

CHAPTER 2: INTERNATIONAL CRIMINAL JUSTICE: A MATTER OF NATIONAL IMPORTANCE

International criminal justice is usually perceived as justice delivered by international courts ... Yet there are reasons to believe that the popular equation of international criminal justice with prosecution by international criminal courts is foreshortened, and may be misleading. In fact, the contribution of states to the enforcement of ICL [international criminal law] is crucial. History ... shows notable domestic efforts to address international crimes by means of criminal law – notable in terms of the numbers of trials and convictions as well as in terms of their significance for the development of ICL.

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There is a tendency among various actors engaged in the international criminal justice project to focus on its **international character**, and downplay the role of its domestic underpinnings.

Undoubtedly, the trials in Nuremberg and Tokyo and the UN ad hoc tribunals of the 1990s were crucial moments in the development of the field.² Yet historically domestic prosecutions have had an equally formative influence on the field's development.³ As a result of this overemphasis on international developments as defining moments in the field, often insufficient attention is given to the important role played by domestic prosecutions and institutions in establishing the substantive norms, and in enforcing, international criminal law. In fact, these activities have sometimes been regarded as setbacks in the progression towards "true" international criminal law (i.e. the prosecution of international crimes by international courts).

Truth be told, for much of the 20th century international criminal law was primarily the concern of domestic courts.⁴ In the absence of an international enforcement mechanism for international crimes, "the international community [resorted] ... to the traditional institutional framework of specific treaties or treaty rules aimed at imposing on states the duty to criminalise the prohibited conducts, and organising judicial cooperation for their repression".⁵ In this way, "international law was used as a tool for the co-ordination of the exercise of criminal jurisdiction by states".⁶ This has been termed **indirect enforcement of international criminal law**. This was done primarily through treaty provisions calling for domestic prosecutions of international crimes. For example, the 1948 Genocide Convention contains a provision stating:

*"Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."*⁷

Similarly, all four of the 1949 Geneva Conventions contain similar provisions requiring state parties to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches".⁸

Unfortunately, these provisions remained dormant for the most part during the Cold War and it was only the resurgence of the international justice project in the 1990s, and in particular the formalisation of the principle of complementarity, that brought the responsibility of states back into focus.

Since 1998, in order to give effect to the principle of complementarity, a number of states have amended their laws to allow for the prosecution of core international crimes within domestic courts. South Africa, Kenya, Uganda, Burkina Faso and Senegal have all done so either through specialised Acts of Parliament or through amendments to their criminal codes

Since 1998, in order to give effect to the principle of complementarity, a number of states have amended their laws to allow for the prosecution of core international crimes within domestic courts. In Africa, South Africa, Kenya, Uganda, Burkina Faso and Senegal have all done so either through specialised Acts of Parliament or through amendments to their criminal codes, with a number of other countries in the process of doing the same. In order to facilitate these national prosecutions, international law has evolved to allow states to exercise **universal jurisdiction** over individuals accused of international crimes. Traditionally, states' ability to prosecute and punish crimes (i.e. to exercise criminal jurisdiction) has been limited to crimes that take place within their borders. The exercise of criminal jurisdiction by a state over events that take place outside its borders was limited to circumstances where there was some other link between the state and the crime in question: such as when the accused or the victim of the crime was a citizen of that state. However, under the principle of universal jurisdiction, states can exercise criminal jurisdiction "based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction".⁹ Recently, the African Union (AU) adopted a Model Law on Universal Jurisdiction designed to allow African states "to overcome the constraints in exercising the principle of universal jurisdiction".¹⁰

It is important to note that domestic prosecutions of international crimes have impacted upon the substantive aspects of the field through the development of custom: both in terms of the existence and nature of particular crimes and their general principles. The significance of domestic prosecutions is illustrated by the general principles relied upon and developed further by the Nuremberg Tribunal. While it regarded itself as enforcing existing international law, in fact these principles must have originated from domestic antecedents. As such, the significance of the indirect enforcement of international criminal law norms by domestic courts, together with relevant institutional milestones (such as Nuremberg and Rome) – as evidence of both state practice and *opinio juris* – in the formation of customary international criminal law cannot be overstated.

The "imbalance" in the attention paid to domestic versus international enforcement is not just historical; it continues to colour perceptions as to how the field is configured today, with international criminal justice presented as justice delivered ideally by international courts and only exceptionally by domestic courts. Notwithstanding that skewed perception, the Rome Statute's "**principle of complementarity**" places the emphasis precisely the other way around.¹¹

This "**internationalising impulse**"¹² risks misrepresenting the construction of the Rome system in at least two ways:

- First, it creates the false impression that the domestic prosecution of international crimes is a new phenomenon and downplays the responsibility of domestic courts to prosecute these crimes under the principle of "complementarity". On this reading, there is the risk that complementarity is not regarded as an organising principle of the Rome system, but rather as an unfortunate concession to state sovereignty or as a practical compromise driven by scarce resources.

- Second, and more importantly, if too much weight is placed on the ICC – an institution that is not beyond reproach¹³ – in the application and development of international criminal law, its failings will be projected on to the project as a whole. This has already happened to some extent in an African context, where there is a tendency to confuse and conflate criticisms of the ICC (or the Security Council, in fact) with criticisms of the project generally insofar as Africa is concerned.

In the final analysis, international criminal justice and the application and development of its principles should not be understood as being restricted to the domain of international institutions. Instead, international and national prosecutions, rather than being regarded as alternatives, should be considered to be formally distinct, yet substantively intertwined mechanisms in pursuit of a common goal: the enforcement of international criminal law.

Why Punish International Crimes?

“There is an all too easy assumption that the principle of international criminal justice is accepted. There is a tendency, when talking about international criminal justice, to slip immediately into the technicalities – how to do it, who will do it, when will it be done. The “why” is ignored.

Yet the failure to answer this basic question “why” is the most significant drag on the failure to realise international criminal justice. At the end of the day, the failure to realise international criminal justice, is not only technical, or even mostly technical. There is a failure of will. Unless we are prepared to answer the objections to international criminal justice, we will not see it happen.”

David Matas¹⁴

The process of addressing international crimes is fraught with inherent challenges and political complexities. The international criminal justice project is one with more proponents than critics, however a variety of objections have been raised and, in some instances, used to justify noncompliance. While the enactment of the Rome Statute represents the international community’s acceptance of the need to address international crimes,¹⁵ questions remain as to why international criminal justice is a worthwhile exercise. In fact, for a project that has widespread acceptance and uptake among states, CSOs and society at large, there is surprisingly little consensus (or even consideration given) as to why there is a need to pursue international criminal justice. Perhaps it is because the need for justice in respect of crimes of the scale and nature of those international criminal law addresses appears self-evident. However, there are a number of reasons why the “why” question is important. For one, as the field expands and resources become stretched – particularly in a domestic setting – the question of purpose will become important to the allocation of scarce resources. Therefore it is necessary to consider the reasons commonly advanced for why we punish international crimes.

One commonly asserted reason for prosecuting international crimes is retribution, i.e. that the perpetrators of these crimes deserve to be punished. Similarly, but from the other side of the equation, is the argument that the victims of such crimes deserve to see justice done. Other explanations for why we punish international crimes focus on the effects such trials can have, such as deterrence. More broadly, many present international criminal justice as a more comprehensive means of addressing the challenges faced by societies emerging from conflict, allowing for the promotion and sometimes re-establishment of respect for rule of law and human rights.

Inherent Moral Value

There is an inherent moral value to international criminal justice. The preamble of the Rome Statute notes that the atrocities of the 20th century “deeply shock the conscience of humanity”. There is a demand for legal accountability for such crimes as a means of deterrence from committing similar atrocities in the future.¹⁶ Payam Akhavan argues that:

“Even if wartime leaders still enjoy popular support among an indoctrinated public at home, exclusion from the international sphere can significantly impede their long-term exercise of power ... Political climates and fortunes change, and the seemingly invincible leaders of today often become the fugitives of tomorrow ... The vigilance of international criminal justice will ensure that their crimes do not fall into oblivion, undermining the prospect of an easy escape or future political rehabilitation.”¹⁷

Justice as a Stabilising Force

International criminal justice can serve as a stabilising force in a post-conflict setting. It can facilitate disarmament, demobilisation and reintegration programmes that need to occur in order to create a stable post-conflict society. Furthermore, it is argued that international criminal justice has the ability to support peace processes by removing figures that may threaten to undermine these.¹⁸ In a post-conflict environment, a culture of justice is an important political asset in alleviating the temptation for destabilising practices of vengeance. Moreover, prosecutions under international criminal justice can act as incentives in peace-building efforts beyond the post-conflict society itself. Such prosecutions demonstrate to political leaders in other countries that there isn’t immunity in committing criminal acts.¹⁹

Strengthen Rule of Law

In a post-conflict context, where the political elite has often orchestrated the crimes in question, it is highly unlikely that accountability and rule of law will flourish. Accountability for international crimes underscores the importance of the rule of law, demonstrating that no one is exempt, providing the foundation for a more peaceful, law-abiding society to emerge. International criminal justice is inseparable from the development of standards of the rule of law in domestic legal practice. It often has the ability to serve as a catalyst for broader system rule of law reform²⁰:

“Holding fair criminal trials of those who commit atrocities places the issue of individual legal accountability squarely on the national agenda. These proceedings can be a focal point for networks of local and international non-governmental organizations who advocate for fair justice and accountability under the law. Hybrid and international courts can help empower and build capacity among civil society organizations working on issues of justice and accountability by convening a regular forum to engage with these groups, by offering workshops to local schools and organizations, and by reaching out to populations that might otherwise have limited access to justice or political power.”²¹

The reasons for pursuing international criminal justice, like those for securing domestic criminal justice, are varied. And different stakeholders are likely to offer disparate responses and prioritise differently.

Endnotes

1. F Jessberger "International v National Prosecutions of International Crimes" in A Cassese *The Oxford Companion to International Criminal Justice* (2009), 208.
2. See Chapter 1 of this Report "International Criminal Law: A Brief History".
3. See GJ Simpson's discussion on the so-called "hidden history of international criminal law" in *Law, War And Crime: War Crimes Trials and the Reinvention of International Law* (2007), 40.
4. These crimes were international in the sense that they were of concern to the international community as a whole and the subject of treaties that both created legal obligations to prosecute them and allowed states to exercise extraordinary universal jurisdiction over those who transgressed them.
5. P Gaeta "Internationalization of Prohibited Conduct" in Cassese supra note 1, 64.
6. Id.
7. Article VI, Convention on the Prevention and Punishment of the Crime of Genocide (1948). As Bianchi notes, "even when these [treaties] mention the possibility of establishing an international court (as do the Genocide and Apartheid Conventions) such compacts were drafted under the assumption that the international crimes they cover will be prosecuted by national courts". See A Bianchi "State Responsibility and Criminal Liability of Individuals" in Cassese supra note 1, 28.
8. Article 49, First Geneva Convention; Article 50, Second Geneva Convention; Article 129, Third Geneva Convention and Article 146, Fourth Geneva Convention (all 12 August 1949). Further, article 85(1), Additional Protocol I incorporates this provision by reference. These provisions in effect place an obligation on states parties to prosecute or extradite offenders who commit grave breaches.
9. Principle 1(1), The Princeton Principles on Universal Jurisdiction (2001). See also R O'Keefe "Universal Jurisdiction: Clarifying the Basic Concept" *Journal of International Criminal Justice* 2 (2004) 735.
10. AU Press Release Number 037/2012, "The African Union has a Clear and Unequivocal Mandate to Fight Impunity" 15 May 2012. The model law is available for download at <http://www.ejiltalk.org/wp-content/uploads/2012/08/AU-draft-model-law-UJ-May-2012.pdf>. Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, June 30 – July 1 2008, Doc. Assembly/ AU/14 (XI), Assembly/ AU/Dec. 199(XI). See also C Jalloh "Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction" *Criminal Law Forum* (2009) 21, 1 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1526622.
11. In fact, under the Rome Statute the ICC will only be able to admit a case before it (where the other jurisdictional bases of nationality and territoriality are present) if the state party concerned is unwilling or unable to prosecute the offender nationally. See Preamble and article 17, Rome Statute.
12. Simpson supra note 3, 30.
13. See generally F Megret "Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project" *Finnish Yearbook of International Law* 12 (2002) 195 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156086.
14. D Matas "The Case for International Justice" Revised remarks prepared for a seminar on Afghanistan's obligations under the Rome Statute of the International Criminal Court, Kabul, Afghanistan (4 March 2006) available at <http://www.cciij.ca/resources/papers/case-for-international-justice.pdf>.
15. Open Society Foundation "International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors and Implementers" (2011), 22 available at <http://www.opensocietyfoundations.org/sites/default/files/international-crimes-local-justice-201111128.pdf>.
16. Id 22.
17. P Akhavan "Beyond Impunity: Can Internationals Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* (2001), 7.
18. Open Society Foundation supra note 15, 26.
19. Akhavan supra note 17, 8.
20. Open Society Foundation supra note 15, 28.
21. J Stromseth "Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?" *Georgetown Law the Scholarly Commons* (2009) 87, 96.