CHAPTER 13

CRIMINAL JUSTICE

DAVID J. SCHEFFER

SINCE the last decade of the twentieth century, the creation of international criminal tribunals of varied character has been one of the most dynamic developments in international organization theory and practice. Whereas in 1992 scholarly tracts on international organizations barely mentioned criminal tribunals (and then only to note the historical reality of the Nuremberg and Tokyo military tribunals immediately following World War II), the emerging reality thereafter is that such courts have arrived as powerful new institutions on the world stage. The establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in late 1994 heralded a new era of international criminal justice that required a novel institutional framework supported by existing international and regional organizations.

Criminal tribunals of the new generation are, with novel features, international institutions, no two of which are identical, and yet they also are dependent on long-established international and regional organizations like the United Nations (UN), the European Union, the African Union, and the North Atlantic Treaty Organization to support and enable their judicial operations. This intertwined relationship among organizations in the pursuit of international criminal justice will be the focus of this chapter.

The most significant judicial institutions that arose on the world scene in recent decades are the ICTY,[1] ICTR,[2] the Special Court for Sierra Leone (SCSL),[3] the

The views expressed by Professor Scheffer in this chapter are strictly his personal views and should not be ascribed to any institution with which he is associated.

[1] See the website of the ICTY, http://www.icty.org.

[2] See the website of the Mechanism for International Criminal Tribunals, http://unictr.unmict.org/.

[3] See the website of the Residual Special Court for Sierra Leone, http://www.rscsl.org/.

Extraordinary Chambers in the Courts of Cambodia (ECCC),[4] the Special Tribunal for Lebanon (STL),[5] and the permanent International Criminal Court (ICC).[6] The Residual Special Court for Sierra Leone is the successor institution for the SCSL and has overseen the continuing legal obligations of the SCSL after the latter's closure in 2013. The Mechanism for International Criminal Tribunals (MICT)[7] is the successor institution for the ICTY and ICTR to carry forth those tribunals' completion strategies and thus should be examined in coming years as the source for the final work product of the original two tribunals.

Key regional courts, such as the European Court of Human Rights[8] and the Inter-American Court of Human Rights,[9] have existed much longer (since 1959 and 1979, respectively) and established large and impressive bodies of jurisprudence pertaining to the enforcement of human rights norms. But these are not criminal courts per se and thus will not be examined here. Nor will the special UN courts created in East Timor[10] and Kosovo[11] following atrocities in those territories in 1999. As important as their role was in bringing justice to the peoples of East Timor (now Timor-Leste) and Kosovo and the critical role the UN assumed in creating and operating them, these courts had quite limited and specialized jurisdictions falling largely outside the international or internationalized tribunals identified above.

The African Court of Human and Peoples' Rights (AfCHPR) is a body created in 2004, having achieved the necessary ratification of fifteen African states, for the purpose of enforcing the African Charter on Human and Peoples' Rights.[12] The AfCHPR began the process of merging with the African Court of Justice in 2008. But that merger had not, as of 2016, achieved the necessary ratifications by African nations. The AfCHPR remains a state responsibility court and thus cannot investigate and prosecute individuals for the commission of atrocity crimes.[13] The African Union, expressing the political objections of many of its member states over the ICC's early focus on Africa and some of its autocratic leaders, has viewed the AfCHPR as the alternative to ICC jurisdiction over Africa. There has been a process

[4] See the website of the ECCC, http://www.eccc.gov.kh and Cambodia Tribunal Monitor, http://www.cambodiatribunal.org.

[5] See the website of the STL, http://www.stl-tsl.org.

[6] See the website of the ICC, http://www.icc-cpi.int.

[7] See the website of the MICT, http://www.unmict.org.

[8] See the website of the European Court of Human Rights, http://www.echr.coe.int/.

[9] See the website of Inter-American Court of Human Rights, http://www.corteidh.or.cr.

[10] See Caitlin Reiger and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect* (New York: International Center for Transitional Justice, 2006).

[11] See Tom Perriello and Marieke Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo* (New York: International Centre for Transitional Justice, March 2006), http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Courts-Study-2006-English_0.pdf.

[12] See the website of the AfCHPR, http://www.african-court.org/en/. As of February 2016, thirty African nations had joined the court.

[13] "Atrocity crimes" encompasses genocide, crimes against humanity, serious war crimes, and aggression. See David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton: Princeton University Press, 2012), 428–37.

underway within the African Union to broaden the jurisdiction of the AfCHPR to include individual criminal responsibility for atrocity crimes, but as of 2016 that had not yet been accomplished.[14] The AfCHPR's experience with atrocity crimes thus has been limited and will not be examined.

This chapter studies two areas of inquiry regarding the criminal tribunals and relevant international and regional organizations. The first part examines the role of international organizations, particularly the UN, in the creation of the international and hybrid criminal tribunals since 1993 and each tribunal's legal character under international law. The second part compares and contrasts the structural composition of the tribunals, which is a critical base of knowledge about their history, how they function, and the law they enforce.

The Role of International Organizations in the Creation of International and Hybrid Criminal Tribunals

The UN played a central role in the creation of the international and hybrid criminal tribunals during the tribunal-building era of 1993 through 2005. Without the UN's direct participation as a legitimizing body, none of the tribunals could have been established with the speed and legal authority that they enjoyed during this period. The costs of UN engagement, particularly for reluctant or resistant governments, were most evident in how easy it became to isolate and shame deniers of international criminal justice in the public realm and within diplomatic circles. Of course, none of the tribunals escaped challenges (by certain governments, defense counsel, and scholars) to how they were created and the legal basis for their very existence. But each of them survived these challenges and while they are important to absorb, such criticisms are historical footnotes on the road to international criminal justice.

The logical and universally acknowledged methodology for the creation of a new international institution requiring the support of and participation by governments would be a treaty negotiated and entered into among nations. This is particularly true for a court that would have the power to punish the criminal actions of individuals by depriving them of their freedom or even, if some governments

[14] "Jurisdiction," AfCHPR website, http://en.african-court.org/index.php/about-us/jurisdiction.

had their way, with the death penalty. Almost all major international organizations have been so constituted and it would be natural to approach the task of building an international criminal tribunal in the same manner. Such a method, namely, an international treaty signed and ratified by a large number of countries, would command automatic respect within the international legal and political communities and with individual governments as the number of states joining the tribunal grows.

But the drafting and negotiations leading to a treaty that would create a new international institution, and then the years required before that treaty comes into force with sufficient ratifications, is a procedure ill-suited to achieving justice in response to ongoing or recently committed atrocity crimes in the absence of International Criminal Court jurisdiction. Since the ICC did not enter into operations until July 1, 2002, and lacks any temporal jurisdiction for atrocity crimes committed prior to that date, a novel means of institutionalizing accountability for the atrocity crimes of the latter part of the twentieth century had to be found.

When confronted with the mounting atrocities in the Balkans beginning in 1991, the international community initially reacted fairly conventionally with respect to a judicial option. The UN Security Council (UNSC) created a War Crimes Commission to investigate the situation,[15] which accelerated into an investigation of gruesome waves of atrocity crimes through 1992. An independent initiative by the Conference for Security and Co-operation in Europe (CSCE, the forerunner to the current Organization for Security and Co-operation in Europe, OSCE), launched a study in August 1992 on how to investigate and prosecute atrocity crimes in the region.[16] The latter group's work concentrated on a treaty approach and proposed a structural framework for a tribunal that would be established once the treaty was adopted. It was a useful contribution by a regional organization that had a particular focus on the war erupting in the former Yugoslavia. But it proved insufficient to the task, which demanded a response sooner and with more potency than could be offered by the conventional proposal of the CSCE.

Meanwhile, the UN International Law Commission, a body created by and reporting to the UN General Assembly, was seized with international criminal justice issues and the creation of a permanent international criminal court.[17] But that effort in the early 1990s had nothing to do with breaking events in the Balkans.

[15] UNSC Res. 780, UN Doc. S/RES/780 (October 6, 1992). See UN Secretary-General, Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674 (May 27, 1994).

[16] William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (New York: Cambridge University Press, 2006), 15; Rapporteurs (Corell-Türk-Thume), "Proposal for an International War Crimes Tribunal for the Former Yugoslavia," CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia, February 9, 1993.

[17] Rep. of the Int'l Law Comm'n, "Establishment of an International Criminal Court: Draft Resolution," 46th Sess., UN Doc. A/C.6/49/L.24; GAOR, 49th Sess. (November 29, 1994); James Crawford, "The Work of the International Law Commission," in *The Rome Statute of the International*

It was designed to launch an endeavor of many years' duration to build a treaty-based international criminal court whose forward-looking temporal jurisdiction was unlikely to cover crimes in Bosnia and Herzegovina and in Croatia during the early 1990s. The completion of the International Law Commission's work in 1994 became the basis for further multi-year UN negotiations leading to the 1998 Rome Statute of the International Criminal Court. But all of this had little relevance to what was required urgently by late 1992 and early 1993 to address the challenge of accountability in the Balkans.

By early 1993 the UN Security Council seized the initiative and launched a novel means of tribunal-building. As an international organization, the Security Council created the first international criminal tribunal, the ICTY, with authority derived from the UN Charter's Chapter VII enforcement powers. Two Council members, the United States and France, took the lead in rapidly moving the concept through to a successful vote on February 22, 1993.[18] One might regard the initiative as a shortcut to avoid the many years typically required of a treaty-based procedure for creating a new institution, particularly such a novel one as an international criminal tribunal. But policymakers felt the public pressure to do something about the Balkans and saw judicial accountability for atrocity crimes in the region as at least one credible measure that could obtain relatively speedy approval.

Following Security Council Resolution 808, the UN Secretary-General and UN lawyers engaged in a three-month exercise of drafting the Statute of the ICTY. They were informed by draft statutes submitted by ten governments and five intergovernmental organizations and nongovernmental organizations (NGOs).[19] The draft that emerged from the UN Secretariat attracted numerous proposals to amend it. But ultimately interested governments that had submitted their own proposals agreed to let the Secretariat draft stand unchanged. They feared that to open it up for any revision could invite undesirable amendments that could severely undermine the tribunal's legal authority and scope of jurisdiction.

The Security Council approved creation of the ICTY as a nonmilitary measure to enforce the law in the Balkans and try to deter future atrocity crimes, although one can never guarantee deterrence. The Security Council is charged with maintaining and enforcing international peace and security, so the ICTY was conceived as a nonmilitary means under Article 41 of the UN Charter to help achieve that objective in the nations of the former Yugoslavia.

Criminal Court, ed. Antonio Cassese, Paolo Gaeta, and John R. W. D. Jones (New York: Oxford University Press, 2002), 23–34.

[18] UNSC Res. 808, UN Doc. S/RES/808(1993) (February 22, 1993). See also Scheffer, *All the Missing Souls,* 19–27; Michael J. Matheson and David Scheffer, "The Creation of the Tribunals," *American Journal of International Law* 110 (2016): 173–90.

[19] See Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (Irvington-on-Hudson, New York: Transnational Publishers, 1994), 209–480.

Some UN member states (including Mexico, Brazil, and China) objected to this formulation and believed that the Security Council had no legal authority to create a criminal tribunal.[20] Defense counsel raised the same objection in the first case before the ICTY, *Prosecutor v Dusko Tadic*.[21] But in February 1993 when the initial authorizing resolution was adopted and several months later when the operative resolution creating the structure and institutional character of the ICTY was adopted by the Security Council,[22] the Council acted with resolve to chart a new course for how an international criminal tribunal could be established. Acting under Article 41 of the UN Charter, the Security Council created the ICTY as a subsidiary body of the Security Council and thus it also stood as an international institution.

The unique features of the ICTY that derived from its origins as a Security Council entity rest primarily with the primacy and mandatory character of its jurisdiction. The Council endowed the ICTY with superior authority over national courts in adjudicating cases, meaning that ICTY judges can insist upon trying a case over the objection or appeal of national authorities.[23] The Security Council resolution establishing the ICTY requires all member states of the UN to cooperate with the tribunal and to adhere to its judicial orders, as does the ICTY Statute.[24] The judges of the ICTY are selected by the UN through action of the Security Council and the General Assembly,[25] while the Prosecutor is appointed solely by the Security Council.[26] The President of the ICTY (namely, one of the judges elected to that position by the other judges)[27] may appeal to the Security Council for assistance in enforcing the tribunal's orders and arrest warrants, and often did so when delivering the President's annual report to the Council and to the General Assembly.[28] The

[20] See Allison Marston Danner, "When Courts Make Law: How the International Criminal Tribunal Recast the Laws of War," *Vanderbilt Law Review* 59 (2006): 1–65.

[21] *Prosecutor v Tadic*, Case No. IT-94-1-T, Motion on the Jurisdiction of the Tribunal, ¶¶ 2–3 (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997).

[22] UNSC Res. 827, UN Doc. S/RES/827(1993) (May 25, 1993).

[23] Updated Statute of the ICTY, Art. 9(2) ("The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.") (ICTY Statute), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

[24] UNSC Res. 827, May 25, 1993, sec. 4 ("Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute."); ICTY Statute, Art. 29.

[25] ICTY Statute, Art. 13*bis*.

[26] Ibid., Art. 16(4). Since the beginning, there has been a de facto rule within the Security Council that each prosecutor of the ICTY (and ICTR) must receive unanimous consent by the fifteen members of the Security Council.

[27] Ibid., Art. 14(1, 2).

[28] Ibid., Art. 34.

budget of the ICTY is covered by UN member states as a percentage of their annual dues for the regular budget of the organization.[29]

In late 1994 the ICTR was established in an identical manner by the Security Council[30] and ultimately, by virtue of its role in electing the tribunal's top officers and approving its budgets, the General Assembly. There were some variations in its statutory authorities, but the Security Council controlled the character of the tribunal and, at least on paper, supported it with the Council's full enforcement authority under Chapter VII of the UN Charter. Thus in both instances, the former Yugoslavia and Rwanda, international criminal justice was propelled forward with stunning speed and legal authority in the early 1990s by the UN and its two most prominent organs, the Security Council and the General Assembly. The tribunals themselves were constituted as subsidiary organs of the Security Council and, in the result, joined the family of international organizations as uniquely crafted judicial institutions.

At the UN the Security Council, General Assembly, Secretary-General and his legal counsel played key roles in establishing the SCSL and ECCC. While still originating in significant degree from UN actions, these tribunals experienced vastly different circumstances and legal authorizations compared to the ICTY and ICTR. Fatigue had set in at the Security Council by the mid 1990s in terms of using the Council's enforcement power under the UN Charter to create any more criminal tribunals. The annual expenses of the ICTY and ICTR were growing with each passing year. Therefore, when the waves of atrocities committed during the civil war in Sierra Leone during the late 1990s finally compelled the creation of a criminal tribunal to investigate and prosecute those "who bear the greatest responsibility" for atrocity crimes,[31] negotiations quickly steered clear of the Security Council model used for the ICTY and ICTR and settled in the summer of 2000 on a treaty-based court of unique character.

On August 15, 2000, the Security Council directed the Secretary-General to enter into negotiations with the government of Sierra Leone for the purpose of creating a criminal tribunal by treaty between the UN and the government.[32] The trigger for UN engagement in May 2000 was the kidnapping of UN peacekeepers, which proved intolerable to contributor nations and the Security Council and invited questions of accountability for not only that action but the atrocities that were erupting

[29] Ibid., Art. 32.

[30] UNSC Res. 955, UN Doc. S/RES/955 (November 8, 1994) (ICTR Statute); see Scheffer, *All the Missing Souls*, 69–86; Michael J. Matheson and David Scheffer, "The Creation of the Tribunals," *American Journal of International Law* 110 (2016): 173–90.

[31] Statute of the Special Court for Sierra Leone, Art. 1(1), April 12, 2002, 2178 UNTS 145 (SCSL Statute), http://legal.un.org/avl/pdf/ha/icty/legalinstruments.pdf.

[32] UNSC Res. 1315, UN Doc. S/RES/1315 (August 15, 2000), sec. 1 ("Requests the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution … ").

again following the Lomé Peace Accords of 1999. So the UN had a real stake in creating a means by which to hold perpetrators accountable.

The Special Court for Sierra Leone was constituted as an international criminal tribunal legally tied to the government of Sierra Leone through both the treaty and a domestic statute authorizing the operation of the Court in Sierra Leone.[33] In one of the first cases before the SCSL, defense counsel challenged the legitimacy of the SCSL as an international criminal tribunal and argued that it had not been properly approved as a domestic court by the Sierra Leone Parliament. But the judges ruled against these arguments and held that the UN had properly constituted the SCSL as an international criminal tribunal in which the UN stood shoulder to shoulder with the Sierra Leone government in creating a treaty-based court governed by international criminal law and not by Sierra Leone law.[34] The SCSL was not constituted with either the express Chapter VII enforcement power of the Security Council or the benefit of automatic funding derived from all UN member states. It stood as an independent tribunal (not as a subsidiary body of the Security Council) with the participation of the UN by treaty in how it was staffed and in framing the statute pursuant to which the Court would exercise its jurisdiction, but the UN was not administratively in control of the SCSL.[35]

Some Security Council member states had no appetite for establishing a criminal tribunal to investigate and prosecute the atrocity crimes of the Pol Pot regime of the late 1970s. The United States, as a permanent member of the Security Council, approached Council members in 1998 and 1999 with the proposal for either expanding the jurisdiction of the ICTY to embrace the Pol Pot regime crimes or creating a new tribunal under the Council's Chapter VII authority. China and France in particular complained that Cambodia no longer fell under the scrutiny of the Security Council as a threat to international peace and security. Once Council action no longer was possible, and the Cambodians began to insist on a domestic court with UN assistance, the Secretary-General explored the alternative path of negotiating the creation of a special Cambodian court, constituted under Cambodian law, but tied to the Secretary-General through a treaty arrangement between the UN and the Royal Government of Cambodia. The negotiations took years to conclude but finally in 2003 an agreement was reached to establish the ECCC and in 2005 the treaty between the UN and the Cambodian government entered into force.[36]

[33] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, January 16, 2002, 2178 UNTS 138, http://legal.un.org/avl/pdf/ha/icty/legalinstruments.pdf (UN/Sierra Leone Agreement); SCSL Statute.

[34] *Prosecutor v Morris Kallon et al.*, Case No. SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (March 13, 2004).

[35] For further explanation, see William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (New York: Cambridge University Press, 2006), 53–6; Scheffer, *All the Missing Souls*, 322–33.

[36] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Reach Kram

In contrast to the SCSL, the ECCC is a national Cambodian court and not an international criminal tribunal. Yet like the SCSL, the relevant national government, in this case the Royal Government of Cambodia, entered into a treaty with the UN (the "UN/Cambodia Agreement"), which was approved by the General Assembly,[37] that provided for the Secretary-General's engagement in staffing the ECCC with international personnel and committed the UN to paying for the salaries of international personnel, defense counsel fees, and certain other expenses of the ECCC. Through its treaty arrangement with the Cambodian government, the UN participates intensively in the day-to-day management of the ECCC through the UN Assistance to the Khmer Rouge Trials supervisory staff, as well as the work of the UN Secretary-General's Special Expert on United Nations Assistance to the Khmer Rouge Trials. The government appoints Cambodian nationals to the majority of judgeships, while international personnel hold the minority in each judicial chamber. Cambodian nationals occupy positions of equal authority with their international counterparts as the Cambodian Co-Investigating Judge and the Cambodian Co-Prosecutor. The Secretary-General appoints the senior international personnel of the ECCC and a UN Deputy Director of Administration supervises the UN-appointed employees of the Court.

The distinction between the SCSL as an international criminal tribunal and the ECCC as a national court lies in the intent of the parties to the treaty and how the respective national parliaments in Sierra Leone and Cambodia approved creation of the respective tribunal. The Sierra Leone Parliament acted to create an independent court with international character in the form of a majority of the judges being international, the sole Chief Prosecutor being appointed by the Secretary-General, the sole Registrar being appointed by the Secretary-General, and the entire staff being appointed by the Registrar and paid for through the resources of the Court and not the government.

In contrast, the Cambodian National Assembly and Senate acted with the clear intent to create a domestic national court and were joined in that understanding by the UN. The majority of senior and subordinate staff positions are occupied by Cambodian nationals supervised by the Director of Administration, also a Cambodian national appointed by the government. The Cambodian government assumed responsibility in the UN/Cambodia Agreement and the ECCC Law to pay the salaries of the national staff of the Court, who constitute the majority of the personnel.[38] The ECCC is located in Phnom Penh with no option for moving it

NS/RKM/0801/12, August 10, 2001, with inclusion of amendments as promulgated on October 27, 2004 (NS/RKM/1004/006), http://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended (ECCC Law); Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, 2329 UNTS 117 (UN/Cambodia Agreement); see generally, Scheffer, *All the Missing Souls*, 341–405.

[37] GA Res. 57/228, UN Doc. A/RES/57/228B (May 22, 2003), http://dacess-dds-ny.un.org/doc/UNDOC/GEN/N03/358/90/PDF/N0335890.pdf?OpenElement.

[38] ECCC Law, Art. 44*new*(1); UN/Cambodia Agreement, Art. 15.

outside of the country.[39] The SCSL could be relocated outside of Sierra Leone for security reasons, and this in fact happened with the Charles Taylor trial, which was held in The Hague.[40]

The Special Tribunal for Lebanon, created in 2006, follows more closely the model of the SCSL, but there are differences. The STL, which is located in The Hague, is an international criminal tribunal (like the SCSL) and not a UN or domestic Lebanon court. A treaty between the UN and the government of Lebanon created the tribunal, but it is staffed entirely at the direction of the Secretary-General, so that all of the judges, the sole Prosecutor, and the Registrar, who recruits the administrative staff, are all UN employees, as are the staff.[41] In stark contrast to the other tribunals, however, the subject matter jurisdiction of the tribunal is drawn solely from the criminal code of Lebanon[42] and not from international law. The Secretary-General essentially is selecting individuals who are tasked with the responsibility to interpret Lebanese criminal law and apply it to the assassination of Prime Minister Rafiq Hariri and other officials in 2005,[43] but to do so in compliance with international standards of due process. The international character of the STL also insulates it, at least in theory, from the influences of the Lebanese political and legal systems. But the government of Lebanon pays 49 percent of the budget of the STL while the international community, through voluntary funding only, must cover 51 percent of the budget each year.[44]

The UN played a key role in creation of the ICC. The International Law Commission, a subsidiary body of the General Assembly, prepared the initial draft statute of the ICC in 1994 and it served as the basis for negotiations among member states commencing in 1995.[45] These talks were convened under UN General Assembly auspices before a series of committees attended by government delegates from 1995 through to the commencement of final talks at Rome in June 1998. Periodic meetings were held at the UN in New York, where UN interpretation and Secretariat services and expertise were utilized on a daily basis. The five-week

[39] ECCC Law, Art. 43*new*.

[40] UN/Sierra Leone Agreement, Art. 10.

[41] Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, Arts. 2(5), 3(1), 4(1), January 22, 2007, 2461 UNTS 257, http://treaties.un.org/doc/Publication/UNTS/Volume%202461/v2461.pdf (UN/Lebanese Republic Agreement).

[42] UNSC Res. 1757, Art. 2, UN Doc. S/RES/1757 (May 30, 2007) (STL Statute).

[43] STL Statute, Art. 1. The unique personal jurisdiction of the STL was established in Art. 1: "The Special Tribunal shall have 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. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators."

[44] UN/Lebanese Republic Agreement, Art. 5(1).

[45] See n. 17.

conference of June–July 1998, where the Rome Statute of the ICC was finalized, was held at the UN Food and Agriculture Organization Headquarters and administratively staffed by UN personnel.

In subsequent years further negotiations on the supplemental documents that would be required for the ICC's operation also were held under UN authority at its New York headquarters. So until the ICC actually began to operate independently on July 1, 2002, it was entirely reliant on the UN to convene meetings, interpret negotiations and translate documents, and provide expertise to manage the entire project for more than a decade. But there would be continued requirements for UN engagement with the ICC and a treaty was negotiated to address that issue. On October 4, 2004, the ICC and the UN entered into a Relationship Agreement setting forth the institutional arrangements and cooperation and judicial assistance between the two organizations.[46] These include, for example, the rights of ICC officials to attend UN meetings, how the testimony of UN officials before the ICC would be handled, as well as cooperation by the UN with requests of the ICC Prosecutor relating, in particular, to investigations.

Other organizations also contributed to the ICC's rise, including the European Union which organized its members to speak with a unified voice whenever possible during the negotiations. The International Committee of the Red Cross (ICRC) weighed in on how to define war crimes in the Rome Statute and the rights of ICRC personnel in relation to the Court as provided in the ICC's Rules of Procedure and Evidence. Women's rights groups were intensively engaged throughout the years of negotiations in fashioning text that defined crimes relating to sexual violence and gender. The International Coalition for the International Criminal Court, in which hundreds of NGOs and entities were and remain members, proved to be a highly effective lobbying force from 1995 and continues to be so to the present day.[47]

Structural and Substantive Law Comparison of the Tribunals

As institutions dedicated to criminal justice, the international and hybrid criminal tribunals have not only emerged from a varied set of originating circumstances, but

[46] Relationship Agreement between the United Nations and the International Criminal Court, Part III, October 4, 2004, 2283 UNTS 196, http://treaties.un.org/doc/Publication/UNTS/Volume%20 2283/II-1272.pdf.

[47] See the website of the Coalition for the International Criminal Court, http://www.iccnow.org/.

they exhibit structural similarities and differences that define and influence the performance of their mandates. The similarities exemplify the common objectives of judicial integrity and compliance with international standards of due process. The differences acknowledge the particular demands of sovereign governments engaged in a tribunal's work, the diverse character of the atrocity crimes under scrutiny, and resource constraints.

All but one of the tribunals share a common enforcement of atrocity law, namely that part of international criminal law that penalizes the commission of genocide, crimes against humanity, and war crimes.[48] (The Statute of the STL differs markedly, as already noted and discussed below.) There are variations in how each tribunal statute defines these crimes and their scope, but in general they subscribe to the same subject matter jurisdiction.

The crime of genocide is defined with nearly identical precision in the tribunal statutes because it is drawn directly from the Genocide Convention definition of 1948,[49] which most nations have joined. Governments readily agreed to replicate the Convention definition in the tribunal statutes, thus minimizing diplomatic negotiations over this particular atrocity crime.[50]

There was some difficulty settling on the definition of crimes against humanity until the Rome Statute provided a comprehensive formula. There the requisite chapeau requires that, "'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[51] The ICTY Statute requires that the listed crimes against humanity be "committed in armed conflict" and further clarified that such conflict could be either "international or internal in character."[52] This understanding of crimes against humanity originated from the definition used at the Nuremberg Military Tribunal when it helped introduce such actions into the realm of criminal prosecution because of their useful association with aggression and war crimes in World War II. But during the intervening decades, the legalistic bond between crimes against humanity and armed conflict had been broken under customary international law and was no longer required. The ICTY judges

[48] For a discussion of "atrocity law," see Scheffer, *All the Missing Souls*, 421–37.

[49] Convention on the Prevention and Punishment of the Crime of Genocide, Key Provisions, January 12, 1951, 78 UNTS 279, *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%20 78/volume-78-I-1021-English.pdf.

[50] The ECCC Statute definition of genocide records an anomaly, inverting the Genocide Convention's reference to "as such" to read "such as". It is believed this was a typographical error, but it was corrected in the subsequent UN/Cambodia Agreement which invokes the Genocide Convention definition, and thus requires the intention to target an ethnic, national, racial, or religious group because of its group identity.

[51] Rome Statute of the International Criminal Court, Art. 7(1), July 17, 1998, 2187 UNTS 90, https://www.icc-cpi.int/resource-library/Documents/RomeStatuteEng.pdf (Rome Statute).

[52] ICTY Statute, Art. 5.

recognized this in their first judgment in the *Tadic* case[53] and thereafter it became a virtual nonissue in ICTY jurisprudence.

One and a half years later the ICTR Statute veered in a different direction when defining crimes against humanity. It omits any linkage to armed conflict but elaborates that the "widespread or systematic attack against any civilian population" must be on "national, ethnic, political, racial or religious grounds" and then lists the specific categories of crimes.[54] The "widespread or systematic attack" language acknowledged characteristics of such crimes emerging from scholarly treatments since World War II, but the further categorization of specific grounds ("national, ethnic, political, racial or religious") was gratuitous language almost mirroring the genocide categories. The Rwandan government wanted to emphasize the targeted character of the crimes against humanity inflicted on mainly Tutsis during the Rwandan atrocities of 1994.

While this language was not replicated in either the Rome Statute or the Statute of the SCSL for crimes against humanity, the Cambodian government preferred to repeat it in the ECCC Law.[55] There was a political objective at work in doing this, as the Cambodian negotiators saw parallels between their experience and that of Rwanda and wanted to demonstrate the targeted character, particularly on political grounds, of the Pol Pot regime's attack on its own citizens. Since historians and lawyers had concluded already that the overwhelming majority of victims in Cambodia died as a consequence of crimes against humanity and not genocide,[56] there was considerable incentive to adopt a more targeted definition for crimes against humanity. Nonetheless, in Article 9 of the UN/Cambodia Agreement, a course correction occurred. The crimes against humanity falling within the jurisdiction of the ECCC are described solely as "crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court."[57] Such language overrides the ECCC Law's novel articulation because the Rome Statute's Article 7 definition of crimes against humanity omits the targeting language.

The Statute for the SCSL provides for the simplest definition of crimes against humanity, namely the commission of any itemized criminal acts "as part of a widespread or systematic attack on a civilian population."[58]

The Rome Statute of the ICC embodies the most expansive and defined set of crimes against humanity, elaborating with further definitions of the specific crimes, such as "torture," "forced pregnancy," and "persecution."[59] This ICC definition ultimately became the gold standard for defining crimes against humanity, and as noted above, this definition was invoked by the UN/Cambodia Agreement to eclipse the domestic law's definition.

[53] *Tadic*, IT-94-1-T at ¶ 4. [54] ICTR Statute, Art. 3. [55] ECCC Law, Art. 5.

[56] See, e.g., Ben Kiernan, *The Pol Pot Regime, Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–79*, 2nd ed. (New Haven: Yale University Press, 2002), 460–3.

[57] UN/Cambodia Agreement, Art. 9. [58] SCSL Statute, Art. 2. [59] Rome Statute, Art. 7.

The tribunals invoke similar provisions on war crimes but even here there are some variations. There is common reference in the tribunal statutes to grave breaches under the Geneva Conventions of 1949 or violations of Common Article 3 of those conventions, depending on whether international or noninternational armed conflicts are being addressed. The latter reference was path breaking as it criminalized Common Article 3 violations for the first time before an international or hybrid criminal tribunal. Previously, such violations had been regarded largely as issues of state responsibility only and not individual criminal responsibility, unless domestic criminal law had criminalized such conduct with respect to internal armed conflicts. But the tribunal statutes unambiguously criminalized three distinct actions that are associated with noninternational armed conflicts, namely violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

The ICTR and SCSL Statutes explicitly limit their war crimes liability only to noninternational armed conflicts given the largely domestic character of the Rwandan and Sierra Leonean atrocities. Only the Rome Statute sets forth extensive provisions on war crimes committed during either international or noninternational armed conflicts.[60] Lengthy negotiations stretching over several years resulted in the Rome Statute provisions, which were intended by the summer of 1998 to reflect customary international law and thus be more easily embraced by governments.

Relatively recent conduct deemed unacceptable by the international community made its way into the Rome Statute as accelerated expressions of customary international law. This includes "[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the UN, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."[61] Such attacks had occurred in Somalia and Bosnia and Herzegovina in the early 1990s. Also, a treaty to this effect had been rapidly negotiated and then concluded in 1994,[62] although only a small number of states had signed it and fewer still had ratified it by 1998. But negotiators of the Rome Statute considered the issue too obvious in its character and too important to omit from the list of war crimes. Other examples include "enforced pregnancy" and "enforced prostitution,"[63] which were freshly articulated sexual violence crimes for purposes

[60] Rome Statute, Art. 8.

[61] Rome Statute, Art. 8(2)(b)(3).

[62] Convention on the Safety of United Nations and Associated Personnel, opened for signature December 15, 1994, 2051 UNTS 363, http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-8.en.pdf.

[63] Rome Statute, Art. 7(1)(g).

of war crimes prosecutions; they arose primarily from the recent experience of the Yugoslav wars of the early 1990s.

In contrast, an obvious candidate for inclusion in the war crimes provisions of the Rome Statute was prohibited actions under the Chemical Weapons Convention (CWC), which came into force in 1997.[64] The CWC provides a much-needed modern articulation of prohibitions on the manufacture, storage, and use of the full range of chemical weapons, and is practically universally agreed to among nations. The treaty clearly states principles of customary international law. There was a strong effort leading up to Rome and during the Rome negotiations to include the CWC prohibitions as war crimes in the Statute but it was omitted at the last moment and only early twentieth-century formulations relating to poisonous or other gases remained as part of a trade-off to keep the use of nuclear weapons out of the Rome Statute.[65]

The Special Tribunal for Lebanon is markedly different in its enforcement of substantive law from the other tribunals. The STL Statute only embodies Lebanon criminal law because the crimes giving rise to the creation of the STL concern the February 14, 2005, assassination of then Prime Minister of Lebanon Rafiq Hariri and other persons, with scope afforded for pursuing other killings during a time period defined either by the Statute or by the Security Council. The tribunal's applicable law is restricted to:

> (a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".[66]

The ECCC and SCSL Statutes refer to particular domestic criminal laws that have special application to the atrocity crimes committed in Cambodia and Sierra Leone respectively.[67] But in the case of the ECCC, the judges eliminated the domestic law liability in their finding that the statute of limitations, already expired by the time the ECCC was established, could not be extended as the ECCC Law and UN/Cambodia Agreement sought to do.[68]

Other structural similarities among the tribunals include the fact that none of them include the death penalty as the most extreme punishment following a guilty

[64] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction, opened for signature January 13, 1993, 1974 UNTS 469 (entered into force April 29, 1997).

[65] Rome Statute, Arts. 8(2)(b)(xvii-xix), 8(2)(e)(xiii–xv).

[66] STL Statute, Art. 2.

[67] ECCC Law, Art. 3*new*; SCSL Statute, Art. 5.

[68] *Prosecutor v Kaing Guek Eav* alias *Duch*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes (July 26, 2010).

verdict. Although a significant number of nations continue to apply the death penalty, at least in law if not in practice, there has never been any prospect of retaining such penalty in any of the international or hybrid war crimes tribunals. The death penalty is rejected as a matter of policy in the European Union and no member state of that regional organization is permitted to use it. Nor is the death penalty adopted anywhere in Latin America or Canada. Elsewhere its use is sporadic and concentrated within a relatively small group of countries. The UN, as an international organization, cannot support the death penalty because too many of its member states oppose it. Protocol II of the International Covenant on Civil and Political Rights seeks universal prohibition of it.[69]

There was no possibility in the talks orchestrated by the UN to create each of the tribunals that the death penalty could survive in the final drafting. During the Rome Statute negotiations, there was a concerted effort by Arab and Caribbean states to install the death penalty for the ICC, but it met such overwhelming opposition from primarily European and Latin American governments that it stood no chance of being adopted.[70] It may transpire, as with the Iraqi High Tribunal, a domestic Iraqi court that had no UN or international organization participation in its work, that a domestic criminal tribunal prosecuting atrocity crimes in some part of the world will be created and impose the death penalty under that nation's laws permitting such extreme punishment.[71] But one can safely assume that the maximum penalty available before the international and hybrid tribunals of modern times will remain life imprisonment.

The ECCC is the only tribunal that has investigating judges (one Cambodian, the other foreign), which is a reflection of the mixture of civil law with common law principles and practices in the Court. Cambodia's legal system is civil in character, evolving primarily from French practice. The Cambodian government insisted on the use of such judges for the investigation of atrocity crimes in Cambodia. Nonetheless, the ECCC also has two prosecutors, one Cambodian and the other a foreigner appointed by the UN Secretary-General. The manner in which the investigative work of the two co-investigating judges (normally schooled in civil law and

[69] Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, July 11, 1991, 1642 UNTS 414, http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-12.en.pdf.

[70] See William Schabas, *An Introduction to the International Criminal Court*, 4th ed. (New York: Cambridge University Press, 2011), 334–6; Scheffer, *All the Missing Souls*, 206–7.

[71] Law of the Iraqi High Tribunal (IHT Statute), Official Gazette of the Republic of Iraq, No. 4006, October 18, 2005, English translation by the International Center for Transitional Justice, http://gjpi.org/wp-content/uploads/2009/02/iraqstatuteengtrans.pdf; Iraqi Penal Code, Law No. 111 of 1969, Art. 406(1). Application of the death penalty was suspended by the CPA (Coalition Provisional Authority) by means of Order No. 7 of June 10, 2003, section 3(1): *CPA Order Number 7: Penal Code*, CPA/ORD/9 June 2003/07, http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf. The death penalty was reintroduced by the Iraqi Interim Government for a range of offenses by means of Order No. 3 of August 8, 2004.

thus the inquisitorial tradition) intersects with the functions of the co-prosecutors (who engage in common law tactics of adversarial character) has been a novel work in progress. No other tribunal dealing with atrocity crimes experiences this uniquely shared set of responsibilities because the entire investigative responsibility is undertaken by the prosecutor.

Investigative processes in the civil law system may be more relevant and workable for common crimes than for atrocity crimes. The experience at the ECCC has been unfortunate delays in investigating the evidence of mass atrocity crimes and then further delays in integrating the work of the investigating judges with the adversarial tasks of the prosecutor and with defense counsel who focus on common law tactics to challenge procedures and delay the overall trial.

The experience of other tribunal prosecutors who have organized their staffs properly and then entered into an adversarial process with what they have investigated under their own supervision may be a superior methodology where an adversarial trial in fact will be conducted. It is important, however, for there to be a Pre-Trial Chamber, as found in the ICC, to impose discipline and judgment on the prosecutor's decisions and practice in connection with investigations.

The SCSL and the ICC are the only tribunals to address the issue of juveniles, their exposure to international criminal justice, and the liability of adults for the recruitment or use of child soldiers. The Rome Statute simply states, "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."[72] The Rome Statute defines the war crime for either international or noninternational armed conflicts of "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities."[73] While there have been logical arguments to criminalize any such conscription, enlistment, or use of children who are 15, 16, or 17 years old, the standard of "under the age of fifteen years" is found in certain widely subscribed treaties and proved to be the least controversial age limitation for states to adopt.

The SCSL alone has jurisdiction over children of 15, 16, 17, or 18 years of age at the time of commission of the crime. This anomaly in tribunal practice arose from the prevalence of frequently drugged teenagers being used by militia during the Sierra Leone civil war to mutilate and kill civilians. There also was the simple fact that gangs of teenagers were sometimes led by teenagers. Public anger with these individuals in the aftermath of the civil war was so great that the government considered it imperative, for its own political survival, to insist on holding such young people publicly accountable for their crimes before the SCSL. This request was resisted for months in 2000 by much of the international community during the negotiations leading up to the final text of the SCSL Statute.

[72] Rome Statute, Art. 26.

[73] Ibid., Arts. 8(2)(b)(xxvi), 8(2)(e)(vii).

Finally a compromise of sorts was reached that recognized the special circumstances of dealing with juveniles. The SCSL Statute requires that if any person between the ages of 15 and 18:

> is brought before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.[74]

As for punishment, the statute effectively prohibits imprisonment of such juvenile offenders. In the alternative, the SCSL must choose any one of various rehabilitation options, including "care guidance and supervision orders, community service orders, counseling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies."[75]

No juvenile offender was ever prosecuted before the SCSL. The first SCSL prosecutor, David Crane, decided that he would not bring charges against any person 18 years or younger because the statute's personal jurisdiction only attaches to those "who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."[76] In fact, no teenager fit that description of "greatest responsibility," at least in Crane's view, and therefore there were none to be prosecuted. The small number of defendants who were brought to trial were much older militia and even pro-government leaders.

The SCSL Statute includes another peculiar feature of personal jurisdiction that remained untapped through the life of the Court but is emblematic of a threshold issue that all tribunals confront: should all persons, of whatever rank and on whatever side in the armed conflict or domestic upheaval, be subject to investigation and prosecution by the tribunal? Article 1(2) of the SCSL Statute provides that peacekeepers of UN origin or, if one reads between the lines, from the Economic Community of West African States Monitoring Group (ECOMOG), the West African-led peacekeeping force that operated in Sierra Leone in the 1990s, and "related personnel" should be subject to the primary jurisdiction of their respective sending states for alleged criminal acts, and were thus outside the reach of the SCSL. This approach coincides with status of forces and status of mission agreements that typically provide for a nation's military forces or UN or regional

[74] SCSL Statute, Art. 7(1). [75] Ibid., Art. 7(2). [76] Ibid., Art. 1.

organization peacekeepers deployed into a foreign country's territory to be investigated and prosecuted under the sending state's criminal law system, and not the host state's national courts.

This provision of near-immunity for peacekeepers from SCSL jurisdiction was a controversial one to negotiate in 2000. NGOs, including within Sierra Leone, wanted ECOMOG soldiers held accountable before the SCSL for alleged atrocity crimes committed against Sierra Leone civilians. Instead, the SCSL Statute retained the conventional formula for sending state jurisdiction, particularly where, as in Sierra Leone, the foreign soldiers were on Sierra Leone territory with the consent of the government.

However, Article 1(3) of the SCSL Statute offers one possibility of salvaging SCSL jurisdiction over such peacekeepers: "In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons." UN lawyers sought, during the negotiations of the SCSL Statute, to require only the authorization of the UN Secretary-General to enable the SCSL to exercise jurisdiction over peacekeepers. But the Security Council insisted on retaining control, which itself could not be exercised in this instance unless there was a State request to that effect.[77] Receiving such a request was highly improbable given the reality of sovereign interests over command and discipline of national soldiers. Nonetheless, at least the theoretical exposure of peacekeepers to the jurisdiction of an international criminal tribunal arose in explicit terms in the SCSL Statute. The Security Council never exercised the Article 1(3) power.

Perhaps the most significant common feature among all of the international and hybrid criminal tribunals is their denial of leadership impunity for the commission of atrocity crimes. No one is spared the reach of the law and of accountability provided he or she falls within the personal jurisdiction of the relevant tribunal. Article 27 of the Rome Statute encapsulates the general principle, found in each of the tribunal statutes with similar wording:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[78]

Familiar shields from liability also are removed: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national

[77] See Scheffer, *All the Missing Souls*, 335–6.

[78] Rome Statute, Art. 27(1).

or international law, shall not bar the Court from exercising its jurisdiction over such a person."[79]

These are powerful words that challenge the international community to uphold the law of the relevant tribunal even against the most powerful of political, military, or business leaders implicated in the commission of atrocity crimes. The first president of the Assembly of States Parties of the International Criminal Court, Prince Zeid Ra'ad Zeid al-Hussein of Jordan, aptly remarked in 2007, when speaking of the Rome Statute's Article 27, that:

> Never before in history have leaders sacrificed their customary right to sovereign immunity as have those who lead their countries into union with the International Criminal Court. This act of self-denial, essential for the elimination of impunity for those who would unleash atrocity crimes, is the biggest step forward in law since the Magna Carta.[80]

Many leaders have not been spared the hand of justice for the atrocities they have created in recent decades. Indeed, the tribunals have focused almost exclusively on individuals of great power and egregious criminal character. Impunity will surely prevail for some leading perpetrators of atrocity crimes, but many have been and will be prosecuted for their complicity in or commission of atrocity crimes before the international and hybrid criminal tribunals. Between 1994 and May 2016, a total of 157 such individuals had been convicted by the tribunals.[81]

Conclusion

This relatively brief explanation of how criminal justice has manifested itself in the creation of new international and hybrid tribunals during recent decades has not explained the significant jurisprudence of these institutions. That task would require far more space than afforded in a chapter designed to introduce the reader to the organizational attributes of the tribunals. But the growth of international criminal law since 1993 has been nothing short of phenomenal, as the definitional

[79] Ibid., Art. 27(2). [80] Scheffer, *All the Missing Souls*, 437.

[81] The specific numbers, drawn from the respective tribunal's website as of May 11, 2016, and including those who are convicted but not yet sentenced and those who have appeals pending from trial chamber judgments, are ICTY – 81; ICTR – 61; SCSL – 9; STL – 0; ECCC – 3; and ICC – 3. For tabulations as of September 2013, see Daniel McLaughlin, *International Criminal Tribunals: A Visual Overview* (New York: Leitner Center for International Law and Justice at Fordham Law School, 2013), http://www.leitnercenter.org/files/International%20Criminal%20Tribunals_Reduced.pdf.

and enforcement characteristics of atrocity crimes emerge from the hundreds of cases, typically of leaders, being adjudicated. The scholarship explaining the substantive law of the tribunals has grown exponentially and is available to anyone who desires a deeper understanding. An excellent source with which to begin one's inquiry is *The Oxford Companion to International Criminal Justice*.[82]

Each of the international and hybrid criminal tribunals has relied upon the support of international organizations, particularly the UN, and governments to conduct its operations successfully. In the absence of such support, the tribunals risk failure in the enforcement of criminal justice. So the essential role that the UN or any particular government has played in establishing each of the tribunals is only the beginning of the process of engagement. The occasional resistance to the reality that continued active assistance is required between the relevant body of organizations and governments and the tribunal in question, makes the daily work of the tribunals harder than it should be in a still violent and politically fractured world.

This chapter has sought to accomplish an overview of the historical developments leading to the establishment of the tribunals and why there exist unique provisions and capabilities, as well as some similar approaches to justice, among them. The key role of the UN in forging the new era of international criminal justice has been of historic dimensions and deserves the focus given to it here. The UN will remain deeply engaged for the foreseeable future in this field of endeavor and for good reason. Wars and atrocities doubtless will continue to erupt. No other international organization has the credibility, legal authority, resources, or experience to create, sustain, and support the body of criminal tribunals that have, in the flash of a historical moment, ignited a revolution in the enforcement of international criminal justice.

[82] Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009).