

## International Criminal Law

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### A. The Rich Variety of Meanings

- 1 The concept 'International Criminal Law' suffers from considerable ambiguity. Its four most important meanings are as follows.

#### **1. International Criminal Law as the Law Governing the Prescriptive Criminal Jurisdiction of States**

- 2 International criminal law continues to be used to denote those national laws that govern the (extra-) territorial scope of municipal criminal law. This body of national criminal law can also be referred to as the rules on prescriptive criminal jurisdiction. In defining its prescriptive criminal jurisdiction, national legislators have to act within the limits of international law and the limits concerned may also be referred to as international criminal law. International criminal law within this first meaning is thus composed of national and international legal rules.
- 3 The principles of international criminal law within this first meaning are territoriality, active and passive personality, the protective principle (including, possibly, the so-called effects doctrine), the principle of criminal jurisdiction by representation and universal jurisdiction. While the principle of territoriality is universally adhered to by States and undisputed under international law, State practice differs with respect to other principles and their respective legality under international law is controversial to a greater or lesser extent (→ *Jurisdiction of States*; → *Criminal Jurisdiction of States under International Law*).

#### **2. International Criminal Law as the Law of International Co-operation in Criminal Matters**

- 4 International co-operation in criminal matters denotes the deliberate provision of support for criminal proceedings in a different forum. Such support may take different forms. In the inter-State context, a threefold distinction was originally made between the following: extradition of a person for the purpose of prosecution or enforcement of a sentence of imprisonment; the transit of a person from the extraditing State to the State seeking → *extradition* through a third State; and mutual assistance comprising other forms of support including, most importantly, the gathering of evidence. Over time, transfer for the enforcement of sentences evolved into a separate category of assistance. More recent additions to the spectrum of co-operation measures are the transfer of criminal proceedings and requested States authorizing the execution of procedural acts by the requesting State, the so-called 'passive co-operation'. Co-operation between States and international criminal courts constitutes the latest development within this body of law. This branch of co-operation in criminal matters is increasingly characterized as vertical in juxtaposition to horizontal inter-State co-operation (→ *Co-operation, International Law of*).

5 International co-operation in criminal matters is governed by some basic principles of → *customary international law* and a wide net of regional and bilateral international treaties. This body of international law is complemented by the national laws of the States concerned. The law on international co-operation in criminal matters can also be said to form part of the law of international criminal procedure. The latter term is increasingly used to denote those rules of criminal procedure that apply where the circumstances of a given case are characterised by an international element. Accordingly, the law of international criminal procedure also comprises rules of international and national law (→ *International Criminal Courts and Tribunals, Procedure*).

### 3. *International Criminal Law as Transnational Criminal Law*

6 International criminal law is also used to denote a body of international treaties dealing with crimes of a transnational character. The key components of such treaties are the duties of States Parties to criminalize the prohibited conduct under their national laws and to either investigate and prosecute, or extradite a suspect apprehended on its territory (→ *aut dedere aut iudicare*; criminal jurisdiction of the *iudex deprehensionis*). Other typical elements of these treaties are provisions to facilitate extradition by making the offences concerned extraditable ones and by excluding the applicability of the traditional political offence exception. State obligations under the treaties concerned apply only *inter partes*; more precisely, they cannot create titles of criminal jurisdiction opposable to third States that exceed the limits of general international law.

7 The signing of three major conventions between 1929 and 1937 marks the beginning of the relevant international treaty practice. Counterfeiting of currency, trade in narcotics, and → *terrorism* were the crimes covered by these conventions, the one on terrorism remaining a draft, though. Subsequently, crimes such as → *slavery*, trade in slaves, trafficking in human beings, attacks against internationally protected persons, torture (→ *Torture, Prohibition of*), money laundering, participation in organized crime (→ *Transnational Organized Crime*), cybercrimes, and corruption (→ *Corruption, Fight against*) were added to the list of transnational offences. Negotiations on a United Nations Comprehensive Convention on International Terrorism have reached an advanced stage at the time of writing.

8 While it is true that many of the treaties concerned speak of ‘crimes of international concern’ in preambular considerations, this language proves somewhat loose on a close reading of the operative provisions. In the case of the multilateral treaties up to 1970, those provisions clearly evidence a concept of reciprocal protection of parallel State interests rather than the protection of fundamental values of the → *international community*. This is evidenced by the fact that the obligation of the *forum deprehensionis* to prosecute is dependent on the receipt and denial of a request for extradition from a State directly connected with the crime. The difficulty that remains is how to qualify those *aut dedere aut iudicare* regimes that follow the so-called ‘Hague Model’ as articulated in Art. 7 Convention for the Suppression of Unlawful Seizure of Aircraft ((signed 16 December 1970, entered into force 14 October 1971) 860 UNTS 105; ‘Hijacking Convention’). Here, the obligation of the State of apprehension to prosecute is no longer made dependent on a prior extradition request and its denial, but applies in all cases of non-extradition. For this reason, the conclusion of a treaty that follows the Hijacking Convention model might be seen to imply the recognition of a genuine international community value. A further indication pointing in this direction is the preambular consideration in most (in particular, anti-terrorist) conventions since 1973 that ‘the occurrence of such acts is a matter of grave concern to the international community as a whole’. Both aspects are not decisive, though. Instead, the true test is whether States agree to the internationalization of the criminal law rule and hereby create a crime under international law. For the time being, it would seem that, with the sole exception of the grave breaches of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ((adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; ‘Geneva Convention I’), the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ((adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; ‘Geneva Convention II’), the Geneva Convention relative to the Treatment of Prisoners of War ((adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; ‘Geneva Convention III’) and the Geneva Convention relative to the Protection of Civilian Persons in Time of War ((adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; ‘Geneva Convention IV’), the ‘Hague model convention crimes’ have not passed that threshold and should, therefore, preferably be referred to as transnational crimes for reasons of conceptual clarity (see also → *Geneva Conventions I–IV (1949)*).

9 The crime of → *piracy* calls for special considerations. In their joint separate opinion in the → *Arrest Warrant Case (Democratic Republic of Congo v Belgium)*, Judges Higgins, Kooijmans and Buergenthal regarded that crime as the ‘classical example’ of a crime regarded ‘as the most heinous by the international community’ (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal)* [2002] ICJ Rep 63 para. 61). This statement provokes a measure of astonishment. It should go without saying that piracy, being comparable to ordinary robbery in terms of gravity, does not even come close to match the heinousness of → *genocide* or → *crimes against humanity*. It also remains open to doubt whether piracy constitutes a

crime under international law. At the same time, the customary title of universal jurisdiction in the case of piracy on the high seas is undeniable. It must be explained, however, on the basis of special considerations. The *sui generis* characterization of piracy on the high seas as a crime of customary universal jurisdiction would seem to rest upon a combination of the absence of a territorial sovereign and the typical difficulty of establishing one of the traditional bases for alternative forms of jurisdiction, such as, in particular, the nationality of the alleged offender.

#### 4. Supranational Criminal Law and International Criminal Law *stricto sensu*

- 10 International criminal law *stricto sensu* establishes → *individual criminal responsibility* directly under international law. This body of law seeks to protect fundamental values of the international legal community as a whole and articulates a *ius puniendi* of that community. Originally, international peace and security constituted the fundamental community value behind international criminal law *stricto sensu*. In the course of more recent developments, the protection of internationally recognized → *human rights* has also gained significance. The precise scope of the latter's protection through international criminal law, and the relationship between international peace and security and internationally recognized human rights as fundamental international community values behind international criminal law *stricto sensu* remain to be defined in greater clarity.
- 11 International criminal law *stricto sensu* may be articulated in international treaties to correspond with the principle of legality in its most stringent form. Ultimately, however, it must be rooted in general international law because of its inextricable connection with fundamental values of the international legal community as whole. This is not to exclude the conceptual possibility of 'crimes under international conventional law'. In fact, international criminal law *stricto sensu* may over time evolve into the hard core of a broader body of supranational criminal law. Supranational criminal law need not be universal in scope, but may also come into existence when a treaty community of States partially integrates the exercise of their national criminal jurisdictions. The European Union is perhaps the regional community of States where such a decision is most likely to be taken in the future. At present, though, a supranational European criminal law does not exist.
- 12 Occasionally, international criminal courts too hastily admit the existence of crimes under conventional international law. This is true, most importantly, for the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)*. It holds that individual criminal responsibility for → *war crimes* can be derived from one of the existing international treaties on international humanitarian law provided that the conventional rule concerned is binding upon both parties to the conflict (*Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* para. 143; → *Tadić Case*) this case law is not uncontroversial; for the opposite view from within the ICTY, see *Prosecutor v Galic (Separate and Partially Dissenting Opinion of Judge Nieto-Navia, ICTY-98-29-T (5 December 2003) paras 108-113; see also → Galic Case)*. This position in *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* neglects the fact that the relevant international treaties do not in and of themselves establish → *individual criminal responsibility*; they do not create crimes under international conventional law. It also ignores the unambiguous message contained in the Secretary General's report on the establishment of the ICTY that 'the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law' (UNSC 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc S/25704). The legal situation under the Rome Statute of the International Criminal Court ('Rome Statute'; 'ICC Statute'; → *International Criminal Court (ICC)*) is different in the important respect that Arts 6-8 ICC Statute articulates crimes so that they exist directly under this international treaty. It is thus conceivable that the ICC Statute contains crimes that are exclusively conventional in character and thus form part of the broader concept of supranational criminal law without encroaching upon the hard core of international criminal law *stricto sensu*. Yet, it was the understanding shared by those formulating the crimes in the ICC Statute to only codify or at best crystallize international criminal law *stricto sensu*, ie crimes under general international law instead of creating new crimes under international conventional law. This understanding is expressed through the preamble's reference to 'the most serious crimes of concern to the international community as a whole' (PmbI ICC Statute), but perhaps even clearer in the following passage on crimes against humanity:
 

Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world (International Criminal Court Assembly of States Parties 'Elements of Crimes' [9 September 2002]).
- 13 The goal to adhere to customary international law proved to be challenging, not least because of the controversy surrounding how to identify custom and the legal uncertainty of its precise content.

- 14 In German legal terminology international criminal law *stricto sensu* has long since possessed the specific denomination *Völkerstrafrecht* as coined by Jescheck. In French (under the notable influence of Glaser) and Portuguese legal terminology, there is a tendency to denote international criminal law *stricto sensu* by the order of words: *droit international pénal* or *direito internacional pena* (instead of *droit pénal international* or *direito penal internaciona*). As of yet, the terminological efforts to denote the specificity of international criminal law *stricto sensu* do not appear to have crystallized a strong trend; rather they continue to vary from author to author. In English legal terminology, a number of suggestions have been made to enhance terminological clarity with respect to 'international criminal law'. An early attempt was made by Schwarzenberger to refer to crimes under international law as international criminal law in the material sense. More recently, Bassiouni has introduced the term → *ius cogens* crimes and Scheffer suggests recognizing 'atrocities law' as a separate category of international criminal law. None of these suggestions, however, can claim to have yielded consensus. Thus, a specific and generally accepted term to denote crimes under international law continues to constitute a *desideratum*. For this reason, the neutral term international criminal law *stricto sensu* will be used in the following text.

## B. International Criminal Law *stricto sensu*

### 1. The Main Features of the Concept

- 15 Current international criminal law *stricto sensu* comprises genocide, crimes against humanity, war crimes committed in international and non-international armed conflicts, and → *aggression*. Only human beings can incur individual criminal responsibility for these crimes. There is no criminal responsibility of legal persons and, in particular, no State criminal responsibility under contemporaneous international law (see also → *Criminal Responsibility, Modes of*).
- 16 International criminal law *stricto sensu* is *ius cogens* (non-derogable), trumps any conflicting national laws and, in the same vein, supersedes the traditional State right to immunity *ratione materiae* under international law. All three points are of crucial importance in practice as international criminal law *stricto sensu* essentially covers macro-criminality directed or sponsored by State leadership.
- 17 International criminal law *stricto sensu* may be directly enforced through international criminal jurisdictions or indirectly through States. In the latter case, the national judiciary acts as the fiduciary of the international *ius puniendi*. The jurisdiction of an international criminal court may be primary or complementary *vis-à-vis* national jurisdictions. In cases of conflict, the *Kompetenz-Kompetenz* must be with the international criminal court. In the case of indirect enforcement of international criminal law *stricto sensu* through national criminal courts, it is matter of the respective constitutional law whether international criminal law *stricto sensu* is directly applied or only through incorporation or transformation into national law.
- 18 How to deal with a national amnesty constitutes a special challenge for the emerging system of international criminal justice *stricto sensu*. Since the Treaty of Peace between the Holy Roman Empire and Sweden and the Treaty of Peace between France and the Holy Roman Empire (these two treaties form the 'Westphalian Peace Treaty') ((signed and entered into force 24 October 1648) (1648–49) 1 CTS 198, 319), a consistent practice unfolded in Europe to provide for amnesty in peace treaties. For Kant, amnesty was even part of the very idea of concluding peace. On the face of it, the Treaty of Peace between the Allied and Associated Powers and Germany ((signed 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 188; 'Versailles Peace Treaty') abandoned the prior practice. However, in light of the surge of pardons after both the First World War and, as is often forgotten, the Second World War, it could be argued that, despite their often emphatic commencement, international criminal cases tend to wind up as false amnesties. The preamble to the ICC Statute recalls 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' (Preamble ICC Statute). This formulation is clearly couched in prescriptive terms and corresponds to the practice of the United Nations ('UN') not to accept amnesties in cases of crimes under international law. The ICC Statute therefore lends support to the emergence of a customary duty of the territorial State to investigate or prosecute the crimes in question. This duty, which would come on top of the already existing treaty obligations applying to certain types of crimes, would lay the ground for a coherent normative framework against amnesties in cases of crimes under international law. On a closer look at State practice, however, the legal situation appears to be considerably more nuanced than the cited preambular paragraph suggests. Furthermore, the ICC Statute itself does not explicitly prohibit the International Criminal Court from accepting a national amnesty decision. Instead, the relevant provisions leave room for the organs of the ICC to defer to such a decision. This statement per se is not particularly helpful, though, as the national decision-makers will need to know whether and, if yes, under what conditions amnesties or alternative reconciliation mechanisms such as truth commissions and/or non-penal sanctions will be

accepted by the ICC (and, it is submitted, consequently by third States). It is therefore quite an urgent challenge for the international community in general and for the ICC in particular to provide for legal certainty through the development of criteria. In light of the great variety of circumstances that may surround the amnesty question, this is a daunting task.

## 2. Philosophical and Theoretical Challenges to the Idea of International Criminal Law

- 19 From the Hegelian perspective that essentially denies the existence of public international law and instead reduces it to external public law (*äußeres Staatsrecht*) international criminal law *stricto sensu* is a bewildering species, namely a body of criminal law in the natural state (*Naturzustand*). As such, international criminal law *stricto sensu* is not necessarily illegitimate, but it is conspicuously different from criminal law within an existing State. Within that perspective it is argued (Jakobs) that international criminal law *stricto sensu* is not about the reaffirmation of an existing legal order, but rather about the creation of a new one by use of coercive means. The argument of a fundamental difference in nature between the criminal law within and outside a State is questionable, though, because it overemphasizes the existing differences in international and national law enforcement. Furthermore, it can hardly be ignored that the emerging international criminal justice system, in and of itself, contributes to the strengthening of some vital components of the existing international legal order.
- 20 The legitimacy of international criminal law *stricto sensu* is also open to argument on the basis of Kant's vision of a world peace order as set out in 1795 in his *Eternal Peace (Zum ewigen Frieden)*. In this famous essay, Kant questions the wisdom of subjecting States to some kind of world public coercive power. While not binding States as such, international criminal law rules *stricto sensu* pose a formidable challenge to the latter's sovereignty because these rules address the subjects of States directly and irrespective of the national law of the State concerned. Thus, a system of international criminal justice *stricto sensu* by necessity entails a rudimentary element of a world public order as rejected by Kant. More recent writings in the Kantian line of thought do not, however, deny the legitimacy of international criminal law *stricto sensu* altogether. The present focus of the philosophical debate is rather on the delineation of the legitimate scope of such a body of law. The more orthodox approach (Köhler) reduces that scope to cases where the conduct concerned negates the very existence of an international legal person or a State component with the potential to international legal personality (such as, in particular, a national or ethnical group). This narrow concept of legitimate international criminal law *stricto sensu* reflects the classical configuration of international law as an essentially inter-State legal order. The latest attempt to scrutinize the legitimacy of international criminal law *stricto sensu* (Gierhake) goes one decisive step further in the direction of the existing law in that it recognizes that international criminal law *stricto sensu* may extend to conduct that negates the very idea of human rights as a prerequisite for a world order of peace.
- 21 From its very beginning, international criminal law *stricto sensu* has been subjected to the critique of potentially placing an individual into a conflict of obligations. He is left to choose between the Scylla of being sanctioned for refusing to obey an order of the State and the Charybdis to entail individual criminal responsibility under international criminal law for the very execution of such an order. Based on Rawls' Theory of Justice, Hoyer has argued that, as a matter of fundamental fairness, international criminal law *stricto sensu* should be confined *ratione personae* to the leadership of a 'criminal State'. However, such a categorical exclusion from international criminal responsibility of all those at the lower echelons of the State hierarchy goes too far. Instead, the final decision on individual criminal responsibility must be made in light of the circumstances of the individual case. In cases of genuine conflict, the appropriate remedies range from the mitigation of the sentence to the recognition of a ground for excluding criminal responsibility. With the sole exception of the crime of aggression, the existing international criminal law *stricto sensu* is not a body of leadership criminal law. At the same time, the more recent practice of international criminal jurisdictions reveals a clear focus on the investigation or prosecution of those persons who are alleged to bear the greatest responsibility for mass atrocities.

## 3. Historic Development

- 22 In 1872, the long-standing president of the → *International Committee of the Red Cross (ICRC)*, Moynier, submitted a first proposal for the establishment of an international criminal court. This court should be competent to adjudicate breaches of the Convention for the Amelioration of the Wounded in Armies in the Field ((adopted 22 August 1864, entered into force 22 June 1865) (1907) 1 AJIL Supp 90). However, neither this proposal, nor the France, Great Britain and Russia Joint Declaration of 24 May 1915 (Record Group, US National Archives, Papers relating to the Foreign Relations of the US, No 59, 867.4016/67) following the Armenian massacres, nor the Versailles Peace Treaty led to the establishment of an international criminal jurisdiction. As a result hereof, it is difficult to argue that international criminal law *stricto sensu* existed at the time of the First World War. Instead, international criminal law *stricto sensu* became a subject of rather lively debate in the inter-war period within the → *League of Nations*, the Interparliamentary Union, the → *International Law Association (ILA)*, and the *Association Internationale de Droit Pénal* (Caloyanni, Descamps, Donnedieu de Vabres, Pella, Politis, Saldana, Sottile).

- 23 In the wake of the Second World War, the trials against the major war criminals before the → *International Military Tribunals* of Nuremberg and Tokyo ('Nuremberg Tribunal'; 'Tokyo Tribunal') constituted a first precedent for internationalized criminal proceedings. From an institutional perspective, it is difficult to portray these tribunals as organs of the international community and as a first instance of a direct enforcement of international criminal law. In substance, though, these tribunals constituted a break-through in that they recognised the existence of international criminal law *stricto sensu*. Thus, today's emerging system of international criminal justice remains rooted in the precedents of Nuremberg and Tokyo. The main motive of the United States of America ('USA') for the Nuremberg Trial was recognition that waging a war of aggression is a crime under international law. The competence of the Nuremberg Tribunal also covered war crimes and crimes against humanity. In the latter case, however, there was a decisive restriction that there had to be a connection with a war of aggression or a war crime. International criminal law *stricto sensu* of the first generation was thus inextricably linked to the existence of a war. Hereby it reflected the fact that, at the time of Nuremberg and Tokyo, public international law's almost exclusive focus was on the relationships between States.
- 24 After Nuremberg and Tokyo, the long journey of international criminal law *stricto sensu* through the UN system began. On 11 December 1946, the United Nations General Assembly ('UNGA') affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Nuremberg Tribunal, and gave the instruction to codify international criminal law *stricto sensu* (UNGA Res 95 (I) (11 December 1946)). On the same day, the UNGA affirmed that genocide, which was not treated as a separate crime at Nuremberg, is a crime under international law. While the latter crime was defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ('Genocide Convention'), the remainder of the codification work took a different course. After some initial drafts had been produced by the → *International Law Commission (ILC)*, the Legal Committee of the UNGA decided in 1954 and again in 1957 to defer all further work until a consensus on aggression was reached. In 1978, four years after the term 'act of aggression' within the meaning of Art. 39 UN Charter had received a definition by consensus (UNGA Res 3314 (XXIX) (14 December 1974)), the Legal Committee of the UNGA recommended to resume the codification work. Three years later, the UNGA acted upon this recommendation and instructed the ILC accordingly. This second phase of the work led to UN ILC Draft Code of Crimes against the Peace and Security of Mankind ((1991) GAOR 46<sup>th</sup> Session Supp 10, 238) and the UN ILC Draft Code of Crimes against the Peace and Security of Mankind ((1996) GAOR 51<sup>st</sup> Session Supp 10, 9), as well as to the UN ILC Draft Statute for an International Criminal Court ((1994) GOAR 49<sup>th</sup> Session Supp 10, 43). The latter formed the basis for State negotiations on the establishment of the ICC.
- 25 These negotiations received decisive momentum through the establishment of the ICTY in 1993 and of the → *International Criminal Tribunal for Rwanda (ICTR)* in 1994. The paramount importance of these two courts is not diminished by the fact that both fall short of the ideal of a permanent international criminal court and were bound to suffer from the opprobrium of being 'special tribunals' established—at least in part—ex post facto by the UN Security Council ('UNSC'), a political organ with selective membership, and as the latter organ's sub-body. The ICTY and the ICTR's competence *ratione materiae* comprises genocide, crimes against humanity, and war crimes. Crucially, both courts eliminated the connection of the first generation international criminal law *stricto sensu* with an international armed conflict. This was achieved through the crystallization of war crimes committed in non-international armed conflicts and through the establishment of crimes against humanity as a clearly distinct category of crimes that may be committed inside or outside an armed conflict. The ICTY and the ICTR thus paved the way towards a second generation of international criminal *stricto sensu* which reflects the development of internationally recognized human rights in the meantime.
- 26 In 1995, governments set up an ad-hoc committee to start negotiations on the establishment of the ICC. Those proved legally complex and, on many occasions, politically sensitive. Notwithstanding, after five rounds of negotiations within the Preparatory Committee, a diplomatic conference was convened in Rome and it adopted the ICC Statute by a large majority on 17 July 1998. With the ICC Statute's entry into force on 1 July 2002, the first permanent international criminal court in legal history came into existence.
- 27 The ICC is a distinct international legal person in the form of a new international judicial organization. The ICC's competence *ratione materiae* reflects legal developments in the jurisprudence of the ICTY and ICTR and comprises genocide, crimes against humanity, and war crimes. The crime of aggression also falls under the ICC's competence, although the exercise of this competence will be possible only once the crime has been defined. As a general rule, the competence *ratione personae* of the ICC is confined to persons who are either nationals of a State Party or whose crimes are alleged to have been committed on the territory of a State Party. The competence of the ICC may, however, turn into one of truly universal character where the UN Security Council chooses to refer a situation to the ICC. The ICC's jurisdiction is complementary to national criminal jurisdictions; the ICC will act only where no State is willing or

able to conduct genuine proceedings. If the genuineness of national proceedings is in question, the final decision rests with the ICC. After its surprisingly early entry into force, there are now more than 100 States Parties to the ICC Statute.

- 28 The establishment of the ICC was followed by efforts on other levels to enhance the enforcement of international criminal law *stricto sensu*. Increasingly, States adjust their criminal laws to the new international legal landscape by way of reference or transformation. The criminal proceedings against Saddam Hussein and the leadership circle around him before the High Iraqi Criminal Court belong to this context. Furthermore, a number of national courts or chambers with a (varying) degree of internationalization have been set up to deal with specific and complex mass atrocities. Those criminal jurisdictions include the War Crimes Chamber of the Court for Bosnia-Herzegovina, the Special Court for Sierra Leone, the District Court of Dili's Special Panels for Serious Crimes (East-Timor) and the Extraordinary Chambers in the Courts of Cambodia (→ *Mixed Criminal Tribunals (Sierra Leone, East Timor, Kosovo, Cambodia)*). The international consensus that perpetrators of crimes under international law should not go unpunished is thus 'being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play' (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (*Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal*) [2002] ICJ Rep 63 para. 51).
- 29 The international consensus that perpetrators of crimes under international law should not go unpunished does not mean that there is universal agreement on the way the international criminal justice system should be devised. For the time being, major powers, such as China, India, the Russian Federation and the USA remain outside the ICC. The US Government would have preferred the establishment of an international criminal court that is dependent on UN Security Council deferrals and it questions the international legality of the rather orthodox jurisdictional framework under the ICC Statute. Under the Presidency of George Bush Jr, the US had made considerable efforts aimed at further curtailing the ICC's jurisdiction with a view to effectively shielding its soldiers from any international investigation or prosecution. The US Government fought hard to have the UN Security Council adopt UNSC Res 1422 (2002) (12 July 2002) SCOR (1 January 2001–31 July 2002) 316 ('UNSC Res 1422'). This legally questionable instrument prohibited the ICC from exercising its jurisdiction over nationals of non-party States acting in accordance with a Security Council mandate under Chapter VII-mandate UN Charter. UNSC Res 1422 was initially effective for one year, and was renewed only once due to growing opposition within the UNSC. Consequently, the US Government has decided to work, with some measure of success, towards concluding a global network of bilateral agreements to ensure a similar protection of its soldiers and other US nationals. The opposition of the Bush administration exemplifies the ICC's enduring difficulty in realizing its vision of full equality before the law. More fundamentally, it reflects a characteristic feature of the present epoch of international law: the tension between unprecedented international community aspirations and a strong and powerful hegemonic temptation of a 'lone superpower'. It is probably overly optimistic to expect the disagreement between the State Parties of the ICC and a number of major powers, including the USA, to be over in the nearest future. More realistically, full realization of the equality principle will still require a lot of patience and determination by the international community. It is somewhat promising, however, that the US has seemed willing, on occasion, to abate its active opposition to the ICC. On 31 March 2005, the UN Security Council adopted UNSC Res 1593 (2005) (31 March 2005) SCOR (1 August 2004–31 July 2005) 131, which referred the Darfur situation to the ICC. Rather than exercise its veto, the US decided to abstain from voting on this resolution. While this may not be a ringing endorsement for the principles of universality and equality, it is a gesture that enabled rather than obstructed the ICC's work. And for the first time, the potential of complementary action between the UN Security Council and the ICC became visible.

#### 4. Crimes

- 30 The Charter of the Nuremberg International Military Tribunal and the Charter of the International Military Tribunal for the Far East as well as the Statute of the International Criminal Tribunal for the Former Yugoslavia ('ICTY Statute') and the Statute of the International Criminal Tribunal for Rwanda ('ICTR Statute') refer to crimes under international law essentially in the form of titles of jurisdiction; to ascertain the full definition of the respective crime, the judges had to turn to customary international law. The ICC Statute deviates from this practice and defines genocide, crimes against humanity and war crimes in Arts 6–8 ICC Statute. This decisive move towards basing the application of international criminal law *stricto sensu* on a *lex scripta* is complemented by Art. 22 ICC Statute, which excludes proceedings based on crimes other than those listed and defined in the ICC Statute itself. This unprecedented emphasis on the legality principle is evidenced further by the adoption of so-called Elements of Crimes 'that shall assist the Court in the interpretation and application of articles 6, 7 and 8' (Art. 9 (1) ICC Statute).
- 31 The definition of genocide in Art. 6 ICC Statute stems from Art. 2 Genocide Convention. The essence of this crime lies in the intent to destroy a national, ethnic, racial, or religious group in whole or in part. For all practical purposes, this intent refers to a collective genocidal campaign because a lone individual will not, save for the most exceptional circumstances, be able to form the realistic intention to bring about, solely by his own conduct, the at least partial destruction of one of the groups concerned. The ICTR and the ICTY have made significant contributions to clarify the

definition of genocide. The → *International Court of Justice (ICJ)* has essentially confirmed the case law of the two ad-hoc tribunals in its *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (ICJ, 26 February 2007). However, important questions regarding the definition of the protected groups, the concept of ‘part of a group’ and of ‘intent to destroy’ remain a matter of intense debate.

- 32 Art. 7 ICC Statute is the first codification of crimes against humanity. It is now settled customary international law that a crime against humanity, like genocide, can be committed in and outside an armed conflict. The essence of this crime consists of the fact that the conduct of the individual perpetrator (murder, torture, rape et al) must form part of a widespread or systematic attack directed against any civilian population with knowledge of the attack. While the elements of the different forms of individual criminal conduct continue to pose significant problems of interpretation, the main challenge is to define as clearly as possible the contextual element of the crime because it is mainly through this threshold element that the material scope of application of current international criminal law *stricto sensu* is delineated. At this point of development, it would be overly optimistic to state that a sufficiently clear and widely adhered to definition exists. Art. 7 (2) ICC Statute correctly deviates from the more recent and overly progressive case law of the ICTY in maintaining the requirement of a State or organizational policy behind the collective activity. However, important questions including, in particular, the precise definition of a ‘policy’ and of an ‘organization’ remain to be settled.
- 33 War crimes are often seen as the oldest crimes under international law. The traditional concept of ‘war crime’ is linked to an inter-State war and it is rooted in the traditional laws of war. The laws of war were made the object of a progressive regulation through international conventions in the second half of the 19<sup>th</sup> century. These conventions, in turn, gave rise to a growing body of customary international law. Originally, the term ‘war crime’ denoted a violation of the laws and customs of war; often it was added that the violation had to be a serious one. The power of a belligerent party under customary international law to punish war crimes committed by persons belonging to the other side of the conflict either by direct application of the laws of war or on the basis of national criminal law rules was recognized by 1907 at the time of the adoption of the Convention concerning the Laws and Customs of War on Land ((opened for signature 18 October 1907, entered into force 26 January 1910) 205 CTS 277; ‘1907 Hague Convention IV’). The existence of war crimes under international law, however, was still open to doubt until the end of the Second World War.
- 34 Under current customary international law, there is a well-established body of war crimes committed in international armed conflicts. While some of the older international conventions such as, in particular, the 1907 Hague Convention IV have not lost their significance, the Geneva Conventions I–IV as well as the *Geneva Conventions Additional Protocol I (1977)* ((adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; ‘Additional Protocol I’) have become the most important points of reference to ascertain the content of the current law. While the Geneva Conventions I–IV mainly follow the tradition of the so-called ‘Geneva Law’ which is to protect persons outside the hostilities, the Additional Protocol I combines Geneva Law elements with conduct of hostility rules that, traditionally, formed part of the separate body of the so-called Hague Law. Art. 8 (2) ICC Statute codifies most of the existing war crimes under international law. Art. 8 (2) (a) ICC Statute incorporates the provisions on the so-called grave breaches of the Geneva Conventions I–IV (cf Art. 50 Geneva Convention I; Art. 51 Geneva Convention II; Art. 130 Geneva Convention III, and Art. 147 Geneva Convention IV). Art. 8 (2) (b) ICC Statute essentially defines war crimes of Hague Law origin. In light of the not yet universal acceptance of the Additional Protocol I, many formulations in Art. 8 (2) (b) ICC Statute are taken from the 1907 Hague Convention IV.
- 35 The crystallization of war crimes committed in non-international armed conflict is one of the most important facets of the stormy legal development of international criminal law *stricto sensu* since the 1990s. Common Art. 3 Geneva Conventions I–IV does not contain a grave breaches regime similar to that applicable in an international armed conflict and the same is true for the → *Geneva Conventions Additional Protocol II (1977)* ((adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609; ‘Additional Protocol II’) on the law of non-international armed conflict. There was thus a considerable measure of doubt regarding the existence of war crimes under international law committed in non-international armed conflicts when the ICTY and the ICTR were established. This explains the landmark importance of the decision *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* of 2 October 1995. In this decision, the existence of customary war crimes committed in non-international armed conflicts was affirmed together with a far-reaching assimilation of the war crimes law in non-international armed conflicts towards the settled law in international armed conflicts. The ICC Statute essentially confirms the decision *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*: Art. 8 (2) (c) and (e) ICC Statute contain two lists of war crimes committed in non-international armed conflict, the latter one extending into the realm of the conduct of hostilities.
- 36 Unlike under the ICTY and ICTR Statutes, the list of crimes under the ICC Statute includes the crime of aggression. In fact, the ICC Statute recognizes in its preamble that peace and security in the world is the paramount collective



value that the ICC is to protect. Thus, the ICC Statute lends support to the view that aggression is a crime under international law as was unanimously confirmed by the British House of Lords in 2006 (*R v Jones* United Kingdom House of Lords (29 March 2006) (2006) UKHL 16). Paradoxically, however, absent an agreed definition of aggression, the ICC is prevented from exercising its jurisdiction over this crime. This judicial disability constitutes a historic irony in light of the fact that the Nuremberg Tribunal called the crime of waging a war of aggression the supreme international crime. The drafters of the ICC Statute were aware that this definitional *lacuna* left unfinished their job in Rome to fully transpose the accumulated body of customary international criminal law into a treaty text. The ICC Statute therefore calls for its own completion by entrusting States with the mandate to define the crime so that the ICC may exercise its jurisdiction over it. In the meantime, the Special Working Group on the Crime of Aggression has gone a very long way to prepare the groundwork for this transposition. The three most important aspects of the negotiations are the formulation of the exclusive leadership character of the crime, the precise definition of the State use of armed force as the necessary prerequisite for any individual criminal responsibility for aggression, and the procedural role to be accorded to the UN Security Council. The latter is the 'question of questions', as it pits the principle of equality before the law against powerful policy demands voiced by the five permanent members of the UN Security Council.

- 37 The tragic events of 11 September 2001 have sparked an intense debate on transnational terrorism and the ICC Statute. Of critical importance is that this debate is of an altogether different order than that about aggression. The aggression debate concerns the completion of the codification of international criminal law's second generation. The terrorism debate asks whether certain violent acts committed by private (aterritorial) entities across national borders should be criminalized directly under general international law. It therefore raises the question whether international criminal law is about to make a third generational step. If so, international criminal law would move into the area of transnational conflicts between States and destructive private organizations. This means that the law's protective thrust, which was hitherto confined to situations of war and internal strife, would extend to protect States and their populations from external threats of a dimension akin to foreign aggression, but emanating from private persons. Many observers take it for granted that conduct such as the attacks of 11 September 2001 already falls within the ICC's jurisdiction *ratione materiae*. While the legal policy strategy underlying the US idea of a 'war on terror' entails the (re)conceptualization of transnational terrorist acts as war crimes, the predominant scholarly position would appear to be that such acts may amount to crimes against humanity. This position provokes words of caution, though. Contrary to a barely substantiated *obiter dictum* of an ICTY chamber (*Prosecutor v Tadić (Sentencing Judgement)* para. 654), it is difficult to prove that customary international law on crimes against humanity has evolved to the point in question. It is therefore open to serious doubt that violent transnational private organizations not in control of State territory are amongst those entities that the ICC Statute's definition of crimes against humanity recognizes as possible originators of the policy to direct an attack against any civilian population. It is worth mentioning that no such decision was made when establishing the Special Tribunal for Lebanon, which was established to deal with terrorist bombings and other attacks that have occurred in Lebanon since October 2004 (UNSC Res 1757 (2007) (30 May 2007)). To the contrary, the rather sweeping suggestion made by the UN Secretary-General to include crimes against humanity within the jurisdiction *ratione materiae* of the Special Tribunal for Lebanon was rejected by the Security Council. States Parties to the ICC Statute will have the opportunity to revisit the issue at the First Review Conference because they are invited 'to consider the crime ... of terrorism with a view to arriving at an acceptable definition, and [its] inclusion in the list of crimes within the jurisdiction of the Court' (UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Final Act: Annex I: Resolutions' UN Doc A/CONF.183/13 vol I, 71).

## 5. General Principles

- 38 Following the tradition of their predecessors, the Statutes of the ICTY and ICTR regulate general principles of international criminal law in only a rudimentary way. This includes a somewhat eclectic list of forms of individual criminal responsibility, as well as provisions on superior orders and → *command responsibility*. By contrast, Part 3 ICC Statute deals with a great many general principles in some detail. It thus constitutes the first attempt in the history of international criminal law to formulate a general part of substantive criminal law. Part 3 ICC Statute also demonstrates the drafters' determination to move beyond any legal family bias. This determination is clearly discernible from the conscious decision made in Rome to avoid, wherever possible, legal terminology carrying too strong a particular legal family connotation. Nevertheless, the analytical distinction between 'material elements' (*actus reus*), 'mental elements' (*mens rea*), and 'grounds for excluding criminal responsibility' (defences) in Part 3 ICC Statute is a legacy of the common law's historical dominance.
- 39 One of the most important characteristics of Part 3 ICC Statute is its enhanced sensitivity for the principle of culpability and the requirement of subjective imputation. In the case law of the ICTY, there are traces of a strong emphasis on prevention, not only at the sentencing stage but already when formulating the conditions of individual criminal responsibility. The most prominent example of such an approach is the Joint Separate Opinion of Judges McDonald

and Vohrah in the Appeals Chamber's Judgment in the case *Prosecutor v Erdemovic (Joint Separate Opinion of Judge McDonald and Judge Vohrah)* (ICTY-96-22-A (7 October 1997) para. 75). This case dealt with the availability of the defence of duress for the war crime of wilful killing or murder. Judges McDonald and Vohrah rejected the availability of this defence and relied on the need to facilitate the development and effectiveness of international humanitarian law and to promote its aims and application by recognizing the normative effect that criminal law should have upon those subject to them. Vindicating the judgement of the dissenting judges, Art. 33 (1) (d) ICC Statute lists necessity as a ground for excluding criminal responsibility and does not contain an exception regarding wilful killing and murder. This fact cautions against similar types of reasoning within the context of the ICC Statute. Two further examples also make this point. The ICC Statute contains a concededly limited acceptance of an exonerating mistake of law based on superior orders (Art. 33 (1) ICC Statute in conjunction with the end of the second sentence in Art. 32 (2) ICC Statute), and recognizes mistakes of law that negate the mental element of a crime (Art. 32 (2) second sentence ICC Statute). All of this indicates that the drafters of the ICC Statute decided to give paramount importance to the principle of individual culpability when the result it yields seems to conflict with prevention.

- 40 While Part 3 ICC Statute is by far the most detailed regulation of its kind in an international legal document, a good number of its components look rather like raw criminal law material (eg the provision on necessity, which does not distinguish between justification and excuse, and the undifferentiated treatment of several forms of command responsibility). Part 3 ICC Statute will therefore require a good deal of judicial refinement. This will necessitate thorough and representative comparative legal analyses. Where these do not yield a clear result, judges will have to carefully develop the law. In so doing, they should adopt a methodological approach that gives due consideration to major tendencies in national legislation and to those national models that are the fruit of an intense and mature scholarly debate. In short, Part 3 ICC Statute provides the best possible incentive to dig deep and to formulate a 'grammar' of modern international criminal law.

## 6. International Criminal Procedure

- 41 Initially and with the one exception of the law on evidence, the international proceedings before the ICTY and ICTR clearly followed the adversarial model of the common law. Most particularly, the 'prosecution' and 'defence' are mainly responsible for establishing the truth. While the degree of judicial intervention has certainly increased over time, the basic adversarial model remains unchanged. By contrast, the multilateral process of creating the ICC's procedural law forced concessions from the entire spectrum of legal families that were represented. After more than 10 years of drafting, a new international criminal procedure has been devised that contains unique compromises. It is also of unprecedented complexity in terms of its sources, which include inter alia Parts 4–6 and 8 ICC Statute, the Rules of Procedure and Evidence, and even the Regulations of the Court's Registry (→ *International Criminal Courts and Tribunals, Procedure*; → *International Criminal Courts and Tribunals, Defences*; → *International Courts and Tribunals, Evidence*).
- 42 Proceedings before the ICC unfold in the following sequence: preliminary situation analysis, investigation, confirmation hearing, trial, and, as the case may be, appeals and revision proceedings (→ *International Courts and Tribunals, Appeals*). Under a broad concept of international criminal proceeding, the enforcement stage is to be added as the final stage. Not surprisingly, as the early procedural practice of the ICC demonstrates, the preliminary phase of the proceeding, will present many novelties. Issues will inevitably arise that, in the past, were predetermined by political decision-makers and most notably by the UN Security Council. In solving those issues, including, inter alia, the interpretation of State or Security Council situation referrals, international practitioners are forced to respond to inextricably intertwined questions of public international law and criminal procedure. This is a rather new challenge.
- 43 The regimes governing the investigation and the confirmation hearing contain the most significant deviations from prior practice. Contrary to the Statutes of the ICTY and ICTR, the ICC Statute requires the Prosecutor to investigate incriminating and exonerating circumstances equally. Drafters of the ICC Statute thus devised a truth-seeking role for the Prosecutor resembling that of an officer of justice rather than a partisan advocate. This may have important consequences for the relationship between the prosecution and the defence. The interplay between the Prosecutor and the Pre-Trial Chamber at the early stages of the proceedings constitutes one of the most striking examples of the uniqueness of ICC procedural law. The Pre-Trial judges have been entrusted with a set of mainly control functions which, taken together, are truly *sui generis*. They place those judges somewhere in between the German *Ermittlungsrichter* and the French *juge d'instruction*. The normative framework of the confirmation hearing again differs from its ICTY and ICTR counterparts. While in the latter cases the pre-trial judicial scrutiny of the indictment forms the subject of *ex parte* proceedings, the confirmation hearing before an ICC Pre-Trial Chamber shall be held in the presence of the person charged as well as his or her counsel. On a closer look, the legal framework of the ICC's confirmation hearing does not copy any national solution but combines elements of several legal systems. The main idea underlying the confirmation hearing is to prepare the trial as efficiently as possible and, in particular, to better organize the disclosure of evidence relative to prior practice.

- 44 The ICC's procedural law does not impose a certain structure and chronology upon the trial proceedings. It is therefore an open question whether trials before the ICC will proceed with the prosecution presenting its case, the defence moving for a judgment of acquittal, and then, if necessary, the defence presenting its case. A much more fundamental ambiguity regarding an ICC trial is whether or not the judges shall, where necessary, assume a responsibility to establish the truth *proprio motu*. Such an obligation has not been explicitly included in the relevant procedural norms and judges may be reluctant to introduce it through case law. They should, however, give at least careful thought to the idea of recognizing defence rights to request that trial judges order the hearing or viewing of certain pieces of evidence. Such a regime could very well prove to be a preferable alternative to the sole reliance on a go-alone strategy of the defence in preparation of an orthodox adversarial defence case.
- 45 The ICC Statute is not entirely clear on the nature of the hearing on appeal. The fact that specific grounds for appeal are listed would, however, point in the direction of a review proceedings rather than a hearing *de novo*. If this view is followed, the ICC's Appeals Chamber will be able to draw on the experience of the ICTY and ICTR as far as its procedural framework is concerned (see also → *International Courts and Tribunals, Chambers*).
- 46 The case law of these tribunals is of very little guidance, however, when it comes to the role of the victims throughout proceedings before the ICC. The ICC Statute also conceives of restorative justice in a novel way. Victims possess a rather far-reaching right to participate in proceedings, as well as a right to obtain reparation on an individual and/or collective basis as a result of a criminal proceeding.
- 47 It is impossible to fully understand how the ICC will operate without looking to the 'external part' of its procedure: the law on co-operation between the ICC and States. These rules deal with the surrender of persons to the ICC, with forms of co-operation relating to the provision of evidence and, if the term co-operation is construed somewhat more broadly, with the enforcement of sentences. Any international criminal court will remain 'utterly impotent' (Cassese (1998) 10) without the co-operation of States and absent its own enforcement apparatus, which is not an option for today. In the same vein, a former judge at the ICTY called the lack of co-operation by States 'the most frustrating aspect' of international criminal justice (Wald 472). In light of these basic truths, Part 9 ICC Statute considerably reduces the list of grounds that States can use to deny requests. Part 9 ICC Statute also does not rule out the possibility for ICC organs to carry out on-site investigations and, most particularly, entrusts the International Criminal Court to authoritatively rule on the respective State obligations. With these key elements the ICC Statute stays within the logic of vertical co-operation as was set out in the landmark → *Blaškić Case (Prosecutor v Blaškić (Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) ICTY-95-14-AR 108bis (29 October 1997) para. 54)*. At the same time, the ICC's co-operation regime suffers from serious weaknesses, which are due more to States' concerns about sovereignty than to the determination to protect human rights. Regarding the surrender of suspects, the main *lacuna* is the absence of a clearly articulated power to enforce the surrender through international armed forces acting within the framework of a → *peacekeeping* or peace-enforcement operation. As far as other forms of co-operation are concerned, the ICC lacks the power to request States Parties to compel witnesses to appear before the International Criminal Court. As well, the power to investigate on-site has been narrowly defined. Finally, the convoluted compromise on national security information can hardly be said to build on the lessons taught in the *Blaškić Case* that, to admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents, could lead to the stultification of international criminal proceedings. In light of the foregoing, perhaps the co-operation provisions will prove to be the first in the new procedural regime to be in urgent need of change.

## 7. A Look Ahead

- 48 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals, who commit such crimes can the provisions of international law be enforced' (*Judgment of the International Military Tribunal for the Trial of German Major War Criminals: Nuremberg 30<sup>th</sup> September and 1<sup>st</sup> October 1946*). During the → *Cold War (1947–91)*, this famous statement of the Nuremberg Tribunal remained without resonance. Only in the 1990s was the message remembered. With the entry into force of the ICC Statute in 2002, it can eventually be acted upon consistently. The ICC signals that the application of international criminal law *stricto sensu*, while remaining selective by practical necessity, may be much less sporadic in the future than it was in the past. To build on the almost Hegelian Nuremberg Tribunal formulation, the now possible and steady exercise of international criminal justice gives reason to hope that the fundamental norms of public international law and the values underlying them will be more fully realized. After its turbulent renaissance and development in the 1990s, there is now no urgent need to push further the limits of international criminal law. Instead, the momentous achievement of the ICC's establishment needs to be consolidated and strengthened.

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