

# Chapter I

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## INTRODUCTION

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### A. INTRODUCTION TO THE CONCEPT AND STUDY OF GLOBAL ISSUES

What are global issues in criminal law? Why is it important to study global issues? The starting point is an understanding of the terminology. *Global* is an umbrella term for *transnational*, *international* and *comparative* issues.

*Transnational* law is a broad category, encompassing at least criminal actions that cross national boundaries and crimes whose elements include actions in foreign countries or foreign law. Typical criminal actions that cross national boundaries include drug trafficking, money laundering, and cybercrime. In each case, the *actus reus* of the crime is likely to occur in multiple national jurisdictions. Money laundering, for example, could involve the transfer of money from an American bank to a Paraguayan bank to a Swiss bank. Crimes whose elements include acts in foreign countries or foreign law are more specialized than general crimes whose acts cross borders. For example, there is a federal crime that penalizes the importation of fish or wildlife *in violation of foreign law*.<sup>1</sup> An element of the crime will require proof of what violates the foreign law. One unfortunate defendant, for example, imported spiny lobsters in violation of packing laws in the Honduras and was sentenced to federal prison. Another federal crime penalizes anyone who travels in foreign commerce and engages in illicit sexual conduct abroad.<sup>2</sup> In today's global society, crimes increasingly in-

1. The Lacey Act prohibits the importation of "fish or wildlife taken, possessed, transported, or sold in violation of . . . any foreign law." 16 U.S.C. § 3372(a)(2)(A). For an interesting discussion of the spiny lobster case, see

Ellen S. Podgor, A New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms, 37 McGeorge L. Rev. 83 (2006).

2. This statute is discussed *infra* in Chapter 2 on Transnational Crimes.

volve actions crossing borders and the definition of crimes is quickly keeping pace with the international nature of the criminal acts. Consequently, knowledge of transnational aspects of crimes is important for those studying and practicing in the field of criminal law today.

*International* is often used as an umbrella term in a similar way in which we are using the term “global.” For the purposes of our study of global issues, however, international will refer to 1) international law that is applicable in domestic criminal cases in the United States, and 2) international law that is applied in international criminal tribunals. International law is defined by treaties, customary international law, and general principles of law. For instance, genocide is a crime under international law through the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) that most countries of the world have ratified. Genocide is also a crime as a matter of customary international law in that most, if not all, nations of the world recognize genocide as a crime as a matter of legal obligation. Moreover, genocide is a crime that has been recognized as an especially safeguarded norm, called *jus cogens*. A *jus cogens* norm is one that is non-derogable—no nation or group may violate it, no treaty, legislation or judicial decision may derogate from the rule. We will consider this concept later in this introduction and in the chapters on terrorism and genocide.

International crimes typically have an impact both domestically and internationally. The Genocide Convention requires countries to adopt domestic legislation if necessary in order to prosecute genocide. Many nations have promulgated such laws. In the United States, there is a federal statute that penalizes the crime of genocide, 18 U.S.C. § 1091. With certain statutory limitations that the crime occur within the United States or that the perpetrator be a U.S. citizen, our federal courts could adjudicate genocide cases. In addition to the possibility of prosecutions within national court systems, there are international tribunals for adjudicating crimes such as genocide that occur in a particular country or across borders. For example, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 to adjudicate genocide, crimes against humanity, and war crimes that occurred in the former Yugoslavia during the conflict in the early 1990s. The ICTY is a temporary tribunal, but the International Criminal Court, established in 1998 and operational in 2002, is a permanent international tribunal for the adjudication of genocide, crimes against humanity, and war crimes (all *jus cogens* offenses) that occur anywhere in the world. Today’s law student and lawyer should be aware of the existence of

international criminal tribunals and the crimes within their jurisdiction.

*Comparative* refers to the law of other countries. Comparative global law is important on two levels: 1) as a general background for all American lawyers about other systems of law, and 2) as a means to understand better the reasoning and policy underlying American criminal law. In the United States, our system is a “common law” legal system. Common law is the foundation of approximately 28% of national legal systems throughout the world. Many of the world’s legal systems are based on a different foundation, “civil law.” Civil law is the basis of approximately 45% of national legal systems (the other 27% are based on traditional or religious law).<sup>3</sup> Today’s lawyer should have a basic understanding of both common law and civil law traditions. While the focus of this book is on transnational and international issues, the courts use a comparative approach in deciding some of the cases that you will read.

In addition to understanding the terminology of comparative, transnational, and international issues, two other terms are necessary for your study of global issues in criminal law. Countries are referred to as **states**. This can be confusing since we refer to each of our 50 states within the United States with the same term. In order to avoid confusion, we will refer to countries as *states*, *nation-states*, or *states-parties* (if referring to parties to a treaty) and to our individual 50 states as a “U.S. state” or by name, such as “California.” Another term that you may encounter is **municipal**. While we commonly refer to a “municipality” as a city or town within a U.S. state, “municipal” law in international law refers to the domestic law of a country.

This book is divided into three chapters that will introduce you to global issues in criminal law. They are: Chapter II—*Transnational Crimes*; Chapter III—*Terrorism*; and Chapter IV—*Genocide*. Each chapter presents a problem based on hypothetical or real facts that you will be asked to analyze based on the cases and other materials in the chapter. You will be applying many of the concepts that you are studying, such as the *actus reus* and *mens rea* of the crime, affirmative defenses, and accomplice and conspiratorial liability. In addition, you will be learning new crimes and sources of law.

Some issues and background are common to all three chapters. These common areas include concepts of jurisdiction, sources of law, and the forums in which international or transnational cases may be adjudicated. The next three subsections will provide you

3. See World’s Legal Systems, University of Ottawa, <http://www.droit-civil.uottawa.ca/world-legal-systems/eng-generale.php>.

with a background in an understanding of domestic jurisdiction (Section B), an introduction to international jurisdiction (Section C), an overview of key players and forums (Section D); and a description of sources of law (Section E).

## B. FEDERAL AND STATE JURISDICTION

“Jurisdiction may be defined as the authority to affect legal interests—to prescribe rules of law; to adjudicate legal questions; and to compel, induce compliance or take any other enforcement action. The term ‘jurisdiction’ derives from *juris* (law) and *dictio* (saying), meaning ‘the implication being an authoritative legal pronouncement.’ Jurisdiction is the means of making law functional; it is the way that states and legal institutions make law a reality. Any definition of crime and any institution that calls for the law’s application to its subjects or objects necessarily includes a jurisdictional breadth—the temporal and spatial scope of that application.” Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 38 GEO. WASH. INT’L L. REV. \_\_\_ (2006).

In the United States, there are two levels of government that may be authorized to pursue criminal charges: the federal government and each of the fifty U.S. states (plus the District of Columbia). Each level of government has authority to punish criminal conduct that comes within its *jurisdiction*, which involves two or three aspects: first, *prescriptive jurisdiction*, the power to enact a statute designating conduct as criminal; second, *enforcement jurisdiction*,<sup>4</sup> the authority to exercise the power of the state over the perpetrator or alleged perpetrator of a crime; and third, *adjudicative jurisdiction*, the authority to prosecute a person in that government’s courts and impose punishment for a violation.

It is likely that most of the cases that you read in your Criminal Law course arise in U.S. state courts. You have probably not focused extensively on jurisdiction because most prosecutions easily satisfy the jurisdictional requirements for the specific U.S. state. For example, if a victim is murdered in California, it is clear

4. Some commentators include adjudicative jurisdiction within the rubric of enforcement jurisdiction. Whether separate or combined, enforcement and adjudicative jurisdiction are dependent on prescriptive jurisdiction. Hence, a state first prescribes a rule, which is to say that either by act of the legislature, decree of the executive, administrative regulation, or decision of a court, it declares a principle or legal norm. Second, the state enforces the rule; it arrests, extradites, subpoenas witnesses and documents, tries, or punishes a person for violation of the rule. A court enters a judgment vindicating the rule. Where the judiciary decides questions of law and fact and metes out the punishment or remedy, jurisdiction to adjudicate is often carved out of enforcement jurisdiction as a separate category. When prescriptive jurisdiction obtains, generally adjudicative and enforcement jurisdiction follow.

that California can prosecute the defendant for the acts that occurred within California's borders. Even if criminal actions cross U.S. state borders, there is rarely a significant jurisdictional issue. For instance, if the defendant steals a car in Indiana and drives it into Michigan, both Indiana and Michigan would be able to prosecute the defendant for theft-related crimes. For group crimes, such as conspiracy, the acts of one conspirator give the courts in that location jurisdiction over the entire criminal enterprise.

Federal jurisdiction to proscribe and prosecute crimes is far more limited than the jurisdiction of U.S. state courts. With regard to the first aspect of jurisdiction, the Constitution gives the federal government only a limited power to regulate and punish conduct in most areas. All federal criminal statutes must be based on a specific grant of authority to the Congress, augmented by the Necessary and Proper Clause. While the federal government has limited power to enact criminal laws, U.S. states retain the broad "police power" recognized as inhering in all sovereign nations to adopt regulations "to define the criminal law and to protect the health, safety, and welfare of their citizens." *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). In determining the contours of the relationship between the federal government and U.S. states, the Supreme Court noted in *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), that "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." U.S. states in turn may delegate a portion of their authority to local jurisdictions, such as counties or municipalities.

The federal government has the leading role in enacting statutes to address transnational and international criminal conduct. Only the national government negotiates and ratifies treaties, and legislation implementing a treaty may call for the enactment of criminal laws to aid the enforcement of obligations under the instrument. The Constitution grants Congress the authority under the Commerce Clause "[t]o regulate Commerce *with foreign Nations*, and among the several States, and with the Indian Tribes." U.S. CONST. ART. I, § 8, cl. 3 (emphasis added). The Foreign Commerce Clause power has been used by Congress in recent years to enact provisions making it a crime for United States citizens and residents to travel abroad for the purpose of engaging in illegal sex acts. The commerce power supports a number of important criminal laws applicable to international and transnational prosecutions involving terrorism, drug trafficking, and money laundering.

The federal government has the equivalent of a U.S. state's police power to legislate on property it owns or administers, including military installations outside the United States. The same

authority applies to conduct occurring within the “admiralty and maritime jurisdiction,” including ships and aircraft from the United States even if the crime occurs in another country. The Constitution also grants Congress power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” U.S. CONST. ART. I, § 8, cl. 10. This is the source of authority for the Maritime Drug Law Enforcement Act, 46 App. U.S.C. § 1903, that has been used to prosecute drug trafficking involving vessels seized on the high seas with no connection to the United States. It could also provide the authority for jurisdiction over terrorism. This is because terrorism may be considered to be a crime against the Law of Nations.

The second aspect of jurisdiction is the authority of a nation (or a U.S. state) to impose its laws on a particular defendant in a criminal prosecution in its courts. There are different grounds on which a government can assert jurisdiction to apply laws to an individual defendant for conduct that may have violated one of its statutes. The fundamental basis for criminal jurisdiction is the *territoriality* principle, that conduct within the confines of a state or nation is subject to its criminal (and civil) laws. This was the basis for jurisdiction under the common law in England and has been recognized in the United States. In *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909), the Supreme Court described the classic principle for a nation to assert its jurisdiction:

No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep, to some extent, the old notion of personal sovereignty alive. They go further, at times, and declare that they will punish anyone, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute, similar threats as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications. But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. \* \* \* For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only

would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

Although the notion of respecting the sovereignty of other states is still an important doctrine, the next section explores an increasing tendency for states to extend their jurisdiction over persons and actions that are in whole or in part outside their own territory.

### C. INTERNATIONAL AND EXTRATERRITORIAL JURISDICTION

International law has not developed a set of rules relating to legislative, judicial, and enforcement jurisdiction in the international criminal setting that is as comprehensive, precise, or developed as the parallel domestic laws of the various nations. As a result, various theories, definitions, and applications of jurisdiction have emerged in international settings.

It is generally accepted that there are five traditional, theoretical bases of jurisdiction over international and transnational crime: **territorial**, **protective**, **nationality**, **universal**, and **passive-personality**. These bases provide the foundation upon which a state may assert jurisdiction over extraterritorial and international criminal conduct.

The **territorial theory** allows for jurisdiction over conduct an element or the effect of which takes place within the territorial boundaries of the state. It actually can be sub-divided into two forms, which may overlap. **Subjective territoriality** applies when a material element of an offense occurs within the territory (e.g., the pulling of a gun's trigger in one territory that results in harm in a second territory). **Objective territoriality** obtains when a significant effect of an offense is intended to impact and impacts the asserting state's territory. For example, if a bullet shot from the United States mortally wounds the victim, who is across the border in Mexico, Mexico would have objective territoriality jurisdiction, while the United States would have subjective territoriality jurisdiction.

The **nationality theory** (*personalité active*) bases jurisdiction on the allegiance or nationality of the perpetrator. This has long been recognized in the United States and around the world. The nationality principle allows for the laws of the home nation to apply to conduct outside its territorial boundaries. In *Skiriotes v. Florida*, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193 (1941), the Supreme Court stated:

[A]side from the question of the extent of control which the United States may exert in the interest of self-protection over waters near its borders, although beyond its territorial limits, the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government. Thus, a criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect.

Congress relied on the nationality principle, for example, for jurisdiction in enacting the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261 *et seq.* The statute makes it a crime to engage in conduct outside the United States that would be punishable by a prison term of more than one year when committed by members of the armed forces, those employed by the armed forces, and by individuals “accompanying” a member of the armed forces outside the United States.

The **passive personality principle** (*personalité passive*) extends jurisdiction over offenses where the *victims* are nationals of the forum state. It applies simply and solely on the basis of the victim’s nationality. Passive personality jurisdiction is not widely accepted and has been roundly rejected in the United States, except, perhaps, in relation to terrorism against U.S. nationals, where it is combined with the protective or universality theories. Because of the primary nature of the territorial principle in U.S. criminal law, extradition has traditionally been refused when the sole basis of jurisdiction is the victim’s nationality, unless a treaty provision allows it.

The **protective principle**, or “injured-forum theory,” is applicable whenever the criminal conduct has an impact on or threatens the asserting state’s sovereignty, security, or some important governmental function. The “protective principle” emphasizes the effect or possible effect of the offense and provides for jurisdiction over conduct deemed harmful to specific national interests of the forum state.

The distinction between the protective principle and the territorial theories was clearly articulated by the Second Circuit Court of Appeals in *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968),

where an alien was convicted of knowingly making false statements under oath in a visa application to a U.S. consul in Canada. The fact that the accused ultimately entered the United States was not an element of the offense. The court was careful to point out that the violation of 18 U.S.C. Section 1546 took place entirely in Canada. Hence, no material element of the crime took place on U.S. territory. No physical or material effect occurred on U.S. territory. On the other hand, the crime's effect on U.S. sovereignty supported jurisdiction on this theory. The Second Circuit defined the protective principle very aptly as, "[the authority to] prescribe a rule of law attaching legal consequences to conduct outside [the state's] territory that *threatens* its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems." Lying to a consular officer in Canada constituted "an affront to the very sovereignty of the United States [and had] a deleterious influence on valid governmental interests." If lying to a consular officer is within the protective principle, then, for instance, attacking U.S. officials working internationally certainly would also be within the jurisdiction of U.S. courts.

The **universality theory** allows jurisdiction in any forum that obtains jurisdiction over the person of the perpetrator of certain offenses, which are considered to be particularly heinous or harmful to humans generally. Universal jurisdiction applies where the alleged perpetrator's conduct violates a universally recognized proscription, sometimes called a *jus cogens* offense. Genocide is a clear example of a *jus cogens*, universal offense. The universality theory allows any forum to assert jurisdiction over particular universally condemned acts, when no other state has a prior interest in asserting jurisdiction. Nations have an obligation either to prosecute or to extradite perpetrators of these crimes.

These theories of jurisdiction form the foundation for conceptualizing how nations, domestically and incident to international law, have applied their law to extraterritorial criminal conduct. Terrorism, for example, planned in one state, perpetrated on a vessel or airliner, prompts both objective and subjective territoriality as well as the protective principle, nationality, the passive personality theory, and perhaps even universality jurisdiction. Extraterritorial application of a criminal law may be justified by any one of the five principles of extraterritorial authority.

The United States and other national courts have expanded the traditional bases of extraterritorial jurisdiction, responding largely to a perceived burgeoning of transnational and international crime. The Congress and U.S. courts in the "war on drugs," for example, have sought to deter narcotics importation by asserting jurisdiction over thwarted extraterritorial conspiracies and, in the "war on

terror,” have asserted jurisdiction over alleged terrorists who have committed their violence outside U.S. territory. Cooperation among governments in investigation and extradition is of paramount importance to combating international and transnational crime. Hence, a state requesting assistance in criminal matters must conform to any and all limitations and requirements made by the requested state and those of international law. Any disparagement of a nation’s sovereignty, international law, treaty formulations, or agreements to extradite or otherwise cooperate will ultimately harm the effectiveness of international crime prevention and criminal justice.

Although expanding jurisdiction might help by broadening enforcement, expansion also should be based on consistency in theory and application. There is presently an ongoing debate whether there is a coherent theory of jurisdiction and a coherent policy basis for expanding extraterritorial jurisdiction. You should keep these issues in mind as you work with the chapters on transnational crime and terrorism.

#### **D. PLAYERS IN INTERNATIONAL CRIMINAL LAW: STATES, INDIVIDUALS, TRIBUNALS, AND OTHER ENTITIES AS “SUBJECTS” OF INTERNATIONAL LAW<sup>5</sup>**

##### **1. States as the Focal Point of International Law**

Subjects of domestic law include individual human beings and legal persons. Domestic law provides a set of rules that govern these subjects. As for legal persons, such as corporations, domestic law even has a clear, explicitly-defined legal process for determining the legally required facts that establish the legal entity. A corporation can be defined as an entity that has been created by compliance with that prescribed process. In contrast to domestic legal systems, no such legal process exists in the case of the formation of the traditional subjects of international law—the entities called states. Moreover, the question of what other entities might be subjects of international law is in a state of evolution. Whether natural persons are subjects of international law has been an issue for some time and is extremely important to international criminal law.

In the international legal system the terms “nations,” “peoples,” “states,” and “nation-states” are used interchangeably and somewhat imprecisely, from a socio-anthropological standpoint, to

<sup>5</sup> Parts of this section are adapted with permission from CHRISTOPHER L. BLAKESLEY, EDWIN B. FIRMAGE, RICHARD F. SCOTT AND SHARON A. WILLIAMS, *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS*, Ch.2 (5th ed. 2001).

refer to the legally-organized political power-structures that are the highest authority in a country, i.e., states. The state (or nation-state) is the term used for these entities, which have long been, and still are, the major structural units of the legal-political order of the planet. Historically, the imprecision noted above goes back to ancient usages, to the times when emperors and kings really ruled their peoples, or nations. States inherited the aura of sovereignty from them. Sovereignty has been the *sine qua non* of statehood—traditionally there has been no higher earthly authority. States have been the recognized actors in the international legal system, since the end of the Thirty Years War through the treaties made at Westphalia in 1648 (when sovereign equality moved from a few key monarchies, such as the Holy Roman Empire and the Holy See, to a number of newly-independent states). States are legally endowed with independence, equality, and the capacity to deal with other states, whether in war or peace, and have had a virtually exclusive role in the evolution of the international legal system. In classical theory, states are the “subjects” of “inter-state” law that they make for themselves, either by accepted custom or by specific agreements. We still call it “international law,” and it is too late to change that; but most states rule over more than one race, ethnic group, people, or nationality.

Section 201 of the Restatement (Third) of the Foreign Relations Law of the United States (1987) defines a state as “an entity which has a defined territory and permanent population, under the control of its own government, and which engages in, or has the capacity to engage in, formal relations with other such entities.” For centuries since the Peace of Westphalia, human beings as such had no standing, except through their states. On the other hand, more recently, individuals have developed some significant standing in the arenas of international criminal law and human rights law. Today, however, civilization is moving into an era in which states are not the only subjects of international law and are no longer entirely sovereign. Nonetheless, statehood is still the essential part of the international legal system. The role of states is manifest in important legal instruments of international law, such as the United Nations Charter.

## **2. International Humanitarian Law and Individual Culpability**

We have noted that individuals were seen as subjects of their state, with only derivative rights and obligations. The state has been obliged to protect and represent its subjects, but the individual had no independent rights or interests. With the rise of the human rights movement and international humanitarian law (in-

ternational criminal law), however, individuals have gained at least part of the status of being subjects of international law, with their own, independent rights, obligations, and standing.

International humanitarian law implicates criminal liability for individuals. The catalog of abuses to which human beings have subjected each other is one of unrelieved horror, which, in turn, has led to the individual perpetrator being the subject of international prosecution and punishment. Abuses range from murder, physical and mental torture, to the slaughter and rape of religious, racial and ethnic masses. They also include slavery, mass rape, sex-slavery, traffic in women and children, forced labor, mass dislocations, and deprivations of liberty of movement. The freedom to speak, to practice one's religion, to select one's own occupation, and to marry whom one pleases are repressed. Terrorism, arbitrary arrest, imprisonment without trial, unfair trials, torture, and degrading punishments are not uncommon.

Many of these abuses to the human personality are common crimes—matters of domestic criminal law. Others are perpetrated by individuals acting in some official capacity for the state. Still others are committed by violent opponents of states or groups of people claiming to promote some cause. Protections against these abuses are frequently afforded by the internal laws of the state. Domestic laws are designed not only to deter private individuals from harming their fellows but also, as in the case of the U.S. Constitution, to protect the individual from abuses by the state. But what protects people when the machinery of domestic law fails or even violates their rights? Does the international legal system offer protection? The traditional rule, until a generation ago, was chilling: a state could treat its own citizens "according to discretion." I OPPENHEIM, *INTERNATIONAL LAW* 682 (Lauterpacht 8th ed. 1955). Is this still true today? What substantive legal norms have been developed in the international system for the protection of the individual? Are they effective? Are citizens and aliens equally protected? By what processes and in what institutions are those norms applied and protections afforded both internationally and domestically? Some of these issues will be considered in the chapters on terrorism and genocide.

As the nation-state became the organizing unit of the European peoples an early, if halting, recognition developed that, in some circumstances, a state might be circumscribed in the way it treated its nationals. Doctrines of natural law furnished a major impetus. DeVisscher noted: "[T]he treaties by which States bound themselves to treat their own nationals in a certain way appear only as isolated phenomena inspired first by political interest and later by considerations of humanity. The series of particular agreements inaugurated in 1660 by the Treaty of Oliva after a century and a

half of religious commotions bore this aspect. In these, states receiving cessions of territory guaranteed to the ceding states the continuance and protection of the religion existing in the ceded territories. This protection, granted first to individuals, was gradually extended to minority groups, to religious minorities first and afterwards ethnic or national minorities." DEVISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 126 (Corbett trans., 1968).

### 3. The Development of International Criminal Tribunals

During the twentieth century there has been an increasing recognition by the international community that individuals may be prosecuted and found liable for international criminal acts, particularly crimes against peace, war crimes, crimes against humanity, genocide, and terrorism. These offenses may be classified as crimes against the peace and security of humanity. We will explore several of them. The most poignant examples of a finding of such liability up until the present time were the war crimes trials undertaken by the specially created International Military Tribunals at Nuremberg and Tokyo as well as some national court cases following atrocities committed in the Second World War, and a few from the Vietnam War. More recently the Ad Hoc Tribunals for the former Yugoslavia and Rwanda were created and the permanent International Criminal Court, established in Rome in 1998, is beginning to operate. Other tribunals include a mixed tribunal (with domestic and international judges), such as those created for Cambodia and Sierra Leone.

Individual criminal responsibility is the cornerstone of any international war crimes tribunal. *Nuremberg Principle I* provides that "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment." *Nazi Conspiracy and Aggression Opinion and Judgment, Nuremberg, 30 September 1945*, reprinted in 41 AM. J. INT'L L. 186 (1947). Acts by heads of state or other government officials, even if committed in an official capacity, may not provide an immunity defense or mitigate criminality. These officials, therefore, could also be held responsible for offenses committed pursuant to their orders. The development of international criminal tribunals has, however, been a halting process.

Efforts to establish an international criminal tribunal are not new, although they have intensified recently. It is a history of many attempts and few successes. Professor Cherif Bassiouni notes that "the first prosecution for initiating an unjust war is reported to have been in Naples, in 1268, when Conradin von Hohenstaufen was executed for that offense." See M. Cherif Bassiouni, *Interna-*

*tional Law and the Holocaust*, 9 CAL. W. INT'L L.J. 201, 206 (1979); ERNST KANTOROWICZ, *FREDERICK THE SECOND (1194–1250)* 673–677 (1957) (discussing the execution and the end of the Hohenstaufen reign). The “modern” idea of establishing an international criminal court could be said to have been launched in 1899 with the Hague Convention for the Pacific Settlement of International Disputes.

The 1919 Versailles Treaty was another early step toward establishing a war crimes court. The face of the treaty provided for the prosecution of Kaiser Wilhelm II for a supreme offense against the “international morality and the sanctity of treaties” and for war crimes charged against German officers and soldiers. Also in 1919, the Allies established a special commission to investigate the responsibility “for acts of war” and crimes against “the laws of humanity.” The Report of the Commission contained the following conclusion: “All persons . . . who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.” This provision was developed in response to the killing of an estimated one million Armenians by Turkish authorities and the Turkish people, supported or abetted by the state’s public policy. There can be no doubt that those who committed such atrocities knew they were committing “crimes against humanity.” U.S. opposition, however, prevented the Commission’s report from including this type of conduct among the offenses that an international criminal court would prosecute. Subsequently, the Treaty of Sèvres, Treaty of Peace Between the Allied and Associated Powers and Turkey Aug. 10, 1920, reprinted in 15 AM. J. INTL. L. 179, 231 (Supp. 1921), provided for the surrender by Turkey of such persons as might be accused of crimes against “the laws of humanity,” but in 1923, the Treaty of Lausanne gave them amnesty. See Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne), July 24, 1923, 28 L.N.T.S. 11, 18 AM. J. INT'L L. 1 (Supp. 1924).

Between the two world wars, a wave of terror swept Europe, mostly in connection with nationalist claims in the Balkans. In 1936, Adolf Hitler exploited the international community’s inability to prosecute or sanction crimes against humanity stating, “And who now remembers the Armenians?” Indeed, it is particularly revealing that he would preface his policy of exterminating the Jewish people, the Roma, and Slavs, among others, by revealing the absence of interest by the world community to prosecute such conduct. That failure and the inability to create efficient international structures to enforce this proscription, gave Hitler the comfort of knowing that he might succeed in genocide, as others had in the past. In 1937, the League of Nations adopted a Convention Against Terrorism; an annexed Protocol provided for the establishment of a special international criminal court to prosecute such

crimes. India was the only country to ratify the Convention. It never entered into force.

After World War II, it became obvious that crimes against peace, war crimes, and what became known, with the London Charter, as “crimes against humanity” had been committed. The London Charter established the International Military Tribunal (IMT) at Nuremberg, which was designed to prosecute major war criminals in the European theater. In 1946, a similar international military tribunal was established in Tokyo to prosecute major Japanese war criminals.

Despite the precedent of Nuremberg and Tokyo, no international criminal tribunal was created for the next 50 years. Although the General Assembly of the United Nations urged consideration of the establishment of an international criminal court in 1989 and the International Law Commission (ILC) proposed the creation of an international criminal court in 1990, the first international criminal tribunal to come into existence since World War II was the International Criminal Tribunal for the former Yugoslavia (ICTY). Security Council Resolution 808, paragraph 1, provides: “An international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” The Secretary-General’s Report relating to the atrocities in the former Yugoslavia noted that the creation of the Tribunal for the prosecution of the alleged breaches of international humanitarian law will apply existing law, including the Geneva Conventions of 1949, and that the Security Council would not be creating law or purporting to legislate. One year after the ICTY was established, the International Criminal Tribunal for Rwanda (ICTR) was created, also through action by the Security Council.

The next major development was the establishment of the International Criminal Court. This time the tribunal was created through a treaty. Consider the commentary on the ICC by Professor, and former ICTY Ad Litem Judge, Sharon Williams:

The International Criminal Court (ICC) was established on 17 July 1998 in Rome by the United Nations Diplomatic Conference. \* \* \* It [has] jurisdiction over some of the most serious international crimes. Its value is not only in prosecuting and punishing the alleged perpetrators of the listed crimes, genocide, war crimes, crimes against humanity and potentially aggression, but also in its capacity for deterrence. An impartial international criminal court with an independent prosecutor’s office must discourage those who seek to instigate and perpetrate barbarous atrocities in violation of customary international and treaty law. The major challenge for the international

community is to make it truly effective and not merely symbolic. \* \* \*

The world community must be prepared to act. Should deterrence fail it must be ready, willing and able to bring to justice those accused, demonstrating that such conduct will not go unchallenged. It is not a question of high-minded revenge, of the victors dictating their terms to the vanquished, but rather a deep-rooted imperative to advance the rule of law and to enhance the quality of human behaviour at the national and international levels. The world community now knows that it is not sufficient to act on an *ad hoc* basis. To do so requires the selective political consent of the . . . Security Council, acting under Chapter VII of the *Charter* \* \* \* and there is a possibility that one of the five permanent members will veto the action. \* \* \* The ICC is fundamental to international peace and security and the protection of human rights and dignity \* \* \* .

The philosophical and practical underpinnings for the ICC are threefold \* \* \* deterrence, prosecution of alleged perpetrators, and justice for victims. The critical factor in the establishment of the court is the capacity to enforce. The goal is to replace impunity with accountability. \* \* \* [In the final plenary the United States requested an unrecorded vote. The Statute was adopted by 120 in favour, 7 against and 21 abstentions.]

It would be naive to suggest that there are not certain weaknesses in the statute. There are. Certain states and most NGOs pressed for the ICC to have universal jurisdiction or a variant thereof, over the listed crimes, but the result at the end of the day was restrictive preconditions in the final text of article 12. In fact, until the proverbial eleventh hour in Rome, article 12 was a make or break provision, and it still today retains its notoriety.

Sharon A. Williams, *The Rome Statute on the International Criminal Court: From 1947–2000 and Beyond*, 38 OSGOODE HALL L.J. 298 (2000).

The Rome Statute has long since received the 60 required ratifications to enter into force.<sup>6</sup> Although in Rome some delegations wanted the list to be broader and to include international terrorism and drug trafficking, at the end of the day article 5 was restricted largely to cover only those crimes that were covered by customary international law. However, there were departures such as the inclusion of offences against humanitarian and UN person-

6. As of November, 2006, 102 nations have ratified the treaty establishing the Court.

nel and the prohibition on conscription or enlisting children under fifteen.

### E. THE SOURCES OF INTERNATIONAL CRIMINAL LAW\*

The substantive sources of international law are identified in the Statute of the International Court of Justice [I.C.J.], article 38(1). The I.C.J., also known as the World Court, is the judicial organ of the United Nations. The statute of the ICJ is particularly influential because the Court has subject-matter jurisdiction as to issues concerning many international agreements.

Article 38(1) was incorporated virtually verbatim from the League of Nations Statute of the Permanent Court of International Justice, and provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the law.

This hierarchy of legal authority is “civilian” or derived largely from Roman law influence as established on the European continent and other areas that have been influenced by that model. Note that judicial decisions, like scholarly doctrine, are not binding, but subsidiary . . . These two persuasive sources are to be used to prove and to interpret the meaning of the binding sources—treaties, custom, and general principles. International conventions (like legislation or codes in civil law jurisdictions), international custom, and general principles of law, are all binding or primary authority.

One of the distinguishing features of the civil law is the hierarchy of authoritative and persuasive sources. Civilian doctrine and law provide that legislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or

\* Adapted with permission from CHRIS- TOPHER L. BLAKESLEY, EDWIN B. FIRMAGE, RICHARD F. SCOTT, AND SHARON WILLIAMS, THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 3–4 (Foundation Press 5th ed. 2001).

secondary sources of law, such as jurisprudence (case law), doctrine, conventional usages—what common law states call practice or usage—and equity, that may guide the court in reaching a decision in the absence of legislation and custom. Equity is not a separate body of rules, as in common law systems, but is deemed to permeate all aspects of the law and should be part of every decision. Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. This vision of authoritative or primary sources and its definition were adopted by public international law.

Thus, the authority articulated in I.C.J. Statute, article 38(1) and its hierarchy represent the basic legal sources of international law. Recognizing this derivation and discipline from the “civil law tradition,” is necessary for one to understand international law properly, to be able to negotiate, litigate, or even to communicate effectively in the arena of international law. An international lawyer cannot be competent without understand the civilian philosophical context and mindset of many of its practitioners. Viewing international through a purely common law prism causes confusion, misinterpretation, and failure. To practice international law well, one should also be a comparativist.

First in the list of sources is “[i]nternational conventions, whether general or particular, establishing rules expressly recognized by the contesting states...” **Treaties** are denominated many ways: conventions, *modii vivendi*, concordats, charters, articles of agreement, pacts, protocols, and accords, agreements, memoranda of understanding, among others. On the other hand, differences are important between multilateral and bilateral treaties and other agreements in which reservations or other special rules are allowed. Not only are treaties a basic source of international law, they are *the* key vehicle by which the international system changes most rapidly. Treaties are a most vital part of international law—they provide for cooperation in criminal law matters, common defense, the promotion of friendship, and cooperation in all areas of international intercourse, such as protecting the environment and protecting the rights and interests of individuals. They are the *modii vivendi* of states; they provide the mechanism for the various subjects of international law to arrange their relations, indeed, to make their own law. This aspect of treaties is really not too different from citizens of states in their contractual relationships, except that treaties may reflect or create customary international law, discussed *infra*.

The modern international practitioner, or any practitioner (including those who practice criminal law) who has a client with a problem that transcends national borders, must of necessity work with international agreements and the international law of treaties.

Treaties lag behind developing needs within the international community and lack specificity due to the technologically complicated and politically sophisticated situations that they address. On the other hand, they are still the *modus vivendi*, because nations have a constant need to reach specific accord upon areas of common concern. Undertakings among states are major tools of operation in the international legal system. Other mechanisms, such as rules of customary law, derived from the usual modes of conduct of international relations, reason, judicial decisions, general principles of law common to the world's major legal systems and the like are also important and provide for evolution.

The second source of authority for international law indicated in ICJ Statute article 38(1) is **customary international law**. Custom is binding authority, although some argue that treaties are higher in the hierarchy. Customary international law also impacts the meaning of treaty terms. Certainly, subsequent practice of states parties to treaties, even relating to non-states-parties may create customary rules that impact interpretation of treaty terms. On the other hand, negative conduct may prove their validity and continued legality, through negative implication. Customary international law is viewed as law that is promulgated (and there is a process of promulgation) on the basis of general or consistent state practice (or the material element) and *opinio juris* (the subjective or psychological element). *Opinio juris* is established when it is proved that a state acts or fails to act in a certain way, because it considers itself legally bound so to act or not to act. Even negative conduct (or violations of a customary rule of international law) may actually promote the rule or it may create new customary international law, especially when the violator tries to hide the violation or makes excuses for it. On the other hand, widespread negative conduct may erode custom, general principles, or the intended meaning of a provision of a treaty.

It may be impossible to find a national legal system which arbitrarily refuses to apply rules of customary international law not in conflict with domestic law. In common law states, courts usually justify their application of customary international law by stating that international law is part of the law of the land. The simplicity of the proposition is deceptive, for if it were accepted as literally true, courts would need only to determine whether there was an applicable rule of customary international law and apply it so long as they found an applicable rule not in conflict with domestic law.

National constitutions may provide a specific legal basis for the application of rules of customary international law. Among those a number of modest formulations provide (or contain language to the effect) that "The State shall endeavour to . . . foster respect for international law and treaty obligations in the dealings of organized

peoples with one another.” Article 51(c), the 1950 Constitution of India. Comparable provisions are found in the constitutions of a number of countries, including Bulgaria Article 24(1), Nepal Article 26(15), Namibia Article 96(d), the Netherlands Article 90, and Romania, Article 10.

Some constitutions provide a basis for courts to apply rules of customary international law by declaring specifically that international law is part of the law of the land, including the following examples. The Austrian Constitution of 1928 states in Article 9(1): “[t]he generally recognized principles of International Law are integral parts of the Federal Law.” Article 2(2) of the 1987 Philippine Constitution states: “The Philippines . . . adopts the generally accepted principles of international law as part of the law of the land.” Article 15 of the Russian Constitution of 1993 states that: “[T]he commonly recognized principles and norms of international law and the international treaties of the Russian Federation shall be a component part of its legal system.” Article 25 of the 1949 German Constitution, as amended, provides: “The general rules of public international law constitute an integral part of federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory.” Article 10 of the Italian Constitution states: “Italy’s legal system conforms with the generally recognized principles of international law.” See *Re Martinez*, Italy, Court of Cassation, 1959, 28 INT’L L. REP. 170 (1963) (Conformity between the two means that rules of municipal law which are contrary to customary international law “*must be eliminated.*”). Article 28(1) of the Greek Constitution of 1975 declares that “the generally recognized rules of international law . . . shall be an integral part of domestic Greek law and shall prevail over any contrary provision of law” The Constitution of Slovenia in 1997 provided in Article 8, that “Statutes and other legislative measures shall comply with generally accepted principles of international law . . . .” One question that arises is whether any of these provisions mean that custom is automatically integrated or whether something further must be done to integrate it.

Stronger terms of acceptance of international law are found in other national constitutions, including Article 29(3) of the Constitution of Ireland (text of 1990), which provides that: “Ireland accepts the generally recognized principles of international law as its rule of conduct in its relations with other States.” Article 98(2) of the Japanese Constitution of 1946 provides that “the . . . established laws of nations shall be faithfully observed”. The Hungarian Constitution of 1949, as amended in 1997, is exceptional in providing, in Ch. 1, sec. 7, that: “[t]he legal system of the Republic of Hungary accepts the generally recognized principles of international law, and

shall harmonize the country's domestic law with the obligations assumed under international law.”

Article 38(1)(c) provides the third authoritative source of international law. “**General principles of law** recognized by civilized nations” relate to principles that arise from the domestic law of the nations of the world. For example, “Thou Shalt Not Steal,” is found in the domestic law of virtually all nations, so it is binding authority. In addition, some general principles have the aura of a universal, moral or natural law principle. These general principles are rules of the highest order in international law, sometimes called *jus cogens* principles. These seem to be a mixture of super custom and super general principle. The core crimes in international humanitarian law have this character. These are non-derogable by legislation, judicial decision, or treaty. There is little dispute over the extent of the authoritative character of general principles, which we will consider in more detail in the terrorism and genocide modules.

International law is evolving in many ways. The number and types of players, even subjects, is expanding. States continue to be the primary subjects of international law, of course, but both natural persons and legal persons, are gaining standing and more of the attributes of subjects. In addition, international organizations have developed many attributes of subjects. The international criminal tribunals from Nuremberg to the International Criminal Court, including the ad hoc tribunals for the former Yugoslavia and Rwanda and the mixed tribunals for Cambodia, Sierra Leone, and other places have made a tremendous impact on substantive international criminal law. These tribunals apply the legal sources that we have presented above: treaties, customary international law, and general principles to render their judgments. The attorneys establish the meaning of treaty terms, the nature and impact of custom and general principles with persuasive sources, such as jurisprudence (case-law) and doctrine (the writings of eminent scholars). International criminal law, transnational criminal law, and comparative criminal law have become necessary tools of lawyers, including those who practice criminal law.