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## International Criminal Law and the Macro-Micro Problem\*

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# International Criminal Law and the Macro-Micro Problem\*

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## **Abstract**

Prior to **1960**, textbooks on international public law hardly made mention of international criminal law, except in brief references to subjects such as extradition, asylum, and jurisdiction over aliens.

**KEYWORDS:** criminal, law, macro-micro

## International Criminal Law and the Macro-Micro Problem\*

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Prior to 1960, textbooks on international public law hardly made mention of international criminal law, except in brief references to subjects such as extradition, asylum, and jurisdiction over aliens. But by 1991, global consciousness in a shrinking, interdependent and increasingly criminally violent world, has seen international criminal law emerge as a generally accepted subject of international law. Prominent among scholars who have contributed to the rising consciousness about international criminal law are M. Cherif Bassiouni,<sup>1</sup> Ved Nanda,<sup>2</sup> John Murphy,<sup>3</sup> Robert Friedlander,<sup>4</sup> Christine van den Wijngaert,<sup>5</sup> Alfred Rubin,<sup>6</sup> and Jordan Paust.<sup>7</sup> The contributors to this Symposium carry on the tradition.

As with most academic subjects, the real world tends to outpace theoreticians' efforts to conceptualize and understand it.<sup>8</sup> Professor Bassiouni has listed twenty-two distinct international crimes;<sup>9</sup> each of

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1. See, e.g., INTERNATIONAL CRIMINAL LAW (M.C. Bassiouni ed. 1986-87).

2. See, e.g., M.C. BASSIOUNI & V.P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW (1973); V.P. NANDA & M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE (1987).

3. See, e.g., J.F. MURPHY, STATE SUPPORT OF INTERNATIONAL TERRORISM (1989).

4. See, e.g., R. FRIEDLANDER, TERROR-VIOLENCE (1983).

5. See, e.g., C.V. WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION AND EXTRADITION (1980).

6. See, e.g., A.P. RUBIN, PIRACY, PARAMOUNTCY AND PROTECTORATES (1974).

7. See, e.g., J.J. PAUST & A. BLAUSTEIN, WAR CRIMES JURISDICTION AND DUE PROCESS (1974).

8. See, e.g., D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983). A notable and persistent exception is mathematics. Mathematical discoveries that have appeared totally academic when discovered have often been employed years later to explain real-world phenomena. Matrix algebra, for example, was invented in the mid-nineteenth century as a totally impractical and rather weird form of combinational function. In the mid 1920s, Werner Heisenberg utilized it to depict the behavior of the newly discovered quantum mechanics.

9. 1 INTERNATIONAL CRIMINAL LAW 135 (M.C. Bassiouni ed. 1986).

them has been the topic of discrete analysis. But we are still short on unifying explanations. How do these subjects cohere with the general theory of public international law? Does public international law throw any light on the specific subjects of criminal law? Can the generalizations of the one serve as heuristics for the generalizations of the other?

One fundamental line of theoretical inquiry highlighted by the study of international criminal law concerns what might be termed the macro-micro problem. It is the question of how the macro world of international law can cope with variations in the micro world of state law. What gives rise to the problem is the fact that there are many individual differences in state substantive law. One of the clearest examples of variations is the aftermath of the publication of Salman Rushdie's book, *The Satanic Verses*. The government of Iran condemned it as blasphemous and ordered its author executed for the crime of writing it. Indeed, Iran proclaims it to be a religious obligation of all its people to seek out and execute Mr. Rushdie. Western nations regard the notion of executing an author for writing a book as outrageous<sup>10</sup> and have taken positive steps (Rushdie is in hiding in London under the protection of the government of Great Britain) to frustrate Iran's attempt to track Rushdie down and execute him. Thus, what is criminal in Iran is highly safeguarded in other states.<sup>11</sup> It would be hard to imagine what general international law could say about the Rushdie problem. No matter what the proffered substantive rule of law might be, that rule would either favor Iran or Great Britain. Hence, Rushdie's case suggests, perhaps in an extreme way, the complexity entailed by examining international criminal law through the macro-micro perspective.

The macro-micro problem is not necessarily confined to the field of criminal law. In the nineteenth century the problem was addressed with respect to variations in state constitutional and tort law under the general rubric of "denial of justice." But whatever the subject matter, classic international law generally has had a hard time dealing with substantive rules that vary from state to state. Indeed, most rules of international law *define what a state is*,<sup>12</sup> and since states enter the

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10. But not 500 years ago at the height of the Inquisition!

11. The macro-micro problem does not apply to all international criminal law. There are some clearly universal crimes: genocide, enslavement, torture, war crimes, counterfeiting. Others are universal by some accounts and almost universal by others: terrorism, air piracy, hijacking, kidnapping.

12. As I have put it elsewhere, a "state" is simply a bundle of entitlements. See

international community with equal entitlements, it is hard for international law to say that any one state has an international entitlement that another state lacks.<sup>13</sup>

The nineteenth century evolved an ingenious solution to the macro-micro problem in matters concerning denial of justice. International law recognized the varying treatment of aliens in different states by evolving through the customary-law process two standards: an international non-discriminatory treatment standard and an international minimum treatment standard.<sup>14</sup> These standards were imposed upon all states; that is, each state had the same entitlement. But the two standards had different functions. The first one denied states the right to accord aliens a lesser standard of justice than that accorded to its nationals. The second standard applied even if there was no discrimination between the treatment accorded to aliens and citizens in those cases where the treatment was abysmally low for either category. International law provided that no state could accord aliens less than the threshold of the "international minimum standard," thus resulting in what today we would view as a human-rights anomaly that aliens in certain situations may enjoy more rights than citizens.

While the "responsibility of states" standards were customary law's attempt to solve the macro-micro problem, in the criminal law area a similar problem was addressed in the nineteenth century through bilateral treaties. Various extradition treaties confronted the problem at the bilateral micro level. These treaties incorporated provisions that have defined two emerging customary standards: the standard of double criminality and the doctrine of specialty.<sup>15</sup> But many difficulties remain because the problem of extradition continues to be addressed at the micro level and not at the more appropriate level of a

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A. D'AMATO, INTERNATIONAL LAW — PROCESS AND PROSPECT 21 (1987).

13. There may be physical differences among states; e.g., Switzerland does not border on an ocean and Japan does not have a continental shelf. But their rights remain the same. For instance, if by some geophysical convulsion Japan were to acquire a continental shelf, then it would have the same continental shelf rights that all other nations enjoy.

14. For an account of these two standards and how they interacted, see D'Amato & Engel, *State Responsibility for the Exportation of Nuclear Power Technology*, 74 VA. L. REV. 1011 (1988).

15. In my view, these doctrines have entered into customary international law. For a general account of the treaty-into-custom process, see A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 103-66 (1971); D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. INT'L L. 459 (1988).

global standard. Some of the difficulties are brought out in Professor Sharon Williams' contribution to this Symposium.<sup>16</sup>

Three other ways for international law to cope with substantive legal differences are to urge "cooperation" among states, to set up an international criminal court, and to promote codification of substantive law. The "cooperation" approach is discussed in the Symposium papers by Roger S. Clark<sup>17</sup> and by Scott Carlson and Bruce Zagaris.<sup>18</sup> The international criminal court approach is discussed by John B. Anderson.<sup>19</sup> Professor Bassiouni has long been an advocate of international codification of substantive crimes, as evidenced by his contribution to this Symposium.<sup>20</sup> In a practical way, these approaches may lead to resolutions of the macro-micro problem. I am somewhat skeptical; I fear that conceptually they may merely recapitulate it. If I am right, efforts favoring cooperation, courts, and codification face their biggest challenges when the time comes to get specific about just what rules about just what crimes are to be included or excluded.

The intractability of at least two international criminal law issues transcends the difficulty of the nineteenth century resolution of the macro-micro problems of state responsibility and extradition. The first of these is the issue of terrorism. The cliché, "one man's terrorist is another man's freedom fighter," only hints at the difficulty because this aspect of the difficulty was at least addressed by classic international law. Customary international law traditionally has viewed any insurgency against a state as an outlaw criminal movement unless and until the point at which the insurgency takes control of the state. Then suddenly all is legalized, all is forgiven. This classic rule is hardly a solution to present complexities, which involve not only transboundary terrorist activities but include affirmative transboundary support of such activities.

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16. Williams, *The Double Criminality Rule and Extradition: A Comparative Analysis*, 15 NOVA L. REV. 581 (1991).

17. Clark, *Crime: The UN Agenda on International Cooperation in the Criminal Process*, 15 NOVA L. REV. 475 (1991).

18. Carlson and Zagaris, *International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime*, 15 NOVA L. REV. 551 (1991).

19. Anderson, *An International Criminal Court - An Emerging Idea*, 15 NOVA L. REV. 433 (1991).

20. Bassiouni, *Draft Statute of the International Criminal Tribunal*, 15 NOVA L. REV. 373 (1991). See also M.C. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* (1980).

At the heart of the present problem of terrorism is how to conceptualize its illegality under present international law without implicating the majority of states which apparently practice it.<sup>21</sup> Anthony Chase's contribution to this Symposium<sup>22</sup> sharply raises the question of candor: Can United States' spokespersons and scholars ignore United States sponsored terrorist acts as they condemn the terrorist acts of others? His skepticism is generalizable; it applies to all scholars when their own nations' terrorism is implicated.

The second difficult macro-micro issue, perhaps the most complex, is narcotic drugs. At the most elementary level, this is a product that many people desire or crave, but one that is denied to many by virtue of the law of their own countries. The gap between demand and illegality (whether it be drugs, coffee, or alcohol) has historically been filled by organized crime. In the prohibition era in the United States beginning in 1921, bootleg alcohol was manufactured and distributed to "speakeasies," distilled liquor was imported from Canada; "rum-runners" challenged the coast guard at the 3-mile and 12-mile limits. Moreover, organized crime gained its foothold in the United States; once organized, it transferred its activities to other spheres when the Twenty-First Amendment was adopted in 1933 ending the federal prohibition of intoxicating liquor. We are still paying the price for the "grand experiment" of prohibition.

It is sometimes argued that narcotic drugs are far more dangerous substances than intoxicating liquor, and so the historical analogy does not hold up. In fact, there are undoubtedly more automobile accident fatalities due to drunken driving than all the deaths attributed to drugs. But the price now being paid to fight the war against drugs by the United States government vastly exceeds anything seen in the prohibition era.

The price has to be measured in terms of the number of criminal organizations spawned by the demand for drugs, the extent of corruption of the police, judges, and other officials, the strains placed upon international law by the aggressive actions of United States officials in interdicting ships on the high seas or even in pursuing and arresting

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21. This is, of course, a classic conundrum of customary international law. If most states engage in an activity *and* at least on occasion admit that they are doing so, how could that activity be illegal under customary international law? *See, e.g.,* D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. INT'L L. 459 (1988).

22. Chase, *Book Review: Ministries of Terror*, 15 NOVA L. REV. 771 (1991).

foreign drug exporters within their own countries, and the opportunity costs associated with this vast police effort that could be diverted to other matters. Yet it is the very extent of the corruption associated with the war on drugs that may be the greatest political factor that insures its continued illegality. If the use of drugs were legalized, the high prices and profits associated with drug dissemination would plummet. Officials who have become accustomed to rake-offs from this vast profit system will suddenly be denied their major source of income, as would crime cartels.<sup>23</sup> Bruce Zagaris' contribution to this Symposium describes the situation as follows *without indicating whether his comments apply chiefly to the United States or to other countries or both*:

National law has been under attack by narco-terrorists and organized crime. By intimidating and killing judges, prosecutors, police, and the media, narco-terrorists and organized criminals ensure that the rule of law and a democracy cannot function properly. Similarly, by financing the campaigns of national and local politicians and running for office themselves, narco-terrorists and organized criminals also influence and control even the law-making and the entire electoral process. Indeed, the distribution of money, jobs, and other forms of wealth of largess by narco-terrorists and organized crime provide the donors with an inordinate amount of political power.<sup>24</sup>

The fact is that Professor Zagaris' words do apply both to the United States and to supplying countries such as Colombia, and for the same basic reason. The immensely valuable demand situation in the United States gives rise to drug corruption at home as well as abroad. Once a large number of politicians, police officers, judges and other govern-

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23. For example, eight police officers raid a hotel room where they had been tipped that a drug exchange was taking place. The criminals escape but leave behind twenty million dollars in cash and twenty million dollars worth of crack. Who will ever know if the police report back that they confiscated twelve million dollars cash and twelve million dollars worth of crack? Each police officer will be richer to the tune of one million dollars cash and one million dollars of street-value worth of narcotics. This is more money than any of them can accumulate in a lifetime's work. Does this scenario, with variations, take place? From all the media accounts, there is reason to believe that it takes place quite often.

What about judges who are paid off to acquit narcotics defendants? *See generally* M. MERMELSTEIN, *THE MAN WHO MADE IT SNOW* (1990).

24. Zagaris, *Protecting the Rule of Law From Assault in the War Against Drugs and Narco-Terrorism*, 15 NOVA L. REV. 703 (1991).

ment officials, are drawn into the lucrative drug trade, they gain a new incentive to call out for increasing criminal enforcement and penalties. The higher the rate of enforcement and the higher the punishment for offenders, the higher the price for drugs will go and hence the more room for profit-sharing and corruption.

Thus, a nation such as Colombia is in a basically self-inconsistent position. Since so much of its GNP derives from the lucrative drug-export trade, it may want to cooperate with the United States in suppressing local drug manufacture because it has an interest in keeping prices high by keeping drugs illegal. These officials want to make the drug business harder but not stamp it out altogether. At the same time, there may be many honest Colombian officials — as there are many honest United States officials — who genuinely want to win the war against drugs. Both the corrupt and honest officials share common ground in maintaining the regime of drug illegality in the United States. Some of the vast enforcement problems associated with the relationship between the United States and Colombia are depicted in Mark Sherman's contribution to this Symposium.<sup>25</sup> His paper should be read against the self-contradictory policy of government officials in wanting to maintain as well as eliminate the drug problem.

Countries who do not make illegal the use of narcotic drugs find it hard to sympathize with the efforts of the United States to strain or bend international oceanic law in order to search and interdict ships that may be carrying prohibited substances. Countries such as Mexico and Colombia which themselves have laws against drug manufacture and export — but at the same time derive a significant portion of their GNP from that trade — are of course more ambivalent toward United States policies. But even they resent actual physical intrusion by the United States, such as the apprehension within their countries of persons who are engaged in drug traffic or the spraying of their fields by American planes trying to destroy poppy and marijuana plants. The United States, in turn, ends up “bribing” such countries with massive foreign aid packages — thus expending taxpayer money in the effort to eradicate the drug problem, but only succeeding in driving up prices and profits.

In my personal view, the effort has not worked and will not work. We are unwilling to learn the lessons of prohibition, and thus are fated to repeat a historical mistake. This time it will be vastly more expen-

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25. Sherman, *United States International Drug Control Policy, Extradition, and the Rule of Law in Columbia*, 15 *NOVA L. REV.* 661 (1991).

sive and harmful.

In the meantime, international lawyers should make an attempt to grapple with the macro-micro problem in all the aspects of the international drug problem. Extradition, searches and seizures on the high seas, forcible intervention in other countries, and a host of related problems all strain against general norms of customary international law. Although I have never believed that solving a legal problem will necessarily solve a real-world problem, I think that real-world solutions can be remarkably wasteful and inconsistent if we fail to address possible inconsistencies in the network of applicable legal norms. The macro-micro problem with respect to international drug control can be a productive source of useful international legal scholarship as long as the criminalization of drugs remains the policy of the United States.

International investment fraud, though less visible and far more "white-collar" a problem than the traffic in drugs, raises many of the same macro-micro issues. The article by Lisa Davis and Bruce Zagaris suggests that, on the practical level, the macro-micro problem is addressed in the form of "international cooperation."<sup>26</sup> Discussion among the relevant national law-enforcement officers of their different national perspectives in the light of their potential common purposes may be the best that can be done to harmonize discordant national voices. International cooperation, on the entirely different subject of deporting Nazi war criminals, is similarly highlighted in the article Jeffrey Mausner.<sup>27</sup> In contrast, the seizure of Panama's Manuel Noriega, recounted in the article by Richard Gregorie, is a kind of test case of the limits of such international cooperation.<sup>28</sup> If the target state were Great Britain or France, instead of Panama, would "cooperation" play a more significant or a less significant role?

Although treaties, at first blush, appear to be a way of harmonizing certain kinds of discord, the article by David Stewart on the U.S. ratification of the Torture Convention reminds us that reservations, declarations, and understandings that are often appended to such documents tend to recapitulate particularistic national viewpoints.<sup>29</sup>

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26. Davis and Zagaris, *International Cooperation in a World Marketplace: Preventing & Prosecuting Commodity Futures Fraud & Abuses*, 15 NOVA L. REV. 507 (1991).

27. Mausner, *Apprehending and Prosecuting Nazi War Criminals in the United States* 15 NOVA L. REV. 747 (1991).

28. Gregorie, *Extraterritorial Jurisdiction: Its Use, Its Roots and Its Viability*, 15 NOVA L. REV. 625 (1991).

29. Stewart, *The Torture Convention and The Reception of International Crimi-*

The Symposium is rounded out by a description of Fordham University's new International Criminal Law Center.<sup>30</sup> More and more law schools—finally!—are discovering that there is a world out there beyond the borders of the United States. The incredible insularity of American legal study is at last under attack, and much of the challenge comes from the demand of students to be educated in legal systems other than the Anglo-American common law system. Not only should law professors introduce their students to different legal systems, but more importantly, in my view, they should use an external systemic perspective as a critical device in examining the fundamental postulates of our own common law.<sup>31</sup>

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*nal Law within the United States*, 15 NOVA L. REV. 449 (1991).

30. Abramovsky and Frank, *The Development, Objectives and Planned Activities of the International Criminal Law Center of Fordham University School of Law*, 15 NOVA L. REV. 501 (1991).

31. See D'Amato, *International Law in the Curriculum*, 2 PACE Y.B. INT'L L. 83 (1990).