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Introduction: What is International Criminal Law?

1.1 International criminal law

International law typically governs the rights and responsibilities of States;[1] criminal law, conversely, is paradigmatically concerned with prohibitions addressed to individuals, violations of which are subject to penal sanction by a State.[2] The development of a body of international criminal law which imposes responsibilities directly on individuals and punishes violations through international mechanisms is relatively recent. Although there are historical precursors and precedents of and in international criminal law,[3] it was not until the 1990s, with the establishment of the ad hoc Tribunals for the former Yugoslavia and Rwanda, that it could be said that an international criminal law regime had evolved. This is a relatively new body of law, which is not yet uniform, nor are its courts universal.

International criminal law developed from various sources. War crimes originate from the 'laws and customs of war', which accord certain protections to individuals in armed conflicts. Genocide and crimes against humanity evolved to protect persons from what are now often termed gross human rights abuses, including those committed by their own governments. With the possible exception of the crime of aggression with its focus on inter-State conflict, the concern of international criminal law is now with individuals and with their protection from wide-scale atrocities. As was said by the Appeal Chamber in the *Tadić* case in the International Criminal Tribunal for the former Yugoslavia (ICTY):

> A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach ... [I]nternational law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings ...[4]

1 See, e.g. Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law* (9th edn, London, 1994) 5–7.

2 Glanville Williams, 'The Definition of Crime' (1955) 8 *Current Legal Problems* 107.

3 See Chapter 6 and e.g. Timothy L. H. McCormack, 'From Sun Tzu to the Sixth Committee, the Evolution of an International Criminal Law Regime' in Timothy L. H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes: National and International Approaches* (The Hague, 1997) 31.

4 *Tadić* ICTY A. Ch. 2.10.1995 para. 97.

The meaning of the phrase 'international criminal law' depends on its use, but there is a plethora of definitions, not all of which are consistent. In 1950, the most dedicated chronicler of the uses of 'international criminal law', Georg Schwarzenberger,[5] described six different meanings that have been attributed to that term, all of which related to international law, criminal law and their interrelationship, but none of which referred to any existing body of international law which directly created criminal prohibitions addressed to individuals; Schwarzenberger believed that no such law existed at the time. 'An international crime', he said in reference to the question of the status of aggression, 'presupposes the existence of an international criminal law. Such a branch of international law does not exist.'[6]

Cherif Bassiouni,[7] on the other hand (and writing almost half a century later), listed twenty-five categories of international crimes, being crimes which affect a significant international interest or consist of egregious conduct offending commonly shared values, which involve more than the State because of differences of nationality of victims or perpetrators or the means employed, or which concern a lesser protected interest which cannot be defended without international criminalization. His categories include, as well as the more familiar ones, traffic in obscene materials, falsification and counterfeiting, damage to submarine cables and unlawful interference with mail.

Different meanings of international criminal law have their own utility for their different purposes and there is no necessary reason to decide upon one meaning as the 'right' one.[8] Nevertheless, it is advisable from the outset to be clear about the sense in which the term is used in any particular situation. In this chapter we will attempt to elaborate the meaning which we give to the term for the purposes of this book and compare it with other definitions.

1.1.1 Crimes within the jurisdiction of an international court or tribunal

The approach taken in this book is to use 'international crime' to refer to those offences over which international courts or tribunals have been given jurisdiction under general international law. They comprise the so-called 'core' crimes of genocide, crimes against humanity, war crimes and the crime of aggression (also known as the crime against peace). Our use thus does not include piracy, slavery, torture, terrorism, drug trafficking and many crimes which States Parties to various treaties are under an obligation to criminalize in their

5 Georg Schwarzenberger, 'The Problem of an International Criminal Law' (1950) 3 *Current Legal Problems* 263.

6 Georg Schwarzenberger, 'The Judgment of Nuremberg' (1947) 21 *Tulane Law Review* 329 at 349.

7 M. Cherif Bassiouni, 'International Crimes; The Ratione Materiae of International Criminal Law' in M. Cherif Bassiouni (ed.), *International Criminal Law*, 3rd edn (Leiden, 2008) vol. I, 129, 134–5.

8 But omnibus uses of 'international criminal law' risk implying that there is a structural unity to what is being referred to, and thus treating very different things as having similarities. For an example, see Barbara Yarnold, 'Doctrinal Basis for the International Criminalisation Process' (1994) 4 *Temple International and Comparative Law Journal* 85.

domestic law. But because a number of the practical issues surrounding the repression of these crimes are similar to those relating to international crimes (in the way we use the term), they are discussed in this book, although only terrorist offences and torture will be discussed in any detail. Some of them (terrorist offences, drug trafficking and individual acts of torture) have been suggested as suitable for inclusion within the jurisdiction of the International Criminal Court (ICC)[9] and may therefore constitute international crimes within our meaning at some time in the future.

Our approach does not differentiate the core crimes from others as a matter of principle, but only pragmatically, by reason of the fact that no other crimes are currently within the jurisdiction of international courts. However, it is clear that since these crimes have a basis in international law, they are also regarded by the international community as violating or threatening values protected by general international law, as the preamble to the Rome Statute of the International Criminal Court makes clear.[10]

'International criminal law', as used in this book, encompasses not only the law concerning genocide, crimes against humanity, war crimes and aggression, but also the principles and procedures governing the international investigation and prosecution of these crimes. As we shall see, in practice the greater part of the enforcement of international criminal law is undertaken by domestic authorities. The principle of complementarity, which is fundamental to the whole of international criminal law enforcement, shows that national courts both are, and are intended to be, an integral and essential part of the enforcement of international criminal law.[11] In this book therefore we shall cover not only the international prosecution of international crimes, but also various international aspects of their domestic investigation and prosecution. However, as mentioned above, this is only one way of conceiving of international criminal law; below we evaluate some of the other approaches to defining the subject.

1.2 Other concepts of international criminal law

1.2.1 Transnational criminal law

Until the establishment of the international courts and tribunals in the 1990s, the concept of international criminal law tended to be used to refer to those parts of a State's domestic criminal law which deal with transnational crimes, that is, crimes with actual or potential

9 See Final Act of the Rome Conference A/CONF.183/10, Res. E.

10 See, in particular, preambular paragraphs 3–4, which affirm that such crimes threaten the 'peace, security and well-being of the world', and as such, must be prosecuted.

11 See Arts. 17 and 18 of the ICC Statute. As to the situation generally, Judges Higgins, Kooijmans and Buergenthal have stated: 'the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play'. *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium)* 14.2.2002 Separate Opinion para. 51.

transborder effects. This body of law is now more appropriately termed 'transnational criminal law'. A similar terminological distinction between 'international criminal law' (criminal aspects of international law) and 'transnational criminal law' (international aspects of national criminal laws) can also be found in other languages, such as German (*'Völkerstrafrecht'* compared with *'Internationales Strafrecht'*),[12] French (*'droit international pénal'* and *'droit pénal international'*) and Spanish (*'derecho internacional penal'* and *'derecho penal internacional'*).

Transnational criminal law includes the rules of national jurisdiction under which a State may enact and enforce its own criminal law where there is some transnational aspect of a crime. It also covers methods of cooperation among States to deal with domestic offences and offenders where there is a foreign element and the treaties which have been concluded to establish and encourage this inter-State cooperation. These treaties provide for mutual legal assistance and extradition between States in respect of crimes with a foreign element. Other treaties require States to criminalize certain types of conduct by creating offences in their domestic law, and to bring offenders to justice who are found on their territory, or to extradite them to States that will prosecute. While international law is thus the source of a part of this group of rules, the source of criminal prohibitions on individuals is national law.[13]

Until recently, there was not a clear distinction in the literature between international criminal law with its more restricted meaning and transnational criminal law. Transnational criminal law, with its focus on domestic criminal law and on inter-State cooperation in the sphere of criminal law, remains the body of 'international criminal law' with which national lawyers are most familiar. Providing full coverage of this body of law would require a volume in its own right. Our discussion of it will address only issues of State jurisdiction, such obstacles to national prosecution as immunities, and State cooperation in national proceedings relating to international crimes; we deal with 'transnational crimes' only in so far as they raise cognate issues to international crimes.

1.2.2 International criminal law as a set of rules to protect the values of the international order

Another, and more substantive, approach to determining the scope of 'international criminal law' is to look at the values which are protected by international law's prohibitions.[14] Under this approach international crimes are considered to be those which are of concern to the international community as a whole (a description which is not of great precision), or acts

12 Kai Ambos, *Internationales Strafrecht*, 2nd edn (Berlin, 2008).

13 See generally, Neil Boister, 'Transnational Criminal Law?' (2003) 14 *EJIL* 953 at 967–77.

14 For discussion in relation to the core crimes, see Bruce Broomhall, *International Justice and the International Criminal Court: Between State Sovereignty and the Rule of Law* (Oxford, 2003) 44–51.

which violate a fundamental interest protected by international law. Early examples include the suppression of the slave trade. The ICC Statute uses the term 'the most serious crimes of concern to the international community as a whole' almost as a definition of the core crimes,[15] and recognizes that such crimes 'threaten the peace, security and well-being of the world'.[16]

It is of course true that those crimes which are regulated or created by international law are of concern to the international community; they are usually ones which threaten international interests or fundamental values.[17] But there can be a risk in defining international criminal law in this manner, as it implies a level of coherence in the international criminalization process which may not exist.[18] The behaviour which is directly or indirectly subject to international law is not easily reducible to abstract formulae. Even if it were, it is not clear that these formulae would be sufficiently determinate to provide a useful guide for the future development of law, although arguments from coherence with respect to the ambit of international criminal law can have an impact on the development of the law (as has occurred, *inter alia*, in relation to the law of war crimes in non-international armed conflict).[19]

1.2.3 Involvement of a State

Another approach to defining 'international crimes' relies upon State involvement in their commission.[20] There is some sense in this. For example, aggression is necessarily a crime of the State, committed by high-level State agents. War crimes, genocide and crimes against humanity often, perhaps typically, have some element of State agency. But the subject matter of international criminal law, as we use it, deals with the liability of individuals, mostly irrespective of whether or not they are agents of a State. In the definition of the crimes which we take as being constitutive of substantive international criminal law, the official status of the perpetrator is almost always irrelevant, with the main exception of the crime of aggression.[21]

15 Arts. 1 and 5(1). The International Law Commission framed its investigation into international criminal law in the broad sense as being one into the 'Crimes against the Peace and Security of Mankind': Draft Code of Crimes Against the Peace and Security of Mankind, in Report of The International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10. See also Lyal Sunga, *The Emerging System of International Criminal Law* (The Hague, 1997).

16 ICC Statute, para. 3 of the preamble.

17 M. Cherif Bassiouni, 'The Sources and Content of International Criminal Law' in M. Cherif Bassiouni (ed.), *International Criminal Law*, 2nd edn (New York, 1999) 3, 98.

18 See Robert Cryer, 'The Doctrinal Foundations of the International Criminalization Process' in Bassiouni (ed.), *International Criminal Law* 107.

19 On such developments, see Chapter 12.

20 See, e.g. M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* (2nd edn, The Hague, 1999) 243–6, 256.

21 The reference in Art. 8(2)(b)(viii), ICC Statute, to the transfer of population 'by the Occupying Power' would also seem to require that the perpetrator is a State agent.

1.2.4 Crimes created by international law

An international crime may also be defined as an offence which is created by international law itself, without requiring the intervention of domestic law. In the case of such crimes, international law imposes criminal responsibility directly on individuals. The classic statement of this form of international criminal law comes from the Nuremberg International Military Tribunal's seminal statement that:

> 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 ... individuals have international duties which transcend the national obligations of obedience imposed by the individual state.[22]

The definition of an international crime as one created by international law is now in frequent use.[23] But this criterion may lead to unhelpful debate as to what is and what is not 'created' by international law.[24] The more pragmatic meaning used in this book, which we do not claim to be authoritative, excludes from detailed discussion certain conduct which has been suggested to be subject to direct liability in international criminal law but which others dispute, such as piracy and slavery,[25] a general offence of terrorism,[26] and individual acts of torture.[27]

Occasionally the *sui generis* penal system of the international criminal tribunals and courts is described as 'supranational criminal law' in process of development.[28] This term, to the extent that it has a determinate meaning, is somewhat misleading since it is normally reserved for law imposed by supranational institutions and not treaty-based or customary international law;[29] the ICTY, International Criminal Tribunal for Rwanda (ICTR) and ICC

22 Nuremberg IMT: Judgment and Sentences (1947) 41 *AJIL* 172 at 221.

23 Broomhall, *International Justice and the International Criminal Court*, 9–10; Robert Cryer, *Prosecuting International Crimes: Selectivity in the International Criminal Law Regime* (Cambridge, 2005) 1; Hans-Heinrich Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (Bonn, 1951) 9; Otto Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg* (Freiburg im Breisgau, 1966) 34; Gerhard Werle, *Principles of International Criminal Law* (The Hague, 2005) 25.

24 A slightly different criterion of an international offence, one with a 'definition as a punishable offence in international (and usually conventional) law', leads to the inclusion of a much wider category of crimes, including hijacking, injury to submarine cables and drugs offences (Yoram Dinstein, 'International Criminal Law' (1975) 5 *Israel Yearbook on Human Rights* 55 at 67). Many of these would fall, under our taxonomy, to be considered under the rubric of transnational criminal law.

25 See, e.g. Broomhall, *International Justice and the International Criminal Court*, 23–4.

26 See, e.g. Antonio Cassese, *International Criminal Law*, 2nd edn (Oxford, 2007) ch. 8.

27 *Ibid*., 149–52. For a counterpoint see Paola Gaeta, 'International Criminalization of Prohibited Conduct' in Antonio Cassese et al. (eds.), *The Oxford Companion to International Criminal Justice* (Oxford, 2009) 63, 68–9.

28 E.g. Roelof Haverman, Olga Kavran and Julian Nicholls (eds.), *Supranational Criminal Law: A System Sui Generis* (Antwerp, 2003).

29 See, e.g. Werle, *Principles of International Criminal Law*, 38–9.

are not supranational in nature, neither as regards the laws they enforce nor, largely, as institutions.

1.3 Sources of international criminal law

As international criminal law is a subset of international law, its sources are those of international law. These are usually considered to be those enumerated in Article 38(1)(a)–(d) of the Statute of the International Court of Justice, in other words, treaty law, customary law, general principles of law and, as a subsidiary means of determining the law, judicial decisions and the writings of the most qualified publicists.[30] As will be seen, all of these have been used by the ad hoc Tribunals. They are available for use by national courts in so far as the relevant national system concerned will allow. The ICC Statute contains its own set of sources for the ICC to apply, which are analogous, although by no means identical, to those in the ICJ Statute.[31]

1.3.1 Treaties

Treaty-based sources of international criminal law, either directly or as an aid to interpretation, include the 1907 Hague Regulations, the 1949 Geneva Conventions (and their additional protocols) and the 1948 Genocide Convention. They form the basis for many of the crimes within the jurisdiction of the ad hoc Tribunals and the ICC. The Statute of the ICC, which sets out the definitions of crimes within the jurisdiction of the ICC, is, of course, itself a treaty. Security Council resolutions 827(2003) and 955(2004), which set up the ICTY and ICTR respectively, were adopted by the Security Council pursuant to its powers under Chapter VII of the UN Charter, and thus find their binding force in Article 25 of the Charter. The source of their binding nature is therefore a treaty. The Statutes of the Tribunals have had an important effect on the substance of international criminal law both directly, as applied by the Tribunals, and indirectly as a source for other international criminal law instruments;[32] the influence of the ICC Statute has so far largely been through its impact on national legislation.

It has been suggested that treaties might not suffice to place liability directly on individuals[33] and as such cannot be a direct source of international criminal law. Such arguments run up against long-standing practice in international humanitarian law, which has been to apply to individuals the 'laws and customs of war' as found in the relevant treaties, as well as

30 See generally Dapo Akande, 'Sources of International Criminal Law' in Antonio Cassese et al. (eds.), *The Oxford Companion to International Criminal Justice* 41.

31 Art. 21 of the ICC Statute.

32 See Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *AJIL* 78.

33 Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford, 2005) 7–9.

in customary law. As the Permanent Court of International Justice noted over eighty years ago, treaties can operate directly on individuals, if that is the intent of the drafters.[34] The International Committee for the Red Cross and Red Crescent (ICRC) study on customary humanitarian law reports that 'the vast majority of practice does not limit the concept of war crimes to violations of customary international law. Almost all military manuals and criminal codes refer to violations of both customary law and applicable treaty law.'[35] That does not mean that every provision of the Geneva Conventions, for example, imposes direct criminal responsibility on individuals. Breach of some of them, for example those regarding the finest details of the treatment of detainees, would probably not constitute a war crime.[36]

It is only those treaties or provisions of a treaty which are intended to apply directly to an individual that can give rise to criminal responsibility. The 'suppression conventions', for example, which require States to criminalize conduct such as drug trafficking, hijacking and terror bombing[37] are not generally regarded as creating individual criminal responsibility of themselves; the conduct covered by those treaties will be incorporated in national law by whatever constitutional method is used by the State concerned. Further, if a court is to apply the terms of a treaty directly to an individual, it will be necessary to show that the prohibited conduct has taken place in the territory of a State Party to the treaty or is otherwise subject to the law of such a Party.[38] The practice of the ICTY has been, with occasional deviations,[39] to accept that treaties may suffice to found criminal liability. This began with the *Tadić* decision of 1995 and the position was reasserted in the *Kordić and Čerkez* appeal.[40] In the *Galić* case the ICTY Appeals Chamber noted that the position of the Tribunal is that treaties suffice for criminal responsibility, although 'in practice the International Tribunal always ascertains that the relevant provision is also declaratory of custom'.[41] This is to adopt a 'belt and braces' approach rather than to require a customary basis for war crimes. The proposition that treaties may found international criminal liability is inherent in the Statute of the ICTR, which criminalizes violations of Additional Protocol II (not all of which was at the time considered customary).[42]

34 *Jurisdiction of the Courts in Danzig* Case 1928 PCIJ Series B. No. 15, p. 17.

35 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge, 2005) 572.

36 See Chapter 12.

37 See Chapter 14.

38 This problem will no longer arise in regard to crimes derived from the four Geneva Conventions which now have universal State participation.

39 *Galić* ICTY T. Ch. 5.12.2003 Separate and Partially Dissenting Opinion of Judge Nieto-Navia, paras. 109–12; *Milutinović, Sainović and Ojdanic* ICTY A. Ch. 21.5.2003 paras. 10 ff. See further Héctor Olásolo, 'A Note on the Principle of Legality in International Criminal Law' (2007) 19 *Criminal Law Forum* 301.

40 *Kordić and Čerkez* ICTY A. Ch. 17.12.2004 paras. 41–6, clarifying *Tadić* ICTY A. Ch. 2.10.1995 para. 143.

41 *Galić* ICTY A. Ch. 30.1.2006 para. 85.

42 ICTR Statute, Article 4, Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994) S/1995/134, para. 12.

1.3.2 Customary international law

The ICTY has accepted that when its Statute does not regulate a matter, customary international law, and general principles, ought to be referred to.[43] Customary international law, that body of law which derives from the practice of States accompanied by *opinio iuris* (the belief that what is done is required by or in accordance with law),[44] has the disadvantage of all unwritten law in that it may be difficult to ascertain its content. This is not always the case, however, when the customary law originates with a treaty or other written instrument, for example a General Assembly resolution, which is accepted as reflecting custom, or has been recognized by a court as such.[45] Nevertheless the use of customary international law in international criminal law has sometimes been criticized on the basis that it may be too vague to found criminal liability[46] or, even, that no law that is unwritten should suffice to found criminal liability. These claims will be discussed below at section 1.5.1 in relation to the principle of *nullum crimen sine lege*. Suffice it to say for the moment that this was not the position of the Nuremberg or Tokyo IMTs, nor is it that of the ad hoc Tribunals.

1.3.3 General principles of law and subsidiary means of determining the law

The ICTY has resorted to general principles of law to assist it in its search for applicable rules of international law. Owing to the differences between international trials and trials at the national level, the ICTY has been chary of uncritical reliance on general principles taken from domestic legal systems and acontextual application of them to international trials.[47] That said, the ICTY and ICTR have both resorted to national laws to assist them in determining the relevant international law through this source. As was said in the *Furundžija* decision, however, care must be taken when using such legislation, not to look simply to one of the major legal systems of the world, as 'international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world'.[48] In relation to criminal law, general principles of law are not ideal. After all

43 *Kupreškić* ICTY T. Ch. II 14.1.2000 para. 591.

44 An alternative description of customary international law dispenses with the need for *opinio iuris*, relying on the constant and uniform practice of States (Maurice Mendelson, 'The Formation of Customary Law' (1998) 272 *Hague Recueil* 159).

45 E.g. para. 3(g) of the Definition on Aggression in GA res. 3314(XXIX) of 14.12.1974; see section 13.2.3; and see Mendelson, 'The Formation of Customary Law', ch. 5.

46 Vladimir Djuro-Degan, 'On the Sources of International Criminal Law' (2005) 4 *Chinese Journal of International Law* 45 at 67. See also Olásolo, 'A Note' 301.

47 *Erdemović* ICTY A. Ch. 7.10.1997 Separate and Dissenting Opinion of President Cassese, para. 5.

48 *Furundžija* ICTY T. Ch. II 10.12.1998 para. 178.

they are, by their nature, general, and thus tend to be a last resort. Also, as the *Erdemović* case showed, at times there simply is no general enough principle to apply.[49]

As regards the ICC, it is to apply, where the first two categories of law do not provide an answer:

> ... general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with [the] Statute and with international law and internationally recognized norms and standards.[50]

The ICC may also apply 'principles and rules of law as interpreted in its previous decisions'.[51] The ICC is not, however, bound by its previous decisions; it has no equivalent to the common law principle of *stare decisis*. The ICTY has frequently had recourse to judicial decisions for determining issues of law, and has constructed a system of precedents for dealing with its own jurisprudence.[52] The ICTY and ICTR have had reference to domestic, as well as international, case law.[53] Domestic case law is a major material source of evidence about international criminal law. However, a caveat must be entered in this regard. The assertions of international law in domestic cases can be affected by local idiosyncrasies. These can arise from the domestic statutes that are being evaluated or applied, or from a court seeing international criminal law through a distinctly national lens.[54]

Finally, although the writings of scholars are not, in themselves, sources of international criminal law, it is possible to have recourse to the views of scholars, which at times, have been highly influential.[55] However, care must always be taken to ensure that the statements relied on are accurate statements of the law as it stands, rather than a statement of how the author would like the law to be; this is important, not least because of the *nullum crimen sine lege* principle.[56] Also, selection of scholars from only one, or a limited set of, legal tradition(s) can lead to a skewed view of what an inclusive approach to international criminal law would require.

49 *Erdemović* ICTY A. Ch. 7.10.1997 Opinion of Judges McDonald and Vohrah, paras. 56–72.

50 Art. 21(1)(c) of the ICC Statute. This and all other sources of law available to the ICC are qualified by Art. 21(3) which requires application and interpretation of the law to be consistent with internationally recognized human rights, and without adverse discrimination.

51 *Ibid*., Art. 21(2).

52 *Alekšovski* ICTY A. Ch. 24.3.2000 paras. 89–115. See Robert Cryer, 'Neither Here nor There? The Status of International Criminal Jurisprudence in the International and UK Legal Orders' in Michael Bohlander and Kaiyan Kaikobad (eds.), *Law, Perspectives on Legal Order and Justice – Essays in Honour of Colin Warbrick* (Leiden, 2010) 155.

53 See, e.g. *Tadić* ICTY A. Ch. 15.7.1999 paras. 255–70.

54 See Leila Sadat Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again' (1994) 32 *Columbia Journal of International Law* 289.

55 E.g. *Krštić* ICTY A. Ch. 19.4.2004 para. 10; *Stakić* ICTY T. Ch. II 31.7.2003 para. 519; *Katanga and Chui* ICC PTCh. 30.9.2008 paras. 482, 485, 501.

56 See section 1.5.1.

1.4 International criminal law and other areas of law

International criminal law relates to other areas of international law. The three areas for which an understanding is the most important are human rights law, international humanitarian law and the law relating to State responsibility.

1.4.1 International criminal law and human rights law

The development of crimes against humanity and the law of human rights was partially inspired by a wish to ensure that the atrocities that characterized Nazi Germany were not repeated. Thus the modern law of human rights and a considerable part of international criminal law have a common base.[57] More recent developments in the enforcement of international criminal law, in particular the creation of the two ad hoc Tribunals, were introduced in response to mass abuses of human rights by States against their own citizens or others within their territory. Hence, parts of international criminal law have developed in this context to respond to egregious violations of human rights in the absence of effective alternative mechanisms for enforcing the most basic of humanitarian standards.

Human rights obligations are imposed primarily on States, and it is frequently State agents who are the transgressors; where States are not implementing their human rights obligations, the principles of international criminal law are a useful and necessary alternative to State responsibility. The similarities in the objectives of both bodies of law are clear; both seek to provide a minimum standard of humane treatment. Both, unlike most other branches of international law, have a direct impact on individuals, albeit in somewhat different ways.

The international instruments on human rights played an obvious part in the drafting of the Statutes of the two ad hoc Tribunals and in the Statute of the ICC.[58] And the ad hoc Tribunals have used human rights law, and decisions of international bodies applying that law, to assist them in their interpretation of substantive international criminal law and in establishing new procedural concepts of law. For example, the ICTY in *Kunarac*[59] explained its past practice thus:

> [b]ecause of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and

57 See, e.g. R. Emilio Vinuesa, 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law' (1998) 1 *YIHL* 69, 70–6; William A. Schabas, 'Criminal Responsibility for Violations of Human Rights' in Janusz Symonides (ed.), *Human Rights, International Protection, Monitoring, Enforcement* (Aldershot, 2003) 281.

58 See, e.g. the provisions on the rights of the accused in Art. 21 of the ICTY Statute and Art. 20 of the ICTR Statute, largely reproducing Art. 14(1) to (3) and (5) of the International Covenant on Civil and Political Rights; the procedures in the ICC Statute are very heavily influenced by human rights instruments, but see in particular Arts. 55 and 67.

59 *Kunarac* ICTY T. Ch. II 22.2.2001 para. 467.

terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law.

The ICTR (particularly at trial level) has used human rights jurisprudence on hate speech and freedom of expression to assist it in drawing the boundaries of the offences of direct and public incitement of genocide and the crime against humanity of persecution in the cases of the Rwandan Radio Station RTLM,[60] and the musician Simon Bikindi.[61] In the area of international procedural law and, in particular, the right to a fair trial, the Tribunals have been especially ready to draw from human rights law. In *Dokmanović*, for example, the ICTY affirmed that an arrest must be made 'in accordance with procedures prescribed by law', as indicated in Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 9(1) of the International Covenant of Civil and Political Rights.[62] In *Tadić*, the Appeals Chamber recognized that a general principle of law may have its source in human rights instruments, in that case the principle that the Tribunal had to be 'established by law'.[63]

Nonetheless, although there are overlaps between human rights law and international criminal law, they are not synonymous, and there are dangers in treating them as being so. Almost every international crime would be a violation of human rights law, but the converse does not apply. The use of human rights standards by the Trial Chamber in the case of the Rwandan Radio Station RTLM with respect to direct and public incitement to genocide was upheld by the Appeals Chamber, but on the basis that the Trial Chamber was careful to distinguish hate speech, that may be a matter for human rights bodies, and that offence.[64] International criminal courts and tribunals do not exist to prosecute violations of the whole panoply of human rights. Further, human rights obligations are primarily imposed upon States, not individuals, and it is for States to decide how they will enforce them on their own agents; except in the case of the most serious abuses, this will not often be by criminalizing the activity concerned. Finally, whereas human rights norms may be given a broad and liberal interpretation in order to achieve their objects and purposes, in international criminal law there are countervailing rights of suspects that are protected through principles requiring that the law be strictly construed and that ambiguity be resolved in favour of the accused.[65]

60 *Nahimana, Barayagwiza and Ngeze* ICTR T. Ch. 3.12.2003 paras. 983–1010.

61 *Bikindi* ICTR T. Ch. III, 2.12.2008, paras. 378–97.

62 See *Mrkšić,* et al. ICTY T. Ch. II 22.10.1997 paras. 59–60.

63 *Tadić* ICTY A. Ch. 2.10.1995 paras. 42–7.

64 *Nahimana, Barayagwiza and Ngeze* ('*RTLM* Appeal'), AC 28.11.2007, paras. 692–6, 972–88 (although they were more circumspect on crimes against humanity of persecution). See also Partially Dissenting Opinion of Judge Shahabuddeen, paras. 18ff. Although see Partially Dissenting Opinion of Judge Meron, paras. 3–20 in relation to crimes against humanity of persecution.

65 See, e.g. Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *LJIL* 925; Allison Marston Danner and Jenny Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' (2005) 93 *California Law Review* 75. *RTLM* Appeal, Partially Dissenting Opinion of Judge Meron, para. 8.

As the case law of the two Tribunals and, in time, the ICC grows, it is likely that there will be less of a need for these courts to have recourse to human rights jurisprudence to supplement the sources of international criminal law.

1.4.2 International criminal law and international humanitarian law

International criminal law also shares common roots with international humanitarian law, the body of law designed to protect victims of armed conflict. Large areas of international humanitarian law are now criminalized as war crimes. Thus, international humanitarian law serves as a point of reference in understanding and interpreting the corresponding war crimes provisions. As with human rights norms, care must be taken before transposing all humanitarian law standards directly into international criminal law; the latter has distinct principles of interpretation. These issues are discussed further in Chapter 12.

1.4.3 International criminal law and State responsibility

International criminal law in the sense in which we use it concerns the criminal responsibility of individuals, not States.[66] The responsibility of a State under international law is a matter for a separate branch of international law, and is not dependent upon the legal responsibility of an individual. If an agent of a State is convicted of an international crime the act in question may, depending upon the circumstances, be attributable to the State, in which case that State may also be internationally responsible.[67] The same act therefore can give rise to both individual criminal responsibility and State responsibility.[68] For example, an agent of Libya was convicted of offences in relation to the aircraft explosion over Lockerbie in 1988, and the governments of the United Kingdom and the United States separately made claims for compensation from Libya.[69] The question of State responsibility for international crimes was dealt with directly in the *Bosnian Genocide* case where, having determined that genocide had occurred in Srebrenica, the International Court of Justice decided that Serbia was not responsible for the perpetrators of that crime. Controversially, it

66 See generally André Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52 *ICLQ* 615; Andrea Bianchi, 'State Responsibility and Criminal Liability of Individuals' in Antonio Cassese et al. (eds.), *The Oxford Companion to International Criminal Justice* 16.

67 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*) (*Bosnian Genocide* case), 26.2.2007, paras. 377–415. See generally Marko Milanović, 'State Responsibility for Genocide – A Follow-Up' (2007) 18 *EJIL* 669. For a critique see Paola Gaeta, 'On What Conditions May A State be Responsible for Genocide?' (2007) 18 *EJIL* 631; Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2007) 5 *JICJ* 875.

68 E.g. *Furundžija* ICTY T. Ch. II 10.12.1998 para. 142.

69 See section 9.5.

rejected the standard for attributability of conduct to a State used by the ICTY, asserting that the relevant test may not always be the same between international criminal law and general international law.[70] However, given the State's relationship with the perpetrators, the ICJ determined that Serbia was separately responsible under Article I of the Genocide Convention for its own failures to prevent and punish that crime.[71]

The question of whether acts of a State can be categorized under international law as *criminal* acts is one of some controversy. Draft articles on State responsibility prepared by the International Law Commission in 1976 used the term 'international crime' to refer to an internationally wrongful act by a State which results from the breach by that State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime.[72] But there were objections to the concept of criminal responsibility, many being based on the nature of the State. It is difficult, although not completely impossible, to apply elements of criminal liability such as *mens rea* to States. There is also the problem of punishment. In practice no international court or tribunal has ever provided for punishment of States different in kind from the law concerning tortious or delictual wrongs of a State. The final version of the draft articles of the ILC on State responsibility no longer uses the concept of State crime, but characterizes the relevant acts as 'serious breaches of obligations under peremptory norms of general international law'.[73]

1.5 A body of criminal law

The two bodies of law that make up international criminal law (international law and criminal law) are compatible, although the relationship between the two can be fractious. International criminal law should be appraised from the standpoints of both bodies of law. Its sources are those of international law, but its consequences are penal.[74] As a body of international law it requires an understanding of the sources and interpretation of international law. But it is also criminal law and as such needs substantive provisions that are clear and exact rather than the often more imprecise formulations of international law.[75] Further,

70 *Bosnian Genocide* case, para. 405. See, e.g. Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *EJIL* 649; Marina Spinedi, 'On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia' (2007) 5 *JICJ* 829.

71 *Bosnian Genocide* case, paras. 425–50.

72 Art. 19.2 of the 1976 draft articles.

73 Arts. 40 and 41 of the draft articles on Responsibility of States for Internationally Wrongful Acts (A/CN.4/L.602/Rev.1).

74 See, e.g. Cassese, *International Criminal Law*, 6–10. On the nature of criminal law, see Glanville Williams, 'The Definition of Crime'.

75 For a discussion of this, and a critique of the lack of attention paid by international criminal lawyers to this aspect of international criminal law see George P. Fletcher, *The Grammar of Criminal Law, American, Comparative and International: Volume I: Foundations* (Oxford, 2007).

the relevant international courts and tribunals require methods and procedures proper to a criminal court, with due regard to the rights of the accused at all stages of the investigation and court procedures. At a more abstract level, the sophisticated philosophical analyses of the appropriate ambit of criminal liability that have been developed at the domestic level ought to be borne in mind whenever international crimes or their principles of liability are being appraised.[76]

Certain fundamental principles of national criminal law systems have now become entrenched in international law, and more particularly, in human rights law. As we have seen in section 1.4.1, international criminal law has been influenced strongly by human rights law. One aspect of human rights law with a close analogue in criminal law theory is the prohibition of retroactive criminal prohibitions and penalties (sometimes referred to together as the principle of legality or *nullum crimen, nulla poena, sine lege*).[77] As shown below, this principle is important both in the application of the law and in the drafting of the instruments of the international courts and tribunals. Due to the relative imprecision of the nature and content of international law, the principle has greater prominence in international than in national courts.

1.5.1 Nullum crimen sine lege

This principle has two aspects: non-retroactivity and clarity of the law, both of which seek to ensure that the law is reasonably publicized, so people can know whether their planned course of action is acceptable or not. It is a fundamental principle of criminal law that criminal responsibility can only be based on a pre-existing prohibition of conduct that is understood to have criminal consequences. Article 15 of the International Covenant on Civil and Political Rights (ICCPR) states that:

> No one shall be held guilty on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed … Nothing in this article shall prejudice the trial of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by the community of nations.[78]

Claims that prosecutions for international crimes violated this principle predate the ICCPR. The Nuremberg and Tokyo IMTs both faced claims that prosecution of crimes against peace involved violations of the *nullum crimen* principle. The Nuremberg IMT, with

76 For useful examples see, e.g. Mirjan Damaška, 'The Shadow Side of Command Responsibility' (2001) 49 *American Journal of Comparative Law* 455; Claus Kreß, 'The Crime of Genocide Under International Law' (2006) 6 *ICLR* 461.

77 See generally, A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine* (3rd edn, Oxford, 2007) ch. 1.

78 International Covenant on Civil and Political Rights, Art. 15.

which the Tokyo IMT agreed, responded by asserting that crimes against peace were already criminalized in international law[79] and that, anyway:

> The maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong was allowed to go unpunished.[80]

At the time, which was before the modern law of human rights, the Nuremberg IMT may have been correct about the law on point. On the other hand, it is possible that the prohibition of retroactive criminal laws was a general principle of law by then,[81] and the retroactive nature of liability for crimes against peace has been used to criticize the Nuremberg and Tokyo IMTs.[82]

When drafting the Statute of the ICTY, the UN Secretary-General was sensitive to such critiques, stating that:

> [T]he application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.[83]

This statement emphasizes the fact that if a rule reflects customary law it will not be necessary for the relevant court to establish whether the parties to the conflict were parties to the relevant treaty. But it is misleading in its formulation. The important issue from the perspective of the *nullum crimen* principle is whether the treaty was applicable to the relevant armed conflict, not whether it reflected customary international law. There is nothing in the *nullum crimen* principle in general or in Article 15 of the ICCPR[84] that requires that any particular source of international law provide the prohibition.[85]

Suggestions that customary international law does not suffice to found criminal liability[86] are based on a strict construction of the *nullum crimen* principle (*nullum crimen sine lege*

79 See section 13.1.2.

80 Nuremberg IMT Judgment (1947) 41 *AJIL* 172 at 217.

81 See Gordon Ireland, 'Ex Post Facto From Rome to Tokyo' (1946) 21 *Temple Law Quarterly* 27; *contra* Susan Lamb, '*Nullum Crimen, Nulla Poena Sine Lege* In International Criminal Law' in Cassese, *Commentary*, 733 at 740.

82 See sections 6.3.2 and 6.4.2.

83 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council resolution 808, UN Doc. S/25704, para. 34.

84 Nor in the ECHR, Art. 7.

85 Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp, 2002) 127–87.

86 Djuro-Degan, 'On the Sources of International Criminal Law' 67; and see Olásolo,'A Note' 301.

scripta),[87] which, whilst applicable in some domestic legal orders, is not the principle applicable in international law.[88] There is no reason in principle why customary international law cannot be used to form the relevant criminal law[89] and the ICTY has consistently taken this view.[90]

The general practice of the ICTY has been to adopt a fairly relaxed standard to the *nullum crimen* principle.[91] However, in the *Vasiljević* case, a Trial Chamber asserted that:

> [f]rom the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of his acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.[92]

Owing to their view that customary law did not provide a sufficiently clear definition of the offence of 'violence to life and person', the Chamber refused to convict the defendant of that charge.[93] It is true that excessively vague offences can violate the *nullum crimen* principle, but it is questionable whether in this particular case, the Tribunal's finding that the international law on the subject was excessively vague was correct.[94] This is particularly the case as clarification of the ambit of offences through case law does not inherently fall foul of the *nullum crimen* principle.[95] Judicial creation of crimes, which some have claimed the ICTY has done,[96] would. It must be said, however, that when human rights courts have come to deal with the question of international crimes and the *nullum crimen* principle, they have been decidedly generous when appraising State action. For example, in the *Jorgić* case[97] the European Court of Human Rights was willing to accept convictions in Germany for genocide on a broader interpretation of that crime than was later adopted by the

87 'No crime without written law'.
88 Alain Pellet, 'Applicable Law' in Cassese, *Commentary* 1051 at 1057–8.
89 *Ibid*.
90 See, e.g. *Tadić* ICTY A. Ch. 2.10.1995 para. 94.
91 William Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, 2006) 63–7.
92 *Vasiljević* ICTY T. Ch. I 29.11.2002 para. 193.
93 *Ibid*., paras. 203–4.
94 See Antonio Cassese, 'Black Letter Lawyering vs Constructive Interpretation: The Vasiljević Case' (2004) 2 *JICJ* 265.
95 See Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of the Law?' (2004) 2 *JICJ* 1007; Ben Emmerson and Andrew Ashworth, *Human Rights and Criminal Justice* (London, 2001) 281–92.
96 Mettraux, *International Crimes*, 13–18.
97 *Jorgić* v. *Germany*, Application No.74613/01, Judgment, 12.7.2007, paras. 89–116.

International Criminal Tribunals, on the basis that it was at least arguable at the time that the German courts' interpretation was correct.

The *nullum crimen* principle played an important role in the drafting of the ICC Statute. The ILC draft Statute with which the negotiations began[98] did not contain definitions of the crimes within the jurisdiction of the ICC, the ILC maintaining that the Statute should be 'primarily an adjectival and procedural instrument'.[99] There was soon, however, a move to define the crimes in the Statute with the clarity and precision needed for criminal law and it was with that objective that the definitions of crimes and, later, the elements of crimes were set out. The wish of the negotiating States to ensure that they knew exactly what they were signing up to may have been at least as strong a motivating factor as the principle of *nullum crimen* in this regard.

The Statute itself contains a strong restatement of the *nullum crimen* principle. Article 22 reads in part:[100]

> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
>
> 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In the case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

The first sentence of the second paragraph was intended, rightly or wrongly, to prevent the ICC from engaging in expansions of criminal liability not mandated by the States Parties.

1.5.2 Nulla poena sine lege

This, related, principle requires that there are defined penalties attached to criminal prohibitions.[101] In customary law, the punishment for international crimes may include the death penalty[102] though many States have undertaken international obligations not to impose such a penalty, or may not permit that sentence in their domestic law.

It appears that concerns about the *nulla poena* principle also caused the Secretary-General, when drafting the ICTY Statute, to require the Tribunal to 'have recourse to the general practice regarding prison sentences in the Courts of the former Yugoslavia'.[103] The ICTR Statute has a similar provision, but with reference to Rwandan sentencing

98 See section 8.2.

99 Report of the International Law Commission on the work of its forty-sixth session, UNGAOR 49th session Suppl. No. 10, A/49/10 (1994) at 71.

100 On which see Bruce Broomhall, 'Article 22' in Triffterer, *Observers' Notes*, 713.

101 See Chapter 19 and Kai Ambos, '*Nulla Poena Sine Lege in International Criminal Law* ' in Roelof Haveman and Olaoluwa Olusanya (eds.), *Sentencing and Sanctioning in International Criminal Law* (Antwerp, 2006) 17.

102 *Klinge* III Law Reports of Trials of War Criminals 1 at 3.

103 ICTY Statute, Art. 24. Lamb, '*Nullum Crimen*' 758–9.

practices.[104] The fact that both States provided for the death penalty at the time of the offences, but the Tribunal cannot impose that sentence, has made this difficult to apply. The Rome Statute also contains an article entitled '*nulla poena sine lege*': Article 23. This states, uncontroversially: 'A person convicted by the Court may be punished only in accordance with this Statute.'[105]

Further reading

Dapo Akande, 'Sources of International Criminal Law' in Antonio Cassese et al. (eds.), *The Oxford Companion to International Criminal Justice* (Oxford, 2009) 41.

Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, 2000).

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Timothy L. H. McCormack, 'From Sun Tzu to the Sixth Committee, The Evolution of an International Criminal Law Regime' in Timothy L. H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes, National and International Approaches* (The Hague, 1997) 31.

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Alfred P. Rubin, *Ethics and Authority in International Law* (Cambridge, 1997).

Georg Schwarzenberger, 'The Problem of an International Criminal Law' (1950) 3 *Current Legal Problems* 263.

104 ICTR Statute, Art. 23.

105 See William Schabas, 'Article 23' in Triffterer, *Observers' Notes* 730.