

PART ONE

GENERAL PRINCIPLES

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Chapter 1

INTRODUCTION

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§ 1.01 SCOPE OF INTERNATIONAL CRIMINAL LAW

It is difficult to provide a concrete definition of the term international criminal law because its boundaries are loosely constructed and expanding. Increased globalization through worldwide communication, transportation, and economic expansion has made international law a topic of enormous importance. Accompanying this globalization, however, comes a host of criminal activities that require punishment. These activities can be both a national and international concern. As such, criminal law issues that arise in the international setting, and international issues that arise in the context of national criminal law, provide the starting point for a discussion about international criminal law.

It could be argued that international criminal law is very limited, including only the law that arises in an international body. Approaching international law in a *stricto sensu* would include the law that comes from international courts such as Nuremberg, the *ad hoc* Tribunal in Yugoslavia, and most recently the International Criminal Court (ICC). Some important works on international criminal law restrict their discussion essentially to the roles of such tribunals and to the crimes with which they have been concerned, namely war crimes, crimes against peace (aggression), crimes against humanity, and genocide.¹ Although these tribunals and bodies of law clearly are encompassed within international criminal law, there are in fact many other instances where international law plays a role in the national criminal law of a state. This book therefore takes a more expansive view of the subject, as will be apparent in subsequent chapters.²

¹ *E.g.*, GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW (2005); ALEXANDER ZAHAR & GORAN SLUITER, INTERNATIONAL CRIMINAL LAW: A CRITICAL INTRODUCTION (2007).

² Among those taking a similarly broad view of the subject are: JORDAN J. PAUST ET AL., INTERNATIONAL

[A] International Aspects of National Criminal Law

Although international criminal law initially focused especially on questions related to jurisdiction, today there are many issues of an international nature that surface in different nations' systems of criminal law. National legal systems cannot operate in a vacuum. Crimes routinely cross the borders of different nations. In addition to questions related to extraterritorial jurisdiction, procedural issues such as obtaining evidence from abroad, extradition of individuals, and questions of immunity become areas for consideration in national legal systems. National systems can also be faced with decisions of whether to proceed against conduct that violates international law.

Some authors designate any crimes that cross borders as "transnational crimes." Others use that term particularly to describe crimes like trafficking in drugs or persons, transnational organized crime, terrorism and foreign corrupt practices that are forbidden by treaty regimes but are not regarded (yet) as sufficiently egregious to be punished in an international tribunal. Like international criminal law, the term transnational crime is problematic. As noted by Professor Gerhard O.W. Mueller, the term "transnational crime" "did not have any juridical meaning" when initially used, and "does not have one now."³ Crimes that could be seen as transnational would include those that might easily cross borders, such as computer criminality and money laundering and these are increasingly becoming the subject of treaty regimes. Issues, however, that might occur solely within one state also can be influenced by international law. Thus, there is a large body of human rights law and of norms and standards created by the United Nations and by regional organizations that have significant effects on the way modern domestic criminal justice systems operate.⁴

[B] Criminal Aspects of International Law

At one level, international crimes can be seen as those crimes expressly prohibited by an international criminal law system. Crimes against humanity, genocide, and war crimes are examples of crimes that have been prosecuted by international tribunals. A broader definition, however, might include crimes that violate customary international law or treaties among countries. Narcotics trafficking and terrorism are examples of crimes that have emerged as issues requiring an international response. In addition to substantive questions of whether the conduct constitutes a crime under international law, there are also procedural questions that accompany these issues, such as extradition and mutual legal assistance. A crucial feature of the landscape is represented by "suppression conventions." These are treaties in which the parties undertake to make defined conduct criminal and to exercise their jurisdiction over it, sometimes even if the conduct takes place outside their territorial jurisdiction and does not even involve their nationals. Typical early examples of suppression treaties were those that the British entered into early in the nineteenth century with bilateral partners, such as Portugal and Spain banning the slave trade. Later slavery and other suppression treaties were multilateral in nature. A very large number of suppression treaties

CRIMINAL LAW: CASES AND MATERIALS 3rd ed. (2007); M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (2003).

³ Gerhard O.W. Mueller, *Transnational Crime: Definitions and Concepts*, in COMBATING TRANSNATIONAL CRIME 13 (Phil Williams & Dimitri Vlassis eds., 2001).

⁴ See generally ROGER S. CLARK, THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM: FORMULATION OF STANDARDS AND EFFORTS AT THEIR IMPLEMENTATION (1994).

have now been sponsored by the United Nations and by regional organizations such as the Council of Europe and the Organization of American States.

It should by now be apparent that the line between what will be considered international criminal law and what will not be included within this concept is extremely fuzzy and subject to change as international practice develops. The definition will in part be determined by the individual deciding the question. This book, to reiterate, uses a broad definition to cover crimes with international aspects in national law and also criminal aspects of what is considered to be international law.

§ 1.02 SOURCES OF INTERNATIONAL CRIMINAL LAW

[A] Generally

International law is primarily consensual in nature. *The Restatement (Third) of the Foreign Relations Law of the United States* provides that “[a] rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.”⁵ One finds similar language in the Statute of the International Court of Justice which states that the sources for deciding international law questions are: “(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilian nations; (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.”⁶ As such, much of international law comes from generally accepted norms among nations and from agreements reached by countries. “General principles common to major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.”⁷ The Rome Statute of the International Criminal Court has a statement of “applicable law” specific to its own circumstances. It says that the Court “shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”⁸

⁵ The Restatement (Third) of the Foreign Relations Law of the United States § 102(1) (1987). The third of these sources, general principles, is mainly used to fill gaps in customary and treaty law.

⁶ The Statute of the International Court of Justice, Art. 38 (1945). Art. 59 of the Statute adds that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case” but the Court generally follows its own prior decisions.

⁷ The Restatement (Third) of the Foreign Relations Law of the United States at § 102(4).

⁸ Rome Statute of the International Criminal Court (1998), Art. 21(1)(a). Para. 2 contains a permissive principle of *stare decisis*: “The Court may apply principles and rules of law as interpreted in its previous decisions.”

[B] The *Lotus* Case

Jurisdictional issues have always been central to international criminal law and the classic case that resolves a jurisdiction issue is *The Case of the S.S. Lotus (France v. Turkey)*.⁹ It involved a collision between a French ship (*Lotus*) and a Turkish Ship (the collier *Boz-Kourt*). Eight Turkish nationals were killed as a result of this collision. The Turkish authorities investigating this case arrested the first officer of the *Lotus*, a French national, and the captain of the *Boz-Kourt*, who was Turkish. Lieutenant Demons, the first officer of the *Lotus*, and officer of the watch at the relevant time, objected to the jurisdiction of the Criminal Court in what was then called Constantinople. Both mariners were convicted and sentenced for manslaughter. The case arose in the Permanent Court of International Justice, the predecessor of the present International Court of Justice (ICJ), when the French government protested the decision of the Turkish court. The argument of France was that only the state under whose flag the vessel sails has authority to proceed with such a case. The issue was complicated by the fact that both France and Turkey were parties to the Convention of Lausanne of July 24, 1923, a companion to the peace treaty which concluded Turkey's involvement in the First World War. Under the old "capitulations" regime that had existed in the Ottoman Empire, Powers like France could exercise judicial jurisdiction in some cases on Ottoman soil, and even apply French law. Now the 1923 treaty provided that questions of jurisdiction between the parties would be decided "in accordance with the principles of international law." Both Turkey and France agreed to submit the question to the Permanent Court of International Justice.¹⁰

The international tribunal was left to wrestle with questions of how to interpret a treaty, what role the "law of the flag" (the flag under which the ship sails) would play in the decision, whether the Turkish Penal Law properly permitted this action, and if it did permit this action, should this law be trumped by international law. Arguments presented by the parties also raised issues of when a country could proceed beyond its territorial jurisdiction in a criminal matter, and when a country would be precluded from exercising jurisdiction outside its territory. Importantly, the court looked at the Convention of Lausanne, thus using a treaty upon which the parties had agreed. This sent the enquiry, in what one might think of as a conflict of laws analysis, out to "international law." As there was no overriding treaty law available to decide this specific issue, the court examined state practice, particularly municipal law, although it found the municipal jurisprudence divided on the subject.

The decision was evenly divided 6-6 with the judgment going to Turkey when the President of the Court (as he was entitled to do under the Court's Rules) cast a deciding vote. Turkey had argued that it was entitled to exercise what is called "passive personality" jurisdiction, (see Chapter 2), as it was Turkish citizens who were killed. The Court's majority was equivocal about this approach, but was more accepting of the alternative Turkish argument, territorial "effects" jurisdiction, as events on the French ship led to death on the Turkish collier, which as a Turkish boat could be considered a part of Turkey.

Perhaps the most significant aspect of this situation and case is that two countries saw it as proper to submit this question to an international tribunal. The specific ruling is less significant, as the holding has been replaced by several

⁹ 1927 P.C.I.J. (ser. A) No. 10.

¹⁰ A further question regarding reparations became irrelevant when France lost.

multilateral treaties.¹¹ *Lotus* is often thought of as a case that “epitomizes an ‘extreme positivism’” in that it comes close to saying that Turkey is not bound by any restrictions on its freedom of action that it has not expressly or impliedly accepted.¹² A fundamental dispute between the parties, and also an issue on which the Court split, was whether Turkey had to show a permissive rule that empowered it to act or whether France had to prove that there was a rule prohibiting what Turkey did. The “majority’s” assertion that the burden was on France remains highly controversial today and is a continuing source of debate about jurisdictional issues in modern international criminal law.

The judges did appear to agree that there could be *concurrent* jurisdiction. Turkey might prosecute at the least on its effects theory and, since it had M. Demons, the first officer of the *Lotus*, in its custody, it was calling the shots. But France, with its flag state theory and Demons’s French nationality, could exercise jurisdiction too. It had only to persuade the Turks to hand him over, before or after they had finished with him. This, however, can present a host of issues. For example, as seen in § 1.03[F], international law on double jeopardy is a work in progress. Nor is there any clear hierarchy or priority of various jurisdictional bases. The concept of concurrent jurisdiction is, however, fundamental to what is going on in many modern suppression treaties where the aim is to avoid safe havens by having several concurrent possibilities.

[C] Customary International Law

A key aspect to resolving international disputes is “customary international law.” In the Supreme Court case of *The Paquete Habana*,¹³ Justice Gray described customary international law as:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well-acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.¹⁴

In the *Habana* decision, the Court referred to a variety of international law authors, from different countries,¹⁵ in order to ascertain the appropriate principles for the

¹¹ See Convention on the High Seas, Art. 11(1) (Apr. 29, 1958), 13 U.S.T. 2312, 450 U.N.T.S. 82; United Nations Convention on the Law of the Sea, Art. 97 (1982), U.N. Doc. A/CONF. 62/122, reprinted in 21 I.L.M. 1261 (1982) (exclusive penal jurisdiction in matters of collision or any other incident of navigation in flag state or state of which accused is a national).

¹² EDWARD M. WISE, ELLEN S. PODGOR & ROGER S. CLARK, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 2d Ed. 18 (2004).

¹³ 175 U.S. 677 (1900). (The Court held that international customary law forbade the seizure of Cuban fishing boats during the Spanish-American War.)

¹⁴ *Id.* at 700.

¹⁵ *E.g.*, HENRY WHEATON, INTERNATIONAL LAW (8th ed.); JOSEPH ORTOLAN, REGLES INTERNATIONALES ET DIPLOMATIE DE LA MER (1864); T.J. LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW (1895).

Court to follow. The use of customary international law appears in treaties constituting international tribunals, such as The Statute of the International Court of Justice,¹⁶ and also in case law.¹⁷

For example, in the civil case of *Filartiga v. Pena-Irala*,¹⁸ the Second Circuit used customary international law to resolve a case that arose under the Alien Tort Statute. In the *Filartiga* case, the court held that there are certain basic human rights accepted by the international community. Specifically, the court held that “[a]mong the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture.” Of particular significance to the analysis was the prohibition of torture in a number of U.N. General Assembly resolutions and in global and multilateral human rights treaties, including some instruments to which the United States was not a party. Modern state practice has to take into account a multiplicity of sources.

Likewise, in the case of *Sosa v. Alvarez-Machain*,¹⁹ the Court examined conduct to determine whether it was contrary to customary international law. The Court stated that “[i]t is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”²⁰

Some questions that arise with respect to customary international law are whether it changes over time and whether it has roots in natural law.²¹ There are instances where customary international law may become part of a later treaty or international agreement. For example, four years after the *Filartiga* case was decided, the U.N. General Assembly adopted the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²² Suppression treaties aimed at dealing further with evils that are already proscribed by customary law are typically focused on promoting explicit criminalization at the domestic level and often contain measures for international monitoring of state obligations to suppress.²³

§ 1.03 KEY TERMS IN INTERNATIONAL CRIMINAL LAW

Often the language used in international criminal law is the same as that found in the criminal law systems of the United States. For example, the requirement of *mens rea* is a common principle in international criminal law just as it is in the law of the United States. Several terms that are commonly referenced in a discussion of international criminal law, however, may require definition. Some of these are listed below, but bear in mind that the usage is not always consistent.

¹⁶ The Statute of the International Court of Justice, Art. 38 (1945).

¹⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹⁸ *Id.*

¹⁹ 124 S. Ct. 2739 (2004).

²⁰ *Id.* at 2769.

²¹ Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000); see also Jordan Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59 (1990).

²² This convention was ratified by the U.S. in 1994. See WISE, PODGOR & CLARK, *supra* Note 12, at 30.

²³ Earlier examples include the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948) and the Counterfeit Currency Convention, 112 L.N.T.S. 371 (1929).

[A] Comity

“Comity” has been interpreted to have many meanings and uses.²⁴ Sometimes it seems to be synonymous with “customary.” Sometimes it is equated with reciprocity. At least courts have found it to “include a requirement of reciprocity.”²⁵ It is important, however, to realize that the term “comity” can have different meanings and that the term should be examined within the context in which it appears. The Supreme Court, in *Hilton v. Guyot*,²⁶ dealing with the enforcement of foreign money judgments, offered a classic definition of the term, stating:

Comity in the legal sense, is neither a matter of absolute obligation, on the one hand, nor a mere customary and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

In a later federal case, *United States v. Nippon Paper Industries Co., Ltd.*,²⁷ the First Circuit defined “comity” as follows:

International comity is a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law. . . . Comity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation. . . .

[B] Complementarity

In the case of the Tribunals for Former Yugoslavia and Rwanda, the international body has a general power to trump any jurisdiction that might be exercised by a domestic body and proceed with a prosecution itself. In the case of the International Criminal Court (ICC), the basic structure is that national courts are given primacy, but the international body can step in on a showing that the national approach has failed. This is described as the principle of “complementarity.” The principle is enshrined in the Preamble and in Article 1 to the ICC’s Rome Statute.²⁸ Basically it allows for the international court to punish international crimes when a State fails to do so or is unwilling to proceed. Although it does not specifically reference the term “complementarity,” Article 17 of the Rome Statute for the International Criminal Court, headed “Issues of admissibility,” gives practical effect to the principle. Article 17 provides that a case does not proceed in the ICC when (1) a State is investigating or prosecuting, unless that state is “unwilling or unable” to proceed, (2) a State decides not to proceed,

²⁴ See Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1 (1991).

²⁵ Restatement (Third) of the Foreign Relations Law of the United States § 403, Comment (a). These remarks come in the context of a discussion by the Reporters of the Restatement of what they regard as a principle of reasonableness that has now gone beyond comity to become a rule of law. A state, they argue, may not exercise jurisdiction with respect to matters having connections with another state when the exercise of such jurisdiction is unreasonable.

²⁶ 159 U.S. 113, 164 (1895).

²⁷ 109 F.3d 1 (1st Cir. 1997).

²⁸ “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” The Rome Statute of the International Criminal Court, Preamble, para. 10. It “shall be complementary to national criminal jurisdictions.” *Id.*, Art. 1.

unless “the decision resulted from the unwillingness or inability of the State genuinely to prosecute,” or (3) the person has already been tried and cannot be tried again because of “*ne bis in idem*.”²⁹

[C] *Erga Omnes*

The term “*erga omnes*” refers to a State’s standing to enforce certain rights, usually rights that are *jus cogens*, rights that belong to the international community.³⁰ These rights may be provided either through treaty or by customary international law. It is not necessary for the specific State to be the victim of the breach of international law. The word “obligation” is often seen prior to the term “*erga omnes*” with some claiming that this term provides an obligation to enforce *jus cogens* violations.³¹

Many refer to the following two paragraphs from the dictum in the International Court of Justice in *Barcelona Traction* as the starting point for defining the term *erga omnes*:³²

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character.

A close relationship can be seen between paragraph 34 and international crimes *stricto sensu*.

[D] Extraterritoriality

Acts that occur outside the territory of a State are considered extraterritorial. This is an important term, as it raises issues of when there is appropriate jurisdiction for a country to proceed with a criminal case when the act occurs outside the State’s territory.³³ Often, when one discusses extraterritoriality, it is necessary to consider issues of reasonableness and comity to determine whether

²⁹ See § 1.03[F]. Art. 17 of the Statute references the Preamble and Art. 1.

³⁰ See § 1.03[E].

³¹ M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 168 (2003).

³² *Case Concerning the Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain)*, Second Phase, 1970 I.C.J. 3, 32 (Feb. 5). See also MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* (1997).

³³ See § 2.04.

assertion of jurisdiction beyond the bounds of a country (including on its ships and aircraft) will implicate the jurisdiction of another State.

In the United States, Congress explicitly provides for extraterritorial jurisdiction within some statutes. Many statutes, however, do not specify whether they apply extraterritorially. These statutes require judicial interpretation to discern the intent of Congress. In addition to ascertaining the intent of Congress at the time the statute was written, jurisdiction principles of international law can also be used to decide whether an extraterritorial application is appropriate.

[E] *Jus Cogens*

Jus cogens is the “compelling law,” the highest of obligations under law placed upon countries. It is usually said to include norms prohibiting crimes such as genocide and violations of human rights. It is a norm that a “large majority” of States accept, with only perhaps a “very small number of States” rejecting.³⁴ Under Article 53 of the Vienna Convention on the Law of Treaties, a *jus cogens* norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

[F] *Ne Bis in Idem*

The term “*ne bis in idem*” is the international version of the concept of double jeopardy that prohibits repeated trials for the same crime. This is an important concept in international criminal law, as more than one State may choose to proceed with a prosecution both in respect of “ordinary” crimes like transnational securities fraud, or in respect of crimes of international concern such as aircraft hijackings. Unfortunately, one cannot say with confidence that a previous conviction or acquittal in State A will preclude a subsequent prosecution in State B. State practice varies and many countries still follow some version of the dual sovereignty rule which is a prominent feature of United States federal/state practice. The main treaty provision dealing with rights in the criminal justice process, Article 17, paragraph 7 of the Covenant on Civil and Political Rights is applicable only in the domestic sphere. It provides that “[n]o one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”³⁵ Recent commentators remark that “although the principle applies internally in almost all domestic jurisdictions, its cross-border application remains controversial and is not recognized as a customary rule or a general principle of law.”³⁶ The area is under development. Many extradition treaties contain various forms of *ne bis* provisions. Embodied within the Rome Statute for the International Criminal Court is a sophisticated provision describing the concept of

³⁴ The Restatement (Third) of the Foreign Relations Law § 102 (1987).

³⁵ International Covenant on Civil and Political Rights, Art. 14(7) (1966). Note also the U.S. “understanding” when ratifying the Covenant: “The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.” See WISE, PODGOR & CLARK, *supra* Note 12 at 593.

³⁶ ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURT, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 68 (2007) (footnote omitted).

ne bis in idem in the context of potential international prosecutions³⁷ It essentially precludes a second trial in the ICC “with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.” (Paragraph 1.) Moreover, “No person shall be tried by another court for a crime referred to in article 5 [genocide, crimes against humanity, war crimes, crime of aggression] for which that person has already been convicted or acquitted by the Court.” (Paragraph 2.) It adds, in respect of trials in domestic courts, that:

No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 [genocide, crimes against humanity, war crimes] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the persons concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

It remains to be seen how these tentative steps will be worked out in national and international practice, as more states begin to exercise extraterritorial jurisdiction, especially on the basis of universal jurisdiction, and thus the opportunities for concurrent jurisdiction leading to issues of *ne bis in idem* become greater.

³⁷ The Rome Statute of the International Criminal Court, Art. 20.