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Beth Van Schaack
Santa Clara University School of Law, bvanschaack@scu.edu

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Beth Van Schaack
Professor of Law
Santa Clara University School of Law

Ron Slye
University of Seattle School of Law

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This chapter is concerned with the question of how acts that would otherwise constitute domestic crimes may also be considered international crimes. Many international crimes actually encompass a constellation of individual crimes. Some of these predicate crimes are unique to international criminal law (ICL) or international humanitarian law (IHL), such as the crime of perfidy — making someone believe an individual is entitled to protected status under the laws of war. Other predicate crimes have domestic law analogs in the familiar crimes of assault, mayhem, and murder. These domestic crimes are considered international crimes when certain attendant circumstances are present. As a matter of definitional structure, these attendant circumstances usually appear in the *chapeau** of the crime's definition.

A major challenge to developing and codifying the field of ICL has been to identify these attendant circumstances to

* *Chapeau* ("hat") elements are circumstantial elements that apply uniformly to a subsequent list of prohibited acts.

fully distinguish international crimes from domestic ones. For example, what attributes make an act of murder a crime against humanity, a war crime, or genocide? A clear demarcation of what crimes fall within international jurisdiction is important, not only for academic or doctrinal reasons. For one, the complete collapse of the distinction between international and domestic crimes would be worrisome to states. It would occasion the ceding of a high degree of jurisdictional sovereignty, as international crimes are often subject to international and extraterritorial jurisdiction. These concerns could result in the withdrawal of support for, and consent to, the regime of ICL, which would be a major reversal of global policy trends. The distinction between international and ordinary crimes also carries certain expressive implications — calling the imprisonment of an individual the crime against humanity of unlawful detention carries greater stigma than a mere kidnapping or false imprisonment allegation. Preserving a notion of international crimes protects them from the semantic inflation that might result if every abhorrent act were designated an international crime. Notwithstanding the importance of retaining a distinction between international and domestic crimes, no grand analytic theory for this process has been identified. Instead, several different approaches are apparent in distinguishing these two bodies of penal law, as discussed next. Keep these approaches in mind as you study the various substantive crimes in your course.

The Jurisdictional Approach

A primary, and facile, explanation for differentiating between international and domestic crimes is jurisdictional: International crimes are those crimes that are prosecuted before international tribunals or pursuant to extraordinary jurisdictional forms. There is no doubt that the distinction between international crimes and "ordinary" crimes has jurisdictional implications. For example,

when an act rises to the level of an international crime it may be prosecuted before an international tribunal if one exists with jurisdiction over the act. Additionally, such an act may be subject to certain extraordinary forms of extraterritorial jurisdiction by states with no tangible nexus to the crime with respect to the nationality of the perpetrator or victim or the place of commission. The authorization to exercise extraterritorial jurisdiction may be a function of customary international law or a treaty obligation. This jurisdictional explanation, however, raises a chicken-and-egg problem: Are international crimes dubbed international because they can be, or are, prosecuted before international tribunals, or are these crimes prosecuted before international tribunals because they are international crimes?

THE INTER-NATIONAL APPROACH

The second approach we call the "inter-national" approach. Put simply, this approach defines as international crimes those crimes that transcend national boundaries and thus involve the interests of more than one state. The relevant transnational dimensions may relate to the nationality of the participants or the place, or places, where the crime was committed. Historically, IHL only recognized war crimes as capable of being committed against nationals of an opposing belligerent in an international armed conflict. The positive law addressing noninternational armed conflicts (which include, but are not limited to, classic civil wars that pit compatriots against each other) does not include any penal component. It is only through the jurisprudence of the modern ICL tribunals that a notion of war crimes outside of international armed conflict is now fully recognized.

Although not requiring proof of the existence of an armed conflict, the crime of aggression, as currently conceptualized, does require some transnational element; there is no notion in

international law of exclusively internal acts of aggression. This inter-national approach does not account for all international crimes, however. Although the definition of genocide and certain definitions of crimes against humanity recognize nationality as a ground for repression, both crimes can be committed within the borders of a single state, even absent any cross-border effect. Indeed, crimes against humanity emerged as a new international crime at Nuremberg precisely to reach conduct that would not constitute war crimes because the victim and the perpetrator shared the same nationality.

IDENTITY APPROACHES

Other approaches to delineating international from domestic crimes focus on the identities of the perpetrators or victims. A third approach we call the "state perpetrator" approach. State action — shown either by way of a governmental policy or through the conduct of state actors enjoying the protection or authorization of a state — has often been cited as a potential defining element of international crimes. Some historical definitions of crimes against humanity included a state action requirement, although contemporary definitions are more catholic in prohibiting action instigated or directed by any organization or group as well as by an official government. Such a limitation was specifically rejected in the case of genocide, as Article IV of the Genocide Convention makes clear that genocide may be committed by private actors with no state involvement.

Although the definitions of crimes against humanity in the statutes of the ad hoc tribunals do not include reference to state action, this limitation has partially snuck back into the definition in the Statute of the International Criminal Court (ICC) in Article 7(2)(a). That article defines the term "attack against any civilian population" as a course of conduct "involving the

multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." It remains to be seen what showing will satisfy the requirement of an "organizational policy" before the ICC. In addition, the ICC's draft definition of aggression is currently formulated in terms of state action: It must be shown that a state committed an act of aggression as defined by the ICC Statute. If such a showing is made, then individuals who knowingly and intentionally order or otherwise participate actively in the act of aggression can be prosecuted for their contributions thereto. Current drafts of the crime of aggression do not recognize the possibility of nonstate (or substate) actors committing aggression. Thus acts of aggression trigger ICC jurisdiction *only* if they are committed by a state actor.

This focus on the state as perpetrator reflects the pragmatic consideration that crimes committed by, or at the behest of, a state will not be adequately or uniformly punished within the applicable domestic criminal systems and so must be penalized and prosecuted at the international level. Indeed, ICL developed in part because states were unwilling (or unable) to prosecute breaches of international law committed by state agents, often pursuant to a state policy. The abortive Leipzig Trials at the close of World War I provide an apt example of the way in which states can institutionalize impunity through inaction and sham proceedings. Concerns about limiting international jurisdiction to those crimes that are the least likely to be pursued by an individual state partially explains the absence in the ICC Statute of several crimes that are the subject of well-subscribed-to multilateral treaties — such as terrorism crimes, drug trafficking, and counterfeiting. The ICC's drafters assumed that such crimes are likely to be aggressively prosecuted in domestic proceedings as they are usually committed by nonstate actors and threaten sovereign values.

A fourth, and inverse, approach for defining a crime as international may be called the "protected group" approach.

Many international crimes involve group-based repression. The collective nature of these crimes may serve to enhance their egregiousness and the culpability of the perpetrator, especially where groups are targeted on the basis of "suspect" classifications like race or ethnicity. Most saliently, the crimes of genocide and persecution (an enumerated crime against humanity) require that the victim be targeted on the basis of his or her membership in a particular group or on discriminatory grounds. This approach does not explain all crimes defined as international, as acts other than persecution can constitute crimes against humanity if they are committed in the context of a widespread or systematic attack against any sort of civilian population, however defined. Interestingly in its first case, the International Criminal Tribunal for the former Yugoslavia (ICTY) attempted to narrow the definition of crimes against humanity by requiring discriminatory intent for all of its constituent acts.[1] This ruling was overturned on appeal[2] on the ground that discriminatory intent is required for the crime of persecution only.*

The definition of war crimes within the Geneva Conventions also incorporates this group-based approach. The penal provisions of the Geneva Conventions are implicated only when the victims fall within one of various categories of "protected person." The Fourth Geneva Convention, for example, recognizes certain acts (so-called grave breaches) as war crimes only when they are committed against individuals who are not protected by the other three Conventions (addressing the

* The Statute of the International Criminal Tribunal for Rwanda is an exception to this approach. That statute requires a showing of discriminatory intent (recognizing national, political, racial, or religious grounds) for all crimes against humanity, not just persecution. In that statute, persecution as a crime against humanity may only be committed on narrower (political, racial, and religious) grounds. This peculiar discrepancy is probably a drafting oversight, or an effort to conform the statute to the reality of the violence in Rwanda, rather than an attempt to modify the definition of crimes against humanity under international law.

wounded, the shipwrecked, and prisoners of war), but who are of a nationality different than that of the perpetrators. Specifically, protected persons are those persons who find themselves "at a given moment and in any manner whatsoever . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[3]

The need to prove a nationality distinction between victim and perpetrator has relaxed in the modern jurisprudence. In a case involving individuals of different group identity (Serb and Muslim) but of the same nationality (Bosnian), the ICTY Appeals Chamber held that a key purpose of the Geneva Conventions is to protect victims who are "different" from the perpetrators, and thus interpreted "nationality" to include ethnicity and other forms of group identification even when the individuals were all of the same formal nationality. The ICTY Appeals Chamber thus effectively redefined "protected persons" in terms of the party to the conflict with which the victims had "substantial relations more than . . . formal bonds" of citizenship.[4]

THE POLICY APPROACH

Related to the state action requirement, and as a fifth approach, certain definitions of international crimes include a policy element as a way to distinguish international crimes from domestic ones. In addition to including a gravity threshold, Article 8 of the ICC Statute concerning war crimes also suggests a preference for prosecuting crimes "in particular" when committed "as part of a plan or policy. . . ." With respect to crimes against humanity, the ICC Statute defines "attack" as including a state or organizational policy to commit the attack. The ICC definition of crimes against humanity thus seems to require proof of a policy by virtue of the operative definition of "attack." The customary international law definition of crimes

against humanity, by contrast, does not appear to have such a requirement, although proof of a policy is often valuable as an evidentiary matter.

The Nexus to Armed Conflict Approach

The sixth approach we call the "nexus" approach. Under this theory, a crime becomes international because of its relationship to an event with international implications, such as an armed conflict. This bootstrapping is nicely illustrated with the definition of crimes against humanity adopted by the World War II tribunals. Much of the Nazi Holocaust involved acts that, traditionally, would not have implicated international law. The Holocaust primarily (although not exclusively) involved perpetrators and victims of the same nationality or of allied nationality, and occurred within the territorial jurisdiction of the state of which those individuals were nationals. The Allies conceived of the charge of crimes against humanity to encompass the crimes of the Holocaust. They gave a nod to then-existing international law by requiring that acts prosecuted as crimes against humanity have a nexus to another crime within the jurisdiction of the Tribunal, namely either crimes against peace (that is, aggression) or war crimes. As a result of this definition of crimes against humanity, the Nuremberg Tribunal expressly refused to prosecute individuals for acts that occurred prior to September 1, 1939, the year in which Germany launched World War II by invading Poland. It is now well settled that crimes against humanity are entirely autonomous from, and may be prosecuted absent, a state of war, although it is unclear exactly when this development occurred. When subsequent definitions of crimes against humanity were drafted, drafters struggled with identifying internationalizing elements to replace the so-called war nexus.

The less radical version of the nexus approach is illustrated with war crimes, which require as a threshold element some link to an armed conflict, either international or noninternational. Internal disturbances, riots, and the like, which exhibit either an inadequate degree of intensity or whose opposing parties are insufficiently organized, do not trigger IHL and, by extension, the war crimes prohibitions. By contrast, where a state of armed conflict exists, either international or noninternational, crimes committed in connection therewith can be classified as war crimes. The law continues to grapple with exactly what sort of nexus between the crimes and the armed conflict is required — for example, is mere temporality enough, or must the acts be committed as part of, or in furtherance of, the armed conflict? Although the international tribunals have made clear that such a nexus is required, they have not clearly defined what relationship is required; rather, they speak of the acts being "closely related to"[5] or exhibiting an "obvious link with"[6] the armed conflict. By contrast and somewhat counterintuitively, the crime of aggression, which remains under diplomatic discussion vis-à-vis the ICC, can under most draft definitions be committed absent a full-scale armed conflict. Nonetheless, the *actus reus* of the crime — which will likely include some combination of invasion, attack, occupation, bombardment, blockade, and so on — often leads to, or occurs in connection with, armed conflict.

The Global Stability Approach

The seventh approach we call the "global stability" approach. A crime rises to the level of international concern because of its effect on international public order and its ability to jeopardize the peace and security of the international community as a whole (recognizing, of course, that the international

community is far from monolithic). Violent acts of aggression, efforts to exterminate entire populations, and even the large-scale commission of war crimes can destabilize entire regions and lead to international armed conflict, thus justifying a collective and coordinated penal response. This is true where the immediate effects are exclusively internal. Indeed, early definitions of crimes against humanity drafted by the International Law Commission in its effort to promulgate a Draft Code of Offences Against the Peace and Security of Mankind used terms such as "widespread," "massive," or "systematic" to modify the *actus reus* of the crime and distinguish international crimes from their domestic counterparts. An early commentator at the end of the Nuremberg and Tokyo proceedings justified the internationalization of those prosecutions as follows:

> As a rule systematic mass action, particularly if it was authoritative, was necessary to transform common crime, punishable under municipal law, into a crime against humanity, which thus became also a concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had been their victims.[7]

The Dignity Approach

This quotation also suggests an eighth approach to defining international crimes that we call the "dignity of humanity" approach. A crime becomes of international concern if it exceeds a minimum threshold with respect to its gravity, or if it otherwise violates certain fundamental values of the global

community. Such crimes are considered to be of international concern even if they do not formally transcend any international borders, and even if they do not immediately threaten the stability of the international community. Rather, because of their enormity, such crimes are of concern to all of humanity, and not just to the immediate victims or even a single polity. In other words, such crimes "signal a larger constituency."[8] This concept was expressed in the Moscow Declaration in which the United States, the United Kingdom, and the Soviet Union first articulated their two-part prosecutorial strategy for Nazi officers and party members: trials in the *locus delicti* for lower level defendants and some sort of joint prosecution of those individuals whose offenses had no particular geographical localization. More recently, Article 1 of the ICC Statute limits the exercise of jurisdiction to "the most serious crimes of international concern."[9] Likewise, the war crimes provision (Article 8) contains threshold language focusing the jurisdiction of the Court with respect to war crimes "in particular" when they are committed "as part of a large-scale commission of such crimes."

Under this approach, the principle of universal jurisdiction can be conceptualized as the delegation of jurisdictional authority to any state that is able to obtain jurisdiction over a *hostis humani generis* — enemy of all humankind. This idea is also contained in the very lexicon of one of the central ICL crimes: the crime against humanity. Thus, genocide or crimes against humanity committed exclusively within the territorial jurisdiction of one state now clearly trigger the ICL regime.

Defining a crime as international because of its gravity does, however, present certain challenges. Using a concept of gravity to identify international crimes is somewhat subjective where harm caused by criminal action may be incommensurable. In addition, gravity alone may not be sufficient to exclude domestic crimes, which can be horrific in their effects. In any case, most modern definitions of international crimes allow for the prosecution of single or isolated criminal

acts, so long as they are committed within the context required by the definition of the offense. To prosecute an individual for crimes against humanity, for example, the criminal act must have been committed within the context of a widespread or systematic attack against a civilian population with knowledge of the attack. These threshold concepts of "widespread" and "systematic" now modify the attendant attack rather than the constitutive offense, the effects of which may be more modest in their impact. The prohibition against war crimes requires only the existence of an armed conflict, and a single war crime can constitute an international crime, even absent any serious impact. Even with the crime of genocide, a single act of violence against a protected group may constitute genocide at a theoretical level. As such, threshold provisions like those in Articles 1 and 8 of the ICC Statute are more jurisdictional than definitional.

THE *MENS REA* APPROACH

A ninth, and final, approach to delineating international crimes focuses on the motive or intent of the perpetrator. For example, the definition of crimes against humanity contains two *mens rea* elements. The first is the *mens rea* element associated with the constitutive crime, such as intent to kill with respect to murder. The second is found in the definition's *chapeau* and requires a showing that the individual knew that the act of intentional murder was part of a widespread or systematic attack against a civilian population. (See Article 7(1) of the ICC Statute.) This second-order *mens rea* element helps to internationalize the crime by connecting the act to a larger campaign of violence or persecution.

Terrorism crimes are also often defined in terms of the perpetrator's subjective motive in committing the crime, with motive being defined as the reason that people engage in crime.

Many terrorism definitions focus on the perpetrator's goal of terrorizing the civilian population; coercing or inducing a government to do or abstain from doing some act; disrupting public services; or otherwise achieving some political, military, ethnic, ideological, or religious goal. Criminal acts that do not involve these particular motives are not prosecutable as acts of terrorism. This reliance on motive as an internationalizing element is somewhat unique in the penal law as most offenses do not include motive as a substantive element of the crime.

Conclusion

In the end, one is left with the impression that the different international crimes have been designated as such for different reasons. This heterogeneity in many ways reflects the fact that ICL has historically evolved along disparate strands that are only today converging in a handful of centralized institutions, most notably the ICC, and in the world's domestic penal codes. In general, the *chapeau* of each crime's definition is where one often finds clues to a justification for internationalization. For war crimes, the key overarching element is the existence of an armed conflict. Crimes against humanity exist where there is a widespread or systematic attack against a civilian population. The unifying theme for the crime of genocide is the targeting of a protected group. Both crimes against humanity and genocide also include second-order *mens rea* elements that apply to the attendant circumstances rather than to the enumerated crimes. As a result of these additional elements, the prosecution of an international crime requires the introduction of evidence that satisfies more elements than would normally be required for a domestic prosecution. This, in turn, contributes to the length and complexity of modern international trials.