CHAPTER THREE
INTERNATIONAL CRIMES: RATIONE MATERIAE

SECTION 1. INTRODUCTION

Most international crimes first developed in customary international law, and were thereafter embodied in conventional international law. What we now generically call “war crimes” were first in gaining cross-national recognition,1 but it was piracy that was recognized in the 1600s by a number of maritime states as the first international crime.2 The perpetrators of piracy and other early crimes like the slave-trade and slavery in the 1800s3 were referred to as hostes humani generis, the enemies of humanity, a concept that derived from Cicero’s writings, reflecting a philosophical perspective of Roman Law.4 Publicists from the seventeenth to the nineteenth centuries used that term to refer to perpetrators of international crimes.

The concept of hostes humani generis was a consequence of the Roman law’s jus naturale and jus gentium. The former was the understanding of natural law that was imported in Roman law from Greek law, as it originated with Plato and Aristotle. The latter, however, was the Roman law’s norms applicable to the nations and peoples who were part of the Roman Empire or who were within the sphere of Roman influence.

The jus naturale and the jus gentium, as well as the concept of hostes humani generis, presupposed the existence of a universal human community and uni-

1 For the historical evolution of the norms applicable to conduct in war, see also M. Cherif Bassiouni, Evolution of International Humanitarian Law and Arms Control Agreements, in A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS (M. Cherif Bassiouni ed., 2000) [hereinafter Bassiouni, INTERNATIONAL HUMANITARIAN LAW].
4 This term is a sixteenth century adaptation of what Marco Tullio Cicerone, in his De Officiis referred to as commune hostis hominem, idem 3, 98, 107. See also CICERO, DE OFFICIIS (L.H.G. Greenwood trans., 1953). CICERONE, DE OFFICIIS, III, used the terms “nam pirata non est ex perduellium numero definitus, sed communis hostis omnium…” (emphasis added). See DARIO ARFELLI, CICERONE, DE DOVERI 290 (1991). I am indebted to Professor Giuliano Vassalli for this citation.
versal values. Obviously, it is different from the contemporary notion of an international community as we have now come to know it, but it evidences the existence of a communal notion that applied to nations and peoples, and it stood for the proposition that those who transgressed certain fundamental universal values would be both enemies of that community as well as transgressors of the law of nations and peoples, namely, *jus gentium*. Thus, those who transgressed certain norms of the *jus gentium* by engaging in acts of brigandage on land or on sea, later called pirates, were at first called *briganti*, and that, as mentioned above, was referred to as *commune hostis hommien*, which in the sixteenth century, was changed into *hostes humani generis* in order to emphasize the moral opprobrium attached to such crimes.

Both *jus gentium* and *hostes humani generis* are founded on the unarticulated premise that there exists a certain community of nations and peoples whose values and interests needed to be protected. The *jus gentium* regulated conduct, and those who violated certain of its norms became *hostes*, the enemies, who were to be tried and punished, though under national law and by national institutions. In time, Hugo Grotius, in 1624, concluded with respect to piracy that those who committed such crimes should be tried or punished, *aut dedere aut punire*.

The regulation of how nations should behave emerged gradually out of the Westphalian legal order, which evolved after the Treaty of Westphalia in 1648.

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5 The term *jus gentium* translates better in French as *le droit des gens*, and in English, more broadly, as the “law of nations.” The French is a more literal translation, and the English, a more conceptual one. Together, they reflect the Roman Law’s socio-political reality during the period of the Roman Empire. See e.g. Emmerick de Vattel, *Le Droit des Gens, (The Law of Nations)*, bk. II, in *CLASSICS OF INTERNATIONAL LAW* (Charles G. Fenwick, trad. 1916). During that period, Rome controlled a vast portion of lands and a large number of peoples. Their legal status varied significantly. Some nations retained their sovereignty but were subject to certain treaty limitations with Rome, and others were outright Roman provinces. This is why Roman Law developed the concept of *jus gentium*, which applied as the inter-national and inter-peoples law as established and enforced by Rome. See Edward Gibbon, *The Decline and Fall of the Roman Empire* (6 vols., 1960). For the history of international law, see generally, Arthur Nussbaum, *A Concise History of the Law of Nations* (2d ed. 1954).

