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To Avgi, Nestor, Angelika, Bartek and Stergios, for distinct yet precious reasons

"One swallow may not a summer make but still may bring more swallows."
Konstantinos Melissas

Foreword

Politics and History as 'Extralegal' Interpretative Factors of Legal Provisions

The subject of the present monograph is the preconditions for the exercise of jurisdiction of the International Criminal Court (ICC). In the ICC Rome Statute (ICCRSt), the Court's jurisdiction revolves around the commission of international crimes, i.e. war crimes, crimes against humanity, genocide and most recently the crime of aggression. It is apparent that the interpretation of those multifaceted terms, as well as other similar notions also contained in the ICCRSt (e.g. 'conflict', 'attack' and 'immunities'), constitutes a fundamental criterion regarding whether or not the Court will eventually intervene. However, when interpreting such general concepts, it is reasonable to include considerations of 'extralegal' character, and, especially, the way that the interests of great geostrategic forces are served. Hence, the quest for the concepts' true meaning in certain cases cannot be fulfiled solely via purely dogmatic legal approaches, and also involves a wider approach, with emphasis on those political and historical factors that decisively impact the rendering of decisions by the International Criminal Court. Otherwise, the interpretation of these legal concepts will be incomplete and exclude from the research's scope the deeper reasons behind the preference for one interpretive approach over the other.

It is precisely this broader interpretative approach, *the 'holistic' approach*, as the author calls it, that constitutes, in my opinion, the great comparative advantage of this monograph in comparison to others. Certainly, this 'holistic' approach somewhat restricts the scope of a purely dogmatic legal approach. However, on the other hand, International Law and relationships between States have always had, since Thucydides' times and the Melian Dialogue with the Athenian superpower of that era, an intense dimension of power relations, where ordinarily the strongest party prevails. And this, of course, cannot be disregarded in the interpretation of international law's legal provisions, especially when the perceptions of 'the law of the strongest' are in direct opposition to basic principles of human rights and social justice.

In a wider context, one could speak at this point about a clash between, on the one hand, legal positivism, which is usually characterised by formalism and strict adherence to the applicable legal rules for the sake of legal certainty (e.g. Hans Kelsen) and, on the other hand, natural law, idealism and leniency, and ultimately 'equitable law' and 'the spirit of the law' (cf. Matthew 23, 23–24), as safety valves for the protection of substantive justice and human rights (e.g. Rudolf Stammler).

This confrontation moves, ultimately, between the dipole *de lege lata* and *de lege ferenda*. In other words, on the one hand, between what has been legally enacted to apply, what is precisely defined by a legal provision on a particular issue at a given time according to theory and jurisprudence (*de lege lata*) and, on the other hand, what ought to apply based on the more appropriate legal interpretation, the legislator's will, the teleological and ultimately optimal interpretation that sufficiently takes into account not only the black letter of the law but also the 'extralegal' elements, including societal developments and changes, business practices, public morals, political correlations, the 'average' person's behaviour and so on (*de lege ferenda*).

Consequently, this is one of the first monographs amid the abundant literature on the International Criminal Court that attempts to examine the breadth and depth of the issues raised in relation to the preconditions for exercising the jurisdiction of the International Criminal Court (Article 12 ICCRSt) and the principle of complementarity, taking into account the 'ubiquitous' factor of international politics as well as contemporary historical data and evidence that are often ignored or overlooked, such as the internal circulars of the ICC Prosecutor's Office.

Undoubtedly, the above co-evaluation provides a panoramic view of the legal issues under consideration, which does not only lead to innovative proposals (such as new criteria for the definition of international crime), but also crucially contributes to the substantiated drawing of conclusions which often contradict the prevalent views of theory and jurisprudence.

Finally, yet importantly, the usefulness of this 'holistic' analysis is particularly demonstrated in the sections regarding Palestine and the concept of the State in international criminal law, immunities and the principle of complementarity. Indeed, the enactment of complementarity for the first time in international criminal law in 1998 during the Rome Conference was the driving force behind the completion of the procedures for the foundation of the International Criminal Court.

The work of Victor Tsilonis, a very promising new scholar, fills a significant gap in the literature and opens up new pathways in the field of Public International Law.

University of Athens, Greece Nestor Courakis

University of Nicosia, Cyprus

Acknowledgements

The story of Darius the Great, the famous Persian king who ordered one of his servants to remind him three times a day that his greatest aim was to conquer Greece, is not unknown. Still when I first read this story my response was one of complete disbelief, since I could not come to terms with the fact that an intelligent and ambitious man could ever need to be reminded by somebody else of his greatest aim. However, as soon as I commenced my legal practice and became executive director of the Intellectum non-profit organization, I swiftly realized how critical these kind of reminders could be.

Hence, I would dearly like to thank my wife Avgi and my parents Panagiotis and Ioanna not only for their unrelenting support but also for their love, which provided me with the requisite persistence to write this book, thus making one of the dreams of my life reality. Additionally, Dr Angelika Pitsela, (emeritus professor of Criminology and Penology at the Faculty of Law of Aristotle University of Thessaloniki), Dr Sophia Giovanoglou (advisor at the Institute of Educational Policy of the Greek Ministry of Education) and Stergios Aidinlis (lawyer and PhD candidate at the University of Oxford) helped me greatly during different periods of time to retain my focus on the Court's jurisdcition and not stray far from my destined path.

Moreover, I would like to thank the professors of the Law School of Aristotle University of Thessaloniki, Elissavet Symeonidou-Kastanidou (my PhD thesis supervisor), Adam Papadamakis and Maria Kaiafa-Gbandi, because their critical remarks and insightful comments concerning my work eventually made it acquire the best possible form and structure. Finally, yet importantly, I would like to dearly thank professor Bartosz Wojciechowski and associate professor Konstantinos Antonopoulos for their kind encouragement, as well as emeritus professor Nestor Kourakis for his adamant support and friendship, which eventually led him to write this book's foreword.

Admittedly, the English edition of this book would not be realized without the valiant efforts of the trainee lawyer Angeliki Tsanta (LLM LSE) who translated most of the chapters (Chaps. 1–5 and 7–8), translator Sophia Simiti who translated the chapter on the principle of complementarity (Chap. 9) and barrister Eirini-Nikoleta

Favgi (LLM Nottingham) who translated the original chapter on Aggression (Chap. 6) and updated the internet sources throughout.

Finally, yet importantly, I am lost for words when it comes to my publisher Springer and particularly Anke Seyfried and Pia Sauerwald for their constant support, input and understanding, and Balaji Kanaga Thara for the excellent management of the proof reading process. I feel extremely happy about our unparalleled collaboration and hope I will be fortunate enough to publish some of my future work with them too. Clearly, the work could not have reached its ultimate form if Benjamin Tendler had not decided to step bravely into the copy-editing battlefield. Obviously, the responsibility for any remaining errors or omissions rests solely with me.

Thessaloniki, Greece Victor Tsilonis
16 July 2019

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Abbreviations

Am. U. Int'l L. Rev.	American University International Law Review
AJIL	American Journal of International Law
Am. Soc. Int'l L. Proc.	American Society of International Law Proceedings
ASP	Assembly of States Parties
Cardozo J. Int'l & Comp. L.	Cardozo Journal of International and Comparative Law
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Duke J. Comp. & Int'l L.	Duke Journal of Comparative and International Law
Denv. J. Int'l L. & Pol'y	Denver Journal of International Law and Policy
ECJ	European Court of Justice
EJIL	European Journal of International Law
Geo. J. Int'l L.	Georgetown Journal of International Law
Geo. Wash. Int'l L. Rev.	George Washington International Law Review
GoJIL	Goettingen Journal of International Law
Harv. Int'l L.J.	Harvard International Law Journal
Hum. Rts. Brief	Human Rights Brief
H. R. L. Rev.	Human Rights Law Review
HVHRJ	Harvard Human Rights Journal
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
ILM	International Legal Materials
ILSA J. Int'l & Comp. L.	International Law Students' Association Journal of International and Comparative Law
Ind. Int'l & Comp. L. Rev.	Indiana International and Comparative Law Review
IMTN	International Military Tribunal of Nuremberg
J. Marshall L. Rev.	John Marshall Law Review
JICJ	Journal of International Criminal Justice
J. L. & Soc. Challenges	Journal of Law and Social Challenges

LJIL	Leiden Journal of International Law
MJIL	Michigan Journal of International Law
MELB. J. INT'L L.	Melbourne Journal of international Law
New Eng. J. Int'l & Comp. L.	New England Journal of International and Comparative law
N.Z. J. Pub. & Int'l L.	New Zealand Journal of Public and International Law
Penn St. Int'l L. Rev.	Penn State International Law Review
ICCRSt	Rome Statute of the International Criminal Court
R.I.D.P.	Revue Internationale de Droit Penale
RGDIP	Revue Générale de Droit International Public
S. Cal. Interdisc. L. J.	Southern California Interdisciplinary Law Journal
SCSL	Special Court for Sierra Leone
SSRN	Social Science Research Network
TJIL	Texas Journal of International Law
U. Pa. L. Rev.	University of Pennsylvania Law Review
U. Colo. L. Rev.	University of Colorado Law Review
US/USA	United States of America
UK	United Kingdom
Vill. L. Rev.	Villanova Law Review
Wash. U. L. Rev	Washington University Law Review
Wash. U. Global Stud. L. Rev	Washington University Global Studies Law Review
ZNR	Zeitschrift fűr Neuere Rechtsgeschichte

Chapter 1
The Definition of International Crime

1.1 Introduction

Theoretical but also practical approaches to international criminal law tend to bring home the fact that "law does not exist in a vacuum". On the contrary, intense political pressures often dictate the adoption of legal provisions, opinions, positions and 'solutions', particularly in the field of international law. Here, whether in the realm of theory or actual international power relations, the various institutions of international criminal justice play an integral role (hybrid courts, international criminal tribunals, the International Criminal Court).

At the same time, the fact that other political, historical and non-legal factors constantly reshape international law, and in particular, international criminal law, compels me to include these in the scope of analysis of the emerging legal issues and cases concerning the jurisdiction of the International Criminal Court (ICC), well aware of the fact that they are usually sidelined or overlooked.

Although, admittedly, this 'holistic' attempt to analyse the aforementioned legal issues has progressively constituted a minor but important stream of thought in the international literature and can also be found, as of October 2013, in the case law of the International Criminal Court (see the official Summary of the landmark ICC Judgment of 11 October 2013 in the Al-Senussi case),[1] academics and scholars generally continue to adopt a one-dimensional approach and examine international

[1] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Pre-Trial Chamber I, Public redacted: Summary of the Decision on the Admissibility of the Case Against Mr. Abdullah Al-Senussi) ICC-01/11-01/11, International Criminal Court (ICC) (11 October 2013) <https://www.icc-cpi.int/CourtRecords/CR2013_07445.PDF> (last accessed 7 January 2019).

V. Tsilonis, *The Jurisdiction of the International Criminal Court*,
https://doi.org/10.1007/978-3-030-21526-2_1

[2,3]

The present book attempts a succinct but holistic presentation of the most important issues related to the jurisdiction of the International Criminal Court (ICC), while emphasis is given to contemporary cases (Palestine, Libya etc.). Undoubtedly, this study is an attempt to analyse an extremely wide range of complex issues with a high level of difficulty.

The 'holistic' approach sets out to consider, analyse and co-evaluate a wide range of historical, political, geostrategic, international and, obviously, legal factors.[4] The significance of this analysis is demonstrated not only by the chapters on immunities and the principle of complementarity or the cases of Libya and Palestine, but also the evolution of international criminal law itself from a historical perspective;

[2]Victor Tsilonis, 'The Awakening Hypothesis of the Complementarity Principle' in C.D. Spinellis, N. Theodorakis, E. Billis, G. Papadimitrakopoulos (eds), *Europe in Crisis: Crime, Criminal Justice, and the Way Forward, Essays in Honour of Professor Nestor Kourakis* (Ant. N. Sakkoulas, Athens 2017) <http://crime-in-crisis.com/en/wp-content/uploads/2017/06/62-VIICTOR-KOURAKIS-FS_Final_Draft_26.4.17.pdf> (last accessed 9 January 2019).

[3]As Professor William Schabas stated in an interview to the author: "Hence I think that one of the problems with international justice right now, and particularly with the International Criminal Court, is that there is an unavoidable political dimension to it... In Thessaloniki, for example, you assume and accept that all serious crimes will be dealt with in an even manner and this is correct. This is what national justice is needed to do: that every murder that takes place in Thessaloniki will be investigated and prosecuted. But we can't and won't do that at the international level because we make political choices. What I want is to have us acknowledge that these are political choices and then discuss the political values that animate those choices. That is my only point. But I think to pretend that they are not political, which is what we are doing today, leads us into a *cul de sac* and this is a mistake.... Why are we going after the president of Sudan for Darfur and not the president of Israel for Gaza? Because of politics". Interview with Professor William Schabas 'Διεθνής Προστασία των Ανθρωπίνων Δικαιωμάτων και Πολιτική: Μια αναπόδραστη Πραγματικότητα' [International Protection of Human Rights and Politics: An Inescapable Reality] (Intellectum, 2 December 2010), English version <http://www.intellectum.org/articles/issues/intellectum7/en/Int%27l%20Protection %20of%20Human%20Rights%20and%20Politics_English%20co-edited%20WS%20&%20VT3.pdf> (last accessed 7 January 2019).

[4]A more thorough analysis of this issue was published in two honorary volumes:

(1) Victor Tsilonis, 'ΗΔιεθνής Ποινική Δικαιοσύνη κατά το Πρώτο Μισό του Εικοστού Αιώνα' [International Criminal Justice during the first half of the 20th Century] in *Τιμητικός Τόμος Χριστόφορου Δ. Αργυρόπουλου [Essays in Honour of Christophoros D. Argiropoulos]* (Criminal Law Practitioners' Association - Nomiki Bibliothiki, Athens 2016) 385-404.

(2) Victor Tsilonis, 'Έγκλημα και Κρίση: η Διεθνής Ποινική Δικαιοσύνη και το Έγκλημα της Πειρατείας' [Crime and Judgement: International Criminal Justice and the Crime of Piracy] in M. Gasparinatou (ed), *Τιμητικός Τόμος Νέστορα Κουράκη [Essay in Honour of Professor Nestor Kourakis]* (Sakkoulas, Athens 2016) 1262-1283 <http://www.ant-sakkoulas.gr/periexomena/15-2764-2.pdf> (last accessed 7 January 2019).

indeed, many philosophers have highlighted the importance of history for the acquisition of deeper knowledge.[5]

Inevitably, the overall synthesis and evaluation of all relevant data cannot bring 'absolute results' and thus, the reader of the present book has the opportunity to form his/her own opinion on the degree of influence that these 'non-legal' parameters carry. This does not mean, of course, that the present study does not evaluate the interrelation of all the above factors or does not reach final conclusions on every examined issue. On the contrary, a particular scientific method of co-evaluation of all relevant data necessitates a loose connection between them; but drawing direct conclusions in the form of cause and effect is not always possible, as Bernard Rachel pointed out in his monumental critical review of Gottfried Wilhelm Leibniz's *magnum opus*.[6]

Moreover, due to the range of issues examined, the book attempts to engage with a selection of PhD theses on international criminal law. This occurs in the first chapter, concerning the definition of international crime;[7] in the second chapter, regarding the prerequisites for the exercise of the International Criminal Court's jurisdiction and the principle of territoriality;[8] and finally in the fourth and sixth chapter while examining two of the four 'core crimes' where the International Criminal Court (ICC) has jurisdiction, namely the crime of aggression[9] and crimes against humanity.[10] It is the author's sincere hope that the reader will find this fruitful scientific dialogue beneficial, as it attempts to deal with seemingly intractable theoretical issues by proposing novel solutions (in the fourth chapter on crimes against humanity), offer new information and approaches (in the sixth chapter on the crime of aggression), review and criticique the existing discourse on Palestine (regarding the issue of the ICC's *ratione loci*) and, finally, summarise and reformulate theoretical concepts in a distinctive and clear way by introducing a new codification regarding the abstract notion of international crime *de lege ferenda* (in this first chapter).

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[5]"History is philosophy teaching by examples", Dionysius of Halicarnassus; "What experience and history teach is this — that nations and governments have never learned anything from history, or acted upon any lessons they might have drawn from it", George Wilhelm Friedrich Hegel; "World history is the world's court", Friedrich Schiller. See A. Partington (ed.) *Oxford Concise Dictionary of Quotations* (OUP, Oxford 1997) 121:4, 164:18, 267:21. "If I reveal to you everything that has ever happened, you will know everything that will happen", Confucius in S. Chalikias (trans.) *Confucius Analects Vol. A* (Indiktos, Athens 2001), 1.15.

[6]Ray Monk, *Wittgenstein* (Patakis, Athens 2007) 24-25.

[7]Athanasios Chouliaras, *ΗΑνάδυση του Διεθνούς Ποινικού Συστήματος [The Rise of International Criminal Justice System]* (Sakkoulas, Athens 2013).

[8]Michael Vagias, *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues* (Ph.D. Thesis) (Bynkershoek Publishing, The Hague, 2011).

[9]Maria A. Pihou, *Η Έννοια της Επίθεσης στο Διεθνές Δίκαιο [The Concept of Aggression in International Law]*, (Sakkoulas, Athens 2012).

[10]Ioannis A. Naziris, *Το Έγκλημα κατά της Ανθρωπότητας κατά το Άρθρο 7 του Διεθνούς Ποινικού Δικαστηρίου [The Crime against Humanity based on Article 7 of the International Criminal Court]* (Digital Library of the Aristotle University of Thessaloniki, Thessalloniki 2009).

Additionally, particular emphasis is placed on the principle of complementarity—which governs the Rome Statute of the International Criminal Court—, the practical complications surrounding its implementation and the 'awakening hypothesis' of the complementarity principle, which the book introduces for the first time. This refers to the paradoxical non-implementation of the complementarity principle during the period from the establishment of the International Criminal Court to the decision on the Al Senussi case (Situation in Libya) on 11 October 2013, when the principle was arguably implemented for the first time, albeit in a distorted way, since it was ruled that Al Senussi should be tried by the State of Libya—despite the country being torn apart by internal armed conflicts.[11] The decision is therefore examined extensively in this chapter, since, along with the decision on the Tomas Lubanga Dyilo case and the cases related to the situation in Kenya, it brings into focus the issue of the non-implementation of the principle of complementarity.

This analysis is essential because, even though much research work and thousands of articles have been written in favour of the principle of complementarity, critique has thus far been scant, while any problems pertaining to the non-implementation of the complementarity principle have not been examined at all. This is because ever since the Rome Conference in 1998, at which the ICC was established, critique has been couched in terms of being either 'for or against' the ICC. Consequently, regardless of whether one agrees or disagrees with the book's final conclusion on the non-implementation of the principle of complementarity, the novelty of this analysis does not lie only in its conclusion (as to the non-application of the principle of complementarity), but mainly in its perspective, which goes beyond 'for or against' arguments and focuses on the fundamental issue of whether this principle has been negated in practice by ICC decisions, internal circulars and the Prosecutor's strategy.

Finally, yet importantly, it should be underlined that issues like the criterion of a case's gravity, the collaboration between States and the ICC via the establishment of domestic laws or the delay in investigations and prosecutions pursuant to Article 16 ICCRSt (an intensely political article that has—thankfully—yet to be put into force) are not examined in this book.

1.2 The Concept of International Crime

During the first decades of the twentieth century, legal scholars did not take a conceptual approach to the term 'international crime'. The Second Protocol to the Geneva Convention for the Pacific Settlement of International Disputes of 2 October

[11] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Pre-Trial Chamber, Decision on the admissibility of the case against Saif Al-Islam Gaddafi), ICC-01/11-01/11-344-Red, International Criminal Court (ICC) (31 May 2013) para 46: 111<http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf> (last accessed 7 January 2019).

1924 is a key example of this trend: it defines aggressive war as a war crime without elaborating on what exactly the term 'war crime' means.[12] As can be expected, the lack of definition of such a crucial legal term did not make a positive contribution to the evolution of international criminal law. Moreover, the fact that even during the Nuremberg trials no definition of this term was introduced speaks for itself. The first definition was eventually introduced a few years later in *USA v. Wilhelm List, et. al.* (commonly known as the Hostages Trial), where the United States Military Tribunal at Nuremberg[13] defined the term 'international crime' for the first time in contemporary international case law: "An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances".[14,15]

The above definition established the following three cumulative characteristics of international crime:

(a) **The universal recognition of an act as an offence.** Thus, for example, the prohibition of alcohol in the United States of America (USA) in the 1930s could never be considered an international crime, because in the vast majority of States worldwide alcohol consumption was fully liberalised and not subject to any legal restrictions, nor, of course, was it considered an offence.
(b) **The exceptionally grave nature of the crime in relation to the damage caused by it**, its widespread commission or the existence of other characteristics which render it an important problem for a significant number of States and,

[12]League of Nations, 'Arbitration, Security and Reduction of Armaments: Protocol for the Pacific Settlement of International Disputes' (25 June 1925) <http://digital.library.northwestern.edu/league/le000016.pdf > (last accessed 7 January 2019).

[13]Apart from NMT, military tribunals were also created to adjudicate cases of minor significance in the areas under the control of the Allied Forces. The most important of those was the Military Tribunal of the United States of America in Nuremberg, which during the three years following the end of the Nuremberg Trials adjudicated twelve cases in the exact same courtrooms. The USA MT conducted trials according to Article 10 of Allied Control Council Statute, which was similar, but not identical to the NMT Statute. For example, the provision of crimes against peace was broader than the one the Nuremberg Trials were based on, as "initiating intrusions into other countries and aggressive wars against the provisions of International law and Treaties" was added to the existing definition. Intrusion into countries which offered no resistance such as Austria and Czechoslovakia became a crime after this addition. Nonetheless, because the trials were conducted exclusively with the participation of American judges, the international character of these trials has been disputed by some authors. Robert K. Woetzel, *The Nuremberg Trials in International Law*, (2nd edn, Stevens & Sons Limited, Plymouth 1962) 218-222.

[14]Hostages Trial, US Military Tribunal at Nuremberg (19 February 1948) 15 Ann. Dig. (1953) 632, 636.

[15]An indication of the timelessness of this definition is that the renowned Geneva Academy of International Humanitarian Law and Human Rights has adopted it and to this day considers it appropriate for the defintion of the term 'international crime', Geneva Academy, Rule of Law in Armed Conflicts Project <http://www.geneva-academy.ch/RULAC/international_criminal_law.php> (last accessed 7 January 2019).

consequently, a great issue of international interest. For instance, the crime of piracy is a distinctive and timeless example of a crime of great international interest.

(c) **The existence of a valid reason which would justify why the offence could not be left within the exclusive jurisdiction of one specific State**, which would under normal circumstances have the legal authority to prosecute its commission, bring it to trial and punish its perpetrator(s).

This third characteristic applies when the special circumstances of a crime, which may be connected to the commission of the crime itself, the identity of the perpetrator(s) or other elements of the crime, obstruct the prosecution of the crime by the State that would normally have jurisdiction over it. The best solution is thus for the prosecution of the crime and the trial to take place at an international level. For instance, this would theoretically be the case for crimes committed by a State's elected government representatives during their tenure with the complicity of another State's officials, as may occur today in cases of embezzlement of European subsidies, to name but one example.

In addition, it is noteworthy that the aforementioned criterion indirectly promoted the primacy of an international criminal court, which would exercise its jurisdiction over international crimes in lieu of the State, because evidently, it would not be appropriate for the State itself or a national court of the State to determine whether a crime fulfilled the criteria set by the 'Hostages Trial' and could not therefore "be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances".[16]

Despite its weaknesses—most notably, the prerequisite of the three criteria to be cumulatively met in order for an act to constitute an international crime—the first official definition of the term can be considered exceptionally positive in retrospect. That is because the term 'international crime', despite being included in earlier international texts and conventions, otherwise remained undefined. Hence the first definition given in the 'Hostages Trial' not only provided the foundations for an international discourse on the term, but also guided the evolution of international criminal law, which has reached a peak now that the International Criminal Court exercises jurisdiction over war crimes, crimes against humanity, genocide and, most recently, the crime of aggression.

In contemporary international criminal law theory, various views have been supported regarding the meaning of the term 'international crime', its elements and the criteria defining its relevance to the case at hand.[17] Certainly, this discussion

[16]Hostages Trial, US Military Tribunal at Nuremberg (19 February 1948) 15 Ann. Dig. (1953) 632, 636.

[17]The extensive review of the international bibliography found in Athanasios Chouliaras's book is considered quite important for Greek bibliography, although it does not eventually offer a specific view on the definition of an international crime *de lege ferenda.* A. Chouliaras, *Η Ανάδυση του Διεθνούς Ποινικού Συστήματος [The Rise of International Criminal Justice]* (Sakkoulas, Athens 2013), 15, 324-386.

had begun immediately after the Nuremberg Trials and the Hostages Trial. Already in 1950, George Schwarzenberger argued in his monumental essay on international criminal law that "an international crime [. . .] requires the existence of international criminal law. Such a discipline of legal studies does not exist."[18]

Almost four decades later in 1989, the International Association of Criminal Law in Vienna attempted to define international crimes by dividing them into two vast categories:

(a) international crimes *stricto sensu,* i.e., international crimes recognised as such by the international community pursuant to the generally recognised principles of international law, which threaten international legal interests (such as the peace and security of the international community)[19] and imply individual criminal liability.[20]
(b) international crimes *lato sensu,* i.e., actions which, though criminalised under a State's domestic law, cannot be efficiently dealt with solely through unilateral actions.[21]

Regarding the above categorisation, Foteini Pazartzi correctly points out that the main distinguishing criterion is the fact that in the first case (the category of international crimes *stricto sensu*), individual criminal liability is directly established at an international level; while in the second case (the category of international crimes *lato sensu)* the criminalisation requirement concerning individual conduct only arises at the level of the states parties,[22] which assume indirectly via international conventions the obligation to criminally prosecute the perpetrators at a national level. Consequently, nowadays, it is exclusively international crimes *sticto sensu* that are the core crimes of the ICC's Rome Statute (ICCRSt), i.e. war crimes,

[18]George Schwarzenberger, 'The Problem of an International Criminal Law' (1950) *3 Curr. Leg. Probs*, 263, reprinted in G. Mueller & E. Wise (eds), *International Criminal Law* (1965) 3-36.

[19]As analysed in more detail below, the term 'international community' does not have the meaning one would expect, i.e. the representation of the majority of States; on the contrary, the term skilfully implies the representation of the interests of the most powerful states.

[20]See also Konstantinos Antonopoulos, *Η Ατομική Ποινική Ευθύνη στο Διεθνές Δίκαιο [Individual Criminal Liability in International Law]* (Ant. N. Sakkoulas, Athens 2003) 23.

[21]Otto Triffterer, 'Efforts to Recognise and Codify International Crimes' in *Rapport General au Colloque Preparatoire du XIV Congres International de Droit Penal, Les Crimes Internationaux et le Droit Penal Interne, Hammamet (Tunisie)* (6-8 June 1987) 1989 (60) R.I.D.P. 29, 40.

[22]It must be noted that the term "States Parties" is included 86 times in the Rome Statute of the International Criminal Court (ICCRSt). The same term is often found in many other international conventions, although it is not grammatically correct; Party is an adjective which comes after the noun State in a rather unusual fashion, most probably being a relic of French legal terminology. Thus the correct plural of the term should be States Party, following similar post-noun adjectives in English like "Governor General" and "Notary Public". Nonetheless, because of the fact that it is a widely established term the author has eventually decided to retain the usage of this term.

crimes against humanity, the crime of genocide and the crime of aggression,[23] while the list of international crimes *lato sensu* based on the aforementioned distinction is lengthy and disputed, as will be seen below.

This position is essentially supported by Robert Cryer, Hakan Friman, Daryl Robinson and Elizabeth Wilmshurst in the second edition of their volume on international criminal law and procedural criminal law, where they argue that it is probably more accurate and practical to link the term 'international crime' to those crimes which are subject to the jurisdiction of international tribunals or other international/hybrid criminal courts pursuant to international law. These crimes are of course the ones already mentioned: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[24] The scholars underline that they do not include in the concept of international crime the crimes of piracy, enslavement, torture, terrorism, international drug trafficking and many other crimes, which States are obligated to criminalise and prosecute pursuant to international conventions under national criminal legislation.[25] Nonetheless, at the same time, they acknowledge that many of the above crimes: **(a)** bear a lot of similarities with the four core crimes of international law regarding their suppression; **(b)** are considered by the international community to breach or threaten legal interests, which are protected by public international law, as the Preamble of the ICCRSt[26] also makes apparent; and **(c)** the possibility that some of those crimes that may be subject to the jurisdiction of the ICC in the future, such as the crime of terrorism, torture at a non-state level and drug trafficking, should not be excluded.[27]

Certainly, the four academics' approach to the concept of international crime seems to differ from the one the judges of International Court of Justice (ICJ) Higgins, Kooijmans and Buergenthal adopted. In the well-known case of *Democratic Republic of Congo v. Belgium* in 2000, the three ICJ judges endorsed the view that in the name of effective protection against international crimes "a versatile strategy must be adopted, in which newly-established international tribunals,

[23]Fotini Pazartzi, *Η Ποινική Καταστολή στο Διεθνές Δίκαιο: Η Διεθνής Ποινική Δικαιοσύνη στη Σύγχρονη Εποχή [Criminal Enforcement in International Law: International Criminal Justice in Modern Times]* (Ant. N. Sakkoulas, Athens 2007) 58-61.

[24]Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurt, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP, Cambridge 2010), 4.

[25]According to one view there is an important difference between a suppression convention and the Rome Statute of the International Criminal Court (ICCRSt) regarding the classification of an act as an international crime: in the first case, States agree on classification through the ratification of an international convention (formal criterion), while in the second case, the specific criteria set out in the ICCRSt are met, as for example in the case of a widespread or systematic attack carried out in connection with the commission of murder (substantial criterion).

[26]See particularly paras 3, 4 and 9 of the Preamble of the ICCRSt, as well as the phrase "the most serious crimes of concern to the international community as a whole" which is repeated twice in the Preamble (par. 4 and 9) and can be interpreted as a declaration of the fact that the ICCRSt refers only to the most serious international crimes.

[27]Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP, Cambridge 2010), 26, 20, 5.

international legal obligations and domestic courts would all participate",[28] recognising indirectly yet clearly that the concept of international crime should not be interpreted narrowly on the basis of jurisdiction of permanent international courts or international tribunals.

Nonetheless, it remains a fact that the analysis of the term 'international crime' was not considered sufficiently important and consequently was not addressed by many scholars after the 'Hostages Trial'. Undoubtedly, the uncertainty surrounding the definition of this term is intensified by academics' work, because of the indiscriminate use of terms such as 'international law crimes', 'international crimes', 'international crimes *largo sensu*', 'international crimes *stricto sensu*', 'transnational crimes', 'international crimes *jus cogens*'[29] and lately 'core crimes'—with the latter now the most widespread term used to refer to the four crimes that come under the ICC's jurisdiction, i.e. genocide, crimes against humanity, war crimes and the crime of aggression.

Antonio Cassese, one of the founders of contemporary international criminal law, supports a restrictive interpretation of the term 'international crime' in the last edition of his book entitled *International Criminal Law* (2008). In particular, he maintains that "international crimes are breaches of international rules which result in individual criminal liability",[30] in contrast to the breach of those international rules which results in international liability for the State whose officials act as its proxies. Cassese established four criteria which should cumulatively coexist for an act to be characterised as an international crime:

1. The act at hand must constitute a breach of international customary law or at least conventional rules, if these rules codify, stipulate or have contributed to the formulation of international law.[31]

[28] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* (Separate opinion of Judges Higgins, Kooijmans and Buergenthal) [2002] ICJ para 51 <https://www.icj-cij.org/files/case-related/121/13743.pdf> (last accessed 7 January 2019).

[29] The principle of *jus cogens* was codified in Article 53 of the Vienna Convention on the Law of Treaties: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Vienna Convention on the Law of Treaties <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (last accessed 7 July 2019).

It is indicative that Hersch Lauterpacht in 1953 described peremptory norms of international law, not as part of international customary law, but as fundamental principles of international customary law, on which the international public order is founded (*ordre international public*)." ILC, 'Documents of the Fifth Session including the Report of the International Law Commission to the General Assembly', 1 June to 14 August 1953) UN Doc A /CN.4/SER.A/1953/Add 1.

[30] Antonio Cassese, *International Criminal Law* (2nd edn, OUP, Oxford 2008).

[31] ibid 11.

2. The rules breached are intended to protect values that are important to the so-called international community and, therefore, be binding for all States and individuals. Undoubtedly, rules of such importance can be found in the United Nations Charter, the Universal Declaration of Human Rights, the European Convention on Human Rights, the American Convention on Human Rights, the African Statute on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UN Declaration on Principles of International Law concerning Friendly Relationships and Co-operation among States, etc.[32]
3. The existence of a universal interest in the suppression of these crimes. This means that according to international law and under certain circumstances,[33] the alleged perpetrators can be prosecuted and punished by *any* State, regardless of the place in which the crime was committed or the nationality of the victim or perpetrator.[34]
4. Finally, if the perpetrator has acted in an official capacity, e.g. as a *de jure or de facto* state official, the State on whose behalf the crime was committed is barred from invoking the alleged perpetrator's immunity from another State's criminal or civil jurisdiction pursuant to international customary law (although it is generally accepted that if the perpetrator is a head of state, a minister or an active diplomat, then he enjoys absolute personal immunity while carrying out his governmental or diplomatic duties).[35]

On the basis of the four cumulative criteria above, Cassese concludes that international crimes are: war crimes, crimes against humanity, genocide, torture (as a crime that is distinct from those cases in which it could be considered a war crime or a crime against humanity), the crime of aggression, as well as some extreme forms of international terrorism. However, at the same time, he maintains that crimes such as piracy, illegal drug trafficking, illegal gun trade, the smuggling of nuclear

[32]Naziris (n 10), 16.

[33]Antonio Cassese, *International Criminal Law* (2nd edn, OUP, Oxford 2008), 21, 29. Cassese neither clarifies nor indicates—even indirectly—what these circumstances are, at this point.

[34]ibid 11-12.

[35]ibid 12; *Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex Parte Pinochet* [1998] (on appeal from a Divisional Court of the Queen's Bench Division) *Regina v. Evans and another and the Commissioner of Police for the Metropolis and others ex Parte Pinochet* (on appeal from a Divisional Court of the Queen's Bench Division) (HL) 25 November 1998, <https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino01.htm> (last accessed 7 January 2019); *Fidel Castro, Audiencia Nacional, Annuario Espanol de Derecho Internacional Privado, Volume I (2001), 811-816, Commentary of J. Gonzalez Vega*; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Merits) [2002] ICJ, <https://www.icj-cij.org/files/case-related/121/13743.pdf> (last accessed 7 January 2019), paras 57-61. Pursuant to the existing case law, it is better for the perpetrator to be a diplomat rather than a minister or a prime minister, because then their time in service lasts considerably longer—that is, until retirement.

and other lethal material, money laundering, slave trade, women and human trafficking or even the crime of illegal racial segregation (apartheid) **are not included** in the concept of international crime.

Based on the adoption of an extremely restrictive interpretation of the term 'international crime', Cassese justifies his aforementioned conclusion by pointing out *inter alia* that piracy does not infringe upon an international legal interest, but upon the individual interests of States, and that is the reason why the piracy committed throughout past centuries using State crusade fleets was not subject to the universal jurisdiction of States themselves.[36] Of course, even if it is assumed that historically Cassese's position was at some point well-founded, this position could not be supported today, because rights to property, freedom and security, free movement of people and goods now constitute a set of universally accepted values as indicatively defined in the International Covenant on Civil and Political Rights,[37] the European Convention on Human Rights[38] and the Charter of Fundamental Rights of the EU.[39]

Secondly, as far as crimes such as drug trafficking, illicit arms trading, the smuggling of nuclear and other lethal material, money laundering, women and humam trafficking or even the crime of racial segregation (apartheid) are concerned, Cassese argues that the aforementioned acts are criminalised on the basis of international conventions and not international customary law, while they are commonly committed by individuals or criminal organisations and not by States, obviously overlooking the case of South Africa. Finally, as far as the crime of racial segregation (apartheid) is concerned, he maintains that it does not touch upon a universally accepted value. This, he argues, is because the Convention on the Elimination of all Forms of Racial Discrimination of 1973 may have been ratified by 101 States, but none could be considered a developed 'Western' State, in Cassese's opinion.[40] However, these arguments are weak, because on the one hand, Cassese seems to classify an act as an international crime if there is a clear 'state element', while on the other he does not accept that racial segregation violates universally accepted human values. Further, he only partly acknowledges the ratification of the Rome Statute by so many States and that the inclusion of racial segregation in art.7(1)(i) ICCRSt as a

[36]Antonio Cassese, *International Criminal Law* (2nd edn, OUP, Oxford 2008) 12, 21.

[37]International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Arts 1 (right to self-determination), 6 (right to life), 9 (right to freedom and security), 12 (right to free movement).

[38]European Covenant on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) Arts 2 (right of life), 5 (right to freedom and security) and 8 (right to private and family life) ECHR; First Protocol to the ECHR (adopted 4 November 1950, entered into force 3 September 1953) Art. 1 (right to property); Fourth Protocol to the ECHR (adopted 16 September 1963, entered into force 2 May 1968) Art. 2 (right to movement).

[39]See for example Charter of Fundamental Rights of the European Union (adopted 18 December 2000, entered into force 1 December 2009) OJ C 326/391, Preamble, Arts 2, 6, 17 and 45.

[40]Antonio Cassese, *International Criminal Law* (2nd edn, OUP, Oxford 2008), 21, 12-13.

distinct form of a crime against humanity as well as its definition in art.7(2)(h) ICCRSt may gradually alter the crime's classification.[41]

On the other hand, the world-renowned scholar Cherif Bassiouni, who has probably researched the importance and the role of the definition of international crime more thoroughly than any other eminent scholar, has adopted an exceptionally broad interpretation. In the last edition of his book on crimes against humanity, he maintains that the following characteristics can be found in all international crimes:[42]

(a) The prohibited conduct violates a significant international interest.
(b) The prohibited conduct constitutes an egregious act which infringes upon the commonly shared values of the world community.[43]
(c) The prohibited conduct involves at least two States in its planning, preparation or commission, either because of the diversity of perpetrators and/or victims' nationalities or because the means employed transcend national boundaries.
(d) The effects of the conduct bear upon an internationally protected interest that does not fall within either (a) or (b) above; nonetheless, the conduct's international criminalization is required in order to ensure its prevention, control and suppression, because it is predicated on 'state policy' without which it could not materialise.[44]

Nevertheless, it should be highlighted that in the second edition of the two-volume collaborative book that Bassiouni edited, under the title *Introduction in International Criminal Law*, he divides the latter criterion into the following two distinct criteria, thus providing five criteria in total:

(d1) The conduct offends an internationally protected person or infringes upon an internationally protected legal interest.
(d2) The conduct infringes upon an internationally protected legal interest, without however the infringement fulfilling the first or second criterion. Nonetheless, it is a conduct which, due to its nature, can only be prevented and confronted successfully through its international criminalisation.[45]

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[41]ibid 13. Cassese notes that "This development could occur if and when cases concerning 'inhumane acts' committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime are ever brought before the Court".

[42]M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP, Cambridge 2014) 8.

[43]The author's opposition to the use of widely common terms, such as 'international' or 'universal community' is apparent throughout the whole thesis. In this case, the term does not include the huge cultural differences between the people, as they are indicatively outlined in the article of Deirdre Evans-Pritchard and Alison Dundes Renteln, 'The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California' (1995) 4 S. Cal. Interdisc. L.J. 1-48.

[44]M. C. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP, Cambridge 2014) 23, 8.

[45]M. Cherif Bassiouni (ed.), *Introduction to International Criminal Law* (Martinus Nijhoff Publishers, Leiden 2013) 142-143.

Consequently, one can observe that in his book Bassiouni reintroduces the concept of the 'internationally protected person' into the aforementioned criteria, pursuant to the standards of the International Law Commission, which considered the protection of UN staff to be absolutely essential. At the same time, he rightly removes the notion of 'state policy' and introduces instead the theoretically vague and undefined yet much more appropriate criterion of the successful suppression of the conduct as a result of its international criminalisation.

Based on the five characteristics above, as well as the nature and scope of 281 transnational treaties,[46] Bassiouni argues that all international crimes fulfil at least one of the following fundamental criteria:

(1) International character, i.e. a conduct that either directly or indirectly threatens the peace and security of the international community or is considered atrocious from the perspective of the international community's collective consciousness and its commonly accepted values.
(2) Transnational character, i.e. a conduct that either affects public security and financial interests within at least two States' territory or concerns citizens of at least two nationalities, whether as perpetrators or victims, or takes place in at least two States.
(3) State policy character, i.e. a conduct which partially entails any of the first two elements, while its prevention, control and suppression require international collaboration, because it is based on a state policy, without which it could not be performed.[47] Undoubtedly, the existence of a state policy renders the crime's international criminalisation necessary, since obviously the criminal conduct in question cannot be lawfully suppressed by the respective State's judicial system.

Based on the above, it becomes apparent that the crimes committed by the Nazis at the concentration camps fulfil all three criteria, because they were atrocious crimes pursuant to the commonly accepted values of the international community (criterion no. 1), with a transnational character as many victims were of Greek, Polish, French etc. nationality and were transferred to Germany by force (criterion no. 2) and finally, because they were committed as a result of a well-organised state policy (criterion no. 3), which 'decriminalised' and facilitated the criminal activity of millions of ordinary people, who acted 'lawfully' within their national legal framework at the time; they hoarded the victims onto trains or drove those trains or opened the gates of the concentration camps and gas chambers, among other tasks.[48]

Additionally, it becomes apparent that international criminal law does not criminalise actions at an international level only because of the fact that they are classified as crimes under almost all States' legal systems. Consequently, rape,

[46]ibid 144-145.

[47]M. C. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP, Cambridge 2014) 23, 8-9.

[48]Zygmunt Bauman and Tim May, *Thinking Sociologically* (2nd edn, Blackwell Publishing, Oxford 2001) 72.

abduction, blackmail and homicide *de lege lata* and *de lege ferenda* are not considered international crimes in the first place, because—though they are of course unanimously accepted as morally abhorrent crimes—they lack the international character required for an act to be dealt within the sphere of international law. However, if these actions are committed as part of a crime against humanity or war crime, then they acquire an international character.

Consequently, Bassiouni lists 25 categories of international crimes that either infringe upon an important international legal interest; or involve perpetrators and/or victims among whom are the nationals of two or more States; or constitute clear violations of universally accepted values. Hence *de lege ferenda*, his extensive categorisation includes crimes such as the trading of illegal pornography (e.g. child pornography), the forgery and counterfeiting of currency, damage done to submarine cables and the illegal obstruction of international mail services.

It is obvious that Bassiouni follows the original ambitious categorisation of the International Law Commission, which was originally presented in 1991—based on the mandate it had received 13 years earlier to draw up a Code of Crimes against the Peace and Security of Mankind—and included 26 crimes in total as international crimes against the peace and security of mankind.[49]

In the two-volume work on international criminal law he edited, Bassiouni argues (without, however, offering any additional references that would support his position), that there are 16 international conventions with provisions on terrorism crimes, 23 international conventions with provisions on drug-related crimes and 71 conventions with provisions on armed conflicts (some of which refer to the existing international legal framework, while others do not, with the inescapable result that the provisions of the latter are binding only upon the state parties that have ratified them).[50]

Then, in accordance with the aforementioned criteria, Bassiouni proceeds to list ten characteristics in total as follows. Even if only a single one of these is found in an international convention, Bassiouni considers it adequate to characterise the conduct prohibited by the convention as an international crime:

(1) Explicit or implicit recognition of a prohibited conduct as an international crime or a crime pursuant to international law (in 71 international conventions)

[49]ILC, 'Report of the International Law Commission on the work of its forty-third session' (29 April–19 July 1991) Supplement No 10 UN Doc A/46/10 (1991) <http://legal.un.org/ilc/documentation/english/reports/a_46_10.pdf> (last accessed 7 January 2019). However, in 1996, the International Law Commission reduced those crimes to twelve and then to just five: the crime of aggression, genocide, crimes against humanity, crimes against the UN and its staff and war crimes. ILC, 'Report of the International Law Commission on the work of its forty-eighth session' (6 May-26 July 1996) (Draft Code of Crimes Against the Peace and Security of Crimes of Mankind) Supplement No 10 UN Doc A/51/10 16, 42-57 <http://legal.un.org/ilc/documentation/english/reports/a_51_10.pdf> (last accessed 7 January 2019).

[50]M. C. Bassiouni (ed.), *Introduction to International Criminal Law* (Martinus Nijhoff Publishers, Leiden 2013) 24, 141.