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Accountability for Human Rights Atrocities in International Law

Beyond the Nuremberg Legacy

Third Edition

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Individual Accountability for Human Rights Abuses: Historical and Legal Underpinnings

The international legal community is beset today with talk of accountability. Governments, international organizations, non-governmental organizations, and scholars speak of the need to hold individuals responsible for official acts that violate the most cherished of international human rights. Some study the nature of various infractions with an eye toward codification; others seek to create or engage mechanisms for trying or otherwise punishing individuals. Their common mission is based on a shared understanding that international law has a role to play not only in setting standards for governments, non-state actors, and their agents, but in prescribing the consequences of a failure to meet those standards.

To understand the promises and limitations of individual accountability as a means to protect human dignity requires treating it as a discrete subject of international law. As such, it demands appraisal of a complex amalgam of law and a wide spectrum of sanctioning processes that transcend orthodox divisions of subjects within international law. Its theory, doctrine, and practice spring from legal sources and events both ancient and modern; and ultimately an appreciation of the topic turns considerably on insights beyond international law, whether political or philosophical in origin. Before any examination of the substantive law and mechanisms can proceed, we begin with the evolution of this concept and the legal threads involved.

A Brief History of Individual Accountability

The law is no stranger to the idea of holding individuals responsible for egregious conduct toward their fellow human beings. Domestic criminal law, and part of civil law, evolved precisely to regulate this behavior. But the application of this law when those committing the conduct acted with the authority of the state has followed a far less certain path. For centuries, in tyrannical states, governmental

officials could act with impunity; and while the rise of liberal government over the past some 300 years has led to an overall improvement in the human rights records of some states, it has not, until very recently, opened the door to punishment of those officials who might continue to violate fundamental individual rights. Exceptions exist, of course, from older times, such as the prominent trials of British soldiers for the killing in 1770 of five citizens of Boston protesting Britain's quartering of soldiers (and the subsequent acquittal of most of them).[1] But the overall historical pattern was effective immunity from prosecution under domestic law for officials carrying out governmental acts. This pattern applied to those following the policies of Stalin, Hitler, or Mao, each with their millions of victims, or those in other countries—including democracies otherwise committed to the rule of law—who resorted with less intensity to murdering, torturing, or otherwise abusing opponents.

International law, for its part, had little to contribute on this issue for most of its history as well. As defined by the positivist school that dominated the field from the late eighteenth century, it governed principally relations between states (and between their sovereigns), with individuals usually at best third-party beneficiaries. The notion that the law would even govern behavior of governments vis-à-vis their own citizens, let alone prescribe accountability for individuals for misconduct, was anathema to the entire exercise. In that respect, internal sovereignty was, until early in the twentieth century, nearly complete and insulated from the law of nations.

The only areas of international law that systematically addressed violations of individual rights by states concerned actions by governments against citizens of *other* states—acts deemed an affront to those states and thus within the ambit of international law.[2] In doctrinal terms, these fell in two areas—the law of state responsibility for injury to aliens, which primarily dealt with disruption of property interests of aliens by foreign states but also included attacks on individual persons; and the laws and customs of war, which recognized certain limitations on the conduct of war that thereby promoted some individual rights in wartime.[3] The latter had ancient origins and applications, dating back at least to the Chinese warrior Sun Tzu in the sixth century B.C.E., its modern incarnation born in the mid nineteenth century with Jean-Henri

[1] *See* 1 PELEG W. CHANDLER, AMERICAN CRIMINAL TRIALS 301–415 (1841, reprinted 1970); HILLER B. ZOBEL, THE BOSTON MASSACRE (1970).

[2] *See generally* Karl Josef Partsch, *Individuals in International Law, in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 957, 959–60 (Rudolph Bernhardt ed., 1995). The only notable exception to this general pattern concerned attempts to abolish slavery, which were based on an abhorrence of the practice, rather than its affront to any state. International law addressed another offense against individuals—piracy—but that crime, by definition, involved persons not under the control of any government. In addition, international law regarded attacks on diplomats as a crime as well. *See, e.g.*, U.S. v. Ortega, 24 U.S. (11 Wheat) 467 (1826).

[3] *See generally* MYRES S. MCDOUGAL, HAROLD D. LASSWELL, AND LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 181–82 (1980).

Dunant's creation of the International Committee of the Red Cross. By the early part of the twentieth century, the Law of The Hague (so named due to the treaties drafted there) had recognized some constraints on methods of warfare, while the Law of Geneva imposed certain duties toward enemy civilians and soldiers no longer engaged in battle.[4] But even the law of war traditionally was mostly silent in terms of mandating specific consequences for individuals who violated it. The 1899 and 1907 Hague Conventions and the 1929 Geneva Convention on prisoners of war lacked any penal provisions, and the 1929 Geneva Convention on the Wounded and the Sick in Armies had only a weak provision.[5] Nevertheless, some states developed sophisticated domestic codes punishing such violations, and prosecution of soldiers for war crimes dates back at least to the Middle Ages.[6]

The shortcomings of international law regarding personal responsibility for government-sponsored abuses of human rights began to change after World War I, and even more so after World War II. This change in the law flowed directly from the new scale of destruction brought about by these global conflagrations and manifested itself in two ways: first, the beginning of a trend in international law directly mandating some individual criminal accountability for violations of the laws of war; and second, the evolution of a corpus of law prescribing limits upon a government's conduct toward its own citizens, in times of peace and war—what is today referred to as international human rights law. These two trends would eventually marry in the Nuremberg trials and their aftermath. (A third constitutive shift in international law, toward the outlawing of war entirely, also transpired during this period.)

With respect to accountability, following World War I, the Allies created a fifteen-member commission to look into the question of war crimes. In its report to the 1919 Preliminary Peace Conference, the majority of the commission found that the Central Powers had committed numerous acts 'in violation of

[4] *See generally* GEOFFREY BEST, WAR AND LAW SINCE 1945, at 39–59 (1994); Leslie C. Green, *International Regulation of Armed Conflict*, *in* 1 INTERNATIONAL CRIMINAL LAW 355, 365–68 (M. Cherif Bassiouni ed., 2d ed. 1999).

[5] *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, art. 30, 118 LNTS 303, 329 (mandating inquiry and that belligerents 'repress it as promptly as possible').

[6] Timothy L. H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime*, *in* THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 31, 32–43 (Timothy L. H. McCormack and Gerry J. Simpson eds., 1997); Yves Sandoz, *Penal Aspects of International Humanitarian Law*, *in* 1 INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 393, 393–401; Leo Gross, *The Punishment of War Criminals: The Nuremberg Trial*, 2 NETH. INT'L L REV. 356, 358 (1955); James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AJIL 70 (1920); *cf.* L. C. Green, *International Crimes and the Legal Process*, 29 INT'L AND COMP. L.Q. 567, 570 (1980) (noting precursors to individual responsibility among classical writers). Among the most significant was the Lieber Code, promulgated by President Abraham Lincoln in 1863. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, *available at* <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>.

established laws and customs of war and the elementary laws of humanity',[7] and the Allies eventually inserted into the Treaty of Versailles three articles providing for the punishment by Allied military tribunals of persons accused of violating the laws and customs of war.[8] However, the Allies never held any trials, accepting instead a small number of trials at Leipzig by the German government, and developments in the law of war did not substantially move toward individual accountability for violations thereof.[9] As for the development of international human rights law, the inter-war period saw the conclusion of numerous treaties aimed at protecting minorities in the many new or redrawn states of Europe. While hardly effective at—and perhaps counterproductive to—stopping the rise of Nazism and the outbreak of World War II, the League of Nations' system of minorities treaties did prescribe clear legal protections for certain citizens vis-à-vis their own government.[10]

Without doubt, however, the watershed for the development of the principle of individual accountability for human rights abuses was the exercise undertaken by the World War II victors following the previously unimaginable atrocities of that conflagration, particularly the Holocaust. The creation of the International Military Tribunal at Nuremberg and the related war-crimes trials evinced a decision by the Allies that individual officials bear personal responsibility for outrageous conduct toward their own citizens and foreigners during wartime and ought to be held accountable. As a result, the IMT Charter provided for individual criminal responsibility for violations of the laws and customs of war, as well as other egregious acts in connection with the war encompassed under the rubric of 'crimes against humanity'. It also criminalized the war itself, and indeed made the initiation of aggressive war the chief crime of the Nazis.[11] The IMT Charter also eliminated the defenses of superior orders, command of law, and act-of-state immunity, thereby subjecting even heads of state to criminal liability. These principles were included in the Charter of the Tokyo Tribunal and in Control Council Law No. 10, the latter of which governed many significant prosecutions of Nazis below the level of those tried before the IMT, and were endorsed by the UN General Assembly in 1946.

[7] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference, March 29, 1919, reprinted in* 14 AJIL 95, 115 (1920).

[8] Treaty of Peace, June 28, 1919, arts. 228–30, 225 Consol. T. S. 188, 285–86. The Treaty also indicted the Kaiser himself for starting the war and provided for his trial, but the Netherlands refused to hand him over for trial. On crimes against humanity, *see* Chapter 3.

[9] Sandoz, *supra* note 6, at 397–98; M. Cherif Bassiouni, *World War I: 'The War to End All Wars' and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT'L L. AND POL'Y 244 (2002).

[10] *See* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 38–52 (1991); FRANCESCO CAPOTORTI, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES 16–26 (1991), UN Sales No. E.91.XIV.2.

[11] IMT Charter, art. 6(a).

Nuremberg had at least three jurisprudential progeny concerning the protection of individuals. First, it paved the way for the International Committee of the Red Cross to lead the effort to codify anew the law of armed conflict, dubbed international humanitarian law, in the 1949 Geneva Conventions and, later, the two 1977 Protocols thereto.

Second, although the IMT Charter, strictly speaking, addressed atrocities only in connection with the war, Nuremberg proved a springboard for the development of international human rights law, as much of the international community came to conclude that a government's treatment of its citizens in peacetime was appropriate for general international regulation. The new United Nations took the lead in developing an international 'bill of rights' and other instruments, eventually to include: the Universal Declaration of Human Rights; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. Oversight mechanisms grew within both international organizations and non-governmental organizations.[12]

Third, Nuremberg also laid the groundwork for further elaboration of international law on individual criminal responsibility for violations of international humanitarian and human rights law. For violations of the law of armed conflict, the Geneva Conventions and Protocol I include provisions for individual culpability for certain violations and obligate states to prosecute offenders.[13] Beyond war, as stated by the UN War Crimes Commission in 1948, the IMT Charter:

> presupposes the existence of a system of international law under which individuals are responsible to the community of nations for violations of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of peoples and individual[s]... constitute international crimes not only in time of war, but also, in certain circumstances, in time of peace.[14]

But the process of elaborating such non-war-related crimes after World War II proved more ad hoc than concerted. As explained further below, the development of human rights treaties creating obligations for states translated into rules

[12] For excellent studies in English, *see generally* McDougal et al., *supra* note 3; Human Rights in International Law: Legal and Policy Issues (Theodor Meron ed., 1984); Guide to International Human Rights Practice (Hurst Hannum ed., 4th ed. 2004); Christian Tomuschat, Human Rights: Between Idealism and Realism (2003); International Human Rights in Context: Law, Politics, Morals (Henry J. Steiner, Philip Alston, and Ryan Goodman eds., 3d ed. 2008).

[13] *See* Chapter 4.

[14] United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War 192–93 (1948).

A study of individual accountability for human rights atrocities as a discrete subject must consider four interrelated bodies of law. To focus on only one or two of these for the sake of some sort of doctrinal clarity is to miss the full picture of individual accountability.

International human rights law

This refers to the body of international law aimed at protecting the human dignity of the individual. Developed in largest part since World War II, it principally seeks to guarantee the rights of persons vis-à-vis their own government, but also protects them to various degrees against other actors in the international community that might violate those rights, whether guerrilla groups, business entities, or terrorists.

International humanitarian law

A far older concept, this body of law is, as noted, synonymous with the law governing the conduct of armed conflict. It addresses both limits on war-making methods (the Law of The Hague) and protection for individuals during wartime or occupation who are not engaged in hostilities (the Law of Geneva).[17] Humanitarian law thus offers minimal protections of human dignity for individuals not vis-à-vis their own governments, but generally vis-à-vis those powers engaged in an armed conflict against those individuals' state of nationality or residence.

International criminal law

We must also appraise the content of this body of law, whose scope has given rise to much debate.[18] For our purposes, the term refers broadly to the international law assigning criminal responsibility for certain particularly serious violations of international law. Although some scholars limit it to responsibility for violations of human rights and humanitarian law,[19] its scope is in fact far wider, to include, for instance, drug crimes and terrorism offenses. This seemingly straightforward definition, however, obscures a core difficulty in clarifying the nature of both

JUSTICE FOR CRIMES AGAINST HUMANITY 107 (Mark Lattimer and Philippe Sands eds., 2003). On whether governments are bound to hold individual officials accountable for human rights abuses, *see* Chapter 7.

[17] On the relationship between these first two bodies of law, *see* Louise Doswald-Beck and Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 INT'L REV. RED CROSS 94 (1993); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AJIL 1 (2004).

[18] For recent treatises devoted to international criminal law, *see* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2d ed. 2008); ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON, AND ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2007); ILIAS BANTEKAS AND SUSAN NASH, INTERNATIONAL CRIMINAL LAW (3d ed. 2007); GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW (2005); KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW (2001).

[19] *See, e.g.*, CASSESE, *supra* note 18, at 12–13.

international criminal law and an international crime—namely, what does it mean to say that international law assigns criminal responsibility?

A conceptual roadblock would appear to bar the way, one that originates in the hybrid nature of the field—a combination of international law and criminal law; for international criminal law involves the inculpation of individuals, but is developed and enforced by the actions of states. It must address, and reconcile, the dichotomies between its two sets of constituent parts: international law's principal focus upon the obligations of states versus criminal law's concern with the obligations of individuals; and international law's general lack of vertical prescription and enforcement processes versus the centrality of both to criminal law.[20] In at least this latter sense, the two fields seem to resemble antipodes more than complements.

Thus, determining the extent to which international law recognizes individual responsibility necessitates an inquiry that takes account of the law's need both to elaborate the crime and to prescribe the role for states. This process requires examining three subsidiary issues that in essence correspond to different strategies for providing international criminal responsibility:

- First, to what extent does international law *directly provide for individual (or other) culpability*?
- Second, to what extent does international law *obligate* some or all states or the global community at large to try and punish, or otherwise sanction, offenders?
- Third, to what extent does international law *authorize* these same actors to try and punish, or otherwise sanction, offenders?

For example, international law can explicitly provide for individual criminality or require states to make an act a crime under domestic law, or both, as does the Genocide Convention. It can obligate states or an international court to carry out prosecutions or punishment, as with the Genocide Convention or the Geneva Conventions, or to extradite or prosecute offenders, as with the Torture Convention.[21] Or it can simply allow states or international courts to try and punish individuals for certain acts, irrespective of normal jurisdictional limits.[22] These strategies have been combined to a certain extent in the Security Council's statutes for the ad hoc tribunals for Yugoslavia and Rwanda and the Statute of the International Criminal Court.[23]

[20] *See* M. Cherif Bassiouni, *An appraisal of the growth and developing trends of international criminal law*, 45 Rev. Int'l Droit Pénal 405, 426–27 (1974); Cassese, *supra* note 18, at 7–9 ('conflicting philosophies' of international law and international criminal law).

[21] *See* Chapter 8, A Jurisdictional Primer.

[22] *See* Yoram Dinstein, *International Criminal Law*, 20 Isr. L. Rev. 206, 222–25 (1985); *cf.* Harvard Research in International Law, Part IV–Piracy, 26 AJIL (Supp.) 739, 757 (1932) (piracy as a crime against the law of nations only in the sense of universal jurisdiction to prosecute).

[23] *See, e.g.*, SC Res. 827, para. 2 (1993) (tribunal's purpose is 'prosecution of persons responsible for serious violations of international humanitarian law'); ICC Statute, arts. 1 ('jurisdiction over persons for the most serious crimes of international concern'), 17 (rules on admissibility).

The methods by which the law provides for individual criminal responsibility can form the basis for various lists of international crimes.[24] The community's reliance on all three strategies suggests that a violation of international law becomes an international crime if the global community intends through any of those strategies (regardless of whether they are implemented through treaty, custom, or other prescriptive method) to hold individuals directly responsible for it.[25] This catholic approach contrasts with methods proffering strict doctrinal criteria that yield a small list of crimes under international law.[26] Yet the debate over the definition of an international crime is ultimately of less importance to the suppression of these acts than the specific strategies and methods chosen by states to provide for individual accountability.[27] The effectiveness of the international law regime will turn on such factors as whether the relevant law mandates or merely authorizes prosecution; and whether it provides for jurisdiction by one state, several states, all states, or an international tribunal.[28]

Although international criminal law shares some of the goals and methods of international human rights and humanitarian law, there is far from a perfect congruence of the first with the other two. Rather, the focus of international human rights law and humanitarian law is upon the prescription of norms for the protection of the individual in peace and war. Those norms are usually formulated as obligations upon states, whether to refrain from certain conduct or to provide remedies in case of their commission. But to the extent that those two bodies

[24] *See, e.g.*, Dinstein, *supra* note 22, at 207–25; Bassiouni, *supra* note 20, at 46–62 (finding twenty-five international crimes); CASSESE, *supra* note 18, at 12–13.

[25] *See Tadić Jurisdiction Appeal Decision*, para. 128; Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554, 562 (1995); BANTEKAS AND NASH, *supra* note 18, at 7–8.

[26] For examples of such approaches, *see* CASSESE, *supra* note 18, at 11–13; WERLE, *supra* note 18, at 25–29; Hans-Heinrich Jescheck, *International Crimes, in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 2, at 1119, 1120–22; Bruno Simma and Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AJIL 302, 308 (1999) (distinguishing between *delicta juris gentium* and direct international responsibility); *see also* International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, Inter-Am. Ct. Hum. Rts. Advisory Opinion OC-14/94, Dec. 9, 1994, 1994 ANN. REP. INTER-AM. CT. HUM. RTS. 89, 100 (1995) (individual responsibility only for 'violations that are defined in international instruments as crimes under international law') [hereinafter 1994 IACHR Advisory Opinion]. As Hersch Lauterpact wrote many years ago:

> As in the case of international rights so also in the matter of international duties the accurate approach to ascertaining the legal position is to rely not on preconceived notions as to the capacity of individuals to be subjects of international law but, primarily, on the practice of States in both the international and municipal spheres.

HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 38 (1950).

[27] *Cf.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404, Reporter's Note 1, at 255 (1987) ('Whether piracy is an international crime, or is rather a matter of international concern as to which international law accepts the jurisdiction of all states, may not make an important difference.') [hereinafter RESTATEMENT].

[28] *See* M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework, in* 1 INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 110–15 (direct versus indirect enforcement).

of law address accountability of the individual for their violation, they overlap with international criminal law. Geometrically, the three bodies of law might be seen as three circles or rings, each of which overlaps with the other two. For example, certain major human rights treaties, such as the Torture Convention, and humanitarian law treaties, such as the Geneva Conventions, contain penal provisions creating individual responsibility.[29]

International criminal law should thus be viewed as but one of the alternatives along a continuum to enforce international human rights or humanitarianism, with criminality a means of enforcement when other methods prove inadequate.[30] Moreover, international criminal law addresses numerous acts beyond the area of human rights or the conduct of armed conflict, such as hijacking, other terrorism-related acts, narcotics offenses, traffic in obscene publications, organized crime, corruption, mercenarism, and, according to some, the initiation of aggressive war.[31]

But under what circumstances will international law hold an individual criminally responsible for violations? As a starting point, states, courts, and others participating in the lawmaking process agree that most violations of international law do not incur individual criminal responsibility.[32] Yet the question of which violations of international law, including human rights and humanitarian law, do entail such accountability is somewhat unsettled.[33] At the least, the international

[29] Thus the three areas of international law overlap as follows:

Source: JEFFREY L. DUNOFF, STEVEN R. RATNER, AND DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 646 (2d ed. 2006).

Even international criminal tribunals have mischaracterized the relationship among these bodies of law. *See, e.g., Blagojević and Jokić Trial Judgment*, para. 834 (equating genocide and crimes against humanity with 'serious violations of international humanitarian law').

[30] *Cf.* W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. AND INT'L L. 175 (1995).

[31] For a discussion of crimes against peace, *see* Chapter 5.

[32] *See* SECRETARY-GENERAL OF THE UNITED NATIONS, THE CHARTER AND JUDGMENT OF THE NÜRNBERG TRIBUNAL 45–46 (1949), UN Doc. A/CN.4/5, UN Sales No. 1949.V.7.

[33] NGUYEN QUOC DINH, DROIT INTERNATIONAL PUBLIC 706–07 (Patrick Daillier and Alain Pellet eds., 7th ed. 2002).

community must share a consensus on the gravity of these offenses and appropriate means of enforcement.[34] Alas, states do not yet regard many violations of international humanitarian and human rights law, including some truly cruel and heinous conduct, as criminal in nature. International criminal law thus does not 'incorporate' all humanitarian or human rights law.

Instead, international criminal law has adopted a more cautious course, criminalizing only certain acts against the person. In general, those acts—what this volume refers to as 'atrocities'—are characterized by the directness and gravity of their assault upon the human person, both corporeal and spiritual.[35] Most significant in this context are genocide, war crimes, and crimes against humanity. As discussed in the chapters below, they share a special status among acts incurring individual responsibility due to both their extreme seriousness and their historical pedigree, arising from early international humanitarian law (war crimes) or the immediate aftermath of World War II (crimes against humanity and genocide). The disagreements over definitional issues related to them do not shield a consensus on the existence of individual criminal responsibility. A second tier of crimes, not specifically associated with the history of war or World War II, has developed through more ad hoc processes—slavery and forced labor, torture, apartheid, forced disappearances, and terrorism.

This corpus of offenses may also be divided along different lines. A first group might be termed the generic offenses—genocide, crimes against humanity, war crimes, and (more recently and more ambiguously) apartheid. These crimes encompass a broad array of specific acts, such as murder or torture, but are defined in terms of, and limited by, general elements. Thus, in order to be criminal, the particular acts must take place in a certain context, pattern, or setting—e.g., against a particular group with an intent to destroy it (genocide), in a mass or systematic manner (crimes against humanity), or during armed conflict (war crimes). The remainder would be regarded as specific offenses—slavery, forced labor, torture, forced disappearances, and terrorism. These cover only specified enumerated acts, or at least a fairly narrow range of conduct, but generally (though not always) these acts are criminal regardless of the circumstances (e.g., target, scale, or setting) in which they take place.

Nevertheless, the results of the international legal process of criminalization are far from completely logical. A particular assault on an individual may

[34] M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 193, 195–96 (1982); Theodor Meron, *Is International Law Moving towards Criminalization?*, 9 EJIL 18, 24 (1998); Quincy Wright, *The Scope of International Criminal Law: A Conceptual Framework*, 15 VIRG. J. INT'L L. 561, 562–63 (1975); BANTEKAS AND NASH, *supra* note 18, at 4–5.

[35] *Cf.* Agnes Heller, *The Limits to Natural Law and the Paradox of Evil*, *in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 149, 154–55 (Stephen Shute and Susan Hurley eds., 1993) ('genuinely heinous crimes' and 'manifestations of evil'). Traditionalists might refer to these as serious violations of international human rights and humanitarian law. *See also* David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT'L L. REV. 389 (2002).

or may not incur individual responsibility depending upon arguably arbitrary distinctions—whether it takes place during war or peace, in an international conflict or a civil war, or whether it is an isolated act or part of a pattern. As will be discussed later, these schisms leave disturbing gaps in criminality under international law.[36]

Domestic Law

Lastly, the *domestic law* of states encountering human rights abuses is pertinent to our study. That law will criminalize many human rights and law of war violations as common crimes. Moreover, states may implement their obligations under international law to suppress certain acts through domestic statutes that criminalize such behavior. They may also promulgate domestic statutes that go beyond their treaty obligations (e.g., a requirement to criminalize only genocide committed on their soil) by criminalizing acts under broad jurisdictional bases permitted under customary international law (e.g., by making genocide a crime under domestic law wherever committed). Domestic and international courts interpreting the material and mental elements of international offenses will often have recourse to domestic law analogies.[37] Domestic law may also provide the legal framework for other methods of accountability, such as investigatory commissions, individual civil liability, and immigration measures.

The Nature of Legal Responsibility

An additional task of clarification involves the lexicon of accountability. The terms 'individual responsibility' (or accountability) and 'criminal responsibility' (or accountability) are often used interchangeably. In fact, the two terms are neither coextensive nor opposite, but address different facets of the law's concern with responsibility for human rights violations. The former concerns a *target* of responsibility for human rights atrocities. Indeed, there would appear to be three such targets, enabling us to speak of individual, group, or state responsibility. The term criminal responsibility, however, addresses the *nature* of the responsibility. In this sense, domestic and international law recognize two broad categories: civil and criminal responsibility.

These targets and forms of accountability, however, interact in less than evident ways. For instance, responsibility for violations of most areas of international law is generally placed under the rubric of state responsibility. It entails

[36] *See* Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237 (1998).

[37] *See, e.g.*, *Furundžija Trial Judgment*, paras. 177–85; *Erdemović Sentencing Appeal*, op. McDonald and Vohrah, paras. 59–66, and *id.*, diss. op. Cassese, paras. 1–6; *see also* Wolfgang Schomburg and Ines Petersen, *Genuine Consent to Sexual Violence Under International Criminal Law*, 101 AJIL 121 (2007).

only one set of targets—states—because most obligations under international law are placed upon states. And though the term civil is little used to qualify that responsibility, it is indeed civil (as opposed to criminal) in that it entails certain duties of reparation on the part of the state.[38] Thus, *state (civil) responsibility* arises whenever a state fails to comply with applicable human rights or humanitarian law, whether by abusing individuals through domestic law or action or, in some cases, even by failing to provide a remedy for a victim or refusing to prosecute a culprit. International law has recognized *group civil responsibility* (or tort liability) for abuses, in particular for organized non-state actors such as guerrilla or secessionist movements.[39] International law has also accepted determinations by individual states to impose *individual civil responsibility* for human rights abuses through civil liability under domestic law, an issue explored in Chapter 10.

With respect to criminal liability for acts against human dignity, the Nuremberg and other prosecutions of Axis defendants clearly established *individual criminal responsibility* for crimes against peace, crimes against humanity, and war crimes.[40] This concept received global endorsement when the General Assembly affirmed the principles of law from the Nuremberg judgment in 1946 and the ILC formulated these principles in 1950.[41] In the years that followed, international humanitarian, human rights, and other criminal law instruments including, most recently, the ICC Statute, have all reflected the principle of criminal responsibility. International law today firmly recognizes the principle of individual criminal responsibility for certain violations of international law.[42] Individual responsibility typically extends beyond governmental officials to private persons.[43] As noted earlier, the more difficult issue has turned on determining which violations of human rights and humanitarian law entailing state (civil) responsibility also lead to individual criminal accountability.

With respect to *group criminal responsibility*, Article 9 of the Nuremberg Charter authorized the Tribunal to find any group or organization criminally responsible for offenses under the Charter.[44] It remains unclear, however,

[38] *See, e.g.*, ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 162 (1994); ILC Articles on State Responsibility, art. 31; Wright, *supra* note 34, at 565–66.

[39] Such entities may become parties to international agreements and would assume responsibility for violating them. *See, e.g.*, Law of Treaties, Third Report by G. G. Fitzmaurice, Special Rapporteur, UN Doc. A/CN.4/115, *reprinted in* 1958 [II] ILC Y.B. 20, 24.

[40] *See, e.g.*, 22 IMT Trials at 465–66.

[41] GA Res. 95(I) (1946); Report of the International Law Commission to the General Assembly, UN Doc. A/1316 (1950), *reprinted in* 1950 [II] ILC Y.B. 364, 374.

[42] ICC Statute, art. 25; SC Res. 1264, preamb. para. 13 (1999); 1994 IACHR Advisory Opinion, *supra* note 26, at 100; OPPENHEIM'S INTERNATIONAL LAW 505–08 (Robert Jennings and Arthur Watts eds., 9th ed. 1992); Dietrich Oehler, *Criminal Law, International*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 2, at 877, 880–81.

[43] *See* ICC Statute, art. 25(1); ICTY Statute, art. 7(1) (not limiting culpability to governmental officials); *Flick Case*, 6 CCL No. 10 Trials at 1192 ('Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual.').

[44] Individuals could be held criminally responsible for membership in an organization found to be criminal, though only if they had knowledge of the organization's criminal purpose or acts. Roger S. Clark, *Apartheid*, *in* 1 INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 643, 646 n. 16.

whether international law generally imposes criminal responsibility on groups and organizations. For example, the Genocide Convention imposes such responsibility only on individuals, not on political organizations or other non-natural persons, with the exception of states. However, international criminal law does recognize notions of accomplice and superior responsibility, thereby inculpating individuals who may not have served as the immediate perpetrators of the crimes.[45] These forms of responsibility have been central to cases in the ICTY and ICTR.

State criminal responsibility for certain violations of international law has proved to be exceptionally controversial. The criminality of violations by a state of certain core norms of international law received support in the ILC's 1980 Draft Articles on State Responsibility,[46] But this position was repeatedly challenged, principally by Western states and scholars, for the lack of a clear distinction between crimes and non-criminal violations of international law (delicts).[47] As a result, the ILC 2001 Articles on State Responsibility rejected the notion of state criminal responsibility in favor of a 'serious breach . . . of an obligation arising under a peremptory norm of general international law', which triggers special duties on other states to bring such a breach to an end.[48] Because the focus of this volume remains on individual accountability, we simply note that international criminal law, to the extent it has developed to cover violations of human rights, has centered on individual culpability, on the theory that personal accountability and punishment will serve as the best deterrent.

Thus, this study remains focused upon one core set of targets—individuals, those who actually commit or are complicit in violations of human rights. As for the nature of their liability, it addresses principally criminal responsibility, although it also considers civil liability as well as *sui generis*, non-civil, non-criminal forms of liability, under domestic law. It thus recognizes that states may choose to punish those responsible for international crimes and other violations of human rights through non-prosecutorial mechanisms.

Individual Accountability as a Holistic Framework

In conceptualizing the process at work globally as individual accountability for human rights atrocities, we have thus deliberately sought to transcend both the four doctrinal bodies of law identified above as well as the criminal/non-criminal

[45] *See* Chapter 6, Forms of Individual Criminal Responsibility.

[46] Report of the International Law Commission to the General Assembly on the work of its thirty- second session, UN Doc. A/35/10, *reprinted in* 1980 [II] 2 ILC Y.B. 32 (article 19 of draft articles).

[47] For an account of the varying views, *see* INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (Joseph H. H. Weiler et al. eds., 1989).

[48] ILC Articles on State Responsibility, arts. 40, 41.

divide. We do so for two important reasons. First, as a descriptive matter, the full range of approaches to individual responsibility implemented to date does not fit neatly into any of these categories. Although some international and domestic institutions have adopted an overtly criminal law framework, others have sought to hold individuals accountable for violations of human rights and humanitarian law whose criminality is less clear, through non-criminal processes, or both. The global process we are witnessing thus needs to be viewed holistically. For despite their many differences, we prefer to see institutions such as the International Criminal Court as fundamentally similar to domestic criminal courts or non-judicial mechanisms—as tools to hold individuals, as opposed to states or institutions, to account in order to advance specific moral, political, and sociological goals.[49] States, international organizations, NGOs, and individuals seeking accountability recognize these goals as coming first, and they do not limit their means to realize them to one set of offenses (international crimes) or one set of institutions (criminal tribunals).[50] The absence of explicit recognition in these various doctrinal categories of the concepts of 'individual accountability' and 'atrocities' as we deploy them is a shortcoming in the law, not a cause for ignoring the reality of action at the global and national level.

Second, as a normative matter, those seeking to appraise, criticize, or improve the various processes at work need to view them together and not in isolated pockets defined by doctrine. The goals of individual accountability can be reached by numerous paths, and those who choose to give inordinate focus to one set of mechanisms are missing the opportunity to learn from other experiences at the domestic and international level. Thus, to ignore truth commissions, civil suits, immigration measures, and lustration is to miss out on potentially effective mechanisms for bringing abusers to some form of justice.

In particular, the normative and institutional developments in international criminal law that have proceeded at a breakneck speed since the early 1990s do not displace our framework. Clearly, significant attention must be devoted to explaining and appraising the scope of international criminal proscriptions, which our catholic approach seeks to do. But international criminal law falls short as a comprehensive analytic lens for at least three reasons. First, to its detriment, academic (though not practitioner) approaches to the field have become preoccupied—consistent with international lawyers' over-fascination with courts—with the decisions or structures of a handful of international courts, thereby neglecting the role of domestic mechanisms. Second, even where its ambit extends to domestic criminal processes, international criminal law typically fails to analyze crimes defined without reference to international sources but addressing equally egregious abuses, such as mass murder. And third, even

[49] For a discussion of these goals, *see* Chapter 7.

[50] For an endorsement of this approach from the United Nations, *see* The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General, Aug. 23, 2004, UN Doc. S/2004/616.

in its broadest incarnation, international criminal law excludes those processes of accountability that are not criminal in nature. As stated earlier, we must start with the goals of accountability, and we see international criminal law as addressing only certain ways to achieve them.

Methodology and Sources of International Law

In determining the relevant norms of international law, we have relied upon the law as a product of a variety of processes among multiple actors making claims in the international arena. The ways in which international law is made, shorthandedly referred to as the 'sources' of international law, are numerous, each offering distinct challenges to the analyst and decision-maker to determine the degree of authoritativeness and accompanying mechanisms for compliance of any purported rule. For the benefit of those unaccustomed to these processes of formation, they are reviewed briefly, without any attempt to engage the major debates surrounding this critical subject of international law.

The Traditional Starting Point

For the sake of a common denominator, we note the traditional list of sources provided in Article 38(1) of the Statute of the International Court of Justice, which identifies the law to be applied by that court:

1. international conventions;
2. international custom as evidence of a general practice accepted as law;
3. general principles of law recognized by civilized nations; and
4. judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law.

With respect to *international conventions*, or treaties, the primary source of guidance for their interpretation is the Vienna Convention on the Law of Treaties.[51] Generally, treaties are to be interpreted in accordance with the ordinary meaning given to their terms in their context and in light of the treaty's object and purpose.[52] Where the general rule leaves the treaty's meaning unclear or leads to an absurd or unreasonable result, decision-makers may resort to certain supplementary means of interpretation, in particular any subsequent agreement or practice between the parties, and, if necessary, its drafting history (*travaux préparatoires*).[53]

[51] Although the United States is not a party to the Vienna Convention, it recognizes most of its provisions as binding under customary international law. RESTATEMENT, *supra* note 27, pt. III, Introductory Note.

[52] Vienna Convention, art. 31(1). [53] *Id.* art. 32.

Customary international law is, by contrast, a far more unstructured method for prescription of law, and its identification necessitates more careful scrutiny. Legal authorities have formulated numerous approaches and theories to determine whether a norm has achieved the status of customary international law. The most common formulation, one adopted by the International Court itself, stipulates two basic requirements: (1) that the norm be reflected in consistent state practice, and (2) that the practice be adhered to out of a sense of legal obligation (*opinio juris*).[54] Nevertheless, great debate surrounds the degree of consistency required to show state practice and on the necessity of, and requirements to demonstrate, *opinio juris*—especially in the area of human rights law.[55]

General principles of law, as used in the ICJ statute, refers generally to those principles of domestic law common to the world's major legal systems. Yet the International Court of Justice has interpreted this neither as a mere analogy to national laws nor as generalizations reached through the processes of comparative law, but as something more fundamental—in the words of Shabtai Rosenne, as 'particularizations of a common underlying sense of what is just in the circumstances'.[56] Among the more commonly used general principles are good faith, reliance, and the duty of reparation for damages, although the notion may encompass broader notions from natural law, including certain human rights norms.[57] At the same time, international tribunals tend to examine such principles only if they fail to find an applicable rule of conventional or customary law.[58]

Judicial decisions covers a broad body of case law. While the ICJ relies extensively upon its own previous decisions as well as those of its predecessor (the Permanent Court of International Justice), other decision-makers typically cite other tribunals, whether domestic or international, considered authoritative. While many courts deny any obligation to follow previous decisions strictly, they tend to accord significant weight to precedent and attempt to develop a consistent international case law.[59] The teaching of *publicists* is synonymous with scholarly work, with a correspondingly greater deference to leading authorities in a field.

[54] North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ 3, 45 (Feb. 20).

[55] *See* the excellent discussions in Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRALIAN Y.B. INT'L L. 82 (1992); Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT'L AND COMP. L. 147 (1995/96); Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts On the Customary Law of Human Rights*, 25 GA. J. INT'L AND COMP. L. 99 (1995/96).

[56] 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920–2005, at 1549 (4th ed. 2006). The reference to 'civilized nations' has been tacitly dropped. *Id.* at 1546 n. 86. *See also* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Grotius Pubs. 1987) (1953); Max Sørenson, *Principes de Droit International Public*, 101 RECUEIL DES COURS 1, 16–34 (1960-III).

[57] OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 51–55 (1991).

[58] *Id.* at 52; *Furundžija Trial Judgment*, paras. 177–85; CASSESE, *supra* note 18, at 22–25.

[59] 3 ROSENNE, *supra* note 56, at 1553–56.

Both of these sources, however, are subsidiary to and of less value than treaties, custom, and general principles of law. The ICTY Appeals Chamber considers its precedents binding on trial chambers, and both ad hoc tribunals generally adhere to their own precedents.[60]

Other Important Conceptual Underpinnings

Article 38's listing of sources offers a formalistic, undynamic, and limited sense of the entire process of law prescription, including the diversity of participants and the difficulties of appraising pretended law from actual law.[61] For instance, it omits one of the most significant methods by which international law has evolved—the practice of *international organizations*. These include resolutions and other decisions of political organs, in particular the UN Security Council and General Assembly. Decisions of the Council represent binding international law, akin to treaties, by virtue of Article 25 of the UN Charter; Assembly resolutions may constitute highly influential or recommended positions, or strong evidence of an emergent or emerging custom.[62] In addition, the studies and projects by subsidiary organs, such as the International Law Commission or the Human Rights Council (previously the Commission on Human Rights), can have significant weight, as do other, less formal indicia of their actions.[63]

Moreover, certain norms have special characteristics in contemporary international law. Obligations *erga omnes* are those norms of international law that a state owes not merely to another state with which it interacts on a certain issue, but to the international community as a whole, permitting any state to invoke the former's responsibility.[64] Most importantly, international law recognizes certain peremptory norms that override even treaties to the contrary. These norms of *jus cogens* reflect core constitutive values and commitments of the international community. They include the ban on aggression, certain essential human rights principles, and the supremacy of the United Nations Charter over other treaties.[65]

We readily acknowledge the relatively recent development of much of the law considered here and the general unwillingness of governments to prosecute

[60] *See Aleksovski Appeal Judgment*, paras. 107–13.

[61] Myres S. McDougal and W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, *in* INTERNATIONAL LAW ESSAYS 355, 362–68 (Myres S. McDougal and W. Michael Reisman eds., 1981).

[62] *See generally* José E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005); HIGGINS, *supra* note 38, at 22–28.

[63] 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 42, at 50.

[64] Barcelona Traction, Light and Power Co. (Second Phase) (Belg. v. Spain), 1970 ICJ 3, 32 (Feb. 5); ILC Articles on State Responsibility, arts. 42, 48.

[65] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 488–90 (6th ed. 2003). On the human rights aspects, *see* MCDOUGAL ET AL., *supra* note 3, at 338–50.

for offenses from the late 1940s to the early 1990s. This dearth of state practice means that treaties often cannot be interpreted in terms of actual subsequent conduct (as required under the Vienna Convention), and customary law proves especially difficult to ascertain. Reliance is thus placed upon the statements of governments as evidence of their belief about the meaning of law where more concrete evidence (such as decisions regarding specific offenders) is lacking.[66] Although this approach may have analytical shortcomings, it seems consistent with the appraisal method of courts and scholars evaluating human rights and humanitarian law norms, even if they differ on the exact methodology and the category of the resultant norms (custom versus general principles).[67] The ad hoc tribunals have responded to the dearth of state practice by relying extensively on post-World War II case law, patterns of domestic law to derive general principles, and scholarly writing.[68] Nevertheless, the talk of governments in favor of a particular customary norm cannot generally override a practice by states contrary to it.

Thus, our linchpin for the determination of the law is, as it must be, whether it 'is viewed as authoritative by those to whom it is addressed and... its audience concludes that the prescriber... intends to and, indeed, can make it controlling'.[69] Yet the lack of authoritative jurisprudence on some issues, and competing jurisprudence on others, leads to many areas of ambiguity and uncertainty. Thus, for example, certain crimes may have never been the subject of a court judgment. Others may be defined differently in various domestic and international instruments, interpreted differently by various domestic and international courts, or both. The discussion and analyses that follow note numerous interpretive disputes, and, as seen in the case study concerning Cambodia, they suggest that definitive conclusions as to the criminal responsibility of individuals for some violations of law may be impossible or conjectural.[70]

[66] *See Tadić Jurisdiction Appeal Decision*, para. 99 ('In appraising the formation of customary rules or general principles [of international humanitarian law]... reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.'); Richard Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 300 (1965–66).

[67] *See* Simma and Alston, *supra* note 55, at 90–106; *Pinochet*, [1999] All E.R. at 151–52 (Lord Hope); 1 INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES xxxi-xlii (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005).

[68] *See, e.g., Tadić Appeal Judgment*, paras. 194–220; *Rwamakuba Joint Criminal Enterprise Appeal Decision*, paras. 14–25. For a critique, *see* Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law*, 6 INT'L CRIM. L. REV. 121 (2006).

[69] McDougal and Reisman, *supra* note 61, at 377; Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2621 (1991) ('a necessary criterion for the validity of any norm of... positive international law is the willingness of... states and international bodies to enforce it.'). *Cf.* Weisburd, *supra* note 55, at 99–111.

[70] *Cf.* Paust, *supra* note 55, at 150 ('If there is a core of settled meaning, measure it.... If new *opinio* or practice has torn the core apart, measure this also.').

The Principles of Legality: *Nullum Crimen Sine Lege* and Related Concepts

A fundamental precept of international criminal law is the prohibition in international and domestic law on assigning guilt for acts not considered as crimes when committed. The maxim *nullum crimen sine lege, nulla poena sine lege*, or 'no crime without law, no punishment without law', captures this notion, which finds different forms in various legal contexts. These include constitutional prohibitions on *ex post facto* laws, judicial rules of construction limiting the use of analogy in interpreting criminal laws, doctrines prohibiting ambiguous criminal laws, and provisions in international human rights instruments barring prosecutions for acts not criminal at the time of their commission.[71] This has a clear methodological impact on those seeking accountability if the law has changed over time. They can appraise conduct only in terms of the law in effect when those crimes occurred, even if later developments have made additional acts criminal.

More importantly, in the context of *international* criminal law, *nullum crimen* has a special dimension. Unlike the domestic criminal law of most countries, much of international criminal law, notwithstanding the ICC Statute, is not codified in treaties or any other agreed code. As a result, the 'law' required for criminality under the *nullum crimen* maxim, at the international level, comes to include not merely conventional (i.e., treaty-based) law but also customary and other law.[72] This interpretation is, however, fraught with dangers for defendants in criminal cases, who may face judges with different methodologies and approaches to the derivation of custom or other law. Moreover, over-reliance on scholarly writings, where progressive views often seek to move the law forward, could instead lead to prosecutions that run afoul of defendants' rights.[73]

The precise contours of *nullum crimen* received extensive discussion during and after the Nuremberg trials, where the defendants asserted that the charges against them—in particular that of waging a war of aggression—were not crimes as of 1939. The International Military Tribunal took an extremely loose

[71] *See, e.g.*, US CONST. art. I, § 9, cl. 3; M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW 127–40 (2d ed. 1999) (exhaustively discussing domestic law principles); ICCPR, art. 15.

[72] *See, e.g.*, *Galić Appeal Judgment*, paras. 81–85; BASSIOUNI, *supra* note 71, at 140–45; Guillaume Endo, Nullum Crimen Nulla Poena Sine Lege *Principle and the ICTY and ICTR*, 15 REV. QUÉBÉCOISE DROIT INT'L 205 (2002); STÉFAN GLASER, DROIT INTERNATIONAL PÉNAL CONVENTIONNEL 199–200 and n. 1 (1970) (appropriate term is *nullum crimen sine iure*, i.e., no crime without law in the sense of a norm but not necessarily a code).

[73] Hans W. Baade, *Individual Responsibility*, *in* THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 291, 324–25 (Cyril E. Black and Richard A. Falk eds., 1972); *see also* Gerry J. Simpson, *War Crimes: A Critical Introduction*, *in* THE LAW OF WAR CRIMES, *supra* note 6, at 1, 11–13.

and controversial view of *nullum crimen* in 1946 with regard to the issue of the criminality of aggressive war. The court saw it as 'a principle of justice' and merely stated that it would be unjust to let those who violate treaties go unpunished since 'the attacker must know that he is doing wrong'.[74] It thereby completely evaded the critical distinction between violations of international law and individual criminal culpability for these violations.[75]

The International Covenant on Civil and Political Rights adopts a more ambiguous stance, allowing prosecutions for acts 'criminal according to the general principles of law recognized by the community of nations', which suggests that international criminality might flow directly from widely accepted domestic criminality.[76] In setting up the international tribunal for the former Yugoslavia, the UN took an extremely cautious position, permitting the court to 'apply rules... which are beyond any doubt part of customary law';[77] and the Statute of the International Criminal Court resolves any ambiguities in the definition of a crime in favor of the defendant.[78] The judges of the ICTY have differed sharply on the extent to which teleological or policy-oriented interpretations of international criminal law are consistent with *nullum crimen*.[79] Some scholars have taken a broader view of *nullum crimen* (though not as broad as the IMT), to suggest it protects defendants only from punishment for acts that they reasonably believed to be lawful when committed.[80]

The approach one adopts to *nullum crimen* directly affects one's legal conclusions regarding the criminality of certain acts, especially in those large areas for which no treaty authoritatively defines the crime. While we accept the Nuremberg Tribunal's strategy for punishing Nazi war criminals for outrageous acts against the peace, its standard of conflating illegality of state action and criminality of individuals no longer reflects the mainstream of expectations of states on *nullum*

[74] 22 IMT Trials at 462.

[75] For attacks on the judgment, *see, e.g.*, George A. Finch, *The Nuremberg Trial and International Law*, 41 AJIL 20 (1947); for views of some leading scholars defending the trials for crimes against the peace, *see* Quincy Wright, *The Law of the Nuremberg Trial*, 41 AJIL 38, 55–61 (1947); 2 OPPENHEIM'S INTERNATIONAL LAW 190–93 (Hersch Lauterpacht ed., 7th ed. 1952). This approach was not necessary for the criminalization of war crimes and most crimes against humanity.

[76] ICCPR, art. 15(2).

[77] Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), May 3, 1993, UN Doc. S/25704, at 9. Of course, the existence of rules that are accepted by all states does not imply that all states have accepted that violations thereof incur individual criminal responsibility. The Secretary-General's report seems to address this gap when it suggests that each of the four offenses in the Tribunal's statute was also firmly established in international law as well. *See id.* at 10–13; *Galić Appeal Judgment*, paras. 81–85.

[78] ICC Statute, art. 22.

[79] *Compare Čelebići Trial Judgment*, para. 170, *and Erdemović Sentencing Appeal*, op. McDonald and Vohrah, para. 78 (need to consider policy), *with id.*, dissenting op. Cassese, para. 11 (rejecting 'policy-oriented approach in the area of criminal law'), and CASSESE, *supra* note 18, at 41–51.

[80] *See* Meron, *supra* note 25, at 566; Christopher Greenwood, *International Humanitarian Law and the* Tadic *Case*, 7 EJIL 265, 281 (1996); Jordan J. Paust, *It's No Defense:* Nullum Crimen, *International Crime and the Gingerbread Man*, 60 ALBANY L. REV. 657, 664–79 (1997).

crimen and cannot be generally sustained. Rather, *nullum crimen* requires an examination of the *criminal* law at the time of the offenses.

At the same time, the analyses in this volume are not limited by the strict standard suggested by the Secretary-General for the ICTY Statute, i.e., 'beyond doubt'. We explore areas of law where doubts remain, and express our views of the state of the law even with such doubts. Indeed, we do not wish to preclude a theory under which persons could be held responsible for particularly outrageous human rights abuses even if the law did not assign criminality to the acts at the time of commission.[81] Ultimately, the mechanism chosen by a state or states for accountability will need to adopt its own interpretation of *nullum crimen* and determine how clear the norm needs to be to inculpate individuals. Domestic courts have already undertaken this exercise in some prosecutions of World War II Nazis, offenders from the conflicts in the former Yugoslavia and Rwanda, and others. The International Criminal Court has the advantage of a statute with detailed definitions of crimes, as well as a lengthy set of elements for each crime adopted by the states parties. Yet those definitions and elements apply only to that court, not to other bodies interpreting identical terms, and even those terms have lacunae, requiring the ICC to formulate an approach to this issue as well. Mechanisms that do not have the right to impose a deprivation of liberty on the defendant, such as investigatory commissions, would seem to have more leeway than criminal tribunals on this question.

Finally, *nullum crimen* does not serve to exculpate all those who committed atrocities under the color of the law or rules in effect at the time. In other words, the promulgation of new rules by a regime violating human rights does not change the international law or criminality of the offenses. This is particularly true with respect to laws that violate those fundamental, peremptory norms (*jus cogens*) at the core of international protection of the individual. The Nuremberg-era tribunals definitively rejected this claim with respect to defenses that Nazi law and practice sanctioned various abuses.[82] Those regimes claiming to build a 'new order' through abrogation of law or its replacement by law not meeting minimal human rights standards cannot walk away from international norms. Domestic law that permits or encourages atrocities may, however, relate to the accused's knowledge of the law and provide a possible defense to lower level officials.[83]

[81] *Cf.* Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT'L L.Q. 153, 165 (1947) (obligation to punish offenders from World War II 'more important than [compliance] with the rather relative rule against ex post facto laws, open to so many exceptions'); *Eichmann*, 36 ILR at 281–83 (Isr. S. Ct).

[82] *See* 22 IMT Trials at 465–66; *Justice Case*, 3 CCL No. 10 Trials at 983–84; *see also Eichmann*, 36 ILR at 47–48 (Dist. Ct. Jerusalem). *Cf.* CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 163–64 (1996) (resorting to domestic law as solution to retroactivity problem).

[83] *See* Chapter 6, Defenses under International Law—Superior Orders and Ignorance of the Law.

A Word on Cultural Relativism

Much of the law elaborated in this study reflects the strong influence of Western states and scholars on the development of international law over the past several centuries. It may, then, seem odd to seek to invoke these norms in non-Western countries with potentially different views on individual criminal liability, especially for state-sponsored offenses. For example, Eastern cultures have unique normative outlooks on criminal law, whether on the sources of norms, means of compliance, or sanctions.[84] Cultural resistance to the application of these 'Western' norms may be significant, and any invocation of them must be sensitive to concerns that foreigners are imposing their values on these states.[85]

We nonetheless believe the exercise is ethically appropriate because of the fundamental universality of human rights law. The Universal Declaration of Human Rights affirms the global nature of these rights. The acceptance by states of a right of oversight (*droit de regard*) by international organizations over domestic human rights practices, the ratification by many non-Western states of numerous human rights and humanitarian law conventions, including the ICC Statute, and UN attempts to expand these norms all testify to the idea that they no longer represent simply Western preferences. In the criminal arena in particular, all states criminalize the most atrocious abuses against the human person, and near-universally accepted treaties single out certain offenses such as genocide and war crimes. States from Southern Africa to Eastern Europe and South America are struggling with the need for accountability for the abuses of prior regimes. This process also includes the creation of internationalized tribunals for Sierra Leone, East Timor, and Cambodia, and the service of Asian and African judges on various international criminal courts. Non-Western scholars endorse individual accountability as well.[86] Distinct societies will clearly take different paths to that goal, in terms of both detailed elaboration of the law and recourse to different mechanisms (prosecutorial and otherwise), much of which international law will permit. But the underlying criminality of the abuses can and should be measured to a large degree by an objective standard, which international and domestic law have developed.

[84] *See, e.g.*, APIRAT PETCHSIRI, EASTERN IMPORTATION OF WESTERN CRIMINAL LAW: THAILAND AS A CASE STUDY 106–48 (1987).

[85] *See* MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE AND THE LAW OF WAR 140–43 (1999); José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 436–52 (1999).

[86] *See, e.g.*, Lu Jianping and Wang Zhixiang, *China's Attitude Towards the ICC*, 3 J. INT'L CRIM. JUST. 608 (2005); Hakeem O. Yusuf, *Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria*, 1 INT'L J. TRANSITIONAL JUST. 268 (2007).