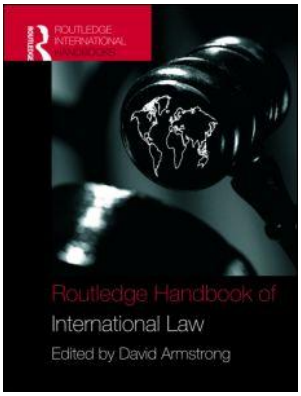

Routledge Handbook of International Law

David Armstrong, Jutta Brunée, Michael Byers, John H. Jackson, David Kennedy

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William A. Schabas
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International crimes

William A. Schabas

The conception of international crimes, as mala in se or mala prohibita, is considered against the background of the early efforts at codification. The distinction between crimes that have been internationalized in order to facilitate their repression, such as piracy, and the more recent categories such as crimes against humanity and genocide, whose defining characteristics include the fact they are "crimes of state" is considered. Drafting of the International Law Commission Code of Crimes against the Peace and Security of Mankind is considered, as well as judicial contributions to the evolving definitions. The consequences of international criminalization are examined, such as the possibility of exercise of universal jurisdiction, the impact upon immunities recognized at customary international law and the obligation to prosecute or extradite.

Many crimes prosecuted by national justice systems, such as murder and rape, are universal in nature. Although formulated with slight differences, they appear in all penal codes. These are crimes that are *mala in se*. Their presence in criminal law is not the result of a policy choice by legislators, but rather the consequence of profoundly important values that are deeply rooted in all human societies. Moreover, international human rights law now imposes obligations with respect to investigation and prosecution of such crimes. That is to say, they must now be included in national justice systems as a result of international legal obligation. In a line of early cases, international human rights law dealt with the obligation to legislate and prosecute where state complicity in such crimes was suspected.[1] More recently, it has extended this logic to cover "ordinary" crimes involving individual delinquents, without any hint of state involvement.[2] To the extent that prosecution of such crimes is dictated not only by the consistent practice of all states but also by rulings of international human rights bodies applying universal norms, it might be said that murder, rape and similar crimes against the person are "international crimes." Indeed, there is evidence of attempts by academics in the past to prepare an international or universal codification of criminal law on this philosophical basis.[3] Yet murder, rape and similar serious crimes against the purpose do not generally figure in enumerations of "international crimes," neither do they mandate the application of various principles applicable to international crimes, such as the permissibility of universal jurisdiction, the prohibition of statutory limitations, and the restriction on sovereign immunities.

Many crimes are recognized as "international" because they are declared to be criminal

in an international treaty. Cherif Bassiouni (2004: 46) has identified 28 categories of crime set out in 281 international conventions concluded between 1815 and 1999. Crimes appearing on the list include piracy, unlawful use of the mail, counterfeiting, destruction of submarine cables, and bribery of foreign public officials. Their designation as international crimes, and the obligations that result from this, are set out in treaties that apply, in principle, to the parties only.

In a certain sense, such crimes have less of a claim to international status than do murder and rape. They often do not threaten human life and dignity, they do not offend fundamental human values, and they attract penalties that would not necessarily be at the highest end of the scale. Their prosecution is not required so as to conform with international human rights obligations. As a general rule, these crimes are outlawed by international treaty essentially because they require international cooperation in order to ensure repression. Often their commission is more transnational than international in nature. In some cases, such as piracy, they pose jurisdictional problems because the crimes are committed on the high seas and therefore escape the territory reach of any given states. This was explained by the Permanent Court of International Justice in *SS Lotus*: "As the scene of the pirate's operations is the high seas, which is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind – *hostis humani generis* – whom any nation may in the interest of all capture and punish."[4] These are crimes that are most certainly *mala prohibita*, but not, as a general rule, *mal in se*.

Finally, there are international crimes that concern "atrocity." These are of more recent vintage than the transnational crimes such as piracy and trafficking in persons. The first suggestions of their prosecution date to the time of the massacres of the Armenians during the First World War, when Britain, France and Russia announced "[I]n the presence of these new crimes of Turkey against humanity and civilization, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres."[5] Comprehensive attempts at codification of these "new crimes" had to wait another 30 years, for the *Charter of the International Military Tribunal*,[6] the *Convention on the Prevention and Punishment of the Crime of Genocide*[7] and the *Geneva Conventions*.[8] The "new crimes" differ from the earlier generation of international crimes in that they are generally concerned with "crimes of state," that is, serious violations of human rights committed by a state against its own civilian population, or that of a territory that it occupies. The difference was also recognized, albeit implicitly, in the original draft resolution on genocide in the United Nations General Assembly, proposed in 1946: "*Whereas* the punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern."[9] These are crimes that are most definitely *mala in se* rather than *mala prohibita*.

Precise distinctions between these different types of international crime are not simple to establish. When destruction of submarine cables and genocide are compared, the difference in nature seems evident enough. The former is a "transnational crime" that is *mala prohibita* whereas the latter is an offense *mala in se* that is in principle confined to a single territory, but one where the state is involved in perpetrating the acts and is therefore unwilling to prosecute. When crimes such as terrorism and trafficking in persons are considered, however, it is not as easy to draw the line.

Crimes against the peace and security of mankind

Since the period of initial codification of international war crimes, crimes against humanity, crimes against peace and genocide, in the 1940s, there have been various attempts at explaining the nature of these "new crimes." In 1947 the United Nations General Assembly charged the International Law Commission with identifying and codifying "offences against the peace and security of mankind."[10] The expression is attributed to Francis Biddle, one of the judges at the International Military Tribunal, who had referred to them in this manner in a letter to United States President Truman in the aftermath of the Nuremberg trial. Biddle was attempting to characterize the subject matter jurisdiction of the Nuremberg tribunal.[11]

In his 1950 report on the subject of an international criminal jurisdiction submitted to the International Law Commission, Special Rapporteur Ricardo Alfaro spoke of "crimes which affect the community of States and hence should be subject to an international jurisdiction."[12] Alfaro thought an international tribunal should exercise jurisdiction not only over crimes derived from the Nuremberg proceedings and the crime of genocide, but also over "certain offences which have always been known as 'crimes against the law of nations,' such as piracy, slave trade, traffic in women and children, traffic in narcotics, currency counterfeiting, injury to submarine cables. To these might be added terrorism of an international character, as defined by the Convention of 1937 on the Prevention and Punishment of Terrorism."[13]

But Alfaro was preparing the special part of a criminal court statute, not a codification of "offences against the peace and security of mankind," and his approach was therefore rather broad. The International Law Commission expert charged with launching work on the draft code of offences against the peace and security of mankind, Special Rapporteur Jean Spiropoulos, insisted on a distinction between "crimes against the law of nations" and "crimes against the peace and security of mankind." Spiropoulos described the latter concept as:

> [A]cts which, if committed or tolerated by a State, would constitute violations of international law and involve international responsibility. The main characteristic of the offences in question is their highly *political* nature. They are offences which, on account of their specific character, normally would affect the international relations in a way dangerous for the *maintenance of peace*.[14]

For this reason, Spiropoulos insisted that "the draft code to be elaborated by the International Law Commission cannot have as its purpose questions concerning conflicts of legislation and jurisdiction in international criminal matters. Consequently, such topics as piracy (*delicta juris gentium*), suppression of traffic in dangerous drugs (opium), in women and children (white slave traffic), suppression of slavery, of counterfeiting currency, protection of submarine cables, etc., do not fall within the scope of the draft code with which we are concerned here."[15] The draft codes prepared by the Commission in 1951[16] and 1954[17] confined themselves to enumerations of crimes that constituted, in practice, a rather detailed development on the three categories of offense that were prosecuted at Nuremberg.

The Commission did not return to the draft code until the early 1980s. In one of its early discussions of the nature of crimes against the peace and security of mankind, the issue was presented as follows:

> Among the several possible criteria suggested were the following: the inspiration of the criminal act (for example an act based on racial, religious or political conviction); the status of the victim of the criminal act (for example, a State or a private individual); the nature of the law or interest infringed (the interest of security appearing more important than a purely material

> interest); or lastly, the motive, etc. Interesting as those suggestions were, none of the criteria proposed sufficed by itself to identify an offense against the peace and security of mankind. The seriousness of an act was judged sometimes according to the motive, sometimes according to the end pursued, sometimes according to the particular nature of the offense (the horror and reprobation it arouses), sometimes according to the physical extent of the disaster caused. Furthermore, these elements seemed difficult to separate and were often combined in the same act.[18]

The Commission observed that since the 1954 draft of its code, many new crimes had been defined by international legal instruments. These included colonialism, *apartheid*, use of nuclear weapons, environmental issues, mercenarism, taking of hostages, violence against persons enjoying diplomatic privileges and immunities, economic aggression, and aircraft hijacking. The Commission even considered including such crimes as forgery of passports, dissemination of false or distorted news and insulting behavior towards a foreign state.[19] In the end, however, it recognized that there was a danger that it might "blur the distinction between an international crime and an offence against the peace and security of mankind."[20] For the Commission, "not every international crime is necessarily an offence against the peace and security of mankind."[21] It therefore decided that:

> [T]he code ought to retain its particularly serious character as an instrument dealing solely with offences distinguished by their especially horrible, cruel, savage and barbarous nature. These are essentially offences which threaten the very foundations of modern civilization and the values it embodies. It is these particular characteristics which set apart offences against the peace and security of mankind and justify their separate codification.[22]

The Commission agreed that in addition to the crimes prosecuted at Nuremberg and included in the early draft codes of 1951 and 1954, these criteria were met by colonialism, *apartheid*, "possibly serious damage to the human environment and economic aggression," mercenarism, and international terrorism.[23]

As its work evolved, the Commission tended to concentrate on expanding the concept of crimes against humanity, listing under that heading, rather than as autonomous categories of offense, a number of acts that had not been part of the definition at Nuremberg, including *apartheid*,[24] serious damage to the environment, drug trafficking, trafficking in women and children, and slavery.[25] In its 1991 draft, the Commission abandoned entirely the concept of crimes against humanity. In distinct provisions, it defined specific crimes of genocide and *apartheid*, and then provided a list of acts whose origin can be traced to the crimes against humanity definition found in the *Charter of the International Military Tribunal* in a separate provision entitled "Systematic or mass violations of human rights."[26] The 1991 draft also contained provisions entitled "[c]olonial domination and other forms of alien domination," "[r]ecruitment, use, financing and training of mercenaries," "[i]nternational terrorism," "[i]llicit traffic in narcotic drugs," and "[w]ilful and severe damage to the environment."[27] But by 1996, when the final draft code was submitted to the General Assembly, the International Law Commission had come back down to earth. There were only five provisions, dealing with aggression, genocide, crimes against humanity, "Crimes against United Nations and associated personnel and war crimes."[28] A summary explanation accounted for the dramatically reduced ambitions of the Commission:

> With a view to reaching consensus, the Commission has considerably reduced the scope of the Code. On first reading in 1991, the draft Code comprised a list of 12 categories of crimes. Some members have expressed their regrets at the reduced scope

> of coverage of the Code. The Commission acted in response to the interest of adoption of the Code and of obtaining support by Governments. It is understood that the inclusion of certain crimes in the Code does not affect the status of other crimes under international law, and that the adoption of the Code does not in any way preclude the further development of this important area of law.[29]

With the exception of "[c]rimes against United Nations and associated personnel," the draft code was essentially confined to crimes that had been recognized by international law in the late 1940s, although there had been some significant evolution in terms of their scope.

Judicial attempts to define international crimes

Explaining the nature of international crimes is a matter that has also confronted the judiciary. The District Court of Jerusalem, in *Eichmann*, said that crimes that have "offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself ('*delicta juris gentium*')."[30] On appeal, the Supreme Court of Israel said that: "[T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations."[31] Eichmann was prosecuted in accordance with Israeli laws that were modeled on article VI of the *Charter of the International Military Tribunal* and article II of the *Convention on the Prevention and Punishment of the Crime of Genocide*.

When the Security Council established the ad hoc tribunals in the early 1990s, subject matter jurisdiction was limited to war crimes, crimes against humanity and genocide.[32] These were described collectively as "serious violations of international humanitarian law."[33] The Security Council did not include "aggression" or "crimes against peace," although the idea of an international tribunal to deal with Iraqi aggression in 1990 had been seriously mooted by the United States, the United Kingdom and the European Union (Gerald 1990, 1991; Weller 1990). According to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, "serious violations of international humanitarian law" consist of breaches of "a rule protecting important values," whose breach "must involve grave consequences for the victim."[34]

The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has described the subject matter jurisdiction of the ad hoc tribunals as encompassing "Universally Condemned Offences."[35] The judges actually capitalized the three words, suggesting that they were attempting to coin a new umbrella term that would subsume genocide, crimes against humanity, and war crimes. Citing Judge Rosalyn Higgins (1995: 72), of the International Court of Justice, the Appeals Chamber said that "Universally Condemned Offences are a matter of concern to the international community as a whole." On other occasions, the Appeals Chamber has noted that its subject matter jurisdiction is exercised over offenses that "do not affect the interests of one State alone but shock the conscience of mankind."[36] Citing the Supreme Military Tribunal of Italy, in a post-Second World War case, the Appeals Chamber said:

> These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one . . . The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be.[37]

The *Rome Statute* uses the expression "the most serious crimes of concern to the international community as a whole" in four places to describe the subject-matter jurisdiction of the International Criminal Court.[38] It also speaks at one point of crimes that "shock the conscience of humanity."[39] Because the Court has jurisdiction over genocide, crimes against humanity, war crimes, and aggression, it can be assumed that these four categories fall within the rubric of "most serious crimes of concern to the international community as a whole." But the line becomes blurred when reference is made to the Final Act of the Rome Conference. It notes that it was not possible to reach agreement during the Diplomatic Conference on a definition of terrorist acts, which are "serious crimes of concern to the international community," and international trafficking of illicit drugs, which is a "very serious crime." According to the Final Act, these "scourges . . . pose serious threats to international peace and security."[40] The Final Act recommended that terrorist acts and international drug trafficking be considered for inclusion in the *Rome Statute* by amendment, implying that both fit the concept of "most serious crimes of concern to the international community as a whole" that "shock the conscience of humanity."

This discussion is not intended to provide a comprehensive theoretical framework for identifying international crimes, or for classifying them in categories. Rather, it attempts to highlight some of the difficulties involved in the exercise. This is a matter on which modern international law lacks limpidity. In fact, the approaches appear somewhat muddled and confused. Although there is much to support a distinction between crimes that are international for essentially practical reasons, such as piracy and trafficking in counterfeit currency, and those "atrocity crimes" that are prosecuted because they "shock the conscience of humanity," there are cases that fall between and that seem to defy such attempts at classification, such as drug trafficking. But lack of clarity about these distinctions does not mean they can be ignored. Drawing the line between international crimes that are *mala prohibita* and those that are *mala in se* has significant legal effects.

In the negotiations leading up to the adoption of the *Rome Statute*, the distinction was often made between "core crimes" and "treaty crimes." The implication here is that the "core crimes" owe their existence to customary international law. The legal consequences of classifying a crime as international under customary international law cannot necessarily be the same as those that result from inclusion of the crime within an international treaty. In the latter case, the legal effects of codification of international crimes are set out in the treaties themselves, and will only bind those states that are parties to the instruments in question. The analysis is not made any easier by the fact that many of the serious international crimes that "shock the conscience" have also been codified. Referring to the first great international criminal law treaty, the *Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice said:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.[41]

There would be little disagreement that the four crimes over which the International Criminal Court has jurisdiction, in accordance with article 5(1) of the *Rome Statute*, are also international crimes whose prohibition is "recognized by civilized nations as binding on

States, even without any conventional obligation." It is not so obvious, however, that the multitude of acts considered by the International Law Commission over the years, and the crimes of terrorism and drug trafficking being studied as possible amendments to the *Rome Statute*, also belong in the category. The distinction is important because of the legal effects that flow from recognition as an international crime belonging to the category variously described in this chapter as "new crimes," "atrocity crimes," "crimes against the peace and security of mankind," "crimes that shock the conscience of humanity," "serious violations of international humanitarian law," and "the most serious crimes of concern to the international community as a whole."

Legal consequences of international criminalization

There are several important consequences that result from the characterization of acts as an "international crime" of the "new crimes" variety: they can be prosecuted retroactively; they can be prosecuted by courts that would not normally exercise jurisdiction; they impose duties on states with respect to mutual legal assistance in the investigation, extradition and prosecution of such offenses; defenses that may exist for ordinary crimes, are eliminated or reduced; traditional rules concerning immunity of heads of state and other senior officials are relaxed; statutory limitations are prohibited. Although some of these features may also apply to certain other "treaty crimes" of the *mala prohibita* genus, this is not an automatic consequence of their designation as international crimes.

Retroactive prosecution operates as an exception to the general rule that prevents a person being tried for an offense that was not prohibited by law at the time of its commission. There is a long history of this norm in national constitutions, which was recognized in international law as early as 1935 in the Permanent Court of International Justice case concerning legislative decrees in Danzig.[42] When challenged by the Nazi defendants who argued that "crimes against peace" had never before been punishable, the Allied judges at Nuremberg tried to demonstrate that acts of aggression had indeed been universally condemned in past decades. The Nuremberg judges also conceded that such crimes should be punished because it would violate principles of justice to let the offenders go free.[43] But this argument is today less tenable because of the quite clear terms of international human rights law: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed."[44] In other words, it is not enough to argue that the act was universally abhorrent and that it would be unjust not to punish offenders. Where a crime is not provided for under national law, retrospective punishment is only acceptable if it can be demonstrated that the act itself was condemned by international law.

The second consequence of characterizing an act as an international crime is that this authorizes prosecution by courts that would not normally be allowed to exercise jurisdiction. The exercise of jurisdiction over crimes is a facet of national sovereignty. Pursuant to principles of international law, as a general rule states have only exercised jurisdiction over crimes when they could demonstrate an appropriate link or interest. Normally, this consisted of a territorial connection, either because the crime was committed on the state's territory or because it had significant effects on that territory. More exceptionally, international law has also allowed states to exercise jurisdiction over acts committed by their nationals, and over acts of which their own nationals are victims,[45] even outside their own territory.

Defining an offense as an "international crime" authorizes some type of international jurisdiction. This may take the form either of

an international tribunal as such, or of prosecution by courts of a state that has no significant connection with the offense, under the universality principle. Views on this subject have evolved considerably over the years. There is now much support for the position that international law entitles the exercise of universal jurisdiction for the core international crimes, although the views of judges of the International Court of Justice were inconsistent when they were canvassed on this subject in early 2002.[46] A case now pending before the Court confronts this issue directly.[47] It is useful to recall that in 1948, the United Nations General Assembly rejected the concept of universal jurisdiction over genocide.[48] This had been proposed by the authors of the original resolutions in the General Assembly, who lamented in their first draft the fact that "genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the judiciary of every State concerned."[49] They failed in their efforts to obtain a declaration from the General Assembly that would change this situation, with the result that article VI of the *Genocide Convention* says: "Persons charged with genocide or any of the other acts enumerated in article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[50] Fifteen years later, the District Court of Jerusalem, in *Eichmann*, said: "It is the consensus of opinion that the absence from this Convention of a provision establishing the principle of universality (and, with that, the failure to constitute an international criminal tribunal) is a grave defect in the Convention which is likely to weaken the joint efforts for the prevention of the commission of this abhorrent crime and the punishment of its perpetrators."[51] The Court held that Israel was entitled to exercise universal jurisdiction over genocide because this was authorized by customary international law.

Among recent indications that states generally accept universal jurisdiction over genocide and similar international crimes are the growing application of the principle in national law. More and more states enact legislation permitting them to prosecute on this basis. Even the United States of America, which has been historically rather reticent about the concept, enacted a statute in late 2007 permitting its courts to prosecute genocide on the basis of universal jurisdiction.[52] Further evidence is provided by debates in the Security Council, where there has been at least tacit endorsement of the referral of cases by the International Criminal Tribunal for Rwanda to states prepared to hold trials of genocide suspects using universal jurisdiction.[53]

The third significant result of the recognition of an offense as an international crime is that it imposes duties on states with respect to investigation, prosecution and extradition. This is sometimes expressed with a Latin expression, *aut dedere aut judicare* (literally, extradite or prosecute). While related to the concept of universal jurisdiction, the two should not be confused: *aut dedere aut judicare* imposes an obligation, whereas universal jurisdiction is merely an option available to states. The duty to prosecute or extradite is recognized in some major treaties, and it is therefore beyond question that in these cases states have willingly and intentionally accepted such obligations. The grave breach provisions of the four *Geneva Conventions* require that "[e]ach High Contracting Party [. . .] search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [. . .] bring such persons, regardless of their nationality, before its own courts." Alternatively, a state may, "if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."[54] The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* imposes something similar.[55] It has been

argued that these obligations to prosecute or extradite are also required by customary international law with respect to a much broader range of international crimes. While this may be a desirable result, from the standpoint of the protection of human rights, it is difficult to find any real evidence in the practice of states to suggest that they consider themselves to be under such obligations.

The fourth significant result of the classification of an act as an international crime is the reduction or elimination of certain defenses that are generally available under national law with respect to ordinary crimes. The *Charter of the International Military Tribunal* declared that "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility,"[56] and a similar provision has been included in the statutes of the more recent generation of international criminal tribunals.[57] The *Rome Statute of the International Criminal Court* takes a slightly less absolutist view, allowing the defense to the extent that orders are not "manifestly unlawful,"[58] a position that probably corresponds to that of customary international law.[59] Similarly, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official is not a defense to an international crime.[60]

The legal position on some defenses with respect to international crimes remains unclear, however. The *Rome Statute* appears to allow a defense of duress,[61] whereas a majority of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has ruled that the defense is inadmissible to a charge of crimes against humanity.[62] The latest international justice instrument to be adopted by the United Nations Security Council, the *Statute of the Special Tribunal for Lebanon*, has no such rules concerning the exclusion of defenses, but this is easily explained by the fact that the Special Tribunal for Lebanon does not have jurisdiction over international crimes.[63]

Principles concerning immunities are relaxed to some extent when prosecution of international crimes is concerned, although not as much as some would like. According to the International Court of Justice, the immunity of heads of state and other high officials is not a bar to prosecution before "certain international criminal tribunals." The judgment offered the International Criminal Court and the two *ad hoc tribunals* for the former Yugoslavia and Rwanda as examples. However, the International Court of Justice also confirmed that such immunities persist in prosecutions before courts of third states even when it is international crimes that are being prosecuted.[64] The logic of the Court's position is not entirely clear. The elimination of immunity before the ad hoc tribunals is a reasonable consequence of their establishment by the United Nations Security Council. Nowhere in the statutes of the ad hoc tribunals is it actually stated that there can be no immunity, and the finding that immunity does not exist before such international tribunals is a matter of judicial construction.[65] The *Rome Statute of the International Criminal Court* has an explicit provision eliminating any immunities.[66] But this may be explained as the result of a conventional agreement by sovereign states. It cannot be set up against heads of state of third states, who preserve their immunity before the Court. These distinctions are not, unfortunately, considered in the famous pronouncement of the International Court of Justice in the *Arrest Warrant case*.

Neither does the International Court of Justice consider the situation with respect to criminal tribunals established by the United Nations but with the authority to prosecute crimes that are not international in nature. Here there is a tension between form and content. The Special Court for Sierra Leone, for example, has jurisdiction over certain crimes recognized in the national criminal law of the country, such as sexual relations with a minor and arson.[67] The Secretary-General of the United Nations explained that they should be included precisely because they are

"either unregulated or inadequately regulated under international law."[68] The Special Court for Sierra Leone has been held to be an "international court"[69] but that does not serve to make such crimes international in nature. The issue is posed even more acutely in the case of the Special Tribunal for Lebanon, whose subject matter jurisdiction is entirely drawn from Lebanese national law and has no claim to encompass international crimes.[70]

Finally, international crimes may not be subject to statutory limitations. During the 1960s, as the application of statutory limitations in national penal codes to Nazi war criminals seemed imminent, there was a movement to amend norms by which such prosecutions could be time barred. Accordingly, there were some changes to domestic legislation.[71] On an international level, these developments took the form of General Assembly resolutions,[72] and treaties within both the United Nations system[73] and that of the Council of Europe.[74] Both of the latter instruments refer to the crime of genocide and to crimes against humanity as offenses for which there shall be no statutory limitation. The French *Cour de Cassation* determined, in the *Barbie* case, that the prohibition on statutory limitations for crimes against humanity is now part of customary law.[75] The *Rome Statute* declares that the crimes within the Court's jurisdiction are not subject to a statute of limitations.[76] Given that the *Rome Statute* has no statutory limitations, the provision appears to be directed at national legislation. It effectively prohibits domestic justice systems from establishing or maintaining statutory limitations with respect to the four crimes within the jurisdiction of the International Criminal Court.

Conclusion

The internationalization of criminal law has brought with it developments of both a structural and a substantive nature. At the structural level, there is a panoply of mechanisms designed to assist the repression of crimes, such as arrangements for extradition and mutual legal assistance as well as the establishment of international bodies such as Interpol. These apply to a variety of criminal acts under national law, of varying degrees of seriousness, as well as to transnational and genuinely international crimes. International law has also seen the establishment of international criminal tribunals.

The international criminal tribunals mainly exercise jurisdiction over "international crimes," but there are exceptions – the cases of the Special Court for Sierra Leone and the Special Tribunal for Lebanon have been discussed – indicating that a precise equation cannot be made between the international nature of the institution and the international nature of its subject matter jurisdiction. Moreover, the concept of "international crime" is also extremely important at the level of national jurisdictions, where it authorizes a number of derogations from general rules applicable in criminal law such as those concerning territorial jurisdiction, immunities, the permissibility of statutory limitations and the prohibition of retroactive offenses.

For this reason, it is important to have a theoretical construct permitting the identification of international crimes and their distinction from crimes that are merely national or transnational in nature, or that are international crimes recognized for practical reasons rather than because they "shock the conscience" of humanity or are "Universally Condemned Offences." The task is complex and confusing, and there is no generally accepted set of conditions permitting such classification. Some categories are beyond debate, of course. These include genocide, crimes against humanity, war crimes and aggression. Their status would seem to be confirmed by inclusion within the subject matter jurisdiction of the International Criminal Court, were it not for the fact that amendment of the *Rome Statute* is being considered so as to include crimes whose claim as cognates to the existing crimes is far from

obvious. No single set of criteria appears to provide an adequate framework. We agree that genocide is, of course, a "Universally Condemned Offence," but doesn't murder also belong to this category?

The exercise is perhaps no simpler in national law, where efforts to classify crimes as *mala prohibita* and *mala in se* have always been imprecise. Perhaps the real difficulty is that we have embarked on a process of globalization that is still very incomplete. The state monopoly on criminal law jurisdiction is slowly being eroded. What are today known as "international crimes" may be simply manifestations of the beginning of this phenomenon. Perhaps at some point in the future, criminal jurisdictions throughout the world will have the authority to prosecute all serious crimes, wherever committed and by whomever. Why, indeed, should borders make any difference when a serious crime has been committed against a fellow human being?

Notes

1 *Velázquez Rodriquez vs. Honduras*, July 29, 1988, Series C, No. 4, (1992); *Bautista de Arellana vs. Colombia* (No. 563/1993), UN Doc. CCPR/C/55/D/563/1993; *Laureano vs. Peru* (No. 540/1993), UN Doc. CCPR/C/56/D/540/1993; *Streletz, Kessler and Krenz vs. Germany*, March 22, 2001; *Akkoç vs. Turkey*, October 10, 2000.
2 See, e.g. *MC vs. Bulgaria* (Application no. 39272/98), Judgment, December 4, 2003.
3 On the efforts of Garofalo and others, see the report by Vespasian Pella to the United Nations International Law Commission: "Memorandum présenté par le Secrétariat," UN Doc. A/CN.4/39, para. 30.
4 *France vs. Turkey, S.S. Lotus* (1927) PCIJ Ser. A. (Judgments) No. 10 (Judgment No. 9) (1929).
5 English translation quoted in United Nations War Crimes Commission 1948: 35.
6 *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT)*, annex, (1951) 82 UNTS 279, art. 6.
7 *Convention on the Prevention and Punishment of the Crime of Genocide* (1951) 78 UNTS 277.
8 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 1950: 75 UNTS 31, art. 49; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* 1950: 75 UNTS 85, art. 50; *Geneva Convention Relative to the Treatment of Prisoners of War* 1950: 75 UNTS 135, art. 129; *Geneva Convention Relative to the Protection of Civilians* 1950: 75 UNTS 135, art. 146.
9 United Nations 1946: UN Doc. A/BUR/50.
10 United Nations 1947: GA RES. 177 (II).
11 United Nations N.D.: UN Doc. A/CN.4/25, para. 9.
12 United Nations 1950: para. 95.
13 United Nations 1950: para. 97; also para. 100.
14 United Nations N.D.: para. 35, original emphasis.
15 United Nations N.D.: para. 35, original emphasis.
16 United Nations 1951: para. 59.
17 United Nations 1954: para. 54.
18 United Nations 1984: para. 34.
19 United Nations 1984: paras. 52–63.
20 United Nations 1984: para. 63.
21 United Nations 1984: para. 63.
22 United Nations 1984: para. 63.
23 United Nations 1984: para. 65. See also: United Nations 1985: paras. 61–94; United Nations 1988: paras. 262–7.
24 *Apartheid* had already been defined as a crime against humanity in the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, (1968) 754 UNTS 73, art. 1(b), *International Convention on the Suppression and Punishment of the Crime of Apartheid*, (1976) 1015 UNTS 244, art. I(1).
25 United Nations 1986a: paras. 93–102; United Nations 1986b: paras. 199–210.
26 United Nations 1991: para. 176.
27 United Nations 1991: para. 176.
28 United Nations 1996: para. 50.
29 United Nations 1996: para. 46.
30 *AG Israel vs. Eichmann* 1968, 36 ILR 5 (District Court, Jerusalem): para. 12.
31 *A.G. Israel vs. Eichmann* 1968 , 36 ILR 277 (Supreme Court of Israel): 291–93.
32 UN Security Council 1993b: annex, arts. 2–5; UN Security Council 1994: annex, arts. 2–4.
33 UN Doc. S/RES/808 (1993a), para. 1; United Nations 1993: para. 33; UN Security Council 1993a: annex, preamble, arts. 1, 9(1), 10(1)–(2), 23(1), 29(1).

34 *Prosecutor v. Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 94.
35 *Prosecutor v. Nikolić* 2003 (Case No. IT-94-2-AR 73), paras. 24, 25.
36 *Prosecutor v. Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 57.
37 *Ibid*. (citing Sup. Mil. Trib., Italy, 1950; unofficial transcript).
38 *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, preamble, paras. 4 and 9, art. 1, art. 5(1).
39 *Ibid*., preamble, para. 2.
40 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) "Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court", UN Doc. A/CONF.183/10.
41 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* (1951) ICJ Reports 16, p. 23.
42 *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, *Advisory Opinion* [1935] PCIJ 2, Series A/B, No. 65 (December 4, 1935), p. 51.
43 *France et al. vs. Göring et al.* (1946) 22 IMT 203, 13 ILR 203, 41 *American Journal of International Law* 172, p. 217.
44 *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN Doc. A/810, art. 11(2). Also: *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171, Art. 15.
45 *S.S. Lotus (France vs. Turkey)* [1927] PCIJ Ser. A. No. 10 (Judgment No. 9) (September 7, 1927).
46 See: *Democratic Republic of Congo v. Belgium (Arrest Warrant of 11 April 2000)*, Separate Opinion of Judge Bula-Bula, February 14, 2002; *Democratic Republic of Congo vs. Belgium (Arrest Warrant of 11 April 2000)*, Separate Opinion of President Guillaume, February 14, 2002; *Democratic Republic of Congo v. Belgium (Arrest Warrant of 11 April 2000)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, February 14, 2002; *Democratic Republic of Congo vs. Belgium (Arrest Warrant of 11 April 2000)*, Separate Opinion of Judge Koroma, February 14, 2002; *Democratic Republic of Congo vs. Belgium (Arrest Warrant of 11 April 2000)*, Dissenting Opinion of Judge Oda, February 14, 2002; *Democratic Republic of Congo vs. Belgium (Arrest Warrant of 11 April 2000)*, Declaration of Judge Ranjeva, February 14, 2002; *Democratic Republic of Congo vs. Belgium (Arrest Warrant of 11 April 2000)*, Separate Opinion of Judge Rezek, February 14, 2002; *Democratic Republic of Congo vs. Belgium (Arrest Warrant of 11 April 2000)*, Dissenting Opinion of Judge Van den Wyngaert, February 14, 2002. These were individual opinions and, strictly speaking, only *obiter dicta*. The matter is raised directly in pending litigation before the International Court of Justice: *Republic of the Congo vs. France (Case Concerning Certain Criminal Proceedings in France)*, Application, December 9, 2002.
47 *Republic of the Congo vs. France (Case Concerning Certain Criminal Proceedings in France), Request Provisional Measure, Order of 17 June 2003*, [2003] ICJ Reports 102.
48 UN Doc. A/C.6/SR.100. See the discussion in Schabas 2000: 353–8.
49 Draft Resolution, U.N. Doc. A/BUR/50.
50 *Convention on the Prevention and Punishment of the Crime of Genocide* (1951) 78 UNTS 277.
51 *AG Israel vs. Eichmann* (1968) 36 ILR 5 (District Court, Jerusalem), para. 24.
52 S. 888, 110th Cong. § 1; 153 Cong. Rec. S 4150; H.R. 2489, 110th Cong. § 1; 153 Cong. Rec. H 14207.
53 United Nations Security Council (2007) "United Nations Security Council", 62nd year: 5796th meeting, Monday, 10 December 2007, New York, UN Doc. S/PV.5796.
54 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1950) 75 UNTS 287, art. 146. Also: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1949) 75 UNTS 31, art. 49; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1950) 75 UNTS 85, art. 50; *Geneva Convention Relative to the Treatment of Prisoners of War* (1950) 75 UNTS 135, art. 129.
55 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 39/46, annex, art. 5(2). See also *International Convention for the Protection of All Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, annex, art. 9(2).
56 *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT)*, (1951) 82 UNTS 279, annex, art. 8.
57 UN Security Council 1993b: annex, art. 7(4); UN Security Council 1994: annex, art. 6(4);

Statute of the Special Court for Sierra Leone (2002) 2178 UNTS 138, annex, art. 6(4).

58 *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 33.

59 *Empire vs. Dithmar and Boldt* (Hospital Ship "Llandovery Castle"), (1921) 2 ILR 437, 16 *American Journal of International Law* 708; *German War Trials, Report of Proceedings before the Supreme Court in Leipzig*, Cmd. 1450, London: HMSO, 1921, pp. 56–7.

60 *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT)*, (1951) 82 UNTS 279, annex, art. 7; *Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277, art. 4; *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 27(1); UN Security Council 1993b, annex, art. 7(4); UN Security Council 1994: annex, art. 6(4); *Statute of the Special Court for Sierra Leone*, (2002) 2178 UNTS 138, annex, art. 6(4).

61 *Rome Statute of the International Criminal Court* (2002) 2187 UNTS 90, art. 31(1)(d).

62 *Prosecutor vs. Erdemović* 1997a: para. 75; *Prosecutor vs. Erdemović* 1997b: para. 12.

63 *Statute of the Special Tribunal for Lebanon*, UN Doc. S/RES/1757 (2007), Attachment.

64 *Democratic Republic of Congo vs. Belgium (Arrest Warrant of 11 April 2000)*, Judgment, February 14, 2002, para. 61. This largely overturned a somewhat more liberal ruling by the United Kingdom's House of Lords in the celebrated *Pinochet* case. In *R. vs. Bartle and the Commissioner of Police for the Metropolis and others, ex parte Pinochet Ugarte*, (1999) 2 All. ER 97 (HL), a majority of the House of Lords said "[s]uch immunity is only in respect of 'official' acts performed in the exercise of his functions." There is a gap between the two tests, as dissenting Judge Van den Wyngaert observed: *Democratic Republic of Congo v. Belgium (Arrest Warrant of 11 April 2000)*, Dissenting Opinion of Judge Van den Wyngaert, February 14, 2002, para. 36.

65 *Prosecutor v. Milošević* (Case No. IT-02-54-PT), Decision on Preliminary Motions, 8 November 2001, paras. 26–34; *Prosecutor v. Taylor* (Case No. SCSL-2003-01-I), Decision on Immunity from Jurisdiction, May 31, 2004. It is widely believed that article 7(2) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, and the equivalent provisions of the other statutes, operate to this effect. But careful reading of the provision shows that it deals with the defense of official capacity, which is not the same thing. The distinction between the defense of official capacity and immunities can be seen clearly in the two paragraphs of article 27 of the *Rome Statute*. It is also apparent with reference to paragraph 61 of the *Arrest Warrant case*, which cites article 27(2) of the *Rome Statute* but no corresponding provision in the statutes of the *ad hoc* tribunals.

66 *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 27(2).

67 *Statute of the Special Court for Sierra Leone* (2002) 2178 UNTS 138, annex, art. 5.

68 United Nations 2000a: para. 19.

69 *Prosecutor vs. Taylor* (Case No. SCSL-2003-01-I), Decision on Immunity from Jurisdiction, May 21, 2004.

70 United Nations 2000: paras. 19–25.

71 Germany seems to have had a 20-year limitation period on Nazi crimes not contemplated by *Control Council Law No. 10*. On March 25, 1965 the Bundestag extended the limitation date for murder to December 31, 1969, which was the twentieth anniversary of establishment of the German Federal Republic. But this was inadequate and the date was again extended until December 31, 1979. On July 3, 1979 the Bundestag voted to eliminate any limitation date for murder (see Monson 1982).

72 G.A. Res. 3 (I); G.A. Res. 170 (II); G.A. Res. 2583 (XXIV); G.A. Res. 2712 (XXV); G.A. Res. 2840 (XXVI); G.A. Res. 3020 (XXVII); G.A. Res. 3074 (XXVIII).

73 *Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 754 U.N.T.S. 73 (1970) (see Miller 1971).

74 *European Convention on the Non Applicability of Statutory Limitation to Crimes against Humanity and War Crimes of January 25, 1974*, E.T.S. 82.

75 *Fédération Nationale des Déportés et Internés Résistants et Patriotes et al. vs. Barbie*, (1984) 78 ILR 125, 135. Also France, Assemblée Nationale, *Rapport d'Information déposé en Application de l'Article 145 du Règlement par la Mission d'Iinformation de la Commission de la Défense Nationale et des Forces Armées et de la Commission des Affaires Étrangères, sur les Opérations Militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994*, p. 286 (1999).

76 *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 29.