

CHAPTER I: INTRODUCTION

International criminal law deals with the darkest side of humanity. [T]he magnitude of this task is such that there is no single response to the multifarious aspects of international criminality.

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An Overview of the Report

International criminal law, its application and enforcement plays out in an environment where law, politics, international relations, diplomacy and justice intersect. It is a playing field that involves many actors – governments, regional organisations, international institutions, victims and civil society.

Positive Reinforcement – Advocating for International Criminal Justice in Africa assesses this playing field as it manifests itself in an African context and from the perspective of African civil society organisations (CSOs). The Report highlights the role and potential of CSOs to secure principled support for international criminal law in Africa. The Report explores the challenges that African CSOs face and demonstrates how these can be overcome both domestically and regionally. It seeks to be a resource, guide and advocacy tool, understanding that African civil society will need to take leadership in the development of international criminal justice on the domestic level and regionally. Not only does the Report seek to provide CSOs with the requisite skills to assume such leadership but it introduces them to a network of organisations already supplying such leadership, working tirelessly to see justice done.

The objectives of this Report are three-fold:

- First, to provide an introduction to the fundamental elements of international criminal law and its status in Africa, so as to provide CSOs with an appreciation of not only international criminal law but the dynamic and varied components of Africa's relationship with the international criminal justice project.
- Second, to highlight the areas in which African CSOs should focus their efforts – cooperation and complementarity.
- Third, to highlight initiatives undertaken by CSOs and identify the lessons learnt in order to demonstrate the role and potential of such organisations to enforce international criminal justice in Africa. The Report concludes with recommendations on what civil society can and should do to further advance the international criminal justice project in Africa so as to ensure justice for victims, and an end to the cycle of impunity.

The Report begins by setting the scene and providing an overview of international criminal law. It goes on to discuss the **three legs of international criminal justice** – states, the International Criminal Court (ICC) and CSOs – in more detail, demonstrating how the continued support and engagement of each is vital for the project's success.

The first leg is the states themselves, on whom the primary responsibility rests in terms of investigating and prosecuting international crimes, and which also play a vital support role in respect of the work of the ICC.



The second leg is the ICC, the “revolutionary institution” established at the turn of the century to dispense justice for international crimes when states are unwilling or unable to do so themselves.

To contextualise these developments, the Report considers **the state of play of international criminal justice in Africa**. After recalling the important and continuing role played by African states in the development of the current international criminal justice system, attention then turns to deconstructing the somewhat challenging relationship between this system (and its flagship institution, the ICC) and African states. Having done so, the claim that the ICC is biased against African states is addressed.

The report then goes on to consider **the role of civil society – the third leg** of the international criminal justice system – which has and continues to play a vital role in establishing and supporting the legal, institutional and political frameworks necessary for the successful pursuit of international justice both internationally and domestically.

Both the domestic and international avenues of enforcement require considerable resources and political will. The Report also considers the role that civil society has played in building the legal architecture, human capacity and political will within states in order to ensure that these obligations are met.

Moving forward, all stakeholders will have to work towards the pursuit of international criminal justice through two distinct but related processes: cooperation and “positive complementarity”. The report demonstrates the realisation of these processes through case studies of best practice, with a strong focus on the role of CSOs.

Cooperation: obligations placed on states parties to ensure cases before the ICC proceed smoothly. States parties are required to establish procedures to facilitate these obligations.

In respect of **cooperation**, the Report focuses on the steps taken (and not taken) by states to cooperate with the ICC when asked to do so in relation to specific cases. In particular, it looks at the failures of certain African states parties to assist the ICC in arresting the president of Sudan, Omar al-Bashir (Bashir), and the efforts on the part of CSOs to encourage states to live up to their obligations.

Complementarity: the use of domestic courts as courts of first instance in the prosecution of international crimes. The Rome Statute envisions the role of the ICC as a court prosecuting international criminals only when national jurisdictions are unwilling or unable to do so. This places weighty obligations on states parties to the Rome Statute to undertake such prosecutions.

In respect of **positive complementarity**, where domestic courts are required to do the heavy lifting, the Report discusses a number of different examples in which civil society has supported, and at times cajoled, states to make good on their obligations through innovative and novel approaches: including the Zimbabwe Torture Case in South Africa, the Mobile Gender Courts in the Democratic Republic of Congo and the Hissène Habré trial in Senegal.

The Report also underscores the importance of community outreach to ensure that African citizenry understands the purpose and importance of international criminal justice, through a case study in Kenya.

It is hoped that this publication will serve as a catalyst for the development of further national and regional strategies that will result in Southern African and African CSOs acting in concert to reverse the tide of impunity for the perpetrators of international crimes.

War crimes

Occur during **armed conflicts**.
Serious violations of **international humanitarian law**.

Examples:

- The unlawful targeting of civilians and wounded;
- The severe mistreatment of both soldiers and civilians;
- The use of prohibited methods of warfare such as the excessive use of force, the use of human shields and hostage-taking;
- The use of prohibited means of warfare such as weapons that cause unnecessary suffering.

Crimes against humanity

Occur during **peace or armed conflicts**.
Acts committed against a civilian population as part of a widespread or systematic attack.

These can include:

- Murder;
- Torture;
- Sexual violence;
- Deportation;
- Enslavement;
- Enforced disappearances.

Genocide

Occur during **peace or armed conflicts**.
Acts committed with the intent to destroy in whole or in part, an ethnic, racial, religious, or national group.

This includes:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

International Criminal Law – The Basics

What is international criminal law?

The term “**international criminal law**” is used to describe the body of rules that enables the prosecution of **international crimes** by both domestic and international courts. Today, international criminal justice is one of the most highly developed fields of international law and a key feature of international and domestic politics. Its rise to prominence is testament to the global community’s commitment to combatting impunity for the most serious human rights violations and atrocities, wherever they occur.

What are international crimes?

There are three core international crimes: war crimes; crimes against humanity and genocide (see sidebar.)

International Criminal Law A Brief History

The first international prosecution of international crimes took place after World War II, when the International Military Tribunal in Nuremberg was established by the Allied powers (Britain, France, the United States and Russia) in 1945 to try the major war criminals of the European Axis for violations of the laws of war, crimes against the peace and crimes against humanity². The Nuremberg trial had a profound effect on the development of international criminal law, such that many consider it to represent the “birth certificate”³ of the discipline. It was followed in 1946 by the International Military Tribunal in Tokyo, set up “for the just and prompt trial and punishment of the major war criminals in the Far East”.⁴

Following the Nuremberg and Tokyo tribunals, the polarisation of the international community as a result of the Cold War meant that the next international criminal courts were established nearly half a century later. However, the precedent set by Nuremberg and treaties adopted in its aftermath – chiefly the four Geneva Conventions of 1949 and the 1948 Genocide Convention – placed the responsibility on states to ensure that crimes against humanity, genocide and war crimes did not go unpunished.

In the 1990s, international criminal justice underwent something of a revival. First, the United Nations (UN) Security Council created two ad hoc tribunals to prosecute international crimes committed in the former Yugoslavia (the International Criminal Tribunal for the former Yugoslavia, or ICTY) and during the 1994

1945

International Military Tribunal at Nuremberg which tried the Nazi and other Axis powers for crimes committed during the Second World War. This tribunal is considered to represent the birth certificate of international criminal law.

1948

A Genocide Convention adopted which recognised genocide as a crime under international law, and that international cooperation is required to prevent it.

1993

International Criminal Tribunal for the former Yugoslavia established by the UN Security Council under Chapter VII of the UN Charter – which tasks the Council with the maintenance of international peace and security – to prosecute international crimes committed in the former Yugoslavia.

1998

UN Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court held. This was the result of a draft statute completed by the International Law Commission in 1994.

1 JULY 2002

The Rome Statute entered into force after Senegal was the first country to ratify it.

2007

A hybrid tribunal, the Special Tribunal for Lebanon, was established by an agreement between the UN and the Lebanese Republic to prosecute those responsible for the assassination of Prime Minister Rafiq Hariri, and attacks between 1 October 2004 and 12 December 2005 that were related to the assassination.

1946

International Military Tribunal at Tokyo which tried the military leaders responsible for crimes committed in the Far East during the Second World War.

1949

Three earlier Geneva Conventions adapted, and a fourth adopted which established international law standards for the treatment of military personnel, civilians and prisoners during wartime.

1994

International Criminal Tribunal for Rwanda established by the UN Security Council to prosecute international crimes committed during the Rwandan Genocide.

2002

A hybrid tribunal, the Special Court for Sierra Leone, was established by the government of Sierra Leone and the UN to try those responsible for serious violations of international humanitarian law and Sierra Leonean law since 30 November 2006.

2003

A hybrid tribunal, the Extraordinary Chambers in the Courts of Cambodia, was established after an agreement between the Royal Government of Cambodia and the UN to try serious violations of Cambodian Penal Law, international humanitarian law and custom and violation of international conventions recognised by Cambodia between 17 April 1975 and January 1979.

Rwandan genocide (the International Criminal Tribunal for Rwanda, or ICTR). These ad hoc tribunals were established by the Security Council acting under Chapter VII of the UN Charter, which tasks the Council with the maintenance of international peace and security. These were followed by a number of “hybrid tribunals”, such as the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon. These courts are hybrid because they are neither purely domestic nor international; rather their founding documents, jurisdiction, composition and funding are a mixture of the two. At the same time, the project to establish a **permanent international criminal court** – which began well over a century ago in 1872 when Gustave Moynier (one of the founders of the International Committee of the Red Cross) proposed the establishment of an international tribunal to punish violations of the Geneva Convention of 1864 – was revived.⁵ In 1994, the International Law Commission completed a draft of what would become the Rome Statute, which led the UN General Assembly to convene the UN Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court in Rome from 15 June to 17 July 1998 to negotiate and agree upon the final text of a treaty establishing a permanent international court. As a result of these marathon efforts, on 17 July 1998, 120 states adopted the Rome Statute of the International Criminal Court (Rome Statute).⁶ Senegal was the first state to ratify the Statute, which entered into force on 1 July 2002.

1989
END OF THE
COLD WAR

Where does International Criminal Law Come From? Sources of International Criminal Law

International criminal law is a subset of public international law and the general rule is that, like all international law, its development, application and enforcement finds its origins in:

- International conventions, establishing rules expressly recognised by signing states;
- International custom, as evidence of a general practice accepted as law;
- General principles of law;
- Judicial decisions and academic writings.

TREATY LAW

Agreements between states criminalising/prohibiting certain conduct:

- Rome Statute of the International Criminal Court;
- The Geneva Conventions and Additional Protocols;
- The Convention on the Prevention and Punishment of Genocide;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- The Pact on Security, Stability and Development in the Great Lakes Region and its Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity

CUSTOMARY INTERNATIONAL LAW

Whereas treaties only bind those states that are party to them, customary international law is binding on all states.

A customary international law exists if two conditions are met:

- It must reflect an established and accepted state practice (usus). This refers to actual behaviour of states in relation to a particular practice, assessed against the following:
 - Duration;
 - Consistency;
 - Repetition; and
 - Generality
- States accept to be bound by the rule or law in question (opinio juris)

JUDICIAL DECISIONS

These include decisions of Tribunals such as the:

- ICTY;
- ICTR;
- SCSL
- ICC

Judicial pronouncements of international criminal tribunals provide content to obligations and develop and inform the criminal law norms and principles that are found in treaties and those that have been elevated to customary international law norms.

Through the agreement of international conventions and treaties dealing with international crimes; the establishment, and resultant jurisprudence, of the ICTY and the ICTR; and the coming into force and the establishment of the first permanent international criminal court (ICC) it is clear that the international community has placed a premium on the punishment of international crimes, to the extent that binding obligations on states to combat impunity for international crimes exist under customary and treaty law.

These efforts have led to acceptance that genocide, crimes against humanity and war crimes are crimes under customary international law.

These sources of law share a dynamic relationship. Overlaps in respect of these sources of law exist. Customary international law can originate in treaties and treaties can constitute evidence of custom. Treaties can aid the interpretation of custom. Often the same rule will be found in treaty law and customary international law. Treaties may codify existing customary law. A judgment may influence the development of a treaty and customary law.

Endnotes

1. A Cassese "The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality" in C Romano, A Nollkaemper & JK Kleffner (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, And Cambodia* (2004) 1, 13.
2. Article 1, International Military Tribunal (1945).
3. G Werle *Principles of International Criminal Law* (2005), 6.
4. Article 1, International Military Tribunal for the Far East Charter (1946).
5. G Moynier "Note Sur la Création d'une Institution Judiciaire Internationale Propre à Prévenir et à Réprimer les Infractions à la Convention de Genève" Bulletin International des Sociétés de Secours aux Militaires Blessés (1872) Comité International 11, 122.
6. Seven voted against the final text, with 21 abstentions.