

Preface

Never in history has a single criminal tribunal had potential jurisdiction over the entirety of the world's population, at least in theory. Students of comparative criminal justice will find that the International Criminal Court is a dramatic and unprecedented experiment in international criminal justice, one that differs in marked ways from domestic legal systems or even prior international tribunals. The Court is a negotiated compromise among the nations of the world, and therefore combines characteristics of different legal traditions. Adopting the generally adversarial system of the common law world, for instance, the Court has a comprehensive legal aid scheme and strict due process protections for defendants. At the same time, the Court's criminal procedure includes significant inquisitorial components, characteristic of the civil law world, such as judicial involvement in early pre-trial proceedings and rulings by panels of judges rather than a jury. The Court also incorporates elements drawn from the restorative or transitional justice movement, such as the participation of and reparations for victims of mass atrocity. More than just a hybrid of domestic systems, the International Criminal Court possesses attributes unique to the grave crimes that it prosecutes and its rather unusual jurisdictional limitations.

What Is International Criminal Justice?

At the most basic level, international criminal justice is a thin membrane of law overlain on the domestic and regional criminal justice systems of the world. Though it operates in a separate realm from national systems of criminal law and procedure, it relies on these systems for the apprehension of suspects, the gathering of evidence and witnesses, and the enforcement of verdicts and sentences. Domestic and international criminal justice systems are intertwined in many ways. International criminal justice absorbs characteristics of an emerging consensus among domestic systems, such as skepticism toward the death penalty, and domestic systems in turn look to the international realm in prosecuting international crimes in domestic courts. Nor is international criminal justice a single integrated

system, as in the domestic realm: it is a fragmented web of different institutions with distinct and occasionally overlapping jurisdiction, sometimes producing contradictory results. We will see with international criminal sentencing, for instance, different philosophies and practices of punishment at different tribunals—some comparatively harsh and some more lenient. International criminal justice is partial and incomplete, but in the modern world also dynamic and rapidly evolving. Groundbreaking developments since the end of the Cold War—not the least of which has been the creation of an international criminal court—make international criminal justice an essential topic of study.

What Do Domestic Criminal Justice Systems Teach Us?

In theory, international law operates as a set of rules that are universal in nature. Yet the rules themselves are subject to negotiation among states, and therefore reflect power differentials and political bargaining; international criminal law in this sense is not equally representative of all of the world's domestic legal traditions (Findlay et al. 2013: 47). The International Criminal Court and other international justice mechanisms do more than simply pick and choose, buffet-style, the “best” features of the great legal systems of the world. These systems—common law, civil law, and Islamic law, to name the three largest—are more than just the sum of their discrete parts; they all possess an internal logic and a balance, with their own strengths, shortcomings, and compromises. We cannot know yet whether the creation of international criminal courts and tribunals will accelerate the convergence of common law and civil law systems, leading to harmonization and even unification of procedural rights and substantive criminal law across borders (Stewart 2014: 105). International criminal justice may be too different from domestic criminal justice systems and therefore relegated to a separate sphere, limiting any potential “spillover” effect. But the underlying tendency toward convergence among legal systems exists in the international realm just as it does the domestic. Inquisitorial systems increasingly absorb adversarial elements to help reduce the risk of judicial bias and overreach, while adversarial systems increasingly adopt the truth-seeking elements of an inquisitorial system to prevent wrongful convictions. In turn, international criminal justice institutions also produce their own innovations. The International Criminal Court's efforts to involve victims in criminal proceedings and to specifically reach sexual and gender-based mass violence, for instance, are among the most notable.

Why Create an International Criminal Court?

The International Criminal Court is a permanent tribunal that tries the very worst crimes that humanity has ever faced. In describing genocide, Samantha Power has written, “[d]espite broad public consensus that genocide should ‘never again’ be

allowed, and a good deal of triumphalism about the ascent of liberal democratic values, the last decade of the twentieth century was one of the most deadly in the grimmest century on record.” Gross violations of human rights, including genocide, war crimes, and crimes against humanity, are not relegated to the distant past. They are still part of our present world. “Genocide occurred *after* the Cold War,” she writes, “*after* the growth of human rights groups; *after* the advent of technology that allowed for instant communication; *after* the erection of the Holocaust Museum on the Mall in Washington, D.C.” (Power 2002: 503). The creation of an international criminal court would hold perpetrators accountable, unimpeded by political circumstances, while hopefully altering the future behavior of belligerent states and destructive military and civilian officials. In particular, the rationale for the Court includes the following:

- *Deterrence*: Lack of accountability for crimes can encourage perpetrators, fuel resentment, and perpetuate violence. Repeated warnings of prosecution did not stop German and Japanese war leaders from committing serious atrocities during World War II, and the establishment of the Yugoslavia tribunal to prosecute atrocities in Bosnia by Serbian and Croatian forces did not stop subsequent violence in Kosovo, even though prosecutions were well underway. But the existence of a permanent court could change this. The deterrent potential of international prosecutions is debated among criminologists, but the specter of prosecution may provide at least a weak deterrent for higher-level government officials. In addition, the threat of international prosecution may spur countries to begin domestic proceedings against perpetrators. At the very least, world leaders for the first time are aware of the *possibility* of prosecution when they engage in hostilities (Mullins and Rothe 2010: 784–786).
- *Ending a Culture of Impunity*: The absence of prosecutions may help create a “culture of impunity” among perpetrators who believe that they would never be punished for their crimes. The establishment of the International Criminal Court may increase the probability of prosecution because it reduces the significant “startup” costs of creating a new tribunal. Indicted leaders become prisoners of their own states and are subject to tremendous diplomatic and economic pressure. Serbia’s transfer of former President Slobodan Milošević to the Yugoslavia tribunal, for instance, was linked to \$40 million in foreign aid (McGoldrick 2004: 460; Findlay 2013: 30).
- *Retribution*: Unsurprisingly, one of the major goals of the International Criminal Court is to punish perpetrators for the most serious crimes known. Retribution is the traditional focus of efforts to punish international criminal wrongdoing, giving perpetrators “just deserts” for their crimes. Yet, retribution has limitations as well: determining a truly proportional punishment to a mass crime may be an impossible task and international criminal justice mechanisms only have the ability to punish a tiny fraction of the total number of perpetrators. Nonetheless, retribution remains central to international criminal justice (Moffett 2014: 14).
- *Justice for Victims*: The International Criminal Court is more sensitive to the needs of victims than previous international criminal institutions, authorizing

victim participation in criminal proceedings, a claims process for individual reparations, and access to a trust fund for the benefit of impacted communities. At the center of the efforts to provide justice for victims are restorative justice principles that seek to repair the harm caused by criminal behavior and the damaged relationships between the victim and the offender and within society as a whole.

- *Gender Justice*: One of the more innovative features of the Rome Statute is the extent to which it develops international criminal law for the protection of women and girls. Gender interests are systematically included in the definition of crimes, the rules of evidence and criminal procedure, the criteria for judicial appointments, the duty to appoint advisers with legal expertise on sexual and gender violence, and special assistance to female victims of mass atrocities. The International Criminal Court was the culmination of long-term international legal developments recognizing systemic sexual violence as a war crime or a crime against humanity (Bensouda 2014: 539–540).
- *The Search for Truth*: International criminal trials are not solely meant to punish; they also produce a public narrative of mass crimes. Truth and reconciliation commissions in places like Argentina, Brazil, Chile, South Africa, and Uruguay involved confessions and storytelling, involvement of victims, and conditional amnesty for perpetrators to uncover what happened to the dead and the disappeared. The International Criminal Court captures some of these attributes by allowing victims to make impact statements and otherwise broadly observe and participate in criminal proceedings. An international prosecution is not simply about fact-finding; oftentimes, the facts are well-known by victims and others on the ground. Rather, truth-telling involves acknowledging wrongdoing, especially when performed by government officials in lifting the veil of doubt about widely-known but unspoken truths (Hayner 2002: 25).
- *Norm-building*: Because successful international criminal prosecutions have the weight of the international community behind them, they may help to settle historical controversies and shape how conflicts are remembered by future generations. As Cruvellier (2010: 172) writes with respect to the Rwandan genocide, the International Criminal Tribunal for Rwanda helped to politically silence the supporters of the genocidal regime, improving the prospects for stability in the region. In its search for truth, the tribunal helped to discredit genocide denialism and the erroneous belief among some former regime supporters that the genocide was only part of a civil war or that it was actually contrived by outside powers.
- *Reconciliation*: Despite a long-running academic debate about the trade-offs between peace and justice, international prosecutions may be an integral part of a post-conflict process of reconciliation. Undoubtedly, some combatants may be compelled to continue fighting if they know an international prosecution looms. However, with an emphasis on victim participation and a provision allowing the Court to conduct trials in the countries where the atrocities took place, the International Criminal Court may be part of a broader “peace” agenda of reconciliation after conflict (Clark 2011: 543–544).

As Karstedt (2008: 16) writes, an international criminal prosecution can be something of a double-edged sword. Trials inspire both collective amnesia and collective memory. They “close the books” by defining guilt and punishing a few perpetrators, implying that they are separate from the many bystanders. However, the setting of a criminal trial shapes collective memory for the future, sending strong symbolic messages and functioning as historical archives by collecting and preserving evidence. The formality and impartiality of the criminal proceeding provide morally powerful instruments for assigning criminal liability to individuals and responsibility to states. As Futamura (2008: 145–151) explains, the Tokyo trials after World War II elicit mixed reactions in Japan today, and the authoritative historical record constructed at the trial did not contribute to settling the history of a controversial period in Japan’s past, seen as a product of highly politicized justice handed down by American victors. International criminal tribunals have great potential to promote reconciliation and social transformation, but they may also distort perpetrators’ sense of responsibility, guilt, and historical perception. If we are to find success in the future, we must learn about the advances—and setbacks—of international criminal justice in the past.

The Organization of This Book

A volume as slim as this one cannot comprehensively cover every aspect of such a complex institution as the International Criminal Court, but it will try to cover the most important and salient points. This book is intended to be a readable and introductory account of the Court for students of comparative and international criminal justice at the undergraduate level as well as the graduate one. Consequently, this book will make reference to comparative criminal justice topics, including those that involve domestic systems. In addition to summarizing the major debates and current academic literature on the workings of the Court, the book also aims to include new and original perspectives, including, for instance, on the Court’s treatment of local criminal justice methods and opposition from the African continent, discussed in the final chapter. Each chapter contains a list of keywords that are defined in the text. In addition, each chapter begins with a summary and concludes with discussion questions and further reading that are intended to guide classroom discussion.

The seven chapters that follow explore the origins, workings, and future prospects of the International Criminal Court, from the origins of the idea after the Nuremberg and Tokyo trials through the negotiations of the Rome Statute and early operations of the Court. Chapter 1 describes the essential features of the International Criminal Court, which are unique from any previous international tribunal or domestic court. Chapter 2 traces the origins of the idea for a permanent criminal tribunal from the trials of Nazi and Japanese war leadership to the more modern experiments in international criminal justice in Rwanda and the former Yugoslavia, and their successors in Africa, the Middle East, and Southeast Asia.

Chapter 3 explores the negotiations and framework of the Rome Statute establishing the International Criminal Court and describing the Court's key players. Chapter 4 is on the Court's jurisdiction, including the four core crimes, as well as the methods by which jurisdiction is triggered and a case becomes admissible. Chapter 5 follows the proceedings of the Court from the issuance of indictments through to a conviction, and includes a summary of all current cases pending at the Court. Chapter 6 discusses sentencing, appeals, and punishment at the Court, including a discussion of victim reparations. Finally, Chapter 7 considers current controversies, including the Court's perceived targeting of the African continent and the resulting backlash that this has engendered, the special case of Israel-Palestine relations, and the role of local or traditional criminal justice methods in international prosecutions.

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