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# CRIMINAL LAW BEYOND BORDERS

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## INTRODUCTION

Conflict, crime, and violence are becoming ever-more internationalized.<sup>1</sup> Transnational organized crime is pervasive and growing.<sup>2</sup> Meanwhile, millions have died in armed conflicts since the Cold War.<sup>3</sup> While the post-World War II Nuremberg trials are often associated with the birth of modern international criminal law, the extension of criminal law beyond borders has not been monolithic. The proliferation of international criminal tribunals, and the continued need for cross-border criminal cooperation, warrants taking a step back to assess the bigger picture. This essay clarifies the distinctions among transnational, international, and inter-state criminal law to help scholars, practitioners, and policymakers think more systematically about promise and pitfalls of different approaches.

Domestic criminal lawyers must grapple increasingly with transnational crimes. Within the international legal community, the distinction between transnational and international criminal law has acquired renewed salience in the wake of Russia's full-scale invasion of Ukraine in February 2022. The initial prosecutorial response to Russia's invasion was swift.<sup>4</sup> On March 23, 2022, a Ukrainian court sentenced a Russian soldier to life in prison for killing an unarmed civilian.<sup>5</sup> The sentencing judge stated that "the crime committed is a crime against peace, security, humanity and the international legal order."<sup>6</sup> The conviction sought to vindicate Ukraine's interest in condemning, punishing, and

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1. WORLD BANK GROUP, POLICY RESEARCH REPORT, VIOLENCE WITHOUT BORDERS: THE INTERNATIONALIZATION OF CRIME AND CONFLICT 2 (2020), <https://www.worldbank.org/en/research/publication/violence-without-borders> [https://perma.cc/KQQ3-22RL].

2. See, e.g., *Global Initiative Against Transnational Organized Crime*, <https://globalinitiative.net/initiatives/ocindex/> (last visited Nov. 18, 2024) [https://perma.cc/9QTM-4WZM].

3. Bastian Herre, *Millions Have Died in Conflicts Since the Cold War; Most of them in Africa and Intrastate Conflicts* (2024), <https://ourworldindata.org/conflict-deaths-breakdown> (last visited Nov. 18, 2024) [https://perma.cc/ZMQ2-6FD2].

4. See Pavel Polityuk, *Russian Soldier Jailed for Life in First War Crimes Trial of Ukraine War*, REUTERS (May 23, 2022, 9:35 AM), <https://www.reuters.com/world/europe/ukraine-court-jails-russian-soldier-life-war-crimes-trial-2022-05-23/> [https://perma.cc/A6Q4-DFFF].

5. *Id.*

6. *Id.*

detering war crimes on its territory and against its nationals.<sup>7</sup> Yet the judge's remarks highlighted another goal of the trial: to vindicate the interests of "humanity and the international legal order."<sup>8</sup> Recent progress towards a global treaty on crimes against humanity reflects a similar impulse.<sup>9</sup>

When criminal conduct crosses international borders, legal and policy options fall under three broad headings. First, as defined here, *transnational* criminal law involves cooperation among nation-states to enforce rules of behavior that cross geographic borders, but that are rooted in the sovereignty of the enforcing state. Second, *international* criminal law defines certain rules (notably the prohibitions on war crimes, genocide, crimes against humanity, and wars of aggression) as sufficiently universal to warrant enforcement by international criminal tribunals and by domestic courts acting in the name of the entire international community. Third, *inter-state* criminal law involves adjudicating state responsibility for international crimes.

Each of these accountability pathways carries its own benefits and drawbacks. For example, international lawyers have debated the legal and policy options for prosecuting Russian President Vladimir Putin for the international crime of aggression, including the possibility of creating a new tribunal. These debates have focused in part on the differential prerogatives of domestic and international courts, rooted in their respective sources of legal authority.<sup>10</sup> The more features a new hybrid tribunal shares with a domestic court, the more likely foreign head-of-state immunity would bar indicting and prosecuting Putin while he remains in office; the more features it shares with an international court, the more likely it could overcome immunity defenses (although it could still have trouble securing custody of high-level Russian officials).<sup>11</sup> Meanwhile, both Russia and Israel have challenged the jurisdiction of the International Criminal Court over alleged crimes committed by these countries' officials on the grounds that they have not agreed to be bound by the treaty that created the court, even though Ukraine and the State of Palestine—on whose territories alleged crimes

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7. Russia has also conducted prosecutions, in an example of what might be called "global justice gaslighting." See, e.g., Amnesty International, *Russia: Charging 92 Members of Ukraine's Military with 'Crimes Against Humanity' Brazenly Undermines Fair Trial Rights* (July 25, 2022), <https://www.amnesty.org/en/latest/news/2022/07/92-ukraine-military-charged-crimes-against-humanity/> [<https://perma.cc/2WRE-56WU>]. Whether or not certain Ukrainian actions have violated the laws of armed conflict, Russia's use of criminal law in these circumstances appears to be purely pretextual and retaliatory.

8. Polityuk, *supra* note 4.

9. See, e.g., Amnesty International, *Global: States Must Negotiate a Robust Treaty on Crimes Against Humanity After Breakthrough Resolution* (Nov. 22, 2024), <https://www.amnesty.org/en/latest/news/2024/11/states-must-negotiate-robust-treaty-crimes-against-humanity-after-resolution/> [<https://perma.cc/S9ZU-QP8V>].

10. See, e.g., *President: Ukraine Stands Against Hybrid Formats of Tribunal for Russian Crime of Aggression* (May 4, 2023), <https://www.president.gov.ua/en/news/ukrayina-vistupaye-proti-gibridnih-formativ-tribunalu-shodo-82669> [<https://perma.cc/HDE9-UFPC>].

11. See, e.g., *Special Court for Sierra Leone*, Prosecutor v. Charles Taylor, *Decision on Immunity from Jurisdiction*, para. 38 (May 31, 2004), <https://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf> [<https://perma.cc/655U-SE36>] (reasoning that head-of-state immunity did not apply because the treaty creating the court expressed "the will of the international community," thereby making the court "truly international"). To date, most have assumed that the U.N. General Assembly could not create an international court without the U.N. Security Council.

have been committed—have joined the treaty.<sup>12</sup> Jurisdictional conflicts can arise when more than one country claims authority to prescribe, adjudicate, and enforce binding rules of conduct. This brief essay offers a framework for thinking about some of these challenges.

### I. TRANSNATIONAL CRIMINAL LAW

The idea of state sovereignty means that nation-states can prescribe rules of conduct for individuals and entities within their borders, but not necessarily beyond them.<sup>13</sup> As a doctrinal matter, international law recognizes several permissible bases for prescribing rules extraterritorially. These include rules governing the conduct of a state's own nationals (active personality), rules governing conduct that harms a state's nationals (passive personality), rules governing conduct that produces an effect within the state's territory (effects or objective territoriality), and rules governing conduct that is universally condemned (universality).<sup>14</sup> Although it is not unusual for a state to prescribe conduct-regulating rules that govern extraterritorial conduct, territorial sovereignty limits a state's authority to enforce these rules.<sup>15</sup> States must cooperate to reduce the resulting enforcement gap.

Transnational criminal law encompasses the network of bilateral and multilateral agreements that allow countries to seek custody of fugitives and obtain evidence located in other jurisdictions. Although one country's courts can apply another country's private or civil law, that is not the case for penal law.<sup>16</sup> Cooperative arrangements are thus necessary in part because, as observed by the U.S. Supreme Court in 1892, national courts will not “punish an offense against the public justice of [a foreign] state,” even though they might “afford a private remedy to a person injured by the wrongful act”<sup>17</sup> by allowing an injured party to bring a tort claim or by enforcing a foreign damages award. While civil remedies can offer compensation and might contribute to deterrence, states generally turn to criminal law to perform distinctive functions such as branding particularly harmful behavior as criminal, imposing punishment, incapacitating offenders, and promoting specific and general deterrence. Although these functions generally operate within a given political and territorial community, they are also intended to promote shared goals of peaceful and orderly coexistence within and between states.

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12. There is a further debate about whether the State of Palestine had the capacity to join the treaty and trigger ICC jurisdiction over nonstate-party nationals. *See* Public Redacted Version of “Israel’s challenge to the jurisdiction of the Court pursuant to Article 19(2) of the Rome Statute” (Sep. 23, 2024), available at <https://www.justsecurity.org/wp-content/uploads/2024/10/state-of-israel-on-jurisdiction-article-192-icc-0118-354-anxII-corr.pdf> [<https://perma.cc/G2RF-KZ9Y>] (last visited Nov. 23, 2024).

13. *See* Restatement (Fourth) of the Foreign Relations Law of the United States § 407 (Am. L. Inst. 2018).

14. *See id.*

15. *See id.* § 432.

16. *See* *Huntington v. Attrill*, 146 U.S. 657, 685–86 (1892).

17. *Id.* at 674.

Human activity—including criminal conduct—routinely crosses borders. This gives rise to jurisdictional puzzles and practical challenges. In the 1920s, Henri Donnedieu de Vabres, a Professor in the Faculty of Law at the University of Paris, described the need to coordinate and reconcile potentially competing claims to authority in the criminal sphere.<sup>18</sup> He labeled the resulting framework *droit pénal international* (international penal law).<sup>19</sup> Transnational criminal law, as defined here, entails a framework akin to de Vabres’ “international penal law.” This paradigm for cross-border accountability privileges cross-border cooperation to enforce domestic criminal law. Mutual legal assistance treaties (“MLATs”) and bilateral extradition treaties provide important tools for international cooperation to combat criminal activity.<sup>20</sup> The transnational criminal law paradigm vindicates a state’s interest in enforcing its own domestic criminal laws. It also promotes other states’ interest in reciprocal cooperation, and in not harboring fugitives who committed crimes in other states.

Absent state cooperation, territorial sovereignty can impede criminal enforcement. One need only think of WikiLeaks founder Julian Assange’s long sojourn in Ecuador’s embassy in the United Kingdom as he sought to evade extradition to Sweden or the United States.<sup>21</sup> Sometimes, extradition requests are controversial, like the United States’s request to extradite Assange.<sup>22</sup> China’s issuance of arrest warrants for vocal critics of its policies in Hong Kong prompted multiple countries to suspend their extradition treaties with China, since there is no international legal obligation to arrest or surrender an individual absent an applicable treaty.<sup>23</sup>

In addition to facilitating the enforcement of ordinary domestic criminal law, the transnational criminal law paradigm can also include the proscription and punishment of crimes that are defined by international treaties. A number of treaties define unlawful conduct and oblige state parties to incorporate these definitions into their domestic criminal law, but they do not create international institutions or mechanisms for enforcement.<sup>24</sup> For example, the United Nations Office on Drugs and Crime (“UNODC”) supports efforts by member states to suppress transnational organized crime, corruption, drug trafficking, and various

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18 See J.S. Reeves, Review of H. DONNEDIEU DE VABRES, *LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL* (1928), 23 AM. J. INT’L L. 241 (1929).

19. *Id.*

20. *See id.*

21. *See Julian Assange: Wikileaks Co-Founder Arrested in London*, BBC (Apr. 11, 2019), <https://www.bbc.com/news/uk-47891737> [<https://perma.cc/Z9ZD-75ZD>].

22. Assange ultimately pleaded guilty to conspiring to obtain and disclose classified information, and he was allowed to return to Australia. See U.S. Dep’t of Justice, *Wikileaks Founder Pleads Guilty and Is Sentenced for Conspiring to Obtain and Disclose Classified National Defense Information* (Jun. 25, 2024), <https://www.justice.gov/opa/pr/wikileaks-founder-pleads-guilty-and-sentenced-conspiring-obtain-and-disclose-classified> [<https://perma.cc/HA9H-SWER>].

23. Jessie Pang, *Arrest Warrants Issued for Six Hong Kong Democracy Activists: CCTV* (Jul. 31, 2020), REUTERS.COM, <https://www.reuters.com/article/world/arrest-warrants-issued-for-six-hong-kong-democracy-activists-cctv-idUSKCN24W2FB/> [<https://perma.cc/S8WV-6ZHW>].

24. *Accord* Neil Boister, “*Transnational Criminal Law?*”, 14 EUR. J. INT’L L. 953 (2003).

terrorism-related offenses.<sup>25</sup> The decentralized enforcement of these treaty-based crimes via domestic prosecutions represents another facet of transnational criminal law. The treaty-based definitions ensure a degree of uniformity and cooperation in efforts to combat harmful activity that crosses state borders, and that can implicate the security and other interests of multiple states.

Differences in states' conceptions of what conduct should be criminalized, and how unlawful conduct should be proved and punished, surface in the design and implementation of transnational criminal law frameworks. For example, opposition to a proposed cybercrime treaty focused on the imprecise definition of "cybercrime" and the potential abuse of the treaty to suppress online dissent.<sup>26</sup> Difficulties can also arise when states disagree about criminal conduct under their domestic laws. A common provision in modern bilateral extradition treaties requires that the charged offense amount to the equivalent of a felony in both countries.<sup>27</sup> Extradition treaties also generally contain procedural guarantees, as well as a provision requiring that the extradited individual only be tried for the crimes specified in the extradition request.<sup>28</sup> Nonetheless, states recognize that prosecution can become a tool for persecuting political opponents and suppressing political dissent. As a safeguard, bilateral extradition treaties often contain a "political offense exception."<sup>29</sup> This exception allows an individual to challenge their extradition on the grounds that the alleged offense was political in nature—even if the charged conduct was clearly criminal.<sup>30</sup> Although imperfect, extradition remains an important mechanism for law enforcement cooperation among states with sufficiently similar conceptions of crime and punishment.

Before turning to international criminal law, it is worth considering several atypical examples of transnational criminal law approaches to cross-border crime. In the absence of a global criminal court that can exercise jurisdiction over all cross-border crimes, states have devised ways to apply domestic criminal law in nonroutine circumstances and through innovative institutional arrangements. For example, after the bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988, Scotland sought to prosecute Libyan defendants charged with planning

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25. *Treaties*, U.N. OFF. ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/treaties/index.html> (last visited Nov. 12, 2024) [<https://perma.cc/SUG7-4ZSE>].

26. *See, e.g.*, Jason Pielemeier, *Rethinking the United Nations Cybercrime Treaty*, JUST SECURITY (Sep. 23, 2024), <https://www.justsecurity.org/100333/rethinking-united-nations-cybercrime-treaty/> [<https://perma.cc/9UQL-URJ3>] (arguing that the treaty will "put the privacy, data, and safety of dissidents, journalists, and activists around the world at risk"); Tomaso Falchetta, *The Draft U.N. Cybercrime Treaty Is Overbroad and Falls Short on Human Rights Protection*, JUST SECURITY (Jan. 22, 2024), <https://www.justsecurity.org/91318/the-draft-un-cybercrime-treaty-is-overbroad-and-falls-short-on-human-rights-protection/> [<https://perma.cc/G9WM-YZQR>] (arguing that the treaty "will give governments' abusive practices a veneer of international legitimacy").

27. *See Individuals in Cross-Border Investigations or Proceedings: The US Perspective*, GIR (Jan. 4, 2023), <https://globalinvestigationsreview.com/guide/the-practitioners-guide-global-investigations/2023/article/individuals-in-cross-border-investigations-or-proceedings-the-us-perspective> [<https://perma.cc/E3FC-7MLA>].

28. *See id.*

29. *See, e.g.*, *Ordinola v. Hackman*, 478 F.3d 588, 596–97 (4th Cir. 2007) (explaining U.S. courts' approach to defining a "political offense" under extradition treaties).

30. *See id.*

and carrying out the bombing.<sup>31</sup> Following intense diplomatic negotiations to secure custody of the defendants, a Scottish court ultimately convened and held a criminal trial of two defendants in the Netherlands.<sup>32</sup> This unusual arrangement enabled Scotland to enforce its domestic criminal law, even though the trial took place outside Scotland's territorial borders.<sup>33</sup> In addition, almost two decades after the trial under Scottish criminal law, the United States indicted a third alleged participant under U.S. criminal law.<sup>34</sup> In announcing the indictment, FBI Director Christopher Wray emphasized the U.S. domestic interest at stake: "when Americans are harmed, the FBI and the United States government will never stop pursuing justice for our citizens."<sup>35</sup> While the Lockerbie bombing was an international incident, the criminal law response was transnational because it involved the application of domestic criminal law to conduct that crossed borders. This is so, even though the Scottish trial and the U.S. indictment also sought to vindicate a broader communal interest in suppressing and punishing terrorist bombings.

In another unusual example, the United States and several other countries initiated domestic criminal investigations in response to Belarus's forced landing of a Ryanair flight for the purpose of arresting a Belarusian dissident who was on board.<sup>36</sup> As part of its response to this incident, the United States indicted the Director General of the Belarusian state air navigation authority and several other Belarusian officials for violating U.S. law. The indictment charged these officials with conspiracy to commit aircraft piracy for allegedly engineering the diversion of the Ryanair flight in May 2021 for the purpose of arresting Belarusian journalist Roman Protasevich.<sup>37</sup> The jurisdictional hook under U.S. law was the presence of four U.S. nationals on board the flight.<sup>38</sup> If any of the named individuals travel to a country that has an extradition treaty with the United States, they will be subject to arrest and prosecution.<sup>39</sup> Because there is no international criminal tribunal for aircraft piracy, states must rely on a

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31. See *Lockerbie Trial*, SCOT. CT. & TRIBUNALS SERV., <https://www.scotcourts.gov.uk/search-judgments/lockerbie-trial> [https://perma.cc/LJ8H-HCXY].

32. *Id.*; see also Michael P. Scharf, *The Lockerbie Trial Verdict*, ASIL INSIGHTS (Feb. 13, 2001), <https://www.asil.org/insights/volume/6/issue/2/lockerbie-trial-verdict> [https://perma.cc/GS73-7GUV].

33. See *Lockerbie Trial*, *supra* note 31.

34. Press Release, Off. of Pub. Aff., U.S. Dep't of Just., *Former Senior Libyan Intelligence Officer and Bomb-Maker for the Muammar Qaddafi Regime Charged for The December 21, 1988 Bombing of Pan Am Flight 103*, <https://www.justice.gov/opa/pr/former-senior-libyan-intelligence-officer-and-bomb-maker-muammar-qaddafi-regime-charged> [https://perma.cc/PUD4-EDTD].

35. See *id.*

36. Press Release, U.S. Att'y's Off. for the S.D.N.Y., U.S. Dep't of Just., *Belarusian Government Officials Charged with Aircraft Piracy For Diverting Ryanair Flight 4978 To Arrest Dissident Journalist In May 2021* (January 20, 2022), <https://www.justice.gov/usao-sdny/pr/belarusian-government-officials-charged-aircraft-piracy-diverting-ryanair-flight-4978> [https://perma.cc/M63J-NAYE].

37. *Id.* See also Chimène Keitner, *Foreign Policy and Legal Implications of the Belarus Aircraft Piracy Indictment*, JUST SECURITY (Feb. 8, 2022), <https://www.justsecurity.org/80129/foreign-policy-and-legal-implications-of-the-belarus-aircraft-piracy-indictment/> [https://perma.cc/WDK7-H448].

38. See 49 U.S.C. § 46502(b)(2)(A).

39. See Keitner, *supra* note 37.

decentralized, transnational approach to enforcement, and on the political will and resources of states that have jurisdictional links to the conduct.<sup>40</sup>

In a final example, as part of its multi-pronged response to Russia's invasion of Ukraine, the U.S. Department of Justice announced the launch of "Task Force KleptoCapture" to enforce "the sweeping sanctions, export restrictions, and economic countermeasures that the United States has imposed, along with allies and partners, in response to Russia's unprovoked military invasion of Ukraine."<sup>41</sup> The criminal offenses that come within the scope of this transnational criminal law project include money laundering, false statements to a financial institution, bank fraud, and various tax offenses.<sup>42</sup> These offenses are not considered international crimes, but they are crimes that require cross-border cooperation to prosecute and punish. Moreover, the cooperating states often view their joint efforts as vindicating a collective—and not merely a domestic—interest.<sup>43</sup>

In sum, transnational criminal law can operate in an international society of sovereign nation-states with a common interest in maintaining a certain degree of public order—as long as states agree on what the demands of public order legitimately require. In international relations terminology, such cooperation can be based on rationalist or "Grotian" conceptions of international society in which each state actor realizes its own self-interest through cooperative arrangements. This is different from international criminal law, which is based on a constructivist or "Kantian" idea of the international community as more than the sum of its parts, and as capable of forming and implementing a collective will—a paradigm that reached its apogee in the late 1990s and early 2000s.

## II. INTERNATIONAL CRIMINAL LAW

On a conceptual level, the idea of international criminal law is closely associated with the work of a contemporary of Donnedieu de Vabres, Romanian jurist Vespasian Pella.<sup>44</sup> Pella used the term *droit pénal interétatique* (literally, inter-state criminal law) to refer to

the new international criminal law, which . . . has for its object the repression of acts violating the fundamental interests of the moral and

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40. *Id.*

41. Press Release, Off. of Pub. Aff., U.S. Dep't of Just., *Attorney General Merrick B. Garland Announces Launch of Task Force KleptoCapture* (March 2, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force-kleptocapture> [https://perma.cc/JHR7-LS49].

42. *Id.*

43. The seizure of Nicolás Maduro's plane in the Dominican Republic at the request of U.S. authorities offers another example. See Press Release, Off. of Pub. Aff., U.S. Dep't of Just., *United States Seizes Aircraft Used by Nicolás Maduro in Violation of U.S. Export Control and Sanctions Laws* (Sep. 2, 2024), <https://www.justice.gov/opa/pr/united-states-seizes-aircraft-used-nicolas-maduro-moros-violation-us-export-control-and> [https://perma.cc/8AWX-SL48].

44. The work of both Donnedieu de Vabres and Pella is explored in Frédéric Mégret and Immi Tallgreen's edited volume, *THE DAWN OF A DISCIPLINE: INTERNATIONAL CRIMINAL JUSTICE AND ITS EARLY EXPONENTS* (Frédéric Mégret and Immi Tallgreen, eds., 2020).

material order for which the establishment of peaceful relations between members of the international community calls.<sup>45</sup>

Pella's conception depends on more than just cooperation; rather, it posits a common "moral and material order" that is part and parcel of peaceful relations among "members of the international community."<sup>46</sup> This type of criminal law presupposes what German sociologist Ferdinand Tönnies called a *Gemeinschaft* held together by common values, not just a *Gesellschaft* of self-interested states.

Contemporary international lawyers generally distinguish between crimes such as aircraft hijacking and the "core" international crimes: war crimes, genocide, crimes against humanity, and crimes of aggression.<sup>47</sup> As a conceptual and practical matter, international criminal law can be distinguished from transnational criminal law because it (1) defines certain conduct as fundamentally contrary to the values of the international community as a whole, and (2) envisions international institutions that use criminal law to vindicate those values.<sup>48</sup>

The careers of Donnedieu de Vabres and Pella illustrate the progression from transnational to international criminal law. After having defined the field of transnational criminal law in his academic work, Donnedieu de Vabres served as the primary French judge on the International Military Tribunal at Nuremberg after World War II.<sup>49</sup> He was also a co-author, with Raphael Lemkin and Pella, of the text that became the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>50</sup>

Criminal law reflects and reinforces behavioral norms common to a given community. The idea of international criminal law and the possibility of individual responsibility under international law depend on the existence of a community standard of behavior. The creation of the International Military Tribunals at Nuremberg and Tokyo, and the International Law Commission's project on a Draft Code of Crimes Against the Peace and Security of Mankind, emphasized the international legal obligations of individuals and "pierced the veil" of the sovereign state.<sup>51</sup> Domestic prosecutions of international crimes—especially absent a connection between the forum state and the crime, the perpetrator, or the victim—seek to vindicate the common interests of the entire international community, rather than the particular interests of the forum state.

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45. Vespasian V. Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L L. 37, 55 (1950). Pella proposed that "as soon as a juridical order is set up, the best name for this new branch of law would be supranational criminal law." *Id.* at 56 n.48.

46. *Id.*

47. This list does not (yet) encompass grand corruption, which often underlies crimes of state violence. See, e.g., Naomi Roht-Arriaza & Santiago Martínez, *Grand Corruption and the International Criminal Court in the "Venezuela Situation,"* 17 J. INT'L CRIM. JUST. 1057 (2019).

48. See *id.*

49. See THE DAWN OF A DICIPLINE, *supra* note 44.

50. *Id.*

51. See M. Cherif Bassiouni, *The History of the Draft Code of Crimes Against the Peace and Security of Mankind*, 27 ISR. L. REV. 247 (1993).

Two principles provide the jurisdictional scaffolding for the contemporary regime of international criminal law: the *aut dedere, aut judicare* (prosecute or extradite) principle, and the principle of complementarity.<sup>52</sup> “Prosecute or extradite” provisions in international treaties oblige state parties to either try alleged perpetrators in domestic court or transfer them to a jurisdiction in which they can be prosecuted.<sup>53</sup> Under the principle of “universal jurisdiction,” some countries’ domestic courts can prosecute international crimes that have little or no connection to the forum state, thereby creating opportunities for third states to conduct trials of non-nationals for international crimes that occurred elsewhere.<sup>54</sup> The International Criminal Court (“ICC”), which was created by an international treaty, is built on a regime of complementarity that prioritizes prosecution by national domestic courts.<sup>55</sup> Under this jurisdictional framework, cases are “inadmissible” before the ICC if they have been investigated or prosecuted by a state that has jurisdiction unless the state is “unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>56</sup>

Efforts to institutionalize international criminal law have fallen far short of genuine universalism, both in their conception and in their execution. Criticisms include the definitions of international crimes, which generally focus on acute, rather than structural, forms of violence, as well as selectivity in prosecutions and gaps in the jurisdictional reach of international tribunals.<sup>57</sup> Claims to universality must be tempered by acknowledgment of these realities. The emergence of a substantive body of international criminal law and accompanying international institutions represents a significant accomplishment, even though it has also created diplomatic tensions. For example, the ICC Prosecutor sought and obtained arrest warrants for high-level officials alleged to have committed international crimes in Ukraine and Gaza.<sup>58</sup> Among other reactions, this has reignited debates about whether international prosecutions during an ongoing armed conflict can undermine efforts to end the conflict.

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52. See Alison Bisset, *The Mutual Legal Assistance Treaty for Core Crimes: Filling the Gap?*, EJIL:TALK! (June 13, 2022), <https://www.ejiltalk.org/the-mutual-legal-assistance-treaty-for-core-crimes-filling-the-gap> [<https://perma.cc/75CG-XJLT>]; Rome Statute for the International Criminal Court, art. 17(1)(a)-(c), July 1, 2002, 2187 U.N.T.S. 90.

53. On efforts to streamline mutual legal assistance for prosecuting genocide, crimes against humanity, and war crimes, see Bisset, *supra* note 52. The text of a new treaty was adopted at a diplomatic conference in Ljubljana, Slovenia held in May 2023.

54. See, e.g., Princeton Principles on Universal Jurisdiction (2001), <http://hrlibrary.umn.edu/instree/princeton.html> [<https://perma.cc/6PL6-PJY2>].

55. Rome Statute for the International Criminal Court, art. 17(1)(a)-(c), July 1, 2002, 2187 U.N.T.S. 90.

56. *Id.*

57. See, e.g., Elies van Sliedregt, *One Rule for Them—Selectivity in International Criminal Law*, 34 LEIDEN J. INT’L L. 283 (2021).

58. Statement by Prosecutor Karim A.A. Khan QC: *Applications for arrest warrants in the situation in the State of Palestine*, INT’L CRIM. CT. (May 20, 2024), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state> [<https://perma.cc/67MW-7TVH>]; Statement by Prosecutor Karim A.A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova, INT’L CRIM. CT. (Mar. 17, 2023), <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin> [<https://perma.cc/3PQY-NNH5>].

Under current doctrine, domestic tribunals prosecuting foreign defendants for international crimes must respect the status-based (*ratione personae*) immunity of heads of state, heads of government, and foreign ministers.<sup>59</sup> Consequently, although Ukraine can prosecute lower-level Russian officials for the crime of aggression (if it secures custody of alleged offenders), it would not be able to prosecute Putin while he still holds office. The intense discussions among international criminal lawyers about the most viable arrangements for prosecuting Putin often overlook the fact that he is most likely to be prosecuted, if at all, after having been removed from power.

Russia's aggression against Ukraine lies outside the scope of the ICC's subject-matter jurisdiction. Ukraine has argued in favor of creating a new international criminal tribunal that could prosecute Putin for aggression while he is still in office, although the legal basis for doing so seems unclear absent action by the U.N. Security Council.<sup>60</sup> The ICC, which does not recognize immunity defenses, has issued arrest warrants for Putin and for Israeli Prime Minister Binyamin Netanyahu, among others.<sup>61</sup> In announcing his decision to pursue charges against leaders of Hamas and the current Israeli government, the ICC Prosecutor emphasized the role of international criminal law in strengthening "stabilizing connections between all communities and individuals"—echoing Pella's conception in 1950 of a "supranational criminal law" that would protect the "fundamental interests of the moral and material order."<sup>62</sup>

### III. INTER-STATE CRIMINAL LAW

Despite the cross-border reach of transnational and international criminal law (as well as other bodies of law, such as international human rights law), we continue to live in an international system made up of separate, sovereign nation-states. The nature of state responsibility under international law does not have a precise analog in domestic legal systems, which generally provide for civil and/or criminal liability. Moreover, even if states could bear criminal responsibility for their acts and omissions, they are not subject to criminal jurisdiction in each other's domestic courts.<sup>63</sup>

As noted above, Pella used the term "inter-state criminal law" to encompass what we would now call "international criminal law" (in French, "*droit international pénal*").<sup>64</sup> The term "inter-state criminal law" conjures notions of state criminality—something that the International Law Commission (a distinguished advisory body appointed by the U.N.) grappled with in its early

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59. See Case Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 22 (Feb. 14).

60. See *supra* note 10 and accompanying text.

61. See *supra* note 58.

62. See *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine*, *supra* note 58; Pella, *supra* note 45.

63. See Chimène I. Keitner, *Prosecuting Foreign States*, 61 VA. J. INT'L L. 221, 225 (2021).

64. See Pella, *supra* note 45.

work on principles of state responsibility.<sup>65</sup> In 2005, International Court of Justice Judge Antônio Augusto Cançado Trindade advocated reviving the idea of state criminality “whenever there is an attack against [certain fundamental and superior] values or a violation of the norms which protect them.”<sup>66</sup> That said, it is difficult to imagine how a determination of state criminality could be made with legally binding force in the current international system. The U.N. Security Council has proved ineffective in addressing situations that implicate its veto-wielding members. Tribunals such as the International Court of Justice can issue judgments declaring violations and ordering cessation and restitution, but they cannot impose punitive measures.<sup>67</sup> For these reasons, the idea of state criminality will likely remain metaphorical rather than doctrinal. Moreover, punishing states raises further questions about collective responsibility and guilt that echo debates after World War II.<sup>68</sup>

It remains to be seen whether the special Uniting for Peace procedures, under which the U.N. General Assembly has already condemned Russia’s actions and called for a ceasefire in Gaza, could be used to craft a more robust international response in the face of Security Council paralysis. Because the United Nations system replicates and entrenches the power dynamics that prevailed at the end of World War II, the legal authority and political will to punish international crimes by powerful states falls far short of what a true system of inter-state criminal law would require. In addition, deep geopolitical divisions, concerns about hypocrisy and “whataboutism,” and the practical necessity of cooperating (or at least coordinating) with other states means that the vocabulary and institutions of international criminal law will likely continue focusing on individual state officials rather than states themselves. That said, General Assembly resolutions passed by an overwhelming majority and judgments by the International Court of Justice in both contentious and advisory cases will continue to shape the perceived legitimacy of state actions and even the international legitimacy of offending states.

#### CONCLUSION

Seeking accountability for crimes is far inferior to preventing them in the first place. Nonetheless, the categories of transnational and international criminal law, and the possibility of inter-state criminal law, illustrate a range of

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65. *See id.*

66. Antônio Augusto Cançado Trindade, *Complementarity Between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited*, in Mauricio Ragazzi, ed., *INT’L RESPONSIBILITY TODAY* 253, 264 (2005).

67. *See, e.g.*, Georg Nolte, *From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations*, 13 *EUR. J. INT’L L.* 1083, 1092 (2002) (referencing, and ultimately disagreeing with, Hersch Lauterpacht’s 1937 Hague Lectures, which cited punitive damages awards by arbitral tribunals to support the concept of state crime and punishment of the state).

68. *See generally* the collected essays in Tracy Isaacs & Richard Vernon, eds., *ACCOUNTABILITY FOR COLLECTIVE WRONGDOING* (2012).

approaches to violations of core conduct-regulating rules, with important differences and limitations:

	<b>Subjects</b>	<b>Normative framework</b>	<b>Enforcement mechanisms</b>	<b>Limitations</b>
<b>Transnational</b>	individuals & entities other than states	pluralist / Grotian	domestic institutions & state cooperation	certain international immunities; potential disagreement on substantive rules governing conduct
<b>International</b>	individuals & entities other than states	universalist / Kantian	domestic & international institutions	jurisdiction based on state consent; agreement on rules but disagreement about application in particular cases
<b>Inter-state</b>	states	universalist / Kantian	international or supranational institutions	U.N. Security Council veto; problems of collective responsibility and guilt

The choice among these approaches can matter for a range of reasons, including logistics and applicable procedures, the availability (or lack) of jurisdictional immunities, and the degree of perceived legitimacy by various stakeholders, including those bound or affected by any resulting judgment. To the greatest extent possible, choices among these options should be made by those most affected by the offending conduct. The catastrophic human toll of cross-border crime and conflict calls for continued attention to, and efforts to improve, the tools available to constrain, deter, and punish the most destructive forms of human behavior, without empowering authoritarian regimes. Given the decentralized nature of the international legal system and the persistent role of geopolitics, countries are likely to deploy a patchwork of transnational and international approaches to criminal law across borders for the foreseeable future.