INTERNATIONAL CRIMINAL TRIBUNALS

A COMPARATIVE STUDY OF THE TRIBUNALS IN THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE

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I. BACKGROUND

The two International Military Tribunals set up after World War II to try and punish the major war criminals of the European Axis and the Japanese Empire[1] established a remarkable precedent for *ad hoc* international criminal jurisdiction. It was therefore self-evident why the international community in the 1990s went back to them when it had to face and combat massacres comparable to those perpetrated during World War II.

Following the Soviet Union's collapse, the bipolar world order and the Cold War came to an end. The United Nations Security Council finally started to function in the spirit of co-operation and fulfilled the dreams of the drafters of the United Nations Charter. This continued until recently when the Russian Federation came round from the daze that resulted from the Soviet empire's dissolution. At the same time, armed conflicts due mainly to hostilities of an ethnic character – the negative collateral effects of these events – flared up all over the world calling for an effective international response. Thus, the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) fell exactly in a special era when the international community and its leading powers

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[1] See the Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945. Also see the annexed Charter of the International Military Tribunal and the Prosecution's Exhibit, No 9, General Orders No 20, General Headquarters, Supreme Commander for the Allied Powers, Charter of the International Military Tribunal for the Far East, Tokyo Transcript, 6 May 1946.

could foster and form their relations in an environment of mutual understanding. Not much later, the United Nations created the Special Court for Sierra Leone to deal with various abuses and crimes committed in that state.

II. THE YUGOSLAVIA AND RWANDA TRIBUNALS

Despite their Nuremberg roots, the ICTY and the ICTR opened a new chapter in the history of international criminal jurisdiction, about 500 years of it. A unique feature of the two Tribunals was their creation by a Security Council resolution under Chapter VII of the United Nations Charter.[2] This feature represented one of the most sensitive and challengeable points of these judicial bodies. They raised the basic question on whether the Security Council, a political organ that bore primary responsibility for the maintenance of international peace and security had the power to establish judicial bodies.[3] If one, by analogy, projected Montesquieu's theory on the division of powers to the international community, the result would be quite alarming since an executive body had set up judicial bodies. A further concern was that, notwithstanding that both the Yugoslav and the Rwandan crises posed a threat to international peace and security, the tribunals fell under Chapter VII. However, their creation did not necessarily come under the same provisions of this Chapter.

Opinions gave voice to the creation of the Tribunals under Chapter VI of the Charter[4] but there were problems with those views. On one hand, Security Council resolutions adopted under Chapter VI did not bear a compulsory character. On the other hand, an international dispute was absent. This was especially so regarding the ICTR that affected only a segment of the ICTY's jurisdiction. In contrast, the United Nations General Assembly would have been equally unsuitable for creating the Tribunals as its resolutions qualified as recommendations only even though it represented the will of the international community better

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[2] Chapter VII of the Charter is entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression."

[3] For a detailed analysis on this issue see Wembou, "The International Criminal Tribunal for Rwanda. Its Role in the African Context" (31 December 1997) 321 International Review of the Red Cross 685-693 available at <www.icrc.org> (visited April 2002).

[4] This Chapter is entitled "Pacific Settlement of Disputes."

than the Security Council. This raised another interesting question: would the creation of the Tribunals be intervention under Article 2(7) of the Charter?[5] The answer would most certainly be no, since the relevant provision *expressis verbis* excluded enforcement measures taken by the Security Council under Chapter VII from the group of conduct mounting to intervention. Consequently, for the United Nations to create a credible and effective international criminal tribunal, a Security Council resolution under Chapter VII or Article 25[6] was necessary.

A conclusion on the nature of United Nations resolutions is not a simple task. For example, how would it be characterised in relation to the creation of subsidiary organs under Article 29 of the Charter?[7] What about enforcement measures under Chapter VII? Or Boutros Boutros-Ghali's peacebuilding initiatives?[8] Or even perhaps Thomas Buergenthal's example of collective humanitarian intervention?[9] The truth would probably lie in the cut of the various concepts.

Assuming the Security Council acted lawfully when it created the ICTY and ICRT, one could raise a further question: why did it take *ad hoc* action? The answer appears to be relatively straightforward. When the Tribunals were created, a competent and permanent international criminal court similar to the one envisaged by the Rome Statute was a distant dream. Further, the factual circumstances at that time required *ad hoc* action. The Security Council had to respond simultaneously to two parallel yet separate armed conflicts with rather different

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[5] Article 2(7) states: Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Member to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

[6] Article 25 states: The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

[7] Article 29 states: The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

[8] General Assembly A/48/93 paras 22-30; Boutros Ghali, B, Development and International Economic Co-operation: An Agenda for Development, Report of the Secretary-General, United Nations, New York, 6 May 1994.

[9] Buergenthal T, International Human Rights in a Nutshell (1995, 2nd ed, West Publishing Co, St Paul) 5. Buergenthal J is presently a member of the International Court of Justice.

backgrounds and characteristics. However, there was no guarantee that the adoption of a uniform, integrated method to solve different problems rarely would meet expectations or end positively. Also, both the Tribunals' effective functioning and the protection of the accused person's rights demanded that the Tribunals should be crisis and state specific in full measure. This in turn resulted in another question: to what extent would this goal be achieved?

(a) ICTY

Security Council resolution 827 adopted on 25 May 1993 sanctioned the United Nations to create the ICTY.[10] When this happened, hostilities in the former Federal Republic of Yugoslavia (FRY) had existed for almost two years, the delay caused by the Security Council's "step-by-step" approach. First, acting under Chapter VII, the Security Council declared that the situation in FRY posed a threat to international peace and security and it condemned the atrocities being committed there. Secondly, it publicised the atrocities and called for an investigation. Finally, after seeing other remedies fail and armed with enough information, it decided that those who gravely violated international humanitarian law would be prosecuted and punished.[11] Recalling the two years of war, the Security Council's progressive procedure could be easily labeled a waste of time. However, when compared to the cumbersome and consensus-demanding nature of a treaty-based international criminal court, this proved to be the fastest and most appropriate method for the United Nations.

The earlier stages of the conflict in FRY[12] included the declaration of independence by two FRY member states, Croatia and Slovenia, in

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[10] Security Council Resolution 827, 3217th meeting, 25 May 1993, United Nations Doc S/RES/827 (1993).

[11] O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia" (October 1993) 87:4 American Journal of International Law 639-643.

[12] For a more detailed discussion see Boelaert-Souminen, "The International Criminal Tribunal for the Former Yugoslavia and the Kosovo Conflict" (31 March 2000) 837 International Review of the Red Cross 217-52, available at the website of the International Committee of the Red Cross (ICRC) at <www.icrc.org> (visited June 2000).

June 1991.[13] In April 1992 Serbia and Montenegro proclaimed that they had assumed the international, legal and political personality of the former Yugoslavia. However, the overwhelming majority of the members of the international community rejected this declaration, including the United Nations, claiming that the former Yugoslavia's dissolution was one of state succession. This hostile attitude began to shift because of the advantageous political changes in the FRY in late 2000 after a decade of sanctions and isolation. Later, it would be seen that this process not only played a vital role in relation to the ICTY but it also resulted in a fruitful co-operation with it.

Meanwhile in early 1993, already shocked by the scale of the raging conflict, the United Nations Security Council was even more horrified by the genocide witnessed in Bosnia. It therefore requested the Secretary-General to report on a new international criminal tribunal to try and punish persons responsible for those atrocities.[14] It was then that the Security Council decided to create the ICTY to be based in The Hague. However, this move did not have the requisite deterrent effects, and the atrocities continued until the 1995 Dayton Peace Agreement.

Although the Agreement embodied a provision on co-operation with the ICTY,[15] despite continuous warnings from the international community and the Tribunal itself, there were no significant outcomes in practice. However, Zagreb did improve its cooperation tendency while Belgrade believed that the major criminals should come before a domestic court. Since the states were hesitant to accept the Tribunal, generally speaking, the ICTY had to resort to unusual means to assure that any person indicted would be arrested and tried. As a result, Special Forces arrested two indicted criminals, Dokmanovic and Kovacevic in the summer of 1997.[16]

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[13] This date was very important regarding the future tribunal's jurisdiction. After this date the conflict in the former Yugoslavia qualified as an international armed conflict although in nature it was non-international as such. Further, the parties to the conflict concluded several agreements under the auspices of the ICRC that bound them to the law of international armed conflicts.

[14] See Security Council Resolution 808, 3175th meeting, 23 February 1993, United Nations Doc S/RES/808 (1993); the Report of the Secretary-General under para 2 of Security Council Resolution 808 (1993), 3 May 1993, United Nations Doc S/25704.

[15] Article IX(g) of the General Framework Agreement for Peace in Bosnia and Herzegovina, 21 November 1995.

[16] Compare Tavernier, "The Experience of the International Criminal Tribunals for

(b) ICTR

Significantly, different circumstances were behind the ICTR's creation. On 6 April 1994, an aircraft was downed with the Presidents of Rwanda and Burundi – Juvénal Habyarimana and Cyprien Ntaryamira respectively – on board. Following this event a genocidal campaign against the Rwandan Tutsis and the more moderate Hutus started that spanned over four months, resulting in more than 500,000 casualties. Although there was a tragic "tradition" of massacres between the Tutsi minority and the Hutu majority, a conflict on this scale had never been experienced before. The magnitude of the mass killings was clearly illustrated shortly after the atrocities began when the United Nations was forced to withdraw most of its peacekeeping contingent (UNAMIR) or "blue helmets" from the troubled state.

A month later, although the United Nations had decided to create a bigger peacekeeping contingent, the international community failed to deploy the troops before the end of the crisis. Instead of international action, French forces entered Rwanda to end the violence within the framework of the controversial *Operation Turquoise*. In this respect, the international community should shoulder moral responsibility for staying idle in the face of the Rwandan genocide. Since this gross negligence with fatal consequences can hardly be atoned *ex post facto*, social reconciliation can only be promoted by judicial means.

The Security Council followed the very same "step-by step" approach adopted previously in relation to the Yugoslav conflict. However, this process, which was very rapid when compared to that during the Balkan conflict, became extremely time-consuming in light of the genocide sweeping across Rwanda. As such, and in contrast to the ICTY, the ICTR was created only after the armed conflict concluded and pursuant to the explicit request of the new Rwandan government.[17]

Even though the Security Council enjoyed the political support of the Rwandan government, views clashed when the ICTR's Statute was

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the former Yugoslavia and Rwanda" (31 December 1997) 321 International Review of the Red Cross 605-621 available at <www.icrc.org> (visited April 2002).

[17] Letter of 28 September 1994 sent by Rwanda's Permanent Representative to the United Nations to the President of the Security Council, United Nations Doc S/1994/1115.

drafted. For example, Rwanda wanted the following: (a) to be a broad influence on the Tribunal's functioning; (b) the Statute to observe its specificities to the utmost extent; and (c) to give voice to concerns regarding certain provisions of the Statute.[18] In contrast, the Security Council was determined to follow the ICTY's example. As a result, it was no wonder that the differences in opinions and expectations led Ambassador Bakuramutsa of Rwanda to vote against the issue[19] in the Security Council.

The ICTR's creation, as it happened, gave rise to antipathy not only in Rwanda but also in the neighbouring states. The ice of aversion did not break until after the Harare Summit of the Organization of African Unity (OAU) held in July 1997.[20] Shortly after, the Tribunal recorded its first significant success within the framework of *Operation Naki* that led to the arrest in Kenya of major criminals of the one-time Provisional Government of Rwanda.[21]

Similar to the conflicts in the Balkans and Rwanda, the widespread and horrendous violations of human rights and humanitarian law characterised the brutal ten-year Sierra Leone civil war.[22] In November

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[18] Rwanda's objections focused mainly on the following points (the comments within parentheses reflect the government's objections): ratione temporis (this was determined arbitrarily); common organs with the ICTY (this undermined the specific nature of the Tribunal); the relation of the Tribunal to domestic courts and the appointment of judges (such states could also appoint judges who supported the genocide); enforcement of sentences (this would be taken out of Rwanda's hands); absence of death penalty; seat of the Tribunal (Arusha, Tanzania was chosen for several reasons, while the ICTR had only a Prosecutor's Office in Kigali, Rwanda). For more details see Peter, "The International Criminal Tribunal for Rwanda: Bringing the Killers to Book" (31 December 1997) 321 International Review of the Red Cross 694-704 available at <www.icrc.org> (visited April 2002); Dubois, "Rwanda's National Criminal Courts and the International Tribunal" ibid at 717-31.

[19] Security Council Resolution 955, 3453rd meeting, 8 November 1994, United Nations Doc S/RES/955 (1994).

[20] 33rd Ordinary Session of the Conference of Heads of State and Government and the 66th Ordinary Session of the Council of Ministers, Harare, Zimbabwe, 26 May – 4 June 1997.

[21] Compare Wembou, "The International Criminal Tribunal for Rwanda: Its Role in the African Context" (31 December 1997) 321 International Review of the Red Cross 685-693 available at <www.icrc.org> (visited April 2002); Dubois, "Rwanda's National Criminal Courts and the International Tribunal" ibid 717-731.

[22] On 23 March 1991, the forces of the RUF led by Corporal Foday Sankoh entered Sierra Leone from neighbouring Liberia and launched a rebellion to overthrow the

1996, the government of President Ahmad Tejan Kabbah[23] signed a peace agreement[24] with the Revolutionary United Front (RUF) but the envisaged ceasefire crumbled shortly after and the clashes continued. On 25 May 1997, some junior as well as non-commissioned officers of the Sierra Leone Army (SLA) overthrew the Kabbah government. The *coup* plotters invited the RUF to form a government known as the Armed Forces Revolutionary Council (AFRC) headed by Lieutenant-General Johnny Paul Koroma, but this move did not bring about the desired peace. In February 1998, the Economic Community of West African States Monitoring Group (ECOMOG), assisted by mercenaries from Sandline and the so-called "kamajors", removed the military junta from power. This allowed President Kabbah to return the following month to Sierra Leone from Guinea, where he had sought refuge, to participate in his ceremonial reinstatement.

In January 1999, the AFRC, RUF and ex-SLA attacked the capital, Freetown, and occupied the central and eastern parts for almost three weeks until ECOMOG troops ultimately removed them. The egregious abuses of human rights during this period shocked the conscience of the international community that finally turned its attention to the events in Sierra Leone.[25] In May 1999, President Kabbah began to negotiate with the RUF leader, Foday Sankoh. Those talks culminated

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one-party rule of the All People's Congress (APC) Party headed by Joseph Saidu Momoh: see Lord, "Introduction: the struggle for power and peace in Sierra Leone" available at <www.c-r.org/accord/s-leone/accord9/intro.shtml> (visited October 2003).

[23] Despite the civil war the first democratic elections in 30 years were held in March 1996. Ahmad Tejan Kabbah was elected President for a five-year term replacing the military government: see The Republic of Sierra Leone, "Bio Data of The President of Sierra Leone" at <www.statehouse-sl.org/biodata.html> (visited October 2003).

[24] This agreement is commonly referred to as the Abidjan Peace Accord signed in Adibjan, Ivory Coast on 30 November 1996: see Kargbo "The international community and the conflict in Sierra Leone" available at <www.alliancesforafrica.org/Publications/Kargbo.doc> (visited October 2003).

[25] For a detailed account of the atrocities committed in January 1999 see Human Rights Watch Report, "Getting Away with Murder, Mutilation and Rape: New Testimony from Sierra Leone" available at <www.hrw.org/reports/1999/Sierra-Leone> (visited April 2002). United Nations Secretary-General, Kofi Annan, and former United States President, Bill Clinton, also condemned the atrocities. The former United Nations High Commissioner for Human Rights, Mary Robinson, and United States Special Envoy to Africa, Jesse Jackson, described the human rights situation in Sierra Leone as worse than those in Kosovo.

in the famous Lomé Peace Agreement[26] between the government and the RUF that granted amnesty to all combatants and collaborators *inter alia* and in the deployment of a United Nations peacekeeping mission to Sierra Leone (UNOMSIL).

Atrocities continued despite the Lomé Peace Agreement. In May 2000, the RUF took several peacekeepers hostage forcing the government to reconsider the Agreement and seek the Security Council's help to create an appropriate judicial forum to try and punish the perpetrators of grave atrocities. In August 2000, the Security Council asked the Secretary-General to negotiate with Sierra Leone with a view to creating this forum.[27] The negotiations ended successfully in an agreement between Sierra Leone and the United Nations to create a Special Court for Sierra Leone that was to be *ad hoc* in nature. The Court's Statute was annexed to the Agreement and later incorporated into Sierra Leonean law by the 2001 Special Court (Ratification) Act. In this sense, the Special Court became a treaty-based organ unlike the ICTY and the ICTR that were created by Security Council resolutions. There were many reasons for this.

The first reason concerned the controversy and claims that the ICTY and ICTR were improperly created. To avoid this, it was acknowledged that a treaty to create the Special Court was the best way forward. The reason was that under contemporary international law and in light of the states' attitude on their own sovereignty, the idea of a treaty-based organ enjoying the consent of the host state would raise fewer, if any, legal concerns.

Secondly, the treaty-based nature of the Special Court would contribute to its effective functioning since the usual problems stemming from the lack of or non-cooperation from the host state would be avoided. In contrast, the lack of cooperation with the ICTY had resulted in innumerable problems, such as the arrest of alleged criminals. Nevertheless, a treaty-based court is not totally problem free since the risk existed that cooperation in future could evaporate with a change in government.[28]

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[26] Peace Agreement signed in Lomé, Togo on 7 July 1999.

[27] Security Council Resolution 1315, 4186th meeting, 14 August 2000, United Nations Doc S/RES/1315 (2000).

[28] Constitutionally speaking, Sierra Leone should have gone to the poll for

Thirdly, the foreseeable dominant role of the Sierra Leone authorities in the Special Court due to its unusual mixed composition could lead to the political manipulation of the process, biased prosecutions and insufficient protection for persons standing trial before it.

Finally, the very roots of modern international criminal jurisdiction starting with the International Military Tribunals established after World War II also point in the direction of treaty-based organs.

(i) Structure

The different backgrounds of the ICTY and ICTR had resulted in significant divergences in their respective Statutes, principally the provisions on jurisdiction. As a result, they cannot be described as twins even though the ICTR was modeled on the ICTY and they shared a similar structure. Created by their Statutes, each was given eleven judges. Their Trial Chambers comprised three judges each and their *common* Appeals Chamber comprised five judges. The Prosecutor and accompanying staff worked as a common unit for both Tribunals. The Tribunals also shared a common Registry that functioned as a separate body servicing the Chambers and the Prosecutor.

To rationalise and cut expenses, the creation of common organs was a wise decision, albeit the same could not be said of the Tribunals' specialised nature and tasks. As a result, the Tribunals were not independent, self-contained régimes, a result that may be deemed an important shortcoming. For example, if a change or event were to affect one, it would affect the other too irrespective of its triviality.

The original number of judges appointed to the Tribunals was quickly shown to be structurally inadequate. Responding to the heavier workload, the Security Council provided each Tribunal with an extra three judges by creating a Trial Chamber for each of them.[29] Therefore,

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presidential and parliamentary elections in March 2001. However, if a political party sympathetic to the perpetrators of human rights violations had won office, the whole process for creating the Special Court would have ended.

[29] On the ICTY, see Security Council Resolution 1166, 3878th meeting, 13 May 1998, United Nations Doc S/RES/1166 (1998). On the ICTR, see Security Council Resolution 1165, 3877th meeting, 30 April 1998, United Nations Doc S/RES/1165 (1998).

following this first amendment to their Statutes, each Tribunal now has three Trial Chambers comprised of three judges each, and the total number of judges in each Tribunal has increased to 14. However, even this adjustment was not enough. Reacting to letters from the Presidents of the Tribunals at the end of 2000, the Security Council expanded the common Appeals Chamber by creating a pool of 27 *ad litem* judges for the ITCY.[30] In light of these changes, the complex structure of the Tribunals may be outlined as follows.

Under the amended ICTY Statute, the Chambers now have 16 *permanent* judges including a maximum of nine *ad litem* judges. Each Trial Chamber has three permanent judges and a maximum of six *ad litem* judges. A Trial Chamber in which *ad litem* judges are assigned may be divided into sections of three judges comprising permanent and *ad litem* judges. Since the sections and the Trial Chambers have the same powers and responsibilities, the working capacity of the ICTY at first instance has therefore multiplied. The common Appeals Chamber now consists of seven judges, two of whom are appointees of the ICTY President and chosen from among the ICTY judges. The rest are chosen from the ICTY's pool of permanent judges. Five of the seven judges are now required for an appeal, a move to enhance the Tribunals' working capacity at second instance.

The United Nations General Assembly elects only 14 of the ICTY's 16 permanent judges because the other two judges of the Appeals Chamber must come from the ICTR. The 14 judges are elected for four-year terms and re-election for another term is possible. The General Assembly elects *ad litem* judges who serve for four-year terms with no possibility of re-election. It is noteworthy that in practice *ad litem* judges might not actually take part in the ICTY's work. This is because when the Tribunal's President requests for *ad litem* judges to comprise a Trial Chamber, the Secretary-General might not choose them from the pool of *ad litem* judges. Further, those chosen could serve in a Trial Chamber for more than one trial but not for a cumulative period of more than three years.

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[30] Security Council Resolution 1329, 4240th meeting, 30 November 2000, United Nations Doc S/RES/1329 (2000). The amendments to the Statutes are found in Annexes I-II of the Resolution. After considering the ICTR's workload, the judges did not require ad litem judges: ICTR Press Release, 5 December 2000, ICTR/INFO-9-2-253.EN.

Under the amended ICTR Statute, the expanded Appeals Chamber now has 16 judges and each of the three Trial Chambers has three judges each. The General Assembly elects eleven judges from among the 16, which means that five judges of the Appeals Chamber are drawn from the ICTY. The Appeals Chamber's composition and functioning are the same as that for the ICTY.

The Special Court's structure has such unique features that it seems to signpost a new epoch in the history of international judicial bodies. Negotiations are presently underway to establish a similar court for Cambodia to try and punish those responsible for atrocities committed under the Pol Pot régime.[31] Further, the Court features a special mixed composition while being dually dependent on the United Nations and the Sierra Leone government. Under Article 11 of its Statute, the Court is a self-contained organ with two Trial Chambers, and an Appeals Chamber, independent Prosecutor and Registry. The judges total eleven and serve for four-year terms. The Trial Chambers comprise three judges each, the Sierra Leone government appointing one and the Secretary-General appointing the other two with support from the international community, in particular from the Commonwealth and ECOWAS. Being appointments, the judges may be foreign nationals as there is no imperative that they be Sierra Leone nationals.

To ensure independence, the Prosecutor is an international functionary although the Deputy Prosecutor is always a Sierra Leonean national. The Secretary-General appoints the Registrar who is a United Nations staff member. Such unique features have led this Court to be classified as a "*sui generis* court" in the Secretary-General's report.[32]

(ii) Jurisdiction

The Special Court's jurisdiction should be viewed within the context of its historical background. The reason relates to the type and nature of the conflicts that not only triggered a process that prompted the court's creation but that led to certain groups of crimes being included within

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[31] See for example United Nations Press Releases, 6 July 2000 and 2 January 2001.
[32] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, United Nations Doc S/2000/915 para 9.

its jurisdiction. For example, the international crimes falling under the ICTY's jurisdiction[33] reflect the special features of the Balkan conflict.

In the Balkans, the conflict had coincided with the dissolution of the former Yugoslavia that provided its twofold characteristic: although certain elements of the hostilities were international in nature other clashes were not deemed to be international armed conflicts. Since the Security Council wanted to ensure that no major criminals would escape punishment caused by shortcomings in the ICTY's jurisdiction, it incorporated rules of customary humanitarian law into the Special Court's Statute[34] so that violations of both the laws and *customs* of war would be included within its jurisdiction.

In contrast to the ICTR, the Court's Statute provided it with power to try and punish the perpetrators of atrocities typically committed in internal (non-international armed conflicts), namely, genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and found in Additional Protocol II (Articles 2-4).[35]

Therefore, the Special Court's jurisdiction extended to the most egregious practices in Sierra Leone, such as mass killings, extra judicial executions, widespread mutilations (the amputation of body parts particularly), sexual violence against females, abductions and forced recruitment of children, looting, and the burning of large urban dwellings and villages. Those acts amounted to crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, other serious violations of international humanitarian law and crimes under Sierra Leonean law (Articles 2-5).[36]

The inclusion of domestic crimes within the Court's jurisdiction under the Statute gave rise to a unique solution whose rationale was threefold.

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[33] They are the grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, genocide and crimes against humanity (Articles 2-5).

[34] For a detailed discussion see Meron, "War Crimes in Yugoslavia and the Development of International Law" (January 1994) 88:1 American Journal of International Law 78-87.

[35] For a detailed discussion see Shraga and anor, "The International Criminal Tribunal for Rwanda" (1996) 7:4 European Journal of International Law 507-510.

[36] The crimes included violations of the 1926 Prevention of Cruelty to Children Act and offences relating to the wanton destruction of property under the 1861 Malicious Damage Act in Sierra Leone.

First, from Sierra Leone's viewpoint, the Court's criminal jurisdiction (in a broader sense, its sovereignty) became less restricted. Secondly, the international community had deemed that such grave crimes committed on such a large scale worthy of prosecution by this *sui generis* court. Thirdly, the goal was to make the Court more specific to the needs of Sierra Leone and to the kind of crisis it had to deal with.

The common denominator of the three Statutes is crimes against humanity. However, the Statutes of the three tribunals had phrased differently the elements of this *crimen*. Similarly, Article 7 of the Rome Statute of the International Criminal Court had a different list of conduct mounting to crimes against humanity. If one were to examine thoroughly the history of such crimes, one would find that they could be easily massaged and molded. In other words, the international community could shape them in such a way as to fill possible gaps in jurisdiction in any given conflict situation.

The ICTY, ICTR and Special Court have concurrent jurisdiction with and enjoy primacy over national courts, although not to the same extent. For example, under Article 8(2) of its Statute, the ICTR has "primacy over the national courts of all States". This was in spite of the ICTY Statute, which had been drafted earlier and served as a basis for the ICTR, containing a less explicit Article 9(2) which provided that it "shall have primacy over national courts."

It is ironic that the oldest of the tribunals, the ICTY, had little opportunity to establish a good co-operative relationship with the Yugoslav successor states. In contrast, the ICTR intends to work with Rwanda's national courts. Nevertheless, the latter relation is far from smooth and shadowed by serious problems owing to the vast number of cases before the national courts. For example, approximately 100,000 suspects await trial for genocide in custodial conditions that are reportedly inhuman. Substantial work on suspects, classified into four groups according to the crimes they allegedly committed, began only in December 1996 and the statistics reflect a type of "conveyor belt justice." For example, within a six month period Rwandan domestic courts delivered 142 judgments, 61 of them attracting the death penalty.[37] Justice and due process aside, another aspect calls for

[37] Dubois, "Rwanda's National Criminal Courts and the International Tribunal"

comment on the logistics for clearing the decks. If six months resulted in 142 judgments, how many years would it take to deal with 100,000? A simple calculation puts the figure at more than 350 years.

Following international human rights concerns, Rwanda's request to include the death penalty in the ICTR's Statute was ignored and life imprisonment is the maximum penalty the Tribunal may impose. In contrast, Rwandan domestic criminal law permits the death penalty, the mandatory sentence for genocide. This has created an anomalous and unacceptable situation where major criminals, such as Jean Kambanda, receive life sentences (maximum sentence) while the national courts have imposed the death penalty on those who had merely carried out superior orders.[38]

Selectivity of justice in Rwanda poses another problem. Since some of those allegedly responsible for genocide have remained in power, the Tribunal has to operate within a political environment. In spite of this, the ICTR's merits cannot be contested or belittled since it ended the tradition of impunity on the African continent. Also, it was the first international tribunal to rule on genocide[39] and it paved the way for future courts such as the Special Court for Sierra Leone.

(c) Special Court for Sierra Leone

The Special Court for Sierra Leone does not have primacy of jurisdiction *vis a vis* the domestic courts. Like the crisis in Rwanda, the Sierra Leonean conflict was internal in nature. This being so, the question is why the Special Court lacks concurrent jurisdiction and primacy over *all* national courts. There are many reasons, including the history, the treaty-based nature of the court, and (perhaps) the ICTR's negative experiences.

Compare (31 December 1997) 321 International Review of the Red Cross 717-731 available at <www.icrc.org> (visited April 2002). On the ICTR's difficulties see Erasmus and anor, "The International Criminal Tribunal for Rwanda: Are all issues addressed? How does it compare to South Africa's Truth and Reconciliation Commission?" ibid 705-715.

[38] Compare ibid. On the issue of penalties see Schabas, "Perverse effects of nulla poena principle: National Practice and the Ad Hoc Tribunals" (2000) 11:3 European Journal of International Law 521-540.

[39] Jean Kambanda (Appellant) v The Prosecutor (Respondent), Judgment, Case No ICTR 97-23-A.

The Special Court also lacks *erga omnes* character and the power to request the surrender of an accused from a third state, both being defects.[40] Since some of those who had committed serious violations of human rights and humanitarian law had already fled to neighbouring states, it is highly possible that they would never be brought to justice. As noted above, sentencing is a problem because life imprisonment is the Special Court's maximum penalty while Sierra Leone's domestic courts may impose the death penalty.[41] This is a big blow to justice, a blow resulting from an international tribunal adhering to human rights norms unconditionally within a state that does not follow suit. Therefore, a solution would be for the state to voluntarily outlaw the death penalty since it cannot be forced to do it owing to the principle of sovereign equality and non-intervention in a state's domestic affairs.

As seen earlier, selectivity of justice in Sierra Leone is a problem. Although high officials have allegedly committed crimes, it is unlikely that they would ever be tried before the Special Court. ECOMOG soldiers are equally unlikely to be brought before the Court since they were the ones who removed the military junta and reinstated the government. Another problem is the appalling prison conditions in Sierra Leone with prisoners reportedly dying of malnutrition and illnesses *en masse*. They are reportedly fed once a day and locked up from 3 pm to 8 am. Only one prison is functional in Sierra Leone, this being the outdated central penal institution in Freetown built during the British colonial days. Overcrowding is a serious issue too and a reason the Statute has provided for prison terms to be served in third states.

(i) Personal jurisdiction

The ICTY, ICTR and Special Court have jurisdiction over natural persons only. On the other hand, the Nuremberg International Military

[40] These defects, however, could be remedied. The Security Council, upon request, could provide the Special Court with erga omnes powers. Further, as the Court would also have power to "[e]nter into agreements with States as may be necessary for the exercise of its functions and for the operation" under Article 10(d) of the Agreement on the Establishment of a Special Court for Sierra Leone, it could in principle conclude agreements on extradition with the states concerned.

[41] Under Sierra Leonean law the death penalty was reserved for only three offences: murder, treason and espionage. As a result, in terms of the Statute of the Special Court, convicted criminals would receive the death penalty under Sierra Leonean law for offences under Article 3(a), (d) and (g).

Tribunal also had power to declare groups or organisations criminal. This is because under the 1945 London Agreement, a signatory state could try the members of a group or organisation.[42] The three courts have no such scope although criminal groups or organisations exist, such as the paramilitary group (Yugoslavia), *Interahamwe* and *Impuzamigambi* (Rwanda) and RUF (Sierra Leone). The reasons include:

1. the courts were designated to try and punish the major criminals (as individuals);
2. the drafters of the legislation did not wish to burden the courts with the added task of determining the criminal nature of a group or organisation especially when individual criminal responsibility existed and was deemed sufficient for justice;
3. the idea of *quasi* collective responsibility had faded after the second half of the 1940s with the subsequent development of international law;
4. criminal law *per se* could not seize the groups or organisations; and
5. the three courts could try individuals including the political and military leadership and those in command authority.

There is an important issue that concerns children. By implication, the Special Court may allow the prosecution of 15-18 year olds for offences (Article 7) unlike the International Criminal Court that excludes children (under 18 years) from its jurisdiction. The Special Court's jurisdiction has therefore raised a significant moral dilemma and been opposed by children's rights groups, particularly in light of the forceful abduction of children and their recruitment as soldiers by groups such as the RUF and AFRC. It has been argued that the Special Court should not try children but should concentrate on prosecuting those who recruited the children, a position the ICC backs. Be that as it may, assuming a child is brought before the Special Court either as an accused or witness they should be given special protection and treatment pursuant to the principles of juvenile and restorative justice.[43]

[42] See Articles 9-10 of the Charter of the International Military Tribunal.

[43] The United Nations Secretary-General reported that there was no international standard for the minimum age of criminal responsibility. The ICC's Rome Statute excluded persons under the age of 18 from this court's jurisdiction. The Statute's travaux preparatoire shows that it was not the intention of the drafters to establish a

(ii) Territorial jurisdiction

The *ratione loci* or territorial jurisdiction of the Special Court for Sierra Leone embraces, but does not extend beyond Sierra Leone (Article 1). Similarly, the ICTY's jurisdiction falls within the geographical borders of the former Yugoslavia and embraces the territory of its successor states (Article 8). On the other hand, the ICTR's jurisdiction is different as it extends beyond Rwanda's borders and covers the territory of neighbouring states (Article 7). Under its Statute, the ICTR based in Arusha may try Rwandan citizens who had committed one or more criminal acts outside of Rwanda during the course of the 1994 crisis. Consequently, it is understandable why certain African states have previously shown antipathy towards the ICTR. Further, it is noteworthy that the Committee on the Elimination of Racial Discrimination (CERD)[44] has recommended that the jurisdiction of the ICTR be broadened to incorporate war crimes and crimes against humanity committed in the territory of the Congo.[45]

Given the ICTY's *ratione loci*, it has been argued that NATO forces participating in Operation Allied Force in the former Yugoslavia should fall under this Tribunal's jurisdiction. This followed allegations that international humanitarian law had been violated during a controversial air operation in March-June 1999. However, NATO

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minimum age for criminal responsibility. Premised on the notion of complementarity between national courts and the ICC it was intended that persons under 18 accused of crimes for which the ICC had jurisdiction would be brought before their national courts. Trials of juvenile offenders before the Special Court recently became questionable in light of a Security Council statement dated 2 February 2001. According to this, the prosecution of children before the Court was "extremely unlikely": see United Nations Press Release, 2 February 2001. Sierra Leone had approximately 5,000 child combatants with 200 of them in command positions and who became feared for their brutality. However, most of them had been subjected to abuse (psychological and physical) and duress. They were abducted, forcibly recruited, sexually abused, reduced to all types of slavery and often trained under the influence of drugs, thereby transforming them from victims to perpetrators. It should be noted that the SLA and the government friendly CDF also actively recruited large numbers of children during the war.

[44] This body was created under the 1965 Convention on the Elimination on All Forms of Racial Discrimination.

[45] United Nations Press Release, "Anti-Discrimination Committee recommends extension of mandate of Arusha Tribunal to include jurisdiction over crimes in Democratic Republic of Congo", 19 March 1998, United Nations Doc HR/CERD/98/28.

survived this awkward situation when the ICTY Prosecutor, referring to a report of a committee established by her for this specific purpose, rejected the possibility of an investigation on the alleged violations.[46] Assuming the Prosecutor had decided to indict the alleged NATO war criminals for aggression, deemed the "arch-crime" of international law, the ICTY could not have acted because it lacked the requisite "subject matter" jurisdiction. Responsibility for crimes against peace belongs to the International Court of Justice and is dealt with at state level.[47] As a result, Belgrade's *in absentia* prosecution and conviction of NATO political and military leaders for such crimes was futile.[48]

(iii) Temporal jurisdiction *(ratione temporis)*

The three courts have been restricted to investigating and sanctioning crimes perpetrated within a certain time period. Since the ICTY was created during the raging crisis in the former Yugoslavia, only the commencement date of its temporal jurisdiction was determined, namely, 1 January 1991. The reason for leaving the *ratione temporis* open-ended was self-evident because when the ICTY's Statute was being drafted, peace had seemed unattainable. In hindsight, this was a

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[46] "On the basis of information available, the committee recommends that no investigation be commenced by the OTP [i.e. Office of the Prosecutor] in relation to the NATO bombing campaign or incidents occurring during the campaign": see ICTY, Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 8 June 2000 at para 91.

[47] See the so-called "Yugoslavia-cases" in the ICJ, namely, Legality of Use of Force (Yugoslavia v Belgium; Yugoslavia v Canada; Yugoslavia v France; Yugoslavia v Germany; Yugoslavia v Italy; Yugoslavia v Netherlands; Yugoslavia v Portugal; Yugoslavia v United Kingdom).

[48] This occurred in Belgrade on 21 September 2000 where the court sentenced the key political and military figures of NATO's air operation to 20 years imprisonment. Among the persons so convicted were former United States President Bill Clinton, French President Jacques Chirac, British Prime Minister Tony Blair, German Chancellor Gerhard Schröder, former NATO Secretary-General Javier Solana and former SACEUR General Wesley Clark. However, the Supreme Court of Serbia annulled the judgment in September 2001 for procedural faults during the original trial. According to the court's reasoning, the Belgrade District Court of first instance had no competence to hear the case and deliver a judgment in the case. Only a court martial could have such competence. See "Belgrade court sentences Clinton, Chirac, Blair, others to 20 years" The Telegraph, 21 September 2000 at <www.unmikonline.org/press/wire/im2109pm.html> (visited November 2003).

wise move by the international community. Similarly, neither did the Dayton Peace Agreement impose a time limit. If the Security Council had done so, the perpetrators of and persons responsible for the blatant atrocities in Kosovo, for example, would have escaped the ICTY as a result of this technicality. This contrasts with the Security Council's call to provide a closing date for the ICTY's temporal jurisdiction[49] that signals the improving Balkan situation.

By the time the ICTR was created, the Rwandan genocide had ended. This permitted the *ratione temporis* to be determined from 1 January to 31 December 1994. The rationale for the choice of the commencement date is interesting as it precedes the actual start of the genocide by three months. This is because genocide requires a "conspiracy" background[50] and a preparatory stage. Thus, the only way to achieve this goal was to set 1 January 1994 as the start date for the ICTR's *ratione temporis* despite the Rwandan government's objection to this arbitrariness.[51]

Although the Sierra Leone civil war began in 1991, the start date of the Special Court's *ratione temporis* was 30 November 1996. This limitation was imposed to curb overburdening the Prosecutor and overloading the court. Since the *ratione temporis* had no end date, it raised more questions than those on the ICTY. For example, who would determine the closing date? Which principal organ of the United Nations would do so, the Security Council or the Secretary-General? Or is it the Sierra Leone government? And, most importantly, when? Further, would this measure require an amendment to the Agreement that established the Special Court? Considering that the Agreement is a treaty governed by international law, the answer appears to be yes.

Human rights groups and other organisations widely condemned the amnesty provision of the 1999 Lomé Peace Agreement.[52] Ambassador

[49] Security Council Resolution 1329, 4240th meeting, 30 November 2000, United Nations Doc S/RES/1329 (2000) at para 6.

[50] Compare Aptel, "The International Criminal Tribunal for Rwanda" (31 December 1997) 321 International Review of the Red Cross 675-683, available at <www.icrc.org> (visited April 2002).

[51] See Shraga and anor, "The International Criminal Tribunal for Rwanda" (1996) 7:4 European Journal of International Law 506-507.

[52] In a letter to United Nations Secretary-General dated 9 July 1999, Human Rights Watch condemned the amnesty provision and called for the perpetrators of human rights violations to be punished. Amnesty International also condemned this

Francis G Okelo, the Secretary-General's Special Representative, had attached a disclaimer to the Agreement during the signing. The United Nations' position was that the amnesty and pardon provision in Article IX should not apply to genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. The disclaimer was in step with international law disallowing amnesties for such crimes. However, the international community subsequently gave no substance to this disclaimer.[53]

The effect of the amnesty on the Special Court's functioning may be outlined as follows. Under the Court's Statute, it may try crimes of an international nature if they fall within its *ratione temporis*. However, its competence concerning domestic crimes is limited to the period following the Lomé amnesty. Therefore, the Court has no power to deal domestic crimes perpetrated between 30 November 1996 and the Lomé Peace Agreement.

III. FINANCING

Since the ICTY and the ICTR are tribunals created by the Security Council, the United Nations bears their expenses.

Under Article 32 of its Statute, the ICTY's expenses shall be "borne by the regular budget of the United Nations" according to Article 17 of its Charter. Under Article 30 of the ICTR Statute, the expenses of this tribunal "shall be expenses of the United Nations" according to Article 17 also. The difference in wording has practical implications as the latter avoids the pitfalls of the former in application. The ICTR's formula is typical of the financing of peacekeeping operations and avoids the ICTY's unfavourable experiences.

Financing is a sensitive issue for the Special Court and a dilemma. If funds came from the United Nations it would transform the Court into a *de facto* United Nations body. If funds came from voluntary contributions, it could compromise the Court's independence and effective functioning. Nonetheless, the Security Council recommended

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controversial provision: Amnesty International Press Release, "A Peace Agreement but no Justice", 9 July 1999.

[53] See Amnesty International, "Sierra Leone, Ending Impunity: An Opportunity not to be Missed", 26 July 2000, AFR 51/60/00 at 3.

to the Secretary-General that the Special Court be funded by voluntary contributions from the United Nations membership. Commenting on this recommendation, Secretary-General Kofi Annan stated:[54]

> I would therefore propose that the process of establishing the Court shall not commence until the UN Secretariat has obtained sufficient contributions in hand to finance the establishment of the Court and 12 months of its operation, as well as pledges equal to the anticipated expenses of the following 24 months.

In light of this statement, it seems that the creation of the Special Court is dependent on the member states. Although the Sierra Leone government and the United Nations had finally managed to avoid the Court becoming a *de facto* United Nations organ, one would have to ask, but at what cost?

IV. CONCLUDING REMARKS

Generally, there are three key factors for an international criminal court to function effectively. They are its specific nature, independence and acceptance by states. Those requirements are interdependent and cannot be fully met if the others are ignored. However, this obstructs the court's functioning. For example, if the state does not recognise the court and does not relinquish part of its criminal jurisdiction, it would not facilitate the extradition of an accused. Since international law lacks the law enforcement capacities of national legal systems, it cannot ensure that the accused would stand trial if the state does not cooperate even if the court has *erga omnes* powers.

Throughout the history of international criminal jurisdiction post World War II, the above requirements have been fulfilled to a variable measure. The *ad hoc* international military tribunals established immediately after that War were in fact neither completely specific,

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[54] Sierra Leone Web News, 16 January 2001 at <http://www.sierra-leone.org/slnews0101.html>. According to the Secretary-General, Kofi Annan, the running cost of the court was estimated at US$22 million annually excluding expenses such as general operational costs and costs related to detention facilities, prosecutorial and investigative activities, conference services and defense counsel. Notwithstanding, the Security Council concurred with Annan's proposal: United Nations Press Release, 2 February 2001.

unquestionably independent, nor recognised. This was because they were created when international law and personal responsibility for war crimes particularly were undergoing revolutionary changes. Thus, they represented a type of transition between the victors' courts in the traditional sense and the much more independent and sophisticated judicial bodies discussed here. The current tribunals hallmarked a new era and created an international precedent at the end of the 20th century when it had to pass judgment on the perpetrators of crimes comparable only to those committed during World War II.

The ICTY and ICTR, created by the Security Council under Chapter VII of the Charter, may be deemed a significant leap forward. Both of them may be considered to be state and crisis specific judicial organs. This becomes apparent when one examines their respective historical backgrounds and jurisdictional domain. They are also independent of the states whose citizens are criminals and whom they are mandated to deal with. However, they are not independent of one another and an example is their shared Registry, a fact that may cause future difficulties. As for their recognition, it should be noted that they were imposed on their respective states following the Security Council's exercise of power under Chapter VII. In this sense, they unhappily obtruded upon the states concerned.

One may argue that the Rwandan government had explicitly requested the ICTR's creation. Suffice it to say, however, that the Security Council ignored most of that state's proposals and instead drafted the ICTR Statute arbitrarily based on the ICTY's. This resulted in antipathy towards it hampering its effective work, at least for a while.

The ICTY's situation seems worse because the tribunal was "forced" upon the former Yugoslavia, which continues to affect it adversely. It constantly encounters opposition and does not receive the routine co-operation required for its effective functioning.

Most of the features of the Special Court for Sierra Leone manifest the effort at specificity, independence and recognition. The Court is an original, *sui generis* court with a mixed composition and mixed jurisdiction. To make the Court more crisis-specific, the drafters added Sierra Leonean crimes to the Court's Statute and waded into a serious moral dilemma by permitting the prosecution of children aged 15-18

years. To remain independent, voluntary contributions would fund the Court. Finally, in the attempt to establish a court that the government of Sierra Leone would recognise, a treaty-based, self-contained, mixed composition was provided. In this sense, if all the expectations are fulfilled the Court would be a success story.

However, there are reasons why the Court's Statute should be reviewed. First, the Court should be vested with extradition powers to bring perpetrators to justice. Secondly, the international community and the Sierra Leonean government should consider excluding children from the Court's jurisdiction especially in light of the Security Council's position as seen above. Thirdly, a closing date for the Court's temporal jurisdiction should be established. Finally, Sierra Leone should consider abolishing the death penalty that is contrary to international human rights. To accord with international standards, the excessive and cruel punishment of perpetrators even of serious violations of human rights and of humanitarian law should end.

It is crucially important that the Special Court be (re-)designed in order to prevent political manipulation of the process by the Sierra Leone government. Therefore, no single individual or party to the conflict should be singled out for prosecution to the exclusion of others.

It is hoped that the efforts of the international community and the Sierra Leone government in establishing the Special Court will succeed in accordance with the growing culture to end impunity. The effort is also crucial for other reasons. First, the arrest, detention and trial of "persons most responsible" would alleviate the desire to exact revenge on suspects. Secondly, it would accelerate the process of voluntary repatriation of Sierra Leonean refugees, many of whom are victims of violations, and assure them justice. Finally, the punishment of individuals responsible for opprobrious acts should deter such future violations and facilitate the process for peace and reconciliation.