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# International Criminal Law: Nature, Origins and a Few Key Issues

Bartram Brown

*IIT Chicago-Kent College of Law*, [bbrown@kentlaw.iit.edu](mailto:bbrown@kentlaw.iit.edu)

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# Research Handbook on International Criminal Law

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*Edited by*

Bartram S. Brown

*Professor of Law and Co-Director, Program in International and Comparative Law, IIT Chicago–Kent College of Law, Illinois Institute of Technology, USA*

RESEARCH HANDBOOKS IN INTERNATIONAL LAW

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# 1 International criminal law: nature, origins and a few key issues

*Bartram S. Brown*

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The purpose of international criminal law is to establish the criminal responsibility of individuals for international crimes. Public international law is traditionally focused on the rights and obligations of states, and thus is not particularly well suited to this task. It has adapted through a long and slow historical process, drawing upon multiple sources. Many of the chapters in this *Handbook* explore to some extent the historical development of international criminal law. I will not attempt to summarize that history in detail, but a few historical observations here will help to explain how international criminal law emerged from its sources in public international law, comparative law, international humanitarian law and international human rights law. This will set the stage for an introductory discussion of some key issues in contemporary international criminal law.

## ORIGINS AND SOURCES

### **Public International Law**

International criminal law has developed and grown as part of a broader system of public international law which, since 1648, has been based on state sovereignty, including each state's jurisdiction over its own territory and citizens. A basic system of international law, defining the rights and obligations of states, was needed to recognize and validate this sovereignty, but this decentralized system has no legislature. Instead, international law must be based on the consent of states, arising from one or more of three formal sources: i.e. treaties, customary international law, or general principles of law. Treaties make binding law for those states that agree to accept them. Rules of customary international law develop when the actions of states, their general and consistent practices, demonstrate their implied consent to those rules. General principles of law, especially when common to the laws of many nations, can also be applied at the international level. Judicial decisions and scholarly writings are recognized as secondary sources of international law, and are especially useful as indicators of changes in customary international law. International crimes, and the other substantive aspects of international criminal law, emerge from these same sources.

Public international law is predominantly state-centric both in the sense that it is based on the consent of states and also because its central focus has always been the rights and obligations of states. According to the well-established and recently codified law of state responsibility,<sup>1</sup> any state's violation of its international legal obligations entails legal consequences.

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<sup>1</sup> For the Articles on Responsibility of States for Internationally Wrongful Acts and the ILC

But the law of state responsibility says nothing about the legal responsibility of individual persons for international crimes,<sup>2</sup> therefore the progress of international criminal law has required the development of a whole new field of public international law. International criminal law is largely unconcerned with state responsibility, focusing instead on the criminal responsibility of those individuals who commit international crimes.<sup>3</sup>

It is impossible to introduce the development of individual criminal responsibility in international law without referring, at least briefly, to the unique 1474 precedent of Peter von Hagenbach, Governor of Breisach, in southern Germany. In that year he was charged with ‘trampling under foot the laws of God and man’ for acts including murder, rape, and ‘orders to his non-German mercenaries to kill the men in the houses where they were quartered so that the women and children would be completely at their mercy’.<sup>4</sup> He was tried by an international panel of 28 judges, and after his conviction for multiple crimes, stripped of his knighthood and executed. This singular historical example nonetheless illustrates that an international criminal trial for atrocities was viewed as an appropriate option well prior to the formal birth of the nation-state system circa 1648. It would be centuries before the states at the center of that new system would once again resort to an international criminal trial.

Traditionally, international law has defined very few crimes, proscribing only acts generally viewed as a serious threat to the interests of the international community as a whole. For centuries, piracy has been recognized as an international crime under customary international law. Slave trading joined the list at the end of the nineteenth century when that practice was outlawed by treaty.

## **Comparative Law**

Criminal law developed first at the national level. Its principles emerged from philosophy and government, grew through practice and experience and were spread by forces ranging from violent revolution to their peaceable incorporation into constitutions and legislation. The US Constitution’s Bill of Rights and France’s 1789 Declaration of the Rights of Man and of the Citizen are examples of this. Each reflects philosophical notions of justice which were

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Commentary to the Articles, see Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), reprinted in James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (2002) (hereinafter ‘ILC Articles on State Responsibility’).

<sup>2</sup> With regard to individual criminal responsibility, the International Law Commission (ILC) has merely observed as follows: ‘The term “individual responsibility” has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.’ ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001) (hereinafter ‘ILC Commentary’) Commentary on Article 58, para. 3.

<sup>3</sup> In the course of its attempts to codify the law of state responsibility the International Law Commission (ILC) did explore the possibility of defining state crimes under international law. The attempt was controversial and was omitted from the final version of the Articles on State Responsibility adopted by the ILC. This matter is briefly discussed in notes 38 and 39 *infra* and the associated text.

<sup>4</sup> For more on this case and for a good discussion of the development of individual criminal responsibility under international law, see Edoardo Greppi, *The Evolution of Individual Criminal Responsibility under International Law*, 835 INT’L REV. RED CROSS 531 (1999), available at [www.icrc.org/web/eng/siteeng0.nsf/html/57JQ2X](http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ2X).

invoked to justify political and social revolution before being enshrined in a new constitutional framework of laws, notably including criminal law. From their national origins, basic principles of criminal law have percolated up into the international legal arena via their incorporation into treaties and their acceptance, based on state practice, as general principles of law or even as part of customary international law.

Inevitably, international criminal law has borrowed from the rules, principles and ideas to be found within the domestic legal systems of states, adapting the best of these as the basis of individual criminal responsibility under international law. This method of borrowing from another legal system is the essence of comparative law.<sup>5</sup> The Statute of the International Court of Justice identifies 'the general principles of law recognized by civilized nations' as a formal source of international law.<sup>6</sup> Thus, comparative law is a source of international law at least insofar as it facilitates the identification of legal principles common to national legal systems.<sup>7</sup> It is important to keep in mind that, beyond this formal source, an ultimate material source of the general principles of law lies in philosophical notions of right and justice.

National systems of criminal justice can be divided into at least two very different models, that is the Anglo-American common law model or the civil law model familiar on the continent of Europe. National criminal law can vary widely even among states both following the same one of these two models. The fact is that national legal systems of criminal law do not necessarily share the same general principles, and this complicates the task of building a system of international criminal law which is truly international.

Two overarching principles of criminal law, both deeply rooted in comparative law and philosophy, are the principle of culpability and the principle of legality.<sup>8</sup> These principles underlie most of the general principles of criminal law codified into the Rome Statute of the International Criminal Court (ICC), but even they are not universally recognized as general principles of national, or international, criminal law.

### Principle of legality

The principle of legality, considered to be fundamental to the rule of law on the European

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<sup>5</sup> 'The utility of comparative law ... The only serious answer, it seems to me, is that the utility is the improvement which is made possible in one legal system as a result of knowledge of the rules and structures in another system. This improvement may occur in various sways ... What these ways all have in common is that they concern borrowing. Comparative law as a practical study is therefore about legal transplants, the desirability and practicality of borrowing from another legal system.' Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE LJ 313, 317–18 (1978).

<sup>6</sup> Statute of the International Court of Justice, 26 June 1945, art. 38(1)(b), (c), 59 Stat. 1055, 1060, 3 Bevens 1153, 1187.

<sup>7</sup> 'The basic notion is that a general principle of international law is some proposition of law so fundamental that it will be found in virtually every legal system. When treaties and customary international law fail to offer a needed international rule, a search may be launched in comparative law to discover if national legal systems use a common legal principle. If such a common legal principle is found, then it is presumed that a comparable principle should be attributed to fill the gap in international law.' MARK JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 56 (4th edn, Aspen Publishers, 2003).

<sup>8</sup> See Nils Jareborg, *Criminal Responsibility: Criminalization as Last Resort (Ultima Ratio)*, 2 OHIO ST. J. CRIM. L. 521, 522 (2005): 'The principle of legality (*nulla poena sine lege*) and the principle of culpability (*nulla poena sine culpa*) are often mentioned as the basic pillars of modern criminal law, but usually only the first of these is given any legally binding status in relation to the legislator.'

continent,<sup>9</sup> is rarely referred to as such in the United States.<sup>10</sup> Nonetheless, the underlying concept is as well known in that country as it is in Western Europe. A rare US district court decision that does directly refer to the principle of legality observes that it ‘has historically found expression in the [US] criminal law rule of strict construction of criminal statutes, and in the [US] constitutional principles forbidding *ex post facto* operation of the criminal law, [and] vague criminal statutes’.<sup>11</sup>

The ICC Statute does not refer to the principle of legality by name, but that principle is reflected in both article 22 of the ICC Statute, *nullum crimen sine lege* (no crime without law), and in article 23, *nulla poena sine lege* (no penalty without law). These are two different expressions of the principle of legality.

### **Principle of culpability**

The principle of culpability expresses a moral theory of responsibility and punishment which essentially holds that ‘[t]he equation of criminal responsibility with moral blameworthiness is the primary justification for imposing criminal sanctions’.<sup>12</sup> This notion is broadly, but not universally,<sup>13</sup> accepted as the basis of criminal law. In many countries the principle of culpability is seen as a fundamental precept of criminal law, requiring that moral culpability be the basis for the imposition of individual criminal liability and that the severity of any sentence imposed be likewise based on the moral culpability of the actor concerned.<sup>14</sup>

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<sup>9</sup> Stanislaw Pomorski notes that the principle of legality, ‘*nullum crimen, nulla poena sine lege*’ is considered as fundamental to the rule of law by all penal systems of continental Europe. It is commonly understood as including at least four requirements: 1) making statutory law the exclusive source of criminalization; 2) prohibition of criminalization by analogy; 3) prohibition of *ex post facto* laws; and 4) a requirement of definiteness of criminal statutes.’ Stanislaw Pomorski, *Review Essay: Reflections on the First Criminal Code of Post-Communist Russia*, 46 AM. J COMP. L 375, 384 (citing a work by Hans-Heinrich Jescheck in Polish).

<sup>10</sup> See Jordan J. Paust, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: It’s No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L REV. 657, 669 (1997) (noting that US court cases have hardly ever referred to *nullum crimen sine lege, nulla poena sine lege* or to the principle of legality).

<sup>11</sup> *United States v. Walker*, 514 F. Supp. 294, 316–17 (E.D. La. 1981).

<sup>12</sup> See John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J CRIM. L 1, 21 (1997): ‘The equation of criminal responsibility with moral blameworthiness is the primary justification for imposing criminal sanctions’, citing H.L.A. Hart’s statement that ‘it is necessary to be able to say on good conscience in each instance in which a criminal sanction is imposed for a violation of law that the violation was blameworthy and, hence, deserving of the moral condemnation of the community’. Henry M. Hart, Jr, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS 401, 412 (1958).

<sup>13</sup> See John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L REV. 111, 112 (1996), ‘criminal law is not explained by moral individual culpability’.

<sup>14</sup> See Pomorski, note 9 *supra*, at 385. (‘The principle of culpability is recognized in European democracies as a fundamental precept of criminal law. Since criminal sanction expresses social condemnation, it must be personally deserved by an actor. Consequently, not only must the ascription of responsibility be contingent upon a finding of personal culpability, but the severity of punishment must not exceed the limits of actor’s culpability. Preventive goals of criminal punishment may be pursued only within the limits marked by culpability of an actor. This way the culpability principle works as a restraint on the government, as a safeguard against inflicting punishment on undeserving individuals for some purely pragmatic reasons.’)

The ICC Statute does not mention the principle of culpability by name, much less identify it as a general principle of criminal law. Nonetheless, the principle is reflected in many articles of the Statute, perhaps most clearly in article 30 on the mental element, or *mens rea*. This article restricts criminal responsibility before the ICC to those who have intentionally committed the material elements of a crime, with knowledge or awareness of the likely consequences.<sup>15</sup> These, of course, are basic elements of culpability.

## International Humanitarian Law

International humanitarian law originated in the nineteenth century, a time when a 'state-centric'<sup>16</sup> concept of international law prevailed. The law of nations<sup>17</sup> of that era was generally believed to define rights and duties for states but not for individuals, and so the law of armed conflict, as it first emerged, did not formally recognize the rights of individuals or directly provide for individual criminal responsibility for any violations.

An international humanitarian law defining and regulating individual criminal responsibility differs substantially from one which merely defines the legal obligations of states *inter se*. In order to develop, international criminal law has often needed to bridge this conceptual gap through a functional adaptation of the norms of international humanitarian law.

In 1863, President Abraham Lincoln signed the Lieber Code, the first real codification of the customary laws of war. It set out a broad range of rules formulated as Instructions for the Government of Armies of the United States in the Field.<sup>18</sup> Among other things, the Lieber Code called for the humane and ethical treatment of populations in occupied areas, forbade the use of poisons and the use of torture, described the rights and duties of prisoners of war, and distinguished between the permissible and impermissible means to attain the ends of warfare. The substance of the Lieber Code was incorporated into treaty in the 1907 Hague

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<sup>15</sup> See Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, UN Doc. A/CONF 183/9\*, 37 ILM 1002 (1998), corrected up to 16 January 2002, available at [www.icc-cpi.int/](http://www.icc-cpi.int/). ICC Statute, art. 30, on the mental element provides: '1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) in relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.'

<sup>16</sup> See Bartram S. Brown, *The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHICAGO-KENT L REV. 203, 204 (1992) (discussing the 'state-centric' nature of international law).

<sup>17</sup> Mark Janis argues that 'the law of nations of the seventeenth and eighteenth centuries [was] a law common to individuals as well as to states' which developed into an international law of narrower scope in the era of nineteenth-century positivism. Janis notes that in 1789, when Jeremy Bentham invented the expression 'international law' in his INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, he offered the term as a replacement for the older term 'law of nations' and that Bentham incorrectly assumed that, under either name, the scope of that law was limited to the relations between states. This contributed to the narrow scope of international law which prevailed in the nineteenth century. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 228–34 (2nd edn, 1993).

<sup>18</sup> Instructions for the Government of Armies of the United States in the Field (Lieber Code of 1863), prepared by Francis Lieber, Correspondence, Orders, Reports and Returns of the Union Authorities from January 1 to December 31, 1863 #7, OR Series III, vol. III [S# 124], General Orders No. 100.

Regulations, which still did not address the issue of individual criminal responsibility under international law.

The essential purpose of international humanitarian law is to protect individuals in time of war.<sup>19</sup> To do so effectively, it should be applied as international criminal law to the broadest possible range of international and internal armed conflicts. Thus, as notions of natural and inalienable rights unfolded in the nineteenth century, subjecting even the conduct of devastating wars to civilizing rules of humanity, it was inevitable that there would eventually have to be a criminal law aspect. International law is still largely state-centric, but since individuals commit international crimes, international criminal responsibility is essential if these crimes are to be addressed effectively. Without it the system of international law would on its face seem to be incomplete. The 1474 prosecution of Peter von Hagenbach presaged this truth.

### **International Human Rights Law**

International human rights law is a relatively new part of international law, and its focus upon individual rights makes it less state-centric than general international law. The idea of universal human rights has its origins in concepts of natural rights and the inherent dignity of the human being, but the international law of human rights has developed well beyond its philosophical origins.

The horrors of the Nazi holocaust brought home to many the need for an international law of human rights. When concerned people and governments abroad protested the treatment of Jews and other oppressed groups in Germany, apologists for the Nazi regime could reject these protestations by characterizing the issue as a matter within the domestic jurisdiction and national sovereignty of the German state. Although the genocidal 'Final Solution' was morally abhorrent and unmistakably wrong, its illegality under positive international law was less clear. The inadequacy of the existing positive international law became apparent, and this provided the impetus for changes to come.

Since the Second World War there has been a major thrust toward the enactment of a positive international law of human rights. By articulating human rights norms in treaties and other international normative instruments, states and international organizations have done more than simply create a few more rules of positive international law. They have begun to transform the nature of the international system.

The United Nations Charter represented a major advance in the codification of the international political order, and it did much to develop the international legal order as well. Promoting and encouraging respect for human rights and fundamental freedoms for all is explicitly mentioned as one of that organization's purposes,<sup>20</sup> and thus human rights were for the first time definitively declared to be a matter of international concern. On the other hand, the Charter is not very specific about the human rights and freedoms to be promoted, or about any specific obligations of states relating to human rights.

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<sup>19</sup> 'It is the object of international humanitarian law to regulate hostilities in order to attenuate their hardships. Humanitarian law is that considerable portion of international law which is inspired by a feeling for humanity and is centered on the protection of the individual in time of war.' JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 1 (1985).

<sup>20</sup> See the Preamble to the UN Charter, and art. 1(3).

Another problem is that the Charter also expresses principles which can be invoked against international action to protect human rights. It reaffirms the 'sovereign equality' of UN member states,<sup>21</sup> and the United Nations's lack of authority to intervene in the domestic jurisdiction of its members.<sup>22</sup> The latter two provisions serve to reinforce the argument that state sovereignty should preclude any intrusive international action for the protection of human rights.

Some of these deficiencies were remedied when the Universal Declaration of Human Rights<sup>23</sup> was adopted by the UN General Assembly in 1948, and the post-Charter evolution of international human rights norms and procedures began. The Universal Declaration proclaims itself 'as a common standard of achievement for all peoples and all nations'<sup>24</sup> in the field of human rights, and it is, in fact, the most frequently cited standard of international human rights. But as a resolution of the UN General Assembly, it is formally non-binding, and this raises the question of its effect upon the development of international human rights law.

Georges Abi-Saab has noted that the normative effect of UN General Assembly resolutions depends upon three factors, i.e. the degree of consensus behind the resolution, the degree of concreteness of the normative language in the resolution, and the extent to which mechanisms of implementation have been provided for.<sup>25</sup> The Universal Declaration was adopted by the General Assembly with no negative votes (although there were eight abstentions); thus, the consensus behind that resolution was very strong. Today, more than 60 years after the adoption of the Declaration, the international consensus on the international human rights standards it sets out remains strong. As far as concreteness is concerned, the Universal Declaration represents a vast improvement over the general human rights language found in the UN Charter.

A large number of international human rights treaties, such as the International Covenant on Civil and Political Rights,<sup>26</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>27</sup> and the Convention Against Torture,<sup>28</sup> have expanded and clarified the scope of international human rights law. Unfortunately, this progress in the normative development of

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<sup>21</sup> UN Charter, art. 2, para. 1, states that 'The Organization is based on the principle of sovereign equality of all its Members.'

<sup>22</sup> UN Charter, art. 2, para. 7 states that 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, or shall require the Members to submit such matters to settlement under the present Charter.'

<sup>23</sup> General Assembly Res. 217A (III), 10 December 1948, UN Doc. A/810/71 (1948).

<sup>24</sup> *Ibid.* Preamble.

<sup>25</sup> See Georges Abi-Saab, *Introduction*, in LES RESOLUTIONS DANS LA FORMATION DU DROIT INTERNATIONAL DU DÉVELOPPEMENT, Etudes et Travaux de l'IUHEI No. 13 9–10. Geneva, Institut Universitaire de Hautes Etudes Internationales, 1971).

<sup>26</sup> International Covenant on Civil and Political Rights (ICCPR), General Assembly Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976.

<sup>27</sup> International Covenant on Economic, Social and Cultural Rights, General Assembly Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) 49, UN Doc. A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976.

<sup>28</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Res. 39/46, 39 UN GAOR Supp. (No. 51) 197, UN Doc. A/39/51 (1984), entered into force 26 June 1987.

human rights has not been matched by the development of truly effective mechanisms of implementation.

International human rights law is relevant to international criminal law in a number of ways. First and foremost, international human rights law defines international fair-trial standards<sup>29</sup> that apply throughout international criminal law and which have been incorporated into the Rome Statute of the International Criminal Court.<sup>30</sup> These rules reflect a broad international consensus on the principles of legality and culpability referred to in the discussion of comparative law above. As a matter of substantive criminal law, the Convention Against Torture (CAT) requires states parties to make torture a crime under their domestic law<sup>31</sup> and to prosecute or extradite those suspected of committing acts of torture as defined in that treaty.<sup>32</sup> For the most part, the basic rules of the CAT have been accepted by states as part of customary international law, and therefore bind all states. Similar rules apply to the crime of genocide, which is also defined by treaty.<sup>33</sup>

## A FEW KEY THEMES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW

### Development of General Principles of International Criminal Law

The identification and clarification of the general principles of international criminal law is an important goal,<sup>34</sup> but making progress towards that goal has not been easy. While it is clear that general principles of law recognized by civilized nations may be a source of international law, it is far less clear what general principles of *criminal* law have been recognized by the major legal systems of the world. Identifying them is an exercise in comparative law. The task is complicated by the fact that general principles of criminal law have developed in national systems which vary a great deal. In addition to the differences between the two best-known models, i.e. common law and civil law, there are also legal systems reflecting Islamic law and many other variations. International criminal law has had very little time to develop independently of that diverse array of national legal systems, as most of that development has come during the past 20 years. In general, there is a lack of clarity and consensus about the relationship between general principles of law, general principles of international law, general principles of criminal law, and general principles of international criminal law.

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<sup>29</sup> See ICCPR, art. 14, for the most generally accepted codification of international fair trial rights.

<sup>30</sup> See David Weissbrodt and Kristin K. Zinsmaste, Chapter 11.

<sup>31</sup> 'Each State Party shall ensure that all acts of torture are offences under its criminal law.' Convention Against Torture, art. 4(1).

<sup>32</sup> *Ibid.* art. 5.

<sup>33</sup> See Mark Drumbl, Chapter 3.

<sup>34</sup> See Kai Ambos, *Remarks on the General Part of International Criminal Law*, 4 J INT'L CRIM. JUSTICE 660 (2006), calling for more focus upon the identification and application of the general principles of international criminal law, in order to ensure consistency with fundamental principles of criminal law including the principles of legality and culpability.

General principles of law recognized by civilized nations are, as noted above,<sup>35</sup> a source of international law, whereas general principles of international law are, at least arguably, ‘the principles inherent in the international legal system’.<sup>36</sup> What Cassese refers to as ‘general principles of criminal law recognized by the community of nations’<sup>37</sup> is presumably a subset of the general principles of law mentioned above which can be identified by comparative analysis, but it seems clear that there is as yet no consensus on a complete set of such principles. The general principles of international criminal law will therefore need to be built and agreed upon over time. The ‘general principles of criminal law’ set out in the Rome Statute of the International Criminal Court were the subject of diplomatic negotiations and will provide the basis for further development of relevant general principles in the future.

### **State Responsibility Versus Individual Criminal Responsibility: The State or Entity Behind International Crimes**

As noted above, the focus of international criminal law is establishing the criminal responsibility of individuals for their violations of international law which constitute international crimes. Since international crimes are committed by and attributed to individuals and not states, international criminal law is not a matter of state responsibility. In the course of its decades-long effort to codify the international law of state responsibility, the International Law Commission considered the notion that states themselves could face penal, as well as delictual, responsibility for certain especially serious violations of international law.<sup>38</sup> The concept of so-called ‘crimes of state’ was ultimately so sensitive and controversial that no consensus could be achieved on the subject.<sup>39</sup> But the International Law Commission’s decision to exclude language about state crimes from the final version of its articles on state responsibility did not resolve the underlying tensions.

The fact is that governments may feel threatened by the criminal prosecutions of their officials or other nationals even if this does not entail a formal determination of state responsibility. At the conclusion of the Rome diplomatic conference, the US government was highly critical of the Rome Statute which had just been adopted. At one point, US officials argued that if the ICC could try a US national without the consent of the US government, the treaty would effectively be imposing obligations upon the United States as a non-party state.<sup>40</sup>

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<sup>35</sup> See the discussion of general principles of law as referred to in Article 38 of the Statute of the International Court of Justice, art. 38 note 6 *supra* and the accompanying text.

<sup>36</sup> Cassese states that ‘[g]eneral principles of international law consist of principles inherent in the international legal system’. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 31 (2003).

<sup>37</sup> *Ibid.* 32.

<sup>38</sup> Compare ‘crimes of state’ in the meaning of art. 19 of the International Law Commission’s Draft Articles on State Responsibility (Part 1), adopted by the ILC on first reading, [1976] 2 YB Int’l L Comm’n, Pt 2, 73, 95–6, UN Doc. A/CN.4/SER.A/1976/Add.1 (Pt 2).

<sup>39</sup> See ILC Commentary, note 2 *supra*, at 279–81.

<sup>40</sup> Compare comments by US Ambassador David Scheffer that ‘I can tell you that it would be bizarre, utterly bizarre consequence for governments to think that this treaty can be adopted and brought into force with the presumption that it will cover governments that have not joined the treaty regime. That is bizarre. That’s weird. That is unheard of in treaty law.’ Davod Scheffer, Ambassador-at-Large For War Crimes Issues, On-the-Record Briefing at the Foreign Press Center, 31 July 1998, available at [www.amicc.org/docs/Scheffer7\\_31\\_98.pdf](http://www.amicc.org/docs/Scheffer7_31_98.pdf).

Equating potential ICC jurisdiction over individuals with the idea that non-party states are being inappropriately ‘bound’ is a clever rhetorical device, but as legal reasoning it is completely untenable. This argument conflated the potential individual criminal responsibility of a US national with a legal obligation of the United States under the Rome Statute. Like any treaty, the Statute creates obligations for states parties: these include the obligations to comply with requests for the surrender and transfer of suspects to the Court,<sup>41</sup> to provide requested evidence,<sup>42</sup> to give effect to fines or forfeitures ordered by the Court,<sup>43</sup> and to pay assessments for the regular budget of the Court.<sup>44</sup> None of these obligations applies to any non-party state, nor does the exercise of criminal jurisdiction against an individual accused formally bind or condemn the state of his nationality.

Recent codification efforts have been careful to distinguish state responsibility from individual criminal responsibility. The Rome Statute of the ICC clarifies that ‘[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law’,<sup>45</sup> while the ILC Articles on State Responsibility affirm that ‘[t]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State’.<sup>46</sup>

Despite the clear legal distinction between individual criminal responsibility, on the one hand, and state obligations and state responsibility, on the other, in some situations both types of responsibility/accountability may indeed be involved.<sup>47</sup> In one example of this ‘duality of responsibility’<sup>48</sup> the International Court of Justice (ICJ) concurred with the judgment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) that the 1995 massacre of Muslim men by Bosnian Serbs in Srebrenica was genocide,<sup>49</sup> in the course of ruling that the Serbian state had breached international law by failing to prevent and punish that genocide.<sup>50</sup> The court’s decision acknowledged a link between state responsibility and individual responsibility when it affirmed that ‘a State can be held responsible for breaching the obligation to

<sup>41</sup> ICC Statute, art. 89(1).

<sup>42</sup> *Ibid.* art. 93.

<sup>43</sup> *Ibid.* art. 109(1).

<sup>44</sup> *Ibid.* art. 117.

<sup>45</sup> *Ibid.* art. 25(4).

<sup>46</sup> ILC Articles on State Responsibility, *supra* note 1, art. 58.

<sup>47</sup> As the International Law Commission has observed: ‘Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.’ ILC Commentary, note 2 *supra*, Commentary on Article 58, para. 3.

<sup>48</sup> ‘The Court observes that that duality of responsibility continues to be a constant feature of international law.’ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment of 26 February 2007, 65, para. 173 (hereinafter ‘Genocide Case’), available at [www.icj-cij.org/docket/files/91/13685.pdf](http://www.icj-cij.org/docket/files/91/13685.pdf).

<sup>49</sup> ‘The Court concludes that the acts committed at Srebrenica falling within Article II(a) and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.’ *Ibid.* 108, para. 297.

<sup>50</sup> *Ibid.* 158, para. 438, and 161, para. 450.

prevent genocide only if genocide was actually committed'.<sup>51</sup> A similar logic will no doubt apply if and when the ICC decides to apply its recently agreed definition of aggression. Thus, an individual will be subject to prosecution for the international crime of aggression only if the state linked to him bears responsibility for prohibited acts of aggression.<sup>52</sup> Any government would be likely to resist the prosecution of its national leader or leaders for a crime implicating the responsibility of the state itself.

## CONCLUSIONS

International criminal law is a relatively young area of law that has developed rapidly since the ICTY was created in 1994. Looking ahead, it is likely that the law, practice and institutions of international criminal law will continue to develop well into the future. No particular result, however, is inevitable. It is possible that the ICC will evolve into a stronger, more independent and effective institution of international justice; less beholden to states, and to the UN Security Council, than international criminal tribunals have proved to be so far. It is also possible that the ICC will fail to survive as a viable and credible institution.

The dynamic development and continuing uncertainty that together characterize the present state of international criminal law present both challenges and opportunities for individuals, NGOs and states. The opportunity lies in the chance to participate in shaping a key aspect of the future international order and hopefully in making it better. The challenge is to do so in a principled way consistent not only with the requirements of criminal justice, but also with agreed limits on international authority.

### **Advancing the Rule of Law Within the Agreed Limits of International Authority**

So long as notorious impunity for international crimes endures, considerations of justice will argue for greater and stronger international institutions to remedy the situation. Although it is essential, moral theory alone cannot be the basis of effective and authoritative international institutions of justice. A certain degree of international consensus is necessary as well. The ICC Statute has been accepted by more than 114 countries, and thus its legitimacy extends to over half the states in the international community. But what of the many states not accepting the ICC Statute, a group including the United States, China, India and Russia? These countries represent most of the world's population, possess most of its military force and hold three vetoes within the UN Security Council as presently constituted. Their reluctance to endorse the ICC is significant and cannot be ignored. The ICC was established based on a broad but limited consensus of states. It must now operate within the jurisdictional constraints that result from these limits.

The ICC Statute establishes an institution with extremely restricted jurisdiction, limited only to specified criminal acts committed on the territory of, or by a national of, a state party and in situations where there is no state willing or able genuinely to prosecute the case.<sup>53</sup> In

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<sup>51</sup> *Ibid.* 154, para. 431.

<sup>52</sup> See Faiza Patel King, Chapter 6

<sup>53</sup> See ICC Statute, art. 17. For an in-depth discussion of how this system of 'complementary jurisdiction' is supposed to work and of how it is working in practice, see Sarah Nouwen, Chapter 9.

many situations, such as that involving the atrocities in Darfur, this will not be enough jurisdiction to permit effective action.<sup>54</sup> The UN Security Council ultimately referred the situation in Darfur to the ICC, thereby granting it extraordinary jurisdiction based on the Council's authority under Chapter VII of the UN Charter.<sup>55</sup> The experience of the ad hoc tribunals for the Former Yugoslavia and Rwanda has already shown that international criminal courts can function with the full support and authority of the UN Security Council. It remains to be seen how effectively the ICC can operate in situations where that support is not forthcoming.

Institutions and officials involved in international criminal law should strive to advance the rule of law and to be effective, but without exceeding the agreed limits of their authority. Judge Georges Abi-Saab, writing in a separate opinion of the ICTY Appeals Chamber in 1995, briefly opined that the international judges of the ICTY 'are ... afforded a unique opportunity to assume the responsibility for the further rationalisation' of the various categories of international crimes 'from the perspective of the evolving international legal order'.<sup>56</sup> His point is that, at times, international judges should use their authority to build, develop and reorganize international law. Our international legal order provides few opportunities for such a reasoned assessment because it is decentralized and chaotic in that there is no international legislature, no international executive, and the existing international courts have little effective jurisdiction.

But while international judges may rightly promote more effective international institutions, it is important for international judges, prosecutors and other officials to act within the agreed limits of their authority. This is another aspect of the principle of legality discussed above. Respect for this principle does not preclude judges from occasionally advancing the development of international law through 'teleological interpretation' of treaties in the light of their object and purpose. Inevitably, however, there must be limits on the discretion of judges, especially when used to extend their own authority. In fact, recent developments regarding the ICC Statute demonstrate that teleological interpretation may sometimes require a more restrictive, rather than a more expansive, interpretation of a treaty text. The ICC's radical redefinition of its own complementary jurisdiction is a case in point.

The text of the Rome Statute of the ICC was agreed only after extended negotiations involving a careful balance between the jurisdiction of the ICC and the national criminal jurisdiction of states. If the practice of the ICC does not scrupulously respect this balance, the ability to reach compromise in future international negotiations will be undermined. There is ample reason for concern in this regard.

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<sup>54</sup> In the case of Darfur, the same state, Sudan, is both the territorial state where the alleged crimes were committed, and the state of nationality of those accused. Sudan is not a party to the ICC Statute, therefore under the ICC Statute, the only possible basis for ICC jurisdiction over crimes in Darfur is a referral by the UN Security Council.

<sup>55</sup> See UN Security Council Res. 1593, 31 March 2005, UN Doc. S/RES/1593 (2005), referring the situation in Darfur to the ICC.

<sup>56</sup> *Prosecutor v. Tadic*, Case IT-94-1-AR72, ICTY, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, 2–3. Judge Abi-Saab also argued (at 5) that 'with a view to introducing a modicum of order among the categories of crimes falling within the substantive jurisdiction of the Tribunal' the Appeals Chamber should have followed 'a teleological interpretation of the Conventions in the light of their object and purpose to the effect of including internal conflicts within the regime of "grave breaches".'

Perhaps the most fundamental compromise leading to agreement on the ICC Statute concerned the relationship between the criminal jurisdiction of states and the so-called ‘complementary’ jurisdiction of the ICC. During the Rome negotiations, complementary jurisdiction was understood to mean that the Court can exercise its jurisdiction over a case only if the case is not being and has not been genuinely investigated or prosecuted by any state.<sup>57</sup> But thus far, the jurisprudence of the ICC suggests that its judges are taking an approach to complementary jurisdiction which could deprive states of any real possibility of challenging ICC jurisdiction by exercising their own criminal jurisdiction. The Court has ruled that the complementarity assessment is case, and not situation, specific. In practice this means that even if national courts genuinely and effectively pursue a full range of cases within the context of a specific ‘situation’, to preclude ICC jurisdiction, those national proceedings must be found by the ICC to concern the same ‘conduct’, the same ‘person’ and perhaps even the same ‘incident’. Since it is difficult for any state to anticipate exactly which cases the ICC Prosecutor will ultimately choose to bring regarding a given overall situation, states may find it difficult, or even impossible, to exclude ICC jurisdiction by exercising their national criminal jurisdiction under the principle of complementarity.<sup>58</sup>

Sarah Nouwen argues persuasively, based on the text of the ICC Statute, that popular notions of complementarity are simplistic and misleading.<sup>59</sup> Her technical argument is quite sound, as is that of the ICC judges who have so far fleshed out the application of ICC admissibility/complementarity in practice. From a broader perspective, however, the degree of legal hair-splitting involved in that argument seems to betray the true intent of the parties at the Rome ICC Conference.<sup>60</sup> International criminal courts, like national courts, should exercise judicial restraint where appropriate. An appropriate time to do so may be now, with regard to the sensitive issue of balancing national and international criminal jurisdiction. ‘Popular notions of complementarity’ may appear simplistic in light of the actual text of the ICC Statute, but it was on the basis of just these popular notions that states were persuaded to adopt the Statute in Rome and then subsequently to ratify it. The arguments that effectively carried the day in bringing the ICC into existence cannot be irrelevant to the interpretation and application of the ICC Statute.

The relevant object and purpose of the ICC Statute, for purposes of its teleological interpretation, should include not only advancing international justice, but also ensuring effective ICC deference to the national jurisdiction of those states genuinely willing and able to prosecute serious international crimes. In general, these goals are not incompatible. Prioritizing the former over the latter, even when there is no evidence of a clear conflict between them, could have unintended negative consequences, not only for international justice, but for international law and institutions in general.

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<sup>57</sup> See ICC Statute, art. 17(1)(a)(b)(c), (2) and (3).

<sup>58</sup> Sarah Nouwen, Chapter 9, discusses this possibility in much greater detail.

<sup>59</sup> Nouwen argues that ‘shorthand definitions of complementarity according to which ‘the Court may assume jurisdiction only when national jurisdictions are unwilling or unable to exercise it’ are misleading’ (citing and critiquing the definition of complementarity set out in M.H. Arsanjani and W.M. Reisman, *Developments at the International Criminal Court: The Law-in-Action of the International Criminal Court*, 99 AMERICAN JIL 385, 396 (2005)).

<sup>60</sup> Nouwen notes that ‘[t]he definition of “case” was not elaborated upon during the negotiations nor in the first commentaries on the Statute’.

### **International Justice Depends Primarily upon the National Jurisdiction of States**

The pioneering work of international criminal tribunals has kick-started the cause of international justice, but it has also exposed the limits of these same institutions. International trials are slow, expensive and ultimately they depend upon the cooperation of states. National courts must be a big part of any general strategy for the enforcement of international criminal law, and a proper balance must be found between national and international criminal jurisdiction.

The establishment and functioning of international criminal courts and tribunals is certainly an important historic accomplishment, but this success should not blind us to the fact that these international institutions have only limited economic and political resources which should be used wisely. International prosecutors, in particular, need to be strategic in focusing upon the most important cases.

In most cases the only way to enforce international criminal law is through the use of national courts. International criminal courts are needed to complement this mechanism, not to replace it. The essays in this volume highlight the astonishing pace of development of international criminal law over the past two decades, as well as the many contentious issues yet to be resolved. Answers to all these questions will not come overnight. One can only hope that the best way forward will eventually emerge from the practice of states and that of the evolving institutions of international criminal law.