

International Criminal Law

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Abstract

The current system of international criminal law works through international ad hoc tribunals, internationalized or mixed tribunals, the International Criminal Court as well as national courts (military tribunals and ordinary courts). One of the legal consequences of framing an act as an international crime is that it may give rise to what is called universal jurisdiction, which allows any state to try alleged perpetrators, even in the absence of any link between the accused and the state exercising jurisdiction.

The principle that individuals are and can be held criminally accountable for violations of the laws of war dates back to many years. However, it was only after World War II and the Nuremberg and Tokyo trials, set up to judge those German and Japanese military leaders accused of serious crimes during the war, that the idea of individual criminal responsibility for serious breaches of international law gained ground.

Keywords: *“international”, „criminal law”, „ad-hoc tribunals”, „responsibility”*

International criminal law is a subset of public international law, and is the main subject of these materials. While international law typically concerns inter-state relations, international criminal law concerns individuals. In particular, international criminal law places responsibility on individual persons—not states or organizations—and proscribes and punishes acts that are defined as crimes by international law.

International criminal law is a relatively new body of law, and aspects of it are neither uniform nor universal. For example, some aspects of the law of the ICTY are unique to that jurisdiction, do not reflect customary international law and also differ from the law of the ICC. Although there are various interpretations of the categories of international crimes (1), these materials deal with crimes falling within the jurisdiction of international and hybrid courts, including the ICTY, ICTR, SCSL, ECCC, and the ICC. These crimes comprise genocide, crimes against humanity, war crimes and the crime of aggression.(2) They do not include piracy, terrorism, slavery, drug trafficking, or other international crimes (whether or not also criminalized in the national laws of Bi H, Croatia, and Serbia) that do not amount to genocide, crimes against humanity, or war crimes.

International criminal law also includes laws, procedures and principles relating to modes of liability, defenses, evidence, court procedure, sentencing, victim participation, witness protection, mutual legal assistance and cooperation issues. Each of these topics will be addressed in these materials.

International criminal law is a body of international law designed to prohibit certain categories of conduct commonly viewed as serious atrocities and to make perpetrators of such conduct criminally accountable for their perpetration. Principally, it deals with genocide, war crimes, crimes against humanity, as well as the crime of aggression. This article also discusses crimes against international law, which may not be part of the body of international criminal law.

"Classical" international law governs the relationships, rights, and responsibilities of states. Criminal law generally deals with prohibitions addressed to individuals, and penal sanctions for violation of those prohibition imposed by individual states. International criminal law comprises elements of both in that although its sources are those of international law, its consequences are penal sanctions imposed on individuals.

An international crime has been broadly defined as "an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances". (3) Today, international criminal liability exists at least in respect of war crimes, crimes against humanity, genocide and torture. Other crimes such as terrorism-related crimes, enforced disappearances and extrajudicial killings can arguably also be considered international crimes but will not be dealt with here.

War crimes refer to "grave breaches", as specified in the 1949 Geneva Conventions and Additional Protocol I, along with other serious violations of international humanitarian norms applicable in international and non-international armed conflict (see Qualification of armed conflict paper). Despite the criminalization of acts committed in non-international armed conflicts, important differences remain between the laws applicable in such conflicts and those applicable to international armed conflict, as evidenced by the shorter list of war crimes that the ICC can prosecute in the context of non-international armed conflicts (see Article 8 of the 1998 Statute of the ICC).

Crimes against humanity encompass serious attacks on human dignity or a grave humiliation or degradation of human beings, the Rome Statute requires that they be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Such crimes can be committed in time of peace as well as during an armed conflict (see article 7 of the 1998 Statute of the ICC). Genocide covers acts such as murder or serious bodily or mental harm, committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

Torture is generally considered to be an aggravated form of inhuman treatment. Torture is not only prohibited as a war crime or when it is part of a widespread or systematic practice amounting to a crime against humanity but is also prohibited as a single act.

Under common Article 3 of the 1949 Geneva Conventions and the 1998 ICC Statute, torture is outlawed as a war crime or a crime against humanity with regard to both state actors and non-state armed groups.

Following World War II, early efforts to establish a permanent international criminal court to ensure individual accountability for international crimes did not go far as a result of Cold War tensions. Moreover, the system instituted by the 1949 Geneva Conventions to punish ("repress") grave breaches of international humanitarian law through national courts was not put in practice. A breakthrough came in 1993 and 1994 with the establishment by the UN Security Council of two ad hoc international criminal tribunals: for the former Yugoslavia and Rwanda.

Other criminal tribunals with diverse international dimensions have since been set up in Cambodia, East Timor, Kosovo and Sierra Leone, though these courts have also included national legal elements in their establishment and implementation. These "internationalized" or "mixed" tribunals are established with the consent of the state on whose territory the atrocities were committed.

A further landmark in the international justice system occurred in 1998 with the adoption of the 1998 Rome Statute for an International Criminal Court. The ICC, which began to operate in 2002, has a mandate to try cases involving war crimes, crimes against humanity, and genocide. The Court is intended to complement existing national

judicial systems and can exercise its jurisdiction only if national courts are genuinely unwilling or unable to investigate or prosecute such crimes. (Article 17 of the 1998 Rome Statute of the ICC)

The notion of transitional justice comprises a range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice, and achieve reconciliation.⁽⁴⁾ It implies that the role of justice in situations of transition is different from its role at other times. Transitional justice can take many forms. However the importance of justice as a means of transition to peace and reconciliation takes centre stage, whether the means used are punitive such as criminal trials or restorative such as truth and reconciliation commissions. This concept emerged in the mid-1990s and seems to have originated in a desire to return elements of justice to the centre of the transition process, as a precondition for true peace.⁽⁵⁾

As international criminal law is a subset of public international law, the sources of ICL are largely the same as those of public international law. The five sources of ICL used by international and hybrid criminal courts generally are:

- 1) treaty law;
- 2) customary international law (custom, customary law);
- 3) general principles of law;
- 4) judicial decisions (subsidiary source); and
- 5) learned writings (subsidiary source).

The sources of law can sometimes overlap and have a dynamic relationship. For example, a treaty can reflect, become or influence the development of customary international law and vice versa. A judgement of an international court may influence the development of treaty and customary international law. Generally, international and hybrid courts use treaties and custom as the main sources of international criminal law, in addition to their own governing instruments (which may include treaties).⁽⁶⁾

The five sources of ICL roughly correlate with the classic expression of the sources of international law contained in Article 38(1) of the Statute of the International Court of Justice (ICJ):

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) [...] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.(7)

The relevance and importance of these sources in national criminal jurisdictions differ between countries. For example, in some jurisdictions, the direct source of international criminal law is national legislation incorporating ICL. In this instance, treaty and customary international law cannot be used as a direct source. Conversely, some courts can apply treaty law but not customary international law, while in others, custom can be applied as well. Moreover, even if national legislation is the direct source of the applicable law, international criminal law treaties, commentaries on them and international judicial decisions are often used as aids to interpret the national law and are sometimes considered persuasive (not binding) precedent.(8)

Different courts may apply these sources in different ways. For example:

- National courts may not find it necessary to refer directly to international law sources when the content and meaning of the applicable national laws (including incorporated or otherwise applicable international law) are unambiguous.
- National legislation and judicial decisions can be evidence of customary international law—but they are not directly applied by international courts. Indeed, the ICTY Appeals Chamber has held that "domestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings".

At the ICC, the Rome Statute, Elements of Crimes, and Rules of Procedure and Evidence provide the primary sources of law.(9) Treaties and principles and rules of international law are applied once the primary sources have been utilised, and finally, general principles of law, including relevant and appropriate national laws are considered.(10)

References:

[1]Robert Cryer, et al., *An Introduction to International Criminal Law and Procedure* 4 (2D ED. 2010).

[2]Related to the crime of aggression, see ICC ASP RC/Res.6, *The Crime of Aggression*, 11 June 2010; Rome Statute of the International Criminal Court, Art. 8bis (2002).

- [3] US v. List et al., 19 February 1948, Trials of War Criminals Before the Nuernberg Tribunals under Control Council Law No. 10 (Washington, DC: US Government Printing Office, 1950) Vol IX 1230, 1241.
- [4] Report of the Secretary-General to the UN Security Council, "The rule of law and transitional justice in conflict and post-conflict societies", 23 August 2004, UN doc. S/2004/616, § 8.
- [5] T. Pfanner, Editorial, International Review of the Red Cross, Special issue on Truth and Reconciliation Commissions, Vol. 88, No. 862, June 2006.
- [6] Dapo Akande, The Sources of International Criminal Law, in OXFORD COMPANION TO INTERNATIONAL CRIMINAL LAW AND JUSTICE 41-53 (Cassese, et al. eds. 2009); CRYER, supra note 1, at 9-12.
- [7] CRYER, supra note 1, at 64-84.
- [8] Tihomir Blaskic, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeal Chamber, 29 Oct. 1997, ^ 23.
- [9] Rome Statute, Art. 21; see also Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 3 March 2009, p. 128 - 132.
- [10] Al Bashir, PT-C I Decision of 3 March 2009, p. 44.