

The Role of International Criminal Law in the Global Legal Order

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1. Introduction

As a relatively young branch of international law, international criminal law ('ICL') has played a remarkable role in shaping and promoting the global legal order. Within a mere seven decades after the Second World War, more than eight special or *ad hoc* criminal tribunals and courts have been established at the international level. With the adoption of the Statute of the International Criminal Court¹ ('ICC') by 120 States, the international community witnessed an historic moment when the first permanent international criminal court, an independent international body, was created by multilateral treaty.

ICL criminalizes certain conduct as international crimes and enforces itself by entailing individual criminal responsibility. The prohibition, prevention and punishment of such crimes have been recognized as *jus cogens*² and obligations *erga omnes*³ in the global legal order. These concepts of the global legal order also serve to influence how ICL is evolving.⁴ Given the complexity

of today's world, ICL plays several roles in the global legal order to satisfy the multi-faceted demands of the international community. This policy brief demonstrates three of them.

2. Adding the Notion of International Criminal Justice to the Global Legal Order

Today, the threat or use of force between States is prohibited in international relations.⁵ However, prior to the 1920s it was generally accepted that international law did not limit the right of States to wage war. Compared to the failed attempts to prevent war during the interwar period,⁶ the successful abolition of warfare after WWII largely depends on the notion of international criminal justice introduced with the creation of two International Military Tribunals.

2.1. The Creation of International Criminal Tribunals

The establishment of the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East ('IMTFE') marked an historic moment when ICL came into being with the notion of criminal justice being firmly embedded in the global legal order. The creation of these tribunals was without precedent, and the law and procedures of the tribunals represented the first proper expression of international criminal law and procedure.⁷ Telford Taylor believed that the tribunals' jurisprudence would have a profound influence on the development of ICL.⁸ This prediction has come

¹ Statute of the International Criminal Court (<http://www.legal-tools.org/doc/7b9af9/>).

² Oscar Schachter, *International Law in Theory and Practice*, Martinus Nijhoff Publishers, 1991, p. 343; XUE Hanqin, "State Responsibility and 'the Obligations *erga omnes*'", in *Chinese Yearbook of International Law*, 2004, p. 26.

³ The concept of obligation *erga omnes* is put forward by the ICJ in 1970 as "obligations of a State towards the international community as a whole" whose very nature is the "concern of all States". The ICJ continues to enumerate the outlawing of acts of aggression and genocide as obligations of this kind, *Belgium v. Spain (Case Concerning Barcelona Traction, Light and Power Company, Limited, New Application: 1962)*, Judgment of 5 February 1970 (Second Phase), paras. 33–34 (<http://www.legal-tools.org/doc/75e8c5/>).

⁴ For example, the concept of "obligation *erga omnes*" or "common interests of mankind" is sometimes employed as the theoretical basis of the universal jurisdiction for international crimes, ZHOU Lulu, "Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law", in Morten Bergsmo and LING Yan (eds.), *State Sovereignty and International Criminal Law*, Torkel Opsahl Academic EPublisher, 2012, pp. 42–43.

⁵ Art. 2(4), Charter of the United Nations (<http://www.legal-tools.org/doc/6b3cd5/>).

⁶ One noticeable endeavour is the Kellogg-Briand Pact which "condemn[s] recourse to war for the solution of international controversies and renounce[s] it as an instrument of national policy in their relations with one another" (<https://www.legal-tools.org/doc/998ff6/>).

⁷ Ilias Bantekas and Susan Nash, *International Criminal Law*, Second Edition, Cavendish Publishing, 2003, p. 325.

⁸ See Kevin Jon Heller, *The Nuremberg Military Tribunals and the*

through. Both the expression of international crimes⁹ and the principle of individual criminal responsibility have become cornerstones of contemporary ICL.

2.2. The Development of Individual Criminal Responsibility

Faced with the challenge that, in the traditional view, individuals were not direct addressees of international rules and thus normally could not be held personally accountable for breaches of international law,¹⁰ both the Nuremberg Tribunal and the IMTFE established the doctrine of individual criminal responsibility to punish “war criminals” by noting that,

individuals can be punished for violation of international law. Crimes against international law are committed by man, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.¹¹

Subsequently codified by the United Nations International Law Commission (‘ILC’) as Principle I of the 1950 Nuremberg Principles,¹² this principle of individual criminal responsibility has gained universal acceptance and been inherited by subsequent jurisprudence.¹³ Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) widens the scope of individual criminal responsibility to offences committed in the context of non-international armed conflicts.¹⁴

All in all, with the hope to “save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”,¹⁵ ICL, with its system based on individual criminal responsibility, serves as a means to safeguard international peace and security, a tool to realize international criminal justice, and a response to dissatisfying methods of dealing with

international criminals.¹⁶

3. Systemizing and Improving Rules of the Global Legal Order

3.1. Codification and Progressive Development

Carefully considered systemizing and well-designed improvement of the global legal order largely depend on two closely related processes: “codification” and “progressive development”.¹⁷ The rapid development of ICL has greatly stimulated the codification and progressive development of the global legal order as regards core international crimes. The following analysis is based on the core international crimes enumerated by Article 5 of ICC Statute.

The crime of genocide. The practice of the International Military Tribunals triggered international effort to deal with peacetime genocide, resulting in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide¹⁸ (‘Genocide Convention’) which confirms that genocide, whether committed during peacetime or war, is a crime under international law.¹⁹ Both the ICTY and the International Criminal Tribunal for Rwanda (‘ICTR’) have tried persons accused of this crime and delivered important judgments on the matter.²⁰ The International Court of Justice (‘ICJ’) also helped to elaborate the customary character and universal scope of the Genocide Convention.²¹ It interpreted the Convention as creating obligations for the States Parties not to commit genocide and to prevent it.²²

Crimes against humanity and war crimes. These crimes largely speak to the old rules of *jus in bello* which have evolved into today’s international humanitarian law (‘IHL’). The development of ICL promotes the implementation of IHL by including grave breaches of IHL into the jurisdiction of criminal tribunals,²³ elaborating

Origins of International Criminal Law, Oxford University Press, 2011, pp. 374–5; see also Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crime Trials under Control Council Law No.10*, U.S. Government Printing Office, 1949, pp. 100–102.

⁹ Art. 6, Charter of the International Military Tribunal (<http://www.legal-tools.org/doc/64ffdd/>); Art. 5, Charter of the International Military Tribunal for the Far East (<http://www.legal-tools.org/doc/a3c41c/>).

¹⁰ See Antonio Cassese, *International Law*, Second Edition, Oxford University Press, 2005, p. 435.

¹¹ *Trial of the Major War Criminals before the International Military Tribunal*, vol. 22, p. 466 (http://avalon.law.yale.edu/subject_menus/imt.asp).

¹² ILC, “Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (1950)” (<https://www.legal-tools.org/doc/038f9a/>).

¹³ Art. 7, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY Statute’ hereinafter) (<http://www.legal-tools.org/doc/b4f63b/>); Art. 6, Statute of the International Criminal Tribunal for Rwanda (‘ICTR Statute’ hereinafter) (<http://www.legal-tools.org/doc/8732d6/>); Art. 25, ICC Statute.

¹⁴ See Bantekas and Nash, 2003, p. 351, see *supra* note 7.

¹⁵ Preamble, Charter of the United Nations, see *supra* note 5.

¹⁶ Some scholars comment that before the emergence of ICL, methods of dealing with international criminals were dissatisfying because they were either subjected to unlawful extrajudicial executions or simply ignored, see Robert Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007, p. 18.

¹⁷ Schachter, 1991, pp. 66–74, see *supra* note 2; H. Lauterpacht, “Codification and Development of International Law”, in *American Journal of International Law*, 1955, vol. 49, no. 1, pp. 16–43.

¹⁸ 78 UNTS No.1021.

¹⁹ Art. 1, Genocide Convention.

²⁰ Cassese, 2005, p. 444, see *supra* note 10.

²¹ See *Case Concerning Reservations to the Convention of Genocide (Request for Advisory Opinion)*, Advisory Opinion of 28 May 1951, p. 23 (<http://www.legal-tools.org/doc/52868f/>).

²² See *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*, Judgment of 26 February 2007, paras. 166–179.

²³ Art. 2, ICTY Statute; Art. 4, ICTR Statute; Art. 8, ICC Statute.

the application of IHL in new contexts,²⁴ and advancing its codification and development.²⁵

The crime of aggression. The criminalization of aggression has urged the international community to define aggression in the global legal order. Marked endeavours include the UN General Assembly's "Definition of Aggression" resolution²⁶ and the ILC's Draft Code of Crimes against the Peace and Security of Mankind.²⁷ Those efforts laid the foundation for States to include the crime of aggression in the ICC's jurisdiction.

3.2. Revitalizing General Principle as a Source of the Global Legal Order

Article 38(1) of the Statute of the ICJ lists three sources of international law: treaty, custom and general principle. However, general principle is not always attached with equal importance to treaty and custom. General principle is often described as a "secondary" source²⁸, an "historical remnant having little more than academic interest",²⁹ or a mere "matter of speaking"³⁰ given that the ICJ has seldom found occasions to apply it.³¹

This situation is altered by the rise of ICL. Given its special character as a combination of international and criminal law, substantial and procedural rules of domestic criminal trials are of considerable importance. It is noteworthy that general principles of law derived from national legal systems are a source of applicable law at the ICC.³² Part 3 of the ICC Statute deals with principles recognized by most domestic criminal legal systems around the world. This is so because the trials in international criminal courts and tribunals have much in common with those at the domestic level as regards the pro-

cedural guarantees of the defendant. By revitalizing general principles as a source of the global legal order, the international criminal justice system of the ICC has become a "successful product of harmonization of the distinctive principles, rules and procedures derived from the world's major judicial systems".³³

4. Promoting Fundamental Values of the International Community

The validity and effectiveness of the global legal order depend on its capacity to maintain the good order of the international community where various values coexist. The importance of values to the global legal order has drawn intensive academic attention although scholars may have different approaches in construing the concept of value. For example, the New Haven school of international law enumerates eight categories of values.³⁴ Many other scholars focus on two important values: State sovereignty and human rights. The vital dynamic between the two is an important dimension in the development of the global legal order.

Among all the values existing in the international community, some are considered too fundamental to the international community to be violated. ICL plays a noticeable role in promoting these fundamental values by complementing the legal mechanisms of *jus cogens* and obligations *erga omnes*, and challenging the dissatisfying *status quo*.

4.1. Complementing *Jus Cogens* and Obligations *Erga Omnes*

According to Article 53 of the Vienna Convention on the Law of Treaties,³⁵ *jus cogens*, also articulated as "peremptory norm of general international law", is

a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Norms of *jus cogens* cannot be derogated from as they contain "fundamental values identified and adopted by the international system"³⁶ which respond to the "interest of the international community as a whole"³⁷ and are found "necessary to international life and deeply rooted in the international conscience".³⁸ Due to this spe-

²⁴ For example, in light of the circumstances in the former Yugoslavia, the nationality requirement was replaced by the allegiance to a party in determining the applicability of IHL, see *Prosecutor v. Duško Tadić*, ICTY Appeals Chamber, Judgement of 15 July 1999, paras. 165–166 (<http://www.legal-tools.org/doc/8efc3a/>); and *Prosecutor v. Tihomir Blaškić*, ICTY Trial Chamber, Judgement of 3 March 2000, paras. 125–133 (<http://www.legal-tools.org/doc/e1ae55/>).

²⁵ The ILC has included the topic "crime against humanity" to its mandate and the goal is to draft a "Crime against Humanity Convention", see http://legal.un.org/ilc/guide/7_7.htm, last accessed at 14 December 2014.

²⁶ UN doc. A/RES/3314.

²⁷ *Yearbook of the International Law Commission*, 1996, vol. II (Part Two), pp. 17–56.

²⁸ Louis Henkin, *International Law: Politics and Values*, Martinus Nijhoff Publishers, 1995, p. 39.

²⁹ Robert Y. Jennings, "What Is International Law and How Do We tell It When We See It", in *Schweizerisches Jahrbuch für Internationales Recht*, 1981, vol. 37, p. 73.

³⁰ Martti Koskeniemi, "General Principles: Reflexions on Constructivist Thinking in International Law", in *Oikeustiede-Jurisprudencia*, 1985, vol. 18, p. 127.

³¹ Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, Ninth Edition, Longman, 1992, vol. I, p. 37.

³² Art. 21(1)(c), ICC Statute.

³³ Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, 1999, p. 38.

³⁴ They are: power, respect, enlightenment, wealth, well-being, skill, affection and rectitude, see Myres S. McDougal, "International Law, Power, and Policy: A Contemporary Conception", in *Recueil des cours*, 1953, vol. 82, p. 168.

³⁵ 1155 UNTS No.18232.

³⁶ Henkin, 1995, p. 39, see *supra* note 28.

³⁷ *Yearbook of the International Law Commission*, 1963, vol. I, p. 68.

³⁸ *Ibid.*, p. 63.

cial character, norms of *jus cogens* elicit obligations *erga omnes*.³⁹

The legal mechanisms of *jus cogens* and obligations *erga omnes* suffer a weakness common to the entire system of international law: lack of enforcement when the law is violated. The development of ICL and the establishment of the ICC reduce the impact of this weakness. As the prohibition of international crimes becomes accepted as *jus cogens*, international criminal courts and tribunals can prosecute perpetrators of such international crimes within their jurisdiction. It is also noteworthy that the system whereby a situation of international crimes can be referred by any State Party to the ICC reflects the essence of obligations *erga omnes*. By doing so, the ICC is able to safeguard fundamental values of human rights and international peace and security.

4.2. Challenging the Dissatisfying *Status Quo*: Example of Aggression

International criminal law also helps to promote fundamental values of the international community – including the significant value of ‘justice’ – by challenging the *status quo* when such values are not sufficiently addressed. The States behind the ICC adopting the definition of the ‘crime of aggression’ and the conditions for it to exercise jurisdiction at the 2010 Kampala Conference provide a striking example.

Under the world order framework of the UN Charter, the threat or use of force is outlawed and a collective security system established. The UN Security Council assumed the “primary responsibility for the maintenance of international peace and security”.⁴⁰ It is empowered to determine the existence of an act of aggression, and to recommend or take measures to eliminate the aggression and restore international peace and security.⁴¹

However, this mechanism, centred on the Security Council, has not proved to be very effective in dealing with aggression. In practice the Council has rarely exercised its powers to identify acts of aggression and take measures in accordance with Articles 41 and 42 of the Charter.⁴² Even in the typical case of Iraq invading Ku-

wait, the Council did not formally identify the existence of aggression and only addressed the situation as “breach of or threat to international peace and security”.⁴³

Facing the *status quo* of the Security Council’s regular paralysis or reluctance to react to aggression, Article 15*bis* of the ICC Statute represents revolutionary progress making it possible for the Prosecutor of the Court to initiate investigations *proprio motu*. The ‘pending time’ of six months also provides a delicate balancing between the ICC and the Security Council. We can foresee that in situations where the Council is reluctant to determine the existence of aggression and the Prosecutor of ICC starts investigations *proprio motu*, the Council may suffer moral embarrassment, undermining its political credibility, thus increasing the likelihood that it will determine the existence of aggression. In this scenario, the value of international peace and security would be served also by international criminal law and justice.

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LING, 2012, pp. 120-121, see *supra* note 4. See also GE Qingqing, “Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression: On the Relationship between the ICC and the UN Security Council”, in *Peking University International Law and Comparative Law Review*, 2013, vol. 10, pp. 207–209.

⁴³ See UN doc. S/RES/660.

³⁹ XUE, 2004, p. 28, see *supra* note 2.

⁴⁰ Art. 24(1), Charter of the United Nations, see *supra* note 5.

⁴¹ See Arts. 39–51, Charter of the United Nations, see *supra* note 5.

⁴² See GUO Yang, “International Criminal Court: A Judicial Guarantee for International Peace and Security?”, in Bergsmo and