
International Law

Discussion Questions

Gleider Hernández, *International Law* (2nd edition, Oxford University Press, 2022)

Chapter 17, International Criminal Law

Question 1. *What is the legacy of the ad hoc international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)? What impact did they leave on the International Criminal Court?*

Students have a number of approaches they may wish to follow. They may wish to focus on the *ad hoc* tribunals' essentially creating the momentum in the 1990s for the international criminal justice movement, foreshadowing the adoption of the Rome Statute in 1998. They could look at the substantive contributions made by the ICTY and ICTR in relation to the definitions of international crimes, the development of rules of procedure, and the removal of immunity for high-ranking officials that would also make its way into the Rome Statute. Even their structure, with an independent Prosecutor and trial and appellate chambers, was influential in the creation of the ICC.

The legacy of the *ad hoc* Tribunals can also be expressed by reference to the different solutions adopted in the creation of the ICC. Unlike the *ad hoc* Tribunals, the ICC has complementary and not primary jurisdiction in relation to international crimes (Article 17 Rome Statute). The Rome Statute rejected the 'joint criminal enterprise' doctrine for being overly broad, instead moving towards a doctrine of co-perpetration that has stricter requirements for participation (Article 25(3) Rome Statute). The ICC also developed a much more active engagement with victims and witnesses than the *ad hoc* Tribunals: see e.g. the *Lubanga* judgment for clarification on the participation of victims and witnesses in the work of the Court.

Question 2. *What is the relationship between the ICC and the Security Council? How can the latter influence or control the work of the Court?*

Though the *ad hoc* tribunals (the ICTY and ICTR) and many other international criminal courts and tribunals were created by, or with the support of the Security Council, the ICC was created as a separate international organisation under the Rome Statute. It is not an organ of the United Nations and functions independently of it. The best responses might even point out that the ICC is composed of its own organs: the Presidency, the Prosecutor, the Registry, the Assembly of States Parties and the Chambers.

Nevertheless, several provisions in the Rome Statute establish a relationship with the Security Council. Under Article 13(b) and Article 15*ter*, the Security Council may refer, under Chapter VII of the Charter, a matter for investigation by the ICC Prosecutor—even in relation to a non-State party (see e.g. the referral by the Council of the situation in Sudan). Under Article 15*bis* (6-8), the Prosecutor must ascertain whether the Security Council has made a determination in relation to the crime of aggression, and must give the latter six months before an investigation may be opened. Most significantly, under Article 16 the Security Council may pass a renewable resolution requiring the ICC Prosecutor to suspend an investigation for twelve months.

Based on these links, the best responses will consider the implications of this relationship between the ICC and the Security Council, including the extent to which the Council may limit or otherwise control the work of the ICC.

Question 3. *'Crimes against humanity are already prohibited under the Rome Statute, customary international law and rules of jus cogens. There is no need for a treaty or convention on the subject.'* Discuss and analyse critically.

Crimes against humanity have been the subject of discussions at the ILC since 2014, which has recently published the Draft Convention on Crimes against Humanity, possibly similar to the Convention against Torture or the Genocide Convention. In order to respond to such a question, students might be advised first to recall the applicable legal framework for crimes against humanity.

Foremost, there have been treaty provisions on crimes against humanity for decades, from the Nuremberg Charter (Article 6 (c)) through to Art 5 of the ICTY Statute and Art 3 of the ICTR to the Rome Statute (Article 7). The latter in particular defines a number of acts (from rape to enslavement to forced population transfer) as crimes against humanity, provided that they are sufficiently widespread and systematic, and directed against a civilian population. These are a valuable component of the legal framework. Moreover, crimes against humanity have long been recognised under customary international law. In *Nuclear Weapons* the ICJ called them 'intransgressible principles' of IHL; and in *Jurisdictional Immunities of the State* it addressed the possible conflict between immunity and certain crimes against humanity as *jus cogens*.

So what would a convention on crimes against humanity add? First, if it mirrors the conventions on genocide and torture, it would clarify the scope of the term. Secondly, it would impose obligations of prevention on States, specifically an obligation to criminalise crimes against humanity in their domestic law. Finally, it might also create an obligation to prosecute or extradite offenders to other States to face trial. In this respect, a convention might buttress the complementarity regime of the ICC by increasing the chance for domestic enforcement.