Irina Valusha, Maryna van den Boom

JURISDICTION OVER INTERNATIONAL CRIMES

The International Criminal Court and Other Ways of Ending Impunity

Kazimieras Simonavicius University

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Irina Valusha
Maryna van den Boom

Kazimieras Simonavicius
University

Irina Valusha
Kazimieras Simonavicius University
https://orcid.org/0009-0009-1248-5256
info@ksu.lt

Maryna van den Boom
Kazimieras Simonavicius University
https://orcid.org/0009-0006-9151-4331
info@ksu.lt

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Review:
Prof. Dr. Valerii Kononenko, Department of International Law, Educational and Scientific Institute of Law, State Tax University, Ukraine
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Foreword

The possibility of bringing individuals to criminal responsibility on the basis of international law is widely acknowledged. Meanwhile, theoretical, normative and practical aspects of persecution of perpetrators for acts threatening common values which pave a clear way for fighting impunity over international wrongdoings are still under construction. After a permanent International Criminal Court (ICC) was established under the Rome Statute, adopted at the United Nations Diplomatic Conference in July 1998, and it started its operations in July 2002, humanity, in the person of the secretary-general, expressed strong hope that the jurisdiction of the International Criminal Court to prosecute criminals at the international level will help "in the fight against impunity or in our efforts to prevent genocide or other abominable crimes falling within the jurisdiction of the Court".[1] Through more than 20 years of the ICC legacy[2] it is becoming obvious that the selected jurisdiction of the ICC did not stop the vicious circle of impunity of

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1 The secretary-general of the United Nations, Kofi Annan, appealed to all states to ratify the statute as soon as possible, because there should be no concessions "in the fight against impunity or in our efforts to prevent genocide or other abominable crimes falling within the jurisdiction of the Court". UN, *International Criminal Court Statute Enters Force; Annan Hails 'Historic' Occasion*, UN News. Global Perspective, Human Stories, July, 2 2002, https://news.un.org/en/story/2002/07/39072-international-criminal-court-statute-enters-force-annan-hails-historic-occasion (accessed November 19, 2023).

2 In 2022 the court chambers issued 534 written decisions, over 15,000 victims participated in cases before the court, more than 8,900 new victim application forms were filed, including over 2,000 for the situation in Ukraine. See: ICC, *The Annual Report of the International Criminal Court on Its Activities for 2022/2023*, August 21, 2023, https://www.icc-cpi.int/news/annual-report-international-criminal-court-united-nations-its-activities-2022/2023 (accessed December 9, 2023).

dictators, tyrants, torturers and servants pursuing their immorality, mostly on the non-member states of the statute.

This raises the problem of the International Criminal Court's procedural capacity to prosecute offenders from non-members of the Rome Statute but also a question on how other effective jurisdiction modes over international crimes committed by macro-criminal nationals of non-member states may be brought before the ICC or other courts, on global or national levels. With regard to the establishment of ad hoc criminal tribunals/hybrid courts and special commissions of various kinds, as well as the Rome Statute of the International Criminal Court, governments, practitioners and scholars recognize that such bodies have their own jurisdictional and practical limitations. Meanwhile, considering that perpetrators of serious crimes of international concern are avoiding prosecution for alleged core crimes under territorial or national jurisdiction, including offenders who escaped from being punished abroad, there is an increased need for broader application of the principle of universal jurisdiction. There have been vivid examples when governments realise their commitment to facilitating the prosecution and punishment of perpetrators. Importantly, all possible ways of delivering justice and fighting impunity will be conducted in compliance with international law.

The main argument put forth by the authors is that, in addition to the International Criminal Court, which has limited jurisdiction, international organizations but also national states, particularly those that have made progress toward realizing the rule of law, can strengthen the international justice system in different ways: by supporting civil society, establishing independent investigative mechanisms, maintaining human-rights monitoring processes, and sharing the best practices of investigating international crimes, including those covered by the Rome Statute within their own systems, applying universal jurisdiction.

The goal of this monograph is twofold: (1) to present an analytical overview of the existing international and national approaches and institutions eligible to fight impunity for international crimes; (2) to provide it as

a roadmap, enabling interested readers (and actors) to undertake additional studies of the topic of jurisdiction(s) over international crimes in order to contribute to the body of knowledge and/or effective deeds aiming to fight impunity and bring justice at the local level or globally.

While the scope of this monograph is limited to the question of jurisdiction over selected international crimes recognized by international law as "core crimes", the first chapter focuses on broader issues of jurisdiction in the realm of international criminal law, providing legal analyses and historical overviews that reveal both institutional and substantive developments in international criminal law with the overarching goal of ending impunity for perpetrators of core crimes globally. The chapter includes analyses of the principles driving international criminal law's development, including the *lex specialis* principle of "universal jurisdiction".

In the second chapter, the scope will be narrowed to the jurisdiction of the ICC over criminals from non-member states. The third chapter is devoted to a specific case related to the ICC warrant against two high officials of the Russian Federation. The scope of this chapter will be even more precise: the legal analysis will include issues related to the "third party" notion, as well as the up-to-date development of the doctrine of international courts' jurisdiction against state officials and immunity. The chapter illustrates how international criminal law may apply and stimulate academic research on international criminal law, but also serve as a practical tool for the sake of ending impunity and preventing criminal enterprises locally and at the earliest stage.

This monograph emphasizes the importance of referencing, applying and developing international criminal law in various activities and embracing academic research and practical aspects of fighting impunity. The monograph covers foundational scientific concepts, normative arguments and case-law examples, facilitating a reader to obtain an outlook on international criminal law, which is applicable both on local and global levels.

Chapters 1 and 2 are written by Irina Valusha, and chapter 3 is written by Maryna van den Boom.

Chapter 1:
Jurisdiction issues and international criminal law

Introduction: What do we mean by jurisdiction?

International criminal law is a relatively new branch that emerged in response to the international cry for justice in cases of the most serious crimes. The concept of international crimes and the procedures governing the investigation, prosecution and punishment of the perpetrators individually accountable for their actions are the subject of international criminal law. To put it simply, international criminal law deals with two interrelated areas: crimes and jurisdiction. The jurisdiction issue must integrate traditional national-level jurisdiction with the new international branch of criminal law. There are various dimensions of the concept of jurisdiction. In order to provide the most comprehensive and practical framework, the author has selected features of the notion of "jurisdiction" that consider both the need for academic scrutiny and the practicality of materials for application by those involved in human rights activities. Ambitious goals to meet both approaches lead the author, and in seeking a balance between academic and practical approaches, the author brings examples from various legal systems and prepares analytical and historical overviews that provide readers with information serving as a means of self-comprehension of legal notions beyond pure normative considerations.

Jurisdiction is considered a fundamental principle in all legal systems, ensuring that cases are heard by the appropriate court or legal authority. Meanwhile the term *jurisdiction* may have different senses – from the notion related to the concept of state sovereignty, with the meaning of a state's power or authority, in which case it is completely synonymous with *sovereignty*. The word *jurisdiction* can also simply refer to a state's power or authority in a certain area, such as adjudication by courts or other judicial agencies.

For this monograph, jurisdiction – the concept and its term – constitutes the main subject of the study and relates mainly to criminal matters. The general title of the monograph, "Jurisdiction over International Crimes" merges two components of international criminal law: its material part, namely crimes, and the procedural component, jurisdiction, which might be entrusted respectively to judicial institutions, both national and international. International criminal jurisdiction refers to the allocation of judicial power among international criminal tribunals and domestic courts, united in combating impunity for international crimes. The author takes the contestable character as well as the variable modes of jurisdiction over international crimes between the judicial bodies into consideration. However, for the sake of establishing a comprehensive map of the possible ways of exercising jurisdiction over international crimes, the generic term *international criminal jurisdiction* fully satisfies the demand. In the literature one may see a confession that there is no hierarchy in exercising jurisdiction in criminal matters.[3] Meanwhile, the flow of different rules of international tribunals with respect to the jurisdiction over international wrongdoings, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR), and the International Criminal Court shall be respected. There are also regional agreements where jurisdiction matters with a sui generis mode of criminal jurisdiction, including cases with respect to core crimes.[4] The jurisdiction of national courts over international crimes de jure

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[3] Ilias Bantekas, *International Criminal Law*, Hart Publishing (2010); Ilias Banteka, Susan Nash, *International Criminal Law*, Routledge–Cavendish Publishing Limited (2003), p. 143–154, 163–164; Theresa Abend, *Grenzen der Völkerrechtsfreundlichkeit*, Göttinger Schriften zum Öffentlichen Recht, Band 13, Universitätsverlag Göttingen (2019).

[4] The European Union's Framework with respect to criminal jurisdiction matters might be presented as an example. When pursuing the objective of making the EU an area of freedom, security and justice, member states agree to abolish extradition between member states, replacing it with a system of surrender between judicial authorities. In that way traditional cooperation relations have been replaced by a system of free movement of judicial decisions in criminal matters, covering both presentence and final decisions within

may be favoured, as they are typically part of domestic material criminal law.[5] Moreover, the generally recognized principles have been requesting states' judicial actions on the domestic level in the cases of crimes threatening common values (see chapter 3, part 3.2.). The presented arguments support the use of the term *international criminal jurisdiction* to define the judicial power of relevant judicial bodies in combating international crimes.

When it comes to classification of jurisdiction modes, one may refer to the report of the United Nation (UN) secretary-general, prepared under a request of the UN General Assembly and its list of the following international criminal jurisdiction modes, which might be based on various foundations, such as: (a) territory (including subjective and objective territoriality); (b) nationality – the concept of "active personality"[6] or "passive personality"[7]; (c) protection reason.[8] It also might have universal dimension

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an area of freedom, security and justice. See: Council of the European Union, *Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures Between Member States*, 002/584/JHA, June 13, 2002, https://www.refworld.org/docid/3ddcfc495.html (accessed January 3, 2024). For examples on the practical application of the agreement, one may see: Eurojust, *Case-Law by the Court of Justice of the European Union on the European Arrest Warrant*, October 2023, https://www.eurojust.europa.eu/publication/case-law-court-justice-european-union-european-arrest-warrant-october-2023 (accessed November 19, 2023).

5 See supra note 3.

6 The "active personality"– a state has authority to make criminal law for its nationals wherever they act in the world – is the second fundamental principle of jurisdiction. See: Andre Klip, *European Criminal Law*, Intersentia (2009), p. 178–190.

7 The "passive personality" principle bases criminal jurisdiction on the status of the victim of crime as a national of the state exercising jurisdiction. See: Kenneth S. Gallant, "The Passive Personality Principle", [in:] idem, *International Criminal Jurisdiction: Whose Law Must We Obey?*, Oxford University Press (2022), online ed. Oxford Academic, May 19, 2022.

8 The protective approach allows states to prohibit and prosecute certain crimes committed wholly outside their territories by persons who are not their nationals. See: Kenneth S. Gallant, "The Protective Principle", [in:] idem, *International Criminal Jurisdiction…* Moreover, also *The Lotus Case*, Judgement No. 9, 1927, P.C.I.J, Series A, 18.19.

known as (d) the universal principle.[9] While all bases will be mentioned later, if implicitly by elaborating on the issues of criminal jurisdiction, the principle of "universal jurisdiction" (UJ) or "universal criminal jurisdiction" will be presented separately and in detail. When talking about the power of a judicial body both terms will be applied as synonyms. This method is justified, as one is following existing approaches of international law.

One more important note for better comprehension of the presented material is the interpretation of the pair of words *jurisdiction* and *competence*.[10] When talking about the power of a judicial body, both terms – *jurisdiction* and *competence* – will be applied as synonyms. This method is justified if one is following existing approaches of international law. For example, in the charter of the (Nuremberg) International Military Tribunal (IMT), the power of the tribunal to "try and punish" individuals who committed specific crimes (Article 6) goes as a part of the court jurisdiction, while in the Statute of the International Criminal Tribunal for Rwanda (ICTR) the same power is defined by the word *competence*. Some authors point out that the *jurisdiction*'s meaning is closer to the genesis of power, while *competence* says more about the capacity of an individual or a body to perform designated tasks. The mentioned approaches will be addressed in the monograph in a mutatis mutandis manner.

Although this complex subject may force the author to address issues across the spectrum of international law, such discussions will be included only if they serve the main idea – assisting in the comprehension of different effective jurisdictional ways to combat the most serious crimes threatening

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9 UN, Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments*, 65th Session, A/65/181, (2010), p. 3, https://digitallibrary.un.org/record/689030 (accessed November 18, 2024).

10 Marc Henzelin, *Commentary. Jurisdiction and Competence of the Tribunale*, Lalive (2005), https://www.lalive.ch/data/publications/mhe_Jurisdiction_and_Competence_of_the_Tribunal_2005.pdf (accessed November 18, 2024).

the international community. In the next part, devoted to the jurisdiction over individual responsibility, the concept of "accountability of states for international wrongful acts" will be briefly introduced to compare the two.

Part 1. Jurisdiction in international criminal law: Retrospective and contemporary overviews

1. International criminal law: Genesis and elements

The very concept of "international criminal law" (ICL) focuses on holding individuals accountable for egregious offences, irrespective of their domicile. There are different approaches when defining international criminal law. The author will use the wording and algorithm prepared by Cassese, who identifies ICL as "a body of international rules" and provides two main area of the rules, which prescribe:

(1) Certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, international terrorism) and

(2) Making persons who engage in such conduct criminally liable.

The third, a very crucial element, is that these rules consequently either authorize states or impose upon them the obligation to prosecute and punish such criminal conduct. Additionally, ICL also regulates international proceedings before international criminal courts, for prosecuting and trying persons accused of such crimes.[11] The main purpose of international criminal law is determined by the traditional perceptions expressed in national penal laws,[12] but significantly influenced by purposes and principles of the modern framework of international cooperation of states aiming to protect

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[11] *Cassese's International Criminal Law*, revised by Antonio Cassese et al., Oxford University Press (2013), p. 3–5.

[12] Hans-Heinrich Jescheck, Thomas Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil*, Duncker & Humblot (1996), p. 1.

people's coexistence as a "human family".[13] This generally defined goal, which is based on the Universal Declaration on Human Rights' statements, the author sees as a modern reading of international criminal law's anticipated outcomes.[14] More specific reasons, like victims' rights to truth, justice, reparation, and non-repetition, as well as a maximalist interpretation of the right to justice as a right to punish criminals, have also been consolidated in recent decades.[15]

The Rome Statute[16] established jurisdiction of the first and the only permanent International Criminal Court, with the determination to put an end to the impunity of the perpetrators of the crimes which threaten the peace, security and well-being of the world.[17] It also proclaimed the ICC's mission, which is impossible to fulfil without the joint efforts of international and national judicial powers.

International criminal law[18] differs from domestic law not only in its (universal) scope of application, but also in that it is limited to the protection of the basic values of humanity and the international community, for whose

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13 UN, General Assembly, *Universal Declaration on Human Rights*, December 10, 1948, preamble, para. 1.

14 Adopted in 1948, the *Universal Declaration* warned about the consequences and causes of the "barbarous acts which outraged the conscience of mankind" and drew the perspectives of the "advent of the world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want…". Ibid.

15 Elena Maculan, Alicia Gil, (2020). "The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts", *Oxford Journal of Legal Studies*, 40(1) (2020), p. 132–157.

16 UN, General Assembly, *Rome Statute of the International Criminal Court*, July 17, 1998, last amended 2010, preamble, para. 3, 5, https://www.refworld.org/docid/3ae6b3a84.html (accessed November 29, 2023).

17 Ibid.

18 "International criminal law" means material criminal law of an international law character which directly, i.e., without a state act of transformation (Article 59 II Basic Law – Constitution of the Germany), establishes the criminality of natural persons. Knut Ipsen, *Völker Recht*, C.H. Beck Verlag (1999), para. 42, Rdnr. 1.

protection the recognition of penal obligations under international law is justified.[19] For a long time states' exclusive authority over criminal persecution issues were regarded as domestic legal affairs because for centuries people did not have any rights or obligations recognized under international law. Individuals were not direct recipients of international rules in the former international community.[20]

Nonetheless, the indications of the concept of individual criminal responsibility in international law can be traced back[21] to a precedent set by Peter von Hagenbach, the governor of Breisach in southern Germany, in 1474. In that year he was charged with "trampling underfoot the laws of God and man" for acts including murder, rape, and "orders to his non-German mercenaries to kill the men in the houses where they were quartered so that the women and children would be completely at their mercy".[22] The individual was tried by an international panel of 28 judges, and after his conviction for multiple crimes stripped of his knighthood and executed. This singular historical example illustrates that an international criminal trial for committed atrocities was viewed as the very appropriate option far prior to the formal birth of the Westphalian nation-state system.

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19 See the judgement of the Israeli Supreme Court of 29 May 1962 on the *Attorney General of the Government of Israel v. Adolf Eichmann*, *International Law Reports*, 36 (1968), p. 277 et seq., based on the assumption that there is universal jurisdiction over genocide.

20 Bartram S. Brown, "International Criminal Law: Nature, Origins and a Few Key Issues", [in:] *Research Handbook on International Criminal Law*, ed. Bartram S. Brown, Edward Elgar (2011).

21 Ibid.

22 Quoted from: ibid. For more on this case and for good discussion of the development of individual criminal responsibility under international law, see: Edoardo Greppi, "The Evolution of Individual Criminal Responsibility Under International Law", *International Review of the Red Cross*, 81(835) (1999), https://international-review.icrc.org/sites/default/files/S1560775500059782a.pdf (accessed December 21, 2023).

2. International criminal responsibility of natural persons and responsibility of states for international wrongful acts

2.1. Responsibility of states for international wrongful acts

The international legal system, based on the Westphalian nation-state system, struggles with state accountability due to a lack of centralized enforcement mechanisms. This hinders practical consequences for states found responsible, and political considerations can impede effective application. Additionally, the complexity of state responsibility and attribution challenges make it difficult to assign responsibility.

Disputes arise when acts are carried out by nonstate actors or groups within a state, or by multiple states. Under a request of the UN, the concept of "internationally wrongful acts of a state"[23] has been developed by the International Law Commission (ILC) as Draft of Articles on the State Responsibility (2001). It contains the needed provisions, specifically that the state's responsibility "may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach".[24] It also stipulates a special mode of international responsibility which is entailed by a serious breach, by a state, of an obligation arising under a peremptory norm of general international law (so-called aggravated responsibility' of the state).[25] Regrettably, however, the concept of "internationally wrongful acts of a state" applies very seldom.

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[23] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), chapter 4.E.1, November 2001. The text reproduced as it appears in the annex to General Assembly Resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol. 1)/Corr. 4.

[24] Ibid., Article 33.

[25] Ibid., chapter 3.

Summary

Jurisdiction over International Crimes

The International Criminal Court and Other Ways of Ending Impunity

The book addresses the challenges and limitations in prosecution of individuals who committed crimes under international law. The individual criminal responsibility is broadly recognized and based on the understanding of the feasibility of such accountability in the present era.

The Nuremberg Trials in 1946 marked a pivotal moment, establishing the first international tribunal for individuals and initiating a new chapter in international law's pursuit of perpetrators threatening common values. The establishment of the permanent International Criminal Court (ICC) under the Rome Statute in 1998 and its operations since July 2002 show that its jurisdiction has not effectively curtailed the impunity of dictators, tyrants, and torture servants, especially in non-member States.

Motivated by these shortcomings, the authors have analyzed the ICC's procedural capacity to prosecute offenders from non-member States to the Rome Statute and explored alternative jurisdiction modes over international crimes committed by individuals. The book advocates a broader application of the universal jurisdiction principle, recognizing the limitations of ad hoc criminal tribunals, hybrid courts, and the practical constraints of the ICC. The authors propose that, in addition to the ICC, international organizations and national states—especially those progressing toward the rule of law—can enhance the international justice system. Their suggestions include supporting civil society, establishing independent investigative mechanisms, maintaining human rights monitoring processes, and sharing best practices in investigating international

crimes, including those covered by the Rome Statute, within national legal systems that apply the universal jurisdiction principle.

The monograph's double objective is to offer an analytical overview of existing international and national approaches and institutions eligible to combat impunity for international crimes and to serve as a roadmap for readers interested in further studies on jurisdiction(s) over international crimes. Emphasizing the importance of referencing, applying, and developing international criminal law in both academic research and practical efforts against impunity, the monograph covers foundational scientific concepts, normative arguments, and case-law examples. It aims to provide readers with an understanding of international criminal law applicable at both local and global levels.

The first chapter explores broader issues of jurisdiction in international criminal law, presenting legal analyses and historical overviews to reveal institutional and substantive developments in international criminal justice. It focuses on principles driving the development of international criminal law, including the *lex specialis* principle of 'universal jurisdiction.' The second chapter narrows the scope of the research to the ICC's jurisdiction and specifically over the criminals from non-member states. The third chapter delves into a individual case involving the ICC warrant against two high officials of the Russian Federation, which was issued in February 2023. This chapter includes legal analysis related to the 'third party' notion, the development of the doctrine of international courts' jurisdiction against state officials, and issues of immunity. Overall, all chapters of the monograph have been synergized by the idea to underscore the significance of international criminal law in combating impunity and preventing criminal enterprises, providing a comprehensive outlook of legal regulations and approaches applicable at both local and global levels.

Keywords: jurisdiction, impunity, International Criminal Court (ICC), universal jurisdiction, rule of law, core crimes, ad hoc tribunals, Genocide Convention, transfer of children

The book Jurisdiction over International Crimes: International Criminal Court and Other Ways of Ending Impunity by Irina Valusha and Maryna van den Boom addresses the challenges and limitations faced by courts in holding individuals criminally accountable under international law. It is based on a widely accepted understanding of the feasibility of such accountability in the present era and deals with shortcomings, particularly those related to the responsibilities of perpetrators from countries that are not members of the international criminal framework.

The Nuremberg Trials in 1946 marked a pivotal moment, establishing the first international tribunal for individuals and initiating a new era in the pursuit of perpetrators threatening common values in international law. Despite the establishment of the first permanent international criminal court in 1998 under the Rome Statute, its operations have not halted the impunity of dictators, tyrants, and others committing core international crimes.

The monograph stands out as unique and superior to other publications of its kind. It provides a detailed analysis of institutional and substantive developments in international criminal law. In particular, the research is enriched by the analysis of the International Criminal Court's jurisdiction over offenders from non-party states, including a recent ICC case. Additionally, the book explores the application of the universal jurisdiction principle in Europe and globally.

These aspects lend significant originality to the topic, especially in the context of current international conflicts and the debate on the limitations of international criminal law, which is being discussed publicly. There are no such detailed and comprehensive studies on the topic in question, neither in Lithuanian law nor in international law.

Prof. Dr. Giedrius Nemeikšis,
Associate Professor, Judge

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