

International crime

Introduction

With a few exceptions, a government only has the legal authority to exercise its laws over its own territory. That is, there is a limit to its jurisdiction. We know that laws are based on a combination of many factors including culture, religion, history, social norms and the like.

Nations are often side-by-side and share common borders. As a result, the activities of people or governments in one nation can impact on and affect the lives of people in other nations. It should be clear that there needs to be an overarching framework of laws that regulates the conduct of the nation state and even of governments within nation states (subject to very strict rules).

A system of international legal rules is therefore required to guide the interactions and relationships between nations. These rules can be found in a body of law called international law. International law may be found in two primary sources:

- Treaty law
- Customary international law

Forms/categories of international crimes

International crimes may be classified into THREE different types. The classification depends on:

- The nature of the types of crimes
- In which jurisdiction(s) the crime or crimes took place in
- Which national or international law applies

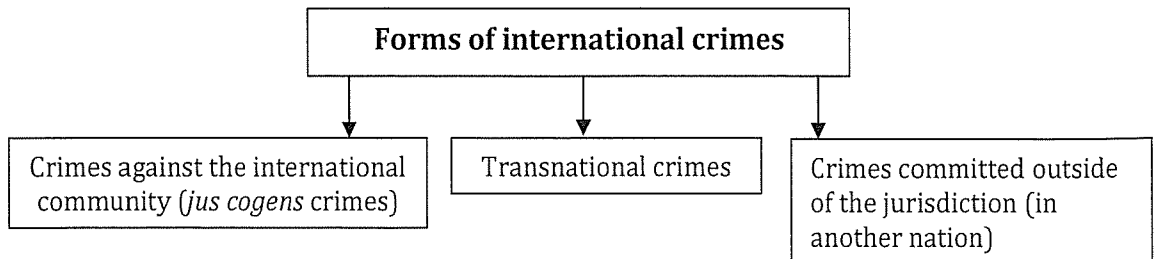


Figure 12 – A summary of the different types of international crime

Crimes against the international community

These are the worst forms of crimes are often generically termed 'crimes against humanity'. These crimes include:

- Genocide
- War crimes
- Other crimes against humanity

Genocide

The international legal definition of the crime of genocide is found in Articles II and III of the 1948 *Convention on the Prevention and Punishment of Genocide*. Article II describes two elements of the crime of genocide:

1. The *mental element*, meaning the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such", and
2. The *physical element* which includes five acts described in sections a, b, c, d and e. A crime must include both elements to be called "genocide."

Article III describes five punishable forms of the crime of genocide: genocide; conspiracy, incitement, attempt and complicity.

Excerpt from the *Convention on the Prevention and Punishment of Genocide*.

"Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group- includes direct killing and actions causing death
- b. Causing serious bodily or mental harm to members of the group - includes inflicting trauma on members of the group through widespread torture, rape, sexual violence, forced or coerced use of drugs, and mutilation.
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part - includes the deliberate deprivation of resources needed for the group's physical survival, such as clean water, food, clothing, shelter or medical services. Deprivation of the means to sustain life can be imposed through confiscation of harvests, blockade of foodstuffs, detention in camps, forcible relocation or expulsion into deserts.
- d. Imposing measures intended to prevent births within the group - includes involuntary sterilization, forced abortion, prohibition of marriage, and long-term separation of men and women intended to prevent procreation.
- e. Forcibly transferring children of the group to another group - may be imposed by direct force or by fear of violence, duress, detention, psychological oppression or other methods of coercion. The *Convention on the Rights of the Child* defines children as persons under the age of 18 years.

Genocidal acts need not kill or cause the death of members of a group. Causing serious bodily or mental harm, prevention of births and transfer of children are acts of genocide when committed as part of a policy to destroy a group's existence.

The law protects four groups - national, ethnical, racial or religious groups.

A **national group** means a set of individuals whose identity is defined by a common country of nationality or national origin.

An **ethnical group** is a set of individuals whose identity is defined by common cultural traditions, language or heritage.

A **racial group** means a set of individuals whose identity is defined by physical characteristics.

A **religious group** is a set of individuals whose identity is defined by common religious creeds, beliefs, doctrines, practices, or rituals.

Source: <http://www.preventgenocide.org/genocide/officialtext.htm>

War Crimes

War crimes arise when there are serious breaches to International Humanitarian Law (IHL). International Humanitarian Law is articulated in the four *Geneva Conventions* (GCs) and *Additional Protocols* (APs). War crimes include the following serious violations of international humanitarian law:

i. Grave breaches of the Geneva Conventions:

In the case of an international armed conflict, any of the following acts committed against persons or property protected under the provisions of the relevant *Geneva Convention*:

- wilful killing;
- torture or inhuman treatment, including biological experiments;
- wilfully causing great suffering or serious injury to body or health;
- extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial;
- unlawful deportation or transfer;
- unlawful confinement;
- taking of hostages.

Source: http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule156

The role of the *Geneva Conventions and Additional Protocols*

The *Geneva Conventions* detail the rules in international armed conflict and also in non-international armed conflict (civil war).

The Additional Protocols (APs) 1977

These relate to the protection of victims in armed conflict, both international and non-international.

Other crimes against humanity

Defined in the *Rome Statute* Article 7, crimes against humanity consist of a “widespread or systematic” commission of prohibited acts against a civilian population, with knowledge of the attacks and include:

- a. Murder;
- b. Extermination;
- c. Enslavement;
- d. Deportation or forcible transfer of population;
- e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i. Enforced disappearance of persons;
- j. The crime of apartheid;
- k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

In summary

Crimes against the international community include war crimes, genocide and other crimes against humanity. These crimes are called *jus cogens* crimes and are considered crimes under all circumstances. These crimes cannot be legally justified and will be punished in proceedings brought in the International Criminal Court (ICC) – see later.

Transnational crimes

These are crimes committed in two or more jurisdictions simultaneously and include such crimes as:

- Child sex tourism
- People smuggling and human trafficking
- Money laundering
- Drug trafficking

Whilst nations may have various agreements such as bilateral and multilateral treaties, each nation must deal with such crimes under its own domestic laws. In Australia the main law dealing with transnational crimes is the *Criminal Code Act 1995*. This can be seen with reference to each of the crimes listed above.

Child sex tourism

Child sex tourism occurs when Australian travellers go to other nations in order to engage minors in sexual activity. Many nations have passed similar laws to Australia's laws which effectively extend Australian criminal law into other jurisdictions. The *Criminal Code Act 1995* Division 272 is the law that outlaws child sex tourism (see below).

Criminal Code Act 1995 Division 272: Child sex offences outside of Australia

272.8 Sexual intercourse with child outside Australia

Engaging in sexual intercourse with child

1. A person commits an offence if:
 - a. the person engages in sexual intercourse with another person (the *child*); and
 - b. the child is under 16; and
 - c. the sexual intercourse is engaged in outside Australia.

Penalty: Imprisonment for 20 years.

http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html

People smuggling ('human trafficking')

All over the world, nations have to deal with the flow of people across international borders. There are several different types of offences that relate to the movement of people across national borders. Some such offences include:

- People smuggling
- Human trafficking
- Various offences related to sexual servitude and debt bondage

The relevant commonwealth laws include the *Migration Act 1958* and the *Criminal Code Act 1995*.

Migration Act 1958 - s233A - Offence of people smuggling

1. A person (the *first person*) commits an offence if:
 - a. the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person (the *second person*); and
 - b. the second person is a non-citizen; and
 - c. the second person had, or has, no lawful right to come to Australia.

Source: http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s233a.html

Note that the text refers to the second person having 'no lawful right to come to Australia'. This wording has opened a defence for those who assist asylum seekers. This is because the *Refugee Convention* makes it lawful for a person to enter Australia on the grounds of seeking asylum. Several human rights lawyers have mounted arguments that those who engage in 'people smuggling' are engaging in lawful acts when the people they bring to Australia are found to be asylum seekers and therefore have a lawful right to enter the nation.

The *Criminal Code 1995* (Cth) – Div 271 – details various offences related to holding people who have been trafficked. An example of one of the clauses is shown below.

Criminal Code Division 271 - Trafficking in persons and debt bondage

271.2 Offence of trafficking in persons

1. A person (the *first person*) commits an offence of trafficking in persons if:
 - a. the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Australia; and
 - b. the first person uses coercion, threat or deception; and
 - c. that use of coercion, threat or deception results in the first person obtaining the other person's compliance in respect of that entry or proposed entry or in respect of that receipt.

Penalty: Imprisonment for 12 years.

Source: www.austlii.edu.au/au/legis/cth/conso_act/cca1995115/sch1.html

Money laundering

Money laundering refers to activities involved with masking the source of money gained from illegal activities such as organised crime. The aim of money laundering is to try and make the money appear to be legal. INTERPOL's definition is listed below.

Money laundering

INTERPOL's definition of money laundering is:

"any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources"

Illegally obtained funds are laundered and moved around the globe using and abusing shell companies, intermediaries and money transmitters. In this way, the illegal funds remain hidden and are integrated into legal business and into the legal economy.

Source: <http://www.interpol.int/Crime-areas/Financial-crime/Money-laundering>

In Australia the relevant laws are the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and the *Criminal Code Act 1995* Division 400.

Criminal Code Act 1995 Division 400 – Money Laundering

"money laundering" means conduct that amounts to:

- a. an offence against Division 400 of the *Criminal Code*; or
- b. an offence against a law of a State or Territory that corresponds to an offence referred to in paragraph (a); or
- c. an offence against a law of a foreign country or of a part of a foreign country that corresponds to an offence referred to in paragraph (a)

400.3 Dealing in proceeds of crime etc. money or property worth \$1,000,000 or more

1. A person is guilty of an offence if:

- a. the person deals with money or other property; and
- b. either:
 - i. the money or property is, and the person believes it to be, proceeds of crime; or
 - ii. the person intends that the money or property will become an instrument of crime; and
- c. at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 25 years, or 1500 penalty units, or both.

Source: http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html

Drug trafficking

Drug trafficking is defined as the sale and distribution of illegal drugs. As a transnational crime the movement of these psychotropic substances is across national borders. In Australia the relevant laws are the *Customs Act 1901* (Cth) and the *Criminal Code Act 1995* (Cth).

Criminal Code Act Part 9.1 Serious Drug Offences

1. (1) The purpose of this Part is to create offences relating to drug trafficking and to give effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988.

Source: http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html

Customs Act 1901

The following sections of the *Customs Act 1901* (Cth) directly address the issue of drug trafficking. Note that drugs are often referred to as 'controlled substances'.

- s51A Certain controlled substances taken to be prohibited imports
- s112A Certain controlled substances taken to be prohibited exports
- s229A Proceeds of drug trafficking liable to forfeiture

Drugs

The drug trade and its associated problems continue to grow in most parts of the world. Global abuse and accessibility of drugs have become increasingly complex, as trafficking routes have become shorter, more diverse and more easily traversed. The drug trade involves growers, producers, couriers, suppliers, dealers and users and affects people in almost all of our 190 member countries.

INTERPOL's response

Our criminal intelligence officers focus on the most commonly used and trafficked narcotic drugs – cocaine, heroin and synthetic drugs – as well as precursor chemicals and doping substances. The Organization's primary drug-control role is to identify new drug trafficking trends and criminal organizations operating at the international level and to assist all national and international law

Source: <http://www.interpol.int/Crime-areas/Drugs/Drugs>

Crimes committed outside of the jurisdiction

There is a third category of international crimes that may be termed crimes committed in another jurisdiction (or outside of the domestic jurisdiction). Such crimes occur when people are in other nations.

When a person commits an offence in another nation, the law of that nation applies to them. This means that it is very important that people understand what the laws are in each and every nation they visit.

Fugitives and extradition

A fugitive is a person who flees after having committed a crime. If this occurs the person will have to be tried in the nation where the offence occurred. Getting a person back to the jurisdiction from which they have fled requires the use of a legal process called extradition. The rules around extradition are detailed below.

Extradition rules

There are three rules that apply with respect to extradition. These are:

1. That the nation where the offender has fled to, and the nation where the offence occurred both recognise the offence in their criminal laws
2. That the sanctions or punishment for the offence are recognised under the laws of both jurisdictions. This means that if the punishment for a crime is excessive (such as the death penalty for drug offences) and not accepted within the Criminal Code of the nation the person has fled to, then an application for extradition will not be successful
3. That the nations have an extradition agreement (treaty) allowing for the transfer of alleged offenders between the nations.

Dealing with international crime – Domestic and international measures

International

There are three (3) options for dealing with these matters:

- i. Through the International Criminal Court (ICC) in the Hague
- ii. Through an *ad hoc* tribunal (such as ICTY, ICTR, ECCC)
- iii. Through the domestic courts of the nation in which the crime(s) took place

ICC

The ICC has the authority to hear *jus cogens* crimes. Since it began, the ICC has had 15 matters in 8 cases brought. There has been one successful prosecution since 2002 (in the first 10 years of its existence). On the 14th March 2012 Thomas Lubanga was found guilty of all charges brought against him, including in matters regarding child soldiers in the Congo. Lubanga was arrested by the ICC and held for 5 years (2004 – 2009) and the trial took 3 years to complete. Lubanga was sentenced to 14 years imprisonment but the case is currently on appeal.

Ad hoc tribunals

An alternative to the ICC is the use of *ad hoc* tribunals (also called ‘war crimes’ tribunals) that are created to hear alleged criminal offences that have occurred during a particular conflict. These bodies are not permanent. Examples of *ad hoc* tribunals are the *Extraordinary Chambers in the Courts of Cambodia* (ECCC) and the *International Criminal Tribunal in Rwanda* (ICTR).

The domestic courts

A nation may use its own courts, or a ‘Truth and Reconciliation’ Commission to hear matters that were committed during conflict within the nation.

A. Transnational crimes

There are two (2) ways of dealing with these matters:

- i. Through treaty law (bilateral or multilateral treaties between nations). These agreements allow nations to share information, exchange prisoners and create extradition agreements with a view to supporting member nations combat crime.
- ii. Through domestic laws in the nations where the crimes were committed. The most effective regime occurs when many nations have very similar laws.

B. Crimes committed outside of the jurisdiction

These are dealt with in the nation state in which the offence took place. As stated earlier, a process called extradition may be taken if the person who committed the offence fled the jurisdiction. When a foreign national commits a crime in another nation the law of the host nation applies. A rare exception relates to crimes committed in an embassy. An embassy or foreign mission carries the law of the home nation into another nation’s territory. This can lead to a problem for the law arising from diplomatic immunity. Diplomatic immunity means that foreign diplomats are unlikely to be charged for crimes committed on foreign soil.

Domestic responses to international crimes

A. Crimes against the international community

- Crimes against humanity
- Genocide
- War crimes

These can be heard by domestic courts and tribunals (eg a court martial for a US soldier indicted for war crimes) however there is always a concern that domestic processes will be 'sham' and that they will not properly prosecute the matter. Thus the ICC reserves the right to order the arrest for trial of a person or persons whose matters are heard by their domestic courts in sham trials

B. Transnational crimes

Interpol is the international policing body that assists the nation state to capture and bringing to trial people who commit crimes in different jurisdictions simultaneously. There can be simultaneous raids and prosecutions in several nations. Moreover, each of the nations will apply its own domestic laws to the offences that have been committed.

The role and purpose of Interpol

INTERPOL is the world's largest international police organization, with 190 member countries.

Our role is to enable police around the world to work together to make the world a safer place. Our high-tech infrastructure of technical and operational support helps meet the growing challenges of fighting crime in the 21st century.

We work to ensure that police around the world have access to the tools and services necessary to do their jobs effectively. We provide targeted training, expert investigative support, relevant data and secure communications channels.

This combined framework helps police on the ground understand crime trends, analyse information, conduct operations and, ultimately, arrest as many criminals as possible.

Source <http://www.interpol.int/en>

C. Crimes committed outside of the jurisdiction

Some nations have laws that extend offshore, such as the *Crimes (Child Sex Tourism) Amendment Act* (Cth), but in the main, crimes committed in another jurisdiction need to be tried in the nation where the crimes occurred. This can mean that a process of extradition will be required unless the person is captured prior to leaving the jurisdiction.

Limitations

There are two significant limitations that arise when dealing with international crimes. These limitations are:

1. State sovereignty
2. Resources

State sovereignty

This is a significant limitation on all types of international crimes. This is because state sovereignty is a legal notion that means there is no higher authority than the state and thus the state cannot be compelled or forced to give someone up to the ICC. Several nations refuse to allow their foreign nationals to be brought before the ICC. Such nations include Sudan, the USA and Syria.

122 nations have ratified the Rome Statute and thus support the ICC. However, there are several key missing nations: USA, Russia, China and Israel. Three of these are UN Security Council members. Kenya, a nation that had ratified the treaty, has decided to withdraw following the indictment of senior political figures on charges of crimes against humanity.

Resources

A significant issue is resource inefficiency. In its first ten years the ICC heard only one matter to its completion. Furthermore, the *ad hoc* courts have been very expensive and gained relatively few prosecutions and have taken a very long time to constitute and fund. The ECCC in Cambodia has been criticised for exceeding its budget and for allegedly mishandling funds.

Review Activities – International Crime

1. Why is there a system of international law?
2. Identify THREE (3) different types of international crime.
3. What is genocide and which treaty bans the practice?
4. With reference to TWO (2) examples, what are crimes against humanity?
5. Define the term '*jus cogens*'.
6. Define the term transnational crimes.
7. Identify FOUR (4) different transnational crimes.
8. Name the law that defines and punishes transnational crimes in Australia.
9. With respect to child sex tourism explain how the *Criminal Code Act 1995* effectively extends offshore.
10. What is people smuggling?
11. Detail the effect of s233A of the *Migration Act 1958* (Cth).
12. How does Interpol define money laundering?
13. Outline the penalties for money laundering.
14. Define the term drug trafficking.
15. What is the relevance of the *Customs Act* to drug trafficking?
16. Explain what crimes committed outside of the jurisdiction are.
17. What is a fugitive?
18. Describe how extradition is applied to help get fugitives to the jurisdiction where crimes were committed.
19. Distinguish between permanent courts such as the ICC, *ad hoc* tribunals and domestic courts.
20. How can transnational crimes be effectively prosecuted?
21. Define the term state sovereignty.
22. Explain how state sovereignty can limited the effectiveness of criminal law.