Introduction

This is a book about international criminal law. More specifically, this book is an investigation of the regime of international criminal law enforcement that has been created since the late 1980s. This is a regime which involves both national and international forums for the prosecution of international crimes. This study is essentially in two parts: part I (chapters 1–3) explains the development of the regime, and some of the problems it has encountered. Having established the existence of the regime, part II (chapters 4–6) will evaluate the regime from the point of view of its legitimacy and compliance with the rule of law, with respect both to who is prosecuted and the approaches taken to the applicable substantive law.

There are a number of different understandings of the content of 'international criminal law'. There is no single right answer as to what is included in 'international criminal law': the phrase may mean different things to different people. Writers such as M. Cherif Bassiouni take an 'omnibus' approach to the subject, including any crime which fulfils one of ten criteria, encompassing having a treaty which includes a duty or right to extradite.[1] This is a very broad approach. The approach taken in this book is narrower than Bassiouni's. International criminal law is taken to be that body of international law that imposes criminal responsibility directly upon the individual, without the necessary interposition of national legal systems.[2] This was something accepted by the Nuremberg International Military Tribunal (hereafter, Nuremberg IMT)

[1] M. Cherif Bassiouni, *Introduction to International Criminal Law* (Ardsley: Transnational, 2004), pp. 114–15.
[2] *Accord* Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003), pp. 9–10.

in its famous pronouncement that 'crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced . . . individuals have international duties which transcend the national obligations of obedience imposed by the individual state'.[3] This position has received no convincing academic challenge for half a century.[4] Critics of international criminal law are now limited to castigating statesmen for their invocation of the concept, which they feel will fail on *realpolitik* grounds, rather than denying that States accept it.[5] Debates now more fruitfully centre on the contours of individual liability under international law, rather than its existence.

Limiting the discussion to those rules of international law that directly impose criminal responsibility on individuals involves the exclusion of two other types of rules sometimes referred to under the general rubric of 'international criminal law'. The first of these is the controversial concept of international crimes of States, originally in Article 19 of the ILC Draft Articles on State Responsibility,[6] but dropped from the final Articles sent to the General Assembly in 2001.[7] Although the type of conduct covered by Article 19 overlaps with the offences dealt with in international criminal law, the transposition of criminality onto a collective entity such as the State is still highly controversial. However,

[3] 'Nuremberg IMT: Judgment and Sentence' (1947) 41 AJIL 172, 221.

[4] The most serious challenge to the existence of international criminal law in this sense of the word was Georg Schwarzenberger, 'The Problem of an International Criminal Law' (1950) 3 CLP 263.

[5] See Alfred P. Rubin, *Ethics and Authority in International Law* (Cambridge: Cambridge University Press, 1997). His criticisms (for example, of the hypocrisy of States) are well founded, but do not undermine the existence of the concept of individual responsibility. As Colin Warbrick points out, there is no principled reason in international law why there cannot be individual responsibility for crimes under international law, and enforcement by international courts; Colin J. Warbrick, 'The United Nations System: A Place for International Criminal Courts?' (1995) 5 TLCP 237, 261.

[6] For the first reading, see Report of the International Law Commission on the Work of its Forty-Eighth Session UN GAOR 51st Sess. Supp. No. 10, p. 131. See, generally, Nina H. B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2000); Geoff Gilbert, 'The Criminal Responsibility of States' (1990) 39 ICLQ 345; Krystina Marek, 'Criminalising State Responsibility' (1978–1979) 14 *Revue Belge de Droit Internationale* 460; Shabtai Rosenne, 'State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility' (1997–1998) 30 NYUJILP 145.

[7] See James Crawford, *The International Law Commissions' Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), pp. 16–20, 35–8.

the reason it falls outside the scope of this work is that it does not relate to individual, but to State, responsibility.[8]

The second exclusion is those crimes set up by treaty regimes which require States to prohibit conduct as part of their national law. Treaties of this nature, such as the 1988 Vienna Convention Against the Illicit Trafficking in Narcotic Drugs and Psychotropic Substances[9] do not create individual responsibility under international law, but place a duty on the State to criminalise the conduct municipally.[10] They are therefore different to the international crimes under discussion herein, as international law does not criminalise such crimes in and of itself. Equally, the two types of crime have certain aspects of national enforcement in common, so reference to those crimes is made where relevant.[11] In one instance, individual peacetime acts of torture contrary to the 1984 Convention Against Torture,[12] a treaty crime may have jumped the gap to the status of an international crime. The assertion that individual acts of torture entail individual liability in international law is still controversial.[13]

Treaty crimes were excluded from the jurisdiction of the ICC. This is another reason for excluding them from this work. Those crimes have been excluded from the regime of international criminal law enforcement that is our focus. Although certain acts of terrorism and perhaps peacetime individual acts of torture are sufficiently serious to rise to the level of the most serious crimes of concern to the international community of States as a whole, the same cannot be said for all treaty crimes such as interference with submarine cables.[14] Treaty crimes such as drug trafficking are also often controversial, and not universally accepted.[15]

[8] See also Broomhall, *International Justice*, pp. 13–19. [9] 1019 UNTS 175.
[10] See further Broomhall, *International Justice*, pp. 12–14.
[11] Report of the ILC on the Work of its Forty Fifth Session, Report of the Working Group on a Draft Statute for an International Criminal Court, UN GAOR 48th Sess. Supp. No. 10, pp. 100–32, UN Doc. A/48/CN.4/Ser.A/1993/Add.1. For an attempt to rationalise both types of international crime into one taxonomy see Barbara Yarnold, 'Doctrinal Basis for the International Criminalisation Process' (1994) 4 *Temple International and Comparative Law Journal* 85.
[12] Which, if committed in an armed conflict, is a war crime. Widespread or systematic torture against a civilian population is a crime against humanity.
[13] In favour, see Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), pp. 117–19; against, Bruno Simma and Andreas Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 AJIL 302, 313.
[14] Contrary to the 1982 United Nations Convention on the Law of the Sea, 516 UNTS 205, Article 113.
[15] 1988 Vienna Convention Against the Illicit Traffic in Narcotic Drugs and Other Psychotropic Substances, Article 1.

These exclusions leave only four categories of crime to be discussed in detail: genocide, crimes against humanity, war crimes and the crime of aggression. These four remain as they have been accepted in the latter half of the twentieth century as the 'core' international crimes which international law itself criminalises. This choice is also supported by the fact that to the present day they are the only crimes which have been punished before international criminal tribunals (ICTs). All four are present in some form in the 1998 Rome Statute.[16] They are also the crimes which comprised the streamlined ILC Draft Code of Crimes Against the Peace and Security of Mankind.[17] The Draft Code declared (in Article 1) that 'Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law'.

Although I am personally in favour of accountability, it is not the purpose of this book to engage in a detailed evaluation of the policy decision to 'give justice a chance'.[18] There is a rich literature on the question of the appropriateness of the decision to engage in a prosecutorial response to situations involving international crimes.[19] The purpose of this book is to show that many States have also taken the view that accountability

[16] Rome Statute, Article 5.

[17] Draft Code of Crimes Against the Peace and Security of Mankind, in Report of The International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10, Articles 16–20.

[18] Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for a New Millennium* (Ardsley: Transnational, 2002), pp. 72–5.

[19] For a sample of such literature, see Susan Dwyer, 'Reconciliation for Realists', (1999) 13 EIA 81; Desmond Tutu, *No Future Without Forgiveness* (London: Rider, 1999); John Dugard, 'Reconciliation and Justice: The South African Experience', (1998) 8 TLCP 277; Kader Asmal, 'Truth, Reconciliation and Justice: The South African Experience in Perspective' (2000) 63 MLR 1; Carlos S. Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996); Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998); Mark J. Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity' (2000) 22 HRQ 118; Gary J. Bass, 'War Crimes and the Limits of Legalism' (1999) 97 Mich LR 2103; Juan E. Méndez, 'National Reconciliation, Transnational Justice and the International Criminal Court' (2001) 15 EIA 25; Steven R. Ratner, 'New Democracies, Old Atrocities: An Inquiry in International Law' (1999) 87 Georgetown LJ 707; Naomi Roht-Arriaza, *Impunity In Human Rights Law and Practice* (Oxford: Oxford University Press, 1995); Stephen Cohen, 'State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past' (1995) 20 LSI 7; Richard J. Goldstone, 'Justice as a Tool for Peace-Making: Truth Commissions and International Tribunals' (1996) 28 NYUJILP 485; Anthony D'Amato, 'Peace *v.* Accountability in Bosnia' (1994) 88 AJIL 500 *contra* the correspondence in (1994) 88 AJIL 717, (1995) 89 AJIL 93, (1995) 89 AJIL 94; Anonymous, 'Human Rights in Peace Negotiations' (1996) 18 HRQ 249; Oliver Schuett, 'The International War Crimes Tribunal for Former Yugoslavia and the Dayton Peace

is the appropriate response to international crimes, and that they have set up a regime to effectuate that decision. This book will then evaluate the operation of that regime with respect to critical principles derived from concepts of legitimacy and the rule of law.

To do this, the book will proceed to show the development of international criminal law in chapter 1, where there will also be a demonstration that some of the problems noted later in the book have a considerable historical pedigree. Chapter 2 explains the framework of jurisdiction and duties to extradite or prosecute to show the problems that have characterised the enforcement of international criminal law and State reluctance to prosecute. The regime created to ensure accountability for international crimes is introduced in chapter 3, alongside a defence of the view that it deserves to be called a 'regime' in the sense in which the term is used in international relations theory. Chapters 4–6 are evaluations of the legitimacy of the attempts to prosecute international crimes from the point of view of legitimacy and the rule of law. This evaluation focuses on critiques of selective enforcement of the law, from both the point of view of whom is prosecuted (chapter 4) and how expansive a view of the ambit of international criminality is taken (chapters 5–6). In these chapters the Nuremberg and Tokyo IMTs are evaluated alongside the ICTY, ICTR, ICC and Special Court for Sierra Leone, as they provided the foundations of the international criminal law regime which became more solid in the 1990s, and critiques of those tribunals were at the forefront of the minds of the creators of that regime. We shall see the extent to which the architects of the modern regime managed to avoid the problems identified in relation to what had gone before.

Much of what follows is critical of aspects of the regime. This is not because I am unhappy such a regime exists; on the contrary. I agree fully with Gerry Simpson that 'an international war crimes regime founded on a concern for consistency, legality and impartiality would be

Agreement: Peace Versus Justice?' (1997) 4 IP 91; Lisa Schmandt, 'Peace With Justice: Is It Possible for Former Yugoslavia?' (1995) 30 TILJ 335; Payam Akhavan, 'The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond' (1996) 18 HRQ 259; Payam Akhavan, 'Can International Criminal Justice Prevent Future Atrocities?' (2001) 85 AJIL 7; W. Michael Reisman, 'Institutions and Practices for Restoring and Maintaining Public Order' (1995) 6 DJCIL 175; Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2000); Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (Washington, DC: US Institute of Peace, 1995).

a valuable addition to the international legal system'.[20] My critique of the international criminal law regime is born not of a desire to undermine the regime, but to ask what it could have been, and might still be.

[20] Gerry J. Simpson, 'War Crimes, A Critical Introduction', in Gerry J. Simpson and Timothy L. H. McCormack (eds.), *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer, 1997), p. 1, p. 3.

Part I The development of the international criminal law regime

1 The development of international criminal law

Introduction

This chapter will trace the development of international criminal law and its enforcement mechanisms. Writing on the development of international criminal law after 1998 carries with it certain risks. It is all too simple to write a 'Whig history'.[1] Such a tale would be inaccurate. We cannot forget the role of contingency and pure chance. Had different choices been made in the twentieth century the situation could be considerably different, for better or for worse. Nonetheless, developments in international criminal law have occurred since the 1990s at a pace that is unprecedented.

There are a number of histories of international criminal law.[2] It could be said that there is a small academic cottage industry engaged in discovering earlier and earlier examples of what might be termed prosecutions of international crimes. The greatest endeavours in this regard were those of Georg Schwarzenberger.[3] There is a particular reason for discussing the historical aspects of international criminal law. Many of

[1] In more modern, albeit less evocative, terms, construct a linear progress narrative. As Martti Koskenniemi notes, the popularity of the title 'From Nuremberg to the Hague' in writings reflects the attractions of the progress narrative in international criminal law, Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 MPYBUNL 1, 34–5.

[2] For examples see Timothy L. H. McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime', in Timothy L. H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer, 1997), p. 31; M. Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish an International Criminal Court' (1997) 10 Harvard HRLJ 11; Howard Levie, *Terrorism in War: The Law of War Crimes* (New York: Oceana, 1992), chapter 1.

[3] Beginning with 'The Breisach War Crimes Trial of 1474', *Guardian (Manchester)*, 23 September 1946, and continuing with Georg Schwarzenberger, 'The Judgment of Nuremberg' (1947) 21 Tulane LR 329, 329–31.

the problems, debates and solutions mooted are by no means novel. To proceed today in ignorance of what has been identified and discussed before is needlessly to retrace the footprints of the past.

Nonetheless, this chapter makes no claim to comprehensiveness. Neither is it a history of the laws of armed conflict. Others have told that story.[4] A third qualification is that the author is a lawyer, not a historian, and therefore this chapter cannot profess historiographic sophistication.[5] Instead, by an analysis of the history of international criminal law it is hoped to cast some light on the development of the subject, and the perennial nature of some of the questions surrounding it.

A final caveat before moving on to history: much of what follows is, until the twentieth century, focused primarily on developments in Europe. This is not because of a conscious or (it is hoped) unconscious Eurocentrism. Histories of international law have rightly been criticised for an excessive focus on Europe.[6] There is some merit in such critiques.[7] The law of armed conflict has a cosmopolitan history.[8] The history of international criminal law is also not solely European.[9] It is not fully the case that '[m]ost of the modern law of war relating to the repression of war criminality has evolved, historically, in a European setting . . . though borrowing, substantially, from Koranic law through long and close contact with the Moslem civilisation . . . the law relating to war criminality owes most to the ethos of mediaeval Christendom'.[10] Nonetheless, much of the literature, in English at least, does tend to focus on Europe. An attempt will be made to refer to developments

[4] Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Methuen, 1983); Geoffrey Best, *War and Law Since 1945* (Oxford: Oxford University Press, 1994).

[5] International lawyers are not necessarily good historians, see Best, *Humanity*, pp. 27–8. For modern developments in international legal historiography, see Ingo J. Hueck, 'The Discipline of the History in International Law: New Trends and Methods in the History of International Law' (2001) 3 JHIL 194.

[6] See Yasuaki Onuma, 'When was the Law of International Society Born? An Inquiry into the History of International Law From an Intercivilisational Perspective' (2000) 2 JHIL 1.

[7] There is little about the extra-European world in the standard history of international law. Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, revised edn., 1954).

[8] See, generally, Hilaire McCoubrey, *International Humanitarian Law* (Aldershot, Ashgate, 2nd edn., 1998), pp. 8–17; Leslie C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 2nd edn., 2000), pp. 20–2; Surya Subedi, 'The Concept in Hinduism of Just War' (2003) 8 JCSL 239.

[9] There have been attempts, for example, to conceptualise an Islamic international criminal law. Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study* (London: Graham & Trotman, 1994).

[10] Gerald I. A. D. Draper, 'The Modern Pattern of War Criminality' (1976) 6 IYBHR 9, 10.

outside Europe, although this will necessarily be limited by the availability of material dealing with such developments. That said, the time for qualifications is over: it is apposite to proceed to matters of substance.

Antiquity

This is roughly the period prior to the fifth–sixth century BCE. In the empires of Egypt, Babylon, Assyria and that of the Hittites (1400–1150 BCE) there was restraint on warfare.[11] There is also evidence of limits on combat in the Christian Old Testament.[12] Nonetheless, as with most forms of religiously based law at the time, the form of sanction remained more divine than earthly. If the tale of Wen-Amon is taken as indicative of concepts of jurisdiction over crime, then no clear concept of overarching criminal rules comparable to international criminal law can be seen.[13] The events recounted by Wen-Amon in a papyrus found in Egypt and dating back to *c.*1000 BCE relate to a disagreement between that writer and the Prince of Dor over authority to prosecute actions by foreigners on a foreign ship. The tension between the vision of international society as one composed of bounded entities and one in which there is a global community with values and a common criminal law is one that continues to this day, and has characterised debate about the International Criminal Court (ICC).[14]

Further to the East, possible analogues to international criminal law have been thought traceable to Confucionist thought in the fifth century BCE. Although Mencius and Motzu (both disciples of Confucius) spoke in the language of criminality in relation to unjust wars, it appears that neither had a legal concept of crime in mind.[15] The indiscriminate use of the potent rhetoric of crime (in particular, international crime) remains popular to this day.[16]

[11] David J. Bederman, *International Law in Antiquity* (Cambridge: Cambridge University Press, 2001), esp. chapter 1, pp. 242–63.

[12] *Ibid*., pp. 244–6; Leslie C. Green, 'The Judaic Contribution to Human Rights' (1990) 28 CYBIL 3, 20–2.

[13] This forms the basis of the argument in Alfred P. Rubin, *Ethics and Authority in International Law* (Cambridge: Cambridge University Press, 1997), pp. 1–4.

[14] See Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003); Frederic Mégret, 'Epilogue to an Endless Debate: The International Court's Third Party Jurisdiction and the Looming Revolution of International Law' (2001) 12 EJIL 247.

[15] Keishiro Iriye, 'The Principles of International Law in the Light of Confucian Doctrine' (1967–I) 120 RdC 1, 50–1.

[16] For a critical analysis of this trend, see William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000), pp. 9–11.