

Analysis: A History and Typology of International Criminal Institutions

November 24, 2017

By: Joseph Rikhof

There has been plethora of international criminal institutions in the last 15 years.

The First Generation

What can be termed the first generation of such organizations, are the ones established by the United Nations Security Council under Chapter VII of the United Nations Charter. They are the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), which were set up in 1994 and 1995 respectively.[1] These tribunals have their own Trial Chambers and a shared Appeals Chamber. The decisions of the Chambers of the two tribunals have greatly contributed to the development of the international law of war crimes, genocide and crimes against humanity. The ICTY has indicted 161 persons, the cases of 136 of those have been completed resulting in convictions and sentences of 76 persons in 52 separate trial processes plus 20 acquittals. The ICTR has indicted 93 persons of whom 76 have been arrested and 61 convicted in 44 judgments (plus another 13 have been acquitted). The ICTR ceased operations in December 2015 while the same will happen with the ICTY in December 2017. Outstanding legal issues, including the conduct of trials will be carried out by a joint United Nations Mechanism for International Criminal Tribunals (MICT).

The Second Generation

Apart from the activities of the two ad hoc tribunals, there has been a lot of work done under the auspices of the United Nations to establish a permanent international criminal court. The Statute of the International Criminal Court, a second-generation institution, was treaty adopted on July 17, 1998, entered into force on 1 July 2002, and has now been ratified or acceded to by 123 states. It contains definitions of aggression, genocide, crimes against humanity and war crimes, which can be considered the most contemporary formulation of the international law at that time pertaining to these crimes. The court started operating on July 1, 2002 and has indicted 32 persons in ten situations.

The Third Generation

The United Nations has also been instrumental in establishing five hybrid tribunals for dealing with international crimes.[2]These are the Special Panel for Serious Crimes of the Dili District Court in East Timor (and its Court of Appeal), the Special Court for Sierra Leone, the Extraordinary Chambers of the Courts of Cambodia, the War Crimes Chamber of the state court of Bosnia and Herzegovina and the courts in Kosovo. These courts have a mixed membership of local and international personnel, including the judges.

The Special Court for Sierra Leone was established on January 16, 2002 by agreement between the United Nations and the government of Sierra Leone and has jurisdiction over the international crimes of crimes against humanity, violations of common article 3 of the Geneva Conventions and other serious violations of international humanitarian law, the latter two mostly defined in the same manner as in the ICC Statute. The Special Court has convicted indicted nine persons, including Charles Taylor, the former president of Liberia. This court closed its doors in 2013 but for the same reasons as those for setting up the MICT, it has a follow-up institution called the Residual Special Court for Sierra Leone.

The Law on the Establishment of The Extraordinary Chambers of the Courts of Cambodia was the result of an agreement between the United Nations and the government of Cambodia and was adopted in Cambodia on January 2, 2001, providing jurisdiction over genocide, crimes against humanity and grave breaches of the 1949 Geneva Conventions in the same manner as the ICTY/ICTR Statutes. It started to operate in 2006 and of the five persons taken into custody, three have been convicted.

This evolution from the involvement by the Security Council in setting up the two international, the ICTY/ICTR tribunals to the participation of other United Nations agencies in establishing specialized geographical institutions (with the ICC and its global reach as a separate interlude) can be seen as the third manifestation seeking justice for victims of international crimes.

The Fourth Generation

The East Timor Special Panels came into being on June 6, 2000 as a result of the promulgation of its constituting instrument by the United Nations Transitional Administration in East Timor (UNTAET) rather than an agreement between the United Nations and a national government. They have

jurisdiction over the international offences (in addition to serious ordinary criminal matters) of genocide, war crimes and crimes against humanity, the elements of which are almost identical to the description of these crimes in the ICC Statute. The panels finished their mandate on May 20, 2005 after having convicted 84 defendants and acquitted three in 60 trials (arising out of 95 indictments covering 440 people. These panels are internationalized domestic courts in that the only international aspect is the fact that they had international personnel in the judiciary and the office of the prosecution, to ensure that the transition from a conflict situation to a peaceful society was as efficient as possible (and as such can be seen as the fourth generation of international criminal institutions). After 2005 all trials were handed over the regular domestic courts.

The Fifth Generation

There is another internationalized domestic court in Bosnia and Herzegovina (BiH) which is a joint initiative of the ICTY and the Office of the High Representative in Bosnia and Herzegovina (OHR) and which started on March 9, 2005. It has jurisdiction **over** genocide, war crimes and crimes against humanity. Since its inception and until June 1, 2016, Chamber I of this court, the war crimes chamber, has indicted 606 people accused of genocide, torture, rape and other war crimes, securing convictions in more than 80 percent of cases, including 11 which had been transferred from the ICTY as part of its completion strategy. The court became part of the domestic legal landscape in that international personnel were no longer involved in the proceedings in December 2012.

Kosovo had a similar court as BiH, which was established on June 10, 1999 by the United Nations Mission in Kosovo (UNMIK) with jurisdiction for war crimes and genocide. There have been final judgments in five war crimes prosecutions of 28 individuals. Of these, 16 were convicted of various war crimes, and 12 acquitted. On February 3, 2009 the newly deployed European Union justice mission in Kosovo opened its first war crimes trial since it took over from the UN mission. On June 3, 2009, the European Union announced it would investigate 1119 Kosovo war crimes cases that remained unresolved a decade after the end of its conflict. Files on the cases were handed over to EULEX, an EU rule-of-law mission in Kosovo, from UNMIK. As of January 1, 2013, EULEX prosecutors were investigating 74 war crime cases while EULEX judges, in mixed panels, have delivered 23 verdicts in war crimes cases, in which 29 persons were found guilty, and 15 persons were acquitted. The transition from the involvement of the United Nations in organizing domestic courts with local elements in an indirect manner (such as a third or fourth generation court set up by a UN agency operating in the country, rather than by international treaty between the UN and that country) to a court established by a supranational or regional international organization could be seen as the next, fifth generation of internationalized criminal institutions.

The Sixth Generation

Along the same lines as the tribunals in Cambodia and Sierra Leone but instigated at the regional level is the Extraordinary African Chambers (EAC) created within the existing court system of Senegal which was created by agreement signed on August 22, 2012 between the African Union and the government of Senegal to try the ex-Chadian dictator Hissene Habré. This special tribunal has

sections to handle investigations, trials and appeals. The trial and appellate levels each have two Senegalese judges and a president from another African country. This would represent the sixth iteration of an international(ized) criminal institution.

This example was followed in Europe with the establishment of the Specialist Chambers, which is similar in character **to**the EAC as it is a regional international institution created by the European Union for the situation in Kosovo.[3]

A Seventh Generation

There have been discussions to set up other internationalized domestic courts in both international and regional fora, such as in Liberia, Burundi, Kenya, the Democratic Republic of the Congo, Syria, Iraq, South Sudan, Sri Lanka and the Central African Republic. But only in the latter case was a special criminal court was established in April 2015, which has both domestic and international personnel.[4] The approach where by a national government established such a hybrid court is another (seventh) manifestation of such institutions.

Another, albeit weakened, in that it only allows for international advisors, type of domestic hybrid tribunal is the Supreme Iraqi Special Tribunal which was established in Iraq without United Nations involvement on December 10, 2003 and which has jurisdiction **over** genocide, crimes against humanity and war crimes, the definitions of which are similar to the ones in the ICC Statute. This court has indicted 24 persons of which 17 have been sentenced in five separate trials for genocide, war crimes and crimes against humanity, including Saddam Hussein, the former president, while three persons have been acquitted.

An Eigth Generation

The most recent example of an international mechanism addressing the issue of impunity of persons involved in international crimes is the International, Impartial and Independent Mechanism (IIIM). It was established in December 2016 by the United Nations General Assembly to assist in the investigation and prosecution of those responsible for such crimes committed in Syria since March 2011. This is a new (eighth) form of hybrid institution, in that it has international personnel but will hand over the results of its investigations to national, regional or international courts or tribunals.[5]

This approach was followed very recently when on September 21, 2017 the Security Council asked the United Nations to establish an investigative team to help Iraq preserve evidence “that may amount to war crimes, crimes against humanity and genocide” committed by ISIS.[6]

Conclusion

As can be seen there has been considerable experimentation with legal structures in the more than a dozen institutions discussed above, to address potential impunity of perpetrators involved in the commission of the international crimes of genocide, war crimes and crimes against humanity. The desire of the international community at all levels to bring a measure of satisfaction to the victims of

these atrocities in situations where this cannot be achieved at the domestic level is admirable, as is the fact there in most cases, these solutions have been of a transitory nature until the countries where these acts were committed have the capacity and political will to carry out their own investigations and prosecutions.[7]

Please cite this article as: Joseph Rikhof, “The Notion A History and Typology of International Criminal Institutions” (2017) 1 PKI Global Just J 15.

Joseph Rikhof **About the Author**

Globally-recognized as an expert in cases of war crimes, Dr. Joseph Rikhof was with the Crimes Against Humanity and War Crimes Section of the Canadian Department of Justice and teaches International Criminal Law in the Faculty of Law at University of Ottawa. Dr. Rikhof was a visiting professional with the International Criminal Court in 2005 and Special Counsel & Policy Advisor to the Modern War Crimes Section of Canada’s Department of Citizenship and Immigration between 1998 and 2002. Extensively published, Dr. Rikhof lectures around the world on organized crime, terrorism, genocide, war crimes, and crimes against humanity.

References

1. The information about the institutions below can be found on the websites of the respective tribunals, court and mechanisms.
2. The United Nations has also established a sixth tribunal based on an agreement with a national state with international aspects, namely the Special Tribunal for Lebanon but this tribunal does not have same jurisdiction as the other three tribunals as it restricted to the crime of terrorism.
3. This tribunal will discussed in more detail in another article by Jim Hendry, which will be posted soon.
4. See http://jurist.org/paperchase/2015/04/central-african-republic-government-establishes-special-criminal-court.php; see also Patryk I. Labuda, “The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?” 15 *Journal International Criminal Justice* (2017), 175-206.
5. Alex Whiting, “An Investigation Mechanism for Syria: The General Assembly Steps into the Breach”, (2017) 15 *Journal of International Criminal Justice*, 231-237.
6. UNSC Resolution 2379 (2017).

7. A large number of countries have carried out such prosecutions, namely 33 countries doing so on the basis of territorial jurisdiction and another 15 using various concepts of extra-territorial jurisdiction (where the crime was committed outside the country of prosecution but the perpetrator is present subsequent to the commission of his crimes); see Joseph Rikhof, “Prosecutions of International Crimes – A Historical and Empirical Overview” in (2014) *Bergen Journal of Criminal Law & Criminal Justice*, 108-140.