LAWS3067

International Criminal Law

Comprehensive Course Notes

UNSW Faculty of Law

1. Introduction to International Criminal Law

1.1 What is International Criminal Law?

International criminal law (ICL) is a body of law that establishes individual criminal responsibility under international law for certain categories of serious conduct. It sits at the intersection of international law, criminal law, international human rights law, and international humanitarian law. The Nuremberg International Military Tribunal (IMT) provided the foundational statement of this principle:

> **Nuremberg IMT, Judgment and Sentences (1947) 41 AJIL 172, 221**
> *'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... individuals have international duties which transcend the national obligations of obedience imposed by the individual state.'*

This statement, affirmed by the UN General Assembly in Resolution 95(I), cemented the principle that individuals can be held directly accountable under international law, independently of the state through which they act.

1.2 The Four Core International Crimes

International criminal law recognises four core international crimes, all within the jurisdiction of the International Criminal Court (ICC):

- Genocide: the deliberate intent to destroy, in whole or in part, a national, ethnic, racial or religious group.
- Crimes against humanity: widespread or systematic attacks directed against civilian populations.
- War crimes: serious violations of the laws and customs of armed conflict.
- Aggression: the planning, preparation, initiation or execution of an act of aggression that constitutes a manifest violation of the UN Charter by a state leader.

Other international crimes exist outside the 'core four', including torture (Convention Against Torture, 1984), terrorism (various conventions), and piracy (an ancient crime of universal jurisdiction). The distinctive feature of the core crimes is their gravity, their connection to collective violence, and their susceptibility to prosecution before international tribunals.

1.3 Related Fields of International Law

Field	Relationship to ICL
International humanitarian law (IHL)	Also called the laws of armed conflict or law of war. IHL provides substantive content for many war crimes (e.g., grave breaches of the Geneva Conventions).

Field	Relationship to ICL
International human rights law (IHRL)	Provides context for crimes against humanity. Rome Statute Art 21(3) requires consistent application with internationally recognised human rights.
International law (general)	ICL derives from and contributes to customary international law and treaty law. Jus ad bellum (the law on use of force) is relevant to aggression.
State responsibility	States bear international responsibility for internationally wrongful acts. ICL additionally establishes individual criminal responsibility, which is parallel but separate.
Transitional justice	Encompasses the full range of processes societies use to reckon with mass atrocities, including criminal prosecutions, truth commissions, reparations, and institutional reform.

1.4 The Goals of International Criminal Justice

International criminal justice is justified by a range of overlapping and sometimes competing goals:

- Retribution: holding individual perpetrators accountable commensurate with the gravity of their crimes.
- Deterrence: preventing future atrocities by demonstrating that perpetrators will face accountability.
- Expressivism: publicly affirming and reinforcing international norms against atrocity crimes.
- Truth-telling: establishing an authoritative historical record of events.
- Incapacitation: removing perpetrators from positions where they can commit further crimes.
- Rehabilitation: where possible, reforming individual offenders.
- Post-conflict reconstruction and reconciliation: contributing to the rebuilding of societies ravaged by conflict.

These goals often pull in different directions. For example, the goal of retribution may require severe punishment, while reconciliation may call for more restorative approaches. The goal of truth-telling may require testimony from perpetrators who expect leniency in exchange. These tensions are persistent features of international criminal justice policy and practice.

1.5 Where is ICL Practised?

International criminal law is enforced through multiple types of forums:

Forum	Examples	Notes
International tribunals	International Criminal Court (ICC); ICTY; ICTR	Permanent or ad hoc; jurisdiction limited to core crimes; no domestic law element
Hybrid/internationalised tribunals	Special Court for Sierra Leone (SCSL); Extraordinary Chambers in Cambodia (ECCC); Special Tribunal for Lebanon (STL)	Mix of international and national law; local participation; located in affected country or abroad
National courts	Prosecutions under universal jurisdiction or domestic incorporation of ICL	Most prosecutions of international crimes occur domestically; variable quality and independence

The distinction between international and domestic enforcement has significant implications: international courts have more legitimacy and access to evidence, but national courts are more numerous, cheaper, and more accessible to victims. The ICC's complementarity principle addresses this relationship directly.

2. Historical Development: Nuremberg and Tokyo

2.1 The 1919 Commission and Inter-War Period

After the First World War, the Allied powers established a fifteen-member commission to investigate responsibility for the start of the war and violations of the laws of war. It recommended creating an Allied High Tribunal and found violations of the 'laws and customs of war and the laws of humanity'. The US members dissented, arguing that they knew of 'no international statute or convention making violation of the laws and customs of war - not to speak of the laws or principles of humanity - an international crime.'

The Treaty of Versailles (Art 227) provided for trial of Kaiser Wilhelm II for 'a supreme offence against international morality and the sanctity of treaties' before an international tribunal. The Netherlands refused to extradite the Kaiser, and no trial took place. German prosecutions for war crimes were conducted in Leipzig (1921-1923), characterised by bias towards defendants and lenient sentences, though two cases produced important precedents for command responsibility.

In 1928, the Kellogg-Briand Pact was signed by fifteen states (eventually 63), renouncing war as an instrument of national policy. The Pact was later invoked at Nuremberg to ground the charge of crimes against peace, although the Pact did not contemplate individual criminal liability.

2.2 The Nuremberg International Military Tribunal

2.2.1 Creation

Following the Second World War, France, the United Kingdom, the United States, and the Soviet Union met in London to draft the charter of an international tribunal. After difficult negotiations (the US and Soviet representatives clashed over whether guilt was presumed, and civil law vs common law procedural differences arose), the London Agreement was signed on 8 August 1945, creating the Nuremberg IMT. Nineteen other states subsequently adhered to the Charter.

2.2.2 Structure and Charges

The IMT had eight judges: four principal and four alternates, one each from the four major Allied powers. The President was Lord Justice Geoffrey Lawrence of the United Kingdom. The four chief prosecutors were drawn from each of the four Allies. The indictment charged four counts:

1. Count 1: Conspiracy (overall plan to commit crimes, handled by US prosecutors).
2. Count 2: Crimes against peace (UK prosecutors).
3. Count 3: War crimes (French prosecutors covered the western zone; Soviet prosecutors covered the eastern zone).
4. Count 4: Crimes against humanity.

Twenty-four defendants were arraigned. Three were acquitted (Schacht, Fritzsche, and von Papen), as were three of six indicted organisations. Of the remaining defendants, twelve were sentenced to death and seven to imprisonment. The trial took place over ten months across 403 open sessions.

2.2.3 Key Legal Holdings

The Nuremberg judgment made several foundational contributions to international criminal law:

- Individual criminal responsibility: the principle that individuals, not only states, can be criminally liable under international law (see section 1.1 above).
- Rejection of the sovereign act defence: acting on behalf of a state does not confer immunity from international criminal responsibility.
- Limitation of the superior orders defence: superior orders do not constitute a complete defence, though they may be relevant to mitigation of sentence.
- Criminality of aggressive war: the judgment held that aggressive war violated the Kellogg-Briand Pact and was criminal under international law by the time of the Second World War.
- Applicability of the 1907 Hague Regulations as customary international law: this holding has been influential in subsequent judicial decisions.

2.2.4 Assessment: 'Victor's Justice'?

The Nuremberg IMT has been criticised as an example of 'victor's justice'. The criticism encompasses several distinct allegations:

- Procedural fairness: the judges were drawn from the prosecuting states, and there was heavy reliance on affidavit evidence and a disparity in resources between prosecution and defence.
- Ex post facto law: the crime of aggression was not clearly established as a crime under international law before the Charter, raising concerns about the nullum crimen sine lege principle.
- Tu quoque: Allied forces had committed comparable acts that were not prosecuted. The devastation wrought by Allied bombing meant no charges were brought relating to the Blitz; Soviet conduct in occupied countries made other charges difficult.
- Prosecution priorities: the prosecution focused on aggression as the 'supreme international crime', though the Tribunal is now remembered primarily as a Holocaust accountability mechanism.

Against these criticisms, defenders of Nuremberg note: the proceedings were largely fair by contemporary standards; the defendants were not truly ignorant that their acts were criminal; and the Tribunal did acquit some defendants. Justice Robert Jackson's opening for the prosecution explicitly acknowledged that the law must apply equally to future aggressors from any nation, including the victorious powers.

2.3 The Tokyo International Military Tribunal

2.3.1 Creation and Structure

The International Military Tribunal for the Far East (IMTFE, or Tokyo IMT) was created by proclamation of General Douglas MacArthur on 19 January 1946, authorised by his powers as Supreme Commander Allied Powers. It had eleven judges drawn from the signatory states to the Japanese surrender (Australia, Canada, China, France, New Zealand, the Netherlands, UK, US, and Soviet Union) plus one each from India and the Philippines. The Australian judge, Sir William Webb, presided, though his conduct was criticised.

The US appointed the chief prosecutor (Joseph Keenan, considered by many to be ill-suited to the task). The trial ran for nearly two and a half years. The indictment contained fifty-five counts