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An overview of crimes under international law

Yves Sandoz once wrote: 'It has often been said that one of the most pressing tasks for international criminal law is to set out clearly what violations are punishable under that law and to define them in specific terms.'[1] This second volume in the *International Criminal Law Practitioner Library* examines the elements of crimes under international law, primarily as they have been defined in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) (collectively, the '*ad hoc* Tribunals'). This jurisprudence has contributed greatly to the nuanced definitions of the core categories of crimes under international law applied in current and future international adjudication, and is the richest body of contemporary applications of the law on elements to the actual facts of cases. Despite this contribution, the specificity referred to by Sandoz appears elusive: the case law is frequently contradictory or obscure, and thus requires analysis to explain the legal principle clearly, or at least to identify what is unclear and in need of further jurisprudential development. Such an analysis is the fundamental goal of this book, as it is of this series.

Two consequences flow from our focus on the judicial interpretation of the scope and content of crimes under international law. First, like the first volume in this series, this volume does not seek to repeat the extensive and well-considered literature on the Statute and Elements of Crimes of the International Criminal Court (ICC), although each chapter contains a brief examination of how those instruments and those of the Special Court for Sierra Leone (SCSL), the East Timor Special Panels for Serious

[1] Yves Sandoz, 'Penal Aspects of International Humanitarian Law', in M. Cherif Bassiouni, *International Criminal Law* (2nd edn 1998), p. 406.

Crimes (SPSC), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Supreme Iraqi Criminal Tribunal (SICT)[2] define crimes, and highlights the important differences between the approaches of the *ad hoc* Tribunals and those of the other tribunals. Second, this volume only discusses the crimes or categories of crimes against the person or against property that are provided for in the Statutes of the *ad hoc* Tribunals. As will be seen in the sections of Chapters 2 and 4 dealing with the ICC and the internationalised criminal tribunals, the respective lists of underlying offences of crimes against humanity and war crimes vary somewhat from tribunal to tribunal. While there is considerable academic literature on some of the offences that do not appear in the *ad hoc* Statutes – especially the many additional offences in the lengthy war crimes provision of the Rome Statute of the ICC – these offences have not, as yet, been the subject of much judicial interpretation. To the extent that they have been the subject of judicial interpretation, this jurisprudence is touched upon in the respective sections on the ICC and the internationalised tribunals in Chapters 2 to 4.

On one view, an international crime could be defined as any offence that requires international cooperation for its prosecution and therefore involves more than one domestic jurisdiction, or which requires cross-border movements or transactions, such as money laundering or trafficking in narcotics. This book, however, focuses on crimes under international law – that is, conduct that violates international law, and is punishable as such with the imposition of individual criminal liability – rather than all crimes that have an international aspect. Moreover, it is not an exhaustive analysis of all conduct that may constitute a crime under international law, but rather a focused study of those 'core' categories of crimes – crimes against humanity, genocide, and war crimes – for which a wealth of judicial exposition exists.

The question of what constitutes the corpus of law with which international criminal law is concerned is not definitively settled. While the Nuremberg and

[2] The Iraqi National Assembly changed this Tribunal's name from its original appellation, 'Iraqi Special Tribunal', and there has been confusion about how to translate the new Arabic name into English. See Michael P. Scharf and Gregory S. McNeal (eds.), *Saddam on Trial: Understanding and Debating the Iraqi High Tribunal* (2006), p. 57. The Tribunal's name in Arabic is al-Mahkama al-Jina'iya al-'Iraqiya al-'Uliya. These words translate as 'Iraqi', 'High' or 'Higher', and 'Criminal Court' or 'Tribunal'. According to Scharf and McNeal, the Tribunal subsequently issued an official statement in which it said its name in English is 'Iraqi High Tribunal' (although they provide no citation to this official statement), and this is the name Scharf and McNeal chose to use in their book. *Ibid*. By contrast, M. Cherif Bassiouni and Michael Wahid Hanna use the translation 'Iraqi High Criminal Court' in their article. See M. Cherif Bassiouni and Michael Wahid Hanna, 'Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein', (2006–07) 39 *Case Western Reserve Journal of International Law* 21, 57. For consistency with Volume I of this series, we follow the practice of Human Rights Watch in employing the translation 'Supreme Iraqi Criminal Tribunal'. See Human Rights Watch, World Report 2006, Iraq, available at www.hrw.org/english/docs/2006/01/18/iraq12215.htm. Although the SICT is not, strictly speaking, a hybrid or internationalised tribunal, it is included in these comparative analyses because it has jurisdiction over the core crimes under international law, and the definitions of these crimes in its Statute are clearly modelled on those of the Rome Statute of the ICC. Though its practice and jurisprudence are limited, and its proceedings criticised and often chaotic, discussion of the manner in which the law on the core crimes has been applied by the SICT is nevertheless useful for illustrating the difficulties of adapting international practice and jurisprudence to a particular kind of domestic context.

Tokyo Charters included the crime of aggression, modern international criminal law – as embodied in the Statutes of the ICTY, ICTR, ICC, and other international and internationalised tribunals, and developed in their jurisprudence – tends to focus exclusively on the three core categories of crimes: crimes against humanity, genocide, and war crimes.[3] Because these crimes are almost invariably (although not necessarily) prosecuted in the context of an armed conflict, the proposition that 'international humanitarian law' is synonymous with these core crimes holds some attraction.

International humanitarian law is generally understood to cover two bodies of law: first, 'Geneva Law', which derives from a range of Geneva Conventions dating back to 1864, but in particular the Geneva Conventions of 1949 and their Additional Protocols of 1977; and which seeks to ameliorate the suffering of those not directly involved in combat;[4] and second, 'Hague Law', which derives mainly from a number of the Hague Conventions, particularly those of 1899 and 1907, as well as Additional Protocol I of 1977; and which seeks to regulate the means and methods by which war is conducted.[5] Crimes against humanity and genocide have traditionally been viewed as outside the definition of international humanitarian law, and separately associated with international criminal law because their proscription gives rise to individual criminal responsibility. This is no doubt in part because these categories of crimes can occur in times of peace as well as war, and because they were developed in the post-Second World War context of the Nuremberg and subsequent post-war trials as distinct species of criminality from war crimes proper, which are violations of international humanitarian law considered to be so serious that they entail not only state responsibility, but also individual criminal responsibility.[6]

[3] Accordingly, we will not discuss aggression (also labelled 'crimes against peace'), even though that crime is included in the Rome Statute of the ICC and the International Law Commission's latest Draft Code of Crimes Against the Peace and Security of Mankind. See 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 (1996) ('1996 ILC Draft Code'), Art. 16; Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002, UN Doc. A/CONF. 183/9, 37 ILM 1002 (1998), 2187 UNTS 90 ('Rome Statute'), Art. 5(2) (providing that the ICC 'shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime').

[4] For a detailed discussion of Geneva Law, see Chapter 4, text accompanying notes 43–45, and 58–63.

[5] For a detailed discussion of Hague Law, see Chapter 4, text accompanying notes 43–57. Frits Kalshoven writes that the term 'international humanitarian law' came into common usage around the time of the 1949 Geneva Conventions, and that the International Committee of the Red Cross used the term to refer to Geneva Law, but not Hague Law or crimes against humanity, let alone genocide. See Frits Kalshoven, 'From International Humanitarian Law to International Criminal Law', (2004) 3 *Chinese Journal of International Law* 151, 153. Additional Protocol I of 1977 finally dissipated any real distinction between Geneva Law and Hague Law, fusing legal rules concerning the protection and treatment of civilians, prisoners of war, and persons *hors de combat* with those regulating the use of certain weapons and certain means of warfare; it thereby merged these two historically distinct strands of law into one. See Kalshoven, *supra*, p. 153; see also Chapter 4, note 45.

[6] See Chapter 2, section 2.1 (discussing the origins and evolution of crimes against humanity); Chapter 3, section 3.1 (discussing the origins and evolution of genocide); Chapter 4, section 4.1 (discussing the origins and evolution of war crimes).

There is sense in the treatment of these categories of genocide and crimes against humanity as not falling within the realm of international humanitarian law. The overwhelming bulk of international humanitarian law concerns the responsibility of states (and, sometimes, armed rebel groups) in respect of armed conflict, and has nothing to do with individual criminal responsibility, whereas genocide and crimes against humanity, strictly speaking, are in the first instance categories of international crimes, that may also give rise to state responsibility in certain circumstances. Nevertheless, genocide and crimes against humanity are much more likely to occur in the context of an armed conflict than in times of peace, so they invariably overlap considerably with international humanitarian law. As such, they have increasingly come to be considered as forming part of that body of law, *de facto* if not *de jure*. A salient example can be seen in the Statutes of some of the international and internationalised criminal courts and tribunals, which provide for jurisdiction over 'serious violations of international humanitarian law', understood in those instruments to cover not only war crimes, but also crimes against humanity and genocide.[7] The jurisprudence of the *ad hoc* Tribunals and the SCSL has reinforced this conceptualisation of international humanitarian law on many occasions.[8] It may well be that, as international criminal law evolves, the distinctions between these differently conceived bodies of law will gradually disappear.

It is no surprise that crimes against humanity, genocide, and war crimes have been included within the jurisdiction of the contemporary international and internationalised

[7] This point is well made by Kalshoven, *supra* note 5, pp. 153–4. See also Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, (1993) 32 ILM 1159, as amended by Security Council Resolution 1660 of 28 February 2006 ('ICTY Statute'), Art. 9(1); Statute of the International Criminal Tribunal for Rwanda, (1994) 33 ILM 1602, as amended by Security Council Resolution 1534 of 26 March 2004 ('ICTR Statute'), Art. 1; Statute of the Special Court for Sierra Leone, 2178 UNTS 138, UN Doc. S/2002/246, 16 January 2002, Appendix II ('SCSL Statute'), Art. 1(1); see also Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended on 27 October 2004, Doc. No. NS/RKM/1004/006, unofficial translation by the Council of Jurists and the Secretariat of the Task Force, revised on 26 August 2007 ('ECCC Law'), Art. 2 new. Perhaps tellingly, however, the Rome Statute of the ICC does not use the term 'serious violations of international humanitarian law' in this sense, preferring instead the terms 'most serious crimes of concern to the international community' or, simply, 'international crimes'. See Rome Statute, *supra* note 3, preambular paras. 4, 6. The constitutive instrument of the East Timor SPSC similarly employs the term 'serious criminal offences'. See United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, 6 June 2000 ('UNTAET Regulation'), Section 1.3.

[8] See, e.g., *Prosecutor* v. *Blagojević and Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005, para. 834 (noting that '[a]ll crimes falling within the jurisdiction of this Tribunal are characterise[d] as "serious violations of international humanitarian law"', and that '[t]he crimes for which the Accused in this case have been convicted' – that is, complicity in genocide, several crimes against humanity, and murder as a violation of the laws or customs of war – 'clearly warrant such a label'); *Prosecutor* v. *Simba*, Case No. ICTR-2001-76-T, Judgement, 13 December 2005, para. 431 ('All crimes under the [ICTR] Statute are serious violations of international humanitarian law.'); *Prosecutor* v. *Fofana and Kondewa*, Case No. SCSL-04-14-J, Judgement, 2 August 2007, para. 93 (noting that, as '[n]o crimes under Sierra Leonean law [had been] charged in the Indictment … , [t]he Chamber [would] therefore consider only serious violations of international humanitarian law', by which it meant war crimes and crimes against humanity).

courts and tribunals, for they represent the worst excesses and atrocities in human conflict, and have characterised to varying degrees the situations to which each of the temporary courts reviewed in this volume is a response.[9] In addition, as outlined below and discussed in detail at the beginning of Chapters 2, 3, and 4, the development and codification of the rules of international law underlying these crimes has been one of the hallmarks of the progressive development of international law over the last century. It is in prohibiting the conduct that constitutes these crimes, and in providing effective means to enforce those prohibitions with individual penal sanctions, that international criminal law seeks to contribute to an international rule of law.

1.1 Legal sources for definitions of crimes under international law

The classic statement of the sources of international law, in Article 38(1) of the Statute of the International Court of Justice, refers to three primary sources and one subsidiary source: international agreements, treaties, or conventions (collectively, 'conventional international law'); customary international law, or the consistent practice of states undertaken in the belief that the conduct is permitted, required, or prohibited by international law; the general principles of law recognised by, and typically derived from the domestic legal systems of, states; and the subsidiary source of the collected commentaries on international law provided by judicial decisions and academic writings of the 'most highly qualified publicists'.[10] International criminal law demonstrates the interplay among these different sources, and thus provides a particularly robust example of how these types of legal instruments and practices relate to and build on each other in the effort to define and enforce the core categories of crimes under international law.

[9] In the constitutive instruments of the courts and tribunals discussed in this series, these core categories include other offences that are also given separate treatment under international law. Certain of the internationalised tribunals in fact include some of these offences as separate crimes. See, e.g., UNTAET Regulation, *supra* note 7, Section 7 (freestanding torture provision); ECCC Law, *supra* note 7, Art. 8 (provision on crimes against diplomatic staff). Except to the extent that breaches of norms of international law constitute war crimes or underlying offences of crimes against humanity, this volume will generally not discuss other international norms – such as the prohibitions against torture, hostage-taking, enforced disappearance, apartheid, the various manifestations of slavery, forced labour, and acts of terrorism – indicating or suggesting that individuals may or should be held responsible for their breach, and that such responsibility may or should be criminal. Other norms of this nature, also not treated in this volume, include mercenarism and piracy.

[10] Statute of the International Court of Justice, (1945) 39 *AJIL Supp*. 215, Art. 38(1). This traditional list of the sources of international law has been criticised as under-inclusive and overly focused on the role of states as international actors, as it is now generally accepted that there are other entities and persons that have international legal personality and should therefore play a role in providing the content and shaping the development of international law. See, e.g., Maurice H. Mendelson, 'Formation of Customary International Law', in (1998) 272 *Recueil des Cours* 165, 188, 203; Jonathan Charney, 'Universal International Law', (1993) 87 *American Journal of International Law* 529 ('Rather than state practice and *opinio juris*, multilateral forums [where representatives of states and other interested groups come together to address important international problems of mutual concern] often play a central role in the creation and shaping of contemporary [customary] international law.'). In particular, the role of international and non-governmental organisations in the field of international criminal law has been especially pronounced in the preparations for, establishment, and initial functioning of the ICC.

International treaties from the turn of the last century represent the earliest efforts to create a code of conduct for interstate hostilities, while post-war agreements between and among victor and vanquished states at the end of the First and Second World Wars laid the foundations for individual criminal liability for violations of that code, and the first comprehensive international effort to bring the worst individual offenders to justice.[11] Developments before, between, and after the major wars of the twentieth century were reflected in burgeoning norms of customary international law, which were in turn codified in later international treaties. In particular, growing acceptance of the need for clearer restrictions on permissible military tactics and protection of vulnerable populations led to the 1949 Geneva Conventions,[12] while widespread revulsion at the Holocaust resulted in the rapid drafting and entry into force of the 1948 Genocide Convention.[13]

Yet the international criminal tribunals, from Nuremberg up to the creation of the ICC and the internationalised tribunals, have experienced some difficulty in marrying these traditional sources of international law with their jurisdictional peculiarities as criminal courts. Perhaps the most important issue confronting their legitimacy has been the fact that their constitutive statutes, which give them jurisdiction and set forth much of the law they must apply, were all promulgated after the commission of the alleged crimes that are the subject of prosecutions,[14] with one exception and one partial exception: (1) the ICC, which has jurisdiction only over crimes committed subsequent to the Court's July 2002 establishment;[15] and (2) the ICTY, with respect to crimes allegedly committed after the 1993 promulgation of that Tribunal's Statute, most notably in and around Srebrenica in 1995 and Kosovo in 1999. Consequently, the Statutes of the various courts and tribunals, drawing inspiration from the Nuremberg Tribunal,[16] grant jurisdiction over certain international crimes but do not themselves prohibit criminal conduct or

[11] See Chapter 2, section 2.1; Chapter 3, section 3.1; Chapter 4, section 4.1; see also Gideon Boas, James L. Bischoff, and Natalie L. Reid, *Forms of Responsibility in International Criminal Law* (2007), pp. 145–8.

[12] See Chapter 4, section 4.1.2.

[13] See Chapter 3, section 3.1.1.

[14] See ICTY Statute, *supra* note 7, Art. 8 (temporal jurisdiction from 1 January 1991 onward); ICTR Statute, *supra* note 7, Art. 7 (temporal jurisdiction from 1 January 1994 to 31 December 1994); UNTAET Regulation, *supra* note 7, Section 2.3 (SPSC temporal jurisdiction from 1 January 1999 to 25 October 1999); ECCC Law, *supra* note 7, Art. 2 new (temporal jurisdiction from 17 April 1975 to 6 January 1979); Law No. 10 (2005), Law of the Iraqi Higher Criminal Court, 18 October 2005, reprinted in Scharf and McNeal (eds.), *supra* note 2, pp. 283 *et seq*., Art.1(2) (temporal jurisdiction from 17 July 1968 to 1 May 2003); SCSL Statute, *supra* note 7, Art. 1(1) (temporal jurisdiction from November 1996 onward). The SCSL has already indicted all of its accused, all for crimes allegedly committed before the Court's establishment.

[15] Rome Statute, *supra* note 3, Art. 24(1) ('No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.').

[16] The indictment at Nuremberg listed a number of international treaties as a basis for the law the Charter included in the Tribunal's jurisdiction, most notably the 1899 and 1907 Hague Conventions. See *France, Union of Soviet Socialist Republics, United Kingdom, and United States* v. *Göring, Bormann, Dönitz, Frank, Frick, Fritzsche, Funk, Hess, Jodl, Kaltenbrunner, Keitel, von Bohlen und Halbach, Ley, von Neurath, von Papen, Raeder, von Ribbentrop, Rosenberg, Sauckel, Schacht, von Schirach, Seyss-Inquart, Speer, and Streicher*, *International Military Tribunal, Judgment and Sentence*, 1 October 1946, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, vol. 1, pp. 84–92.

create individual liability.[17] Rather, the primary prohibitive rules, generally identifying the conduct that violates international law, and secondary attributive rules, identifying which individuals may be held personally responsible for those violations, must usually exist in customary international law before they may be enforced.[18] A significant part of the body of decisional law of the *ad hoc* Tribunals is therefore an exercise in divining and clarifying customary international law, and the effect the Tribunals will have on the jurisprudence of the ICC will further advance that project.

The Rome Statute of the ICC is arguably the most important treaty in contemporary international criminal law, owing to its relative comprehensiveness and to the fact that it was agreed upon by a large body of states. In addition, because the Court enjoys only prospective jurisdiction, the legal basis for its jurisdiction is far less controversial than that of its predecessors.[19] Like the *ad hoc* Tribunals, the ICC owes a significant debt to customary international law.[20] First, the *travaux préparatoires* of the Rome Statute at times reveal intense debate between a range of international actors over how far a specific requirement or prohibition had developed in customary international law,[21] with the result that the final text represents a partial codification of custom, partial progressive development of the

[17] As such, it is important to note that judgements of the *ad hoc* Tribunals are technically incorrect, and certainly imprecise, when they refer to alleged crimes as 'violating' a given Article of their Statutes.

[18] For the ICTY and the ICTR, see Boas, Bischoff, and Reid, *supra* note 11, pp. 27 & n. 100, 112–13 & n. 640; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, ('Secretary-General's ICTY Report'), para. 33 (noting that the subject matter jurisdiction of the ICTY includes international humanitarian law, which 'exists in the form of both conventional law and customary law', and that 'while there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law'); *ibid*., para. 35 (explaining that 'the part of conventional international humanitarian law which has beyond doubt become part of international customary law' includes the Geneva Conventions and the Genocide Convention); Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1994/1125, 4 October 1994 (attaching the report of the Commission of Experts appointed to investigate the events in Rwanda, and noting the Commission's conclusion that violations of the Geneva Conventions and the Genocide Convention, as well as crimes against humanity, were committed in Rwanda). While the ICTY Appeals Chamber has held that the relevant legal rules may also be found in conventional international law binding on Yugoslavia at the time of the alleged crimes, see, e.g., *Prosecutor* v. *Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, paras. 43–46, chambers at both levels in both *ad hoc* Tribunals generally also undertake or rely on analyses of customary international law. See *Prosecutor* v. *Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 83 (noting that 'in most cases, treaty provisions will only provide for the prohibition of a certain conduct, not for its criminalisation, or … will not sufficiently define the elements of the prohibition they criminalise and customary international law must be looked at for the definition of those elements').

[19] See Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (2007), pp. 80–91.

[20] The Rome Statute was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and opened for signature by all states on 17 July 1998. It entered into force on 1 July 2002, and as of 1 December 2007 had 139 signatories and 105 parties. See Multilateral Treaties Deposited with the Secretary-General, available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp. One of the main bodies of the ICC is the Assembly of States Parties, in which each state party is represented and to which signatories may send observers. See Rome Statute, supra note 3, Art. 112.

[21] See, e.g., Chapter 2, notes 476–477 and accompanying text; Chapter 3, notes 323–329, 346 and accompanying text; Chapter 4 notes 439–445, 459–464, 474–477 and accompanying text.

law, and a partial compromise between the different participants in the process. Second, much of the content of the Statute and the accompanying Elements of Crimes is derived from or influenced by the jurisprudence of the *ad hoc* Tribunals.

The role that states play in the lawmaking process at the international level is complemented by the contribution that their domestic criminal legal systems make to the growing sophistication of international criminal law. Although relatively few prosecutions for crimes under international law have taken place at the domestic level,[22] the procedural rules of international criminal adjudication are based on – and are in fact an attempt to take the best practices from – the rules in the principal legal systems of the world.[23] Moreover, the most fundamental principles of international criminal law are in fact derived from the general principles of criminal law accepted in domestic legal systems. *Nullum crimen sine lege* and *nulla poena sine lege* are the principles that no conduct can be subject to criminal sanction unless prohibited and penalised by law.[24] In the context of international criminal law, these principles are interpreted as requiring that, at the time the alleged conduct was committed, it was a breach of international law and was subject to the imposition of individual criminal penalties.[25] As such, they are important limiting principles that guide judicial findings and pronouncements of guilt or innocence. In particular, they require that chambers at the *ad hoc* Tribunals ground their analysis firmly in customary international law – a responsibility that is observed to varying degrees by different chambers.[26]

[22] See, e.g., *Fédération Nationale des Déportés et Internés Résistants et Patriotes et Autres* v. *Barbie* (French Cour de Cassation, Chambre Criminelle, 20 December 1985), 1985 Bull. Crim. No. 407, 1053, (1990) 78 ILR 124; Affaire *Touvier* (French Cour de Cassation, Chambre Criminelle, 27 November 1992), 1992 Bull. Crim. No. 294, 1085; *Public Prosecutor* v. *Menten* (Dutch Hoge Raad 1981), 75 ILR 362, 362–363; *Regina* v. *Finta* (Canadian Supreme Court 1994), 1 SCR 701, 814; *Chilean Genocide* case (Spanish Audiencia Nacional, 5 November 1998), *translation reprinted in* Reed Brody and Michael Ratner (eds.), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (2000); see also Chapter 2, note 53 (citing crimes against humanity cases in Canada, Australia, Germany, Austria, and Israel).

[23] See generally Patrick L. Robinson, 'Fair but Expeditious Trials', in Hirad Abtahi and Gideon Boas (eds.), *The Dynamics of International Criminal Justice: Essays in Honour of Sir Richard May* (2005), p. 169; Gideon Boas, 'A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY', in Gideon Boas and William A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (2002), pp. 31–33; Daryl A. Mundis, 'From "Common Law" Towards "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence', (2001) 14 *Leiden Journal of International Law* 367.

[24] See generally Guillaume Endo, '*Nullum crimen nulla poena sine lege* principle and the ICTY and ICTR', (2002) 15 *Revue québécoise de droit international* 205.

[25] See, e.g., Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *International Criminal Law and Procedure* (2007), pp. 12–16; William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006), pp. 155–156; Gerhard Werle, *Principles of International Criminal Law* (2005), pp. 190–195; Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (2003), pp. 195–197; Christoph Safferling, *Towards an International Criminal Procedure* (2001), p. 88.

[26] See Theodor Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals', (2006) 100 *American Journal of International Law* 551, 566–567 (asserting that 'to forestall … criticisms' similar to those levelled at the Nuremburg trials, 'the *ad hoc* tribunals take pains to explain the customary and conventional underpinnings of their decisions', and that '[c]onsequently, judgments of the ICTY are helping to revitalize customary law and to anchor international law firmly in both codified law and judicial decisions'); Secretary-General's ICTY Report, *supra* note 18, para. 34 (expressing the view that the *nullum crimen sine lege* principle

Finally, the efforts of renowned international scholars – most notably in the form of the work of the International Law Commission (ILC) – cannot be underestimated. In 1950, the ILC presented its codification of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal;[27] in 1954, its first draft criminal code, the Draft Code of Offences against the Peace and Security of Mankind;[28] in 1991, a revised and updated version of that Code;[29] in 1994, the Draft Statute for an International Criminal Court that was eventually considered by the conference of plenipotentiaries in Rome;[30] and in 1996, the revised Draft Code of Crimes against the Peace and Security of Mankind.[31] Each of these documents included invaluable commentaries that explored and explained the relevant principles of the nascent and developing field of international criminal law. Collectively, they have had a remarkable influence on the establishing instruments and the evolving case law of the contemporary international and internationalised criminal courts and tribunals.

1.2 Structure of crimes under international law

The complex variety of sources from which international criminal law derives its substantive content is matched by the complicated structure of the crimes themselves. In certain domestic criminal regimes, for example, each crime is typically a comprehensive description of the conduct justifying the imposition of penal sanctions, bundling together the physical act or omission, the accused's role in the crime, and sometimes any aggravating or mitigating factors.[32] In international criminal law, however, those components are disaggregated, and must be independently evaluated and then combined in order to determine whether the accused on trial

'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'). But see, e.g., Chapter 3, note 178 and accompanying text (noting, for example, that the *Akayesu* Trial Chamber cited almost no authority for its descriptions of the various bases on which a protected group under the Genocide Convention may be defined).

[27] 5 UN GAOR Supp. (No. 12) at 11, UN Doc. A/1316 (1950).

[28] See Report of the International Law Commission on the Work of Its Sixth Session, UN Doc. A/2963 (1954).

[29] See Report of the International Law Commission on the Work of Its Forty-third Session, UN Doc. A/46/10 (1991).

[30] See Report of the International Law Commission on the Work of Its Forty-sixth Session, UN Doc. A/49/10 (1994).

[31] See 1996 ILC Draft Code, *supra* note 3.

[32] See, e.g., Carl Erik Herlitz, *Parties to a Crime and the Notion of a Complicity Object* (1992), p. 89 (describing the traditional common-law structure of felonies, which distinguished between the participants in a crime by, *inter alia*, the concepts of first-degree and second-degree principals; for murder, for example, those who physically committed the crime would be guilty of first-degree murder, while those who were merely present and aided its commission would be guilty of second-degree murder); *American Jurisprudence*: *Criminal Law*, vol. 21 § 187 (2nd edn 2007) (treatise on criminal law in the United States, noting that while '[s]ome jurisdictions today continue the common-law distinction in liability' between the participants in a crime, in most state jurisdictions, no such distinction is recognised, and '[a]ll persons involved in the crime are equally guilty of the completed offense, and all are liable for the conduct of each person').

may be convicted. As will be seen below and throughout this volume, the result is that the various elements of an international crime may, in the circumstances, be fulfilled by different actors involved in the bringing to fruition of a given crime.

Broadly speaking, there are three substantive components to international crimes: (1) the underlying offence; (2) the general requirements of each core category of crimes under international law; and (3) the specific requirements for certain crimes. A fourth component – the form of responsibility, or method through which a given individual participates in the crime – must be supplied before an accused can be subject to criminal penalties. This critical fourth component is the subject of the first volume in this series.[33] Though all the elements of a crime may be satisfied by the accused's conduct, international law does not require that a person physically commit the offence in order to be held responsible for the crime. With limited exceptions for certain requirements where their satisfaction may be determined as a matter of law,[34] the prosecution must prove all elements of all four components beyond reasonable doubt before a conviction may be entered.

The **underlying offence** is the conduct that produces the result, or is intended to produce the result, that is prohibited by international law. Such conduct is usually also prohibited by domestic law. Examples include murder; rape; physical assault or beating; and theft or destruction of property. In the contexts in which international crimes are generally committed, such as international or non-international armed conflicts, or actions by military or security services against civilian populations, there are frequently many people at different levels in the political or military hierarchy who are involved in the preparation and execution of the criminal activity. In such circumstances, it is often the lowest-level actor, the foot soldier, who carries out the underlying offence. In order to form the basis of an international crime, such conduct will almost always have to be criminal itself;[35] as such, it will have its own physical and mental elements. In order to avoid confusion, we restrict the use of the terms '*actus reus*' and '*mens rea*' to these physical and mental elements of the underlying offences.

The **general requirements** are the elements that must be satisfied before an underlying offence constitutes a crime of international significance. These elements vary according to which core category of crimes is alleged, and generally correspond to the context in which the underlying offence was committed or the intent that accompanies the offence: for example, war crimes must occur in an armed

[33] See generally Boas, Bischoff, and Reid, *supra* note 11.
[34] For example, the equal gravity requirement for persecution as a crime against humanity, and the gravity requirement for violations of the laws or customs of war. See Chapter 2, text accompanying note 399; Chapter 4, section 4.2.1.5.2.
[35] The sole exception being certain forms of persecution as a crime against humanity. See Chapter 2, note 397 and accompanying text.