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Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst

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PART A

Introduction

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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.

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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.

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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.

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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.

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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.

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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 individuals³³ 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 Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford, 2005) 7–9.

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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 bombing³⁷ 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 Ojdanić* 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.

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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 liability⁴⁶ 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.