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Defining an International Crime: Historical and Contemporary Developments

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Despite the desirability of the identity of crimes being specific, the category of conduct constituting international crimes remains blurry. In consequence, the controversy over what is, or is not, an international crime has continued to rage on. Different criteria have been used to classify a specific conduct as an international crime. As a source of authority, some authorities point to the works of scholars, treaties, legal systems, the statutes of international criminal courts, or even works of the International Law Commission, to identify an international crime. Nevertheless, unanimity in identification remains elusive. Thus, this article examines differing perspectives on the constituents of international crimes. The analysis is relevant because the definition of crime forms the bedrock of international criminal justice. However, the paper finds that leaving the category of conducts constituting an international crime open, facilitates the inclusion of other grave or emerging forms of criminality, which may also rise to the threshold of the crimes within the jurisdiction of international criminal tribunals. Although this may appear advantageous, the need for predictability, consistency and uniformity in the categorization of an international crime cannot be overemphasized.

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INTRODUCTION

The idea of crime has a long history. The first civilizations generally did not distinguish between civil law and criminal law but fused the two. Crimes are prohibited by criminal laws which reflect the moral and ethical beliefs of society. Records of criminal codes dating back to antiquity have been discovered. The Sumerians produced the earliest surviving written codes.¹ Urukagina (reigned 2380 BC-2360 BC) had an earlier code that did not survive; a later king, Ur-Nammu, left the earliest extant written law system; the Code of Ur-Nammu.

The Code of Ur-Nammu prescribed a formal system of penalties for specific cases in 57 articles. Successive legal codes in Babylon, including the code of Hammurabi, reflected the Mesopotamian belief that law was derived from the will of the gods. Many States at this time were theocratic, and codes of conduct were essentially of a religious character. Another code of significance was the *Corpus Iuris Civilis*, otherwise known as the Justinian Code. The Justinian Code began a revival in the study of Roman law in the Middle Ages. The code dealt heavily with religion as it enforced laws against heresy, paganism, and Judaism.²

However, it was Maine who asserted that ancient codes lacked the characterization of law in the modern sense because they contained substantial wrongs committed not against the State, but against the individual victim, who retained the prerogative of enforcing redress. Ancient codes mixed up religious, civil, criminal and merely moral ordinances, without any regard for differences in their essential character. Thus, offences such as theft, assault, rape and murder were all treated as private wrongs.

Most penal systems have one code or the other conceptualizing crime for certain purposes.³ Notwithstanding the avalanche of statutory definitions, like most other legal concepts, a universally accepted definition of crime is not readily available. This is complicated further by the fact that 'crime' is a subject of enquiry not only by legal scholars but by sociologists, criminologists, forensic scientists, statisticians, economists, psychologists, etc., as well. For example, the normative conceptualization of crime to the sociologist is that of deviant behaviour that violates prevailing norms, that is, cultural standards prescribing how humans ought to behave normally. Nevertheless, the merit of an interdisciplinary perspective is that it considers the complex realities surrounding the concept and seeks to understand how changing social, political, psychological and economic conditions may affect changing definitions of crime and the form of the legal, law-enforcement, and penal responses made by society.

The word 'crime' is used interchangeably with 'offence'. A crime is defined as an 'act that the law makes punishable; the breach of a legal duty treated as the subject matter of a criminal proceeding.'⁴ Legislatures may pass laws called *mala prohibita*, defining crimes against social norms, or offences that are wrong only because the law prohibited them.⁵ These laws have neither time nor place constants. For example, the prohibition of gambling, duelling and dealing in narcotics has varied throughout history. Other crimes, called *mala in se*, are outlawed in most jurisdictions. This category of crimes, for example, murder, theft or rape, is inherently bad, independent of, and prior to the law. Crimes are generally reduced into two elements: '*actus reus*,' or the guilty conduct, and '*mens rea*,' the evil

¹ National Open University of Nigeria, 'Measurement and Patterns of Crime and Delinquency', *Course Guide*, 2012, p. 24.

² Frederick W. Dingley, (2016) 'The Corpus Juris Civilis: A Guide to Its History and Use', Library Staff Publications, William and Mary Law School Scholarship Repository. <<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1122&context=libpubs>> accessed 3 April 2022.

³ By the Nigerian Criminal Code Act s. 1, an offence is 'an act or omission which renders the person doing the act or making the omission liable to punishment under the code, or under any Act or law'.

⁴ B A Garner, *Black's Law Dictionary* (9th edn, St Paul MN: Thomson Reuters, 2009) p. 427.

⁵ A Ristroph, 'Criminal Law in the Shadow of Violence' (2011) Vol. 62. No. 3. *Alabama Law Review*, 582-584.

mind. To be convicted of a crime, both elements must be proved.⁶

International crimes

Everyone seems to know an international crime but is still unable to define it. Most definitions are not spared the usual legal wrangles on semantics. In a municipal system of justice, a crime is easy to define. The Criminal Law of Lagos State, Nigeria, 2011 defines an offence as ‘an act or omission which renders the person doing the act or making the omission liable to punishment or other measures under the Law or any other Regulation.’⁷ However, flippantly defining an ‘international crime’ as an act or omission which renders the person doing the act or making the omission liable to punishment under international law, leads us nowhere. Firstly, the definition is unhelpful because it does not identify the scope of international crimes; those included or excluded. Secondly, unlike the penal systems of sovereign States, there is a visible lack of an international penal code. Moreover, no legal scholarship on the taxonomy of international crimes is for the time being, authoritatively conclusive. Thus, there are divergent views on the specific crimes to classify as international.

While some writers regard slavery, piracy and terrorism as international crimes, others want to limit the term to the ‘core crimes’ in the Statute of Rome. Sandoz recognized this difficulty when he posited that one of the most pressing tasks for international criminal law is to set out clearly what violations are punishable under that law and to define them in specific terms.⁸ Only four crimes: aggression, genocide, crimes against humanity and war crimes, have been inducted into the sanctorum of international criminalism. As the

problem is compounded by the absence of an international legislature with crime-creating functions, we have no alternative other than to turn to the traditional sources of international law. Furthermore, international criminal law is relatively new and in a state of flux.

International crimes have existed for centuries, dating back to the times of the Roman orator, Marcus Tullius Cicero. From Cicero, descended the theory of the ‘common enemies of all’ or ‘*communis hostis omnium*’, which was later applied to those who had committed the most serious crimes of international concern, using the term ‘enemies of all mankind’ or ‘*hostis humani generis*’.⁹ In the United Nations system, vestiges of the notion of ‘*hostis humani generis*’ were seen in the post-World War II Nuremberg and Tokyo trials. The Nuremberg Principles embody a document created by the International Law Commission to codify the legal principles underlying the Nuremberg Trials in the post-war era.¹⁰ Principle 1 provides that ‘any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.’ By Principle VI, the crimes punishable under international law are crimes against peace, war crimes, and crimes against humanity.

The exclusion of genocide from this catalogue can be quickly explained. Firstly, the trials preceded the Genocide Convention of 1948, and secondly, at that time, genocide was not regarded as an international crime in its own right, but as a subclass of crimes against humanity, which could be committed only during an armed conflict.¹¹ During the Control Council Law No. 10 trials, the judgment in the *Justice Case* described genocide as ‘the prime illustration of a crime against

⁶ D Milovanovic, ‘Legalistic Definition of Crime and an Alternative View’ (2006) *Annals Fac L. Belgrade Int’l Ed.*, 79-80.

⁷ Criminal Law of Lagos State 2011 s. 1 (1).

⁸ Y Sandoz, ‘Penal Aspects of International Humanitarian Law’ in M C Bassiouni (ed), *International Criminal Law* Vol. 1 (Leiden: Nijhoff, 2008) pp. 293-321.

⁹ B Victor & A Cassese, *The Tokyo Trial and Beyond: Reflections of a Peace Monger* (Cambridge: Polity Press, 1994) p. 97.

¹⁰ Farhad Malekian (2016), ‘Comparative Substantive International Criminal Justice’ in *The Nuremberg Principles in Non-western Societies A Reflection on their Universality, Legitimacy and Application*, Ronald Slye (ed), International Nuremberg Principles Academy, p. 16, range 10-44

¹¹ Y Aydin, ‘The Distinction between Crimes against Humanity and Genocide Focusing Most Particularly On the Crime of Persecution.’ Ministry of Justice, Turkey.

humanity'.¹² The International Military Tribunal for Nuremberg and the International Military Tribunal for Tokyo were established in 1945 and 1946 respectively. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were established by the United Nations Security Council in 1993 and 1994 respectively. The International Criminal Court was created in 1998.

Prior to 1998, a number of courts, loosely, described as 'internationalized' or 'hybrid' operated in countries like Kosovo, East Timor, Cambodia, Sierra Leone, Bosnia and Herzegovina, Iraq, and Lebanon. Taken together, these tribunals have indicted and convicted a large number of individuals for international crimes, ranging from war crimes, genocide, crimes against humanity and crimes of aggression. Among these courts, the Special Tribunal for Lebanon stands apart. It was established jointly by the United Nations and the Republic of Lebanon for the trial of terrorists for the murder of the former Lebanese Prime Minister; Rafiq Hariri and some twenty-two other persons.¹³ However, it is noteworthy that the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which met in Rome from 15th June to 17th July 1998, had adopted Resolution E for the possible definition and inclusion of the crimes of terrorism and drug trafficking in the material jurisdiction of the International Criminal Court.¹⁴

Terrorist crimes were regarded as serious crimes of concern to the international community. In addition, international trafficking in illicit drugs was considered to be a very serious crime capable

of destabilizing the political, social and economic orderliness of states. Accordingly, both crimes were taken as constituting 'serious threats to international peace and security'. The foregoing analysis tends to lend credibility to the view that the inclusion of particular crimes in the statutes of the courts provides unquestionable evidence that the crimes are indeed regarded as international. However, except to the extent that the pre-ICC tribunals could be regarded as crime-specific courts, this does not address the exclusion of other crimes from the statutes of the tribunals. Nor does it disqualify them from the description as international crimes.

The work of the International Law Commission (ILC)

The Nuremberg Principles earlier mentioned were formulated by the ILC in 1950.¹⁵ Besides the Principles, the International Law Commission (ILC) has devoted considerable attention to the development of international criminal law and has played a signal role in its evolution.¹⁶ Established by the United Nations General Assembly in 1948, the ILC has played a major role in the 'promotion of the progressive development of international law and its codification'.¹⁷ After its creation, the ILC had on its agenda the problem of defining the crime of aggression and considering an international criminal jurisdiction to cope with international crimes.¹⁸

The 1954 Draft Code of Offences against the Peace and Security of Mankind submitted by the ILC to the UN General Assembly listed 13

¹² *United States of America v Josef Alstotter et al.* (The Justice Case) (1948) 3 T.W.C 1; (1948) 6 L.R.TW.C 1; (1948) 14 Ann. Dig. 278.

¹³ UN Security Council resolution 1664 (2006), 29 March 2006.

¹⁴ By the Rome Statute of the ICC Article 123, 7 years after the entry into force of the Statute, the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to the Statute, and such review may include, although not limited, the list of crimes contained in Article 5.

¹⁵ Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of The Tribunal, 1950.

¹⁶ J Harrison, 'The International Law Commission and the Development of International Investment Law' (2013) Vol. 45 The George Washington International Law Review, 417.

¹⁷ Statute of the International Law Commission Article 1, United Nations General Assembly Resolution A/RES/174(II) 21 November 1947.

¹⁸ B B Ferencz, 'The Draft Code of Offences against the Peace and Security of Mankind' (1981) Vol. 75. No. 3 The American Journal of International Law, 674.

categories of international crimes.¹⁹ With the exception of the terrorism-related Special Tribunal for Lebanon, these offences roughly correspond to the crimes within the material jurisdiction of the international criminal tribunals earlier mentioned. Indeed, the preamble of the Rome Statute of the ICC offers several allusions to ‘grave crimes threatening the peace, security and wellbeing of the world;’ ‘the most serious crimes of concern to the international community,’ and ‘unimaginable atrocities that deeply shock the conscience of humanity.’²⁰

According to Article 1 of the Rome Statute, the ‘ICC shall have the power to exercise its jurisdiction over persons for the ‘most serious’ crimes of international concern’. Nevertheless, this invariably yields a polygonal categorization of international crimes and befuddles the identification process. To some extent, the least of which is in linguistic terms, this classification is unhelpful as it implies levels of gravity: the ‘unserious crimes’ or ‘serious crimes’ or ‘more serious crimes’ of international concern have not been identified by the Statute. Indeed, the use of the adjectives ‘grave’ and ‘most’ serious in the

Statute presupposes the existence of a lesser sub-category of international crimes, without defining its constituents.

Such qualifiers have been used since the Nuremberg Trials, with the Tribunal condemning ‘aggressive war’ as the ‘supreme international crime’.²¹ Moreover, at the thirty-fifth session of the ILC in 1983 on the Draft Code, the Commission was of the opinion that the Draft Code should cover only the most serious international offences. The Blacks’ Law Dictionary describes an international crime as a ‘grave breach’ of international law such as genocide, or a crime against humanity, made a punishable offence by treaties or applicable rules of international law.²² It would appear from the foregoing literature that the differentiation in the gravity of criminal offences in national laws has somehow, found its way into international criminal law. For example, in the common law system, offences are classified in descending order of gravity as indictable and summary offences; arrestable and non-arrestable offences;

¹⁹ Article 1 of the 1954 Draft Code provides that offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individual must be punished”. By Article 2 of the Code, the offences are: (1) Any act of aggression, including the employment by the authorities of a State of armed force against another State; (2) Any threat by the authorities of a State to resort to an act of aggression against another State; (3) The preparation by the authorities of a State of the employment of armed force against another State for any purpose other than self-defence, or a decision of the United Nations; (4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State...; (5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State...; (6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State; (7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by restrictions or limitations on armaments...; (8) The annexation by authorities of a State of territory belonging to another State...; (9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind; (10) Acts by the authorities of a State

or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including (i) Killing members of the group; (ii) Causing serious bodily or mental harm to members of the group; (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) Imposing measures intended to prevent births within the group; and (v) Forcibly transferring children of the group to another group; (11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or toleration of such authorities; (12) Acts in violation of the laws or customs of war; (13) Acts which constitute conspiracy, direct incitement, complicity, or attempts to commit any of the preceding offences.

²⁰ By virtue of Principle 2 of the Princeton Principles on Universal Jurisdiction 2001, serious crimes under international law includes piracy, slavery, war crimes, crime against peace, crimes against humanity, genocide, and torture.

²¹ Donald M. Ferencz, (2017) ‘Continued Debate Over the Crime of Aggression: A Supreme International Irony’, Vol. 58. Online Journal, *Harvard International Law Journal*, p. 24, range 24-27.

²² Garner (n4 supra), p. 891.

and felonies and misdemeanours, which are now of historical interest only.²³

An analysis of the 1954 Draft Code will uncover crimes against peace, terrorism, genocide, crimes against humanity, and war crimes. The preoccupation of the ILC with the criminalization of aggression owes its origin to the incidence and atrocities of the World Wars. Furthermore, the previous works of the ILC on state responsibility also reflect its conceptualization of international crimes. The laws of state responsibility are the principles determining when and how a state is held accountable for the breach of an international obligation. The theory of state responsibility has been redefined by the adoption of the Articles on the Responsibility of States for Internationally Wrongful Acts, by the ILC in August 2001.²⁴ Earlier drafts of the Articles on State Responsibility contained a provision on international crimes perpetrated by states. The crimes were aggression; colonial domination; slavery; apartheid; and massive pollution of the atmosphere or of the seas.²⁵ However, this provision was deleted from the final draft.

In 1981, the General Assembly by resolution 36/106 of 10 December invited the ILC to resume its work on the elaboration of the Draft Code of Offences against the Peace and Security of Mankind. In 1984, at its thirty-sixth session, the ILC addressed the issues of the offences covered by the 1954 Draft Code and the offences classified since 1954. In its report to the General Assembly on its thirty-sixth session, the ILC expressed the intention of limiting the scope *ratione personae* of the draft code to individual criminal

responsibility, without prejudice to the possible extension of notions of international criminal responsibility to states. In addition to the pre-existing offences in the 1954 Draft Code, some other offences namely, colonialism, apartheid, serious damage to the human environment, economic aggression, the use of atomic weapons, and mercenaryism, were proposed for inclusion in the revised draft code.

On the recommendation of the ILC at its thirty-ninth session in 1987, the General Assembly approved the English version of the Draft Code, the 'substitution' of 'offences' in its title with 'crimes'.²⁶ In 1991, at its forty-third session, the ILC adopted on first reading, the Draft Code of Crimes against the Peace and Security of Mankind, which included the crimes of aggression; threat of aggression; intervention; colonial domination and other forms of alien domination; genocide; apartheid; systematic or mass violations of human rights; exceptionally serious war crimes; recruitment, use, financing and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and wilful and severe damage to the environment. However, while considering the thirteenth report of the Special Rapporteur at its forty-seventh session in 1995, the ILC had observed that the Special Rapporteur had omitted from his report six of the twelve crimes,²⁷ leaving in the Draft Code, the crimes of aggression; genocide; systematic or mass violations of human rights,

²³ Indictable offences are the more serious crimes, e.g., murder, theft, perjury, the trial of which takes place in the crown court. Summary or petty offences are those which must be tried summarily, i.e., before a magistrates' court, where there is no jury. Arrestable are offences for which the sentence is fixed by law or for which a person, not previously convicted, may under or by virtue of any enactment be sentenced to imprisonment for a term of five years... All other offences are generally non-arrestable offences. A felony was an offence which had been made such by statute, or which, at common law, carried on conviction, the penalties of death and forfeiture. All other offences were misdemeanours. L B Curzon, *Criminal Law* (3rd edn, Plymouth: MacDonald & Evans Ltd, 1980) pp. 11-12.

²⁴ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Session, Supp. No. 10, p. 43, UN Doc A/56/10 (2001).

²⁵ See for instance, Article 19 of the 1996 ILC Draft Articles on State Responsibility.

²⁶ UNGA 222; A/RES/42/151 (7 December 1987)

²⁷ Namely, the threat of aggression; intervention; colonial domination and other forms of alien domination; apartheid; the recruitment, use, financing and training of mercenaries; and willful and severe damage to the environment. This was done in response to strong criticism from some governments over the inclusion of the crimes.

exceptionally serious war crimes; international terrorism and illicit traffic in narcotic drugs.²⁸

Even within the United Nations system, notions of international crimes were still blurred. The scope was so uncertain that at the forty-eight sessions of the ILC in 1996, a proposal which regarded ‘wilful and severe damage to the environment’ as a war crime, a crime against humanity or a separate crime against the peace and security of mankind was considered. At the same session, the ILC adopted the Draft Code of Crimes against the Peace and Security of Mankind 1996.²⁹ The Code contained the following crimes: aggression,³⁰ genocide,³¹ crimes against humanity,³² crimes against United Nations and associated personnel,³³ and war crimes.³⁴ The ILC adopted the Draft code with the following understanding:

With a view to reaching a consensus, the commission has considerably reduced the scope of the code. On first reading in 1991, the draft Code comprised a list of 12 categories of crimes. Some members have expressed their regrets at the reduced scope of coverage of the Code. The Commission acted in response to the interest in adoption of the Code and obtaining support from Governments. It is understood that the inclusion of certain crimes in the Code does not affect the status of other crimes under international law and that the adoption of the Code does not in any way preclude the further development of this important area of law.³⁵

²⁸ Yearbook of the International Law Commission, 1995, vol. II (Part Two), paras. 38 and 39.

²⁹ Text adopted by the International Law Commission at its forty-eight session, in 1996, and submitted to the General Assembly as part of the Commission’s covering the work of that session.

³⁰ Article 16.

³¹ Article 17.

³² Article 18.

³³ Under Article 19 (1), the following crimes constitute crimes against the peace and security of mankind when committed intentionally and in a systematic manner on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate: (a) murder, kidnapping or other attack upon the person or liberty of any such personnel; (b) violent attack upon the official premises, the private accommodation or the

At its thirty-fifth session, in 1983, the ILC considered the Report of the Special Rapporteur for the Draft Code, which focused on the implementation of the code. Some members of the Commission articulated the view that a Code lacking penalties and criminal jurisdiction was ineffective. In 1989, the United Nations General Assembly considered an agenda titled ‘International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes’.³⁶ At its forty-fourth session, in 1992, the ILC established a Working Group to consider the creation of an international criminal court. The jurisdiction of the court would be limited to crimes of an international character defined in specified international treaties in force, including the crimes defined in the Draft Code of crimes against the peace and security of mankind, but by no means limited by it.

The ILC adopted the Draft Statute for an International Criminal Court in 1994.³⁷ Article 20 of the Draft Statute invested the court with jurisdiction over the following crimes: (a) genocide; (b) aggression; (c) serious violations of the laws and customs applicable in armed conflict; (d) crimes against humanity; and (e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having

means of transportation of any such personnel likely to endanger his or her persons or liberty. (2). This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

³⁴ Article 20.

³⁵ Year Book of the International Law Commission, 1996, Vol. II (Part Two), para. 46.

³⁶ United Nations General Assembly A/RES/44/39, 72nd Plenary Session, 4th December 1989.

³⁷ Draft Statute for an International Criminal Court with Commentaries, 1994. Report of the International Law Commission on the work of its forty-sixth session submitted to the United Nations’ General Assembly.

regard to the conduct alleged, constitute exceptionally serious crimes of international concern.³⁸ The African Union has also adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights, to extend the jurisdiction of the court to fourteen international crimes. It also acknowledged the possibility of incorporating other crimes in future in order to reflect developments in international law.³⁹ The merit of a flexible classification of international crimes is that it allows States or a region like Africa, to prosecute crimes peculiar to it, over which the ICC has no jurisdiction, or which are not perceived to be serious enough for the purposes of the ICC.⁴⁰

The opinions of scholars

The authority of scholars to espouse 'crimes', by limiting or expanding their normative descriptive, characterization is very narrow. The definition they may offer can be lexical only, but not stipulative. A normative definition of international crimes emanating from publicists is not one of the recognized law-creating sources of international criminal law, particularly, when they have already been typified by treaty or

international customary law. Academic penmanship may extend international crimes beyond the *lex lata* to the *lex ferenda*. Scholars differ significantly on what crimes to christen 'international'.

Cassese asserted that terrorism, torture, aggression, war crimes; crimes against humanity and genocide are international crimes. Cassese defined international crimes as 'breaches of international rules entailing the personal criminal liability of the individual concerned (as opposed to the responsibility of the state of which the individuals may act as organs)'.⁴¹ To Cassese, four conditions must co-exist to constitute an international crime: (a) violations of international customary rules; (b) the rules must have been made to protect values seen as important by the entire international community; (3) the presence of a universal interest in repressing the crime, especially through universal jurisdiction; and (4) the absence of immunity as a defence, except for incumbent heads of state, and diplomats.⁴²

However, a critique of this definition is necessary. Cassese appears to have excluded crimes not derived from customs. International customs are not the only law-creating sources of international

³⁸ In summary, the crimes pursuant to treaties (in Article 20 (e)) are (1) Grave breaches of the four Geneva Conventions of 1949 and Additional Protocol I; (2) The unlawful seizure of aircraft as defined by Article 1 of the Convention for the Unlawful Seizure of Aircraft of 16th December 1970; (3) The crimes defined by Article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23rd September 1971; (4) Apartheid and related crimes as defined by Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30th November 1973; (5) The crimes defined by Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents of 14th December 1973; (6) Hostage-taking and related crimes as defined by Article 1 of the International Convention against the Taking of Hostages of 17th December 1979; (7) The crime of torture made punishable pursuant to Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10th December 1984; (8) The crimes defined by Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and by Article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, both of 10th March 1988; and (9) The crimes of illicit traffic in narcotic drugs and psychotropic Substances of 20th September 1988

which, having regard to Article 2 of the Convention are crimes with international dimensions.

³⁹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights, adopted on 27th June 2014, Article 28A: 1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have power to try persons for the crimes provided hereunder: (1) Genocide; (2) Crimes Against Humanity; (3) War Crimes; (4) The Crime of Unconstitutional Change of Government; (5) Piracy; (6) Terrorism; (7) Mercenarism; (8) Corruption; (9) Money Laundering; (10) Trafficking in Persons; (11) Trafficking in Drugs; (12) Trafficking in Hazardous Wastes; (13) Illicit Exploitation of Natural Resources; and (14) The Crime of Aggression.

2. The Assembly may extend upon the consensus of States Parties the jurisdiction of the Court to incorporate additional crimes to reflect developments in international law.

⁴⁰ Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) Vol. 24.No. 3. The European Journal of International Law, 939.

⁴¹ A Cassese, *International Criminal Law* (2nd ed, Oxford: Oxford University Press, 2008) p. 11.

⁴² Ibid pp. 11-12. See also T Einarsen, *The Concept of Universal Crimes in International Law* (Oslo: Torkel Opsahl Academic EPublisher, 2012) p. 151.

criminal law; treaty crimes like trade in narcotics, money laundering, slave trade, and trafficking in persons, which did not emanate from international customary law, are excluded from his definition. Indeed, Cassese has said that the 'notion of international crimes does not include illicit traffic in narcotic drugs; the smuggling of nuclear and other potentially deadly materials; money laundering; slave trade; or traffic in women' for this broad range of crimes is only provided for in international treaties or resolutions of international organizations, not in customary law.⁴³

Cryer, Friman, Robinson and Wilmshurst offered several criteria for identifying an international crime.⁴⁴ Firstly, international crimes are limited to those offences over which international tribunals have been given jurisdiction under general international law.⁴⁵ These include the core crimes of genocide, crimes against humanity, war crimes, and crimes against peace, but exclude treaty crimes such as piracy, slavery, torture, terrorism, drug trafficking, etc. The second criterion of identification looks at the community value or fundamental interest which international law seeks to protect, exemplified by the suppression of the slave trade.⁴⁶ Yet, another approach considers the involvement of the state in the commission of the crime. The authors argued that aggression, war crimes, genocide and crimes against humanity involve elements of a state agency.⁴⁷ Fourthly, the authors defined an international crime as an offence created by international law itself without requiring the intervention of domestic law, with the imposition of direct criminal responsibility on individuals.⁴⁸ However, the authors acknowledged that such a definition may lead to a fruitless debate over what is, and what is not created by international law.

According to Schabas, international crimes were generally considered to be offences whose repression compelled some international dimension. For example, piracy, the slave trade, trafficking in women and children; trafficking in narcotics, hijacking, terrorism, and money laundering.⁴⁹ Schabas observed that the core international crimes are of a more recent origin than the treaty crimes, having been closely associated with the human rights movement emerging in the post-World War II period.⁵⁰

Howard has attempted to distinguish between 'international crimes' and 'crimes under international law'. According to her, the popular usage of 'international crimes' may cover a range of subject areas, from trans-border crime to a crime at international law committed by an individual, to an internationally wrongful act resulting in state responsibility.⁵¹ She observed further that 'crimes under international law' are those committed by individuals which trigger individual responsibility. However, the author seems to have suggested that perpetrators of 'international crimes' do not incur individual responsibility, while the perpetrators of 'crimes under international law' incur individual responsibility; in addition, her emphasis was on state pecuniary responsibility for internationally wrongful acts, and not international criminal law.

A crime is a confusing word to use in the context of state responsibility as it raises the idea of penal, rather than pecuniary or civil sanctions. As rightly stated by Jessica Howard, the term 'international crimes', in the context of State responsibility, is often used to refer to wrongs committed by states of such a severity that they concern the world community as a whole and state responsibility at international law to make reparation for the

⁴³ Cassese, (n 41) p. 12.

⁴⁴ R Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007) p. 2.

⁴⁵ *Ibid.*

⁴⁶ *Ibid* p. 4.

⁴⁷ *Ibid* p. 5.

⁴⁸ *Ibid.*

⁴⁹ W A Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2004) p. 26.

⁵⁰ *Ibid.*

⁵¹ J Howard, 'Invoking State Responsibility for Aiding the Commission of International Crimes-Australia, The United States of America and the Question of East Timor' (2001) Vol. 2 No. 1. *Melbourne Journal of International Law*, 1.

wrong.⁵² It is also necessary to point out that the Draft Code of Crimes against the Peace can be regarded as the forebear of the Statute of Rome, as the statute had adopted crimes negotiated previously in the Draft Code of Crimes against the Peace and Security of Mankind.⁵³ Thirdly, Article 19 of the Draft Articles of State Responsibility, which contained international crimes, was expunged from the final draft.

In the words of Oji, international crimes refer to those internationally wrongful acts which result from the breaches of those international obligations that are so essential for the protection of fundamental interests of the international community, that the breach is recognized as a crime by the international community as a whole.⁵⁴ It is her view that international crimes include the offences stated in the statutes of international criminal courts or tribunals; offences provided in other documents stating various international obligations from which no derogation is allowed; and crimes designated in international conventions and instruments.

Having explored scholastic writings on international crime, it has become imperative to make a few more remarks. Firstly, the concept is amorphous. Secondly, no definition offered is free of controversy. Thirdly, all definitions, collated, point at the same thing, and fourthly, 'international crimes' lend themselves more readily to description than definition. Bearing these in mind, I will proceed to define an international crime as an action or omission prohibited by the law-creating sources of

international criminal law, penalized by individual criminal responsibility, which may also give rise to state pecuniary liability, including, but not restricted to the crimes within the jurisdiction of the International Criminal Court, but other crimes subject of treaty or universal jurisdiction. The Princeton Principles on Universal Jurisdiction define universal jurisdiction as criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.⁵⁵

Jus cogens

Crimes in breach of *jus cogens* affect the collective interest of the world community; threaten the peace and security of humankind and shock the conscience of humanity. The jurisprudential assertion of the prohibition of *jus cogens* has taken place in pursuance of the superior and fundamental values to be protected, shared by the international community as a whole, from which no derogation or diversion is allowed.⁵⁶

Usually, a *jus cogens* crime is implicated explicitly or implicitly by state-favouring policy or conduct, irrespective of whether it is manifested by commission or omission, which differentiates such crimes from other international crimes.⁵⁷ In international law, the notion of '*jus cogens*' refers to certain peremptory norms, from which no derogation is ever permitted.⁵⁸

⁵² Howard, *op cit*.

⁵³ The Code was intended to serve as the jurisdictional basis for both domestic courts and the permanent international criminal court. Article 8 of the Draft Code of Crimes against the Peace and Security of Mankind provides that "Without prejudice to the jurisdiction of an international criminal court, each state party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in Arts. 17 (genocide), 18 (crimes against humanity), 19 (crimes against the United Nations and associated personnel), and 20 (war crimes), irrespective of where, or by whom these crimes were committed. Jurisdiction over the crime set out in Article 16 (aggression) shall rest with an international criminal court..."

⁵⁴ E A Oji, *Responsibility for Crimes under International Law* (Lagos: Odade Publishers, 2013) p. 7

⁵⁵ It is worthy to recall that the Princeton Project on Universal Jurisdiction is a project sponsored by the International Commission of Jurists and is a combined effort of eminent scholars and jurists to formulate principles in order to clarify this area of international law.

⁵⁶ A A C Trindade, 'Jus Cogens: The Determination and Gradual Expansion of Its Material Content in Contemporary International Case Law' (2012) 12. <http://www/oas.org/.../3%20-%20cancado.LRC...> accessed on 2 May 2022.

⁵⁷ ISIS/ISIL in Syria is said to have received support in funds, etc from some Middle-East States.

⁵⁸ Garner, (n 4), p. 1251, defines 'peremptory' as 'final; absolute; conclusive; Incontrovertible. Not requiring any cause shown; arbitrary.'

Bassiouni has defined the term *jus cogens* as the ‘compelling law’. To him, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles.⁵⁹ It has been argued that some principles of international law exist which constitute ‘a body of *jus cogens*’.⁶⁰

The notion of *jus cogens* has a rather ancient origin traceable to the natural law theory of the Stoics. The Stoics developed the theory that law should be applied on an international scale through the process of ‘universal reasoning’ which is common to all men, irrespective of differences in race, place and nationality.⁶¹ This theory was developed further by writers like Grotius,⁶² Wolff⁶³ and Vattel,⁶⁴ who posited the existence of a ‘necessary law’ which was natural to all states; and from which all treaties and customs derive their validity. The formal recognition of *jus cogens* in international law began only in the second half of the 20th century, firstly in legal scholarship,⁶⁵ and secondly, in the Covenant of the League of Nations⁶⁶ and the judgment of the Permanent International Court of

Justice in the *Wimbledon Case* stating that state sovereignty is not alienable.⁶⁷

Jus cogens norms have been formally codified by the Vienna Convention on the Law of Treaties (VCLT) 1969 and affirmed in judiciary jurisprudence.⁶⁸ Article 53 of the VCLT, provides that a treaty will be void ‘if, at the time of its conclusion, it conflicts with a peremptory norm of general international law’. In the context of the 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. Furthermore, according to Article 64 VCLT, if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. Some crimes are considered to be contrary to *jus cogens*: crimes against peace, war crimes, genocide, crimes against humanity, maritime piracy, slavery and trade-related practices, and

⁵⁹ M C Bassiouni, ‘A Functional Approach to “General Principles of International Law” (1989) 11 *Michigan Journal of International Law*, 768.

⁶⁰ I Brownlie, *Principles of Public International Law* (Fifth edn, Oxford: Clarendon Press, 1998) p. 515.

⁶¹ R Nieto-Navia, ‘International Peremptory Norms (*Jus cogens*) and International Humanitarian Law’. *Man’s Inhumanity to Man: Essays on International Law in honour of Antonio Cassese*. (The Hague: Kluwer Law International, 2003) pp. 595-640.

⁶² H Grotius held that there existed certain ‘principles’ amounting to *jus naturale necessarium* (necessary natural law).

⁶³ C Wolff, ‘*Jus Gentium*’ (1764), para. 5.

⁶⁴ E de Vattel, ‘Le Droit des Gens ou Principes de la Loi Naturelle’ (1758), para. 9.

⁶⁵ In 1905, Oppenheim opined that ‘a number of universally recognized principles’ of international law existed which rendered any conflicting treaty void and that the peremptory effect of such principles was itself a ‘unanimously recognized customary rule of international law’. See M Byers, ‘Conceptualizing the Relationship between *Jus cogens* and *Erga Omnes* Rules’ (1977) 66 *Nordic Journal of International Law* 213, referring to L Oppenheim, *International Law* Vol. 1 (London: Longmans, 1905) p. 528.

⁶⁶ Covenant of the League of Nations, 1919 Article 20.1. Interpreting Article 20.1 of the Covenant in The Oscar Chinn Case (1934) PCIJ Rep. Ser. A/B, No. 63, p. 149, Judge Schucking held that ‘the covenant of the League of Nations,

as a whole, and more particularly its Article 20...would possess little value unless treaties concluded in violation of that undertaking were to be regarded as absolutely null and void...And I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible, even today, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void’.

⁶⁷ M C Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011) p. 266. See also Case of The SS. Wimbledon, PCIJ 17th August 1923, p. 25.

⁶⁸ Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), 1986 ICJ. 14, 95 (27th June) (concerning the applicability of the Vienna Convention on the Law of Treaties). The VCLT with annex, 23rd May 1969, U.N. A/Conf. 39/27. However, Article 71, paragraph 1 (a) makes it clear that the entire treaty is not null and void if the parties do not give effect to the provision in question. The ICJ has also considered the question. In U.S. Diplomatic and Consular Staff in Tehran (U.S v Iran), 1980 I.C.J. 3 (May 24), the court holds that some treaty obligations can also be ‘obligations under general international law’, and in its advisory opinion on the Reservations to the Convention on Genocide 1951 I.C.J. 15 (May 28), it holds that the Genocide Convention is part of customary law.

torture. Tribunal jurisprudence justifies this conclusion.

The decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chambers maintain the understanding that genocide, torture and attacks against civilians in armed conflicts are in breach of *jus cogens*.⁶⁹ In the same way, the Restatement on Foreign Relations of the United States (Restatement) describes *jus cogens* to include, at a minimum, the prohibition against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and the principles of the United Nations Charter prohibiting the use of force.⁷⁰ 'At the minimum' appearing in the restatement shows that the list is not exhaustive. The description by the ICJ of the basic rules of international humanitarian law applicable in armed conflict as 'intransgressible' in character, in the *nuclear weapons Advisory Case*, would seem to justify treating them as peremptory.⁷¹

Jus cogens norms present two major problems to international criminal law, especially in the context of mass atrocity crimes: normative conformity to the *lex certa* principle (that is, the need for a precise definition in the law, of criminal offences) and the principle of legality, which requires all laws to be clear, ascertainable and non-retrospective. These issues were evident in the proceedings leading to the adoption of the Statute of the International Military Tribunal

(IMT) Nuremberg in the London Charter of 8th August 1945.⁷² The crimes defined in Article 6 (c) of the London Charter were not founded upon treaty law but had to be prosecuted based on other philosophical foundations. While natural law protagonists accorded *jus cogens* norms a higher value to be observed by prosecutions, positivist scholars contend that the principle of legality should prevail.

Obligatio erga omnes

The *obligatio erga omnes* and *jus cogens* concepts are often entwined in a normative tryst. '*Erga omnes*' is a Latin derivative which means 'in relation to everyone'. The concept, *obligatio erga omnes* refers to 'specifically determined obligations that states have towards the international community as a whole.'⁷³ Posner has observed that careful scholarship has identified only a handful of norms: the laws against aggression, genocide, slavery, and racial discrimination, although there are many other likely candidates.⁷⁴ To him, 'it seems plausible that other human rights are *erga omnes* norms; these could include laws against torture, sex discrimination, arbitrary detention and certain norms against pollution'.⁷⁵ Although the concepts of *erga omnes* and *jus cogens* are related, they are not interchangeable or necessarily interdependent.

Explaining their relationship, Bassiouni has said: '*jus cogens* norms refer to the status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*'.⁷⁶ Thus, *erga omnes* is a result of an

⁶⁹ The Prosecutor v Anto Furundzija (ICTY Trial Chamber), 10th December 1998, paras. 137, 144-157.

⁷⁰ Restatement (Third) of Foreign Relations of the United States 702 cmts. d -I, 102 cmt. k (1987).

⁷¹ H Fujita, 'The Advisory Opinion of the International Court of Justice on the Legality of Nuclear Weapons' (1997) No. 316 International Review of the Red Cross.

⁷² Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8th August 1945, London Charter, 59 Stat. 1544, 82 U.N.T.S. 279.

⁷³ A Memeti and B Nuhija, 'The Concept of Erga Omnes Obligations in International Law' (2013) No. 14 New Balkan Politics: Journal of Politics.

⁷⁴ Eric A. Posner 'Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law' (2008) John M. Olin Law and Economics Working Paper 2nd Series, Public Law and Legal Theory Working Paper No. 224, The Law School of the University of Chicago, p. 2.

⁷⁵ *Ibid.*

⁷⁶ Bassiouni has argued that it may be true that all *jus cogens* norms of international law give rise to *erga omnes* obligations, but the converse that all norms from which *erga omnes* obligations flow are *jus cogens* is questionable. For example, arguably all customary human rights norms carry with them *erga omnes* obligations, yet all have certainly not reached the status of *jus cogens*. M C Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes (1996) Vol. 58 No. 4 *Law and Contemporary Problems*, 63

international crime having risen to the level of a *jus cogens* norm. A *jus cogens* norm rises to the level of *obligatio erga omnes* when the principle it embodies has been universally accepted, through consistent practice accompanied by the necessary *opinio juris*, by most states.⁷⁷ For example, the territorial sovereignty of states has risen to the level of a ‘peremptory norm’ because all states have consented to the right of states to exercise exclusive territorial jurisdiction.⁷⁸ Bassiouni has persuasively argued that international crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are non-derogable. One of the consequences of the criminalization of genocide, crimes against humanity, and war crimes in the statute of the ICC is that every State is obliged to investigate, prosecute, punish or extradite individuals accused of such crimes.⁷⁹

Transnational crimes

As the list of ‘international crimes’ is still inconclusive, some of the crimes regarded as ‘international crimes’ are also classified as transnational crimes. With the exception of the ‘core international crimes,’ any other crime with a trans-border element, or which offends the basic values of humankind can loosely be described as a transnational crime. These crimes have an actual or potential effect across national borders or are intra-state crimes which offend fundamental values of the international community.⁸⁰ To

prohibit such crimes, the United Nations General Assembly adopted the United Nations Convention against Transnational Organized Crime in 2000.⁸¹ It is also called the Palermo Convention and its three protocols (the Palermo Protocols) are: (1) Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children;⁸² (2) Protocol against the Smuggling of Migrants by Land, Sea and Air;⁸³ and (3) Protocol against the Illicit Manufacturing and Trafficking in Firearms.⁸⁴ All four instruments contain elements of current international law on human trafficking, arms trafficking and money laundering. The United Nations Office on Drugs and Crime (UNODC) acts as the custodian of the Convention and its protocols. The Convention came into force on 29th September 2003. The United Nations has identified 18 categories of transnational crimes.⁸⁵ Sex slavery, torture and apartheid are also seen as part of transnational criminality.

Concluding remarks

This article has examined differing perspectives about the nature of international crime, beginning first with an exposition of crime under national law. However, a direct transposition of the methods of ascertaining a crime under national law, as an aid to identify a crime under international law, is unhelpful. A probable cause of the confusion over the identity of an international crime is the overlap between

⁷⁷ In Right of Passage over Indian Territory (Portugal v India) (Merits), 1960 ICJ 123, 135 (12th April) (Fernandes, J. dissenting), Judge Fernandes stated that it is true that in principle, special rules will prevail over general rules, but to take it as established that in the present case the particular rule is different from the general is to beg the question. Moreover, there are exceptions to this principle... And the general principles to which I shall refer later constitute true rule of *jus cogens* over which no special practice can prevail.

⁷⁸ S.S ‘Lotus’ (France V. Turkey), 1927 P. C.I.J (ser. A) No. 10 (Sept. 7).

⁷⁹ Bassiouni (1996), *op cit*, p. 74.

⁸⁰ N Boister, ‘Transnational Criminal Law?’ (2003) Vol. 14, No. 5. *European Journal of International Law*, 967-77.

⁸¹ The United Nations Convention against Transnational Organized Crime, 15th November 2000. And the Palermo Protocols: (1) Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2) Protocol against the Smuggling of Migrants by Land, Sea and

Air (3) Protocol against the Illicit Manufacturing and Trafficking in Firearms.

⁸² 12th December 2000, in force 25th December 2003.

⁸³ 12th December 2000, in force 28th January 2004.

⁸⁴ 11th July 2001, in force 3rd July 2005.

⁸⁵ Money laundering; terrorist activities; theft of art and cultural objects; theft of intellectual property; illicit arms trafficking; aircraft hijacking; sea piracy; land hijacking; insurance fraud; computer crime; environmental crime; trafficking in persons; trade in human body parts; illicit drug trafficking; fraudulent bankruptcy; infiltration of legal business; corruption and bribery of public officials as defined in national legislation; and other offences committed by organized criminal groups. See the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, Egypt, 29th April -8th May 1995; A/CONF. 169/15/Add. 1.

different categorizations. A crime identified as an international crime may also be a treaty crime, or a crime in breach of *jus cogens*. International criminal law is a relatively recent area of international law and has continued to develop since the post-war trials, beginning first with the Nuremberg trials, and leading to the creation of the ICC. Nevertheless, the tribunals preceding the ICC, were crime-specific, in the sense that they were established to deal with specific incidents and crimes. As already noted, other works have helped to explore the concept of international crime. The work of the ILC, during the sessions leading to the adoption of the 2001 Articles on State Responsibility for Internationally Wrongful Acts, illuminated the idea of international crimes, although the relevant provision was expunged from the final version.