

The evolution of the mandates of international tribunals, including a move towards
complementarity

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Introduction

All aspects of the jurisdiction of an international criminal tribunal – material, personal, temporal and geographical – are intricately linked with the context within which the crimes upon which it will adjudicate took place. An examination of the jurisdiction of the tribunals therefore benefits from close consideration of the broader discussions and debates which led to the tribunals’ creation.

Dual trends are discernible in these discussions. First, it is clear that in the face of atrocities and the commission of international crimes, the international community is acutely conscious of the need to act and to demonstrate its commitment to accountability. There can be no doubt of this development over the past two decades. However, with regard to the jurisdiction conferred upon the international criminal tribunals there has been a sharpening in focus, a tightening in the parameters. This paper will examine the jurisdiction conferred upon each of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), International Criminal Tribunal for Rwanda (“ICTR”), Special Court for Sierra Leone (“SCSL”), Extraordinary Chambers in the Courts of Cambodia (“ECCC”) and Special Tribunal for Lebanon (“STL”) (together referred to as the international and UN-assisted criminal tribunals) in order to identify trends in the approach taken by the international community to prescribing their mandates. In the conclusion of this paper, some of the possible reasons for these trends are identified, with the increasing emphasis on the principle of complementarity highlighted.

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Mandates of the tribunals – *ratione materiae, personae, temporis and loci*

International Criminal Tribunal for the former Yugoslavia

The unanimous adoption of resolution 808 (1993) of 22 February 1993 by which the Security Council decided to create the ICTY was a turning point in international criminal justice and individual accountability. The record of the Council's meeting² demonstrates that the members of the Council were cognisant of the historic step being taken, with numerous references in statements before and after the vote to the Nuremberg Tribunal and the intervening decades which had passed without criminal accountability for serious international crimes. Throughout the speeches, Council members referred to the specific crimes which had been reported from the former Yugoslavia: mass killings, torture, rape, ethnic cleansing – “grave breaches of humanitarian law ... committed on a massive scale and in a systematic fashion”.³ The material jurisdiction of the tribunal which the Council was creating, and the necessity that it respond to the atrocities in the former Yugoslavia, was therefore foremost in the minds of Member States.

In resolution 808 (1993) the Council referred to the subject matter jurisdiction of the new tribunal, deciding that it should be established “for the prosecution of persons responsible for serious violations of international humanitarian law”.⁴ A key issue at the time was the application of the principle of *nullum crimen sine lege*, consideration of which led to the decision that the ICTY should only apply principles of international humanitarian law which are part of customary international law.⁵ The Secretary-General concluded that the grave breaches provisions of the Geneva Conventions 1949; the 1907 Hague Convention (IV) on the Laws and Customs of War; the 1948 Genocide Convention; and the 1945 Charter of the Nuremberg Tribunal formed part of

² S/PV.3175

³ *Ibid* - Statement before the vote by Mr. Araujo Castro (Brazil).

⁴ S/RES/808, operative paragraph 1.

⁵ See *Some Major Problems in the Drafting of the ICTY Statute*, R. Zacklin, JICJ 2 (2004), 360.

customary international law.⁶ The conclusions of the Secretary-General were reflected in Articles 2 to 5 of the Statute of the ICTY, which conferred jurisdiction upon the tribunal for grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity.

In terms of the jurisdiction of the ICTY *ratione personae*, Articles 1 and 6 of the Statute confer upon the tribunal jurisdiction over all natural persons responsible for serious violations of international humanitarian law. The ICTY's Statute did not, therefore, include a threshold limiting prosecution to the leadership echelons or to those most responsible for the commission of the crimes. As the work of the ICTY proceeded, however, the focus shifted in that direction, with the Security Council in resolution 1503 (2003) endorsing "in the strongest terms" the completion strategy which the tribunal had devised and which highlighted that the tribunal would "concentrate[e] on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction". This resolution echoed the Council's earlier resolution 1329 (2000), which had taken note "of the position expressed by the international tribunals that civilian, military and paramilitary leaders should be tried before them in preference to minor actors".

Concomitant with this focus on the application of the finite resources of the international criminal tribunals to prosecuting higher level offenders, we can detect the shift towards complementarity. In the course of gathering evidence, the Prosecution acquired a considerable amount of evidence regarding lower level accused. As time progressed and the ICTY was not in a position to prosecute all of these cases, and to avoid that they "fall by the wayside", a system was developed whereby such cases (referred to, in the context of the ICTY as "Category 2 cases") were transferred to domestic prosecutors.⁷ The progress of domestic prosecutions of cases

⁶ Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), S/25704 paragraph 35.

⁷ See further, *The ICTY: Transitional Justice, the Transfer of Cases and Lessons for the ICC*, D. Tolbert and A. Kontic. *The Emerging Practice of the ICC*, eds. C. Stahn and G. Sluiter. Brill (2008): 135–162.

transferred by the tribunal remains a matter of concern and interest to the international community, and in the six-monthly reports to the Security Council, the ICTY Prosecutor continues to report upon the progress being made within the national jurisdictions in respect of such prosecutions.

The ICTY has temporal jurisdiction over crimes committed since 1 January 1991 in the territory of the former Yugoslavia.⁸ The matter of the tribunal's temporal jurisdiction was carefully considered when the Statute was being drafted. Three possible dates were considered, each of which related to an event during the conflict. However, the Secretary General "opted for a neutral date which would not carry with it any political connotation as to the international or internal character of the conflict, with the legal implications that such a determination would have entailed for the choice of the applicable law".⁹ Thus, in addition to ensuring that all crimes committed by all parties in the territory of the Former Yugoslavia were covered by the Tribunal's jurisdiction, the intention behind the commencement date of the temporal jurisdiction to convey an impression of neutrality and impartiality towards the parties of the conflict.¹⁰

International Criminal Tribunal for Rwanda

Like the ICTY, the ICTR has jurisdiction over genocide, crimes against humanity and war crimes.¹¹ However, a slightly different tenor can be detected in several of the statements made after the vote to adopt resolution 955 (1994) establishing the ICTR. Several representatives referred to the fact that the Council was not replicating the ICTY, noting that efforts were being made to take into account the distinct situation in Rwanda. The French delegate emphasised the importance of "taking into account the specific needs of the situation in Rwanda as compared to

⁸ Article 8, ICTY Statute.

⁹ Shraga and Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EJIL (1994) 360-380, at 363.

¹⁰ *Ibid.*

¹¹ Articles 2, 3 and 4 of the ICTR Statute.

... the former Yugoslavia”. The representative of New Zealand noted that the focus of the ICTR’s jurisdiction was on genocide rather than war crimes, as Rwanda had requested.¹²

Two distinctions can be drawn between the material jurisdiction of the ICTY and that of the ICTR. First, with regard to crimes against humanity, an additional requirement of discrimination applies in the ICTR, in that the relevant crimes must have been committed “on national, political, ethnic, racial or religious grounds”.¹³ With regard to war crimes, the conflict in Rwanda was non-international in nature. As such, the tribunal’s jurisdiction over war crimes was limited to those which apply to situations of non-international armed conflict.¹⁴ There was a degree of controversy at the time that this aspect of the tribunal’s jurisdiction may have advanced customary international law.¹⁵

Pursuant to Article 1 of the ICTR Statute, the ICTR’s personal jurisdiction extends beyond the borders of Rwanda to encompass “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States”. This is a noteworthy feature of the ICTR’s jurisdiction and again, one which reflects the intention of the drafters of the Statute within the Security Council to address the specific conflict.

Like the ICTY, the ICTR has open-ended personal jurisdiction, not restricted to those in the highest echelons of control. However, the guidance given by the Security Council referred to above in respect of the exercise of prosecutorial discretion at the ICTY and the direction to focus on those most responsible was also applicable to the ICTR. The transfer of cases to Rwanda by the ICTR under rule 11*bis* of the Rules of Procedure has played an important role, both in terms of the completion strategy of the tribunal and with regard to capacity building of the Rwandan

¹² S/PV.3453, Statement of New Zealand.

¹³ Article 3 ICTR Statute.

¹⁴ Article 4 ICTR Statute.

¹⁵ Shraga and Zacklin, *The International Criminal Tribunal for Rwanda*, Eur J Int Law (1996) 7 (4): 501-518 at page 509.

justice system. In this regard, therefore, we see both a tightening in the exercise of the tribunal's jurisdiction, and a bolstering of the principle of complementarity.

The ICTR's temporal jurisdiction, by contrast with that of the ICTY, is restricted to the period from 1 January 1994 to 31 December 1994. Again, these dates were selected without reference to specific events during the conflict, but rather with the intention of encompassing all relevant acts, including the planning for the genocide which commenced in April 1994.¹⁶

Special Court for Sierra Leone

By contrast with the ICTR and the ICTY, the material jurisdiction of the SCSL encompasses both crimes under international humanitarian law and Sierra Leonean law. As the Secretary-General's report on the establishment of the SCSL noted, the subject-matter jurisdiction of the SCSL was drafted to cover the "most egregious practices of mass killing, extrajudicial executions, [and] widespread mutilation" which had taken place during the conflict.¹⁷ As with the earlier tribunals, the Secretary-General's report also highlighted the importance of the principle of legality, in particular, *nullum crimen sine lege*, and as such the international crimes included in the draft statute were only those "considered to have had the character of customary international law at the time of the alleged commission of the crime".¹⁸

The influence of the ICTY and ICTR is clear from the earliest days of discussion about the SCSL. The Secretary-General's report noted that the list of crimes against humanity in the draft SCSL Statute followed those of the ICTY and ICTR, and that violations of common article 3 of the Geneva Conventions and article 4 of Additional Protocol II committed in a non-international armed conflict "have long been considered customary international law ... in particular since the establishment of the two International Tribunals".¹⁹ The SCSL Statute as

¹⁶ See, for example, the statement of the representative of New Zealand, S/PV.3453.

¹⁷ S/2000/915, paragraph 12.

¹⁸ *Ibid.*

¹⁹ S/2000/915, paragraph 14.

drafted ultimately gave the Court jurisdiction over crimes against humanity;²⁰ serious violations of common Article 3 to the Geneva Conventions and Additional Protocol II;²¹ other serious violations of international humanitarian law, namely intentionally directing attacks against civilians, peacekeepers and conscripting or enlisting child soldiers.²² In terms of crimes under Sierra Leonean law, the SCSL had jurisdiction over offenses relating to the abuse of girls and the wanton destruction of property.²³ The importance of tailoring the material jurisdiction of the SCSL to the crimes committed during the conflict can be seen in the report of the Secretary-General which noted that although most of the crimes committed during the conflict were covered by the provisions of international humanitarian law set out in Articles 2 to 4 of the draft Statute, where specific crimes were unregulated or inadequately regulated under international law, recourse could be had to domestic law.²⁴

The personal jurisdiction of the SCSL is more restricted than that of the ICTY or ICTR, with the Security Council having specifically indicated that the Special Court “should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes”.²⁵ In his report, the Secretary-General indicated that this phrase was “understood as an indication of a limitation on the number of accused by reference to their command authority and the gravity and scale of the crime”.²⁶ The Secretary-General proposed that the more general term “persons most responsible” should be used and put forward that language in the first draft of the Statute. However, the Council held fast to the initial language proposed, and Article 1 of the SCSL Statute reflects the Council’s wish that the Special Court have jurisdiction over those who played a leadership role in the conflict.²⁷

²⁰ SCSL Statute Article 2.

²¹ SCSL Statute Article 3.

²² SCSL Statute Article 4.

²³ SCSL Statute Article 5, referring to offenses under the Prevention of Cruelty to Children Act, 1926 and the Malicious Damage Act, 1861.

²⁴ S/2000/915, paragraph 19.

²⁵ S/RES/1315 (2000).

²⁶ S/2000/915, paragraph 29.

²⁷ S/2000/1234, paragraph 1.

A notable feature of the personal jurisdiction of the SCSL is that it extended to persons aged between 15 and 18. This matter was the subject of extensive consultation and discussion between the United Nations and the Sierra Leonean Government, legal profession and non-governmental organisations. As the Secretary-General noted, “[m]ore than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.”²⁸ In Article 7 of the SCSL Statute, jurisdiction over persons between 15 and 18 years of age was conferred upon the Special Court, but in paragraph 2 specific reference was made to special measures, many of a protective nature, which could be ordered by the Special Court when dealing with a case against a juvenile offender. Ultimately no persons under 18 years of age were prosecuted by the SCSL.

The temporal jurisdiction of the SCSL cannot be considered in exclusion of the treatment of the amnesty granted under the Lomé Peace Agreement of 7 July 1999. The United Nations has consistently maintained the position that no amnesty can be granted in respect of international crimes, and this position was ultimately reflected in Article 10 of the SCSL Statute, which provides that an amnesty granted to any person falling within the jurisdiction of the SCSL in respect of the crimes set out in Articles 2 to 4 of the Statute would not be a bar to prosecution.

The temporal jurisdiction of the SCSL was not closed because, as the Secretary-General noted at the time, the armed conflict was still ongoing at the time of the Special Court’s establishment. As with the ICTR, several dates were considered as possible options for the commencement of the jurisdiction, with 30 November 1996 ultimately selected as a date which would both encompass the most serious crimes committed by those on all sides of the conflict,

²⁸ S/2000/915, paragraph 32.

but which did not necessarily have political connotations.²⁹ The Secretary-General noted that although the civil war in Sierra Leone dated to 1991, it was felt that to have conferred such a lengthy temporal jurisdiction upon the tribunal would be to impose too heavy a burden upon it.

Extraordinary Chambers in the Courts of Cambodia

Like the SCSL, the ECCC has jurisdiction over both international and domestic crimes. In terms of international crimes, the ECCC law, Articles 4 to 8 provide that the ECCC has the power to prosecute the crimes of genocide; crimes against humanity; grave breaches of the Geneva Conventions; violations of the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict; and crimes against internationally protected persons pursuant to the 1961 Vienna Convention on Diplomatic Relations. Article 3 of the ECCC Law provides that the ECCC has jurisdiction over three domestic crimes, namely homicide, torture and religious persecution. The Group of Experts appointed by the Secretary-General to examine the establishment of the ECCC had recommended that the tribunal have jurisdiction over crimes against humanity and genocide.³⁰ It is clear that the Group of Experts was concerned that the jurisdiction conferred upon the tribunal be sufficiently focussed to ensure accountability, without being so widely drafted that prosecutorial and judicial resources would be stretched too thinly. For example, the Group of Experts considered that prosecution of offenses under Cambodian law “might not be a wise investment of time of the prosecuting staff and judges in light of the difficulty in finding sources that elaborate that law”.³¹

The temporal jurisdiction of the ECCC extends from 17 April 1975 to 6 January 1979, being the period of the Khmer Rouge’s rule. Indeed, the mandate of the Group of Experts appointed by the Secretary-General was specifically limited to this period, and the Group of Experts interpreted their mandate such that human rights violations of the Khmer Rouge before or

²⁹ S/2000/915 paragraph 25.

³⁰ A/53/850, paragraph 219(1).

³¹ A/53/850, paragraph 153.

after that period were beyond their scope of inquiry.³² The Group of Experts went further and expressed the view that “consideration of human rights abuses by any parties before or after that period would detract from the unique and extraordinary nature of the crimes committed by the leaders of Democratic Kampuchea”.³³ The need for focus is a thread which runs through the report of the Group of Experts.

The personal jurisdiction of the ECCC is also restricted, limited to “senior leaders of Democratic Kampuchea and those who were most responsible” for the crimes within the ECCC’s jurisdiction.³⁴ This was a matter of considerable attention of the Group of Experts, who noted that they had extensive discussions on this point with governmental and non-governmental representatives. The prevailing view expressed by those among whom the Group of Experts consulted was that “only ‘leaders’ of the Khmer Rouge form the targets of investigation, and not low-level cadre, even though those cadre were the persons who actually committed various atrocities”.³⁵ Practical considerations such as the feasibility of trying large numbers of defendants, and the impact on national reconciliation were taken into account. The estimate of the Group of Experts was that the number of potential defendants would be “in the range of some 20 to 30”.³⁶

Special Tribunal for Lebanon

The STL is distinct from the other tribunals considered in this paper, in that it has “jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons”.³⁷ The tribunal may also exercise jurisdiction over connected attacks which occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date agreed upon between the

³² A/53/850, paragraph 9.

³³ A/53/850, paragraph 149.

³⁴ ECCC Law Article 1.

³⁵ A/53/850, paragraph 103.

³⁶ A/53/850, paragraph 110.

³⁷ STL Statute Article 1.

United Nations and the Government of Lebanon, with the consent of the Security Council. To date the tribunal has established jurisdiction over three connected cases. The tribunal's material jurisdiction is therefore focussed upon a specific incident, rather than upon crimes committed in the context of a broader conflict. Article 2 of the STL's Statute sets out the provisions of the Lebanese Criminal Code which are applicable before the tribunal. Within the tribunal's jurisdiction is the Lebanese definition of terrorism, but notably the STL Appeals Chamber has also issued a decision defining terrorism as an international crime for the first time.³⁸

The personal jurisdiction of the STL is drafted to encompass all "persons responsible" for the attack of 14 February 2005. However, given the nature of the attack in which it is understood that the actual assassin was killed, those being prosecuted are individuals alleged to have been involved in the attack by planning and ordering it. The trial is currently ongoing, with five defendants being tried in absentia.

Conclusion

As we mark the twentieth anniversary of the establishment of the ICTR, there can be no doubt that it has made an enormous contribution, together with the other international and UN-assisted criminal tribunals, to the development of international criminal law and to bringing about a culture of accountability. The ICTY and ICTR are approaching the conclusion of their mandates and the transfer of functions to the Residual Mechanism for International Criminal Tribunals is well under way. The SCSL has completed its work and the Residual Special Court for Sierra Leone has been functioning since 1 January 2014.

The trend which has been highlighted throughout this paper, namely the narrower jurisdiction which has been conferred upon successive international and UN-assisted tribunals, can be detected empirically in the numbers of defendants brought before the tribunals. To date,

³⁸ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber Judgment)(16 February 2011).

the ICTY has concluded proceedings against 141 of the 161 persons indicted³⁹ and the ICTR has completed proceedings against 86 of the 93 indictees. The SCSL issued 13 indictments, and ten individuals were brought to trial. At the ECCC, one person was indicted in Case 001 and four in Case 002, and it remains possible that further suspects will be charged in Cases 003 and 004, while at the STL the *Ayyash et al* case is brought against five defendants.

The experience of the international and UN-assisted tribunals has demonstrated that significant resources in terms of time, personnel and finance are required in order to prosecute serious international crimes. The ICTY and ICTR have operated on a far more stable financial footing than the subsequent tribunals, being funded by assessed contributions from the budget of the United Nations. In contrast, the ECCC and SCSL in particular have faced significant financial challenges which have at times threatened the ongoing judicial work of those tribunals. Considerations of cost and other resource issues may well have been factors at play when the mandates of the later tribunals were considered.

However, perhaps the most notable trend, identifiable in the context of the international and UN-assisted criminal tribunals, in the context of the International Criminal Court and, indeed, more broadly in international criminal law, is an increased emphasis upon complementarity. With regard to the international criminal tribunals we see this most clearly in relation to those cases transferred to national jurisdictions for prosecution, albeit with support and monitoring from the international institution. The emphasis on complementarity is made explicit in the Preamble to the Rome Statute. Prosecutions for serious international crimes have been brought in domestic jurisdictions.

Twenty years after the tragic events which led to the establishment of the ICTR, the international community continues to be confronted by the commission of serious international crimes and the challenge of holding those who commit such crimes accountable. One difference,

³⁹ A/69/225, paragraph 2.

however, wrought by two decades' experience of international justice is the demand and, in many quarters, the expectation that there will ultimately be accountability. The interesting question for international lawyers is the form which such accountability measures will take.

Countries emerging from conflicts and scarred by atrocity crimes will continue to face the challenges which have led to international justice being considered necessary over the past two decades, including a lack of capacity within domestic legal systems, a lack of resources to conduct investigations and bring prosecutions, and no legal framework within which to conduct trials of complex and serious international crimes to fair trial standards. It is submitted that in such contexts, the prosecution of such crimes at the international level will continue to be necessary. In the longer term, however, we may hope to continue to see a continued and increased willingness of States at the domestic level to bring prosecutions of serious international crimes.

Those responsible for conducting such cases will doubtless look back upon the past two decades as formative in terms of the development of substantive international criminal law, and upon the achievements of the international and UN-assisted criminal tribunals as laying the foundations upon which successful prosecutions are built.