CHAPTER 22
INTERNATIONAL CRIMINAL LAW

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INTRODUCTION

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BOX 22.1 Required Knowledge and Learning Objectives

Required knowledge: Subjects and Actors in International Law; Law of Armed Conflict; International Human Rights Law

Learning objectives: Understanding the notion, foundation, purpose, and importance of international criminal law.

BOX 22.2 Interactive Exercises

Access *interactive exercises for this chapter*[1] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 22.1 QR code referring to interactive exercises.

A. INTRODUCTION

International criminal law (ICL) refers to principles and rules of international law for the prevention and repression of international crimes.[2] It is a relatively new branch of

1 https://openrewi.org/en-projects-project-public-international-law-international-criminal-law/.

2 On international crimes, see Fiskatoris, § 22.1, in this textbook.

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international law, which owes its very foundation to the emergence of the principle of individual criminal responsibility in international law.

Under classical international law, with States[3] as the main international actors, individuals[4] could not be held accountable, in the same way as they could not claim international rights. The origin of the principle of individual criminal responsibility lies in the idea that in addition to States, individuals may be held responsible for serious violations of international law. This implies that certain international obligations (the prohibition of war crimes, crimes against humanity, genocide, torture, aggression, and others) are not only addressed to States, but also to individuals. ICL emerged rapidly in the aftermath of World War II and underwent tremendous developments during the post-1990 years to become a body of international law which plays an important role in upholding fundamental values shared by the international community.

From a normative point of view, ICL includes both substantive and procedural rules concerning the prosecution of international crimes, which are examined in the subsequent chapters. Substantive rules indicate the prohibited criminal activities and the circumstances (excluding criminal responsibility). They also either authorise States, or impose upon them the obligation, to prosecute and punish persons accused of such criminal acts. Procedural rules govern international proceedings before international courts and tribunals, from the investigative and prosecutorial phases to the various stages of international trials.[5]

B. THE PRINCIPLE OF INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW

The notion of international crimes refers to those criminal activities, harmful to values that transcend the interests of individual States, in relation to which a need for repression arises in the international community. Therefore, an international crime can be defined as a criminal activity of an individual in relation to which the international community organises some form of international repression.

The first and most important consequence that international law attaches to the commission of an international crime is the criminal responsibility of the individual who commits it. This is the core of the principle of individual criminal responsibility for international crimes. The principle of individual criminal responsibility also operates – where necessary – as an exception to the general rule according to which the activity carried out in the name and on behalf of the State is attributable to the latter and not to the individual concerned (principle of individual criminal responsibility for

3 On States, see Green, § 7.1, in this textbook.

4 On individuals as actors in international law, see Theilen, § 7.4, in this textbook.

5 On international and domestic prosecution of international crimes, see Viswanath, § 22.2, in this textbook.

international crimes committed by State-organs). The rationale for this exception could not be explained more effectively than with the words of the Nuremberg Tribunal:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[6]

Hence, when an international crime is committed by an individual acting on behalf of the State or the conduct of an individual is attributable to a State, the principle of individual criminal responsibility constitutes an exception to the general immunities of State organs under international law,[7] including persons in leadership positions (both military and civilian). This was first affirmed after WWI with reference to war crimes and then reiterated in numerous subsequent instruments, and it is now part of customary international law.[8] It applies equally to all persons without any distinction based on official capacity before international criminal courts and tribunals (see e.g. article 27 of the Statute of the International Criminal Court). For serving heads of States, however, customary international law keeps open the possibility of impunity in limited circumstances.

As in national legal systems, also in international law, crimes consist of two elements: a conduct, that is an act or omission contrary to a substantive rule prohibiting or imposing a specific behaviour (*actus reus* [Latin: 'criminal act']), and a mental element, that is a state of mind directed to or linked to the commission of the criminal act (*mens rea* [Latin: 'criminal intent']). International crimes are often committed by a plurality of persons with the same (co-perpetration) or different modalities of participation (joint criminal enterprise). A person may only be held criminally responsible if they are somehow culpable for the commission of the crime. Furthermore, according to the principle of legality of crimes, only the law can define a crime and prescribe a penalty (*nullum crimen* [Latin: 'no crime'], *nulla poena sine lege* [Latin: 'no punishment without law').

I. COEXISTENCE OF INTERNATIONAL CRIMINAL LAW AND STATE RESPONSIBILITY

Individual criminal responsibility arises alongside international State responsibility when the crime is committed by a State-organ and/or is attributable to a State under any of the rules on the attribution to States of internationally wrongful acts.[9] In this respect, a basic distinction can be drawn between crimes committed by private individuals, crimes generally or necessarily committed by State organs, and crimes that are likely to be committed by individuals either in their private or official capacity.

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6 Nuremberg Tribunal, judgment of 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*.

7 On State immunity, see Walton, § 11, in this textbook.

8 On customary international law, see Stoica, § 6.2, in this textbook.

9 On State responsibility, see Arévalo-Ramírez, § 9, in this textbook.

The most ancient category of crimes which are always or generally committed by State organs, are war crimes. Genocide and crimes against humanity also originate, as a rule, from State conduct, either in the sense that their authors are State organs or because they are the result of policies or choices indirectly favoured or supported by a State. The commission of one of these international crimes implies the commission of an internationally wrongful act by the State of which the individual is an organ or to which the conduct in question is attributable, according to the general rules of State responsibility.[10] The need remains, however, to keep the two forms of responsibility distinct.

II. ENFORCEMENT MECHANISMS

ICL possesses two main enforcement mechanisms: the so-called direct enforcement system and the indirect enforcement system of ICL. The establishment of an international criminal court or tribunal relates to the direct enforcement system of ICL. The prosecution and punishment of international crimes takes place before international courts or tribunals, directly at the international level. Indirect enforcement mechanisms refer to domestic prosecution and punishment before national courts. In this case, criminal repression is organised by national jurisdictions: States have the power and sometimes the duty to prosecute and, where appropriate, punish perpetrators of international crimes. In relation to core crimes (genocide, crimes against humanity and war crimes), the principle of universal jurisdiction[11] provides for the possibility – if not the obligation – of repression by any State, regardless of the place where the crimes were committed or the nationality of the suspect. Another system is enforcement by the so-called internationalised or hybrid (mixed) tribunals, which combine features of international and national tribunals.[12]

C. THE HISTORICAL EVOLUTION OF INTERNATIONAL CRIMINAL LAW

I. BEFORE WORLD WAR II

One of the first and most notable manifestation of the principle of individual criminal responsibility is the Treaty of Versailles, which set the terms ending World War I. The victorious Allies – Britain, France, and Italy and the United States – ultimately agreed to investigate and prosecute the defeated German Emperor Kaiser Wilhelm II. Article 227 of the Treaty of Versailles stated that Kaiser Wilhelm would be tried by an international court for the 'supreme crime against international morality and the sanctity of treaties'. The provision was unprecedented in at least two important respects. First, the very notion of holding a leader responsible for crimes committed in

10 See articles 4–11 of the Draft Articles on State Responsibility for International Wrongful Acts.

11 On jurisdiction, see González Hauck and Milas, § 8, in this textbook.

12 On hybrid tribunals, see Viswanath, § 22.2, in this textbook.

conflict was unprecedented. It was also the first time in history that States imagined the possibility of an international tribunal for the prosecution of an individual.[13]

II. FROM NUREMBERG TO THE HAGUE

The international prosecution of crimes against peace began with the Nuremberg and Tokyo trials of the major war criminals following WWII.

1. The Nuremberg Trials

The Nuremberg trials were a series of 13 trials carried out in Nuremberg, Germany, between 1945 and 1949 by a tribunal established under the London Charter of the International Military Tribunal (IMT) by the Allies France, Great Britain, the former Soviet Union, and the United States. The Tribunal was endowed with the power to try and punish persons who, acting in the interest of the European Axis countries, committed any act falling in the three categories of crimes defined in article 6 of the London Charter: crimes against peace (including planning, preparing, starting, or waging wars of aggression or wars in violation of international agreements); war crimes (including violations of customs or laws of war, improper treatment of civilians, and prisoners of war); and crimes against humanity (including murder, enslavement, or deportation of civilians or persecution on political, religious, or racial grounds). Article 7 stipulated that even heads of State could not claim immunity.

The best known of the Nuremberg trials was the Trial of Major War Criminals, held from 20 November 1945 to 1 October 1946. Although Nazi leader Adolf Hitler (1889–1945) committed suicide and was never brought to trial, 24 individuals, including Nazi Party officials and high-ranking military officers, were indicted along with six Nazi organisations determined to be criminal. The IMT found all but three of the defendants guilty. Twelve of the accused were sentenced to death, one *in absentia* (Latin: 'in absence'), and the rest were given prison sentences ranging from ten years to life imprisonment.

The Nuremberg trials were controversial even among those who wanted punishment for the Nazis' main criminals. The main criticism, and the most common defence strategy, was that the crimes defined in the London Charter criminalised actions committed before the relevant provisions were drafted. Another criticism, and defence, was that the trial was a form of victor's justice – the Allies were applying a harsh standard to crimes committed by Germans and leniency to crimes committed by their own soldiers. On the other hand, the Nuremberg Tribunal itself responded that the defendants knew that what that they were doing was wrong and therefore the principle of legality, as a principle of justice, was respected.

2. Tokyo Trials

The IMT's trials and findings set a step forward for the development of international criminal law. They were paralleled by the trials of the leaders of the Empire of Japan

13 William Schabas, *The Trial of the Kaiser* (OUP 2018).

in Tokyo by the International Military Tribunal for the Far East (IMTFE). Besides prosecuting Japanese leaders, the IMT supplied a useful precedent for future prosecution of international crimes by national courts, most notably the 1961 trial of Nazi leader Adolf Eichmann by the Supreme Court of Israel.[14]

3. Developments After Nuremberg and Tokyo

The experience of the IMT and the IMTFE inspired the Convention on the Prevention and Punishment of the Crime of Genocide and the Universal Declaration of Human Rights, adopted by the United Nations General Assembly (UNGA) on 8 and 10 December 1948, respectively, as well as the four Geneva Conventions on the Laws and Customs of War adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War. The UNGA entrusted the International Law Commission (ILC) with the task of drafting a Statute for the establishment of an international criminal tribunal, together with a code of crimes, the so-called Code of Crimes Against Peace and Security of Mankind. The two projects were interrelated, but the failure of the latter brought about a halt to the works for draft statute as well. The Cold War prevented any progress.

4. International Criminal Courts and Tribunals

It was only in 1989 that the UNGA asked the ILC once again to draft a statute for the institution of an international criminal court. The end of the Cold War also made it possible to establish two *ad hoc* (Latin: 'for this purpose`) international criminal tribunals as subsidiary organs of the UN Security Council (UNSC): the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). During its mandate, which lasted from 1993 to 2017, the ICTY prosecuted those responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, in accordance with UNSC Resolution 827 and the Statute annexed thereto.[15] The ICTR, established by UNSC Resolution 955,[16] prosecuted those considered most responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States in 1994.

The ILC eventually approved a draft statute for an international criminal court in 1994, which provided the basis for the further works which were entrusted to the Preparatory Committee (Prep Com), an *ad hoc* group of people established by the General Assembly. The draft of the Prep Com was the basis of the further negotiations, which took place in Rome in 1998 and finally resulted in the adoption by 120 States of the Statute of the International Criminal Court (ICC)[17] on 17 July 1998. The Rome Statute entered into force on 1 July 2002, making the ICC the first permanent international criminal court.

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14 Randolph L Braham, *The Eichmann Case: A Source Book* (World Federation of Hungarian Jews 1969).

15 UNSC Res 827 (25 May 1993) UN Doc S/RES/827.

16 UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

17 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

The ICTY and the ICTR terminated their mandates on 31 December 2017 and 2015, respectively, following the establishment of the International Residual Mechanism for Criminal Tribunals by the UNSC to ensure that the closure of the two pioneering *ad hoc* tribunals does not open the way for impunity.

D. CONCLUSION

Built heavily on the law of armed of conflict,[18] at its inception, for the identification of the violations which give rise to individual criminal responsibility, ILC continues to draw significantly upon international humanitarian law and international human rights law[19] – the latter also in relation to the fundamental rights of suspects, accused persons, victims and witnesses, and the basic safeguards of a fair trial. Albeit a relatively new branch of international law, ICL has become of prominent importance with the establishment of the ICC in 1998 and in subsequent years. And it remains complementary to other branches of international law, in particular, human rights and international humanitarian law.

BOX 22.3 Further Readings and Further Resources

Further Readings

- A Cassese and P Gaeta, *Cassese's International Criminal Law* (3rd edn, OUP 2013)
- R Cryer, D Robinson, and S Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn, CUP 2019)

Further Resources

- Judgment at Nuremberg, Film Directed by S Kramer (1961) <www.youtube.com/watch?v=50fR251R_Ck> accessed 20 August 2023
- Nuremberg, Film Directed by Y. Simoneau (2000) <www.youtube.com/watch?v=f7p7DDihpvQ> accessed 20 August 2023
- RJ Golsan and SM Misemer (eds), *The Trial That Never Ends: Hannah Arendt's Eichmann in Jerusalem in Retrospect* (University of Toronto Press 2017)
- S Minerbi, *The Eichmann Trial Diary. An Eyewitness Account of the Trial that Revealed the Holocaust* (RL Miller, trans., Enigma Books 2011)

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18 On the law of armed conflict, see Dienelt and Ullah, § 14, in this textbook.

19 On international human rights law, see Ciampi, § 21 (and the following sub-chapters), in this textbook.

§ 22.1 INTERNATIONAL CRIMES

TAXIARCHIS FISKATORIS

BOX 22.1.1 Required Knowledge and Learning Objectives

Required knowledge: International Criminal Law; Law of Armed Conflict

Learning objectives: Understanding the foundations and purpose of international criminal justice; the most prominent international crimes; the content of international crimes and its dynamic evolution in time; and the elements of international crimes to practical situations.

BOX 22.1.2 Interactive Exercises

Access *interactive exercises for this chapter*[20] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 22.1 QR code referring to interactive exercises.

A. INTRODUCTION

A conceptual definition of international crimes does not exist in international law. The constitutive instruments of international or internationalised courts and tribunals enumerate their subject matter jurisdiction without explicitly labelling the punishable offences as international crimes. The jurisdictional remit of such institutions cannot be considered a substitute for a comprehensive international criminal code, which does not exist. The preamble to the Rome Statute of the International Criminal Court[21] (Rome Statute or ICC Statute) implies that the International Criminal Court's (ICC) jurisdiction does not cover all 'international crimes'.[22] Scholars usually distinguish between 'international crimes *lato sensu*' (Latin: 'in the broad sense') and 'international

20 https://openrewi.org/en-projects-project-public-international-law-international-criminal-law/.

21 On the International Criminal Court, see Viswanath, § 22.2, in this textbook.

22 Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court* (TOAEP 2017) 2 fn 7.

crimes *stricto sensu*' (Latin: 'in the narrow sense').[23] International crimes *stricto sensu*, also known as *core crimes*, coincide to a great extent with Rome Statute crimes.

B. ROME STATUTE CRIMES

The ICC Statute qualifies the offences within the jurisdiction of the ICC as 'the most serious crimes of concern to the international community as a whole'.[24] All Rome Statute crimes have a similar structure, which consists of a catalogue of offences, and an introductory sentence about their contextual elements. The offences may overlap, but the contextual elements distinguish the crimes from one another.

BOX 22.1.3 Example: Overlapping Offences

A murder is an ordinary crime, which can take the form of a war crime, a crime against humanity, or genocide, depending on what contextual elements are fulfilled.

Additionally, according to article 30, 'unless otherwise provided', the mental element of 'intent and knowledge' applies to all offences within the ICC's ambit.

I. WAR CRIMES

1. The Nature of War Crimes

War crime is the oldest category among the four Rome Statute crimes. Individual accountability for war crimes has its origins in the process of progressive criminalisation of customary and conventional rules of the law of armed conflict.[25] War crimes generally pertain to the use of prohibited weapons and methods of warfare, and to attacks on protected persons or property.

2. The Underlying Offences

In its 1951 Draft Code of Offences against the Peace and Security of Mankind, the International Law Commission (ILC) commented that war crimes were relevant not only in cases of declared war, but also in 'any other armed conflict which may arise between two or more States, even if the existence of a state of war is recognized by none of them'.[26] The content of war crimes was further elaborated by the ILC in its review

23 On this distinction, see Ciampi, § 22, in this textbook.

24 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 preamble.

25 On the law of armed conflict, see Dienelt and Ullah, § 14, in this textbook.

26 Draft Code of Offences against the Peace and Security of Mankind (1957) 2 YILC 1951 134 Comment 11 to article 2.

of the Draft Code, and in the Statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). All of them confirmed that 'grave breaches' of the Geneva Conventions give rise to individual criminal accountability. Nowadays, war crimes are incorporated into article 8(2) of the ICC Statute.

The enumeration of war crimes in the context of non-international armed conflicts is modest in comparison to that of war crimes in international armed conflicts. For example, the war crime of 'intentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment' can only be prosecuted by the ICC if linked to an international, and not an internal conflict.[27] However, through the amendment procedure of the Rome Statute, the number of punishable war crimes committed in non-international armed conflicts incrementally converges with that of war crimes perpetrated in international conflicts.

3. The Contextual Elements

In its first case, the ICTY clarified that the prerequisite for war crimes, the existence of an armed conflict, was fulfilled whenever 'there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[28] That meant, essentially, that war crimes can be committed in both international and internal armed conflicts. A mere resort to force, such as in occasions of riots, does not meet the required level of intensity of 'protracted armed violence', and thus criminal conduct in such contexts does not constitute war crimes.

However, even in the event of an armed conflict, not every offence is necessarily a war crime. The perpetrator's ability or decision to commit the offence, the purpose for which it was committed, or the manner in which it was committed must be substantially linked to the conflict.[29] Furthermore, the perpetrator must fulfil the threshold of the mental element. For instance, the accidental destruction of historic monuments may not qualify as a war crime, but 'intentionally directing attacks' against them, provided they are not used for military purposes, most probably will.[30]

II. GENOCIDE

1. The Material Element

Genocide was explicitly recognised in the 1948 Genocide Convention as a 'crime under international law' whether committed in time of war or peace.[31]

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27 Article 8(2)(b)(iv) Rome Statute.

28 *ICTY,* Prosecutor v Duško Tadić (AC Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 70.

29 *ICTY*, Prosecutor v Dragoljub Kunarac et al. *(AC Judgement) IT-96–23&IT-96–23/1-A (12 June 2002)* para 58.

30 Article 8(2)(b)(ix) and 8(2)(e)(iv) Rome Statute.

31 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; see also UNGA 'The Crime of Genocide' (11 December 1946) UN Doc A/Res/96(I).

According to article 2 of the Genocide Convention and article 6 of the Rome Statute:

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent births within the group;
> (e) forcibly transferring children of the group to another group.

The material element of genocide may take the form of any one of five alternative prohibited acts, directed against any one of four alternative protected groups. The ICTR has attempted to define the four protected groups based on scientific criteria.[32] However, jurisprudence has progressively accepted that whether one belongs to a protected group does not exclusively depend on objective facts, but also on the subjective perceptions of the victims or the perpetrators.[33] In any case, prohibited acts committed against other groups, such as political, social, or gender groups, do not fall within the definition.

Genocide is not confined to acts of killing. Echoing the judgment of the first international genocide trial in history, the ICC Elements of Crimes accept that, among others, 'torture, rape, sexual violence or inhuman or degrading treatment' may constitute underlying genocidal offences as causing serious bodily or mental harm.[34]

2. The Mental Elements

The legal definition of genocide consists of two mental elements. First, the general intent to execute one of the underlying offences of the material element. However, genocide's distinctive feature is the second and more stringent mental element of a specific intent (Latin: '*dolus specialis*') of the perpetrator to destroy 'in whole or in part' a protected group 'as such'.[35] The actual destruction of the group is not required. The wording 'in part' suggests that even the intention to destroy a small but 'substantial part' of the group, not only in the sense of numeric size but also of emblematic prominence, counts as genocide.[36] It is usually 'difficult, even impossible' to unequivocally establish genocidal intent, especially when there are other reasonable explanations.[37]

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32 *ICTR*, The Prosecutor v. Jean-Paul Akayesu *(TC Judgement), ICTR-96–4-T (2 September 1998)* paras 512–515.

33 See Carola Lingaas, 'Defining the Protected Groups of Genocide through the Case Law of International Courts' (2015) ICD Brief 18, 12/2015 <www.internationalcrimesdatabase.org/upload/documents/20151217T122733-Lingaas%20Final%20ICD%20Format.pdf> accessed 26 June 2023.

34 ASP, 'Elements of Crimes' in ASP 'Official Records, First Session, New York, 3–10 September 2002' (2002) ICC-ASP/1/3 Part II.B article 6(b), element 1 fn 3; *ICTR*, The Prosecutor v. Jean-Paul Akayesu *(TC Judgement), ICTR-96–4-T (2 September 1998)* paras 731–733.

35 See *ICTY*, The Prosecutor v Goran Jelisić *(TC Judgement), IT-95–10-T (14 December 1999)* para 66.

36 *ICTY*, The Prosecutor v Radislav Krstić *(AC Judgement) IT-98–33-A (19 April 2004)* para 12.

37 I*CTR*, The Prosecutor v. Jean-Paul Akayesu *(TC Judgement), ICTR-96–4-T (2 September 1998)* para 523.

III. CRIMES AGAINST HUMANITY

1. The Nature of Crimes Against Humanity

The essential characteristic of crimes against humanity (CAH) is that humanity rather than the individual is their ultimate victim.[38] Some CAH overlap with genocide and war crimes. They differ, though, from genocide because they lack the mental element of special intent to destroy a group, and from war crimes because they apply equally in wartime and peacetime.

2. The Underlying Offences

Article 7 of the Rome Statute establishes that persecuting an identifiable group or community on political, racial, national, ethnic, cultural, religious, gender, or other grounds; sexual violence such as sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilisation; enforced disappearance of persons; and the crime of apartheid are considered to be CAH.[39] Furthermore, other inhumane 'acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' are also included in the list of CAH.[40] Forced marriage has been prosecuted by the Special Court for Sierra Leone and the ICC as falling into the latter category.

BOX 22.1.4 Advanced: Apartheid as a Crime Against Humanity

The 1967 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the 1973 Apartheid Convention, and numerous UN General Assembly (UNGA) Resolutions explicitly declared apartheid a CAH. This categorisation is based on the vigorous efforts of countries in the Global South that felt empowered by the decolonisation movement.[41] Nonetheless, States from the Global South had to fight until the very last moment of the Rome Conference in order to achieve the inclusion of apartheid as an underlying CAH into the Rome Statute.

3. The Contextual Element

According to the contextual element of CAH in the Rome Statute, CAH must be 'committed as part of a widespread or systematic attack directed against any civilian

38 *ICTY*, Prosecutor v Erdemović *(TC Sentencing Judgement) IT-96–22-T (29 November 1996)* para 28.

39 Article 7 Rome Statute.

40 Article 7(1)(k) Rome Statute.

41 On decolonisation, see González Hauck, § 1, in this textbook.

population, with knowledge of the attack'.[42] Article 7(2) further specifies that the attack must be 'pursuant to or in furtherance of a state or organizational policy to commit such attack'. According to the ICC's Elements of Crimes, attack is not necessarily military, but understood as 'involving the multiple commission' of an underlying offence.[43]

To this date, apart from the Rome Statute, there is not any international convention on crimes against humanity. The ICTY stated that CAH are part of customary international law, but a number of States reject this. The ILC has concluded Draft Articles on the Prevention and Punishment of Crimes Against Humanity, but the UNGA has not yet adopted these draft articles.[44]

IV. THE CRIME OF AGGRESSION

Article 8bis of the Rome Statute provides that the crime of aggression requires the planning, preparation, initiation, or execution of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the UN Charter. Aggression covers the 'use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter . . . regardless of a declaration of war'. The person committing the crime of aggression must be in a position effectively to exercise control over or to direct the political or military action of a State.

C. OTHER INTERNATIONAL CRIMES

Depending on the definition of international crimes one adopts, the catalogue of international crimes can be much broader than the list presented above. For instance, M. Cherif Bassiouni, one of the pioneers of modern international criminal law (ICL), having studied international conventions with penal characteristics, had compiled a list of no less than 25 international crimes in the broad sense.[45] Most of these crimes are to be found in conventions that establish for States parties a duty to domestically criminalise acts as well as a right or duty to either prosecute or extradite the offenders and to cooperate in prosecution and punishment. A majority of modern scholars prefers to call such offences transnational crimes or treaty crimes.[46]

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42 Article 7(1) Rome Statute.

43 ASP, 'Elements of Crimes' in ASP 'Official Records, First Session, New York, 3–10 September 2002' (2002) ICC-ASP/1/3 Part II.B article 7, introduction, para 3.

44 2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity 2(2) YILC 2019.

45 M Cherif Bassiouni, *International Criminal Law Conventions and Their Penal Provisions* (Transnational Publishers 1997) 20–21.

46 Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, OUP 2018).

Among others, piracy,[47] human trafficking,[48] torture,[49] terrorism,[50] and drug trafficking[51] belong to this category. The Malabo Protocol, which establishes the subject-matter jurisdiction of a future African Criminal Court,[52] lists terrorism, mercenarism, corruption, money laundering, trafficking in persons, drugs and hazardous wastes, illicit exploitation of natural resources, and the crime of unconstitutional change of government as other, non-core international crimes.[53]

BOX 22.1.5 Advanced: Ecocide

The relevance of ICL to the protection of the environment has been debated and occasionally put on the UN agenda at least since the 1970s. However, with the exception of the ICC Statute, where widespread, long-term, and severe environmental damage is mentioned as an underlying war crime in international armed conflicts, ICL remains anthropocentric. In recent years, the recognition of environmental offences as international crimes worthy of prosecution at the international level has gained significant importance. The connotative term 'ecocide' is used in order to raise awareness. Non-governmental organisations and eminent legal scholars have attempted to vest ecocide with a definition that could become the fifth autonomous Rome Statute crime:

> For the purpose of this Statute, 'ecocide' means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe

47 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) *1833 UNTS 3 (UNCLOS)* article 101.

48 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) *2237 UNTS 319* article 3(a).

49 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; see Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, OUP 2013) 132.

50 *STL*, The Prosecutor v. Ayyash et al *(AC Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) STL-11–01/I (16 February 2011)* para 85; See also A Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 JICJ 933; cf Kai Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law?' (2011) 24 LJIL 655.

51 Single Convention on Narcotic Drugs (adopted 30 March 1961, entered into force 13 December 1964) 520 UNTS 151; Convention on Psychotropic Substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95; 'Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1988) UN Doc A/CONF.183/10 Annex E.

52 On the African Criminal Court, see Rachovitsa, § 21.3, and Viswanath, § 22.2, in this textbook.

53 See Charles C Jalloh, 'A Classification of the Crimes in the Malabo Protocol' in Charles C Jalloh, Kamari M Clarke, and Vincent O Nmehielle (eds), *The African Court of Justice and Human and Peoples' Rights in Context* (CUP 2019) 225–256.

and either widespread or long-term damage to the environment being caused by those acts.[54]

D. CONCLUSION

The concept and extend of international crimes are still open to doctrinal scrutiny. There is little doubt that war crimes, genocide, crimes against humanity, and the crime of aggression, all prosecutable by the ICC, are international crimes. They differ from one another and from other international offences due to their particular contextual elements.

BOX 22.1.6 Further Readings and Further Resources

Further Readings

- MC Bassiouni, *International Criminal Law Conventions and their Penal Provisions* (Transnational 1997)
- A Cassese and others, *Cassese's International Criminal Law* (3rd edn, OUP 2013)
- T Fiskatoris, 'The Global South and the Drafting of the Subject-Matter Jurisdiction of the ICC' in F Jeßberger, L Steinl, and K Mehta (eds), *International Criminal Law: A Counter-Hegemonic Project?* (TMC Asser Press 2023)
- M Klamberg (ed), *Commentary on the Law of the International Criminal Court* (TOAEP 2017)
- C Stahn, *A Critical Introduction to International Criminal Law* (CUP 2018)

Further Resources

- M Gillett, 'A Tale of Two Definitions: Fortifying Four Key Elements of the Proposed Crime of Ecocide' (*Opinio Juris*) <https://opiniojuris.org/2023/06/20/a-tale-of-two-definitions-fortifying-four-key-elements-of-the-proposed-crime-of-ecocide-part-i/> and <https://opiniojuris.org/2023/06/20/a-tale-of-two-definitions-fortifying-four-key-elements-of-the-proposed-crime-of-ecocide-part-ii/> accessed 26 June 2023
- SLU LAW Summations Podcast, 'Episode 41: International Criminal Law and the War in Ukraine' <www.slu.edu/law/podcast/international-criminal-law-ukraine.php> accessed 26 June 2023

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54 Stop Ecocide International, 'Legal Definition of Ecocide Drafted by Independent Expert Panel' <www.stopecocide.earth/legal-definition> accessed 20 August 2023.

§ 22.2 INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

RAGHAVI VISWANATH

BOX 22.2.1 Required Knowledge and Learning Objectives

Required knowledge: Sources of International Law; Jurisdiction; Law of Armed Conflict; International Criminal Law; International Crimes; Interaction

Learning objectives: Understanding the various types of international criminal tribunals; the mandate and legacy of contemporary international criminal tribunals; how domestic courts apply international criminal law; and the application of universal jurisdiction in domestic law.

BOX 22.2.2 Interactive Exercises

Access *interactive exercises for this chapter*[55] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 22.1 QR code referring to interactive exercises.

A. INTRODUCTION

This chapter introduces readers to a range of contemporary international criminal courts and tribunals, the political contexts in which they were set up, and the workings of such tribunals. It is in international criminal courts and tribunals that the substantive principles of international criminal law (ICL) are applied on a case-by-case basis. The International Criminal Court (ICC), a permanent and universal international criminal tribunal based in The Hague, is arguably the most prominent international tribunal for criminal responsibility. Additionally, so-called hybrid criminal tribunals and domestic courts apply international criminal law and interact with the ICC.

55 https://openrewi.org/en-projects-project-public-international-law-international-criminal-law/.

B. THE INTERNATIONAL CRIMINAL COURT

The ICC is distinct for being the first permanent tribunal that applies ICL with jurisdiction in over 123 States. The idea of a permanent international criminal tribunal was mooted much before even the Nuremberg Tribunal was set up. In 1872, Gustav Moynier from the International Committee of the Red Cross articulated the concern that national judges would find it difficult to be impartial when prosecuting humanitarian law violations orchestrated by their own State.[56] This apprehension developed into a request for a standing court. Following a study by the International Law Commission (ILC), the United Nations General Assembly prepared a draft code for such a court.[57] This effort lost steam during the negotiations of the Genocide Convention. The demand was later picked up in 1989. The Prime Minister of Trinidad and Tobago approached the ILC to set up a court that would be able to prosecute drug crimes. The ILC, paying heed to the request, drafted a statute by 1994 and a separate conference was eventually held in Rome to deliberate the draft.[58] The deliberations saw multiple States participating directly and contributions from non-governmental organisations. However, the jurisdiction of the Court (particularly for war crimes) generated great controversy. Yet, the Court received the approval of 120 out of the 148 participating States.[59] The Rome Statute of the International Criminal Court (Rome Statute) was adopted in 1998 and came into force on 1 July 2002.[60]

BOX 22.2.3 Advanced: The Seat of the ICC

The selection of The Hague as the seat of the ICC has faced great censure, given that it places significant distance between the Court and those it admittedly serves. Recently, the counsels for the defence in the Bangladesh/Myanmar situation requested the ICC to move its seat within reasonable proximity of the affected populations.[61] The Court rejected the request, citing reasons of prematurity and immobility during the pandemic.[62] In this context,

56 Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 International Review of the Red Cross 57.

57 UNGA, 'Report of the Committee on International Criminal Jurisdiction', UNGAOR 9th session UN Doc. A/2645 (1953).

58 UNGA, 'Report of the International Law Commission on the Work of Its Forty-sixth Session', UNGAOR 49th session Suppl. No. 10, A/49/10 (1994).

59 Mark Klamberg, *Commentary on the Law of the International Criminal Court* (TOAEP 2016).

60 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

61 *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Request), ICC-01/19–34 (4 August 2020).

62 *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Corrected version of 'Decision on Victims' joint request concerning hearings outside the host State'), ICC-01/19 (27 October 2020), para 26.

it is important to acknowledge that the Rome Statute – under article 3 – does allow for the seat to be moved wherever deemed necessary. The new design of the Court has also been called out by critical scholars as not being encouraging for victims with its opaque setting, monochromatic colour scheme, less visible witness boxes – all of which impede the interests of reflexivity.[63]

I. COMPOSITION AND ORGANISATION

The Court is composed of four organs – the Presidency, the Chambers, Office of the Prosecutor, and the Registry (under article 34 Rome Statute).

1. Presidency

The Presidency of the ICC oversees the constitution of the judicial chambers of the ICC. It is also the organ that liaises with States by concluding cooperation agreements and organising outreach activities.

2. Chambers

The three Chambers – Pre-Trial, Trial, and Appeals – are responsible for various stages of the proceedings. The Pre-Trial Chamber is tasked with determining whether the Prosecutor's request for the opening of an investigation under article 15 should be granted, and also for reviewing the Prosecutor's decision not to open an investigation.[64] The Pre-Trial Chamber is also in charge of confirming the charges pinned by the Prosecutor. The Trial Chamber's jurisdiction is triggered after this stage is crossed. The Trial Chamber conducts the trial and, where required, awards the sentence. Appeals against the decisions of both the Pre-Trial Chamber and the Trial Chamber are heard and decided by the Appeals Chamber.[65]

At any point of time, the Chambers are constituted by a total of 18 judges, who are elected for nine-year terms by signatories of the Rome Statute. Article 36(8)(a) calls for equitable geographical representation determined through regional groupings (being the African States, Asia-Pacific States, Eastern European States, Latin American and Caribbean States, and Western Europe and Others Group) with only one judge of the same nationality eligible to sit at one time. The Raising the Bar report identifies that minimum voting requirements in practice reflect 'an alarming concentration of the ICC's judiciary in only a small handful of states,

63 Stephanie Maupas, 'The New Clothes of the ICC' (*Justice info.net*, 19 December 2015) <https://theblacksea.eu/stories/secrets-of-the-international-criminal-court-jolie-clooney-and-the-world-fixer-psychosis/> accessed 20 March 2023.

64 Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force on 1 July 2002) 2187 U.N.T.S. 90 (hereinafter 'Rome Statute').

65 Article 82 of the Rome Statute.

as well as a decline in the engagement of States Parties in the judicial selection process over time'.[66]

3. Office of the Prosecutor

The Office of the Prosecutor has been envisaged as an independent and impartial investigating authority, drawing on the Yugoslavia and Rwanda models.[67] Under article 15, the Prosecutor is empowered to initiate investigations in situations, based on information received from States, organs of the UN, intergovernmental and nongovernmental organisations, or other reliable sources. Before doing this, the Prosecutor must obtain approval from the Pre-Trial Chamber. Under article 15, when the Prosecutor decides not to open such an investigation, the Pre-Trial Chamber may order the Prosecutor to reconsider their decision.

4. Registry

The Registry helps the Court to conduct fair, impartial, and public trials. The core function of the Registry is to provide administrative and operational support to the Chambers and the Office of the Prosecutor.

II. APPLICABLE LAW

Article 21 Rome Statute prescribes the sources of law that the ICC can apply. Earlier tribunals predominantly relied on custom[68] and general principles[69] as gap filling tools.[70] This invited severe criticism about it impugning the principle of legality and vesting unreasonable law-making authority on the Court. The most important sources are the Statute, the Court's Rules of Procedure and Evidence, and the Elements of Crimes.[71] If this fails to yield an effective solution, then the Court may consult general principles of international law and failing that, rules derived from national legislations and human rights.[72] Article 21 was inserted with the motive of restricting the Court's discretion and ensuring that the principle of legality (*nullum crimen sine lege* [Latin: 'no crime without law']) is respected.[73] The construction of article 21 that the Statute finally retained does not create any room for oral sources, customs, or indigenous legal

66 Open Society Justice Initiative, 'Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court' <www.justiceinitiative.org/publications/raising-the-bar-improving-the-nomination-and-election-of-judges-to-the-international-criminal-court> accessed 12 July 2023.

67 Article 42 of the Rome Statute and Rule 11 of the Rules of Procedure and Evidence.

68 On customary law, see Stoica, § 6.2, in this textbook.

69 On general principles, see Eggett, § 6.3, in this textbook.

70 Mia Swart, 'Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and "Adventurous Interpretation"' (2010) 70 Heidelberg Journal of International Law 459, 461–462.

71 ASP, 'Elements of Crimes' in ASP Official Records, First Session, New York, 3–10 September 2002' (2002) ICC-ASP/1/3.

72 On international human rights law, see Ciampi, § 21 (and the following sub-chapters) in this textbook.

73 Margaret M deGuzman, 'Article 21, Applicable Law' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck 2016) 933.

orders.[74] It imposes Western epistemologies governing the formation of treaties[75] and 'international legal principles' on Global South peoples who forge relationships with the Court.[76] Substantively, article 21 – as the Court's own jurisprudence has demonstrated – has made it difficult for the Court to recognise the evolving nature of ICL and the victimhood triggered by crimes that the original Statute did not codify.[77]

III. JURISDICTION

There are four bases for the Court's jurisdiction: personal, territorial/nationality, subject matter, and temporal. In terms of *ratione materiae* (Latin: 'on the basis of the matter'), the Court is authorised to exercise jurisdiction over 'the most serious crimes of international concern': genocide, crimes against humanity, war crimes, and aggression (article 5(1)). On *ratione personae* (Latin: 'on the basis of the person') and *tertii* (Latin: 'on the basis of the place'), the first condition is one of age. The Court can only try natural persons above the age of 18.[78] The second is that of territoriality. Article 12 of the Rome Statute confers territorial jurisdiction on the Court in cases where the 'conduct in question' was committed on the territory of a State party to the Statute or by a national of a State party. The third condition, nationality, has not been defined in the Statute. The Court has implicitly imported the domestic understanding of nationality as the legal bond between the natural person and the sovereign State.[79] Importantly, the Court's jurisdiction cannot be activated through passive nationality (when only victims bear a nationality link to State parties). Nationality under article 12(2)(b) is limited to active nationality.[80] The temporal starting point of the Court's jurisdiction has been spelled out in article 11. The provision notes that the Court's jurisdiction is prospective and can be invoked only for crimes committed following the Statute's coming into force on 1 July 2002.

Exceptionally, article 12(3) allows non-State parties to file declarations accepting the Court's jurisdiction on an *ad hoc* (Latin: 'for this purpose') basis for crimes committed within their territories or by their nationals. This option, some argue, also offers the facility of circumventing the temporal limits of the Court's jurisdiction. Palestine, for instance, has lodged an article 12(3) declaration accepting the Court's jurisdiction over crimes committed against its nationals prior to Palestine's own accession of the Statute in 2015.[81]

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74 On indigenous peoples, see Viswanath, § 7.2, in this textbook.

75 On treaties, see Fiskatoris and Svicevic, § 6.1, in this textbook.

76 Sujith Xavier, John Reynolds, and Asad Kyani, 'Foreword: Third World Approaches to International Criminal Law' (2016) 14(4) Journal of International Criminal Justice 915.

77 Alain Pellet, 'Revisiting the Sources of Applicable Law before the ICC' in Margaret deGuzman and Diane Marie Amann (eds), *Arcs of Global Justice: Essays in Honour of William A. Schabas* (OUP 2018).

78 Article 24 of the Rome Statute.

79 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, CUP 2019) 443.

80 *Situation in the State of Palestine* (Prosecutor of the International Criminal Court, Fatou Bensouda, Re-opens the preliminary examination of the situation in Iraq), OTP Press Release (13 May 2014).

81 *Situation in the State of Palestine* (Palestine declares acceptance of ICC jurisdiction since 13 June 2014), ICC-CPI-20150105-PR1080 (5 January 2015).

IV. THE TRIGGERING MECHANISMS

The ICC can be accessed following a referral by a State party, a referral by the UN Security Council (UNSC) acting under Chapter VII of the UN Charter,[82] and the institution of an investigation by the Prosecutor acting on their own initiative (article 13). The first mode is a *proprio motu* (Latin: 'with his own motion') investigation by the Prosecution. To do this, the Prosecutor must obtain the approval of the Pre-Trial Chamber by showing how and why the selected situation meets the admissibility and jurisdiction requirements prescribed by the Statute. The Prosecutor must also obtain the consent of the States implicated. The second mode is self-referral. The bulk of the cases that the Court has heard have been self-referrals by the States in which the crimes were committed. A recurring concern with self-referrals has been that States have fashioned it into a tool to pursue retributive prosecutions of rebel non-State actors to bolster the 'legitimacy of its own military operations'.[83] Article 13(b) of the Statute allows the Court – a treaty-based creature modelled to exercise jurisdiction purely based on nationality and territoriality – to extend jurisdiction over crimes and accused persons even in non-State parties.

BOX 22.2.4 Advanced: Hegemonial Structure of the ICC

The UNSC referral route raises important questions about the legitimacy of the Court. The ICC originally postured itself as a mechanism to rectify the failures of past international criminal tribunals. The deliberations in Rome reveal that the drafters were clear about avoiding accusations of Eurocentric exercise of judicial discretion. However, the Security Council referral in the Statute suffers from the same vices. The Security Council referral departs from the nationality-based and territoriality-based jurisdictional framework that the ICC otherwise rests on. This route of referral has faced much censure, primarily on account of its vulnerability to political misuse. Scholars argue that it offers a free pass to the permanent members to exercise 'unilateral negative control' and exempt their own nationals from criminal responsibility for the same acts that they refer other individuals to the ICC for. The recent political clashes triggered by the Palestine and Afghanistan situations have shown that the Court still 'reifies White supremacy' and 'works to mask the core-periphery relations' that sustain economic and power inequalities.[84]

V. ADMISSIBILITY

According to article 17 Rome Statute, admissibility at the Court hinges on two aspects. The first is complementarity. Complementarity requires an assessment of whether the referring

82 Charter of the United Nations 1945, 1 UNTS XVI (1945).

83 Parvathi Menon, 'Self-Referring to the International Criminal Court: A Continuation of War by Other Means' (2015) 109 AJIL Unbound, 260–265.

84 Kamari Maxine Clarke, 'Affective Justice: The Racialized Imaginaries of International Justice' (2019) 42:2 Political and Legal Anthropology Review 244, at 247.

State/host State is unwilling or unable to prosecute the case. The defence – in order to challenge admissibility – must demonstrate that the national jurisdiction is investigating and taking genuine steps to interrogate witnesses, collecting evidence, and so forth.[85] The second part of the admissibility test relates to the analysis of the 'gravity threshold', in order to determine whether the case is of sufficient gravity to justify further action by the Court.

VI. ENFORCEMENT OF JUDGMENTS AND STATE COOPERATION WITH THE ICC

The primary challenge plaguing the ICC is its enforcement powers. Although decisions of the Court are binding on parties, the ICC does not possess its own enforcement infrastructures. Illustratively, the ICC does not have its own police that could accost those who are charged by the Court and bring them to the Court's premises in The Hague. The only recourse left for the Court is to rely on cooperation of the State parties to the Rome Statute. State parties to the Statute have an obligation to cooperate with the Court in all stages of the investigation and trial: from surrendering suspects/accused and seizing assets to detaining convicts.[86]

BOX 22.2.5 Advanced: Pushback Against the ICC

Of the 36 arrest warrants issued by the Court, only 20 have been enforced. The Court's warrants against Bosco Ntaganda, Simone Gbagbo, and Omar Al-Bashir were flouted for many months.[87] The Court's chiding of African States' failure in Bashir's case triggered a string of withdrawals (from Burundi, South Africa, and The Gambia). In all three cases, the withdrawals were intended to protect and immunise State officials, including sitting heads of State, from the ICC's reach.[88] The Philippines also notified the ICC of its withdrawal, pushing back on the Prosecutor's efforts to investigate the drug war and former President Duterte's complicity in its violence.[89] Withdrawals have becoming increasingly popular tools for States to express their discontent with the Court, and to curb the Court's prosecutorial reach. This pushback is seemingly quite alive to the Court's treaty-based character and the powers that such a design vests in treaty parties.

85 *Prosecutor v. Muthaura, Kenyatta and Ali* (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'), ICC-01/09–02/11–274 (30 August 2011), paras 1 and 40.

86 Articles 86 and 88 of the Rome Statute.

87 Saumya Uma, 'State Cooperation and the Challenge to International Criminal Justice' (*The Wire*, 31 January 2022) <https://thewire.in/law/state-cooperation-and-the-challenge-to-international-criminal-justice> accessed 16 July 2023.

88 Ssenyonjo, Manisuli, 'State Withdrawals from the Rome Statute of the International Criminal Court: South Africa, Burundi, and The Gambia' in Charles Chernor Jalloh and Ilias Bantekas (eds), *The International Criminal Court and Africa* (Online edn, Oxford Academic 2017).

89 ICC, 'Situation in the Republic of the Philippines' <www.icc-cpi.int/philippines> accessed 20 August 2023.

These challenges are compounded by the opposition to the ICC's jurisdiction by powerful States. To impede the Court's reach, the US Congress has passed the American Service-Members' Protection Act in 2002, empowering the government to stop financial aid to the ICC's State parties who surrender American nationals to the ICC.[90] When the Prosecutor expressed her desire to prosecute CIA officials in relation to the opening of an investigation in Afghanistan, the US government also went so far as to issue sanctions against ICC officials.[91] Similar non-cooperation quagmires have plagued the opening of investigations in Palestine against Israeli nationals[92] and in Iraq against British nationals.[93]

C. HYBRID (MIXED) TRIBUNALS

Hybrid tribunals are those tribunals that are governed by and have the authority to apply both international and domestic laws.

I. SPECIAL COURT OF SIERRA LEONE

The Special Court of Sierra Leone (SCSL) was established by treaty between Sierra Leone and the UN to prosecute crimes committed during the 1991 civil war between militia and the governments in Sierra Leone and Liberia.[94] The Court is independent of both the UN and the domestic legal system. The Court is composed of judges – the majority of whom are elected by the UN and the remaining by the government of Sierra Leone.[95] The jurisdiction of the Court is circumscribed to crimes against humanity and war crimes committed in non-international armed conflicts. Like the ICC, the Court's prosecutorial strategy is to prosecute those persons who are most responsible for serious violations of international humanitarian law and Sierra Leonese law.[96] The Court commenced its work in 2002 and wrapped up in 2013, entrusting its pending cases to the Residual Court for Sierra Leone.

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90 Department of State of the Office of Electronic Information, Bureau of Public Affairs, 'American Service-Members' Protection Act' (July 2003) <https://2001-2009.state.gov/t/pm/rls/othr/misc/23425.htm> accessed 16 July 2023.

91 Federal Register, 'Blocking Property of Certain Persons Associated With the International Criminal Court' <www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court> accessed 14 July 2023.

92 NBC News, 'Netanyahu Calls ICC Investigation "Undiluted Anti-Semitism"' <www.youtube.com/watch?v=fa8m2KkHJuw> accessed 14 July 2023.

93 Ronan Cormacain, 'Overseas Operations Bill: Getting Away When Powerful States Are Implicated (Particularly Those Who Are Members of the Council or Strong Allies of Council Members' (UK Human Rights Blog, 20 January 2021) <https://ukhumanrightsblog.com/2021/01/20/overseas-operations-bill-getting-away-with-murder-dr-ronan-cormacain/> accessed 16 July 2023.

94 UNSC Res 1315 (14 August 2000), UN Doc S/RES/1315.

95 Statute of the Special Court for Sierra Leone (16 January 2002), 2178 U.N.T.S. 145, article 14 ('SCSL Statute').

96 Article 1(1) of the SCSL Statute. The date relates to an earlier peace agreement between the Government of Sierra Leone and RUF, signed in Abidjan on 30 November 1996.

II. KOSOVO SPECIALIST CHAMBERS

The Kosovo Specialist Chambers – and the Specialist Prosecutor's Office – was established in 2011 following a report by the Parliamentary Assembly of the Council of Europe which shed light on the detention, torture, and enforced disappearances of Serbs and Kosovo Albanians during the 1999 conflict in Kosovo.[97] The Specialist Chambers comprises two organs, the Chambers and the Registry. The Specialist Chambers are staffed with international judges, prosecutors and officers and have a seat in The Hague.

III. EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

In 1997, the Cambodian government approached the UN to set up a tribunal to prosecute the crimes committed by the Khmer Rouge (English: 'Red Khmer') against political dissidents from 1975 to 1979. The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established through a 2003 agreement between the UN and Cambodia. The ECCC has been absorbed into the Cambodian domestic legal system, albeit supported by the UN. The jurisdiction of the ECCC extends to genocide, crimes against humanity, and war crimes (solely in international armed conflicts). The Cambodian government insisted that the ECCC be predominantly staffed by local judges and prosecutors. This demand was honoured. Although the dominance of local staff has not inspired much confidence in the impartiality of the bench, all the judges and prosecutors are appointed by the Cambodian Supreme Council of Magistracy with the UN Secretary-General nominating international personnel.

D. REGIONAL AND DOMESTIC PROSECUTION OF INTERNATIONAL CRIMES

I. THE PROPOSED AFRICAN CRIMINAL COURT

Right from the mid-2000s when the ICC's docket was almost completely populated by cases seeking prosecution of African rebel groups or heads of State, the African Union has voiced its strong objection to being disproportionately targeted by the ICC. Fair to say that the ICC found it difficult to retain the trust of the 34 African States who signed onto its Statute, with States like Burundi choosing to exit the Statute altogether.[98]

The distrust in the ICC prompted the African Union to call for an African Criminal Court and dissuading African States from cooperating with the ICC. In 2014, the statute of this court – which came to be called the African Court of Justice and Human Rights –

97 Council of Europe Committee on Legal Affairs and Human Rights, 'Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo' (12 December 2010), AS/Jur (2010) 46.

98 'Burundi Is Officially Not a Member of the International Criminal Court (ICC)' (*Africanews*, 27 October 2017) <www.africanews.com/2017/10/27/burundi-is-officially-not-a-member-of-the-international-criminal-court-icc/> accessed 16 July 2023.

was passed.[99] The jurisdiction of the African court and the ICC greatly overlap. Article 46Ebis of the African Criminal Court's Statute is different only insofar as it allows the Court to exercise jurisdiction when the victim is a national of a State party or when a State party's vital interests have been threatened. The Court has jurisdiction over 14 unique offences, including the core crime but crimes outside the Rome Statute such as collective punishment.[100] However, the protocol of the Court is not yet in force and, consequently, the African Court of Justice and Human Rights is still to be established.[101]

II. DOMESTIC PROSECUTION OF INTERNATIONAL CRIMES

Domestic courts can exercise universal jurisdiction[102] over certain crimes. Universal jurisdiction allows the prosecution of certain crimes by any State, unconnected to the commission of the crime, the place it occurred, the accused or the victim because the conduct is of universal concern.[103] Universal jurisdiction does not replace domestic or international prosecutions. It elevates certain crimes because of their seriousness and ensures that impunity is eliminated for such crimes. It is also implicit in this rationale that powerful States actively shield their senior officials who commit core crimes; this would hold them back from prosecuting such actors.[104]

Universal jurisdiction was conceived as a way out of such conflicts of interest. Universal jurisdiction was first recognised for the crime of piracy. Ever since, a longer list of crimes can now trigger universal jurisdiction. The 1948 Genocide Convention,[105] for instance, enjoins all State parties to punish and prosecute perpetrators of genocide. The 1984 Convention against Torture[106] codifies universal jurisdiction for the crime of torture. Crimes against humanity,[107] apartheid,[108] and enforced disappearance[109] have also been added to this list.

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99 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (adopted 27 June 2014, entered into force 2 April 2019).

100 Article 28D(b)(v), (xxviii), (xxix)–(xxxiii), and article 28D(e)(xvi)–(xxii), but also (g) of the Statute.

101 On the African Criminal Court, see Rachovitsa, § 21.3, in this textbook.

102 On jurisdiction, see González Hauck and Milas, § 8, in this textbook.

103 Kenneth C Randall, 'Universal Jurisdiction Under International Law' (1988) 66 Texas Law Review 785, 788 as cited in Steven W Becker, 'Universal Jurisdiction: How Universal Is It? A Study of Competing Theories' (2002–3) 12 Palestine Yearbook of International Law 49, 50; Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2(3) Journal of International Criminal Justice 735.

104 Comments From Kenya, 'The Scope and Application of the Principle of Universal Jurisdiction: The Report of the Sixth Committee' A/64/452-Res64/117 (2018).

105 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

106 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

107 Charles Jalloh, 'Universal Criminal Jurisdiction' in *Report of the International Law Commission on the Work of Its Seventieth Session* (ILC 2018), A/73/10 (2018).

108 International Convention on the Suppression and Punishment of the Crime against Apartheid (adopted 30 November 1973, entered into force 18 July 1976), 105 UNTS 243.

109 International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010), G.A. res. A/61/177 (2006), reprinted in (2007) 14 Int'l. Hum. Rts. Rep. 582.

Many scholars laud universal jurisdiction for creating a globalised jurisprudence, involving transnational networks.[110] This does not mean that universal jurisdiction is not political. This is evident in the statistics compiled by TRIAL International annually. Although universal jurisdiction has acquired much traction in terms of geographical reach (almost 92 States initiated universal jurisdiction cases in 2021–2022), these prosecutions are concentrated on crimes committed mostly in the Global South. The African Union has been vocal in its opposition to such exercise of jurisdiction. It has instead adopted a Model Law calling on African States to legislate on universal jurisdiction and prosecute 'international crimes, trafficking, and terrorism crimes'.[111] This addition of terrorism and trafficking departs from the internationally recognised list of crimes warranting universal jurisdiction.

When seen from a positivist[112] lens, the validity of exercises of universal jurisdiction rest majorly on the source which confers such jurisdiction. This is done by referring to either domestic laws,[113] international treaties,[114] or customary international law.[115]

E. CONCLUSION

This chapter homed in on the workings of contemporary international criminal tribunals, including the ICC. In so doing, the chapter not only looked at the legal framework supporting the mandate of such tribunals, but also the political hegemonies upon which these tribunals rest. In particular, the chapter discussed the political pushback experienced by the ICC. For instance, the control exercised by powerful Western States and the Security Council on the ICC's budget and case selection. The chapter also looked at the political contexts in which other hybrid tribunals are situated. The final parts of the chapter examined the sources of universal jurisdiction, common trends in the invocation of universal jurisdiction, and the transnational mobilisation universal jurisdiction cases entail.

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110 Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004) 150.

111 African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, adopted at 21st Ordinary Session of the Executive Council Addis Ababa (9–13 July 2012).

112 On positivism, see Etkin and Green, § 3.1, in this textbook.

113 See *Federal Prosecutor's Office v. Anwar R* (Higher Regional Court, Koblenz 2022); *R v. Kumar Lama*, Case no. 2013/05698 (Central Criminal Court 2016).

114 See 'Universal Jurisdiction Annual Review 2022' (*TRIAL International*, March 2022) <https://trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf> accessed 16 July 2023; chapter 1, section 7 of the Criminal Code of Finland, 39/1889, amendments up to 766/2015 included, translation from Finnish by Ministry of Justice, Finland; Asetus rikoslain 1 luvun 7 §:n soveltamisesta (unofficial translation: Decree on the Application of Chapter 1, Section 7 of the Criminal Code), 16 August 1996/627, 1996; on international treaties, see Fiskatoris/Svicevic, § 6.1, in this textbook.

115 See *Attorney General v. Eichmann* (Supreme Court of Israel 336/31), 36 ILR 28; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, ICJ Reports (2002) 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at 63; on customary international law, see Stoica, § 6.2, in this textbook.

BOX 22.2.6 Further Readings and Further Resources

Further Readings

- R Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010)
- C Schwöbel, *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014)
- G Werle, *Principles of International Criminal Law* (2nd edn, TMC Asser 2009)

Further Resources

- D Guilfoyle, Introduction to International Criminal Law, Introduction to International Criminal Law (*YouTube* 2011) <www.youtube.com/watch?v=BdX3n1dbla4> accessed 16 July 2023

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