

**INTERNATIONAL
AND
COMPARATIVE
CRIMINAL
LAW
SERIES**

Editorial Board

Series Editor

M. Cherif Bassiouni

President, International Human Rights Law Institute, DePaul University
President, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy
President, International Association of Penal Law, Paris, France
Professor of Law, DePaul University, Chicago, IL, USA

Diane Amann

Professor of Law
University of California
School of Law
Davis, CA, USA

Christopher L. Blakesley

William S. Boyd Professor of Law
School of Law
University of Nevada
Las Vegas, NV, USA

Roger S. Clark

Board of Governors Professor
Rutgers University
School of Law
Camden, NJ, USA

John Dugard

Member, International Law
Commission, Geneva; Emeritus
Professor of Law, University of
Witwatersrand, South Africa; and
Professor of Public International
Law, University of Leiden,
The Netherlands

Albin Eser

Professor of Criminal Law, Albert
Ludwig University; Director, Max-
Planck Institute for International and
Comparative Criminal Law
Freiburg, Germany

Alfredo Etcheberry

Professor of Criminal Law,
National University of Chile;
President, Chilean Lawyers'
Association, Santiago, Chile

Jordan Paust

Law Foundation Professor of Law
University of Houston Law Center
Houston, TX, USA

Mario Pisani

Professor of Criminal Procedure
Faculty of Law, University of Milan
Milan, Italy

William Michael Reisman

Myres S. McDougal Professor of Law
and Jurisprudence, Yale Law School
New Haven, CT, USA

Leila Sadat

Professor of Law
Washington University in St. Louis
School of Law
St. Louis, MO, USA

Michael P. Scharf

Professor of Law
Frederick K. Cox Int'l Law Center
Case Western University
School of Law
Cleveland, OH, USA

Kuniji Shibahara

Professor Emeritus
University of Tokyo, Faculty of Law
Tokyo, Japan

Brigitte Stern

Professor of International Law
University of Paris I
Panthéon, Sorbonne
Paris, France

Otto Triffterer

Emeritus Professor of International
Criminal Law and Procedure,
Faculty of Law,
University of Salzburg
Salzburg, Austria

INTRODUCTION TO INTERNATIONAL CRIMINAL LAW

M. C H E R I F B A S S I O U N I



Transnational Publishers, Inc.
Ardsley, New York

Published and distributed by *Transnational Publishers, Inc.*
Ardsley Park Science and Technology Center
410 Saw Mill River Road
Ardsley, NY 10502

Phone: 914-693-5100
Fax: 914-693-4430
E-mail: info@transnationalpubs.com
Web: www.transnationalpubs.com

Library of Congress Cataloging-in-Publication Data

Bassiouni, M. Cherif, 1937-

Introduction to international criminal law / by M. Cherif Bassiouni.
p. cm.

Includes bibliographical references.

ISBN 1-57105-286-0

1. Criminal law. 2. Criminal jurisdiction. 3. International offenses. I. Title.

K5015.B37 2003

341.7'7—dc21

2003055989

Copyright © 2003 by Transnational Publishers, Inc.

All rights reserved. This book may not be reproduced, in whole or in part, in any form (beyond that copying permitted by U.S. Copyright Law in Section 107, "fair use" in teaching and research, Section 108, certain library copying, and except in published media by reviewers in limited excerpts), without written permission from the publisher.

Manufactured in the United States of America

To Cooks

At whose bedside this book was written

TABLE OF CONTENTS

<i>Table of Abbreviations</i>	<i>xvii</i>
<i>Acknowledgments</i>	<i>xxix</i>
<i>Introduction</i>	<i>xxxi</i>
Chapter I	
The Discipline of ICL	1
Section 1. The Sources of ICL	1
1.1 The Components of ICL	1
1.2 The Different Sources of Law and Their Application to ICL's Components.	8
1.3 Assessing the Sources of Law Applicable to ICL and the Doctrinal Framework of ICL	11
1.4 Complementarity	15
Section 2. The Peculiarities of ICL Enforcement Regimes	18
Section 3. The Policies and Values of ICL and Their Systemic Development.	21
3.1 The Historical Evolution of the Direct Enforcement System.	23
3.2 The Evolution of ICL Norm-Development.	25
3.3 The Historic Evolution of ICL Enforcement Through the Indirect Enforcement System.	29
3.4 The Underlying Concept of ICL Enforcement: <i>A Civitas Maxima</i>	31
Section 4. The Changing Nature of International Law and Relations and Their Impact on ICL.	41
Section 5. Conclusion	50
Chapter II	
The Subjects of International Criminal Law: <i>Ratione Personae</i>	57
Section 1. Introduction	57
Section 2. Doctrinal Considerations	59
Section 3. International Criminal Responsibility of Individuals	64
3.1 Basis of Responsibility	64
3.2 International Criminal Responsibility of Non-State Actors	68

Section 4. Criminal Responsibility of Heads of State and Other Persons Benefiting from International Immunities	71
4.1 Introduction	71
4.2 Historical Evolution Before International Judicial Organs and Under Conventional ICL.	73
4.3 Customary Practice of States	76
4.4 The ICJ's 2002 Ruling on Immunities	80
4.5 Conclusion	81
Section 5. International Criminal Responsibility of Groups and Organizations	82
Section 6. International Criminal Responsibility of States.	85
Section 7. The Victim as a Subject of ICL.	90
7.1 The Evolution of the Individual Victim's Rights in International Law	90
7.2 The Normative Framework of a Victim's Right to Reparation.	92
7.2.1 The Evolution and Foundation of the Normative Framework for a Victim's Right of Reparation.	92
7.2.2 Defining the Term "Victim"	95
7.2.3 A State's Obligation to Respect, Ensure Respect for, and Enforce International Human Rights and Humanitarian Law	97
7.2.4 The Rights of Victims	97
i The Right to Access Mechanisms of Justice . . .	98
ii The Right to Reparation	98
7.3 Mechanisms for Obtaining Reparations for Victims . . .	99
7.4 Economic and Political Considerations	103
Section 8. Conclusion	106
Chapter III	
International Crimes: <i>Ratione Materiae</i>	109
Section 1. Introduction	109
Section 2. Codification of ICL.	112
Section 3. Criteria for International Criminalization	114
Section 4. The Penal Characteristics of ICL Conventions.	115
Section 5. The Hierarchy of International Crimes.	118
5.1 International Crimes	121
5.2 International Delicts.	122
5.3 International Infractions	123
5.4 Ranking and Classification of International Crimes . . .	124
Section 6. Evolution of the Process of International Criminalization.	133
6.1 Introduction	133
6.2 The Categories of International Crimes	136

Jus ad Bellum and Jus in Bello

6.2.1	Aggression	136
6.2.2	Genocide	138
6.2.3	Crimes Against Humanity	139
6.2.4	War Crimes	141
6.2.5	Unlawful Possession, Use, and Emplacement of Weapons.	142
6.2.6	Theft of Nuclear Materials	144
6.2.7	Mercenarism	144

Protection of Human Interest

6.2.8	Apartheid	145
6.2.9	Slavery and Slave-Related Practices	145
6.2.10	Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment	146
6.2.11	Unlawful Human Experimentation	147

Protection Against Terror-Violence

6.2.12	Piracy	149
6.2.13	Aircraft Hijacking and Unlawful Acts of International Air Safety.	149
6.2.14	Unlawful Acts Against the Safety of Maritime Navigation and the Safety of Platforms on the High Seas	150
6.2.15	Threat and Use of Force Against Internationally Protected Persons	150
6.2.16	Crimes Against U.N. and Associated Personnel	151
6.2.17	Taking of Civilian Hostages	151
6.2.18	Unlawful Use of the Mail	151
6.2.19	Use of Explosives	153
6.2.20	Financing of Terrorism	153

Protection of Social and Cultural Interests

6.2.21	Unlawful Traffic in Drugs and Related Drug Offenses	153
6.2.22	Organized Crime	154
6.2.23	Destruction and/or Theft of National Treasures	154
6.2.24	Unlawful Acts Against Certain Internationally Protected Elements of the Environment	155
6.2.25	International Traffic in Obscene Materials	156
6.2.26	Falsification and Counterfeiting	156

6.2.27 Unlawful Interference with International Submarine Cables	157
6.2.28 Bribery of Foreign Public Officials.	158
Section 7. The Characteristics of ICL Conventions on International Crimes	158
Section 8. <i>Jus Cogens</i> International Crimes	167
8.1 The Meaning of <i>Jus Cogens</i>	171
8.2 The Scope of <i>Obligatio Erga Omnes</i>	176
Section 9. Principles of Legality in International Crimes.	178
9.1 Introduction	178
9.2 Principles of Legality in the World's Major Criminal Justice Systems	182
9.3 Principles of Legality in ICL	198
9.4 Post-IMT/IMTFE Developments	204
9.5 The Principles of Legality in Contemporary ICL.	212
Section 10. The Principles of Legality and the <i>Ratione Materiae</i> of ICL.	218
Section 11. Conclusion	226
Appendix: ICL Conventions	227
Chapter IV	
Principles of Criminal Responsibility: The General Part	259
Section 1. Introduction	259
Section 2. General Considerations	263
Section 3. National Legal Standards and Their Relevance to ICL.	270
Section 4. Some Problems in Identifying the General Part in the Charter to the ICC	276
Section 5. The Application of the General Part by the IMT, IMTFE and in Other Proceedings: A Historical Analysis.	279
Section 6. Some Specific Problems	281
6.1 The Mental Element	281
6.2 Command Responsibility: Policy Considerations	290
6.2.1 The Evolution of Command Responsibility in the Regulation of Armed Conflicts	295
6.2.2 Civilian Command Responsibility.	318
Section 7. ICL Penalties and Sentencing	320
7.1 Introduction	320
7.2 IMT and IMTFE	322
7.3 ICTY and ICTR	324
7.4 ICC.	328
7.5 Conclusion	331

Chapter V**The Indirect Enforcement System and the Modalities of**

International Cooperation in Penal Matters	333
Section 1. Introduction	333
Section 2. The Maxim <i>Aut Dedere Aut Judicare</i>	334
2.1 Origin and Rationale	334
2.2 Nature and Content of the Obligation	343
Section 3. The Modalities of International Cooperation in Penal Matters	347
3.1 Introduction	347
3.2 Extradition	348
3.3 Legal Assistance (also Referred to as Mutual Legal Assistance)	352
3.4 Execution of Foreign Sentences.	354
3.5 Recognition of Foreign Penal Judgments.	357
3.6 Transfer of Criminal Proceedings	358
3.7 Freezing and Seizing of Assets (Deriving from Criminal Activities)	359
3.8 Intelligence and Law Enforcement Information- Gathering and Information-Sharing	368
3.9 Regional and Sub-Regional Judicial Spaces	377
Section 4. Assessing the Indirect Enforcement System.	379
Section 5. Conclusion	384

Chapter VI**The Direct Enforcement System: History of International**

Criminal Investigations and Prosecutions	387
Section 1. Introduction	387
Section 2. History of International Criminal Investigations and Prosecutions: From Versailles to Rome, 1919–1998	393
2.1 <i>Ad Hoc</i> International Investigative Commissions and International Criminal Tribunals Since 1919.	394
2.2 The 1919 Commission on the Responsibilities of the Authors of War and on Enforcement Penalties	395
2.3 The Allies' Failure to Establish Prosecutions Pursuant to the Treaty of Versailles	399
2.4 The Leipzig Trials	401
2.5 The 1943 United Nations War Crimes Commission.	403
2.6 The International Military Tribunal at Nuremberg	405
2.7 Control Council Law No. 10	412
2.8 The Instrument of Surrender of Italy	413
2.9 The Far Eastern Commission and the International Military Tribunal for the Far East at Tokyo	414

2.10	Politics of Defendant Selection in the Far East	418
2.11	Comparison of the Legal Bases for Setting Up the IMT, IMTFE, and CCL 10 and Far East Allied Military Prosecutions	420
2.12	The Years of Silence: 1955-1992	422
2.13	The Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)	422
2.14	The International Criminal Tribunal for the Former Yugoslavia	426
2.15	The Rwanda Commission of Experts	430
2.16	The International Criminal Tribunal for Rwanda (ICTR)	431
Section 3.	Establishing an International Criminal Court: Historical Efforts, 1937-1994	434
Section 4.	Changing Times: The ICC Comes Into Being, 1989-1998	444
4.1	Assessing the Progress from 1989 to 1998	450
4.2	Informal Inter-Sessional Meetings	457
4.3	The "Like-Minded" States	457
4.4	The NGO Community	458
4.5	The Draft Statute of the International Criminal Court	459
4.6	The Rome Diplomatic Conference: June 15-July 17, 1998	462
4.6.1	The Flow of Texts to the Drafting Committee.	469
4.6.2	The Negotiating Process	474
4.6.3	The Final Stage	478
4.6.4	Legal Methods and Techniques	481
4.6.5	The Signing of the Convention	489
 Chapter VII		
The International Criminal Court: A Hybrid		
	Direct Enforcement System	495
Section 1.	The Need for an ICC	495
Section 2.	The Characteristics of the ICC	499
2.1	The Nature of the ICC	499
2.2	Complementarity of the ICC and National Legal Systems	500
Section 3.	Applicable Law	501
Section 4.	The Jurisdiction of the ICC	503
4.1	Preconditions to the Exercise of Jurisdiction	503
4.2	<i>Ratione Temporis</i> : When the ICC May Exercise Its Jurisdiction	505
4.3	<i>Ratione Personae</i> : The Subjects of Criminal Responsibility	506

4.4	<i>Ratione Materiae</i> : The Crimes Within the Jurisdiction of the ICC	506
4.5	Defining Aggression and the Inclusion of Other Crimes.	512
Section 5.	Elements of Criminal Responsibility:	
	The General Part.	513
Section 6.	Invoking the Jurisdiction of the Court	514
6.1	Referring a “Situation” to the Court: Initiation of the Investigation and Prosecution.	514
6.2	The Prosecutor’s <i>Proprio Motu</i> Initiation of an Investigation	516
6.3	Admissibility and Inadmissibility.	517
6.4	<i>Ne Bis In Idem</i>	519
Section 7.	The Court’s Exercise of Jurisdiction	520
7.1	Procedural Due Process	520
7.2	The Investigation Process	520
7.3	The Trial	522
7.3.1	The Rights of the Accused at Trial	522
7.3.2	Protection of Victims and Witness at Trial	523
7.3.3	Relevant Evidence and the Protection of National Security	523
7.3.4	Offenses Against the Administration of Justice	524
7.3.5	Decisions and Orders	524
7.4	The Appeal	525
Section 8.	The Penalties and Sentencing	525
Section 9.	Victim Reparation.	527
Section 10.	Enforcement Modalities, Surrender, and Judicial Assistance	528
10.1	Enforcement Modalities	528
10.2	Surrender of Individuals and Judicial Assistance	529
Section 11.	Exceptions to the Obligation to Cooperate	532
Section 12.	The Organization and Operation of the Court	535
12.1	The Presidency	535
12.2	The Appeals, Trial, and Pre-Trial Division	536
12.3	The Prosecutor and the Office of the Prosecutor	536
12.4	The Registry	537
12.5	The Assembly of States-Parties	537
Section 13.	Relationship of the ICC to the United Nations	538
13.1	Relationship to the Security Council	538
Section 14.	Amending the Statute	540
Section 15.	The Operation of the Court.	540
Section 16.	The Assembly of States Parties	541
Section 17.	National Implementing Legislation	543

Chapter VIII

The New Mixed Models of International Criminal Justice	545
Section 1. Introduction	545
Section 2. Cambodia	548
Section 3. Kosovo.	553
Section 4. East Timor	558
Section 5. Sierra Leone	566
Section 6. Conclusion	575

Chapter IX**The Procedure Part of ICL: Procedural and Evidentiary Norms**

Applicable to International Criminal Proceedings	583
Section 1. Introduction	583
Section 2. International Criminal Procedure	591
2.1 Introduction	591
2.2 Rights and Clusters of Rights	594
2.3 A Summary of Protected Procedural Rights	625
2.4 Conclusion	626
Section 3. Evidence in International Criminal Proceedings	626
3.1 Introduction	626
3.2 The Peculiarities of International Criminal Prosecutions	630
3.3 Historical Evolution of the Rules Governing Evidence	636
3.4 The Collection of Evidence	639
3.5 Fair Trial Rights and Evidence	641
3.5.1 Equality of Arms	642
3.5.2 The Right to be Promptly Informed of the Charges and the Disclosure of Evidence Prior to Trial.	643
3.5.3 The Right to Translated Documents	645
3.5.4 The Rights of the Suspects	646
3.5.5 The Right to an Expeditious Trial	647
3.5.6 The Right to be Present at Trial and to a Public Trial.	648
3.5.7 Witnesses and Protective Measures	649
3.5.8 The Privilege Against Self-Incrimination and the Right to Remain Silent	652
3.5.9 Remedies for the Infringement of Rights	654
3.6 Other Issues Related to Evidence	655
3.6.1 Expert Evidence.	655
3.6.2 Documentary and Forensic Evidence	656
3.7 Evidence in Appellate Proceedings.	657
3.8 Conclusion	658

Appendix I: International Instruments Surveyed.	661
Appendix II: Rights Surveyed	663
Appendix III: Constitutions Surveyed.	664
Appendix IV: ICC Comparison Chart	666
Chapter X	
International Criminal Justice in the Age of Globalization	673
Section 1. Introduction	673
Section 2. Enhancing Accountability	674
Section 3. National Criminal Justice Systems Enforcing ICL Norms	678
Section 4. The Distinction Between the Policies and Goals of Punishment in National Criminal Justice Systems and Those in the International Criminal Justice System	680
Section 5. The Need to Harmonize the International Criminal Justice System and National Criminal Justice Systems	682
Section 6. The Philosophy and Policy of Punishment for <i>Jus Cogens</i> International Criminal Crimes	684
6.1 Philosophical Considerations	684
6.1.1 Moral and Social Philosophy	690
6.2 The Historic Premise of Punishment	691
6.2.1 Talion Law	691
6.2.2 Just Desert	693
6.2.3 Deterrence and Rehabilitation	696
6.2.4 Punishment of <i>Jus Cogens</i> International Crimes	697
6.3 Universal Justice for <i>Jus Cogens</i> International Crimes	698
Section 7. Accountability Mechanisms	704
7.1 International Prosecutions.	706
7.2 International and National Criminal Investigatory Commissions	709
7.3 International and National Truth Commissions	711
7.4 National Prosecutions	712
7.5 National Lustration Mechanisms	714
7.6 National Civil Remedies	716
7.7 Mechanisms for the Reparation of Victims	720
7.8 Policy Considerations and the Selection of Accountability Mechanisms	723
7.9 Amnesties and the International Criminal Justice System	729
Section 8. Conclusion	737
<i>Bibliography</i>	741
<i>Index</i>	801