The Relationship Between Internationalized Courts and National Courts

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Finally, in spite of the establishment of the permanent International Criminal Court, internationalized courts are not an endangered species and development of ever more refined methods for ensuring fair trials by such institutions will be necessary.207

207 Efforts are currently being undertaken, however, and a series of draft model codes—including a Transitional Criminal Code, Transitional Code of Criminal Procedure, and a Transitional Detention Act—have been drafted by an international expert team in a project by the Irish Centre for Human Rights ('Applicable Law in Complex Situations'), which is a component of the US Institute of Peace's 'Project on Peacekeeping and the Administration of Justice'.

Each of the four internationalized courts that are discussed in this book is embedded into, or grafted onto, the national legal order of one particular state: Yugoslavia/Kosovo, East Timor, Sierra Leone, and Cambodia. It is this connection that makes the courts 'internationalized' rather than 'international'.

The linkage to a particular state raises the question how the internationalized courts are related to the national courts of that state. Some of the suspects who are or may be prosecuted before internationalized courts, might also have been or could be prosecuted before national courts. Does the establishment of the internationalized court mean that national courts can no longer exercise jurisdiction over these suspects? Or can the national courts still exercise jurisdiction, but subject to review of the internationalized court? These types of questions are to some extent comparable to the relationship between national courts and international courts. However, there is reason for a separate treatment of the relationship between internationalized and national courts, for internationalized courts have a much closer relationship with national courts and the legal questions therefore are different than for a truly international court.

In this chapter, we will examine six questions that have arisen or that may arise pertaining to the relationship between internationalized courts and national courts: (1) whether national courts have jurisdiction over acts that are within the jurisdiction of an internationalized court; (2) if so, what rules govern concurrent jurisdiction between national and internationalized courts; (3) whether national courts can exercise jurisdiction over persons that are at large in the territory of the internationalized court; (4) whether national courts can exercise jurisdiction over persons that are in the territory of the internationalized court; (5) whether national courts have jurisdiction over acts that are within the jurisdiction of an internationalized court; and (6) whether national courts can exercise jurisdiction over persons that are absent from the territory of the internationalized court. Each of these questions will be examined in turn.

A. INTRODUCTION
courts; (3) whether individuals can resort to a national court to challenge the legality of establishment of an internationalized court; (4) whether national courts can review judgments of an internationalized court; (5) whether suspects that have been tried in an internationalized court could later also be tried in a national court or vice versa; and (6) the authority of judgments of internationalized courts for national courts.

It will appear from our analysis that the interaction between internationalized and national courts cannot easily be captured in general principles that are equally valid for all internationalized courts. The differences in the procedures by which these courts are established, as well as in their jurisdiction and authority, resist generalization. Nonetheless, a few patterns can be found. The dominant theme that emerges from this chapter is that internationalized courts cannot easily be captured in general principles that have been tried in an internationalized court. It is only in rare and narrowly defined circumstances that national courts can act with regard to matters within the jurisdiction of an internationalized court.

Three qualifications are necessary. First, we will confine ourselves to the jurisdiction of national and internationalized courts over serious crimes, as it is for those crimes in particular that the internationalized courts were set up. Secondly, in principle we confine ourselves to national courts of the state to which the internationalized court has been connected and do not examine the relationship with courts of third states.

Thirdly, the chapter does not cover the relationship between internationalized courts and non-judicial national arrangements, in particular truth and reconciliation commissions.

B. OVERLAPPING JURISDICTION OF INTERNATIONALIZED AND NATIONAL COURTS

A first question to be examined is whether the jurisdiction of the internationalized courts is an exclusive one. Can serious crimes only be tried by the internationalized courts, or do they also fall within the jurisdiction of a national court? This question is particularly relevant since, due to the operation of the ne bis in idem principle (see section F), a trial of a suspect in a national court could preclude a subsequent trial by an internationalized court.

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1. Kosovo

In Kosovo, competence in respect of serious crimes has not been limited to one particular internationalized court. Serious crimes can be prosecuted throughout Kosovo, by all courts that have territorial jurisdiction under local law (the Law on Courts of Serbia and Montenegro).

In terms of their composition, only some of the Kosovo courts have actually been internationalized. As of 14 April 2003, 17 international judges were placed at the District and Supreme Courts of Kosovo. Courts with international composition thus exist next to courts, which, in terms of their composition, are still national courts, even though the applicable law of all courts has been internationalized. Whether or not a 'non-internationalized' court could assume jurisdiction over serious crimes is governed by the Law on Courts of Serbia and Montenegro. However, in practice the possibility of a national court exercising jurisdiction is only speculative, since, at the moment, should a non-internationalized court assume jurisdiction, that court would probably be internationalized de facto by the Special Representative of the Secretary-General (SRSG). The SRSG can, upon recommendation of the Department of Judicial Affairs, assign international judges/prosecutors where this is considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice. In practice, crimes connected to the 1998–99 conflict have been dealt with exclusively by district courts that have been internationalized by the SRSG.

A separate question is whether the courts of Serbia and Montenegro could exercise jurisdiction over crimes within the jurisdiction of the internationalized Kosovo courts. UN Security Council Resolution 1244 (1999) does not invalidate any jurisdiction that Serbian courts may have under national law. The authority of the Special Representative of the

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2. We understand the term 'serious crimes' to cover international crimes and serious crimes under national law.
3. In any case in Sierra Leone, Cambodia, and East Timor.
4. Other aspects of the relationship with the courts of other countries are dealt with in Chapter 17 (Shraga).
5. On the truth and reconciliation institutions in Sierra Leone and East Timor, see Chapters 9 (Schabas) and 6 (Lyons).
Secretary-General is limited to Kosovo. In this respect a shared jurisdiction may exist.

Not every jurisdiction that Serbia and Montenegro may exercise with respect to Kosovo is lawful, however. Article 1.1 of UNMIK Regulation 1999/1 provides: ‘All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.’ This provision seems to render illegal the re-establishment of ‘Kosovo’ District Courts within Serbia proper after the war by Serbia. Serbian authorities have transferred many of the court files from Kosovo to those courts. In his report to the Security Council of 14 April 2003, the Secretary-General noted that ‘Belgrade-supported parallel structures now exist in virtually all municipalities that have a sizeable Kosovo Serb population’. It appears that suspects arrested by authorities in northern Mitrovica have been brought to trial before the court in Kraljevo, in Serbia proper, where they have been tried under Serbian law. This form of concurrent jurisdiction between regular (Serbian) courts and internationalized courts seems to violate Article 1.1 of UNMIK Regulation 1999/1. This view is shared by UNMIK, which has attempted to dismantle the parallel structures.

2. East Timor

According to UNTAET Regulation 2000/11, judicial authority in East Timor shall be exclusively vested in courts that are composed of both East Timorese and international judges. This suggests that the entire court system of East Timor, composed of four District Courts and one Court of Appeal, is internationalized. However, a full internationalization of the first ruling in a case of a war crime committed during the armed conflict in Kosovo. Two former soldiers of the Yugoslav Army were convicted for killing two Albanian civilians and burning their bodies. The suspects were sentenced to five years and three years' imprisonment. A senior military security officer who ordered the crime was sentenced to seven years. See www.hlc.org/english/wci/wcl17.htm.

16. UN Doc S/2003/421 para 19: UNMIK attempted to dismantle the parallel courts supported by Belgrade and worked to establish an unified justice system under UNMIK. Seven Kosovo Serb judges were appointed in the northern part of Kosovo and the Minor Offences and Municipal Courts in both Leposavic and Zubin Potok were officially opened under UNMIK administration on 13 January.
18. Cf ibid ss 7 and 14. The structure of the judiciary is in the course of being modified by Title V of the Constitution of the Republic of East Timor of 20 May 2002 (available at www.etnum.org.etatnpdf/pdf2/comm/enia.pdf). However, the transitional provisions relating to the judiciary (ss 163 and 164) provide that ‘the collective judicial instance existing in East

East Timorese judiciary was never seriously contemplated by UNTAET, and not implemented in practice. Internationalization has only occurred with regard to the District Court in Dili. Such Panels have exclusive jurisdiction over serious criminal offences. These are, on the one hand, the international crimes of genocide, crimes against humanity, war crimes, and torture, and, on the other hand, the domestic offences of murder and sexual offences, insofar as they were committed in the period between 1 January and 25 October 1999 in the territory of East Timor. In respect of these crimes, there is thus no role for non-internationalized courts.

The jurisdiction of the Special Panels over murder and sexual offences committed in East Timor prior to 1 January 1999, appears to be not of an exclusive nature and is shared with other 'non-internationalized' District Courts, subject to the clause which requires that the law on which the serious criminal offence is based is consistent with internationally recognized human rights standards, to the possibility that a Special Panel requests a deferral, and to the exceptions to the principle of ne bis in idem.

So far, no proceedings have been conducted with respect to serious offences committed outside the period that is reserved for the District Court in Dili and conse-
quentlly, the question whether and to what extent 'non-internationalized'
District Courts share the jurisdiction with the Serious Crimes Panels has
not arisen in practice. 26

3. Cambodia

According to the Agreement between the United Nations and Cambodia, as
approved by the General Assembly on 13 May 2003, the Extraordinary
Chambers will be established in the existing court structure of Cambodia. 27
One thus cannot speak of 'internationalized courts' (the Extraordinary
Chambers) and 'national courts': the Extraordinary Chambers are regular
Cambodian courts, be it with some special features, in particular in terms of
their composition and the applicable law 28

The question whether the jurisdiction of the Extraordinary Chambers is
shared with the non-internationalized parts of the judicial system seems, to a
large extent, a theoretical one. There has been little inclination to prosecute
the suspects with greatest responsibility for the genocide in the regular
Cambodian courts; indeed that has precisely been the reason for the estab-
ishment of the Extraordinary Chambers. The possibility of any court
wishing to step in seems remote. Nonetheless, a few observations on the
jurisdiction of the regular courts can be made.

The jurisdiction of the Extraordinary Chambers appears to be exclusive in
so far as they will have jurisdiction over suspects of genocide, crimes against
humanity, suspects responsible for the destruction of cultural property
during armed conflict pursuant to the 1954 Hague Convention for Protection
of Cultural Property in the Event of Armed Conflict, and suspects responsible
for crimes against internationally protected persons pursuant to the 1961
Vienna Convention on Diplomatic Relations, and which were committed
during the period from 17 April 1975 to 6 January 1979. To the extent that
these are not defined in the other provisions of Cambodian criminal law,
including the 1956 Penal Code, the normal courts would appear to have no
jurisdiction over these crimes.

The subject-matter jurisdiction of the Extraordinary Chambers also covers
homicide, torture, and religious persecution. These crimes are defined under
national Cambodian law and would in principle also fall within the jurisdic-
tion of regular Cambodian courts. However, also in respect of these crimes

26 For an overview, see Judicial System Monitoring Programme www.jsmp.minihub.org/
Trialsnew.htm.
27 Article 2 of the Law on the Establishment of Extraordinary Chambers in the Courts of
Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kam-
puchea; Art. 2 of the Agreement of 17 March 2003 between the United Nations and the Royal
Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes com-
mited during the Period of Democratic Kampuchea.
28 See Chapter 14 (Swart).

the jurisdiction of the Extraordinary Chambers appears to be exclusive if one
considers the temporal jurisdiction of the Extraordinary Chambers. The Law
on the Extraordinary Chambers extends the statute of limitations set forth in
the 1956 Penal Code for an additional 20 years for the crimes within the
jurisdiction of the Extraordinary Chambers. Presumably, prosecution of
these crimes under the other provisions of the national criminal code would
be barred because the statute of limitations would be in effect. 29 For this
reason, no overlap in jurisdiction between the Extraordinary Chambers and
the regular courts in respect of homicide, torture, and religious persecution
appears to exist.

4. Sierra Leone

The Special Court for Sierra Leone does not form part of the judiciary of
Sierra Leone. 30 Its jurisdiction over those persons who bear the greatest
responsibility for serious violations of international humanitarian law and
Sierra Leonian law committed in the territory of Sierra Leone since
30 November 1996 31 in principle is concurrent with that of national courts
of Sierra Leone. 32 No provision of the Special Court Agreement of the
Ratification Act precludes jurisdiction of the ordinary courts. Thus, national
courts of Sierra Leone may, to the extent that national law allows for
prosecution of the crimes within the jurisdiction of the Special Court, exercise
jurisdiction over these crimes.

5. Summary

From the above, it emerges that the jurisdiction of each of the four inter-
nationalized courts is delineated from that of regular courts in a different way.
Only in Cambodia the jurisdiction of the internationalized courts appears to

29 The contents of the applicable national penal law of Cambodia is difficult to ascer-
cain. Cambodia has six legal codes that could in theory be applied in various ways to the crimes in
question here. In addition to the French-inspired 1956 Penal Code and the Law on the Extra-
ordinary Chambers, there exists a body of socialist decree law created in the early 1980s under
the People's Republic of Kampuchea (PRK); a criminal code written in haste by the State of
Cambodia (SOC) just before the arrival of the UN Transitional Authority for Cambodia
(UNTAG) forces in the early 1990s; a criminal code written by the United Nations in 1992-93;
and an emerging body of criminal procedure and law promulgated since the formation of the
Royal Cambodian Government (RCG) in 1993. Although formally any new law promulgated
since 1993 supersedes previous law, in practice this is routinely ignored and prosecutors and
courts may use elements from among each of these different codes in the course of proceedings.
Information provided by Craig Thulin.
30 Article 1 of the Special Court Agreement (Ratification) Act 2002.
31 Article 1 of the Agreement between the United Nations and the Government of Sierra
Leone on the Establishment of a Special Court for Sierra Leone and Art 1 of the Statute of the
Special Court for Sierra Leone.
32 Article 8(1) of the Statute.
be an exclusive one. In the three other cases a certain concurrent jurisdiction may exist. The internationalized courts in Kosovo have not been given an exclusive jurisdiction, but in practice the possibility that 'non-internationalized' Kosovo courts try suspects of serious crimes is negated by the likelihood that the SRSG would internationalize that court. Concurrent jurisdiction may exist, however, with the courts of Serbia and Montenegro. In East Timor, internationalized courts have been given exclusive jurisdiction over most serious crimes, but jurisdiction over murder and sexual offences committed in East Timor prior to 25 September 1999 is shared with 'non-internationalized' District Courts. In the case of Sierra Leone jurisdiction is shared.

C. REGULATION OF CONCURRENT JURISDICTION BETWEEN INTERNATIONALIZED AND NATIONAL COURTS

For the three situations in respect of which concurrent jurisdiction may exist, the question arises how the exercise of concurrent jurisdiction has been regulated. In each of these cases, the chosen solution, even though formulated in different ways, is that the national courts may have to defer to the internationalized courts. In respect of Kosovo, the concurrence with the jurisdiction of the ordinary courts of Serbia and Montenegro is subject to Resolution 1244 (1999) and the relevant UNMIK Regulations. The allocation in Article 1.1 of UNMIK Regulation 1999/1 of 'all legislative and executive authority with respect to Kosovo', to UNMIK, to be exercised by the Special Representative of the Secretary-General, would appear to give him the power to intervene in cases in Serbian courts 'with respect to Kosovo' and, possibly, to have those cases transferred to Kosovo. UNSC Resolution 1244 (1999) demands full cooperation in the implementation of the Resolution.

As to the situation in East Timor, if East Timorese courts would assume jurisdiction, a Special Panel may have deferred to itself a case which is pending before another panel or court in East Timor 'at any stage of the proceedings, in relation to cases of serious criminal offences listed under the procedures, namely: (i) objections based on lack of jurisdiction; (ii) objections based on defects in the form of the indictment; (iii) applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82(3); (iv) objections based on the denial of request for assignment of counsel; or (v) objections based on abuse of process. Thus, if such objections or applications were made in the courts of a State, the Prosecutor would be entitled to apply for an order or request for deferral. 39

35 Article 8(2) of the Statute.
36 The situation for the Special Court for Sierra Leone is comparable. The Special Court for Sierra Leone may formally request a national court to defer to its competence at any stage of the procedure. 35 The relationship between the Special Court and national courts of Sierra Leone thus resembles the one between ICTY and ICTR and national courts. 36

The Rules of Procedure and Evidence 37 implement the primacy of the Special Court and specify the legal framework for deferrals. Rule 9 provides that the Trial Chamber of the Special Court may issue an order or request that courts of a state defer to the competence of the Special Court under one of four conditions, namely where: (i) crimes which are the subject of investigations or proceedings instituted in the courts of a state are the subject of an investigation by the Prosecutor; (ii) such crimes should be the subject of an investigation by the Prosecutor considering, amongst other things, the seriousness of the offences; the status of the accused at the time of the alleged offences; the general importance of the legal questions involved in the case; or (iii) such crimes are the subject of an indictment in the Special Court; or (iv) fall within Rule 72(B). 38 According to Rule 10, an order for deferral shall be issued by the Trial Chamber if it appears to it that any of the first three conditions mentioned in Rule 9(i) to (iii) are satisfied. It is not immediately obvious how an order for deferral under the fourth condition (cases falling within Rule 72(B)) 39 is to be issued. It would seem from the wording of Rule 10 that the Trial Chamber is not obliged to issue an order for deferral in such a case. 40 In case of non-compliance by the government of Sierra Leone with...
an order for deferral, the Trial Chamber may refer the matter to the President of the Special Court 'to take appropriate action'. At the time of writing (January 2004), no orders or requests for deferral have been issued by the Special Court.

The concurrent jurisdiction between the Kosovo court, the East Timorese Serious Crimes Panels and the Special Court for Sierra Leone, on the one hand, and the national courts of Serbia and Montenegro, the national courts of East Timor and the national courts of Sierra Leone, on the other, thus is regulated along similar lines. While only the legal framework of the Special Court for Sierra Leone expressly refers to 'primacy', each of those internationalized courts has the competence to request deferrals from the respective national courts at any stage of the proceedings.

D. CHALLENGING THE LEGALITY OF ESTABLISHMENT OF INTERNATIONALIZED COURTS IN NATIONAL COURTS

As the experiences with the ICTY and the ICTR have shown, indictees can try to challenge the legality of the establishment of international tribunals, not only before the tribunals themselves but also in national courts. Such challenges may also be directed against internationalized courts. For instance, in particular circumstances it might be claimed that an internationalized court lacks a proper legal basis and therefore a trial before an internationalized court would violate Article 14 of the ICCPR, which provides that in the determination of any criminal charges, 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. This is a difficult area. On the one hand, national courts may play an important role in the overall systems of checks and balances in regard of international or internationalized institutions. On the other hand, national courts may show bias or nationalism that was precisely the reason why internationalized rather than national courts were used.

In considering the possibility of a challenge to the legality of the establishment of internationalized courts, the case of the Kosovo and East Timor courts on the one hand, and that of the Sierra Leone Court and the Cambodian Extraordinary Chambers, on the other, must be differentiated. As the former courts are established under the authority of the UN Security Council, and the Security Council has vested its power in the SRSG, a challenge to the establishment of the Kosovo and East Timor courts is in fact a challenge to a decision emanating from the Security Council acting under Chapter VII of the UN Charter. International law can allow for a challenge to Security Council decisions in a national court only under restrictive conditions. A review by national courts of the legality of Security Council resolutions, or their application, may undermine the efficiency of the Charter system, as it would open the door for states to evade their Charter obligations. This problem was raised when Slobodan Milosevic challenged the jurisdiction of ICTY before the District Court of The Hague. While the Dutch court rejected the claim, its reasoning did rely on the Appeals Chamber of ICTY's decision on the defence motion for interlocutory appeal on jurisdiction in the Tadić case. By accepting the conclusion of the Appeals Chamber that the Security Council does have the power to establish ICTY as a measure for maintaining or restoring international peace and security, the Dutch court did not take the position that a national court would, as a matter of principle, lack the jurisdiction to review a Security Council decision establishing an international tribunal. This scenario might be relevant for challenges to the legality of the establishment of internationalized courts under the authority of the Security Council.

The situation is different in the case of the Cambodian Extraordinary Chambers. The question here is whether national courts could review the legality of the Law on the Establishment of Extraordinary Chambers. Under Cambodian constitutional law, such a review would appear to be possible before the Constitutional Council, in accordance with the relevant provisions that apply to an assessment of the constitutionality of laws after their
promulgation. Article 122 of the current Constitution provides that 'the
King, the prime Minister, the President of the Assembly, one-tenth of
the assembly members or the courts, may ask the Constitutional Council
to examine the Constitutionality of [laws]' and grants citizens 'the right to
appeal against the Constitutionality of the laws as through their representa-
tives or the President of the Assembly'.

A challenge in the national courts of Sierra Leone to the legality of the
establishment of the Special Court would in effect be a challenge to the treaty
that established the Special Court, or to the procedure that led to the adoption
of the approval of the Treaty. In at least three cases before the Special Court
the argument has been made that the conclusion of the Special Court Agree-
ment violated the constitution of Sierra Leone.50 Conceivably, the same
argument could be made before the Sierra Leone Supreme Court in accor-
dance with section 127(1) of the Sierra Leone Constitution.51 This argument
was considered by Judge Mutanga Itoe of the Trial Chamber of the Special
Court for Sierra Leone in his ruling on 'habeas corpus' in 
Prosecutor v Tamba Alex Brima.52 The Applicant argued the Special Court is part of the judicial
hierarchy of the courts of Sierra Leone as provided for under the Constitution
of Sierra Leone and that it thus falls under the supervisory powers of the
Supreme Court. The Trial Chamber rejected the argument. It stated that the
Special Court owed its existence not to the Constitution of Sierra Leone, but
solely to Security Council Resolution 1315 (2000) and the Agreement between
the United Nations and Sierra Leone. It also considered that the Sovereign
People and Sovereign Parliament of Sierra Leone, in enacting the 1991 Con-
stitution in a time of peace, 'never could have enacted or even envisaged
constitutional structures which were supposed to regulate a post civil war
stabilizing institution' such as the Special Court. It therefore concluded that
application of the Constitution was limited to Courts created by that Con-
stitution. It remains to be seen whether it will be attempted to pursue the
argument in the courts of Sierra Leone.

It can be concluded that the legality of the establishment of international-
ized courts can be challenged in national courts only under very limited

50 Special Court for Sierra Leone, Prosecutor v Tamba Alex Brima SCSL-03-06-PT, Ruling
on the Application for the Issue of a Writ of Habeas Corpus (22 July 2003); Prosecutor v Morris
Kallon SCSL-03-07-PT, Preliminary Motion Based on Lack of Jurisdiction: Establishment of
Special Court violates Constitutions of Sierra Leone (filed on 16 June 2003); Prosecutor v Sam
Hinga Norman SCSL-03-08-PT, Preliminary Motion Based on Lack of Jurisdiction: Lawfulness
of the Court's Establishment (filed on 26 June 2003). At the time of writing, no ruling had been
given on the last two motions.

51 The section provides: 'A person who alleges that an enactment or anything contained in
or done under the authority of that or any other enactment is inconsistent with, or is in contra-
vention of a provision of this Constitution, may at any time bring an action in the Supreme
Court for a declaration to that effect.'

52 Special Court for Sierra Leone, Prosecutor v Tamba Alex Brima (supra n 50).

circumstances as far as those internationalized courts which emanate from
binding Security Council resolutions are concerned. With regard to those
internationalized courts that are established by treaty or national law, the
possibilities for challenges generally will be wider. In all cases, the prospects
for such challenges will largely be determined by national law.

E. REVIEW OF DECISIONS OF INTERNATIONALIZED COURTS BY NATIONAL COURTS

Another possible interaction between national and internationalized courts is
that it may be attempted to resort to national courts in order to challenge a
decision, order or judgment of an internationalized court. In terms of legal
policy, similar considerations apply as those noted with respect to challenges
to the legality of the establishment of internationalized courts. While it may
be said that national courts have a role to play in the overall systems of
checks and balances,53 assuming such a role brings a distinct danger of
undermining the efficacy of internationalized courts.

In Kosovo, no cases are known to the authors in which judgments of
internationalized courts were reviewed by 'non-internationalized' courts. It
has been reported, however, that appeals would be filed in Serbian courts
against judgments of the parallel court system (which, as noted above, in itself
is illegal).54 Appeals in the Serbian courts against decisions of international-
ized courts certainly would be precluded by Resolution 1244 (1999), and the
same result is warranted when considering judgments emanating from
the internationalized courts in East Timor, Cambodia, and Sierra Leone. In
these cases, the relevant instruments suggest that there is no room for reviews
by national courts, because an internationalized appellate structure has been
established for that purpose. In East Timor, judgments of the panels with
exclusive jurisdiction over serious criminal offences are appealable to the—
equally internationalized—Special Panel of the Court of Appeal.55 In Cam-
bodia, appeals and resort to the Supreme Court are within the Extraordinary
Chambers structure56 and similarly, the Agreement on the Establishment as

53 Christoph H Schreuer, 'The Implementation of International Judicial Decisions by
Domestic Courts', (1975) 24 ICTY 182 (noting that implementation of international judicial
decisions need not be 'slavish and mechanical').
54 See www.mls.org.yu/english/toka/toka45.htm (stating that 'Four Kosovo Albanians
from the so-called "Urosevac Group" received the judgment handed down against them
by two, who have been illegally held since June 1998, the right to defend themselves. Their defense
Serbian Supreme Court').
55 id Arts 36 and 37 of the Law on the Establishment of Extraordinary Chambers, (supra n 27).
well as the Statute of the Special Court for Sierra Leone provide for an
Appeals Chamber as integral part of the Special Court,\textsuperscript{57} competent to
counsel, and review proceedings.\textsuperscript{58}

The conclusion that national courts could not review judgments of inter-
nationalized courts, would equally seem to apply to other decisions of inter-
nationalized courts, because such review takes also place within the
internationalized structures.\textsuperscript{59} As a rule, national courts can thus not review
such decisions.

However, an additional aspect arises in this regard in relation to the Special
Court for Sierra Leone. Article 16 of the Agreement between the government
of Sierra Leone and the United Nations provides that the government 'shall
cooperate with all organs of the Special Court at all stages of the proceed-
ings'\textsuperscript{60} and 'shall comply without undue delay with any request for assistance
by the Special Court or an order issued by the Chambers'.\textsuperscript{61} If one were to
understand the duty to cooperate to extend not only to the 'government' in the
narrow sense but more broadly also to other branches of the state of Sierra
Leone with functions other than executive ones, a review by the judicial
branch appears to be excluded. This view also finds support in the Sierra
Leone implementing legislation. Section 21(2) of the Special Court Agreement
(Ratification) Act 2002 states that '[n]otwithstanding any other law, every
natural person, corporation, or other body created by or under Sierra Leone
law shall comply with any direction specified in an order of the Special Court'.
However, if one considers certain other provisions with a bearing on the
relationship between the national courts of Sierra Leone and the Special
Court, the situation is less clear. Section 14 of the Special Court Agreement
(Ratification) Act 2002, for instance, provides that the Attorney-General shall
grant any request for deferral or discontinuance in respect of any proceedings
pursuant to Article 8 of the Statute of the Special Court 'if in his opinion there
are sufficient grounds for him to do so'. The latter qualification of the duty to
grant such requests suggests that there is room for review, albeit by the
Attorney-General, rather than a national court.\textsuperscript{62}

\textsuperscript{57} of Art 2 of the Agreement and Arts 11, 12 of the Statute.
\textsuperscript{58} of Arts 20, 21 of the Statute.
\textsuperscript{59} For East Timor, see ss 23, 27 of UNTAET Reg 2000/30 (On the Transitional Rules of
Criminal Procedure) as amended by Reg 2001/25 (September 2001) in conjunction with s 15.4 of
UNTERT Reg 2000/11 and s 22.2 of UNTAET Reg 2000/15; for Cambodia, Art 12 in conjunction
with Art 32(b) of the Agreement between the United Nations and Cambodia, and Arts 36, 37 of the Law on the Establishment of Extraordinary Chambers.
\textsuperscript{60} Article 16(1) of the Agreement.
\textsuperscript{61} Article 16(2) of the Agreement.
\textsuperscript{62} The Act also provides room for review by national courts with respect to the execution of
requests for assistance, cf \textsection 16 of the Act, which provides: '(1) Subject to subclause (2), if the
Special Court makes a request for assistance, it shall be dealt with in accordance with the
relevant procedure. (2) If the request for assistance specifies that it should be executed in a
particular manner or by using a particular procedure that is not prohibited by Sierra Leone law,
the Attorney-General shall use his best endeavours to ensure that the request is executed in that
manner or using that procedure'. Whether such a request for assistance has indeed been dealt
with in accordance with the relevant procedure (\textsection 16(1)) and whether a particular procedure is
not prohibited by Sierra Leone law (\textsection 16(2)) could presumably be reviewed by national courts.
Also note that \textsection 16(2) of the Act envisages the possibility of the Attorney-General's refusing or
postponing the execution of a request for assistance in whole or in part, in case of which 'he shall
notify the Special Court accordingly and shall set out the reasons for that decision'.
\textsuperscript{63} Assuming that they are not appealed, see p 371.
\textsuperscript{64} UNTAET Reg 2000/15 s 11.1
\textsuperscript{65} ibid s 11.2.
\textsuperscript{66} ibid s 11.3. This is reiterated in s 4.2 of UNTAET Reg 2000/30
\textsuperscript{67} Article 20(3) of the Rome Statute.
\textsuperscript{68} Article 9(1) of the Statute. Similarly, s 239(9) of the Sierra Leone Constitution, provides
that 'no person who has been tried by any competent court for a criminal offence

\section*{Relationship Between Internationalized and National Courts}

The foregoing suggests that, as a rule, national courts of the state to which
the different internationalized courts are connected do not seem to have any
possibility to review judgments or decisions of the latter. With regard to
certain decisions of the Special Court for Sierra Leone other than judgments,
however, this rule is arguably subject to exceptions.

\subsection*{F. NE BIS IN IDEM}

A further question that needs to be addressed is whether the judgments of
internationalized courts trigger the principle of \emph{ne bis in idem} as a bar to
subsequent trials by national courts. The same question arises in the reverse
situation where the prior trial took place in a national court. While it seems
that the first question has to be answered in the negative with respect to allour internationalized courts, the latter question raises a number of interest-
ing issues.

In East Timor, Judgments of the Panels with exclusive jurisdiction over
serious criminal offences in principle are final.\textsuperscript{63} UNTAET Regulation
2000/15 on the principle of \emph{ne bis in idem} bars a subsequent trial before a
Special Panel,\textsuperscript{64} and before another East Timorese court.\textsuperscript{65}

In the reverse situation, the principle of \emph{ne bis in idem} allows for exceptions.
A person may be tried again before a Special Panel if the proceedings in the
other court 'were for the purpose of shielding the person concerned from
criminal responsibility for crimes within the jurisdiction of the panel' or
'otherwise were not conducted independently or impartially in accordance
with the norms of due process recognized by international law and were
conducted in a manner which, in the circumstances, was inconsistent with
an intent to bring the person concerned to justice'.\textsuperscript{66} These exceptions repro-
duce verbatim the corresponding provision of the ICC Statute.\textsuperscript{67}

In Sierra Leone, national courts of Sierra Leone are barred from trying a
person for acts for which he or she has already been tried by the Special
Court.\textsuperscript{68} Comparable to the situation in East Timor, exceptions apply in the

\textsuperscript{63} Assuming that they are not appealed, see p 371
\textsuperscript{64} UNTAET Reg 2000/15 s 11.1
\textsuperscript{65} ibid s 11.2
\textsuperscript{66} ibid s 11.3. This is reiterated in s 4.2 of UNTAET Reg 2000/30
\textsuperscript{67} Article 20(3) of the Rome Statute.
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that 'no person who has been tried by any competent court for a criminal offence
Internationalized Criminal Courts and Tribunals

The reverse situation of a prior trial in a national Sierra Leone court. The Court would preclude a subsequent trial in a national court, and that a final judgment in Serbia and Montenegro would preclude a trial for the same act in Kosovo. 73

After what has been said previously about the exclusive jurisdiction of the Cambodian Extraordinary Chambers, 74 there is no doubt that judgments of the Extraordinary Chambers necessarily will be final for other Cambodian courts and that suspects cannot afterwards be tried by 'non-internationalized' parts of the judicial system. The reverse situation, in which Cambodian courts have conducted trials with regard to crimes that fall into the jurisdiction of the Extraordinary Chambers prior to the coming into operation of the latter, however, is more complex. This question remains to be solved with regard to the trials conducted by the 1979 People's Revolutionary Tribunal in Phnom Penh, which sentenced Pol Pot and Ieng Sary to death in absentia. 75 Pol Pot has died in the meantime, but Ieng Sary, although pardoned in 1996, remains one of the potential suspects to be tried by the Extraordinary Chambers. Whether and to what extent the conviction and subsequent pardon affects a new trial will have to be decided by the Extraordinary Chambers. 76

In conclusion, both in the case of East Timor and Sierra Leone, the ne bis in idem principle is subject to certain exceptions in the case in which an indictee has been tried first before a national court and then before an internationalized one, provided that the first trial was conducted for the purpose of shielding the person concerned, or was otherwise inconsistent with the intent to bring that person to justice. Such an approach confirms a trend with respect to international criminal courts and tribunals, and accentuates the 'international courts' traits of internationalized courts in East Timor and Sierra Leone. Absent specific regulation, ie in the internationalized courts of Kosovo and Cambodia, a prior trial in a national court of Kosovo, Serbia and Montenegro, and Cambodia would seem to bar a subsequent trial in the internationalized courts. It is less clear, whether the aforementioned exceptions to the ne bis in idem principle where the first trial was conducted for the

72 This latter situation arose when a Kosovo Serb had been acquitted by a Serbian court but was later indicted for the same offence by an internationalized court in Kosovo. In this instance, a Kosovo Serb, residing in a village within the Zabina Polok municipality, was indicted and tried for an alleged murder by the District Court of Kraljevo (Serbian proper) that assumed the territorial competence of the Mitrovica/Mitrovica District Court. After being tried and acquitted by the former court, the defendant was indicted for the same offence by the Mitrovica/Mitrovica District Court on 24 August 2001, and later detained by order of the same court on 30 August 2001; see OSCE Report 9: On the Administration of Justice (March 2002) 8. This case arose in implementation of the parallel system discussed above, but the same scenario may happen when a suspect is actually within the jurisdiction of the courts of Serbia.

73 See pp 358-65

74 See Chapter 10 (Ethereon).

75 Art 11(2) of the Agreement of 17 March 2003 (supra n 27).

76 cf Arts 10 ICTY, 9 ICTR, 20 ICC.
purpose of shielding the person concerned, or otherwise inconsistently with the intent to bring that person to justice, apply also to the internationalized courts of Kosovo and Cambodia. Support for an affirmative answer is provided by the fact that the latter are internationalized and thus presumably less susceptible to bias. They could be said to exercise legitimate control functions with regard to national courts, which operate in an environment characterized by serious challenges to an effective, independent, and impartial judiciary. On the other hand, as has been shown in this book, the independence and impartiality of internationalized courts is not an axiom, and any possible exception to the ne bis in idem principle, on the ground that a judgment was adopted for the purpose of shielding a person, raises the question whether it should not equally apply to judgments of internationalized courts.

G. AUTHORITY OF JUDGMENTS OF INTERNATIONALIZED COURTS

A final issue to be considered is the legal weight, or more specifically the precedential value, of decisions of internationalized courts for subsequent decisions of the courts of the national legal order in which the internationalized court is embedded. One of the justifications for the establishment of international courts and tribunals is to make available expertise in the prosecution of serious international humanitarian law violations, and to allow for capacity-building in the national systems, in particular as concerns the interpretation and reception of international (human rights, criminal, and humanitarian) law. Potentially, the interpretation and application of international law by internationalized courts may help build a case law that supports national courts in determining, interpreting and applying international law. This is particularly relevant as in the three cases where internationalized courts are integrated in the national system (Kosovo, East Timor, and Cambodia), the applicable law has been internationalized.

In each of these cases, international law, to some extent, had domestic validity before the arrival of the internationalized courts, and the judgments of internationalized courts may have an impact on the practice of national courts in regard to the application of international law.

As a general matter, judgments and decisions of internationalized courts can be relevant for the determination of rules of law. Article 38(1)(d) of the Statute of the International Court of Justice provides that judicial decisions are subsidiary means for the determination of rules of law. 'Judicial decisions' include decisions of national courts. This certainly would hold for internationalized courts, which have the added authority of international judges. Arguments that are usually put forward to qualify the relevance of judgments of national courts in the determination and development of the law (eg, national courts generally will be tied to the national legal system, have an at least partly national rather than international outlook, and generally lack expertise in applying international law) have less weight in the case of internationalized courts. Conceivably their decisions and judgments may carry weight for subsequent decisions of national courts. The extent to which this actually will be the case may in part depend on the quality of the judgments.

H. CONCLUSION

It is difficult to draw some general conclusions on the relationship between internationalized and national courts. The relationship between national courts and internationalized courts differs from case to case. Moreover, there is only scant practice that could validate generalizations on the basis of the constitutive documents.

One general conclusion that can safely be drawn is that for most of the questions considered in this chapter the internationalized courts have largely been separated and isolated from the national courts. The jurisdiction of internationalized courts either de jure or de facto is mostly of an exclusive nature. To the extent that jurisdiction is concurrent (East Timor and Sierra Leone), the internationalized court has primacy and can request the deferral of a case. The powers of national courts to review the legality of the
establishment of the internationalized courts or to review decisions of national courts is limited at best. The judgment of an internationalized court in principle bars a subsequent trial by the respective national courts.

However, the separation between internationalized and national courts is not complete. It appears that under narrowly circumscribed conditions, national courts may be able to review the legality of the establishment of internationalized courts. These functions of national courts may be considered as checks and balances vis-à-vis the internationalized courts, though they must be treated with much caution as they may have the potential to undermine the purposes for which the internationalized court was set up.

In the long term, the most important aspect of the interaction between internationalized and national court may be the influence that the decisions of the internationalized courts have on the practice of national courts. The relationship between national courts and internationalized courts must be assessed in the light of the aims that underlie the establishment of internationalized courts. Central amongst these is the contribution of internationalized courts to the rebuilding of the national judicial system.