be responsible for the remuneration of the Cambodian personnel[231] and the premises of the Extraordinary Chambers,[232] while the UN shall be responsible for the remuneration of the international personnel[233] and for costs such as for the defence counsel and for witnesses' travel expense within Cambodia and from abroad.[234] Whether this funding will be adequate and sufficient remains to be seen. As described above, the Special Court in Sierra Leone faces difficulties in ensuring sufficient funding. Therefore, providing financial support to the Extraordinary Chambers in Cambodia promises no easy task.

The March Agreement gives the Extraordinary Chambers the subject matter jurisdiction over the crime of Genocide as defined in the Genocide Convention of 1948, over crimes against humanity as defined in the Rome Statute for the ICC of 1998, over crimes constituting grave breaches of the 1949 Geneva Conventions and over additional crimes as defined in the (Cambodian) Law (of 2001) on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (which was originally deemed as insufficient by the UN).[235]

The ratio tempore of the Extraordinary Chambers will be from April 17 1975 to January 6 1979,[236] when the Vietnamese army ended the Khmer Rouge rule over large parts of Cambodia.[237]

The personal jurisdiction of the March Agreement is explicitly defined, contrary to the ratio loci, which is not laid down. Only senior leaders of Democratic Kampuchea and those most responsible for the crimes described above shall be prosecuted by the Extraordinary

[229] Art. 6 March Agreement.
[230] Art. 5(5), 6(5) March Agreement.
[231] Art. 15 March Agreement.
[232] Art. 14 March Agreement.
[233] Art. 16 March Agreement.
[234] Art. 17 March Agreement.
[235] Art. 9 March Agreement.
[236] Art. 1 March Agreement.
[237] Article on BBC Website, "Timeline: Cambodia", dated 31/08/2004, http://news.bbc.co.uk/1/hi/world/asia-pacific/country_profiles/1244006.stm, accessed on 06/09/2004.

Chambers.[238] Therefore ordinary foot soldiers of the Khmer Rouge are not to be prosecuted, with the exception of individuals who committed the most ferocious atrocities. But how exactly the Extraordinary Chambers will interpret this regulation remains to be seen.

There are four distinctive characteristics of the March Agreement to be highlighted:

First, the Agreement prohibits granting any further amnesties or pardons to former members of the Khmer Rouge through the Royal Cambodian government.[239] In September 1996, the Cambodian government granted an amnesty to the former Khmer Rouge Deputy Prime Minster Ieng Sary for defecting to the Hun Sen government and bringing some Khmer Rouge troops with him.[240]

Second, with regard to this controversial pardon, the March Agreement regulates that the Extraordinary Chambers shall have the power to determine whether it is valid or not.[241]

Third, the March Agreement commits the Extraordinary Chambers to the due process regulations of Art. 14 and 15 of the International Covenant of Civil and Political Rights (ICCPR),[242] a regulation that is to prevent the exclusion of representatives of the UN and the press and media from sessions of the Extraordinary Chambers for example.

Fourth and last, the March Agreement prohibits imposing the death penalty.[243]

Thus, the March Agreement for the proposed tribunal carries some notable differences when compared to the other hybrid models in Sierra Leone and in Cambodia. While in Sierra Leone judges chosen by the UN are in the majority, for example, in Cambodia the Chambers will consist of more national than international judges at all levels, although at least one international judge is necessary in order to form a majority in one chamber.

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[238] Art. 1 March Agreement.
[239] Art. 11 March Agreement.
[240] Ben Kiernan, *Historical and Political Background to the Conflict in Cambodia, 1945 –2002*, in: Kai Ambos/Mohamed Othman,(eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p 173, p. 185.
[241] Art. 11(2) March Agreement.
[242] Art. 12 (2) March Agreement.
[243] Art. 10 March Agreement.

In East Timor, the UNTAET had all legal and administrative powers when establishing the Special Panels and did not have to negotiate with a national government which wanted to ensure maximum say in the organization of the hybrid tribunal like in Cambodia.

Notably, the Cambodian government allowed the judicial review of a pardon that was granted by it, thereby lessening the chance of a confused and problematic legal situation like in Sierra Leone with its blanket amnesty through the Lomé Accord of 1999 – at first sight. Whether the political realities in Cambodia will really allow the Extraordinary Chambers to review and possibly even recall this pardon, remains to be seen.

Chapter 3: Evaluation

After describing the historical background and the legal framework of the ad-hoc tribunals and the hybrid courts, I will try to measure the success of the hybrid court model against the ad-hoc tribunal. Is it true that hybrid courts are better suited to deal with serious human rights violations?

In order to measure the success of the different models, it is necessary to define the term success and what parameters have to be taken into account.

The most obvious way to measure the success of the different models is to take their own goals, as stated in the statutes or legislations establishing them, and to try to evaluate whether these goals have been achieved.

At first glance, this is a proper and helpful manner to examine the success of the two models. But at second thought, it may not be as easily done as it at first appears, since all of the tribunals are still in operation and some of their goals may be difficult to evaluate, such as the goal of the ICTR to promote the process of national reconciliation and to establish regional stability.[244] The March agreement for the Extraordinary Chambers in Cambodia[245] states the same goal, while the Statute for the Special Court in Sierra Leone speaks of "rehabilitation, reintegration into and assumption of a constructive role in society" of juvenile perpetrators between 15 and 18 years of age.[246]

The goals of the tribunals are often, as shown above, not limited to the area of criminal prosecution, but are political in their nature as well, which is especially true for the goal of reconciliation, which will be discussed in further detail below. The Rwandan Statute states the goal of establishing regional stability.[247] This will be, besides the goal of promoting reconciliation, one of the most difficult goals to be evaluated, which will be done further below. Considering these goals the author will try to develop an example of how the success of the different models can be examined.

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[244] ICTR website, http://www.ictr.org/ENGLISH/geninfo/intro.htm, accessed on 07/09/2004.
[245] Cf. Preamble of the March Agreement between Cambodia and the UN.
[246] Art. 7(2) of the Statute for the Special Court in Sierra Leone.
[247] ICTR website, http://www.ictr.org/ENGLISH/geninfo/intro.htm, accessed on 07/09/2004.

One instrument, taking surveys in the different countries, is often hard to apply due to problems such as poor infrastructure and political opposition or outright prohibitions. In Rwanda for example, it would be most difficult to examine what Tutsis and Hutus think about the progress of reconciliation because of the repressive Tutsi-dominated regime under Paul Kagame.[248]

But even when measuring the goal of ensuring prosecution, which the prosecuting bodies of all five case studies, the ICTY,[249] the ICTR,[250] the Special Court in Sierra Leone,[251] the Special Panels in East Timor[252] and the Extraordinary Chambers in Cambodia[253] state as goals, one is faced with the difficulty that all tribunals are still in progress and that there are, for example, a large number of top-level perpetrators which are yet to be apprehended, let alone sentenced by the tribunal. Even if they are apprehended and sentenced, uncertainties about reaching the goal remain. How is the success of ensuring prosecution to be measured in numbers? Even if the top-perpetrators are all caught and put into prison, the population might still have the sentiment that most of the killers and torturers could escape prosecution and live next to their former victims without being held accountable for their crimes.

But despite all the aforementioned arguments, the comparison of the numbers of arrests (especially of top – level perpetrators) has to serve as an indicator whether or not the goal of ensuring prosecution was reached.

Keeping in mind that the trials are still in progress, the author will compare the two models, without giving definite answers where this is impossible at this point in time.

All of the tribunals, whether international and ad-hoc or with national participation and hybrid, operate in specific and often difficult contexts. This leads to the question if there are certain circumstances that call for either one of the models. For example, a hybrid tribunal in Yugoslavia or now Serbia would probably meet serious resistance from the population and from within governmental institutions. Judges, especially the ones of Serbian nationality, would probably face threats and attempts to influence them. The case of the murdered Serbian

[248] Human Rights Watch 2004 report on Rwanda, on HRW website: http://www.hrw.org/english/docs/2003/12/31/rwanda7009_txt.htm, accessed on 29/09/2004.
[249] Cf. ICTY website, http://www.un.org/icty/glance/index.html, accessed on 07/09/2004.
[250] Cf. ICTR website, http://www.ictr.org/ENGLISH/geninfo/intro.htm, accessed on 07/09/2004.
[251] Art. 1 Special Court Statute.
[252] Sec. 1(3) of UNTAET Regulation 15/2000.
[253] Art. 1 of the March Agreement.

Prime Minister Goran Djindic[254] shows that members of the old regime under Milosevic are still ready to commit serious crimes against their opponents. The political and social context has also to be taken into consideration when measuring the two models.

Another factor that can be examined is how much the two models have so far influenced the field of international criminal law with their jurisprudence. Here, the ad-hoc tribunals have the advantage of having been in operation much longer than the tribunals for East Timor and Sierra Leone, not to speak of the one for Cambodia which has not even been established yet. But during its short term of operation, the Special Court for Sierra Leone has already made some important decisions.[255] When examining the jurisprudence of International law, the establishment of the International Criminal Court (ICC) in July 2002[256] cannot be left unconsidered. Is it possible – in the short time that has passed since July 2002 – to examine how the two models and the ICC interact, and if the case law of the different tribunals is accepted as part of international criminal law or if the ICC is the only institution shaping this field?

Furthermore, the idea of reconciliation through truth commissions will be examined and whether these bodies – in cooperation with the different models – are useful to reach the goals enumerated in the statutes establishing the tribunals. Maybe a combination of the two – a tribunal, be it hybrid or ad-hoc, and a truth commission – promises to be a better tool to deal with crimes against international law and serious violations of international human rights.

3.1 The International Criminal Tribunal for (the former) Yugoslavia

Regarding the success of the International Criminal Tribunal for the former Yugoslavia (ICTY), Tolbert states: "The record is mixed. On the one hand, the ICTY's achievements have exceeded the boldest hopes of its creators. However, in several important respects, it has failed to make a difference in the region itself."[257]

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[254] Amnesty International Report 2004 for Serbia-Montenegro, on website http://web.amnesty.org/report2004/yug-summary-eng, accessed on 09/09/2004.
[255] Cf. website of the Special Court, http://www.sc-sl.org/, accessed on 10/10/2004.
[256] International Criminal Court website, http://www.icc-cpi.int/ataglance/whatistheicc/history.html, accessed on 23/07/2004.
[257] David Tolbert, The International Criminal Tribunal for the former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, in: *Fletcher Forum of World Affairs* 26 (Summer/Fall 2002), p. 7, p. 7.

In order to measure the success of the ICTY the goals of the tribunal and its success to reach them have to be examined by using the model developed in chapter three.

3.1.1 The Goals of the ICTY

The mission of the ICTY is to bring to justice those persons that are allegedly responsible for serious violations of international humanitarian law, to render justice to the victims, to deter further crimes and to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia.[258]

The focus of the ICTY lies on prosecution of the crimes committed and not on reconciliation, as it was quite clear from the beginning that tensions between the different ethnic groups on the territory of the former Yugoslavia would remain high. Clashes between Serbs and ethnic Albanians in the Serbian province of Kosovo in March 2004 have proven this once more.[259]

3.1.1.1 The Goal of Prosecution

The easiest way to measure the success of achieving the goal of prosecution is to look at how many indictments and sentences were handed down by the ICTY. In its ten years of operation since 1994, the Tribunal has indicted some 80 persons.[260] The beginning had not been easy: Although 75 persons were indicted within the first two years, the ICTY did not apprehend one of them in its first year.[261]

The question of how to bring to justice perpetrators of this brutal conflict remains, a conflict in which hundreds of thousands of people were killed, tortured, raped or kept in concentration camps, their homes were burned and they were forced to leave their property.[262] The ICTY limits itself to the ones who committed the most serious violations, but even then, the number of people should probably be in the thousands. Since the indictments are normally secret until

[258] Cf. ICTY website, http://www.un.org/icty/glance/index.html, accessed on 07/09/2004.
[259] Article on CNN website, "NATO rushes troops to Kosovo", dated 18/03/2004, http://www.cnn.com/2004/WORLD/europe/03/18/kosovo.violence/index.html, accessed on 07/09/2004.
[260] Article on BBC website. "At a glance: Hague tribunal", dated 05/07/2004, http://news.bbc.co.uk/1/hi/world/europe/1418304.stm, accessed on 10/10/2004.
[261] Sean Murphy, Progress and Jurisprudence of the International Criminal Tribunal for the former Yugoslavia, in: *American Journal of International Law* 93(1999), p. 57, p. 58.
[262] Article on BBC website, "Balkan leaders embrace new era", dated 15/07/2002, http://news.bbc.co.uk/1/hi/world/europe/2128641.stm, accessed on 12/10/2004.

the accused is apprehended,[263] it is not possible to say how many more persons are to be prosecuted for their crimes.

For the overall public sentiment that the crimes are being prosecuted, it is very important to bring to trial those who are at the top of the command chain. Therefore, a cornerstone for the success of the ICTY was the arrest of former Serbian president Slobodan Milosevic by the Serb authorities in June 2001.[264] However, the case has been hampered by the poor health of the defendant and the sudden resignation of the presiding judge.[265]

The ICTY still encounters serious difficulties in arresting top-level criminals, especially from the Serbian part of Bosnia-Herzegovina. While cooperation of the Croatian courts and the Bosnian Croats in handing over suspected war criminals has significantly improved since the death of the Croatian dictator Franjo Tudjman in 1999,[266] the same cannot be said of the cooperation by the Bosnian Serbs. According to a recent interview with Paddy Ashdown, UN High Representative for Bosnia Herzegovina, the Bosnian Serbs have not handed over a single person wanted by the ICTY during the nine years since the Dayton Agreement was signed in 1995.[267] The authorities in Serbia have been somewhat more cooperative after the extradition of Milosevic. Serbian courts have sentenced perpetrators, although there have been protests especially from veterans of the Serb-Croatian war of the early 1990s.[268] In May 2003, a law allowing the immediate extradition of persons indicted by the ICTY was passed by the Serbian parliament.[269]

But many key figures such as Radovan Karadzic,[270] the former leader of the Bosnian-Serb republic, and his military leader Ratko Mladic[271] have not yet been arrested, even though their

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[263] Article on BBC website, "At a glance: Hague tribunal", dated 05/07/2004, http://news.bbc.co.uk/1/hi/world/europe/1418304.stm, accessed on 05/11/2004.
[264] Claire De Than/Edwin Shorts, *International Criminal Law and Human Rights* (2003), London: Sweet and Maxwell, p. 289.
[265] Article on CNN website, "Case against Milosevic ends early", dated 25/02/2004, http://www.cnn.com/2004/WORLD/europe/02/25/hague.judge/index.html, accessed on 08/09//2004.
[266] David Tolbert, The International Criminal Tribunal for the former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, in: *Fletcher Forum of World Affairs* 26 (Summer/Fall 2002), p. 7, p. 11.
[267] Article on CNN Website, "Bosnian Serbs Sacked over Karadzic", dated 01/07/2004, http://www.cnn.com/2004/WORLD/europe/06/30/serbia.hunt/index.html, accessed on 09/09/2004.
[268] Article on CNN website, "Croat general jailed for war crime", dated 24/03/2003, http://www.cnn.com/2003/WORLD/europe/03/24/croatia.trial/index.html, accessed on 09/09/2004.
[269] Amnesty International Report 2004 for Serbia-Montenegro, on website http://web.amnesty.org/report2004/yug-summary-eng, accessed on 09/09/2004..
[270] Cf. ICTY website, http://www.un.org/icty/indictment/english/kar-ii950724e.htm, accessed on 08/09/2004.
[271] Cf. Interpol Website, http://www.interpol.int/public/Wanted/Notices/Data/1995/54/1995_47754.asp, accessed on 09/09/2004.

whereabouts often appear to be known to the Bosnian-Serb and Serbian authorities.[272] Other sources express the opinion that not only does the unwillingness of the Bosnian Serb and Serbian authorities help Karadzic escape the arrest attempts of the international SFOR-troops in the region, but that these attempts are not meant to be successful in the first place.[273] These sources suspect that Karadzic has either struck a deal before stepping down from power, has information about deals struck with the Western powers during the war or – as another alternative – has left Europe and is hiding in Russia or in the Caucasus.[274]

3.1.1.2 The Goal of Rendering Justice to the Victims

The goal of rendering justice to the victims is a very noble goal, but also a goal that is difficult to reach through an institution that focuses predominantly on the perpetrator and not on the victim, like the ICTY does. Criminal justice can only provide limited satisfaction to the victims.[275]

The proceedings focus on the individual liability of the perpetrators, which often does not include all the abuses that the victim has suffered.[276] Second, the weight of the victim's testimony is decreased by the attempts by the defence counsel to let it appear contradictory. Furthermore, the perpetrator will always try to negate his guilt unless the proof situation is overwhelming.[277]

Unlike the Nürnberg prosecutions or the prospective Extraordinary Chambers in Cambodia, the prosecution of the ICTY has to rely on witness' testimony for large parts, since the perpetrators in the former Yugoslavia did not leave behind a large amount of documents and files like the Nazis in Europe and the Khmer Rouge in Cambodia.[278] If they left any documents, these are often in the hand of administrations unwilling to cooperate with the

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[272] Claire De Than/Edwin Shorts, *International Criminal Law and Human Rights* (2003), London: Sweet and Maxwell, p. 291.
[273] Article in "Die Zeit" (German Weekly Newspaper), "Die Freiheit eines Mörders", printed edition Nr. 37/2004 (02/09/2004), p. 11 – 15.
[274] Article in "Die Zeit" (German Weekly Newspaper), "Die Freiheit eines Mörders", printed edition Nr. 37/2004 (02/09/2004), p. 11, p. 15.
[275] Richard Goldstone, Justice as a tool for Peace-making: Truth Commissions and International Criminal Tribunals, in: *New York University Journal of International Law and Politics* 28 (1996), p. 485, p. 491.
[276] Franca Baroni, The International Criminal Tribunal for the Former Yugoslavia and its Mission to restore Peace, in: *Pace International Law Review* 12 (Fall 2000), p. 233, p. 239.
[277] Franca Baroni, The International Criminal Tribunal for the Former Yugoslavia and its Mission to restore Peace, in: *Pace International Law Review* 12 (Fall 2000), p. 233, p. 240.

prosecution of the ICTY – or any prosecution trying to hold "war heroes" of the Balkan wars accountable – and therefore practically inaccessible, while trials for crimes committed in Nazi Germany, Cambodia and also Rwanda have the advantage that they can operate within an administration that is not per se opposed to prosecutions of crimes against international law and violations of international human rights. This is true as long as the "right" perpetrators are being prosecuted – the new RPF-dominated government in Kigali, Rwanda, for example, frequently denies that its own forces committed atrocities as well.[279]

Witness protection is another problem, especially since the ICTY is located outside the territory of the former Yugoslavia and lacks the power to establish an effective witness protection program in Serbia- Montenegro and in Bosnia-Herzegovina.[280] Many witnesses still live in the areas where the crimes against international (and national) law took place, and with very much reason they often fear intimidation or retaliation by friends, family or allies of the defendants.[281] Witnesses testifying in front of the ICTY often ask for and get protection ranging from non-disclosure of their identity to the media, facial and voice distortion of the witness on camera and in some cases even testifying in closed session which will not appear in the public transcripts.[282] However, this does not guarantee complete protection. Especially in their home country the protective measures are often worthless once the name of the victim has leaked out to the public or even to a smaller circle of people ready to take revenge, often with the goal to prevent future witnesses from testifying by which they themselves could be incriminated.

In order to render justice to the victim, it is necessary that the ICTY provides for a forum that encourages the search for truth.[283] But whether this can be achieved in a body focused on the prosecution of crimes and handing down sentences to the alleged perpetrators is more than

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[278] Patricia Wald, The International Criminal Tribunal For the Former Yugoslavia comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court, in: *Washington University Journal of Law and Policy* 5 (2001), p. 87, p. 107.
[279] Human Rights Watch 2004 Report on Rwanda, on website http://www.hrw.org/english/docs/2003/12/31/rwanda7009_txt.htm, accessed on 29/09/2004.
[280] David Tolbert, The International Criminal Tribunal for the former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, in: *Fletcher Forum of World Affairs* 26 (Summer/Fall 2002), p. 7, p. 11.
[281] Patricia Wald, The International Criminal Tribunal For the Former Yugoslavia comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court, in: *Washington University Journal of Law and Policy* 5 (2001), p. 87, p. 108 –109.
[282] Patricia Wald, The International Criminal Tribunal For the Former Yugoslavia comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court, in: *Washington University Journal of Law and Policy* 5 (2001), p. 87, p. 109.
[283] Franca Baroni, The International Criminal Tribunal for the Former Yugoslavia and its Mission to restore Peace, in: *Pace International Law Review* 12 (Fall 2000), p. 233, p. 240.

questionable. The establishment of a truth commission could be a helpful tool in order acknowledge the suffering of the victims and thus, by providing them with a forum to tell their sufferings, really render justice to them. This will be discussed in further detail in chapter four.

3.1.1.3 Deterring Future Perpetrators

The goal of deterring future possible perpetrators is inherent to every system of criminal prosecution, be it on a national or an international level. On neither level has it worked perfectly, which would cause the crime rate to drop significantly because of the threat of prosecution. On a national level, the pure need to uphold a system of criminal prosecution shows that the deterrent factor does not work completely. Even in countries where the death penalty is imposed such as in the United States of America, the crime rate did not drop significantly after the (re-)introduction of the death penalty.[284] This is of course not to be taken as an argument that the deterrent factor does not work at all on a national level. Deterrence not only includes severity, but also certainty and celerity of the punishment.[285] For the deterrence factor to work, severity of the punishment is not as important as its certainty.[286]

On an international level, the best argument that the deterrent factor of the ICTY is not to be overestimated is the genocide that took place in Rwanda in 1994 – a year after the ICTY was established - and the fact that more atrocities were committed even in the territory of former Yugoslavia such as in Srebrenica in 1995[287] and in Kosovo in 1998 and thereafter.[288] Tolbert argues that the ICTY was just beginning to emerge as an effective institution for criminal prosecution and could therefore not serve as a real deterrent in Kosovo in 1999 when even international diplomacy had failed.[289] However, this argument seems flawed, because the deterrent factor of the ICTY was not strong enough to prevent ethnic Albanians from

[284] Amnesty International USA, "The Death Penalty is not a Deterrent", undated, on website http://www.amnestyusa.org/abolish/deterrence.html, accessed on 29/09/2004.
[285] Sanja Kutnjak Ivkovic, Justice by the International Criminal Tribunal for the former Yugoslavia, in: *Stanford Journal of International Law* 37 (Summer 2001), p. 255, p. 264.
[286] Sanja Kutnjak Ivkovic, Justice by the International Criminal Tribunal for the former Yugoslavia, in: *Stanford Journal of International Law* 37 (Summer 2001), p. 255, p. 264.
[287] Sean Murphy, Progress and Jurisprudence of the International Criminal Tribunal for the former Yugoslavia, in: *American Journal of International Law* 93 (1999), p. 57, p. 95.
[288] Article on CNN website, "NATO rushes troops to Kosovo", dated 18/03/2004, http://www.cnn.com/2004/WORLD/europe/03/18/kosovo.violence/index.html, accessed on 10/09/2004.
[289] David Tolbert, The International Criminal Tribunal for the former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, in: *Fletcher Forum of World Affairs* 26 (Summer/Fall 2002), p. 7, p. 11.

rampaging in Kosovo in March 2003,[290] at a time when the ICTY surely was an established institution and with Slobodan Milosevic even had a former head of state in detention. Nonetheless, the deterrence factor of the ICTY, especially regarding persons responsible at top-level, probably has improved over the years, since the tribunal was able to apprehend important key figures as Milosevic. It is vitally important that perpetrators breaking international criminal law are aware that prosecution and punishment is ensured around the world and that there is no safe haven for them. Unfortunately, examples of safe havens still exist in parts of the Balkan for the criminals of the Yugoslav wars and in Africa for criminals like Charles Taylor, the Liberian ex-dictator leading a comfortable life in Nigeria.

3.1.1.4 Promoting Reconciliation in the Former Yugoslavia

The goal to promote reconciliation is probably the most ambitious one. When trying to establish whether the ICTY has promoted reconciliation in the former Yugoslavia, one is faced with several problems.

3.1.1.4.1 Defining Reconciliation

The first problematic point is how to define reconciliation. In our context, it is easier to start with the goal of reconciliation. In a region like the former Yugoslavia with no democratic tradition and several ethnic groups – Serbs, Croats, Bosnian Serbs, Bosnian Croats, Bosnian Muslims, and Albanians[291] - the objective is to create a stable democratic community in which the wounds of the past – physical, psychological, emotional, economic and others – are treated in a way that the individuals and communities can at least coexist peacefully. Victims and perpetrators and the different ethnic groups have to be able to live in the same community or country, accepting each other and participating in a functioning civil society. Thus, the broad definition of Webster's dictionary seems appropriate: To reconcile is defined as "to restore to friendship or harmony."[292]

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[290] Article on CNN website, "NATO rushes troops to Kosovo", dated 18/03/2004, http://www.cnn.com/2004/WORLD/europe/03/18/kosovo.violence/index.html, accessed on 10/09/2004.
[291] Mario von Battara (ed.), *Der Fischer Weltalmanach 2004* (2003), Frankfurt/Main: Fischer, Column 151, Column 757.
[292] Webster's dictionary website, http://www.webster.com/cgi-bin/dictionary?book=Dictionary&va=reconciling, accessed on 12/09/2004.

Another, often proposed way to deal with the past is to forget what has happened and move on, often combined with the declaration of a blanket amnesty, like in Sierra Leone with the Lomé Accord. But being able to forget what has happened in the past is an illusion: a society that decides not to deal with the past will at some point in time still be confronted with it.[293] In order to create a new stable society in which democracy is deeply embedded, reconciliation amongst the different groups of society has to be promoted.

These groups can be ethnic groups like in Yugoslavia, where all conflict parties committed atrocities during the 1990s. In other conflicts such as Cambodia, victims and perpetrators belong mostly to the same ethnic group. But there are always the two groups of victims and perpetrators. Sometimes, a person can be both victim and perpetrator, like the child soldiers in Sierra Leone.[294]

The acknowledgment of past crimes is necessary for the establishment of a legitimate democratic legal order.[295] The need to look backwards so that perpetrators can be held accountable and the need to look forward in order to allow all sides to participate in the transitional process to a new democracy have to be balanced.[296] The concept of accountability for past crimes through acknowledging them does not necessarily require legal proceedings and punishment,[297] since there are other possibilities such as a truth commission,[298] which will be discussed in further detail in chapter four.

The ICTY is a body for prosecuting crimes through punishment, thus following a classical approach of acknowledging crimes of the past. But after defining reconciliation, the next and even more problematic task is to establish whether the ICTY helped to promote reconciliation in the territory of the former Yugoslavia. How can the success of reconciliation be measured?

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[293] Jeremy Sarkin, The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda, in: *Human Rights Quarterly* 21 (1999), p. 767, p. 799.
[294] Jeana Webster, Responding to the Crisis, Planning for the Future: The Role of International Justice in the Quest for National and Global Security, in: *Indiana International and Comparative Law Review* 11 (2001), p. 731, p. 740.
[295] James D. Wilets: Introduction: The Building Blocks to Recognition of Human Rights and Democracy: Reconciliation, Rule of Law and Domestic and International Peace, in: *ILSA Journal of International and Comparative Law* 7 (2001), p. 597, p. 598.
[296] Aeyal Gross, The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel, in: *Stanford Journal of International Law* 40 (2004), p. 47, p. 48 – 49.
[297] Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998), Boston: Beacon Press, p. 9.
[298] Jeremy Sarkin, The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda, in: *Human Rights Quarterly* 21 (1999), p. 767, p. 770 – 771.

3.1.1.4.2 Measuring Reconciliation – Proposition of a Model

At first sight, the countries covering the territory of the former Yugoslavia do not seem to have been successful at promoting reconciliation, moreover, they appear to be unwilling to reconcile with each other. Some individuals (Serbs,[299] Croats[300] and Bosnian Muslims alike) who have committed crimes against international law are seen as war heroes by their respective ethnic group. Clashes in Kosovo prevail.[301]

Leaving aside this anecdotal approach, one could try to develop a tool to measure the success of reconciliation, thus being able to measure the amount of reconciliation in Bosnia Herzegovina in 1999 and in 2004, for example, or compare the situation in the former Yugoslavia to that in Cambodia. This five-tier approach should include a

- sociological approach
- political approach
- economical approach
- demographic approach
- way of reckoning with the past

The sociological approach could focus on the examination of a survey, for example. But the situation in Yugoslavia and in other countries with a history of massive human rights violations does often not allow conducting a proper scientific survey. The reasons are manifold, such as strained resources, poor infrastructure, and non-cooperation by government officials.

Surveys are also very vulnerable to being used as political weapons by interest groups within society, thus decreasing the value of the results found. Who designs the survey, who is responsible for conducting the survey and interpreting the results may alter the value of the survey significantly. In some parts of the former Yugoslavia, extensive research was

[299] Article on CNN Website, "Bosnian Serbs Sacked over Karadzic", dated 01/07/2004, http://www.cnn.com/2004/WORLD/europe/06/30/serbia.hunt/index.html, accessed on 12/09/2004.
[300] Article on CNN website, "Croat general jailed for war crime", dated 24/03/2003, http://www.cnn.com/2003/WORLD/europe/03/24/croatia.trial/index.html, accessed on 12/09/2004.
[301] Article on CNN website, "NATO rushes troops to Kosovo", dated 18/03/2004, http://www.cnn.com/2004/WORLD/europe/03/18/kosovo.violence/index.html, accessed on 12/09/2004.

conducted, but people also expected changes fuelled by the survey and are less willing now to participate than they were at the beginning.[302]

Second, one can evaluate the political and legal situation of each society in question. Do the former victims have the possibility of participating in public life, for example by holding public office and forming parties, and are not longer discriminated against? Can the former victims claim reparations?

An important stepping stone on the way to a stable democratic society are free and fair elections without intimidation and suppression of political opponents, for example. The strict adherence to the principle of separation of powers and the role of a free press is also important.

Third, the economy can be examined. Are the former oppressors, for example through state-run companies, still in control of the market? Does everybody have the possibility of participating in the economy? What is the growth rate, and is it stable? A good indicator for the economic situation is the amount of foreign investment, though it should not be taken alone. Investors prefer reliable and stable markets, but an authoritarian regime can provide this as well.

Fourth, demographic factors are important. What is the situation of international refugees? Are internally displaced persons able to return to their old homes without fear of intimidation or physical harm? Does everybody, regardless of his status in the past, have access to infrastructure? Do the members of the formerly opposed groups intermix (if applicable) in such terms as areas of residence, participation in political, social and religious groups? Does intermarriage occur in significant numbers, if applicable?

Fifth, is the society dealing with its own past, in whatever way – from a blanket amnesty (like the one proposed in Sierra Leone) to a general prosecution of everybody who was involved in the crimes (like Rwanda is apparently trying to do)? Is there a discussion in process about the past? Is the discussion led in a manner that all groups have a free and fair chance to take part in it without having to fear retaliation? Are victims of former crimes being recognized? Do

[302] Sanja Kutnjak Ivkovic, Justice by the International Criminal Tribunal for the former Yugoslavia, in: *Stanford Journal of International Law* 37 (Summer 2001), p. 255, p. 294 – 295.

they have a chance to claim reparations? Are former perpetrators held accountable for their crimes, through criminal prosecution or in other ways?

The results have to be carefully interpreted and the overall circumstances have to be taken into account. Comparing two countries or societies might nonetheless be difficult, because the starting point may be very different: For example, if the countries of former Yugoslavia and East Timor are to be compared, the examination of access to infrastructure is not very useful, since the overall access in Yugoslavia is much better than in East Timor.

Therefore, the model is open to discussion and alteration. Furthermore, the different approaches are subject to intensive research when it comes to studying the different case studies. In the following, these five different approaches will be examined to a certain depth, but it is advisable to conduct further research on the progress of reconciliation in the different case studies by adding more variables.

3.1.1.4.3 Progress of Reconciliation in the Former Yugoslavia

When evaluating the progress of reconciliation between the different ethnic groups in the countries covering the territory of the former Yugoslavia, the first impression that there has not been much success within the ten years since the ICTY was established is reaffirmed. Applying the proposed model, the five approaches will be briefly discussed.

Following the sociological approach, it is interesting to state that although there has been a series of surveys in the former Yugoslavia regarding the situation of refugees and the possibilities of reintegration,[303] the war victims in the former Yugoslavia have very rarely been asked about their opinion of the ICTY and whether or not the tribunal is helpful to promote reconciliation in the former Yugoslavia.[304] Ivkovic has conducted a survey regarding the acceptance of the ICTY, but it covers only 600 respondents, is already more than four years old and does not have the subject of reconciliation as a main target.[305]

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[303] Sanja Kutnjak Ivkovic, Justice by the International Criminal Tribunal for the former Yugoslavia, in: *Stanford Journal of International Law* 37 (Summer 2001), p. 255, p. 294 – 295.
[304] Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the former Yugoslavia, in: Stanford Journal of International Law* 37 (Summer 2001), p. 255, p. 292 – 293.
[305] Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the former Yugoslavia, in: Stanford Journal of International Law* 37 (Summer 2001), p. 255, p. 293 – 346.

Regarding the political aspect, one perceives that the situation causes great concern, especially in Serbia[306] and Bosnia-Herzegovina.[307] The rights of minorities are seldom respected, the Serbian Prime Minister Djindic[308] was murdered, and in the UN-administered Serbian province of Kosovo clashes between ethnic Albanians and Serbs persist.[309]

Examining the economical factors, one has to state that the situation is quite dire in Bosnia-Herzegovina and in Serbia-Montenegro. Bosnia-Herzegovina remains the poorest republic of the old Yugoslav federation next to Macedonia.[310] The official unemployment rate in Bosnia-Herzegovina is 40 percent,[311] while in Serbia it is officially close to 25 percent.[312] The same rate (25 percent) is true for Croatia,[313] but official rates have to be evaluated carefully, and other indicators which are not as easily forged have to be taken into account, such as inflation: Here, the rate for Croatia is 2.2 percent in 2002[314] while inflation in Serbia ran at 91.1 percent in 2001[315] and at 3 percent in Bosnia-Herzegovina in 2000.[316]

When looking at the demographic factors, the impression given by the anecdotic research is reinstated: At the end of 2002, there were 262,000 internally displaced persons (mainly from Kosovo), and 353,000 refugees from other parts of the former Yugoslavia in Serbia-Montenegro, 228,000 of these were from Croatia and 121,000 from Bosnia-Herzegovina.[317] In Bosnia-Herzegovina, there were 368,000 internally displaced persons.[318] Croatia had 17,000 internally displaced persons, 22,000 persons fled Croatia to Bosnia and 228,000 persons fled Croatia to Serbia.[319]

[306] Human Rights Watch, Human Rights Overview: Serbia and Montenegro, dated January 2004, on HRW website, http://hrw.org/english/docs/2003/12/31/serbia7022.htm, accessed on 13/09/2004.
[307] Amnesty 2004 report on Bosnia Herzegovina, on website http://web.amnesty.org/report2004/bih-summary-eng, accessed on 21/09/2004.
[308] Amnesty International Report 2004 on Serbia-Montenegro, on website http://web.amnesty.org/report2004/yug-summary-eng, accessed on 13/09/2004.
[309] Article on CNN website, "NATO rushes troops to Kosovo", dated 18/03/2004, http://www.cnn.com/2004/WORLD/europe/03/18/kosovo.violence/index.html, accessed on 13/09/2004.
[310] US Department of State, „Background Note: Bosnia and Herzegovina", dated February 2004, on website http://www.state.gov/r/pa/ei/bgn/2868.htm, accessed on 12/10/2004.
[311] Mario von Battara (ed.), *Der Fischer Weltalmanach 2004* (2003), Frankfurt/Main: Fischer, column 152.
[312] Mario von Battara (ed.), *Der Fischer Weltalmanach 2004* (2003), Frankfurt/Main: Fischer, column 757.
[313] Mario von Battara (ed.), *Der Fischer Weltalmanach 2004* (2003), Frankfurt/Main: Fischer, column 518.
[314] Mario von Battara (ed.), *Der Fischer Weltalmanach 2004* (2003), Frankfurt/Main: Fischer, column 518.
[315] Mario von Battara (ed.), *Der Fischer Weltalmanach 2004* (2003), Frankfurt/Main: Fischer, column 757.
[316] Mario von Battara (ed.), *Der Fischer Weltalmanach 2004* (2003), Frankfurt/Main: Fischer, column 152
[317] Mario von Battara (ed.), *Der Fischer Weltalmanach 2004* (2003), Frankfurt/Main: Fischer, column 757.
[318] Mario von Battara (ed.), *Der Fischer Weltalmanach 2004* (2003), Frankfurt/Main: Fischer, column 151.
[319] Mario von Battara (ed.), *Der Fischer Weltalmanach 2004* (2003), Frankfurt/Main: Fischer, column 517.

Evaluating the fifth approach of the proposed model, reckoning with the past, one finds that the population in all parts of the former Yugoslavia tends to negate the atrocities committed by members of their own ethnic group.

During the period January to May 2003, there were over 1000 violent incidents against returnees and displaced people and their property in Bosnia-Herzegovina.[320] In Croatia, tens of thousands of Serb refugees are unable to return and have lost pre-war tenancy rights in unfair legal proceedings in their absence.[321] Serbs still tend to see themselves as victims and not as perpetrators in the conflict of the 1990s.[322] In the UN-administered Serbian province of Kosovo, attacks against minorities and their properties continue, and only 1000 Serbs out of the 180,000 who have fled the province since 1999 returned to Kosovo in 2003.[323]

When considering all the enumerated facts and statistics mentioned above, one concludes that reconciliation in the countries of the former Yugoslavia is far from being accomplished. It is difficult to evaluate exactly how much the ICTY has contributed to the promotion of reconciliation in the former Yugoslavia or how much it has prevented reconciliation. But there are other measures such as a truth commission (discussed in chapter four) that might be better suited to promote reconciliation than an international criminal tribunal.

3.1.2 Critical Voices in the Literature

Several authors have criticized the work of the ICTY, without negating its achievements. Since it is the tribunal that has been longest in operation after the end of the Cold War, its work, proceedings and shortcomings were the subject of numerous articles.

Regarding the right to a fair trial and the principle of due process, the lengthy proceedings of the ICTY are one of the main points that critics bring forward.[324] Due to the fact that most defendants do not speak English or French, the official working languages of the court, and

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[320] Amnesty International 2004 report on Bosnia-Herzegovina, on website http://web.amnesty.org/report2004/bih-summary-eng, accessed on 15/09/2004.
[321] Amnesty International 2004 report on Croatia, on website http://web.amnesty.org/report2004/hrv-summary-eng, accessed on 15/09/2004.
[322] Article on BBC website, "Serb Justice under Scrutiny", dated 01/10/2004, http://news.bbc.co.uk/1/hi/world/europe/3708118.stm, accessed on 10/10/2004.
[323] Amnesty International 2004 report on Serbia-Montenegro, on website http://web.amnesty.org/report2004/yug-summary-eng, accessed on 15/09/2004.
[324] Daryl A. Mundis, Improving the Operation and Functioning of the International Criminal Tribunals, in: *American Journal of International Law* 94, 4 (October 2000), p. 759, p.773.

because the translation services have too little capacity, the defendants sometimes do not get access to important documents in Serb or Croatian before these are subject in the courtroom.[325] The members of the defence counsel, which are in almost all of the cases paid by the ICTY because the defendants are destitute or pretend to be destitute, do not speak the native languages of the defendants, have to be flown in to the Hague at a vast expense and are tempted to prolong the ICTY's proceedings because the remuneration is better than in their home countries.[326]

A crucial point where the ICTY had no chance of being successful because of its design was the missing impact of the ICTY on the development of courts and justice systems in the countries covering the territory of the former Yugoslavia.[327] The justice system in almost all of the states of the former Yugoslavia is simply not well-equipped enough to provide fair and impartial trials for all groups. Since the judges are biased towards their own ethnic groups or are subject to threats and intimidation, there are little to no effective mechanisms to bring perpetrators to court in the states of the former Yugoslavia itself.[328]

The ICTY, realizing this shortcoming, has established an outreach program to improve contact to communities in the former Yugoslavia in which the applied laws and procedures are seldom known and are seen as unfair.[329] Especially in the opinion of Bosnian Serbs and Bosnian Croatians, the ICTY focuses unfairly on members of their own ethnic group and it is considered an "instrument of Western influence".[330]

The outreach program is under-funded and has not received any direct funding from the UN. Although it has had a number of successes in improving the perception of the ICTY in the region and the work of local law professionals, there has been little systematic effort by the

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[325] Patricia Wald, The International Criminal Tribunal For the Former Yugoslavia comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court, in: *Washington University Journal of Law and Policy* 5 (2001), p. 87, p. 103.
[326] Patricia Wald, The International Criminal Tribunal For the Former Yugoslavia comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court, in: *Washington University Journal of Law and Policy* 5 (2001), p. 87, p. 103.
[327] David Tolbert, The International Criminal Tribunal for the former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, in: *Fletcher Forum of World Affairs* 26 (Summer/Fall 2002), p. 7, p. 13.
[328] David Tolbert, The International Criminal Tribunal for the former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, in: *Fletcher Forum of World Affairs* 26 (Summer/Fall 2002), p. 7, p. 12.
[329] Franca Baroni, The International Criminal Tribunal for the Former Yugoslavia and its Mission to restore Peace, in: *Pace International Law Review* 12 (Fall 2000), p. 233, p. 247 – 248.
[330] Patricia Wald, The International Criminal Tribunal for the former Yugoslavia comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court, in: *Washington University Journal of Law and Policy* 5 (2001), p. 87, p. 115.

ICTY to improve the judicial structure in the region.[331] The fact that the tribunal is located in The Hague, the Netherlands, far away from the region where the crimes were committed, is another factor that alienates the tribunal from the local population and prevents it from achieving its goals.

The amount of money spent on the ICTY – its annual budget was 96.4 million for 2001[332] - is enormous, considering what could have been accomplished when using part of this sum for training of local law professionals and improving the judicial structure in the region. This of course requires an improved cooperation by the states in the region, especially the Republika Srpska in Bosnia-Herzegovina. According to Tolbert, the mandate of the tribunal is defined too narrowly regarding this aspect, since it was not given any specific role in assisting local war crimes prosecution or improving the domestic justice system.[333]

3.1.3 ICTY Goals not reached

When examining the four goals of the ICTY – ensuring prosecution, rendering justice to the victims, deterring future perpetrators and promoting reconciliation – it is obvious that the ICTY was not successful at reaching all goals. The ICTY was more and more successful in ensuring prosecution over the years, but on the other hand it had little success in deterring future perpetrators and failed to render justice to the victims and to promote reconciliation.

As has been shown above, there is a considerable number of shortcomings and problems that the ICTY has to deal with. On the other hand, the ICTY has also had considerable success after a difficult start. Especially the critical point of local proximity, involvement of the local law community and improvement of the domestic justice system can better be solved by a hybrid court that is located within the country. National staff that speaks the local languages also help to improve the acceptance of a criminal tribunal, while at the same time saving valuable resources that do not have to be spent for translation services, but can be used for other purposes.

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[331] David Tolbert, The International Criminal Tribunal for the former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, in: Fletcher *Forum of World Affairs* 26 (Summer/Fall 2002), p. 7, p. 13-14.
[332] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 453.
[333] David Tolbert, The International Criminal Tribunal for the former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, in: *Fletcher Forum of World Affairs* 26 (Summer/Fall 2002), p. 7, p. 13-14.

3.2 The International Criminal Tribunal for Rwanda

3.2.1 The Goals of the ICTR

The goals of the ICTR are to ensure prosecution, to promote national reconciliation and to maintain peace.[334] Furthermore, the ICTR also has the mandate to promote the process of national reconciliation and to establish regional stability. [335]

The work environment of the ICTR is different from the ICTY and former Yugoslavia insofar as prosecution is concerned because the new Tutsi-led government of Rwanda wants to prosecute the perpetrators of the 1994 genocide as well.[336] The bodies and strategies of the Rwandan national government have to be taken into account when examining the success of the ICTR. Notably, the *Gacaca* courts – community courts in Rwanda - will be described and whether their design and work has so far contributed to the goals of the ICTR. After an initial stage of cooperation, the government of Rwanda now chastises the ICTR for being too slow and inefficient.[337] Contrary to the states of former Yugoslavia, it is not lacking political and personal will to ensure prosecution for example, but poverty and the sheer number of the cases as well as the lack of experience of the judges seriously hinder the process.[338]
This year, the tribunal has experienced serious financial shortages.[339]

3.2.1.1 The Goal of Ensuring Prosecution

The main goal of the ICTR is to ensure prosecution of persons who allegedly participated in the Genocide in 1994.[340]

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[334] ICTR website, http://www.ictr.org/ENGLISH/geninfo/intro.htm, accessed on 17/09/2004.
[335] ICTR website, http://www.ictr.org/ENGLISH/geninfo/intro.htm, accessed on 17/09/2004.
[336] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p 1221, p. 1323.
[337] Yacob Haile-Mariam, The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court, in: *Hastings International and Comparative Law Review* 22, 4 (Summer 1999), p. 667, p. 697.
[338] Daniel J. Rearick, Innocent until Alleged Guilty: Provisional Release at the ICTR, in: *Harvard International Law Journal* 44 (Summer 2003), p. 577, p. 594.
[339] Article on BBC website, "Rwanda tribunal strapped for cash", dated 30/06/2004, http://news.bbc.co.uk/1/hi/world/africa/3854715.stm, accessed on 21/09/2004.
[340] ICTR website, http://www.ictr.org/ENGLISH/geninfo/intro.htm, accessed on 17/09/2004.

3.2.1.1.1 Prosecution by the ICTR

More than a hundred thousand people are suspected of having committed crimes in the genocide of 1994.[341] The ICTR is only to prosecute top-level criminals and has indicted more than 81 individuals, of whom 66 have been arrested and transferred to the Tribunal's custody. [342] The trials of thirteen individuals who are in custody of the ICTR have been completed and all but one were convicted. The Appeals Chamber has confirmed eight of the convictions and one acquittal, while four appeals are still pending. Eight trials involving 20 defendants are currently in progress.[343]

The number is small compared to the over 100,000 individuals held in totally overcrowded prisons,[344] of whom 20,000 were provisionally released in 2003.[345]

However, one has to keep in mind that the ICTR has concurrent jurisdiction with the courts in Rwanda, whose work will be examined below.[346] It took some time for the ICTR, established in 1994, to get started: The first case began in January 1997, two and a half years after the end of the genocide.[347] The court is scheduled to finish all investigations by the end of this year and complete its work by 2008.[348]

The ICTR has had considerable success in prosecuting top level criminals responsible for planning the genocide, like former Prime Minister Jean Kambanda and the Interahamwe leaders Arsène Ntahobali and Georges Rutaganda.[349] But at least 300 people considered to fall

[341] Amnesty International Report on Rwanda 2003, on website: http://web.amnesty.org/report2003/rwa-summary-eng, accessed on 17/09/04.
[342] Article on CNN website, "Rwanda seeks genocide suspects abroad", dated 22/03/2004, http://www.cnn.com/2004/WORLD/africa/03/22/rwanda.suspects.reut/index.html, accessed on 23/03/04. Note that these numbers differ slightly from the ones stated by the UN.
[343] ICTR website, http://www.ictr.org/default.htm , accessed on 17/09/2004.
[344] Evelyn Bradley, In Search for Justice – A Truth and Reconciliation Commission for Rwanda, in: *Journal of International Law and Practice* 7 (1998), p. 129, p. 143.
[345] Amnesty International on Rwanda 2004, on website: http://web.amnesty.org/report2004/rwa-summary-eng, accessed on 17/09/2004.
[346] Jeremy Sarkin, The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda, in: *Human Rights Quarterly* 21 (1999), p. 767, p. 798.
[347] Jeremy Sarkin, The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda, in: *Human Rights Quarterly* 21 (1999), p. 767, p. 798.
[348] Article on CNN website, "Rwanda seeks genocide suspects abroad", dated 22/03/2004, http://www.cnn.com/2004/WORLD/africa/03/22/rwanda.suspects.reut/index.html, accessed on 17/09/2004.
[349] Cf. ICTR website, http://www.ictr.org/default.htm, accessed on 17/09/2004.

under "category one" under Rwandan law because they are suspected of having worked at the planning level of the genocide still remain at large ten years after the genocide.[350]

The trials of the ones indicted have been lengthy. A long period of pre-trial detention is problematic considering the rights of the defendants according to the principles of due process.[351] Ten years after the genocide, only eight cases involving eight accused have been completed. Considering that the ICTR is in its tenth year of operation with an annual budget of about US $ 150 million,[352] each conviction has cost close to US § 200 million. Even when assuming that all 81 indicted individuals will be apprehended, the cost of each conviction would be close to US $ 20 million – if the ICTR would not receive any more funds after 2004.

The sum of US $ 1,5 billion is tremendous, especially when compared to Rwanda's annual GDP of about US $ 2 billion.[353] What could have been achieved with a fraction of it in Rwanda? Measures of reconciliation could have been taken, the domestic justice system could have been improved, the legal profession trained and the infrastructure rebuilt. That is, if the new government of Rwanda would be more cooperative and less authoritarian. The human rights situation in Rwanda has steadily deteriorated over the last years, with severe intimidation and arrests of members of the political opposition as well as a mounting number of disappearances of government opponents.[354]

But before jumping to a quick conclusion about the tribunal's goal to prosecute the perpetrators, it has to be taken into account that in Rwanda, unlike in Yugoslavia, the national criminal system is also prosecuting alleged perpetrators. If the Rwandan justice system is successful in ensuring prosecution in fair trials, the relatively small number of convictions by the ICTR would not harm the process. The ICTR could legitimately concentrate on the prosecution of a relatively few number of offenders who were involved in the genocide at top level. In order to answer the question whether prosecution is ensured by the ICTR combined

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[350] Article on CNN website, "Rwanda seeks genocide suspects abroad", dated 22/03/2004, http://www.cnn.com/2004/WORLD/africa/03/22/rwanda.suspects.reut/index.html, accessed on 17/09/2004.
[351] Louise Arbour, The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results, in: *Hostra Law and Policy Symposium* 3 (1999), p. 37, p. 41.
[352] Süddeutsche Zeitung, "Ruanda zehn Jahre nach dem Völkermord", printed edition of 23/03/2004, p. 3
[353] Statistic of the United Nations Development Program for 1999, on website http://www.undp.org/hdr2001/indicator/indic_88_1_1.html, accessed on 17/09/2004. For 2002, this figure has not changed: The German Foreign ministry (Auswärtiges Amt or AA) puts the GDP of Rwanda at US $ 1.8 billion, according to a statistic on the AA website, http://www.auswaertiges-amt.de/www/de/laenderinfos/laender/laender_ausgabe_html?type_id=2&land_id=138, accessed on 17/09//2004.
[354] Amnesty International 2004 Report on Rwanda, on website http://web.amnesty.org/report2004/rwa-summary-eng, accessed on 17/09/2004.

with the work of the Rwandan national courts, the domestic criminal country of Rwanda has to be examined as well.

3.2.1.1.2 Prosecution by the Rwandan Courts

In Rwanda, specialized chambers within the criminal justice system are to deal with the cases of more than 80,000 defendants still awaiting trial ten years after the genocide. In 2003, only about 450 genocide suspects were tried, which puts the number of total defendants to be tried by the Specialized Chambers to approximately 8000 since they became operational in 1996.[355] This surprisingly low number is accompanied by the fact that most trials did not meet international standards of fairness.[356] The even decreasing numbers of trials is caused by the temporary halt in the assignment of cases, the transfer of prisoners to itinerant judicial seats, the progressive disengagement of NGOs from assisting the courts and, to a very small amount, by the beginning of Gacaca jurisdiction.[357]

The courts of Rwanda, whose legal profession was seriously decimated in the 1994 genocide, are not able to guarantee a fair and speedy trial for these people still waiting for trial in the totally overcrowded prisons of the country. The danger of unfair trials and the sentencing of innocents is high.[358]

No judicial system anywhere in the world is designed to handle the stress presented by an attempt to prosecute more than 100,000 people at once accused of committing such a wide range of atrocities.[359] The government provisionally released over 20,000 individuals from prisons in 2003, but only after most of them had confessed of having participated in the genocide.[360] 80,000 people remain in prisons designed for 15,000 individuals.[361]

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[355] Amnesty International 2004 Report on Rwanda, on website http://web.amnesty.org/report2004/rwa-summary-eng, accessed on 17/09/2004.
[356] Amnesty International 2004 Report on Rwanda, on website http://web.amnesty.org/report2004/rwa-summary-eng, accessed on 17/09/2004.
[357] Amnesty International 2003 report on Rwanda, http://web.amnesty.org/report2003/Rwa-summary-eng, accessed on 22/04/2004.
[358] Evelyn Bradley, In Search for Justice – A Truth and Reconciliation Commission for Rwanda, in: *Journal of International Law and Practice* 7 (1998), p. 129, p. 143.
[359] Jeremy Sarkin, The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda, in: *Human Rights Quarterly* 21 (1999), p. 767, p. 788.
[360] Amnesty International 2004 Report on Rwanda, on website http://web.amnesty.org/report2004/rwa-summary-eng, accessed on 17/09/2004.
[361] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p. 1221, p. 1233.

The prosecution of the people accused of participating in the 1994 genocide was not ensured by the Rwandan Specialized Chambers either. The government, heavily dependent on foreign aid, tried to minimize international criticism by using the traditional Gacaca courts as means to hold the perpetrators accountable.

3.2.1.1.3 Prosecution by the Gacaca Courts

In April 2003, the Rwandan government, realizing that the country's criminal justice system could not cope with the caseload, trained some 250,000 lay magistrates regarding basic principles of law, group management, conflict resolution, judicial ethics and trauma counselling, after which these lay magistrates should work in Gacaca tribunals.[362]

The Gacaca courts were traditionally a conflict-solving mechanism in the Rwandan communities for less serious crimes and were never used to deal with capital offences. By using them for a completely different purpose, the government altered the nature of the traditional courts, leaving them with the task to hold over 100,000 alleged perpetrators accountable, which clearly was expecting too much of them, regarding both the caseload as well as the expertise of the lay magistrates.[363]

From the beginning, there have been voices airing concerns that Gacaca tribunals may fall short of minimum international standards of fairness, particularly regarding the rights of the alleged criminals; whether Gacaca benches would be competent, independent and impartial; and whether there would be adequate protection for all those involved in the Gacaca sessions and hearings.[364] The lay magistrates, often poorly trained, hindered the Gacaca courts from functioning efficiently.[365] They are expected to hand down heavy sentences, including life imprisonment.[366] Because of the number of defendants the inexperienced members of the

[362] Amnesty International 2003 Report on Rwanda, on Amnesty International website, http://web.amnesty.org/report2003/rwa-summary-eng, accessed on 17/09/2004.
[363] Jeremy Sarkin, The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in dealing with the Genocide, in: *Journal of African Law* 45, 2 (2001), p. 143, p. 170.
[364] Amnesty International 2003 Report on Rwanda, on Amnesty International website, http://web.amnesty.org/report2003/rwa-summary-eng, accessed on 17/09/2004.
[365] Amnesty International 2003 Report on Rwanda, on Amnesty International website, http://web.amnesty.org/report2003/rwa-summary-eng, accessed on 19/09/2004.
[366] Jeremy Sarkin, The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in dealing with the Genocide, in: *Journal of African Law* 45, 2 (2001), p. 143, p. 163.

Gacaca trials and the overall poor infrastructure in Rwanda, individuals who allegedly participated in the genocide might wait for years until their case is being tried.[367]

Human rights abuses of the former rebels-turned-government RPF members are not being tried in front of the Gacaca courts, although they may have committed equally horrendous acts as the members of the old Hutu regime and its Interahamwe militia.[368]

Until the beginning of 2004, less than ten percent of the planned 11,000 tribunals had become operational.[369] There have been reliable reports of witnesses being killed and individuals offering fake testimonies for cash.

The Rwandan Gacaca courts could not ensure prosecution for the crimes committed in the genocide of 1994. The community-based courts, originally a conflict solving tool for petty crimes, are clearly overstretched in both resources and design to deal with capital crimes, especially when considering the requirements of due process and a fair trial.

3.2.1.1.4 Prosecution Not Ensured

The ICTR has not been successful at reaching its goal to ensure prosecution for the offenders.[370] Although the ICTR was successful in apprehending over three quarters of the indicted individuals,[371] it has only sentenced a fraction of them ten years after the genocide.[372] Since the national criminal justice system of Rwanda could neither through the Specialized Chambers nor through the Gacaca court ensure prosecution according to the principles of fair trial and due process, the situation is even more worrying. Thousands of people still await trial ten years after the genocide.[373] The tribunal's financial means are enormous compared to the domestic criminal justice system of Rwanda, and the money and expertise (as well as impartiality) is bitterly needed in Rwanda. Even if one argues that the ICTR's responsibility is

[367] Interview of Radio Netherlands with Amnesty International researcher Richard Haavisto, "The Gacaca Fiasco", dated 14/01/2004, on website http://www.rnw.nl/hotspots/html/rwa040114.html, accessed on 20/09/04.
[368] Interview of Radio Netherlands with Amnesty International researcher Richard Haavisto, "The Gacaca Fiasco", dated 14/01/2004, on website http://www.rnw.nl/hotspots/html/rwa040114.html, accessed on 20/09/04.
[369] Interview of Radio Netherlands with Amnesty International researcher Richard Haavisto, "The Gacaca Fiasco", dated 14/01/2004, on website http://www.rnw.nl/hotspots/html/rwa040114.html, accessed on 20/09/04.
[370] Cf. ICTR website, http://www.ictr.org/ENGLISH/geninfo/intro.htm, accessed on 20/09/2004.
[371] Article on CNN website, "Rwanda seeks genocide suspects abroad", dated 22/03/2004, http://www.cnn.com/2004/WORLD/africa/03/22/rwanda.suspects.reut/index.html, accessed on 20/09/04. Note that these numbers differ slightly from the ones stated by the UN.
[372] ICTR website, http://www.ictr.org/default.htm , accessed on 17/09/2004.

to prosecute only top level criminals of the genocide, the tribunal has failed to reach this goal, with over a quarter of the indicted individuals still not in custody and only a fraction of the apprehended sentenced.

3.2.1.2 The Goal of Promoting Reconciliation

As has been developed above, it is a difficult task to measure the success of reconciliation in a given society.[374] The proposed five-tier model[375] will help to evaluate the progress of reconciliation. Has the ICTR, as a body of criminal justice, been successful at promoting reconciliation in Rwanda?

In contrast with the former Yugoslavia, perpetrators and victims of the genocide of 1994 have to live side by side. Although over a million of Tutsi and Hutus were killed and hundreds of thousands of Hutus fled Rwanda after the Tutsi rebels took control, the settlement areas remain mixed. The planners of the genocide were not successful in their plan to wipe out all Tutsi in Rwanda, while in the former Yugoslavia, the different radicals of the various population groups succeeded with their vicious system of ethnical cleansing. In Rwanda, it is not possible – nor desirable – to separate the two population groups or to divide the country into cantons settled by one population group only.

As opposed to the former Yugoslavia, where Serbs, Croats and Muslims were – to a different extent – both victims and perpetrators, in Rwanda the Tutsi minority group was the only target of crimes committed in ethnical hatred (although Hutus were killed as well). Another difference is that the formerly victimized group of the Tutsi has managed to take control of the country, as they had in some form or other for centuries until 1959.[376]

Applying the proposed model, the promotion of reconciliation shall be examined by using the sociological approach. This proves to be difficult, as the policy of the new government in

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[373] Jeremy Sarkin, The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda, in: *Human Rights Quarterly* 21 (1999), p. 767, p. 788.
[374] See above, chapter 3.1.1.4.2.
[375] See above, chapter 3.1.1.4.2.
[376] "Leave none to tell the story", Human Rights Watch publication, on HRW website: http://hrw.org/reports/1999/rwanda/Geno1-3-09.htm#P196_82927, accessed on 29/09/04.

Rwanda under its leader Paul Kagame is to negate any differences between Tutsis and Hutus officially, which makes conducting surveys extremely difficult.[377]

Evaluating the situation following the political approach one does not get a bright picture of the situation in Rwanda. The Tutsi-led regime under Paul Kagame has become more and more openly repressive. There were consistent reports of intimidation of voters during the presidential election held in September/October 2003, which the ruling RPF party officially won with 74 percent of the votes.[378] A number of members of the opposition party MDR "disappeared" or were kept in unlawful detention and received death threats by the government forces.[379]

Oppositional civil organizations were denounced as "divisionist" or "sectarian", one of the gravest accusations in Rwanda, since a "divisionist" person or organization is accused of creating divides between the Tutsi and Hutu and by that inciting racial hatred.[380] The MDR was accused of fermenting "division", and the leading human rights organization was accused of financially supporting the MDR and by doing so, aiding the "divisionists". The media remained controlled by the government.[381]

Following the economic approach, an examination shows that Rwanda is heavily dependent on foreign aid. Over 80 percent of Rwanda's budget are financed by foreign donors, who are ready to give after not having intervened in the genocide of 1994 on time.[382] The real growth of the GDP from 1990 – 2001 was only 0.8 percent,[383] and economic growth is handicapped by high population growth, land shortage, Rwanda's land-locked position, a small fragmented market and regional insecurity.[384]

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[377] Human Rights 2004 Report on Rwanda, on HRW website, http://www.hrw.org/english/docs/2003/12/31/rwanda7009_txt.htm, accessed on 29/09/2004.
[378] Amnesty International 2004 report on Rwanda, on website http://web.amnesty.org/report2004/rwa-summary-eng, accessed on 20/09/2004.
[379] Amnesty International 2004 report on Rwanda, on website http://web.amnesty.org/report2004/rwa-summary-eng, accessed on 20/09/2004.
[380] Amnesty International 2004 report on Rwanda, on website http://web.amnesty.org/report2004/rwa-summary-eng, accessed on 20/09/2004.
[381] Amnesty International 2004 report on Rwanda, on website http://web.amnesty.org/report2004/rwa-summary-eng, accessed on 20/09/2004.
[382] Auswärtiges Amt (Foreign Ministry of Germany), Country Profile on Rwanda, on website http://www.auswaertiges-amt.de/www/en/laenderinfos/laender/laender_ausgabe_html?type_id=12&land_id=138, dated October 2003, accessed on 20/09/2004.
[383] Mario von Battara, *Der Fischer Weltalmanach 2004* (2003), Frankfurt: Fischer, column 681.
[384] Auswärtiges Amt (Foreign Ministry of Germany), Country Profile on Rwanda, on website http://www.auswaertiges-

Looking at demographic factors, it has to be stated that Rwanda is far from being a reconciled society. Rwanda is Africa's most densely populated country with an annual population growth rate of 3.6 percent. Access to drinking water is a problem for more than half of the population.[385] The refugee problem remains yet to be solved. There are still large refugee populations in neighbouring countries, and the government forces returning refugees into a programme of forced resettlement ("villagization"), which causes food and water shortage.[386] The number of Hutu in the legislative, executive and judiciary of Rwanda has steadily decreased over the years since 1994.[387]

The way Rwanda is reckoning with its past is not helpful to promote reconciliation either, although the country urgently needs reconciliation. Restoring reconciliation in a transitional society assists stability and is helpful on the way to democracy.[388] According to the model of Drumbl, Rwanda is a dualist postgenocidal society, where victims and perpetrators live side by side.[389] A vital question for this kind of society is to create institutional structures to accommodate both groups, hold the perpetrators accountable and help the victims in the healing of their wounds. The success of establishing effective institutional mechanisms (such as a truth commission) is a key factor in order to prevent new human rights violations.[390] Drumbl also argues that the criminal justice system should facilitate and demand active participation of the parties and their communities in order to find solutions to the conflict.[391]

In Rwanda, the new government has clearly decided to reckon with the past only by punishing everybody who was allegedly involved in the genocide, other measures are not to be taken. But the justice system is already overburdened with the caseload, although authorities

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amt.de/www/en/laenderinfos/laender/laender_ausgabe_html?type_id=12&land_id=138, dated October 2003, accessed on 20/09/2004.

[385] USAID, Overview on Rwanda, on website http://www.usaid.gov/pubs/bj2001/afr/rw/, dated 12/03/2002, accessed on 20/09/2004.

[386] Human Rights Watch 2001 Report on Rwanda, on website http://www.hrw.org/wr2k1/africa/rwanda.html, accessed on 20/09/2004.

[387] Jeremy Sarkin, The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide, in: *Journal of African Law* 45, 2 (2001), p. 143, p. 152.

[388] Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998), Boston: Beacon Press, p. 23.

[389] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p. 1221, p. 1237.

[390] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p 1221, p. 1239.

[391] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p 1221, p. 1256.

estimate that 250,000 people are yet to be accused.[392] Rwanda decided not to establish a truth commission, which could have helped to bridge the gap between the Hutu and the Tutsi, who remain deeply separated in many areas of Rwanda.[393] A large group within the Hutu part of the population does not condemn the genocide as such.[394] To the contrary, there is widespread belief that at the beginning of April 1994, a Tutsi attack was imminent and that the mass killings were merely an act of self-defence.

Rwanda is far from being reconciled, even the promotion of reconciliation is doubtful at the present stage. There might be different stages of and different roads to reconciliation, but Rwanda is not on any of them. The now Tutsi-dominated government is involved in a wide range of human rights abuses.[395] The Hutu majority of the population is not allowed to participate in the government. The regime has installed some Hutu in prominent posts in the beginning, but it is more and more openly showing that Hutu are not supposed to play a part in the government in Rwanda. For example, after being accused of "divisionism", the Hutu president Pasteur Bizimungu had to resign in March 2000.[396] The Hutu majority will sooner or later demand their share of power. This can only be denied if the Tutsi-dominated government remains as repressive as today. The growing frustration and anger of the Hutu majority, together with goals and ambitions of the criminals of the old Hutu regime hiding in Congo could unfortunately prove to be a fertile soil for a new genocidal catastrophe in Rwanda.

The second goal of the ICTR, the promotion of reconciliation in Rwanda,[397] has not been reached.

[392] Human Rights Watch, Human Rights Overview on Rwanda, dated 01/01/2004, on website http://hrw.org/english/docs/2003/12/31/rwanda7009.htm#2, accessed on 20/09/2004.
[393] Jeremy Sarkin, The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda, in: *Human Rights Quarterly* 21 (1999), p. 767, p. 799 – 802.
[394] Report of the International Crisis Group on Rwanda, dated 13/11/2002, on International Crisis group website: http://www.crisisweb.org/home/index.cfm?id=1555&l=1, accessed on 20/09/2004.
[395] Amnesty International 2003 Report on Rwanda, on Amnesty International website: http://web.amnesty.org/report2003/rwa-summary-eng, accessed on 22/09/2004.
[396] Article on CNN website, "Rwandan President resigns", dated 23/03/2000, http://www.cnn.com/2000/WORLD/africa/03/23/rwanda.presidentresig.02/index.html, accessed on 22/09/2004.

3.2.1.3 Establishing Regional Stability

The last of the aims of the ICTR to be examined is the goal of establishing regional stability,[398] which is a very ambitious goal for a body of criminal justice. Since the Security Council resolution establishing the ICTR[399]did not provide for any peace-enforcing measures such as police or armed forces, the tribunal has to rely on its own work in order to establish regional stability.

This means that the ICTR has to use speedy trials as a deterrence factor for other perpetrators committing crimes in the region, but that alone will probably not be enough. The region around the Great Lakes in Africa has a long history of violence and widespread warfare has been endemic over the past decades. In Rwanda, the Tutsi-led government is accused of massive human rights violations itself. The Amnesty International Report on Rwanda 2004 states the following:

> "'Disappearances', arbitrary arrests, unlawful detentions and the ill-treatment of detainees were reported. (..) Approximately 80,000 individuals remained in detention, nearly all of them suspected of participation in the genocide. Most were held for prolonged periods without charge or trial, in harsh and overcrowded conditions. (..) Grave human rights violations committed in previous years by state security agents remained without thorough or independent investigation. Several people were detained for peaceful opposition activities."[400]

The new government of Rwanda, equipped with efficient armed forces and backed by generous donor funding, has proven to be an instability factor in the region itself. The RPF-Rwandan Army invaded the eastern DRC in 1998 under the pretext of defending Rwanda against attacks from Hutu militias.[401] Rwanda uses its military presence to exploit the natural

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[397] ICTR website, http://www.ictr.org/default.htm , accessed on 22/09/2004.
[398] ICTR website, http://www.ictr.org/default.htm , accessed on 22/09/2004.
[399] ICTR Website, http://www.ictr.org/ENGLISH/geninfo/intro.htm, accessed on 28/07/2004.
[400] Amnesty International 2004 report on Rwanda, on website http://web.amnesty.org/report2004/rwa-summary-eng, accessed on 22/09/2004.
[401] Article on CNN website, "Tensions build between Rwanda, DRC", dated 20/07/2004, http://www.cnn.com/2004/WORLD/africa/06/20/congo.rwanda.tension/index.html, accessed on 22/09/2004.

resources and support the RCD - Goma militia fighting the government in Kinshasa.[402] The situation remains dangerous with different militias fighting the central government in Kinshasa. In Burundi though the circumstances are different, the situation is no less volatile.[403]

Although the DRC conflict parties formed a transitional government in June 2003, local leaders operating beyond effective central control have kept the region in turmoil.[404] The different militias have continued to commit crimes, including killing, raping, and otherwise injuring civilians and destroying or pillaging their property, often in efforts to win or defend local control. Rwanda and Uganda, the major powers in the eastern DRC since 1999, officially withdrew their troops but have ensured their grip on the region through local warlords and have exploited Congolese resources for their own profit.[405] Ethnic tensions, especially between Hutu and Tutsi, but also between other ethnic groups like Hema and Lendu around the town of Bunia in the Eastern DRC[406] are often provoked by warlords and different militias - who sometimes act on behalf of multinational corporations - whose actual goal is not ethnical hatred, but profit by means of exploiting the vast natural resources.[407] The UN General Secretary stated that the size of UN forces in the DRC should be doubled in order to increase the chance of stability in the DRC.[408]

With the ongoing fighting over strategic resources and political influence, the region resembles a powder keg. In Burundi, the situation between the Tutsi-dominated government and Hutu-led rebels remains tense. Various ceasefires, the last one arranged by South Africa in 2003,[409] have been broken. Since the main Hutu rebel group FNL joined a new coalition government, hopes have been high that Burundi, where over 300,000 people were killed in

[402] Relief Web, article on Relief Web website, "DRC: RCD-Goma captures Lubero as ceasefire talks continue", http://www.reliefweb.int/w/rwb.nsf/0/b32630d2ebf5b61649256d4b000f4462?OpenDocument, accessed on 22/09/2004.
[403] Relief Web, article on Relief Web website, "DRC: RCD-Goma captures Lubero as ceasefire talks continue", http://www.reliefweb.int/w/rwb.nsf/0/b32630d2ebf5b61649256d4b000f4462?OpenDocument, accessed on 22/09/2004.
[404] Human Rights Watch Overview on DRC, on Human Rights Watch website, http://hrw.org/english/docs/2003/12/31/congo7003.htm, accessed on 22/09/2004.
[405] Human Rights Watch Overview on DRC, on Human Rights Watch website, http://hrw.org/english/docs/2003/12/31/congo7003.htm, accessed on 22/09/2004.
[406] Article on CNN website, "UN appeal over Congo violence", dated 15/05/2003, http://www.cnn.com/2003/WORLD/africa/05/15/congo.un/index.html, accessed on 22/09/2004.
[407] Human Rights Watch, on HRW website, "Human Rights Overview: Democratic Republic of Congo", http://hrw.org/english/docs/2003/12/31/congo7003.htm, accessed on 22/09/2004.
[408] Article on CNN website, "Annan : More troops needed for DRC", dated 16/08/2004, http://www.cnn.com/2004/WORLD/africa/08/16/un.congo/index.html, accessed on 22/09/2004.

ethnic fighting between Tutsi and Hutu in the 1990s, could be stabilized. Clashes in March 2004 between the army and Hutu rebels group diminished these hopes.[410] Recently, the attacks on Tutsi refugee camps in Burundi by forces of the old Rwandan Hutu regime from the territory of the DRC have caused alarm; experts are afraid that the Hutu rebels in Burundi will form an alliance with the forces of the old Rwandan Hutu regime in the DRC.[411]

In order to stop the fighting in this region, the different parties have to obey the cease-fire agreements that have too often been broken. For example, Rwanda and Uganda would have to stick to their promise not to interfere in the Eastern DRC anymore. The ICTR cannot – because of its ratio temporis and especially because of practical means - prosecute any government or local militia attacking another one today. Here, international sanctions and peacekeepers with a robust peace-making mandate could be an adequate measure. But one always has to bear in mind what will happen if UN troops do not have sufficient support or numbers – as happened in Rwanda in 1994. Another measure could be the use of truth commissions and other mechanisms to reconcile the region, which will be discussed further below. Today, the most worrying situation on the continent is to be found in the Sudanese province of Darfur, where the central government in Khartoum supports a militia that murders, rapes and tortures the inhabitants of Darfur and drives them out of their homes.[412] Again, the conflict is motivated by ethnical hatred – the militias are of Arab descent, the population of Darfur is mainly black -, but what is no less important is control over the oil resources in the region.

The ICTR has not had effective measures to establish regional stability in the Central African region of the Great Lakes. The tribunal's deterrent factor has not been strong enough to keep perpetrators in the region from committing the same crimes over and over. The Great Lakes region remains unstable today, but the focus of the media has shifted to the crisis in Southern Sudan, while massive human rights violations in Rwanda, Burundi and the DRC continue.

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[409] BBC News Country Profile on Burundi, on BBC website, dated 14/07/2004, http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1068873.stm, accessed on 22/09/2004.
[410] Article on CNN website, "Burundi battle kills 13", dated 18/03/2004, http://www.cnn.com/2004/WORLD/africa/03/18/burundi.killings.reut/index.html, accessed on 22/09/2004.
[411] Article on BBC website, "Armed alliance feared in Burundi", dated 27/08/2004, http://news.bbc.co.uk/1/hi/world/africa/3604424.stm, accessed on 22/09/2004.
[412] Article on CNN website, "UN says Darfur clashes hinder access to Refugees", dated 20/09/2004, http://www.cnn.com/2004/WORLD/africa/09/20/sudan.darfur.reut/index.html, accessed on 24/09/2004.

3.2.2 The ICTR could not reach its Goals

The ICTR has not been successful at reaching its goals. The best results have been achieved regarding the goal of ensuring prosecution, but comparing the small amount of indictments and convictions and the enormous costs of the tribunal, the question remains whether the money could have been better put to use in rebuilding Rwanda's battered judicial system. The other two goals, promoting reconciliation and establishing regional stability, are very ambitious and hard to reach for the ICTR simply because of its design as a body of criminal justice dealing with the crimes committed in Rwanda in 1994. This does not seem to impress the warlords in the Eastern DRC who have continued to commit crimes against the civilian population in 2004.

3.3 Contributions of the Ad-hoc Tribunals to International Criminal Law

Both the ICTY and the ICTR have contributed to the field of international criminal law in important aspects.

3.3.1 Contributions of the ICTY

3.3.1.1 War Crimes and the Definition of an Armed Conflict

The Statute of the ICTY allows the tribunal to prosecute grave breaches of the Geneva Conventions of 1949 in a conflict, whether it is an international or an internal one.[413] Victims and perpetrators in the conflict in Bosnia-Herzegovina held the same nationality. Problems arose over the question whether the war in Bosnia-Herzegovina was to be seen as an international armed conflict – predominantly because of the involvement of Serbia on the side of the Bosnian Serbs – to which international criminal law would be applicable.[414]

In *Prosecutor v. Tadic*, the ICTY ruled that the conflict in former Yugoslavia carried the characteristics of an international conflict and the perpetrators could therefore be tried for

[413] Art. 2 SYIT.
[414] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 44.

grave breaches of the Geneva Conventions of 1949.[415] In its judgement, the Appeals Chamber found that overall political and military authority over the Republika Srpska was held by the Federal Republic of Yugoslavia and that this control persisted until the end of the conflict.[416]

In a decision in the case *Prosecutor vs. Tadic*, the ICTY broadened the definition of the term armed conflict and held that an armed conflict in the sense of international criminal law is given "whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."[417] By this ruling, the application of international law to a much greater range of armed conflicts was made possible, notably to internal armed conflicts with some sort of foreign involvement, which constitute the majority of conflicts in the world today. The ICTY Appeals Chamber reaffirmed these findings and applied Article 3 SYIT to internal armed conflicts. The Chamber argued that the development of customary international law – embracing the Geneva Conventions and thus Art. 3 SYIT – is meant to protect civilians and civilian objects in internal armed conflicts.[418]

Another issue to be decided was whether the victims were to be considered as "protected persons" as required by Art. 2 SYIT.[419] In order for the victims to be considered "protected persons" according to Art. 4 Geneva Convention, they had to "find themselves, in the case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals".[420] In Bosnia-Herzegovina, victims held the same nationality as the perpetrators. However, the Appeals Chamber argued (in *Prosecutor vs. Tadic*):

> "While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality

[415] Judgement of the Appeals Chamber, *The Prosecutor v. Tadic*, ICTY case No. IT-94-1, dated 15/7/1999, on ICTY website http://www.un.org/icty/tadic/appeal/judgement/index.htm, accessed on 01/11/2004, at paragraph 162.
[416] Judgement of the Appeals Chamber, *The Prosecutor v. Tadic*, ICTY case No. IT-94-1, dated 15/7/1999, on ICTY website: http://www.un.org/icty/tadic/appeal/judgement/index.htm, accessed on 01/11/2004, at paragraph 162.
[417] ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, in *Prosecutor v. Tadic*, Case No. IT-94-1, dated 02/10/1995, http://www.un.org/icty/tadic/appeal/decision-e/51002.htm, accessed on 02/11/04, at paragraph 70.
[418] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 45.
[419] Claire De Than/Edwin Shorts, *International Criminal Law and Human Rights* (2003), London: Sweet and Maxwell, p. 284.
[420] Art. 4 Geneva Convention IV.

may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test."[421]

The Appeals Chamber found that the Bosnian Serbs acted as de facto organs of another state (the Federal Republic of Yugoslavia), and that the victims "were 'protected persons' as they found themselves in the hands of armed forces of a State of which they were not nationals."[422] This viewpoint was later reinforced by the Appeals Chamber in the case *Prosecutor vs. Delalic et al. (Celebici Camp)*[423] and in *Prosecutor vs. Aleksovksi* (concerning the Bosnian-Croatian forces under de facto control of Croatia).[424]

3.3.1.2 Crimes against Humanity

Article 5 SYIT allows the ICTY to prosecute crimes against humanity. Historically, in order to prosecute a person for crimes against humanity, his or her actions had to be taken in a nexus with an armed conflict, a prerequisite that is found in Art. 5 SYIT as well.

However, in *Prosecutor vs. Tadic*, the Appeals Chamber of the ICTY ruled that customary international law does not require a direct connection of crimes against humanity with an armed conflict, thus negating the war nexus as a necessary element of a crime against humanity.[425]

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[421] Judgement of the Appeals Chamber, *The Prosecutor v. Tadic*, ICTY case No. IT-94-1, dated 15/7/1999, on ICTY website: http://www.un.org/icty/tadic/appeal/judgement/index.htm, accessed on 03/11/2004, at paragraph 166.

[422] Judgement of the Appeals Chamber, *The Prosecutor v. Tadic*, ICTY case No. IT-94-1, dated 15/7/1999, on ICTY website: http://www.un.org/icty/tadic/appeal/judgement/index.htm, accessed on 03/11/2004, at paragraph 167.

[423] Judgement of the Appeals Chamber, *The Prosecutor vs. Delalic et al.*, case No. IT-96-21, dated 20/02/2001, on ICTY website: http://www.un.org/icty/celebici/appeal/judgement/index.htm, accessed on 03/11/2004, at paragraph 63.

[424] Judgement of the Appeals Chamber, *The Prosecutor vs.Aleksovski*, case No. IT-95-14/1, dated 24/03/2000, on ICTY website: http://www.un.org/icty/aleksovski/appeal/judgement/index.htm, accessed on 03/11/2004, at paragraph 79.

[425] Judgement of the Appeals Chamber, *The Prosecutor v. Tadic*, ICTY case No. IT-94-1, dated 15/7/1999, on ICTY website: http://www.un.org/icty/tadic/appeal/judgement/index.htm, accessed on 01/11/2004, at paragraph

The Appeals Chamber replaced the war nexus element with a context element, meaning that is it sufficient that an armed conflict is taking place at the time and place relevant for the prosecution, but the crime does not have to be committed in a direct connection with the operations of the armed forces.[426] This eases the prosecution of crimes committed against the background of an ongoing conflict, as it is often the case that crimes in the conflicts of today are not committed in direct connection to military battles.

Often, it has been difficult to prove that superiors actually gave orders to subordinates to commit crimes against humanity. According to the ICTY case law, not only the individuals who actually commit the crime but also the ones who give the orders, participate in, conspire for, incite to or attempt crimes against humanity can be held responsible.[427]

As happens quite often in internal conflicts, often not only military personnel but also civilians commit crimes against humanity. These private individuals may be regarded as de facto state officials which can be held accountable for their crimes.[428]

3.3.1.3 Genocide

The crime of genocide was first defined in Article II of the UN Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly on 9 December 1948 (hereafter Genocide Convention).[429]

272; see further: Guénaël Mettraux, Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, in: *Harvard International Law Journal* 43 (Winter 2002), p. 237, p. 268.

[426] Judgement of the Appeals Chamber, *The Prosecutor v. Tadic*, ICTY case No. IT-94-1, dated 15/7/1999, on ICTY website: http://www.un.org/icty/tadic/appeal/judgement/index.htm, accessed on 01/11/2004, at paragraph 251; see further Guénaël Mettraux, Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, in: *Harvard International Law Journal* 43 (Winter 2002), p. 237, p. 268.

[427] Claire De Than/Edwin Shorts, *International Criminal Law and Human Rights* (2003), London: Sweet and Maxwell, p. 288; see further Judgement of the Appeals Chamber, *The Prosecutor v. Tadic*, ICTY case No. IT-94-1, dated 15/7/1999, on ICTY website: http://www.un.org/icty/tadic/appeal/judgement/index.htm, accessed on 03/11/2004, at paragraph 189.

[428] Claire De Than/Edwin Shorts, *International Criminal Law and Human Rights* (2003), London: Sweet and Maxwell, p. 288; see further Judgement of the Appeals Chamber, *The Prosecutor v. Tadic*, ICTY case No. IT-94-1, dated 15/7/1999, on ICTY website: http://www.un.org/icty/tadic/appeal/judgement/index.htm, accessed on 03/11/2004, at paragraph 144.

[429] Cf. Website of the UN High Commissioner for Human Rights, http://www.unhchr.ch/html/menu3/b/p_genoci.htm, accessed on 26/09/2004.

According to Article II of the Genocide Convention, a criminal act such as the killing[430] of a member or causing serious bodily harm[431] to a member of a national, ethnic, racial or religious group is considered as genocide.

In its judgement in the case *Prosecutor vs. Krstic*, the Appeals Chamber found that the Trials Chamber was correct in its view that the killing of over 7000 male Bosnian Muslims by the Bosnian Serbs in September 1995 constituted genocide.[432] The Genocide Convention requires that the part of the group that the perpetrator intends to kill must be of considerable quantity.[433] The intention to kill a few members of the group does not constitute genocide.[434] If the special intent to destroy the group in whole or in part can not be proven, the crime cannot be prosecuted as genocide, but may be prosecuted as a crime against humanity.[435]

The question was whether the killing of a part of the Muslim population of Srebrenica constituted an important enough part of the Muslim population group in Bosnia in order to be considered as genocide according to the Genocide Convention.[436] The Appeals Chamber argued that the decision whether the targeted group is a substantial part of the whole group may involve a number of considerations, including the numeric size, but also the emblematic role of the specific part of the group as well as the question of whether the survival of the specific part is vital for the survival of the whole group.[437]

In its judgement, the Appeals Chamber held the view that although numberwise the Muslim population of Srebrenica did not constitute a substantial part of the Muslim population of Bosnia-Herzegovina, the strategic importance of the region and the symbolic character of Srebrenica as a UN – declared safe area elevated this specific group to the level of a

[430] Article II a) Genocide Convention.
[431] Article II b) Genocide Convention.
[432] ICTY Appeals Chamber Judgement in *Prosecutor vs. Krstic*, dated 19/04/2004, available at http://www.un.org/icty/krstic/Appeal/judgement/index.htm, accessed on 30/10/2004, at paragraph 23.
[433] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 25.
[434] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 25.
[435] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 25.
[436] ICTY Appeals Chamber Judgement in *Prosecutor vs. Krstic*, dated 19/04/2004, available at http://www.un.org/icty/krstic/Appeal/judgement/index.htm, accessed on 30/10/2004, at paragraph 7.
[437] ICTY Appeals Chamber Judgement in *Prosecutor vs. Krstic*, dated 19/04/2004, available at http://www.un.org/icty/krstic/Appeal/judgement/index.htm, accessed on 31/10/2004, at paragraph 12.

substantial part of the group.[438] Therefore, the mass killings of the Muslims of Srebrenica constituted the crime of Genocide according to Art. 4 Genocide Convention.

3.3.2 Contributions of the ICTR

Through its work, the ICTR has contributed decisively to the development of international criminal law regarding the crime of genocide and crimes against humanity.

3.3.2.1 Defining the Term "Group" for the Crime of Genocide

Since the beginning, there have been discussions whether the definition of a group according to Article II Genocide Convention (which distinguishes national, ethnic, racial or religious groups)[439] should include political and social groups. The question was originally negated in 1948 as well as in the drafting process for the statute of the International Criminal Court.[440]

The old definition of the term "group" made it doubtful whether the crimes committed in Rwanda in 1994 could be considered as genocide, since the victims – in their large majority Tutsi – do not constitute a specific racial group. Both Tutsi and Hutu speak the same language and cannot be separated by any other means in general,[441] except for the artificial separation introduced by the Belgian colonial power, which was documented in the old Rwandan ID cards. This proved to be a helpful tool for the Hutu killers in 1994.

Confronted with the problem that the Tutsi do not constitute a racial or ethnic group and the term "racial group" has changed considerably since 1948 (nowadays the term ethnic group is preferred),[442] the ICTR argued that the definition of the term "group" of the Genocide Convention includes all "permanent and stable groups."[443] With this definition, the ICTR was

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[438] ICTY Appeals Chamber Judgement in *Prosecutor vs. Krstic*, dated 19/04/2004, available at http://www.un.org/icty/krstic/Appeal/judgement/index.htm, accessed on 31/10/2004, at paragraph 15.
[439] Article II Genocide Convention, available at Website of the UN High Commissioner for Human Rights, http://www.unhchr.ch/html/menu3/b/p_genoci.htm, accessed on 31/10/2004.
[440] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 24.
[441] William Schabas, Groups protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda, in: *ILSA Journal of International and Comparative Law* 6 (2000), p. 375, p. 378.
[442] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 25.
[443] ICTR Trial Chamber, Judgement in *Prosecutor v. Akayesu*, date 02/09/1998, on ICTR website, http://www.ictr.org/default.htm, accessed on 29/09/2004, at paragraph 701.

able to prosecute the mass killings of Tutsi in 1994 as genocide, since they constituted a stable group, similar to "racial" or ethnic group, within the population of Rwanda.[444]

The problem whether the Tutsi constitute a group according to the Genocide Convention is not purely scholarly. In 1994, different nations shied away from calling the mass killings in Rwanda genocide[445] because the Genocide Convention imposes an obligation on the signatory states to prevent and punish genocide.[446] Since they were not willing to intervene, they avoided the use of the word "genocide" until it was over. Today, the same can be observed regarding the situation in Darfur, only that this time the United States have been quicker to call the mass killings a genocide.[447] The fact that Sudan has vast oil reserves and is governed by a repressive Islamistic regime suspected of harbouring Al-Quaeda terrorists is probably part of the motivation of the US government to be stricter in its judgement than in the case of Rwanda, which is neither of strategic importance nor has important natural resources. Other countries like Germany still avoid putting a name to the crime, because this would again be an equivalent to an obligation to intervene.[448]

The argument of the ICTR to include permanent and stable groups in the group definition of the Genocide Convention has been criticized.[449] In later judgements, the tribunal did not repeat its opinion,[450] which is not helpful for the future, since there will most probably be more population groups which are hard to fit into one of the original four categories and nonetheless their members will be killed and tortured because of their membership of the group.

Schabas criticizes the enlargement of the definition of the term "group", because in his view the term genocide, one of the most horrible crimes of all, would be diluted and the overuse of

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[444] Alexandra Miller, From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to include Rape, in: *Penn State Law Review* 108 (2003), p. 349, p. 360.
[445] Article on CNN website, "Amanpour: Looking back at Rwanda genocide", dated 06/04/2004, http://edition.cnn.com/2004/WORLD/africa/04/06/rwanda.amanpour/, accessed on 29/09/2004.
[446] Article I Genocide Convention.
[447] Article on CNN website, "Powell calls Sudan killings Genocide", dated 09/09/2004, http://edition.cnn.com/2004/WORLD/africa/09/09/sudan.powell/index.html, accessed on 29/09/2004.
[448] Reuters, on Reuters' website, "War of words over Sudan genocide charge", dated 10/09/2004, http://www.reuters.co.uk/newsPackageArticle.jhtml?type=worldNews&storyID=581190&section=news, accessed on 29/09/2004.
[449] William Schabas, Groups protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda, in: *ILSA Journal of International and Comparative Law* 6 (2000), p. 375, p. 380.
[450] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 24.

the word would lead to trivializing the horror of genocide.[451] This argument is not persuasive. If a group, no matter if defined by racial terms or other standards, is persecuted as a group and its members are killed, raped and tortured, the crime of genocide is committed, regardless of whether one would rather like to call it mass killings, ethnic tensions or whatsoever. For the situation of the group, the suffering does not change because the crimes committed are not called genocide.

Schabas recognizes the problem that not all population groups can be included in one of the four terms of the Genocide Convention. But here, his argument becomes strangely similar to the one of the ICTR. He writes that one should not create an "autonomous meaning for each of the four terms since it would weaken the overarching sense of the four terms as a whole (..)"[452] Schabas does not want to stick to the fifty-year old definition of the term "group" himself, but wants to make an ad-hoc judgement whether a population group should be included in one of the four categories of Article II of the Genocide Convention. But if there is not to be a definition of a national, ethnic, racial or religious group, what is the difference to the point of view to include all permanent and stable groups? Schabas contradicts himself and is closer to the legal opinion of the ICTR than it appears at first sight.

In Rwanda, the Tutsi were clearly prosecuted because they were Tutsi, even if from the old 1948 definition the Tutsi group does not fall into one of the four categories of Article II of the Genocide Convention. But what difference does that make to the fact that approximately one million people were killed because of the membership to this population group? It has clearly been genocide. To include all permanent and stable groups into the definition of the term "group" according to Article II of the Genocide Convention is a useful way to deter future perpetrators and to treat all victims of persecutions that target special groups on an equal basis. The very horror of the crime of genocide is that members of a group are persecuted not because of their individual actions, but simply because of their membership of a group. It does not make any difference whether this group can fit into a national, ethnic, racial or religious group or not. Whenever humans are targeted for their membership of a certain group and are killed, tortured, raped or driven from their homes, this constitutes genocide. Otherwise,

[451] William Schabas, Groups protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda, in: *ILSA Journal of International and Comparative Law* 6 (2000), p. 375, p. 386.
[452] William Schabas, Groups protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda, in: *ILSA Journal of International and Comparative Law* 6 (2000), p. 375, p. 386.

members of a racial group would enjoy more protection than members of another group that does not fit into one of the four categories of Article II of the Genocide Convention, which would lead to the point that one human life is worth more than another.

3.3.2.2 Rape included in the Crime of Genocide

In 1994, Tutsi women were consistently raped by Hutu militias, whose goal was to spread terror. The ICTR has ruled that mass rapes committed with the intent to destroy a particular group are to be prosecuted as genocide.[453]

The ICTR has also decided that encouraging genocide in public places constitutes the crime of genocide as well, no matter whether the incitement was successful or not, if the incitement has the goal to destroy the group as such through the acts of another.[454] Thus, the various organizers of the genocide in Rwanda, the mayors, priests and radio moderators, can be prosecuted for their public hate speeches, no matter if they actually killed a person with their own hands.

3.3.2.3 Crimes against Humanity

In order for a criminal act (such as murder or rape) to be prosecuted under international criminal law as a crime against humanity, the crime has to carry certain elements. The international jurisprudence has developed these elements over a long period of time.[455] The required elements are that the criminal act – the widespread or systematic attack - must be committed for non -military purposes against a civilian population in a severely inhumane and cruel way on a widespread scale or in an organized form.[456] The attack does not necessarily have to be violent in nature, according to the jurisprudence of the ICTR, imposing a system of apartheid or exerting pressure on the population to act in a certain way may be considered as

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[453] ICTR Trial Chamber, Judgment in *Prosecutor v. Akayesu*, dated 02/09/1998, on ICTR website, http://www.ictr.org/default.htm, accessed on 03/11/2004, paragraph 731. See further Alexandra Miller, From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to include Rape, in: *Penn State Law Review* 108 (2003), p. 349, p. 364.

[454] ICTR Trial Chamber, Judgment in *Prosecutor v. Akayesu*, ICTR case No. 96-4, dated 02/09/1998, on ICTR website, http://www.ictr.org/default.htm, accessed on 03/11/2004, paragraph 729. See further ICTR Trial Chamber, Judgment in *Prosecutor v. Kambanda*, dated 04/09/1998, ICTR case No. 97-23-S, on ICTR website, http://www.ictr.org/default.htm, accessed on 03/11/2004, at paragraph 40.

[455] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 28.

[456] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 29.

an attack as well.[457] Furthermore, in order for the act to be considered as crime against humanity, it has to be committed in a wider context of specified circumstances, but according to the context element not necessarily in a direct nexus to an armed conflict. It is sufficient that an armed conflict is taking place in the country where the crime is committed.[458]

In Rwanda, the mass killings and other crimes were not always organized by the government, but by government-affiliated militias or individual persons. Nonetheless, the Hutu government in power until July 1994 incited the killings and helped organize them. The ad-hoc tribunals have developed the policy element, which states that a single crime must be connected to a governmental or organizational authority, which excludes criminal organizations and conspiring individuals, but includes state-like de-facto authorities such as the Interahamwe militias in case of the absence of a central government.[459]

3.3.2.4 Criminal Responsibility

What makes criminal prosecution of superiors often difficult is that there is no clear command chain and the persons responsible for serious crimes often do not commit the crimes themselves, but are responsible for creating the circumstances in which other perpetrators actually commit the crimes.

The ICTR agrees with the jurisprudence of the ICTY according to which a superior responsible for a crime does not necessarily have to be a formal superior as in the sense of a military command chain. It is already sufficient that the actions of the subordinate are the result of some underlying behaviour of the superior, which then amounts to a form of accomplice's liability.[460]

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[457] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 33.
[458] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 32.
[459] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 37. See further ICTR Trial Chamber, Judgement in *Prosecutor vs. Rutaganda*, ICTR case No. 96-3, dated 06/12/1999, on website http://www.ictr.org/default.htm, accessed on 03/1172004, at paragraph 71.
[460] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals* (2003), Ardsley: Transnational Publishers, p. 56. See further ICTR Trial Chamber, Judgement in *Prosecutor vs. Musemi*, ICTR case No. 96-13-A, dated 27/01/2000, on website http://www.ictr.org/default.htm, accessed on 03/1172004, at paragraph 131.

This facilitates the prosecution of individuals who commit crimes in a civil war, an internal conflict or a failed state, in which an obvious command chain in a military sense does not exist and official documentation of the actions is normally rare.

3.4 The Special Court for Sierra Leone

The evaluation of the work of the Special Court for Sierra Leone can not be complete when measuring it against its goals, since the Special Court has only begun its work in March 2004 and has so far indicted 11 individuals. The single stated goal of the Special Court for Sierra Leone is to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law in the territory of Sierra Leone since 30 November 1996.[461]

The accused individuals come from both the government armed forces and affiliated militias and from the former rebels.[462] The indicted are charged with war crimes, crimes against humanity and other violations of international law, specifically with murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force, forced marriage and attacks on UN peacekeepers and humanitarian assistance workers.[463] Of course, there are many more perpetrators that should be indicted, even if one takes into account that the Special Court has been established to prosecute only those who bear the greatest responsibility. The best – or better, worst – example for this is that of the former Liberian dictator Charles Taylor. He remains in Nigeria in relative safety although Interpol has issued an international arrest warrant against him at the request of the Special Court.[464]

Although it is difficult to examine the actual success of the work of the Special Court, what can be done is to evaluate the chances of a greater outcome and success of the Special Court compared to the ad-hoc tribunals ICTY and ICTR because of its design as a hybrid court.

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[461] Art. 1 Special Court Statute.
[462] Website of the Special Court, http://www.sc-sl.org/basicfactspamphlet09.pdf, accessed on 28/09/2004.
[463] Website of the Special Court, http://www.sc-sl.org/basicfactspamphlet09.pdf, accessed on 28/09/2004.
[464] Article on CNN website, "Charles Taylor wanted by Interpol", dated 04/12/2003, on website http://www.cnn.com/2003/WORLD/africa/12/04/nigeria.taylor/index.html, accessed on 28/09/2004.

3.4.1 Perception and Acceptance by the Local Population

One of the most problematic points for the ICTY and the ICTR was the legitimacy in the eyes of the governments and people of the former Yugoslavia and of Rwanda. Dickinson calls this the perceived legitimacy, which is not legitimacy in a strictly legal sense but the question whether the decisions of the criminal tribunal will be accepted by the local population or whether this is seen as an outside, victor-dominated body to punish local war heroes.[465] Of course, it might be difficult to compare the acceptance of bodies of criminal justice on equal grounds, simply because the initial situation is different. While in the former Yugoslavia, especially the Serbian government and population were opposed to the ICTY in The Hague, the Rwandan government originally asked for the establishment of the ICTR and changed its opinion about the tribunal only later. In Sierra Leone, on the other hand, the government asked for the establishment of the Special Court and continues to support it.

In order for a body of criminal justice to achieve greater acceptance within the population, it is important that the court prosecutes perpetrators of all conflict parties and keeps the population informed about its proceedings.[466] For this, the Special Court in Sierra Leone has a unique advantage over the tribunals for Yugoslavia and Rwanda: It is located within the country where the atrocities took place and enables the local population – at least of the capital, Freetown – to gather information about the tribunal much more easily. Access to information for the rural population could be ensured via radio, the distribution of leaflets and/ or the use of alternative ways of communication such as town criers, comedians, theatre groups, women mobilisers, sports and drama.[467]

One could argue that the establishment of an objective criminal court dedicated to the rule of law and the prosecution of crimes against international criminal law would not have been possible in the states of the former Yugoslavia in 1993. This is probably true, but the question has to be asked whether the instalment of a court located in Serbia, Croatia or Bosnia in later years could not have changed the negative sentiment of the people. Part of the mission of a criminal court in post-conflict societies is to inform the people about its work and to reassure

[465] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 301.
[466] Nancy Kaymar Stafford, A model War Crimes Court: Sierra Leone, in: *ILSA Journal of International and Comparative Law* 10 (Fall 2003), p. 117, p. 134.
[467] Nancy Kaymar Stafford, A model War Crimes Court: Sierra Leone, in: *ILSA Journal of International and Comparative Law* 10 (Fall 2003), p. 117, p. 134.

them that a legal order has been re-established and that it will prosecute all perpetrators, regardless of ethnic origin, social standing, financial wealth or military power.

The ICTR in Tanzania is handicapped to fulfil this mission too, because it is located outside the country and the Rwandan government does not cooperate with the ICTR.[468] The people of Rwanda, mostly very poor, lack the financial means to travel to Tanzania to inform themselves about the tribunal, and in Rwanda itself the government holds a tight control over the media.

Of course, there are always parts of the population that strongly support international criminal justice, such as large parts of the East Timorese population or the ethnic Albanians in Kosovo.[469] But it is equally important for the stabilization process in a conflict-torn country to win over the part of the population that is sceptical or ill-informed about the work of a criminal court prosecuting serious violations of national and international law. According to a recent Human Rights Watch report, there was an initial sentiment under an educated part of the population that the Special Court was a waste of money and that the resources should be redirected to the country's truth and reconciliation commission; however this sentiment has, according to the report, decreased.[470] Since the Court only recently went into operation, no scientific survey of the acceptance in the population of Sierra Leone has yet been conducted.

Another factor that has to be taken into account is the fact that hybrid courts such as the Special Court will include the cooperation of local legal experts in their work. Local judges will sentence local perpetrators. The judges come from the same background as the rest of the population, speak their language and understand and know local customs. This is also a chance to include such population groups that have been excluded from being part of the local jurisprudence, for example the Albanians in Kosovo and the East Timorese in East Timor.[471] On the other hand, a hybrid court with international experts guarantees that after a political change, the principles of due process and a fair trial are respected and the new rulers do not

[468] Human Rights Watch, Report on Rwanda 2003, on website http://www.hrw.org/wr2k3/africa9.html, accessed on 28/09/2004.
[469] Laura Dickinson, The Promise of Hybrid Courts, in: American *Journal of International Law* 97 (2003), p. 295, p. 303.
[470] Human Rights Watch Report, "Bringing Justice: The Special Court for Sierra Leone- Accomplishments, Shortcomings, and Needed Support", dated September 2004, available at http://hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf, p. 39, accessed on 01/10/2004.
[471] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 301.

use the prosecution of past human rights violations as a pretext to suppress opposition, as it is happening in Rwanda.

The Special Court as a hybrid court has decisive advantages over the ad-hoc tribunals ICTY and ICTR because a court that is located within the country has much greater possibilities of improving its acceptance within the local population than one that is operating hundreds of kilometres away in another country. Furthermore, the cooperation of local legal experts strengthens the local roots and improves the acceptance within the local population.

3.4.2 International Legitimacy, Perception and Funding

While local acceptance of the Special Court as a hybrid tribunal is probably better than that of a distant international criminal tribunal, the question arises how the international community perceives the legitimacy of the Special Court and whether its jurisprudence will become part of the international criminal law.

The Special court is a treaty-based court and was, contrary to the ICTY and the ICTR, not established by the UN Security Council acting under Chapter VII UN Charta.[472] This means that its jurisprudence does not automatically have the same weight as the jurisprudence of the two ad-hoc tribunals, which can refer to the authority of the UN Security Council. Since the court is the result of a treaty between the UN and Sierra Leone, the courts of other countries might not acknowledge the findings and legal opinions of the Special Court. This would be a disadvantage, as the Special Court has already made important rulings, such as declaring the recruitment of child soldiers a crime under customary international law.[473] But as the Special Court has only been in operation for a few months, only time will tell whether the jurisprudence of the Special Court will be used as a reference by the domestic courts of other countries, by the ICTR and the ICTY and possibly the ICC. The fact that the Special Court has experienced international legal experts amidst its judges will hopefully increase the chances.

In order for a hybrid court to achieve greater international acceptance, it is important that the international component plays a decisive part in the hybrid court. This is ensured in Sierra

[472]Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 442 – 443.

Leone, but in the projected hybrid court in Cambodia, for example, the influence of the international judges is not as strong.[474] A strong influence of the international component – through a majority of international judges in all chambers of a hybrid court might, on the other hand, prove to be negative for the local acceptance of the hybrid court.

Thus, influence has to be carefully balanced and all circumstances have to be taken into account. The less the national judicial system is damaged and the more independent legal experts willing and able to participate in a fair criminal justice system there are, the smaller is the necessity for a decisive international influence in the criminal system. But this will seldom be the case in environments in which international ad-hoc tribunals or hybrid courts are to be established.

In East Timor, only Indonesians had staffed the judiciary, all of whom had fled after Indonesia lost control of the territory, and there were almost no East Timorese with any legal training.[475] In the former Yugoslavia, ethnic tensions have prevented legal professionals from taking part in bodies of criminal justice that stick to the principles of due process and a fair trial.[476] The government of Sierra Leone has asked the UN for the establishment of the Special Court in order to have access to legal expertise, financial support and access to the UN infrastructure.[477]

There may be situations in which the establishment of a hybrid court is simply not possible, because the local population and its government and administration are far too hostile and too uncooperative for a hybrid court to operate in the country. This was the case in Yugoslavia, and it is doubtful whether a hybrid court in Indonesia prosecuting the crimes committed during the Indonesian occupation of East Timor could operate freely and without fear of intimidation. Then, the international legitimacy of the hybrid court does not play a role.

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[473] Special Court for Sierra Leone Press Release, dated 01/06/2004, on website http://www.sc-sl.org/Press/pressrelease-060104.html , accessed on 30/09/2004.
[474] Scott Luftglass, Crossroads in Cambodia: The United Nation's (sic) Responsibility to withdraw involvement from the Establishment of a Cambodian Tribunal to prosecute the Khmer Rouge, in: *Virginia Law Review* 90 (2004), p. 893, p. 948.
[475] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 303 – 304.
[476] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 304.
[477] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 143.

The hybrid courts have been criticized from both those propagating the strengthening of international criminal justice measures and those who are against all forms of international criminal justice bodies, most notably the present administration of the United States.[478]

The supporters of a strong international criminal justice system appear to fear that hybrid tribunals may be used to undermine the authority of the International Criminal Court, while for the opponents of a strong international criminal justice system the hybrid courts are already too internationalized.[479] Nonetheless, the United States have promised to support the Special Court with US $ 5 million, since in the eyes of the current US administration a bilateral court with international components concurs far better with US interests than the permanent ICC.[480]

The design of the Special court as a treaty-based court lacking the powers according to Chapter VII UN Charta might prove to be problematic for international legitimacy and acceptance of the court.[481] While all states are to cooperate with the ICTR and the ICTY since they are obliged to comply with UN Security Chapter VII resolutions – through which the two ad-hoc tribunals were established – the Special Court cannot refer to such authority.[482]

The funding of the Special Court will be a source of problems <and discussions in the future. The ICTY and the ICTR, as bodies established by the UN Security Council, can rely on its assessed share through the UN administrative system, whereas the Special Court can not count on such definite and foreseeable financial support.[483] The UN Secretary-General has asked the UN Security Council to support permanent contribution to the Special Court, but the UN Security Council has not complied with this request.[484]

[478] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 296.
[479] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 296.
[480] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 458.
[481] Nicole Fritz/Alison Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, in: *Fordham International Law Journal* 25 (2001), p. 391, p. 416.
[482] Nicole Fritz/Alison Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, in: *Fordham International Law Journal* 25 (2001), p. 391, p. 416.
[483] Nicole Fritz/Alison Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, in: *Fordham International Law Journal* 25 (2001), p. 391, p. 416, p. 418.
[484] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 454.

Insufficient and insecure funding threatens the efficiency of the Special Court. Its officials have spent extensive time on fundraising rather than legal work and some needed staff could not be hired because of the insecurity of budget planning.[485] As of July 2004, the voluntary contributions totalling at US $ 49.3 million were only expected to last until mid-2006.[486] The UN donated US $ 16,7 million for the operation of the court from June to December 2004, but only under the condition that any additional voluntary donations would reduce the UN funding by the relevant sum, which makes any additional fundraising – at least for 2004 – useless.[487] As recommended by the General Secretary, the UN should make additional funding available in order for the Special Court to fulfil its mission.

3.4.3 Training the Local Jurisprudence and the Relation between Domestic and International Law

During a conflict in which massive human rights violations and serious crimes under international criminal law occur, the national justice system of the country is often destroyed, both by the killing or flight of legally trained personnel and the destruction of the infrastructure. In Rwanda, only very few lawyers survived the genocide.[488] In the former Yugoslavia and especially in Bosnia-Herzegovina, the legal system is still strained by ethnic tensions between its members and mistrust against the work of the ICTY.[489] Sierra Leone's judicial system, although once considered one of the best functioning ones of the continent, has been decimated by ten years of war.[490]

It is vitally important for the transitional society of Sierra Leone to establish trust in the country's domestic judicial system.[491] Sierra Leoneans work at all levels of the Special Court

[485] Human Rights Watch Report, "Bringing Justice: The Special Court for Sierra Leone - Accomplishments, Shortcomings, and Needed Support", dated September 2004, available at http://hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf, p. 41, accessed on 01/10/2004.
[486] Human Rights Watch Report, "Bringing Justice: The Special Court for Sierra Leone - Accomplishments, Shortcomings, and Needed Support", dated September 2004, available at http://hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf, p. 41, accessed on 01/10/2004.
[487] Human Rights Watch Report, "Bringing Justice: The Special Court for Sierra Leone - Accomplishments, Shortcomings, and Needed Support", dated September 2004, available at http://hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf, p. 42, accessed on 01/10/2004.
[488] Avocats sans Frontières, on ASF website, http://www.asf.be/EN/ENfield/rwanda/presentation.htm, accessed on 29/09/2004.
[489] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 302.
[490] Nancy Kaymar Stafford, A model War Crimes Court: Sierra Leone, in: *ILSA Journal of International and Comparative Law* 10 (Fall 2003), p. 117, p.133.
[491] Laura R. Hall/Nahal Kazemi, Prospects for Justice and Reconciliation in Sierra Leone, in: *International Harvard Law Journal* 44 (2003), p. 287, p. 300.

and comprise forty percent of all professional non-administrative and fifty percent of all staff.[492] Contrary to the ad-hoc tribunals ITCY and ICTR, both the proximity through its seat in Freetown and the large number of nationals working for the court will prove very valuable for the task of rebuilding Sierra Leone's battered judicial system.

The chance of training local staff is one of the most persuasive advantages of a hybrid court located in the country where the crimes were committed when compared to a purely international ad-hoc tribunal like the ICTY or the ICTR. A criminal justice organ staffed by foreigners only or a local justice system operated solely by the UN are not able to train local professionals in the skills necessary to be part of a functioning judicial system[493]

The fact that the Special Court will apply international as well as domestic criminal law might prove as another advantage over the ICTY and the ICTR. Most of the crimes committed in the ten-year long war can be prosecuted under international law, but the Sierra Leonean law is useful to prosecute crimes involving sexual violence, mass abuse of children as well as looting and arson.[494] Access to prosecution under domestic law permits the Special Court to try all perpetrators, no matter whether the crime is punishable under international law or not.[495] This again will prove helpful for the acceptance of the Special Court by the local population.

Through the combined application of international and national criminal law and the training of local professionals by international experts, it can be ensured that a network of national and international legal professionals is created and that prosecution through national and international criminal law is guaranteed in Sierra Leone, international norms are embedded within the legal system and the rule of law is accepted and welcomed by the local population.[496]

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[492] Human Rights Watch Report, "Bringing Justice: The Special Court for Sierra Leone - Accomplishments, Shortcomings, and Needed Support", dated September 2004, available at http://hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf, p. 36, accessed on 01/10/2004.
[493] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 304.
[494] Nancy Kaymar Stafford, A model War Crimes Court: Sierra Leone, in: *ILSA Journal of International and Comparative Law* 10 (Fall 2003), p. 117, p. 135.
[495] Nancy Kaymar Stafford, A model War Crimes Court: Sierra Leone, in: *ILSA Journal of International and Comparative Law* 10 (Fall 2003), p. 117, p. 135
[496] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 304.

According to Dickinson, this norm penetration process helps, through application of international law in a domestic context by functioning national and transnational legal networks, to internationalize domestic criminal law and aids the interpenetration of domestic and international criminal law.[497] She argues that the mere incorporation of international law into domestic law does not automatically mean that international standards will be observed, because local judges and lawyers may be unfamiliar with the international norm and therefore will prefer to apply ordinary domestic law to mass atrocities punishable under international criminal law – or apply international law falsely and use it for unjust sentencing.[498]

While the argument is persuasive that the cooperation between international and national legal professionals will lead to better implementation of international standards and better understanding of international criminal law, this is not the case for the reasoning that hybrid courts will lead to a process of norm penetration and the internationalization of criminal law. Only time will tell whether the international legal community and domestic courts of other countries will accept the ruling of the hybrid courts as part of international criminal law. Here, the ad-hoc tribunals have an advantage because they can refer to the authority of the UN Security Council and Chapter VII UN Charta.

The Special Court can be an excellent starting point for rebuilding the country's judicial system, both by training and motivating local staff and by providing much-needed infrastructure. Moreover, the Special Court will, if it will be adequately funded, prove as an example in the conflict-torn region of Western Africa with such run-down states as Liberia.

3.4.4 Cooperation with the Truth and Reconciliation Commission

Sierra Leone's Truth and Reconciliation Commission (TRC) began its work in July 2002, dividing its work into three phases: A deployment stage for statement taking and investigations, a hearings phase, including individual, institutional, thematic, and event-specific hearings, and a report-writing phase.[499] The TRC has many similarities to the South

[497] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 304.
[498] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 305.
[499] Elizabeth Evenson, Truth and Justice in Sierra Leone: Coordination between Commission and Court, in: *Columbia Law Review* 104 (2004), p. 730, p. 739.

African Truth and Reconciliation Commission, which also conducted hearings, could investigate by itself and issued a report.[500]

After taking approximately 6000 statements between December 2002 and April 2003, the TRC held public hearings between April and August 2003, with the participation of victims and perpetrators and prominent individuals such as President Kabbah.[501] The final report of the TRC was due in January 2004, but has not yet been issued.[502]

There are a number of questions that arise due to the unclear legislation concerning the Special Court and the TRC.

Neither the Sierra Leonean Act establishing the TRC nor the treaty between Sierra Leone and the UN mentions the respective other institution.[503] The Special Court has, according to its statute, primacy over national courts,[504] while the TRC does not have primacy over the national courts. The Special Court does not have the power to exercise primacy over the TRC. Therefore, it is unclear whether the TRC has to follow orders of the Special Court.[505]

Tejan-Cole notes that the national Supreme Court of Sierra Leone shall have "supervisory jurisdiction over all other Courts and over any adjucating authority", which according to his opinion includes the TRC.[506] But while stating that the Special Court enjoys supremacy over the Supreme Court of Sierra Leone, Tejan-Cole denies that the TRC consequently falls under Art. 8 (2) Special Court Statute, which gives the Special Court primacy over all national courts.[507] Nonetheless, he writes that the Special Court Statute enables the Special Court to

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[500] Laura R. Hall/Nahal Kazemi, Prospects for Justice and Reconciliation in Sierra Leone, in: *International Harvard Law Journal* 44 (2003), p. 287, p. 290 – 291.
[501] Elizabeth Evenson, Truth and Justice in Sierra Leone: Coordination between Commission and Court, in: *Columbia Law Review* 104 (2004), p. 730, p. 739 – 740.
[502] Elizabeth Evenson, Truth and Justice in Sierra Leone: Coordination between Commission and Court, in: *Columbia Law Review* 104 (2004), p. 730, p. 740.
[503] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 151 – 152.
[504] Art. 8 (2) Special Court Statute.
[505] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 152.
[506] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 151 – 152.
[507] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 151.

demand from the TRC to take or to omit any action and to hand over any information that is in its possession.[508] Although the Prosecutor for the Special Court has stated that the Special Court will not use testimony taken by the TRC,[509] the danger that this might be changed will prevent perpetrators from testifying in front of the TRC – even if the hearing is closed to the public – as there will always be danger that the information has to be handed over to the Special Court, which will use it for prosecution. However, only time will tell if the Special Court will use this power and whether it will go unchecked by the TRC and NGOs participating in the process of reconciliation in Sierra Leone. This would create another problem, as it is difficult to say which court would have the jurisdiction over a case involving the Special Court, as the Special Court enjoys primacy over all national Courts and this question of competent jurisdiction would not involve international law, thus barring the possibility of filing a case with an international court.

Both institutions have the same goals, namely to ensure accountability in Sierra Leone – be it through prosecution or other measures -, to bring peace to the war-torn country and to build a society in which human rights are valued.[510] But since the hierarchy between the two is unclear and they pursue their common goals through different means, problematic situations will surely arise in the future. As the Sierra Leonean TRC does not have the power to grant amnesty, it is doubtful whether perpetrators will really tell the truth in front of the commission, and in the trials at the Special Court the perpetrators will try to deny as much as possible.[511] Moreover, evidence given in testimonies at hearings of the TRC could be used in a prosecution by the Special Court or a national court, since no regulation on this matter has been laid down.[512]

Given the difficult financial situation of both the Special Court and the Sierra Leonean Truth and Reconciliation Commission, the two institutions will have to share resources whenever possible. Two fields have been identified where cooperation might prove especially

[508] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 152.
[509] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 154.
[510] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 150.
[511] Elizabeth Evenson, Truth and Justice in Sierra Leone: Coordination between Commission and Court, in: *Columbia Law Review* 104 (2004), p. 730, p. 732.

beneficial: The training of investigators, interviewers and other staff members, and public information and education.[513] Both fields are vital for the success of the Special Court and the TRC. Without properly trained local staff, the bodies will not be able to reach their goal to hold the perpetrators accountable and furthermore the local capacity building process will be stalled. The two institutions also have to create a sense of trust in the judicial system and start the process of reckoning with the past within the population of war-torn Sierra Leone. This will be achieved much more easily if the two institutions cooperate in the field of public information and education, in order to reach not only the inhabitants of the capital Freetown but also farmers in the countryside. The TRC and the Special Court can only profit from this cooperation, as spreading information about the two institutions will help to create trust, which will in turn encourage more people to step forward and to testify at the Special Court or in front of the TRC. By ensuring that as many people as possible give testimony, evidence against the perpetrators and masterminds of the brutal conflict can be collected and the country, while dealing with its past, can hopefully become one of the - unfortunately still quite rare- stable democracies in Western Africa.

3.4.5 Success of the Special Court

As has been shown above, the concept and the specific situation of the Special Court have advantages as well as shortcomings in comparison to the ad-hoc tribunals ICTY and ICTR. While the Special Court as a hybrid court may have bigger problems than the internationalized ad-hoc tribunals to attain international legitimacy and respect, this shortcoming is also one of its biggest advantages: Because of its structure, a hybrid court is much more suited to (re)establish trust into a country's legal system and train local professionals. Since there are nationals on all levels of its institution and because it is located within the country where the crimes were committed, chances are much higher that the local population will accept the work and the goals of the court and therefore cooperate. This will in turn make the task of prosecuting those responsible for serious crimes against international law much easier.[514] Through the process of capacity building, local judges are given the opportunity to learn from international experts and apply international criminal law within the

[512] Celina Schocken, The Special Court for Sierra Leone: Overview and Recommendations, in: *Berkeley Journal of International Law* 20 (2002), p. 436, p. 456.
[513] Abdul Tejan-Cole, The complementary and conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in: *Yale Human Rights and Development Law Journal* 6 (2003), p. 139, p. 156.
[514] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 306.

local context, which could lead to higher sensitivity regarding human rights violations on this continent marked by a sad history of inhumane dictatorships and brutal civil wars.

A hybrid court is hard to establish when the population rejects the idea of accountability as in Serbia and the Republika Srpska after open hostilities in the Balkan had ceased in the mid-1990s. But in Kosovo, while cases tried by courts staffed only with ethnic Albanians were not accepted by the population of Serbian descent, the verdicts of the hybrid tribunals were widely supported, even among the Serbian part of the population.[515] Maybe today, a hybrid court could even work in Serbia or Bosnia-Herzegovina.

Another disadvantage of the fact that the Special Court is not established by the Security Council acting under Chapter VII UN Charta is its reliance on donor funding rather than on allocated funds through the UN administration. If the international community is not willing to support the Special Court financially, the success of its work is seriously endangered. This would be a major drawback for the peace process in Sierra Leone. Considering how much can be reached through the work of a hybrid court with comparatively little money, the donors should think twice before risking the failure of the democratization process in Sierra Leone. This is another advantage of hybrid courts over ad-hoc tribunals: Since a hybrid court is operating in the country where the crimes were committed and employs local staff that is normally paid less than employees in the industrialized countries, budget figures such as translation and travel costs are minimized. The small financial support of the hybrid courts hinders international recruitment. If funding is not guaranteed and wages are unattractive for international experts, the necessary international expertise cannot be provided for at the panels of hybrid courts.[516]

[515] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 306.
[516] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 307.

3.5 The Special Panels in East Timor

3.5.1 Progress of Work

The Special Panels in East Timor, established under UNTAET supervision, were originally scheduled to be administered by the United Nations Mission of Support in East Timor (UNMISET) for the first two years after the country gained independence on May 20, 2002.[517] While the judges of the Special Panels were originally appointed by UNTAET, this has changed since East Timor gained independence: They are now appointed by the (national) Supreme Council of the Judiciary.[518] However the UN Security Council, with Security Council Resolution 1543 of 14 May 2004, established a new mandate for UNMISET beginning on May 2004 for six months, with an optional further and final period until May 2005.[519]

The Special Crimes Unit (SCU), established by UNTAET in 2000 and responsible for investigations and indictments concerning genocide, war crimes, crimes against humanity, murder, sexual offences and torture committed in 1999, had filed 81 indictments against 369 individuals at the end of 2003.[520] 281 of these 369 individuals remain at large, mostly in Indonesia. By the end of 2003, the Special Panels at the Dili District Court had handed down 46 convictions and one acquittal and had dismissed two indictments.[521]

Indonesia has refused to hand over the accused individuals to East Timor and has largely failed to try them in domestic trials, although it promised to do so.[522] The Indonesian Ad-hoc court for Human Rights, established in summer 2001, has tried a small number of defendants,[523] of whom the overwhelming majority received complete acquittals.[524]

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[517] Diane F. Orentlicher: *Striking a Balance: Mixed Law Tribunals and Conflicts of Jurisdiction*, in: Mark Lattimer/Philippe Sands (eds.), Justice for Crimes against Humanity (2003), Oxford: P Hart Publishing, p. 213, p. 222.
[518] Sylvia de Bertodano, Current Developments in Internationalized Courts, in: *Journal of International Criminal Law* 1 (2003), p. 226, p. 230.
[519] UN Department of Peacekeeping Operations Website, "East Timor – UNMISET – Facts and Figures", http://www.un.org/Depts/dpko/missions/unmiset/facts.html, accessed on 06/10/2004.
[520] US Department of State 2003 Report on Human Rights Practices in East Timor, dated 25/02/2004, on website http://www.state.gov/g/drl/rls/hrrpt/2003/27769.htm, accessed on 06/10/2004.
[521] US Department of State 2003 Report on Human Rights Practices in East Timor, dated 25/02/2004, on website http://www.state.gov/g/drl/rls/hrrpt/2003/27769.htm, accessed on 06/10/2004.
[522] Human Rights Watch Overview on East Timor, dated 01/01/2004, on website http://hrw.org/english/docs/2003/12/31/eastti7004.htm, accessed on 06/10/2004.
[523] Article on CNN website, "Surprise Verdict in E. Timor Trial", dated 05/08/2003, http://www.cnn.com/2003/WORLD/asiapcf/southeast/08/05/indo.timor/index.html, accessed on 07/10/2004.

3.5.2 Problems encountered by the Special Panels

The UN-administered judicial system encountered serious difficulties. While retreating, the Indonesian military and its allied militias demolished all court buildings, and most East Timorese who had acquired legal, political and administrative experience working for the Indonesian administration fled to Indonesia, fearing revenge from the oppressed population.[525]

The most serious difficulty the Special Panels had to deal with apart from the complete lack of infrastructure in the beginning was the inadequate number of experienced judges.[526] In 2002, there was never a sufficient number of judges to operate both chambers of the Special Panels. As a result, many defendants charged with serious crimes have been detained for up to three years without trial, which is problematic regarding the principle of due process.[527] Inexperienced jurists not familiar with international criminal law, the regulations of UNTAET and international standards regarding a fair trial, were appointed to positions of great responsibility and were supposed to work as judges, prosecutors and public defenders, without proper training for the task.[528] Of the seven judges which were sworn into office in January 2000 by UNTAET, none had previous judicial experience, and only two knew the work in a courtroom from serving as support staff.[529] The court system was clearly overburdened; in July 2003, the Dili Court of Appeal began sitting for the first time in 18 months.[530]

The new East Timorese administration has tried to recruit international judges and train local people as court actors (judges, prosecutors and defence lawyers) for the largely non-functioning East Timorese judicial system. Two of the district courts have been largely non-operational, and the swearing in of one international judge for the Special panels and four

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[524] Sylvia de Bertodano, Current Developments in Internationalized Courts, in: *Journal of International Criminal Law* 1 (2003), p. 226, p. 235.
[525] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 250.
[526] Sylvia de Bertodano, Current Developments in Internationalized Courts, in: *Journal of International Criminal Law* 1 (2003), p. 226, p. 231.
[527] Sylvia de Bertodano, Current Developments in Internationalized Courts, in: *Journal of International Criminal Law* 1 (2003), p. 226, p. 231.
[528] Suzannah Linton, Rising from the Ashes: The Creation of a viable Criminal Justice System in East Timor, in: *Melbourne University Law Review* 5 (2001), p. 122, p. 178.
[529] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 254 – 255.
[530] Amnesty International 2004 Report on Timor-Leste, on website http://web.amnesty.org/report2004/tmp-summary-eng, accessed on 06/10/2004.

international judges for the district courts (one each for the four district courts) in August 2004 will not suffice to fill this gap.[531]

Regarding the rebuilding of the country's judicial system the relationship between the UNTAET and the East Timorese was uneasy from the very beginning. The East Timorese felt sidelined by the UN staff, especially when the Special Panels were established, since in their opinion they were often not consulted in important aspects of the decision-making process.[532]

Another very problematic point is that the Special Panels operate in four different languages – Portuguese, Indonesian, English and Tetum, the language spoken by most Timorese.[533] The Special panels lacked a proper translation unit in August 2002, and the international members of the Special Panels do not speak Indonesian or Tetum, the two most common languages in East Timor. Of the Timorese prosecutors, only one speaks English,[534] while the new East Timorese government is determined to establish Portuguese as the official and predominant language in public administration as well as in the courtroom.[535] The government argues that the broad use of the Portuguese language is vital for sustaining East Timor's cultural identity.[536] No matter if this is the only motivation - Indonesian has no good standing since it is the language of the oppressors – it makes the work of the Special Panels even more difficult, as new rules and regulations have been published in Portuguese only, which left the already inexperienced defence lawyers helpless, as only few of them speak Portuguese.

The inequality between the novice East Timorese public defenders and their counterparts, the veteran international prosecutors, has made the task of operating a balanced judicial system even more difficult. Realizing this shortcoming, UNTAET offered to sponsor three positions, a move that has been resisted by the East Timorese Ministry of Justice.[537] The defence

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[531] Report of the Justice Monitoring Programme (JSMP), "Justice Update – New Court Actor Program", dated September 2004, on website http://www.jsmp.minihub.org/courtmonitoring/justiceupdate/Justice%20Update%2004_09_1-10(e).pdf, accessed on 06/10/2004, p. 1.

[532] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 256.

[533] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 260.

[534] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 268.

[535] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal 16* (2003), p. 245, p. 270.

[536] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 270.

[537] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 263.

counsel remains under - funded and ill – equipped, it has neither investigators nor a budget for witness expenses and has to rely on court interpreters when reading documents.[538]

3.5.3 Success of the Special Panels

The Special Panels of East Timor are an example of how under funding by the international community, lack of support by the UN and an uncooperative national government and administration can obstruct the work of a hybrid court and seriously endanger its success at reaching its goal of holding perpetrators of massive human rights violations and crimes against international law accountable.

In the case of East Timor, all these factors have played a role in the problems that the Special Panels had to deal with. The role of the United Nations is unfortunately not a glorious one: Focused on establishing a functioning administration and an orderly judicial system, the UN was not able to lay a solid foundation to a criminal justice system in which the perpetrators are held accountable for their past wrongdoings in fair and impartial trials. The Special Panels are caught in the middle between the UN which is not willing to give the necessary support and a new and inexperienced government who intends to use the Special Panels for its own goals, but otherwise wants to leave them aside.

Lack of experience and support hamper the work of the tribunal for the time being. The apparent unwillingness of some UN officials – be it in East Timor or in New York – to understand the most pressing needs and the specific problems of the Special Panels is an example of how interaction between international organizations and local people should not take place.

Unlike in Sierra Leone, most of the perpetrators are in another country – Indonesia – that is unwilling to cooperate with the Special panels. This fact does not make the task of holding the perpetrators accountable easier. Again, political instead of legal issues threaten the success of the Special Panels: It seems that the UN still is not willing or able to risk a confrontation with Indonesia, and the East Timor is in no position at all to risk a confrontation with its bigger neighbour.

[538] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights*

But despite all these shortcomings and problems, the Special Panels in East Timor demonstrate the potential a hybrid court can develop if the circumstances are right and the funding of the court, the training of the local personnel and the cooperation between the international organizations and the local government is ensured. All these factors have worked against the success of the Special Panels. But if one develops a scenario of an international Ad-Hoc-Court (which the UN were strictly against from the very beginning),[539] seated for example in Darwin, Australia, with no or very little participation by East Timorese nationals and much higher costs due to the higher wages and standard of living in Australia, one will find that even an ill-planned hybrid court might have more positive aspects for the local population and the acceptance of international criminal law in the specific country than a purely international Ad-hoc tribunal.

3.6 The Extraordinary Chambers in Cambodia

The Secretary General of the UN is doubtful whether the proposed Extraordinary Chambers can meet international standards, especially regarding the situation of judiciary and lack of separation of powers in Cambodia.[540] May argues against these concerns[541], but since important human rights organizations such as Amnesty International and Human Rights Watch have been supporting the position of the UN,[542] they cannot be lightly brushed aside.

3.6.1 Problematic Points of the Projected Extraordinary Chambers

The projected Extraordinary Chambers in Cambodia will, like the Special Panels in East Timor, operate within the national court system.[543] Like the Special Court in Sierra Leone and unlike the ICTY and the ICTR, the Extraordinary Chambers will be established through an agreement between one country and the UN (and the national law ratifying this agreement),

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Journal 16 (2003), p. 245, p. 263 - 264.

[539] Sylvia de Bertodano, Current Developments in Internationalized Courts, in: *Journal of International Criminal Law* 1 (2003), p. 226, p. 229.

[540] Gerald May III, An (Un)likely Culprit: Examining the UN's counterproductive Role in the Negotiations over a Khmer Rouge Tribunal, in: *Boston College International and Comparative Law Review* 27 (2004), p. 147, p. 158.

[541] Gerald May III, An (Un)likely Culprit: Examining the UN's counterproductive Role in the Negotiations over a Khmer Rouge Tribunal, in: *Boston College International and Comparative Law Review* 27 (2004), p. 147, p. 151 – 159.

[542] Article on CNN website, "Sowing justice: Tribunal in Cambodia has lessons for Iraq", dated 26/05/2003, http://www.cnn.com/2003/LAW/05/26/findlaw.analysis.leavitt.tribunals/index.html, accessed on 07/10/2004.

[543] Subhash Kashyap, *The Framework of Prosecutions in Cambodia*, in: Kai Ambos/Mohamed Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia (2003), Freiburg im Breisgau: Edition Iuscrim, p. 189, p. 192.

which means that the Extraordinary chambers cannot refer to the authority of the UN Security Council.

Most critiques of the projected Extraordinary Chambers point out another set of problems: They doubt that the Extraordinary Chambers will meet international standards of justice, especially with respect to the independence of the judges and the rights of the defendants.[544]

May has another point of view. In his opinion, it is not Cambodia but the UN who is the major cause of problems for the Extraordinary Chambers.[545] But his arguments are not persuasive. May admits that some problems exist – the amount of international say at the different levels, and the amnesty provisions - while but he does not mention other problems, as the right of the defendant to choose his or her own counsel.[546] He does not deal with the most pressing problems of the Extraordinary Chambers, as reported by the UN Group of Experts, according to whose report the Cambodian judiciary lacks three key components for a fair and effective judiciary: A trained cadre of judges, lawyers and prosecutors, an adequate infrastructure, and a culture of respect for the process.[547] As the Extraordinary Chambers will be operating within the existing legal system, it is doubtful that these criteria will be fulfilled by the Cambodian judges, and very improbable that Cambodia will be able to find enough national judges with professional knowledge in international criminal law.[548] On the other hand, a hybrid tribunal can be an instrument to train local judges in the application of international law and in the trust-building process within the local population, for which the Special Court in Sierra Leone is a promising example.

Especially crucial are the amnesty provisions in the Cambodian Law on the Extraordinary Chambers. May tries to describe the amnesty provisions in the Cambodian Law on the Extraordinary Chambers as unproblematic, but the more he writes, the more it becomes clear

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[544] Scott Luftglass, Crossroads in Cambodia: The United Nation's (sic) Responsibility to withdraw involvement from the Establishment of a Cambodian Tribunal to prosecute the Khmer Rouge, in: *Virginia Law Review* 90 (2004), p. 893, p. 945 – 946.
[545] Gerald May III, An (Un)likely Culprit: Examining the UN's counterproductive Role in the Negotiations over a Khmer Rouge Tribunal, in: *Boston College International and Comparative Law Review* 27 (2004), p. 147, p. 151 – 159.
[546] Gerald May III, An (Un)likely Culprit: Examining the UN's counterproductive Role in the Negotiations over a Khmer Rouge Tribunal, in: Boston *College International and Comparative Law Review* 27 (2004), p. 147, p. 152 – 156.
[547] Suzannah Linton, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, in: *Criminal Law Forum* 12 (2001), p. 185, p. 188.
[548] Scott Luftglass, Crossroads in Cambodia: The United Nation's (sic) Responsibility to withdraw involvement from the Establishment of a Cambodian Tribunal to prosecute the Khmer Rouge, in: *Virginia Law Review* 90 (2004), p. 893, p. 934.

to the reader that these amnesty provisions (or better: the silence on granted amnesties) are very problematic.[549] Linton clearly shows that Art. 40 of the Law on the Extraordinary Chambers does not deal with those already benefiting from an amnesty or somebody who has already been pardoned and leaves the door open for amnesties granted by the Cambodian King, as well as additional laws shielding individuals or groups from investigation and prosecution.[550]

Luftglass sees the Extraordinary Chambers almost completely controlled by the Cambodian judges –which are in his opinion subject to political intimidation and threats – and dismisses the "supermajority" rule, according to which the vote of at least one international judge is needed for guilty or innocence verdicts, as not sufficient.[551] Although his arguments are not persuasive all the way – the vote of an international judge for a guilty or innocent verdict is an important counterbalance to the feared inexperience of the Cambodian judges – Linton writes that the supermajority will apparently only be needed for guilty and innocent verdicts, while for all other court proceedings a simple - and thus possibly purely Cambodian – vote will be sufficient.[552]

There is a number of other points of the law of the Extraordinary Chambers that can be seen as problematic regarding the independence of judges and the rights of the accused. Even May admits that while Art. 24 of the UN Draft Statute grants suspects a right to counsel of their own choosing, the corresponding article in the Law on the Extraordinary Chambers only speaks of a suspect's right to counsel, while omitting the words "of their own choosing".[553] But enumerating all these problematic points would not change the outcome of the evaluation. The Cambodian Extraordinary Chambers, while not even established, have already sparked a debate about whether they can hold the perpetrators of massive human rights violations in Cambodia accountable according to the principles and the standards of international law.

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[549] Gerald May III, An (Un)likely Culprit: Examining the UN's counterproductive Role in the Negotiations over a Khmer Rouge Tribunal, in: *Boston College International and Comparative Law Review* 27 (2004), p. 147, p. 156 – 157.

[550] Suzannah Linton, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, in: *Criminal Law Forum* 12 (2001), p. 185, p. 198.

[551] Scott Luftglass, Crossroads in Cambodia: The United Nation's (sic) Responsibility to withdraw involvement from the Establishment of a Cambodian Tribunal to prosecute the Khmer Rouge, in: *Virginia Law Review* 90 (2004), p. 893, p. 943 – 944.

[552] Suzannah Linton, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, in: *Criminal Law Forum* 12 (2001), p. 185, p. 199.

3.6.2 The Extraordinary Chambers at a Crossroads

The Extraordinary Chambers are a very good example to show which points are especially crucial when establishing a hybrid court and that there are situations in which it is not possible or too early to establish a hybrid court in the country where the crimes were committed. In Cambodia, the fear of the already weak government regarding an outbreak of a civil war if all perpetrators – including top-level officials like Ieng Sary – are prosecuted[554] weakens the prospects of the hybrid court to be able to live up to international legal standards. The Cambodian government is very keen on ensuring that the Cambodian judges have a maximum say at all levels of the tribunal. This is a very questionable intention, given the poor standards at present Cambodian courts, the lack of experience of Cambodian judges, the overall lack of respect for the rule of law and the intimidation and threatening of court actors by the government and interest groups.[555] The Cambodian side has been insisting on a Cambodian majority at the Extraordinary Chambers despite these shortcomings from the very beginning of the negotiations, which at least partly explains the UN pullout from the talks in February 2002.[556]

Since the Extraordinary Chambers have not been established yet, the international community still has the opportunity to influence the setting-up process and to call for changes in the Cambodian legislature wherever deemed necessary. A helpful lever might be that Cambodia receives more than half of its annual budget from foreign aid and loans.[557] The less stable the situation in a country is and the more corrupt and inefficient its judiciary, the more the international component of a hybrid court has to play a bigger role. This is not to say that a hybrid court is not suitable for present-day Cambodia at all.

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[553] Gerald May III, An (Un)likely Culprit: Examining the UN's counterproductive Role in the Negotiations over a Khmer Rouge Tribunal, in: *Boston College International and Comparative Law Review* 27 (2004), p. 147, p. 154.
[554] Suzannah Linton, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, in: *Criminal Law Forum* 12 (2001), p. 185, p. 198.
[555] Human Rights Watch, Overview on Cambodia, dated January 2004, on HRW website http://hrw.org/english/docs/2004/01/21/cambod6974.htm#3, accessed on 08/10/2004.
[556] Gerald May III, An (Un)likely Culprit: Examining the UN's counterproductive Role in the Negotiations over a Khmer Rouge Tribunal, in: *Boston College International and Comparative Law Review* 27 (2004), p. 147, p. 159.
[557] Human Rights Watch, Overview on Cambodia, dated January 2004, on HRW website http://hrw.org/english/docs/2004/01/21/cambod6974.htm#3, accessed on 08/10/2004.

The current design of the Extraordinary Chambers and the human rights situation in Cambodia[558] are not promising for the start of the hybrid court. But it would certainly not be any better if the perpetrators – or only some of them – were to be tried by purely Cambodian courts. A hybrid court can still address the culture of impunity for massive human rights violations that exists in Cambodia today.[559] What it needs is a cooperative national government and sufficient support from the UN and other international organizations; in both fields, much has to be improved before the Extraordinary Chambers can begin their work with the prospect of earning a good reputation and record by holding the perpetrators of massive human rights violations accountable in impartial and fair trials which adhere to international standards.

3.7 The Hybrid Courts and the International Criminal Court

The question has to be posed whether hybrid courts or international ad-hoc tribunals are necessary in the future as the International Criminal Court can prosecute crimes against international criminal law as well.

According to the complimentary regime of the International Criminal Court (ICC), the ICC – in general - can only assume jurisdiction if the national courts are unwilling or unable to investigate.[560] But if the national courts are unwilling or unable to prosecute the perpetrators, it will be in situations in which there are normally lots of crimes to be prosecuted and the caseload would be more than both the national courts – because of their inefficiency, inexperience or simple non-existence – or the ICC – because of the sheer number of cases – can cope with. Here, hybrid courts can help build a functioning national justice system by training the local jurisprudence and ease the caseload from the ICC by taking on second-level criminals, for example. This was the goal of the UN when establishing the hybrid courts in Kosovo, where the ICTY could not deal with the caseload.[561]

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[558] Amnesty International 2004 Report on Cambodia, one website http://web.amnesty.org/report2004/khm-summary-eng, accessed on 08/10/2004.
[559] Human Rights Watch, Overview on Cambodia, dated January 2004, on HRW website http://hrw.org/english/docs/2004/01/21/cambod6974.htm#3, accessed on 08/10/2004.
[560] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 308.
[561] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 308.

Hybrid courts can not only help the ICC to deal with crimes against international law, but they potentially have the same advantages over the ICC as over international ad-hoc tribunals: While the ICC is seated in the Netherlands, far away from today's crisis regions, hybrid courts are to be established right in the region where the crimes were committed. They can help in the process of capacity building and, by promoting the rule of law in the often war-torn countries, aid creating a civil society with respect for an independent judiciary that is hopefully stable enough to prevent new massive, large scale crimes against international criminal law.

By increasing local acceptance of international criminal law and international and hybrid institutions, the hybrid courts can also improve the chance that the perpetrators can be held accountable and are not protected by the local population, as it is often the case in the countries of the former Yugoslavia. But there is the danger that hybrid courts might also have the opposite effect: If they are poorly funded, inadequately staffed and equipped, not sufficiently supported by the UN and have to deal with a national government that wants to use the court for their own purposes, chances are high that the local population will not respect, but disrespect international criminal law and international criminal institutions even more.

The argument that the establishment of hybrid courts might take the jurisdiction over serious crimes against international law away from the ICC (because of the complementary jurisdiction of the ICC)[562] is not persuasive. The complementary jurisdiction of the ICC allows it to assume jurisdiction wherever national courts are not willing or able to prosecute crimes against international law.

First of all, hybrid courts are not per se national courts[563] (even if they are integrated into the court system, as it is envisaged in Cambodia with the Extraordinary Chambers), and established only if the national courts are not willing or able to prosecute, which means that jurisdiction of the ICC is given.

Second, it is highly unlikely that hybrid courts will be established without considering the potential collision of jurisdiction with the ICC, and the international component within the

[562] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 309.

court will probably propose to leave top-level perpetrators to the ICC (with the notable exception of Sierra Leone's Special Court, which tries those who bear the greatest responsibility for the crimes committed in Sierra Leone's civil war). Again, the Kosovo hybrid courts are a good example, as the top-level criminals still are to be prosecuted by the ICTY.[564] Rather, the different organizations working on or for the ICC and the hybrid court will try to cooperate before establishing the hybrid court in order to ensure accountability of the perpetrators with maximum effect.

Therefore, it seems highly unlikely that hybrid courts and the ICC will act as opponents, each grasping as many cases as possible causing legal and administrative chaos endangering accountability; rather, the institutions will work together in their goal of prosecuting serious violations of international (and, in case of the hybrid courts, national) criminal law. Ideally, both the hybrid court and the ICC can complement one another, each taking on the task that it is best equipped for reaching the goal of holding accused perpetrators of serious violations against international criminal law accountable.

[563] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 309.
[564] Laura Dickinson, The Promise of Hybrid Courts, in: *American Journal of International Law* 97 (2003), p. 295, p. 309.

Chapter 4: Use of Elements of Restorative Justice

Hybrid courts, international ad-hoc tribunals and International Criminal Court are all following the goal of holding perpetrators accountable through prosecution. But this is not the only possible way to deal with massive human rights violations; sometimes, it seems impossible to prosecute all perpetrators, leaving many victims of the crimes that are uneducated with even greater feelings of remorse and a desire for vengeance.

In situations where the (new) government has to deal with a past in which murder, rape and torture were no exception but the norm, prosecuting all perpetrators may not be the best solution, if it is one at all.[565] The paramount goal of all societies with a history of massive human rights violations is the transition towards a more stable society, from the viewpoint of a propagator of human rights preferably even towards a stable democracy with a culture of respect for human rights and the rule of law. Truth commissions as a model of restorative justice can be an excellent measure to ensure this transition by holding the perpetrators accountable and giving the victims a platform where their suffering is recognized.[566] In the following, the ideas of restorative justice will be discussed and whether elements of restorative justice should be included as an alternative or cumulative measure alongside hybrid courts, ad-hoc tribunals and the ICC in order to create a stable democratic society.

4.1 Retributive and Restorative Justice: Two different concepts

At first sight, the concepts of retributive justice (embracing criminal courts such as hybrid courts, ad-hoc tribunals and the ICC) and restorative justice (with the best-known example being the truth commissions in different countries) seem to be opposing models. But it is possible to combine the two.

Supporters of the retributive justice model argue that perpetrators have to be held accountable for their past wrongdoing through prosecution and punishment; because failure to do so would be equal to an invitation to repeat the crimes and this would automatically undermine the rule

[565] Stephen Landsman, Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions, in: *Law and Contemporary Problems* 59 (1996), p. 81, p. 84 – 85.
[566] Charles Villa-Vicencio, Why Perpetrators should not always be prosecuted: Where the International Criminal Court and Truth Commissions meet, in: *Emory Law Journal* 49 (2000), p. 205, p. 215.

of law.[567] The model of retributive justice relies strongly on the deterrent value of punishment, which is believed to keep people from committing a crime, since they fear the punishment and therefore will choose not to act criminally.[568]

But as shown above, the deterrent element does not work perfectly, neither on a national level nor an international level, and it seems to decrease at least equally to the degree that crimes are not the exception, but the norm, as it is sadly enough often the case in today's conflicts, such as the war in the former Yugoslavia, the genocide in Rwanda or the civil war in Sierra Leone. The deterrent element failed to keep perpetrators from committing new atrocities.

For the victims, the system of retributive justice often means more suffering. When tried in criminal proceedings, defendants tend to deny involvement, dispute wrongdoing and ignore the harm they caused.[569] Victims have to undergo extensive cross-examination and often relive the crimes that they witnessed or were the target of. Concerning the perpetrators, a criminal trial is often not a suitable measure for him or her to acknowledge that he or she has done something wrong, especially if the victim is not considered as an equally valuable human being by the perpetrator.

The model of restorative justice, on the other hand, does not primarily treat the crime as a conflict between offender and state or government but between offender and victim. Its first and foremost goal is to create peace within the community by reconciling victims and perpetrators. To this end, the victims have to be able to forgive the perpetrators – which is of course not easy, sometimes even seems impossible – and the perpetrator has to feel guilty. According to Drumbl, the process of reconciliation is facilitated if the perpetrator feels not only guilty but ashamed.[570]

He argues that criminal trials only impose guilt – on the offender, meaning that society condemns his actions, but the perpetrator himself does not necessarily regret his past actions,

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[567] Jamal Benomar, *Justice after Transitions*, in Neil Kritz, Transitional Justice (1995), Washington D.C.: United States Institute of Peace, p. 32, p. 33.
[568] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p 1221, p. 1253.
[569] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p 1221, p. 1255.
[570] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p. 1221, p. 1253.

which he will only do if he feels ashamed.[571] Otherwise, the perpetrator might take the sentence as an imposed punishment which he does not accept because in his view, it is simply victor's justice.

Apart from moral and legal points, measures of restorative justice such as a truth commission, in front of which perpetrators admit to their wrongdoings and victims are recognized as such, are very effective in emerging democracies for tactical and prudential considerations. A policy of national reconciliation and amnesty for past abuses – though not unconditional – can possibly be more promising for democracy and the respect of human rights in an unstable society than the retributive approach.[572] It is important to establish a "shared truth" in which all sides of society – former victims and perpetrators create a common view on the past and all acknowledge the fact that people have been killed, raped, tortured or deported from their homes.[573] The acknowledgment of a common truth promotes reconciliation and lessens the danger that serious violations of international (and national) criminal law will be committed in the country again.[574]

4.2 Alternative or Cumulative Option to a Criminal Tribunal: A Truth Commission

The question arises how to establish a common view on the past and how to hold perpetrators accountable for their wrongdoings, while not necessarily punish them in the classical sense, and how to acknowledge the suffering of the victims. The model of a truth commission has been applied in order to deal with this task, in various countries from South Africa to Chile and Argentina, to, recently, Sierra Leone.

Some authors argue that criminals have to be held accountable for their past wrongdoings through punishment. In their view, this is necessary because society benefits from it – other

[571] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p 1221, p. 1260.
[572] Jamal Benomar, *Justice after Transitions*, in: Neil Kritz (ed.), Transitional Justice (1995), Washington D.C.: United States Institute of Peace, p. 32, p. 33.
[573] Franca Baroni, The International Criminal Tribunal for the Former Yugoslavia and its Mission to restore Peace, in: *Pace International Law Review* 12 (Fall 2000), p. 233, p. 241.
[574] Franca Baroni, The International Criminal Tribunal for the Former Yugoslavia and its Mission to restore Peace, in: *Pace International Law Review* 12 (Fall 2000), p. 233, p. 241.

potential criminals are deterred, and the perpetrator is rehabilitated or incapacitated – and because the criminal deserves punishment for the injury he inflicted upon society.[575]

In the concept of restorative justice, emphasis is put on reconciling the victims, healing their wounds and establishing a stable society in which former victims and perpetrators are able to live side by side without the atrocities of the past being repeated.[576] In Yugoslavia, for example, one of the most important reasons for the brutal conflict was the revival of old hatred and stereotypes rooted in a flawed view on history manipulated by members of the political elite such as Slobodan Milosevic.[577]

To reach these goals, truth commissions can be helpful. Perpetrators have to admit their crimes and face the victims and are given the possibilty to be held accountable, while the victims are recognized as such and can tell their stories, which is often a first step towards reconciliation with the perpetrators – which sometimes seems, considering the seriousness of the crimes, impossible at first.

Truth commissions can, but do not have to be an alternative to a criminal tribunal, be it a hybrid court or an international ad-hoc tribunal. Truth commissions do need certain prerequisites. Even more than hybrid courts, they need a cooperative national government and financial and administrative support as well as the expertise of both national and international organisations. The less these prerequisites given, the higher chances are that the truth commission will not be able to promote national reconciliation. In Rwanda, the new government, focused on retribution and not reconciliation, rejected the idea of a truth commission.[578] By promoting vengeance and not forgiveness and excluding the large Hutu majority from participating in public life, the RPF-led government risks a new conflict.

In the process of dealing with the crimes in the former Yugoslavia, this was also recognized. Madeleine Albright, then the US Secretary of State, said at the UN Security Council meeting

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[575] Leyla Nadya Sadat, *International Criminal Law and Alternative Modes of Redress*, in: Andreas Zimmermann (ed.), International Criminal Law and the Current Development of Public International Law (2003), Berlin: Duncker & Humblot, p. 161, p. 163.
[576] Carrie Niebur Eisnaugle, An International "Truth Commission", Utilizing Restorative Justice as am Alternative to Retribution, in: *Vanderbilt Journal of Transnational Law* 36 (2003), p. 209, p. 212.
[577] Franca Baroni, The International Criminal Tribunal for the Former Yugoslavia and its Mission to restore Peace, in: *Pace International Law Review* 12 (Fall 2000), p. 233, p. 241.
[578] Jeremy Sarkin, The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide, in: *Journal of African Law* 45, 2 (2001), p. 143, p. 154.

in May 1993 in which the ICTY statute was adopted: "[T]ruth is the cornerstone of the rule of law and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process."[579] In Sierra Leone, a truth commission was established in 2000,[580] and the same was done in East Timor.[581] If the same happens in Cambodia remains to be seen.

Truth commissions can be a valuable tool to establish a stable and functioning democracy by holding perpetrators accountable for their crimes and reconciling the victims. But they need a relatively stable environment and the support of the national government. There is the danger that the national government tries to use the truth commission for their goals, or that the truth commission is not given a powerful mandate and therefore cannot operate properly. Also, the international community should support a truth commission, especially financially and by providing legal and administrative expertise and equipment. Then, a truth commission is an important tool besides a criminal court – whether hybrid or purely international –to deal with the crimes of the past while proceeding on the road to a brighter future.

[579] Sanja Kutnjak Ivkovic, Justice by the International Criminal Tribunal for the former Yugoslavia, in: *Stanford Journal of International Law* 37 (Summer 2001), p. 255, p. 263.
[580] Laura R. Hall/Nahal Kazemi, Prospects for Justice and Reconciliation in Sierra Leone, in: *International Harvard Law Journal* 44 (2003), p. 287, p. 289.
[581] Article on BBC website, "East Timor launches truth commission", dated 21/01/2002, http://news.bbc.co.uk/2/hi/asia-pacific/1773601.stm, accessed on 12/10/2004.

Chapter 5: Outlook

Hybrid courts are a valuable tool to hold perpetrators of crimes against international criminal law accountable. They can function complementarily with the work of the International Criminal Court without hindering the Court's work; to the contrary they can aid the goal of the ICC by supporting the implementation of respect for the rule of law in the respective country or region where they work.

Hybrid courts cannot operate in all situations and societies, they need a certain amount of support from the local government and administration otherwise they are doomed to fail. The smaller the amount of support and cooperation locally, the more international involvement and dedication is needed. If the local government is not cooperative at all, an international Ad-hoc tribunal or the International Criminal Court is most probably the better choice. After the Balkan wars of the 1990s, a hybrid court would have faced a very difficult task in the republics of the former Yugoslavia. But the dilemma then is that a population and government already hostile to holding perpetrators accountable will not be won over to support the prosecution under national and international criminal law because the ad-hoc tribunal has its seat in another country without any national involvement.

A major problem of the hybrid courts in Sierra Leone and in East Timor is the lack of international support, especially financially. Since the hybrid courts do not operate under Chapter VII UN Charta and are not (like the ad-hoc tribunals are) based on a UN Security Council resolution, they do not automatically receive funds from the UN or from other international organizations. As they are commonly established by a treaty between the UN and a single country, other countries are not obliged to step in and apparently sometimes do not hold the view that it is necessary to support the democratization processes and to ensure that perpetrators are held accountable. There is a potential that hybrid courts are seen as an easy way to evade the responsibility to support the prosecution of serious violations of international criminal law worldwide. But if hybrid courts are only used as a pretext by other countries not to get involved any further, they are destined to struggle, if not to fail.

Nonetheless, hybrid courts can be very useful. As the example of the Special Court in Sierra Leone shows, if the circumstances are favourable and the national government supports the hybrid court, it can be a very promising model. As the national justice system in the countries

where the courts are to operate has often been destroyed or did not even function prior to the conflict, it is vitally important to hire international legal experts to work at the hybrid court.

In order to ensure the attractiveness of working for a hybrid court in a country which is often devastated by the previous conflict, the funding of the court has to be guaranteed and the amount that an international expert is paid has to be calculated according to international standards. The example of the Special Panels in East Timor and the struggle of the East Timorese administration to ensure a functioning legal system and to attract international experts to the remote country is a warning example for the importance of sufficient funding and the employment of international legal experts. Hopefully, the same will not hold true for the Special Court in Sierra Leone, which has only a fraction of the annual budget of the ICTY or the ICTR available.

Equally important for the participation of international legal experts is the employment of local legal professionals and other staff in order to integrate the hybrid court into the country's legal system and to ensure the maximum impact of the capacity-building potential. If there are no local legal experts – as in Rwanda after 1994 or in East Timor after independence - it is even more crucial to lay emphasis on training nationals for the work as judges, prosecutors, investigators, defence lawyers, translators and administrative staff at the hybrid court.

Apart from employment and training possibilities for the local population, the hybrid court should also provide for a communications campaign to keep the population informed about its goals, proceedings and success. By doing so, a hybrid court can increase its acceptance, overcome fear and prejudices, promote knowledge about international (and national) criminal law and human rights, and help to re-establish respect for and trust in the rule of law in the respective region or country.

A hybrid court as an institution of retributive justice can be combined with measures of restorative justice such as a truth commission. Often, this appears to be not a simple possibility but an outright necessity. A hybrid court can ensure the prosecution of the perpetrators - if there are not too many of them, as in Rwanda. But the hybrid court as a measure of retributive justice has only limited possibilities to promote reconciliation and provide for a society in which both victims and perpetrators are able to live together without

the danger of mass atrocities being committed again, as the deterrent element of retributive justice does not keep individuals from committing crimes.

Hybrid courts will be an important tool to hold perpetrators of crimes violating international and national criminal law accountable in the future and can be a powerful tool to help a respective country on its way to a stable democracy, through their local approach, capacity building within the local population and the promulgation of international criminal law, possibly in cooperation with the ICC. In order to stabilize the country in which the hybrid court is located, the establishment of a truth commission is an excellent measure of restorative justice to promote reconciliation, hold the perpetrators accountable and acknowledge the sufferings of the victims.

Chapter 6: Conclusion

The thesis has shown that the internationalized ad-hoc tribunals ICTY and ICTR have failed to reach their goals, be it ensuring prosecution, promoting reconciliation, or establishing regional stability.

Although more and more perpetrators were arrested over the years after a difficult start (especially for the ICTY), many individuals accused of horrible crimes still remain at large. The tribunals have spent a vast amount of money – since coming into operation, the ICTR has spent a sum which is almost equivalent to Rwanda's annual GDP – and have sentenced comparatively few perpetrators. Although the sentiment that the tribunals are powerless and far away may have ceased to a certain degree, the fact that such key figures as the Bosnian Serbs Mladic and Karadzic are yet to be arrested shows that the tribunals have not been able to complete their task. The ad-hoc tribunals have to rely on national governments and international organizations for arresting the criminals. They are not located in the country in which the crimes were committed and thus have little access to the local population, which could provide valuable help for the success of the ad-hoc tribunals. The trials of those that have been arrested have been lengthy and costly. This is problematic with regard to the right to due process and a fair trial - especially because of the long pretrial detention period -, but also because the money could have been put to use much more effectively.

The design of ad-hoc tribunals as institutions of retributive justice hinders their effect on promoting reconciliation. Perpetrators are not willing to fully testify because their testimony would be used against them in the trial. Victims are only asked to come forward and tell the story of their suffering when testifying in a criminal trial, in which they often have to endure cross-examination by the defence counsel, which questions the testimony of the victim. The victims do not have the sentiment that their sufferings are acknowledged; to the contrary, they have to experience that their suffering is doubted. The chance that the perpetrators admit their wrongdoings and acknowledge their guilt is very small; rather, they try top defend themselves with all means, unless the evidence is overwhelming. From many defendants' point of view, the ad-hoc tribunals are a foreign-dominated instrument whose only goal is the unjust prosecution of war heroes.

Greater regional stability has not been achieved through the work of the ICTR. Whether or not this was possible by the work of a criminal tribunal is irrelevant; the Statute of the ICTR enumerates this goal, and the ad-hoc tribunal has to be measured against it. If the ICTR were able to be of greater impact in the process of promoting reconciliation between Hutu and Tutsi in Rwanda, this would probably have an effect on the neighbouring countries, especially Burundi and the eastern part of the DRC. But overall, the ICTR has little influence on regional stability, as warlords and other interest groups fight for control over the region's vast natural resources, especially in the Eastern DRC.

With their case law, the two ad-hoc tribunals have been able to contribute considerably to the field of international criminal law. Since the ICTY and the ICTR have been established by a UN Security Council Resolution, they operate backed by the Authority of the Security Council and powers granted in Chapter VII of the UN Charta. The primacy over all other national courts, no matter if in the country in which the crimes were committed or abroad, further strengthens their position from a legal point of view. Thus, the rulings of the ad-hoc tribunals have become part of international law.

Considering the deterrent effect of the Genocide Convention(which holds an obligation to intervene for all signatory states), the rulings of the ICTY and ICTR will hopefully lead to better protection of groups persecuted in internal conflicts, in which the line between combatants and civilians is often blurred or not respected by marauding militias. The fact that in internal conflicts the members of the opposed groups often have the same nationality, but other nations are more or less openly supporting one of the conflict parties, used to lead to the conclusion that international criminal law was not applicable. This has been changed by the case law of the ad-hoc tribunals, which developed criteria in order to apply international criminal law to internal conflicts. This was necessary and logical, as the case of the Bosnian Serbs shows, which were controlled and supported by neighbouring Serbia (then the Federal Republic of Yugoslavia). Today, the fighting in the eastern DRC with different factions supported by neighbouring countries is another example in which an internal conflict also bears the characteristics of an international conflict. Amongst others, the decision that the killing of a small, but important part of a group may constitute genocide is a notable contribution of the ICTY to the field of international criminal law.

Another important aspect is the improvement of the protection of women with the acknowledgment that mass rapes constitute genocide under certain circumstances. The suffering of women in the conflicts of today is still often underestimated, and their protection under international criminal law should be strenghtened further.

The model developed in order to measure the extent to which reconciliation has been reached in society after massive human rights violations has proven to be a valuable tool to compare the situation in different societies. The model's five components - including a sociological, political, economical and demographic approach and an examination of how the specific society reckons with the past – have helped to establish that the opposed groups in the former Yugoslavia and in Rwanda are far from being reconciled. Nonetheless, the model is open to further development and research. Further components may be added and the examination of the given components is far from being complete. For example, it has been shown that more surveys need to be conducted on the perception of the work of the ICTY by the people in Serbia, Croatia and Bosnia-Herzegovina. The necessary data for the different components is not always easily retrieved, as there are few reliable statistics in countries torn apart by internal conflicts. Furthermore, the new government may be opposed to impartial scientific research, since this may lead to results which are not favourable for the political goals and official propaganda. This is for example currently the case with the Tutsi-led government in Rwandas under Paul Kagame.

The shortcomings of the ad-hoc tribunals have shown the need to improve this model or to use another design for a criminal tribunal to better deal with serious violations of international criminal law.

Hybrid courts, provided that they are able to operate under certain prerequisites and circumstances, are a valuable alternative to a purely international ad-hoc tribunal. They may be even more effective if they are combined with measures of restorative justice such as a truth commission.

Hybrid courts need support from both the national government of the country they operate in and the international community. If the national government rejects the prosecution of suspected perpetrators accused of crimes against international and national law, the work of the hybrid court is substantially endangered, if not impossible. But it is highly improbable that

a hybrid court will be established in such a constellation because it will most likely be based upon an agreement between the UN and the national government, as happened in Sierra Leone and as will happen in Cambodia. A notable exception to this rule are the Special Panels in East Timor, since this country was administered by the UN at the time of the establishment of the East Timorese hybrid court.

As for all judicial institutions sufficient funding is crucial for hybrid courts. The UN and the UN member states tend to support the hybrid courts in East Timor and in Sierra Leone with a much smaller amount than the international ad-hoc tribunals ICTY and ICTR. This is probably caused by the fact that hybrid courts are not established by the UN Security Council and therefore, the prestige of the UN is comparably less at risk if the hybrid courts fail. Added to this, the courts are established by an agreement between a single state and the UN which prompts the donor nations to think that they are not responsible for the hybrid court. Either reasoning is short-sighted, because hybrid courts need support just as much as international ad-hoc tribunals, while they are able to have more impact on the stabilization process of the often fragile societies with an equal or smaller budget than the ad-hoc tribunals.

Since the coming into operation of the Special Panels in East Timor is relatively recent and the Special Court began its work only in March 2004, it is still too early to be able to fully evaluate the work of the hybrid courts. They will have more success in the future, but they will also experience failures and problems. But it is possible to emphasize their potential and the advantages over the international ad-hoc tribunals.

Hybrid courts have a much better lever to ensure prosecution since they are situated in the country in which the crimes were committed and can include local staff and knowledge in their work while at the same time improve the image of bodies of criminal justice and the national judicial system as a whole. The current international ad-hoc tribunals, on the other hand, are located in another country with almost no participation of locals (in general except for translators), which makes it much easier for their opponents to create a picture of an institution of biased victor's justice dominated by foreigners, as happened with the ICTY in the countries of the former Yugoslavia.

The participation of locals, whether as legal professionals, translators or administrative staff, provides for much-needed job opportunities in the often devastated economies. This also

means a process of capacity building, where local court actors – judges, prosecutors, and defence counsel alike – can learn from international experts. But this need not be a one-way street: The international members of the hybrid courts can interact with local legal professionals, taking into account their view and knowledge of local surroundings, and develop international criminal law in cooperation with the national staff. This in turn leads to greater acceptance of international criminal law, which makes the prosecution of perpetrators easier since the local population is less willing to protect them.

Combining a hybrid court as a measure of retributive justice with a truth commission, which is a model of restorative justice, promises to be a good model for the promotion of reconciliation in a society with a history of serious violations of international (and national) criminal law. In a criminal tribunal, perpetrators will deny as much as possible because they have to fear punishment and victims will experience that their testimony is doubted and attacked in cross-examination by the defence counsel. A common view on what has happened in the past is very hard to create, and the different groups in society remain hostile to each other. The perpetrators view the criminal prosecution of their crimes as victor's justice, while the victims have the sentiment that justice has not been done because not all perpetrators are held accountable and some might not be sentenced because there is not enough evidence.

By the work of a truth commission, perpetrators can be held accountable for their crimes. They have to admit their actions and often face their victims or the relatives of their victims. Often, this is the first point in time that the perpetrators realize that they caused immense harm and suffering and that there is no justification for their actions. Their victims can tell their stories – sometimes for the first time ever – and are acknowledged as a victim of a crime, which was often not done before either. They may be able to reconcile with the perpetrators. This may sometimes be hard, if not impossible to achieve on a personal basis.

Also important to mention is the effect of the work of a truth commission on society in general: The members of the former group of perpetrators or the former privileged group are confronted with the crimes of the past, be it in public meetings, in conversations or by the media. They may hear about them for the first time – because it was more convenient not to look too close or too ask questions before – and by this, they recognize that the past regime is guilty of massive human rights violations and that society needs to be reconciled. The members of the formerly oppressed group experience that the crimes of the past are

acknowledged and are able to play a part in the new society without harbouring the feeling that nothing has changed. This of course is the ideal effect and it may not be established right from the beginning. A truth commission therefore greatly improves the chance that the different groups are reconciled and a functioning civil society, in which serious human rights violations are no longer tolerated, is created. The emerging democracy is stabilized and future violations of international criminal law are less probable.

The establishment of the International Criminal Court is not an obstacle for the establishment of more hybrid courts in the future. To the contrary, the complementary jurisdiction of the ICC and the hybrid courts, the international expertise of the ICC and the local knowledge of the hybrid courts can be used for job sharing: While the ICC is responsible for the top-level criminals whose trials might bring difficult legal questions, the majority of the perpetrators can be tried in the country itself by the hybrid court, which trains the local judiciary, builds up trust in the national justice system and last but not least is simply more cost-effective.

In most of the conflicts that the ICC, the ad-hoc tribunals or the hybrid courts have to deal with, the number of perpetrators is large and their prolonged detention without trial is problematic both with regard to the right to due process and to the overstretching of already limited resources. Nonetheless, the perpetrators have to be held accountable and the victims demand justice. Models of restorative justice such as truth commissions are an excellent measure to solve this problem, which would be a difficult task, in the case of Rwanda for example even if the country's judicial system, infrastructure and financial situation were excellent. Prosecuting every single perpetrator in a criminal trial might not stabilize the country, especially if a large percentage of the population committed the crimes. The perpetrators can be held accountable by facing the victims and admitting their crimes. Though they are testifying, they do not automatically have to fear criminal prosecution, which can lead to a common truth for both victims and perpetrators. Through restorative justice, the process of reconciliation and the transition to a stable democracy can be supported. Nevertheless, it remains difficult to measure reconciliation, but the proposed five-tier model offers a method. This model is open to and needs further discussion and development and is meant to serve as a starting point for further research and work.

If circumstances are as favourable as described and the UN and other organizations as well as other countries provide for the necessary support, hybrid courts have decisive advantages over

international ad-hoc tribunals, especially when combined with measures of restorative justice such as truth commissions. They are able to function well in cooperation with the International Criminal Court, ensuring that perpetrators who committed lesser crimes or were at the top level of organizing mass atrocities are held accountable.

The potential advantages of hybrid courts clearly make them a more suitable option in many situations compared to ad-hoc tribunals, which were important for prosecuting the crimes in Yugoslavia and Rwanda and still might be preferable if the national government is unwilling to cooperate.

Hybrid courts will probably have to be established again and again. Hopefully, the need for successors will decrease through the success of the work of each one, starting with East Timor, Sierra Leone and Cambodia.

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