

International Crimes and Accountability:

A beginner's introduction
to the duty to investigate,
prosecute and punish

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 diakonia

PEOPLE CHANGING THE WORLD

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1. Introduction

Massacres of civilians, rape, forcible transfer, torture, indiscriminate bombings, apartheid and persecution all violate the most basic tenants of humanity, morality and human dignity. Over the last century, the international community has reaffirmed the importance of the protection of these basic values by prohibiting the above conduct. Yet when such serious abuses continue to occur, people rightly ask what the tangible consequences are for those who commit, plan, order, or allow such actions? Additionally what are the responsibilities of the international community who often bear witness to such crimes?

Confronting such serious conduct through investigations and prosecution has been growing development within international law throughout the last century. As the Nuremberg Tribunal aptly noted *"crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."*

Prosecution represents an important form of legal protection. By punishing perpetrators, the notion that international crimes are crimes not just against individuals, groups and states, but against all of humankind, is taken seriously. Holding individuals accountable is the central purpose of prosecuting international crime. However the process also has broad transitional justice implications. For example it may deliver justice to numerous victims, reinforce peace building efforts and reconciliation, provide an historical record, and hopefully deter others from committing similar crimes.

Occupied Palestinian Territory has long been at the forefront of international political discourse. Yet despite voluminous documentation regarding gross violations of human rights and serious violations of IHL, there has been little accountability for many criminal acts. There is no shortage of accusations, from all sides, that international crimes have been committed:

"There is no moral symmetry; there is no moral equivalence, between Israel and the terrorist organizations in Gaza. The terrorists are committing a double war crime. They fire at Israeli civilians, and they hide behind Palestinian civilians. And by contrast, Israel takes every measure to avoid civilian casualties."

Prime Minister Netanyahu's statement to the foreign press, 15th
November 2012

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

Nuremberg Tribunal

"True peace is not merely the absence of tension, it is the presence of Justice. Without justice, there can be no peace. He who passively accepts evil is as much involved in it as he who helps to perpetrate it."

Martin Luther King Junior

"Head of UN Fact Finding Mission on the Gaza Conflict urges accountability for war crimes; insists impunity undermines peace process and encourages violence."

UN Fact Finding Mission

By continuing these war crimes of settlement activities on our lands and stealing our money, Israel is pushing and forcing us to go to the ICC.

Nabil Shaath (Senior
Palestinian Official)

“What permits the Israeli Government to blatantly continue with its aggressive policies and the perpetration of war crimes stems from its conviction that it is above the international law and that it has immunity from accountability and consequences. This belief, unfortunately, is bolstered by the failure by some to condemn and demand the cessation of its violations and crimes and by positions that equate the victim and the executioner.”

President of PLO, Mahmoud Abbas, Speech to General Assembly, 29 November 2012.

From the facts ascertained in all the above cases, the Mission finds that the conduct of the Israeli armed forces constitutes grave breaches of the Fourth Geneva Convention in respect of wilful killings and wilfully causing great suffering to protected persons and, as such, give rise to individual criminal responsibility.

United Nations Fact Finding Mission on the Gaza Conflict (Goldstone Report), para 46.

Palestinian organizations that fire rockets and mortar shells into Israel openly declare that they intend to strike Israeli civilians, among other targets. Aiming attacks at civilians is both immoral and illegal, and the intentional killing of civilians is defined a grave breach of the Fourth Geneva Convention and a war crime that cannot be justified, under any circumstance.

B'tselem: Rockets and Mortar Fire into Israel¹
(http://www.btselem.org/israeli_civilians/qassam_missiles)

The proposed relocation plan of 2,300 Arab Jahalin Bedouins from the Jerusalem periphery (E1) to a site next to the Abu Dis Municipal garbage dump, due to commence in January 2012, is a clear violation of international humanitarian law. Furthermore, it is a grave breach of the Geneva Conventions – an unquestionable war crime and possibly a crime against humanity.

Diakonia, Legal Brief, December 2011.

¹ http://www.btselem.org/israeli_civilians/qassam_missiles

Amid such serious allegations it is important to reflect on the broad framework of international criminal law (ICL). This document offers a brief overview of the purpose and scope of application of ICL. After laying this foundation, the potential application of international criminal law to specific cases that have arisen in Occupied Palestine is examined. Fundamental challenges of ensuring accountability for international crimes in this context are also highlighted. This introductory document has been designed to improve awareness of International Criminal Law (ICL), including its strengths and limitations, and to promote discussions among stakeholders about its potential application in the context of occupied Palestine. The present document addresses: accountability for violations of IHL and war crimes; legal standards for appropriate investigations of international crimes; and universal jurisdiction in Europe. The remaining papers address: accountability for corporate actors; international standards for investigations; and application of the EU guidelines on promoting compliance with IHL in the context of the oPt.

As well as addressing important aspects of criminal accountability, these four papers are designed as ready reference tools for analysis of specific circumstances, arising in occupied Palestine, that may involve the commission of international crime.

2. What is International Criminal Law?

International Criminal Law (ICL) is a relatively new and constantly developing branch of public international law. By criminalizing gross violations of human rights² and serious violations of international humanitarian law, it exposes perpetrators of such conduct to criminal liability. ICL provides criminal sanctions that apply to all perpetrators, including those at the highest political and military levels who engage in international crime. This has been demonstrated in the international tribunals for the former Yugoslavia and Rwanda as well as the recent prosecution of Charles Taylor, former President of Liberia, before the Special Tribunal for Sierra Leone. Moreover, the International Criminal Court is currently prosecuting the former President of Cote d'Ivoire, Mr Laurent Gbagbo, the current President of Kenya Uhuru Kenyatta and has issued an indictment against the current President of Sudan Omar Al Bashir. These important developments have fueled both expectations and criticisms of the Court. While the reach of ICL remains uneven (for a range of reasons including resource constraints and geopolitical interests) support for the Court among States continues to grow.³ Criminal accountability for serious violations of ICL is fundamental to promotion of respect for the rule of law, deterring future violations, and providing redress and justice for victims of the most serious international crimes. It is important to note that not all violations of international human rights law (IHRL) or international humanitarian law (IHL) are recognised as international crimes. This paper focuses on what are widely regarded as the most serious of international crimes war crimes, the crime of aggression, crimes against humanity, and genocide.

The term international criminal law is used in different ways in different contexts. For the purposes of this paper, the author uses the term to refer to the international legal regime that enables perpetrators of war crimes, crimes against humanity and genocide to be prosecuted.

Less serious violations of human rights or international humanitarian law do not amount to such crimes and therefore will fall outside of the scope of this paper. The issues regarding less serious violations of IHL will be covered in An introduction to the legal consequences stemming from violations of international humanitarian law .

² Definition of gross and large-scale violations of human rights as an international crime. Working paper submitted by Mr. Stanislav Chernichenko in accordance with Sub-Commission decision 1992/109. E/CN.4/Sub.2/1993/10: "Another difficulty is in distinguishing between gross and less serious human rights violations. This cannot be done with complete precision. According to the conclusions of the Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, which took place between 11 and 15 March 1992, "the notion of gross violations of human rights and fundamental freedoms includes at least the following practices: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention, and systematic discrimination". The conclusions state further that "violations of other human rights, including violations of economic, social and cultural rights, may also be gross and systematic in scope and nature, and must consequently be given all due attention in connection with the right to reparation".

³ By July 2013, of the 194 member State of the UN, 122 had signed the Rome Statute of the International Criminal Court.

War Crimes are serious violations of treaty or customary rules of international humanitarian law committed during armed conflict. War crimes include but are not limited to willful killing, wanton destruction of private property, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer, taking of hostages, recruitment and use of child soldiers, and willfully depriving a person of the rights of fair and regular trial, all occurring in the context of an armed conflict. War crimes can be committed during international armed conflict or non-international armed conflict. Unlike crimes against humanity which require a widespread or systematic commission of prohibited acts, any single serious violation of IHL is a war crime (e.g. recruitment of a child soldier, or willful killing of a unarmed soldier who has surrendered).

Crimes against Humanity are serious human rights violations committed as part of a widespread or systematic attack against a civilian population. Many courts, including the International Criminal Court, require proof that the conduct formed part of a governmental or organizational policy. Crimes against humanity can be committed in numerous ways, including: torture; murder; extermination; enslavement; deportation or forcible transfer; sexual violence; persecution; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law and the crime of apartheid.

Genocide: takes place when certain act or acts are committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. It may involve killings, causing serious bodily harm, inflicting conditions of life calculated to bring about its physical destruction, imposing measures intended to prevent birth, or forcibly transferring children of the group to another group. The term *genocide* is often misused as the crime is not one which is necessarily defined by numbers, but is defined by the specific intent of the perpetrators to not only harm the victims but done to destroy the group as such. Examples included the Holocaust and the Rwandan genocide of 1994.

The same act can amount to both a war crime and a crime against humanity, if the elements under each crime are fulfilled separately.

Torture: is the intentional infliction of severe suffering or pain whether physical or mental, upon a person in the custody or under the control of the accused. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. Depending on the context, under international law an act of torture may be classified as a crime in itself, war crime, an act of genocide or a crime against humanity. It is important to note that the specific elements of these different international crimes are not identical.

Difference Between a Domestic Crime and an International Crime			
Domestic offense of murder	"Internationalizing Element"	In the context of an armed conflict	War Crime
		Conducted as part of a widespread or systematic policy	Crime Against Humanity
		Conducted with the specific intent to destroy in whole or in part a protected group	Genocide

3. Amnesties and Immunities

It is important to note that, as the UN High Commissioner for Human Rights Navi Pillay recently put it, “amnesties are not permissible if they prevent the prosecution of individuals who may be criminally responsible for international crimes including war crimes, crimes against humanity, genocide, and gross violations of human rights.”⁴ The ICC Statute is silent on amnesties (and therefore does not recognize them). As for immunity from prosecution, the ICC Statute is clear: no one is above the law. Everyone, including high ranking officials, can be prosecuted for international crimes.⁵ Decades of practice confirms that no one enjoys immunity when prosecuted before international tribunals.

4. Modes of Criminal Liability

Perpetrators of international crime may be convicted on the basis of their own direct acts or omissions. Other modes of criminal liability including ordering and facilitating a crime. Where international crimes form part of a broad and complex state policy, a wide range of perpetrators may be convicted under different modes of liability. What follows is a list of the most common modes of liability applied by international criminal courts and tribunals:

Committing (act or omission): Physically perpetrating a crime through an act or culpable omission.

Indirect perpetration: Using another person to physically carry out the crime, while controlling the will of the direct perpetrator.

Joint Criminal Enterprise (JCE): Contributing to an activity of several individuals embarking on criminal activity with a common purpose that is carried out either jointly or by some members of this plurality of persons.

Co-perpetration: Being directly involved in the commission of the crime, without necessarily being a principal actor. For example being a member of a gang who attacks an individual, without necessarily performing the physically acts constituting the assault.

Aiding and abetting: Substantially contributing to the perpetration of the crime.

Attempt: Taking a substantial step towards committing a crime, where independent circumstances prevent the crime from occurring.

Planning: Contemplating, planning and designing the commission of a crime, regardless of whether the crime was actually committed.

Ordering: Using a de jure or de facto authority to instruct another person to commit an offence.

Superior/command responsibility: Failure by a superior to prevent or punish the commission of a crime by a subordinate. If the superior knew, or should have known, that subordinates were going to commit a crime, but did nothing to prevent it, they can be held criminally responsible. Failure to take any action against subordinates who have already committed a crime also leads to criminal responsibility.

Conspiracy: Agreeing to commit an offence. In international law, the crime of conspiracy only exists in relation to genocide.

Incitement: instigating, inducing, encouraging, or persuading the perpetration of the crime.

⁴ Pillay: No amnesty for gross human rights violations in Yemen 6 January 2012 <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11752&LangID=E>

⁵ Article 27, Rome Statute

5. The duty to investigate, prosecute, and punish

Beyond the general framework of substantive ICL (established through treaties, customary international law and judicial practice) are also important obligations upon States. For ICL to be put into practice, States must fulfill these obligations. They include obligations to investigate, prosecute and punish international crime. States must investigate international crime, and if there is sufficient evidence, to prosecute the alleged perpetrators. Those convicted must be punished according to international law. In short, there is not simply a legal obligation to refrain from committing international crimes, there are obligations to investigate, prosecute and punish such crime

The responsibility to investigate is codified in several treaties (see following table), including the Geneva Conventions, and recognized as binding obligation under customary law.⁶ Soft law instruments including the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Van Boven Principles)⁷ offer a useful restatement of the law. These principles highlight the duty to, *inter alia*: “investigate violations effectively, promptly, thoroughly and impartially and where appropriate, take action against those allegedly responsible in accordance with domestic and international law.”⁸

Sources of the obligations to investigate, prosecute (or extradite) and punish international crime	Obligation
<p>Geneva Conventions (Grave Breaches)</p>	<p>Common Article 49/50/129/146 Enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present convention...’</p> <p>Each High Contracting party shall be under the obligation to search for persons alleged to have committed, or have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality before its own courts.</p>
<p>ICRC Study on Customary International Humanitarian Law (CUIHL) (War Crimes)</p>	<p>Rule 158 : States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.</p>

⁶ See for example Rule 158 CIHL Study (“ States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.”) Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Customary International Humanitarian Law, Vol. I, 2005

⁷ Adopted by General Assembly Resolution. Important document yet non-binding. Adopted without a vote but after a 17 year process. For procedural history see http://untreaty.un.org/cod/avl/ha/ga_60-147/ga_60-147.html.

⁸ Van Boven principles, at 3. <http://www2.ohchr.org/english/issues/remedy/principles.htm>

<p>Genocide Convention</p>	<p><i>Article 1:</i> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.</p> <p><i>Article 4:</i> Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.</p> <p><i>Article 5:</i> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide...</p>
<p>International Convention for the Protection of All Persons from Enforced Disappearance</p>	<p><i>Article 3</i> Each State Party shall take appropriate measures to investigate acts defined in article 2 (enforced disappearance) committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.</p>
<p>Apartheid Convention</p>	<p><i>Article 4.</i> The State Parties to the present Convention undertake: (a) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of <i>apartheid</i> and similar segregationist policies or their manifestations and to punish persons guilty of that crime; (b) to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.</p>
<p>Convention Against Torture</p>	<p><i>Article 7:</i>The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.</p> <p><i>Article 12:</i> Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.</p>
<p>Van Boven Principles</p>	<p>In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.</p>

6. Venues for prosecution

When prosecuting domestic crime, the choice of venue is clear: domestic courts. The issue is less straight forward with respect to international crime. Various practical and legal challenges may complicate the task of deciding on a suitable forum for prosecution of international crime. Prosecution in the forum closest to victims and witnesses is one consideration. Others include the level of expertise of the local legal profession in prosecution of international crime as well as the costs involved.⁹ Sometimes domestic courts are politicized or dysfunctional due to armed conflict. While international criminal courts and tribunals can provide a more comprehensive justice system, they are often limited in their mandate and competence.

a. Domestic Venues

States are the primary duty holder in relation to investigations and prosecution of local crime, be it international or domestic in character. This is because States exercise national jurisdiction over criminal acts or omissions within their sovereign territory.¹⁰ For example, when allegations of war crimes have surfaced in Syria and Sri Lanka, the Syrian and Sri Lankan authorities have had the primary responsibility to investigate and where appropriate prosecute such conduct. While the International Criminal Court (ICC) may, in a range of circumstances, prosecute international crimes listed in the Rome Statute the ICC is bound by the principle of complementarity. Under this principle, States have the primary responsibility when it comes to the prosecution of international crimes committed within their territory.

In some States, fundamental conflicts of interest may hinder the investigation and prosecution of crime. All too often, national authorities have failed to conduct good faith investigations into international crime, especially where the alleged perpetrators exercise political or military power or can otherwise influence or control investigations and prosecutions. When those close to the ruling regime enjoy impunity, local authorities cannot conduct investigations and prosecutions of international crime in accordance with international standards.

i. Principles of jurisdiction

An international crime may affect victims and perpetrators from different nationalities. In such cases, multiple states may be able to claim jurisdiction. The duty to investigate may be exercisable by a range of States exercising various heads of jurisdiction (see below). However, for reasons of *real politik* or due to their legal complexity, some international crimes receive too little rather than too much interest from states in terms of investigations and prosecution.

Under international law, jurisdiction can be exercised by invoking one or more of the following principles:

- The territoriality principle: jurisdiction is exercisable by the State in whose territory the crime took place
- Active personality or nationality principle : jurisdiction is exercisable over nationals who commit a crime in a foreign country
- Passive personality or nationality principle: jurisdiction is exercisable over persons who commit a crime against a national in a foreign country
- Universal jurisdiction: all states have jurisdiction to bring to trial persons accused of international crimes regardless of the place of commission, or nationality of the author or victim.

⁹ The primacy of domestic mechanisms is a common feature in international law. It is recognized in regional human rights mechanisms where petitioners must exhaust domestic remedies before going to the regional forum (example European Court of Human Rights).

¹⁰ This is not specific to the issue of criminal investigation, but a general aspect of international law, whereby the Vienna Convention on the Law of Treaties Article 26 asserts "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".

<i>Scenario: An A soldier with dual nationality (A/B) commits a war crime by directly attacking civilians during an incursion into C. 3 D tourists are killed. The soldier then boards a direct flight to London.</i>	
Country	Basis for exercising jurisdiction
A	Active Personality/Nationality
B	Active Personality/Nationality
C	Territoriality
D	Passive personality
E	Universal Jurisdiction

This hypothetical example demonstrates that multiple states may claim to the right to exercise jurisdiction over the same criminal conduct. Unfortunately, from a legal perspective “....There are no international customary rules designed to resolve the question of concurrent jurisdiction of two or more states.”¹¹ In a case like this, exercise of jurisdiction is often determined by who has physical custody over the suspect. However, where there are a large number of victims and the crime occurred in a third state, that state would usually seek the extradition of the suspected perpetrator by invoking the territorial principle of jurisdiction.

Discussions concerning the concept of *universal jurisdiction* have become increasingly prevalent in recent years, yet its utility remains limited for several reasons both legal and political. Under this principle, States may bring persons accused of international crimes to trial irrespective of the place of commission or nationality of the perpetrator or victim.¹² The principle is derived from the notion that as international crimes are crimes against all of humanity, giving all states have an interest in their repression. Both the Geneva Conventions of 1949 and the 1984 Convention Against Torture codify the principle. The sheer breadth of the principle has led to concerns that universal jurisdiction infringes upon state sovereignty and could be misused by States for political ends. However, it is also true that political interests restrict the use of the principle. Moreover, jurisprudence of international tribunals demonstrates that when it comes to the commission of international crimes, state sovereignty has its limits. In any case, many states place limits on their ability to exercise universal jurisdiction over international crimes. For example, domestic law often requires the presence of the alleged perpetrator on the territory of the state before an investigation can be launched, or the insertion of a ‘interests of justice’ clause allowing for the political oversight.

¹¹ Cassese.

¹² This principle has been applied in two different ways: narrow and broad. The narrow concept demands the presence of the accused on the territory of the state exercising universal jurisdiction as a condition for the existence of jurisdiction. Whereas the broad notion does not demand such presence. It has been used as a jurisdictional basis for both trials in absentia and commencement of evidence and information gathering where the accused is not present.

Sources of International Jurisdiction	
Geneva Conventions (Grave Breaches)	Common Article 49/50/129/146 Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality before its own courts.
Convention Against Torture	Article 7: The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
ICRC Study on Customary International Humanitarian Law (CUIHL) (Rule 157)	Rule 157. States have the right to vest universal jurisdiction in their national courts over war crimes.
Van Boven Principles	(5) ... where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction.

European Union States and Universal Jurisdiction			
Key EU Member State	UJ: War Crimes	UJ: Genocide	UJ: Crimes Against Humanity
France	✓	✓	✓
United Kingdom	✓	✓	✓
Germany	✓	✓	✓
Denmark	✓	✓	✓
Sweden	✓	✓	⊗
Spain	✓	✓	✓
<i>Israel (non EU)</i>	✓	✓	✓

Source: Universal Jurisdiction- A Preliminary Survey of Legislation Around the World (p16-21)

b. Hybrid Tribunals

Before discussing 'international' courts and tribunals, it is important to note the role of internationalized or hybrid criminal bodies. Incorporating both international and domestic aspects, they are sometimes referred to as a "third-generation" of criminal bodies (the Nuremberg and Tokyo Tribunals being the first, and the ICTY, ICTR and ICC being the second generation). Examples of hybrid tribunals include:

- Crimes Panels of the District Court of Dili
- "Regulation 64" Panels in the Courts of Kosovo
- Special Court for Sierra Leone (SCSL)
- Extraordinary Chambers in the Courts of Cambodia (Khmer Rouge Prosecutions) (ECCC).

c. International

Prior to World War II, international crimes were prosecuted in domestic courts. While this legal tradition continues permanent and ad hoc international and courts and tribunals have taken on a significant role since the 1990s. Building on the legacy of the Nuremberg and Tokyo Tribunals, international and hybrid courts have played a central role in the prosecution of those charged with committing some of the most serious international crimes of the late 20th and early the 21st centuries. One reason is that States are often unwilling or unable to prosecute (often complex or politically sensitive) international crimes. Four States, including Uganda have referred situations to the ICC (e.g. Uganda referred the Joseph Kony case). The UN Security Council has also referred situations to the ICC eg the case against President of Sudan Omar Al Bashir) As the number of cases before the ICC grows, its role in closing the impunity gap becomes increasingly important.

The following table gives a brief overview of the key facts and figures with regards to the number of cases held before these international and hybrid tribunals (as of June 2013).

	Indicted	Concluded Proceedings	Sentenced	Acquitted	On-going
ICTY	161	126	64	13	35
ICTR	106	72	64	10	18
SCSL	13	10	10	0	1
ECCC	5	1	1	0	4

i. ICTY/ICTR

Unlike the ICC, which is a permanent court, the *ad hoc* tribunals of the International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) were endowed with jurisdictional primacy over national courts. These two tribunals were created by a political body (The United Nations Security Council) in response to specific historical 'events' in two different geographical locations.. While they have left a lasting legacy in terms of case law and as the first post Nuremberg international tribunals, they had no direct utility for situations in other parts of the world.

Arguably the most important legacy of the *ad hoc* tribunals is the impetus they gave for the creation of a permanent tribunal with jurisdiction over international crime: the International Criminal Court.

ii. The International Criminal Court

"In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished."

-- Kofi Annan, United Nations Secretary-General, 1998

The ICC, established by the Rome Statute of 1998, is the first permanent international criminal tribunal. Whenever international crimes are mentioned, the ICC is usually central to the discussion, which suggests that it has become the central mechanism for the prosecution of international crime. While that is its function, it is important to emphasize that the ICC has limited jurisdiction. In general, it can only deal with international crimes that domestic authorities are unwilling or unable to address, including times when national courts have already dealt with but imposed manifestly inadequate penalties or no penalty at all (sham prosecutions).

As with any treaty, States decide for themselves whether they will bind themselves to the Rome Statute. As of May 2013, 122 states were party to the Rome Statute. The ICC can exercise jurisdiction over the four crimes in the statute when committed by *nationals of state parties or occurring in the territory of a party* to the Statute. In limited circumstances, it can also exercise jurisdiction over crimes committed in states who are not party to the treaty, such as the United States, Israel, Syria, Sudan and Libya. One means is where a state recognizes the jurisdiction of the ICC on an ad hoc basis. Here retroactive jurisdiction can be exercised over crimes allegedly committed since July 2002. Another mechanism is a referral by the UN Security Council. While a useful method of expanding the jurisdiction of the court beyond member states (and thereby curbing impunity), this referral mechanism is open to the criticism that it creates uneven application of justice: as the Security Council is a political body and its permanent member States have a right of veto, those States can prevent the ICC from addressing their own conduct or that of their allies. It is important to note that even when the Security Council referral mechanism is triggered (giving the ICC has jurisdiction in say Libya) the ICC Prosecutor retains an independent discretion to proceed with investigations. Furthermore, where domestic courts are genuinely investigating themselves, they are given primary responsibility. In such circumstances, the ICC cannot deal with the matter.

● International Criminal Court: Israel and Occupied Palestine *Israel*

As the State of Israel has signed but not ratified the Rome Statute (the legal basis for the ICC), it is not currently a State party to the Rome Statute. During the negotiations leading to the adoption of the Rome Statute, Israel objected to the inclusion of the war crime of “transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies.” According to Israel:

International law has long recognized that there are crimes of such severity they should be considered “international crimes.” Such crimes have been established in treaties such as the Genocide Convention and the Geneva Conventions.... The following are Israel’s primary issues of concern [i.e. with the rules of the ICC]: The inclusion of settlement activity as a “war crime” is a cynical attempt to abuse the Court for political ends. The implication that the transfer of civilian population to occupied territories can be classified as a crime equal in gravity to attacks on civilian population centers or mass murder is preposterous and has no basis in international law.¹³

It should be noted that the prohibition in question was first outlawed by the Fourth Geneva Convention in 1949 (which Israel is a state party to). It is also a grave breach under Article 147 GCIV,¹⁴ a position reiterated under Article 85(4)(a) of the 1977 Additional Protocol I.

As Israel has signed the Rome Statute it has the minimum obligation not to defeat the object and purpose of the treaty and hence should not work against the Court.¹⁵

Palestine

On January 22nd 2010, the Government of Palestine attempted to utilize the ad hoc acceptance mechanism contained in Article 12 of the Rome Statute, so that the ICC could exercise jurisdiction over “acts committed on the territory of Palestine since 1 July 2002.”¹⁶ xx

¹³ Israeli Minister of Foreign Affairs produced “The International Criminal Court Background Paper”http://www.mfa.gov.il/mfa/mfaarchive/1990_1999/1998/7/the%20international%20criminal%20court%20-%20background%20pape

¹⁴ ‘ Unlawful deportation or transfer. ’ -- This refers to breaches of the provisions of Articles 45 and 49. ICRC Commentaries to Articles 147. <http://www.icrc.org/ihl.nsf/COM/380-600169?OpenDocument>.

¹⁵ Article 18, Vienna Convention on the Law of Treaties. Also customary international law, see Blay, Piotrowicz, Tsamenyi , Public international law: an Australian perspective (OUP, 1997) at 101.

¹⁶ The declaration can be accessed at: <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>

The innovative aspect of this initiative is that it entailed Palestine becoming party to the ICC. If so, the ICC would have jurisdiction over actions carried out in the context of the Israeli–Palestinian conflict: first, on Palestinians suspected of committing international crimes; and, second, on Israelis suspected of offenses within the territory of the Palestinian territory which would be considered for the sake of ICC jurisdiction, a state or at similar status. the ICC would not prosecute a case if the relevant state exercised appropriate jurisdiction, i.e., properly investigated the case and brought it to trial when required.

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In response, despite acknowledging, that “Palestine has been recognized as a State in bilateral relations by more than 130 governments and by certain international organizations, including United Nation bodies,” the Prosecutor concluded, in a statement dated 3rd April 2012, that “The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term “State””. For this reason, the matter was taken no further at that time.

It is important to note that the Prosecutor did state that “the current status granted to Palestine by the United Nations General Assembly is that of “observer”, not as a Non–member–State.” This status changed in November 2012. The Prosecutor also stated “in instances where it is controversial or unclear whether an applicant constitutes a State, it is the practice of the Secretary General to follow or seek the General Assembly for directives on the matter.”

On the 29th of November 2012, the UN GA upgraded Palestine’s status at the UN to a “Non–Member Observer State.” In light of this development, the ambiguity raised in the Prosecutors statement of 3rd April 2012 seems to have been resolved. In December 2012, the ICC released a statement stating that “The Office of the Prosecutor takes note of the decision” and will now “consider the legal implications of this resolution.”¹⁷

If Palestine is able to utilize the ad hoc acceptance mechanism, or decides to become a high contracting party, the ICC Prosecutor could undertake investigations into crimes committed on all sides of the conflict.

- Challenging the ICC’s jurisdiction once triggered?

These developments have triggered debate over whether ICC prosecutions would help or hinder peace and justice. Many governments have called upon the Palestinian Government not to go to the ICC.¹⁸ Arguments that ICC litigation would undermine the peace process reflect the narrative that in the conflict between Israel and the Palestinians, peace must be prioritized above justice and accountability.

If the ICC decides that it is seized of the matter brought by the Palestinian Government, the only obstacle to the ICC investigating whether there is sufficient evidence to present indictments for war crimes such as an occupying power transferring parts of its own civilian population into territory it occupies,¹⁹ would be for Israel to genuinely investigate international crimes within the jurisdiction of the ICC²⁰. Once the ICC is seized, the Court would only be

¹⁷ Statement sent to Agence France Presse

¹⁸ For example UK government, see <http://www.bbc.co.uk/news/uk-politics-20524115>.

¹⁹ Article 8 (2)(b)(viii), Rome Statute.

²⁰ See Article 19(2), Rome Statute.

precluded from dealing with the matter if the Security Council halts the investigation and prosecution,²¹ or the Prosecutor indicates that there are “substantial reasons to believe that an investigation would not serve the interests of justice.”²² Once the matter is before the Court, legal objections could be raised to the exercise of jurisdiction or the merits of the case.

- *No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect (article 16)*
- *Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. (Article 53(c))*

In order to successfully challenge a potential investigation by the ICC, the authorities must not only start investigations, but also conduct them in good faith. The Court may deal with a matter, in the language of the Rome Statute, if the State is “unwilling or unable genuinely to carry out the investigation or prosecution.”²³ . Two recent incidents in the occupied Palestine highlight lack of accountability and ongoing impunity which could trigger ICC investigations. Since the recent Gaza Conflict (November 2012), the IDF is yet to provide adequate disclosure of its investigations into violations of IHL, meanwhile Palestinian Militants do not appear to be subject to any investigations for systematic violations of IHL during that conflict. Secondly, there is strong evidence of lack of accountability with respect to population transfer into the oPt and related settlement expansion by Israel. Following the Palestinian upgrade by the UNGA Israeli Prime Minister Netanyahu responded by approving the construction of 3,000 units in the West Bank and East Jerusalem (both are occupied territory). Settlement activity in occupied territory can constitute a grave breach of the Fourth Geneva Convention of 1949 and a war crime under the Rome Statute. In response to widespread criticism from European States and the United States, Netanyahu stated that *“Israel will continue to stand by its vital interests, even in the face of international pressure, and there will be no change in the decision that was made.”*²⁴

It is important to note that war crimes cannot be justified on the basis of domestic law, government policy or group interests.

²¹ See Article 16, Rome Statute. (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”)

²² Article 53(1), Rome Statute.

²³ Article 17(1), Rome Statute.

²⁴ Israel Settlements: Netanyahu defies outcry over EI. <http://www.bbc.co.uk/news/world-middle-east-20585706>

Conclusion

Criminal accountability for serious violations of IHL and gross violations of IHRL is fundamental to ensuring justice and remedies for victims. It also strengthens efforts to secure a durable peace in transitional and post-conflict environments. . Where domestic courts are unwilling or unable to act, prosecutions may take place in international or hybrid domestic-international tribunals. International criminal law, which has developed significantly in recent years, is an important mechanism for criminal accountability. In the context of the occupied Palestine, criminal accountability for serious violations of IHL is lacking. It is therefore important to continue to assess steps to ensure criminal accountability and engage with mechanisms which can help bridge the impunity gap. When it comes to prosecution of international crime, those who want to avoid being indicted in international tribunals are well advised to refrain from engaging in international crime.

No State is above the law. State violations of international obligations have consequences under the law of state responsibility. All persons are protection by the law. No individual is above the law. Persons who commit international crimes can be held accountable before domestic or international tribunals.

Jurisdiction of the International Criminal Court

The Court may exercise jurisdiction over **genocide, crimes against humanity, war crimes and aggression**.

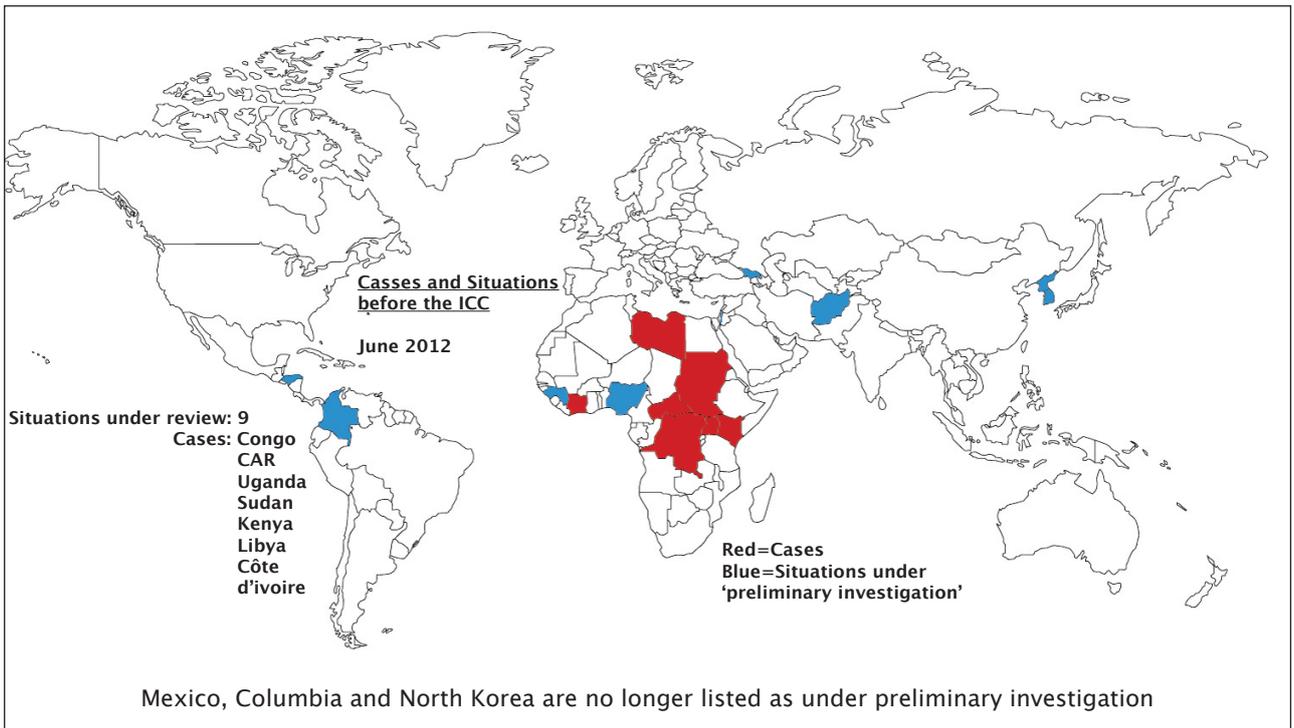
The Court has jurisdiction over individuals accused of these crimes. This includes those directly responsible for committing the crimes as well as others who may be liable for the crimes, for example by aiding, abetting or otherwise assisting in the commission of a crime. The latter group also includes military commanders or other superiors whose responsibility is defined in the Statute.

The Court **does not have universal jurisdiction**. The Court may only exercise jurisdiction if:

- The accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court;
- The crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or
- The United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime

The Court's jurisdiction is further limited to events taking place since 1 July 2002. In addition, if a State joins the Court after 1 July 2002, the Court only has jurisdiction after the Statute entered into force for that State. Such a State may nonetheless accept the jurisdiction of the Court for the period before the Statute's entry into force. However, in no case can the Court exercise jurisdiction over events before 1 July 2002.

Even where the Court has jurisdiction, it will not necessarily act. The principle of "complementarity" provides that certain cases will be inadmissible even though the Court has jurisdiction. In general, a case will be inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction. However, a case may be admissible if the investigating or prosecuting State is unwilling or unable to genuinely to carry out the investigation or prosecution. For example, a case would be admissible if national proceedings were undertaken for the purpose of shielding the person from criminal responsibility. In addition, a case will be inadmissible if it is not of sufficient gravity to justify further action by the Court.





What is Diakonia?

Diakonia is a Swedish development organisation working together with local partners for a sustainable change for the most vulnerable people in the world. We support more than 400 partners in nearly 30 countries and believe in a rights-based approach that aims to empower discriminated individuals or groups to demand what is rightfully theirs. Throughout the world we work toward five main goals: human rights, democratisation, social and economic justice, gender equality and sustainable peace.

Diakonia International Humanitarian Law Resource Centre

The goal of Diakonia International Humanitarian Law Resource Centre is to increase the respect for and further implementation of international law, specifically international humanitarian law (IHL), in the Israeli–Palestinian conflict. We believe that addressing violations of IHL and international human rights law tackle the root causes of the humanitarian and protection crisis in the oPt, in a sustainable manner. Our Centre makes IHL expertise available by providing:

- Briefings to groups and organisations on IHL and its applicability to Israel and the oPt;
- Tailored in–depth trainings on specific issues and policies relating to IHL;
- Legal analyses and ongoing research on current IHL topics; and
- Legal advice, consultation and legal review of documents for other actors in the oPt, to support policy formulation and strengthen advocacy with an IHL perspective.

Do you or your organisation want to learn more about IHL and its applicability to the oPt? Visit our website 'An Easy Guide to International Humanitarian Law in the occupied Palestinian territory' at: <http://www.diakonia.se/ihl> – or contact us to set up a general or specialised legal briefing by our legal advisors.

Contact us at: ihl@diakonia.se

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