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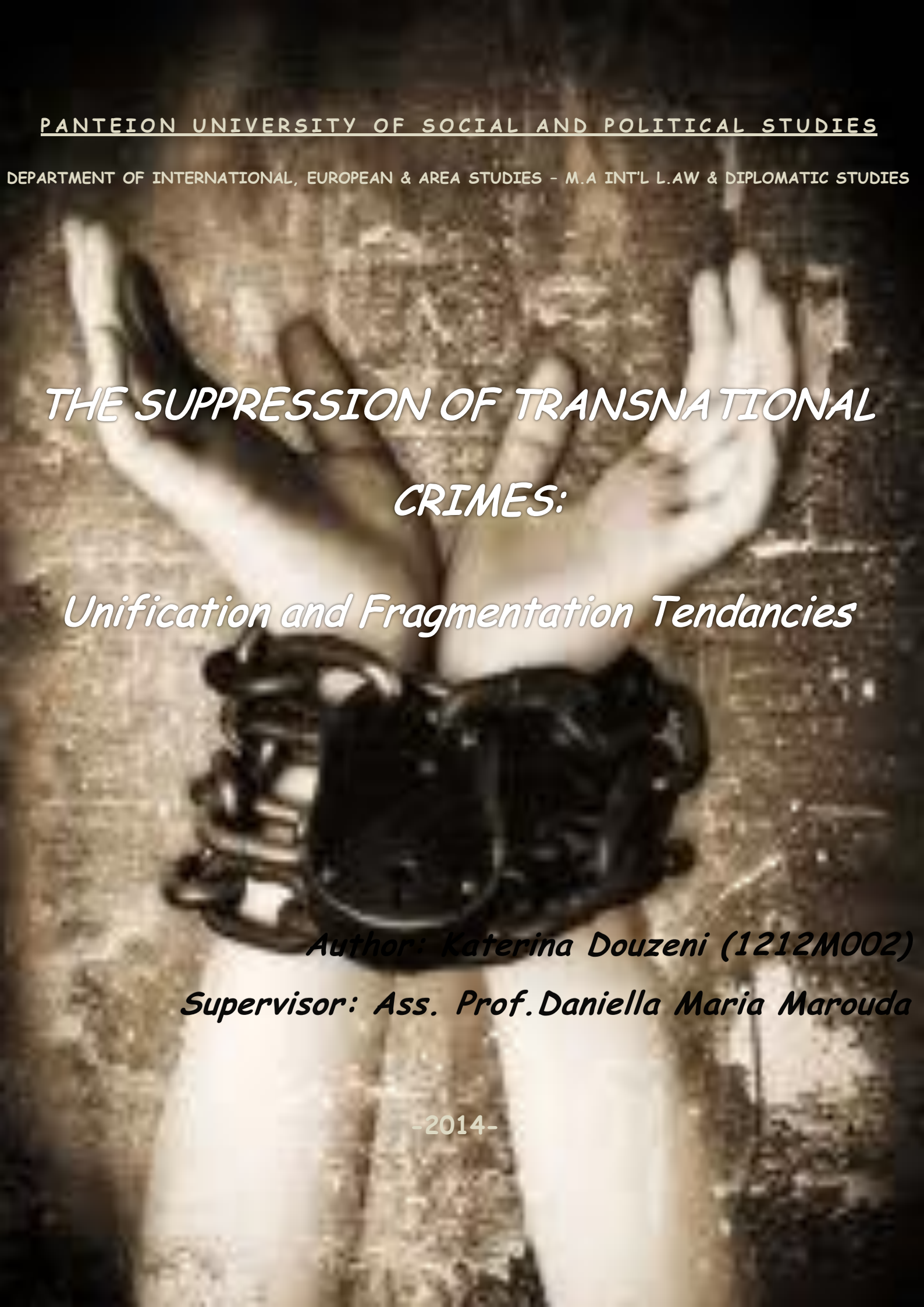

THE SUPPRESSION OF TRANSNATIONAL CRIMES:

Unification and Fragmentation Tendancies

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THE SUPPRESSION OF TRANSNANTIONAL CRIMES:

Unification and Fragmentation Tendencies

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A thesis submitted to the faculty of the Department of International European and Area Studies (IES) at Panteion University of Social and Political Studies, in partial fulfilment of the requirements for the degree of Master of Arts in 'International Law and Diplomatic Studies'.

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Abstract

In 1971, John Lennon sang to ‘Imagine all the people, living life in peace, a brotherhood of man, sharing all the world’. Two decades later, the globalization process had already begun, gaining momentum exponentially. And even if this journey will eventually lead us to the utopian brotherhood Lennon envisaged, it has also made the international community vulnerable in numerous new ways.

Transnational organized crime, fuelled by the effects of globalization, the emergence of new unregulated markets, the advancements in technology and fast transportations of persons and funds, has recently been characterised by U.N.O.D.C. as ‘a menace to states and societies, eroding human security and the fundamental obligation of states to provide for law and order’.

At the same time, international criminal law, as a pertinent means of addressing this threat, remains fragmented and its ratione materiae divided into the so-called core crimes on the one hand and transnational or treaty crimes on the other. The synergies of this new globalised environment seriously challenge the efficiency, the legitimacy and even the raison d’ être of this dichotomy and its subsequent differentiated modes of enforcement.

Tempora mutantur and there is nothing more crucial for anyone than to be aware of the constitutional changes taking place at his own time. After decades of being neglected by the individual states and the intergovernmental organizations of the past, transnational crime has become a global problem in desperate need of a global solution. Time has therefore come to direct the attention of the international community, from the so-called core crimes as the only perceived threat, to the pressing matter of transnational crime. In this context, we explore ways of incorporating transnational crimes into norms and structures of today, with a view to tomorrow’s safer world. Our yardstick: the end of impunity for the perpetrators of these crimes with the unwavering commitment to due process.

Preface and Acknowledgements

The present thesis was prepared in partial fulfilment of the requirements for the degree of Master of Arts in 'International Law and Diplomatic Studies' of the Department of International, European and Area Studies of Panteion University of Social and Political Studies. It has been the capstone of two wonderful years, full of long-hours teaching sessions, where no one was keeping track of time, adsorbed in fascinating discussions and heated debates, of mute courts and simulation exercises that were as educative as they were enjoyable and of afterhours reflections between teachers, PhD Candidates and colleagues during our participation in summer schools, intensive programs and conferences. For this memorable experience, I would like to express my deepest gratitude to the Academic Community of the Department of IES as well as my sincere appreciation for their continuous support during the research and writing stages of this thesis. My heartfelt thanks especially to Deputy Dean and Director of the Program, Prof. Stelios Perrakis, for his inspired lectures and critical approaches on the various fields of international law.

More than that, the hereby project, under the title 'The Suppression of Transnational Crimes: Unification and Fragmentation Tendencies', has been a highly personal experience, as it reflects a long-term desire to combine my work experience and interest in criminal law with the unshakable belief and faith in international law's potential, as a unifying tool for the peoples of the world in the era of globalisation, most internationalists, including myself, believe in and work for. For these reasons, I cannot express enough gratitude to my supervisor, Ass. Prof. Daniella Maria Marouda, for her always to the point remarks and sharp observations, which helped me communicate my views in the most unambiguous and scientifically based way possible. Thank you for teaching me how to keep a clear view of what I am trying to convey and not get lost in the way.

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CONTENTS

LIST OF ABBREVIATIONS

AU – African Union

ASEAN – Association of Southeast Asian Nations

ASOD – ASEAN Senior Officials on Drug Matters

CARICOM – Caribbean Community

CATOC – Convention against Transnational Organised Crime

CHS – Commission on Human Security

CICTE – Inter-American Committee on Terrorism

ECOSOC – Economic and Social Council

ELN – National Liberation Army (Columbia)

EU – European Union

FARC – Fuerzas Armadas Revolucionarias de Colombia, Ejército del Pueblo

GA – General Assembly

GDP – Gross domestic product

HRL – Human Rights Law

ICC – International Criminal Court

ICL – International Criminal Law

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the Former Yugoslavia

IHL – International Humanitarian Law

ILC – International Law Commission

IMT – International Military Tribunal

IMTFE – International Military Tribunal of the Far East

INCB – International Narcotics Control Board

INT'L – International

MLAT(s) – Mutual Legal Assistance Treaty(ies)

OAS – Organization of American States

OCHA – Office for the Coordination of Humanitarian Affairs

OECD – Organization for Economic and Co-operation and Development

OSCE – Organization for the Security and Co-operation in Europe

RES – Resolution

SAARC – South Asian Association for Regional Co-operation

SC – Security Council

STL – Special Tribunal for Lebanon

TC(s) – Transnational Crime(s)

THC – Tetrahydrocannabinol

TCL – Transnational Criminal Law

UN – United Nations

UNCAC – United Nations Conventions against Corruption

UNCLOS – United Nations Convention on the Law of the Sees

Introductory Chapter

A. Introduction

It is beyond doubt that international criminal law is still employed by the international community on a highly selective basis. Yet, its capacity of transmuting even its symbolic manifestations to tangible results for large proportions of the population, has rightfully granted International Criminal Law with a prominent place as the choice of preference for policy-makers at the international level.

It is also true that international criminal law lacks the linear cohesion and consistency that would normally characterise any traditional legal branch. ICL ripened into a system from the accumulation of pragmatic responses and sporadic experiences that derived from the needs and political estimations of certain periods and not from a pre-defined and consistent legal framework. Following this fragmented formulation process it becomes evident that, while the international legal status of certain grave crimes has been clarified as such, the status of other crimes, including transnational crimes, remains controversial.[1] As a result, many authors claim today that transnational crimes do not constitute part of the ICL and cannot therefore be characterised as international crimes. Under this line of reasoning, their exclusion from the direct enforcement system seems justified.

The implementation of the direct system in regards to the international [core] crimes, has admittedly led to palpable results. Unfortunately, this has not been the case for transnational crimes, which, more often than not, seem to evade ICL's punitive arm, through the indirect system's numerous loopholes. Ergo, the response propounded by many distinguished scholars[2], that of reinforcing the -already existing- international cooperation in penal matters between states, does not seem suited (on its own accord) for addressing the increased transnational criminality, in a sufficient and decisive manner.

In addition, while ICL has presumably met the legality principal requirement, that of being internally consistent and predictable, insofar as the core crimes are concerned, the ambiguity and diversification of the indirect system's crimes, remains a prominent feature in both their substantive and procedural provisions. At the same

[1] In the same line of thought, Einarsen Terje, The Concept of Universal Crimes in International Law, Torkel Opshal Academic Epublisher, Oslo, 2012, p. 4

[2] Bassiouni M. Cherif, Introduction p. xi, in Bassiouni M. Cherif (ed), 3 International Criminal Law: International Enforcement, 3rd Edition, Martinus Nijhoff Publishers, 2008

time, due process and the rights of the accused are more likely to be violated in the context of the indirect enforcement system than in that of the direct system, where the presence of international institutions provides for additional guarantees.

One can subsequently wonder how well grounded and/or justified is the fragmentation of ICL and the division between core crimes, other international, and transnational crimes, and their corresponding enforcement systems. Following the observations set above, it is the author's view that transnational crimes, and ICL in general, could largely benefit from the former's recognition as *international crimes*, following a holistic approach in labelling criminal acts with international features and in regards to the methods of their suppression.

Quoting L. Blutman[3] 'one can hardly fight against linguistic conventions as these do not necessarily obey the rules of semantics and logic but are evolving in everyday discourse in an organic way'. Nevertheless, the legal characterization of a criminal act, as either international or transnational or domestic, is not without consequences. As Koskenniem points out[4], 'what is being forward as significant and what gets pushed into darkness is determined by the choice of the language through which the matter is looked at and which *provides the basis for the application of a particular kind of law and legal expertise*.'

B. Research Question

International Criminal Law may be one of the few branches of international law, along with HRL, where the flow of information and feedback between practioners and academics needs to remain direct and uninterrupted. A balanced international criminal law requires critical and constructive dialogue: as international defence lawyers point out indiscretions and rights violations in the investigation and prosecutorial process, judicial authorities highlight the diversification of substantial and procedural norms of TCL and its loopholes, and law-enforcement agencies attest to the limitations and ineffectiveness of the indirect enforcement system, legal scientists and academics are called to provide for answers and consistent doctrinal frameworks to overcome these obstacles and contribute to the progressive development of ICL.

[3] Blutman L., In the trap of a legal metaphor, International Soft Law, International and Comparative Law Quarterly, Vol. 59, 2010, pp. 605-624

[4] Koskenniemi M., The politics of International Law, 20 years later, European Journal of International Law, Vol. 20, No 1, 2009, pp. 4-19 at 11

In this context, we critically examine the lex lata normative and institutional framework of transnational criminal law and assess its efficiency and effectiveness. At the same time, we attempt to illustrate the problems caused by the diversification of its substantive and procedural norms, as well as by the fragmented nature of the indirect enforcement system's modalities through the intermediation of various states.

Consequently, we challenge the raison d' être of the fragmentation of ICL and the division between international [core] crimes and transnational crimes and their corresponding enforcement systems. The question that inevitably arises is whether transnational crimes are in fact international crimes and in case of an affirmative answer what are the legal consequences of such a characterisation. Accordingly, we question whether it is possible - and advisable - to unify transnational and other international crimes under one scheme and on what legitimization basis. Under the same thematic, we explore ways of integrating transnational crimes into existing institutions of the direct enforcement system or establishing new ones.

Last but not least, another issue that arises is whether an holistic conception of ICL under the cover of [human] security, places transnational crimes under the jurisdiction of the UN Security Council, whose broad competences allow for direct enforcement of its relative decisions.

C. Schematic Outline

The present thesis is structured in two main parts. In general terms, the first part refers to the normative and institutional framework for the regulation of transnational crime, which causes the fragmentation of both International and Transnational Criminal Law within, while the second comprises of the unification tendencies that are observed in this field, as well as the means of incorporating TCs in direct enforcement systems of the international community.

In more detail, in Chapter 1, we cite the main features of the discipline of International Criminal Law and its peculiarities, which endow the latter with its sui generis character. Subsequently, we clarify the meaning of Transnational Criminal Law, its ratione materiae crimes and we become witnesses of its gradual identification with the indirect enforcement system, through the narrative of the two systems' ascent. In Chapter 2, after a brief analysis of the legal framework for the suppression of

certain selected transnational crimes (transnational organised crime, illicit drug trafficking and related offences and terrorism) and its institutional dimensions (through the actions of international organizations such as the UN, EU, OASCE etc. and their specialised organs or targeted programs), we attempt a critical assessment of the suppression treaties regime. In Chapter 3, we proceed with the analysis of the modalities employed under the indirect enforcement system, highlightening the opportunities that arise for their abuse from both states and concerned individuals.

In the second Part of the present thesis, we begin with the proposal of a holistic approach to ICL in Chapter 4. To this end, it is imperative to firstly affirm the highly disputed international status of transnational crimes. This we attempt to achieve by following a deductive approach in Chapter 5, which enunciates TCs' both international and criminal character. In Chapter 6, we re-visit the gravity clause, which is introduced by many scholars as a criterion in order to distinguish international from ordinary crimes. Having dismissed this line of reasoning, which leads to further fragmentation of TCL, without any legal basis in the suppression treaties or any other international instrument whatsoever, we examine its usefulness as a selection tool for the determination of the appropriate prosecutorial forum (national or international) of transnational crimes. With the aid of Rechtsgutstheorie of Legal Goods, we propose a figuratively displayed course of action for the prosecution of international/transnational crimes. In Chapter 7, we enumerate the substantial legal consequences that generate from the characterization of transnational crimes as international, while in Chapter 8 we advocate for a unified codification of international crimes under the aegis of UN.

After the establishment of the legitimization basis for the unification of international crimes with the inclusion of TCs and for a unified tool for ending diversification, id est a concentrated international penal code, in Chapter 9 we contemplate on possible ways in which the UNSC could undertake measures, with direct effect, for the suppression and prevention of transnational crime, ranging from the adoption of related legislative resolutions, the establishment of universal jurisdiction for prosecution of these crimes and of Ad Hoc Criminal Tribunals to the authorization of use of force against non-state international criminal networks and humanitarian interventions. Following, in Chapter 10, we examine the possibility of integrating TCs in the structures of the International Criminal Court, either by

expanding its mandate or through broad interpretation of the crimes that already fall into ICC's material scope. Finally, in Chapter 11, we re-affirm the complementarity principle's usage as an additional basis that legitimises the direct enforcement of transnational criminal law, even in cases where the primal and overriding interest to prosecute belongs to a concerned state.

D. Research Methodology

The study will be mainly be conducted through the review of international instruments relating to the suppression of transnational crimes, such as international conventions, UNSC resolutions, other decisions adopted by various international organizations, as well as through the review of their respective ad hoc programs and initiatives. In our work, we also draw from the available literature on international and transnational criminal law, relevant jurisprudence and various articles and commentaries by distinguished scholars.

Moreover, since gradual expansion and diversification is not limited to international criminal law but constitutes a general problem within the broader field of international law, we follow the reasoning of the ILC, which claimed in 2006 that international law is a legal system and that its rules and principles should be interpreted against the background of other rules and principles.[5] The systemic integration, provided by the Vienna Convention, in Article 31 (3) (c)[6], which requires the interpreter of a treaty to take into account any relevant rules of international law applicable in the relations between the parties including other treaties, customary law and general principles of law, is also used as a methodological tool. Epistemological Holism and Systems thinking, as generally recognised methods of scientific analysis are also employed, to enable us to see the interrelationships between transnational criminal law, international criminal law and other norms and principles of international law, rather than static snapshots of individual crimes.

Nevertheless, it should be stressed that for the purpose of this thesis, the aforementioned tools do not imply a multidisciplinary methodological approach, for

[5] ILC, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 2006, conclusion no. 1, reprinted in Yearbook of the International Law Commission, 2006, vol. II, part II.

[6] On 'systemic integration', see International Law Commission (ILC), Conclusions of the Work of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 2006, conclusion no. 17 and 18, reprinted in Yearbook of the International Law Commission, 2006, vol. II, part II

instance through the lens of HRL, IHL, international law, comparative law and national criminal law. Instead, against the mosaic of international law sources, we project legal theories, borrowed from national criminal law, such as the German Rechtsgutstheorie of Legal Goods and the Greek theory of legal interest for the legitimate introduction of civil action in the criminal procedure, to introduce a legal structure that is ultimately alienated from its municipal origins and serves the needs of transnational criminal law in the international context.

E. Literature Review

From a comprehensive review of the academic literature on international criminal law, one would be disappointed to realise that the overwhelming majority focuses almost exclusively (with the exception of terrorism) on the so-called core crimes. And while a number of academics have examined the impact of individual transnational crimes on today's globalised world and assessed the legal normative framework and institutional initiatives for their suppression, inclusive writing attempts that accumulate the entire spectrum of TCs, the modalities of their enforcement system, as well as some general principles that can be identified from their fragmented application are relatively recent, such as R. Currie's '*International and Transnational criminal law',* published in 2010 or Neil Boister's '*An Introduction in Transnational Criminal Law',* published in 2012.

However, even in these more comprehensive works, the authors do not seem ready or willing to make the leap and label transnational crimes as international crimes but build on the established dichotomy. On the other hand, broader approaches can be traced in the work Cherif M. Bassiouni and Terje Einarsen, even if the latter introduces another compartmentalization, labelling as international crimes only grave manifestations of TCs.

Part 1
The Fragmentation of TCs

'I am the product of a fragmented world…'

-Junot Díaz-

Chapter 1

Transnational Crimes and the Discipline of International Criminal Law

1.1 The Discipline of International Criminal Law

Contrary to common misconception, manifestations of International Criminal Law are not a novelty of the 20th century, the caseload ranging from Ancient Arginouses of the 5th century B.C. to the hybrid trial of Sir Peter von Hagenbach in 1474, for crimes he committed in the service of the Duke of Burgundy.[7] Admittedly, the extensive disparity, both chronologically and geographically, and the selectivity that characterised the attempts of applying international criminal justice to perpetrators outside the boarders of a single state, did not allow the emersion of ICL as a distinct branch of international law. The real breakthrough though in the history of ICL, after the heavily criticised Nuremberg and Tokyo Trials, can be traced back in the establishment of the Ad Hoc Criminal Tribunal for the Former Yugoslavia (ICTY)[8] and Rwanda (ICTR)[9] in 1993 and 1994 respectively, followed by the conclusion of the Rome Statute in 1998, which created the International Criminal Court (ICC).

From the accumulation of these sporadic experiences and the independent gradual development of its substantial norms, through the intrusion of criminal provisions in various texts, International Criminal Law ripened into existence. Owing to its fragmented formulation process, mainly due to sovereignty considerations, it is well recognised that ICL 'is a complex legal discipline consisting of several components, bound by their functional relationship in the pursuit of its value-oriented goals'.[10] Each of these components derives from one or more legal disciplines and

[7] Sir Peter von Hagenbach's 1474 prosecution in Breisach for atrocities committed serving the Duke of Burgundy constitutes the first international war crimes trial in history. Hagenbach was tried before an ad hoc tribunal of twenty-eight judges from various regional city-states for misdeeds, including murder and rape, he allegedly perpetrated as governor of the Duke's Alsatian territories from 1469 to 1474. Though it remains obscure in the popular imagination, most legal scholars perceive the trial as a landmark event. Some value it for formulating an embryonic version of crimes against humanity. Others praise it for ostensibly charging rape as a war crime. And all are in agreement that it is the first recorded case in history to reject the defence of superior orders. For this landmark case see Gordon S. Gregory, The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law, University of North Dakota - School of Law, 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006370 , last accessed on 10-07-2014.

[8] S/Res/808 (1993) Establishment of the International Tribunal for the Former Yugoslavia

[9] S/Res/955 (1994) Establishment of the International Tribunal for Rwanda

[10] Bassiouni M. Cherif, Introduction to International Criminal Law [Hereinafter, Bassiouni 2013], 2nd Revised Edition, Martinus Nijhof Publishers, 2013, p. 1.

their respective branches, including international law, national criminal law, comparative criminal law, IHL and HRL, that are not easily reconciled under one doctrinal regime. However, it has been maintained that 'that the different components that make up ICL constitute a functional whole, even though lacking the doctrinal cohesiveness and methodological coherence found in other legal disciplines whose relative homogeneity gives them a more defined systemic nature.'[11] The process has also been characterised as a rapprochement between the two major disciplines, international and national criminal law, although it is still noted that 'rapprochement works best with respect to what is referred to as core international crimes and not with respect to what is called transnational crimes (drug, human and arm trafficking, organised crime activities, cybercrime, terrorism and piracy)'[12]

There are two main inter-related factors that contribute to the poor results ICL produces in the field of transnational crime. The first one lies in the friction between traditional concepts of sovereignty and international criminal law. The exercise of criminal jurisdiction, being of extremely coercive nature, was long regarded as the exclusive right of states; one that they were willing or ready to divest themselves of, in exceptional cases, or *to recognise that the international community as a whole had the overriding right of prosecution*, should the crimes is question primarily targeted the latter's collective legal goods. Likewise, random historical events, such as the Holocaust, served as a locomotive for states to recognise crimes like genocide and crimes against humanity as international crimes, punishable outside the context of a sovereign state.

This was not however the case with transnational crimes. First of all, it was not until the early 1990s, that transnational organised crime claimed its enormity and moved up in the agendas of states and international organizations, to find the international community quite unprepared to address the threats it posed. Secondly, none of the proponents of ICL, at the early stages of its emersion, had relied on a cohesive doctrinal framework that through the combination and merge of its different components had obtained its own identity and cohesion. The same problematic could apply in relation to core crimes, but the potential impediments in their case were largely avoided, thanks to their prosecution before international fora with detailed and

[11] Id.
[12] Id. at p. cxxv - cxxvi

extensive statutes. Instead, the nascent discipline of transnational criminal law, truncated from the body of ICL, is a juxtaposition of different subjects, whose exposition reflects alternatively either international or national criminal norms.

The fact is that the devastating effects transnational criminal organizations inflict on humanity at large, dictate a different approach, one which endows TCL with its international nature and its autonomous international status. To this end, it is imperative to work towards the harmonization of substantive and procedural transnational criminal law, to create and uphold a high standard for the international criminal law, taking into account aspects of security and individual rights at the same time.

1.2 Transnational Criminal Law

International criminal law is currently subdivided into international criminal law stricto sensu –the so called core crimes- and international criminal law sensu lato, encompassing the so called treaty crimes[13] or else 'crimes of international concern' as well. Among the first known examples of a treaty crime was a Roman Law which provided that the Kings of Cyprus, Egypt, Cyrene and Syria were to prevent the harbouring of pirates, an obligation enforced by a fine of 200.000 sestertii.[14]

The overwhelming majority of treaty crimes can fall under the heading of 'transnational crimes'[15], pursuant to the definition set by the Fifth UN Congress on Crime Prevention and the Treatment of Offenders, in 1975 and the UN Crime Prevention and Criminal Justice Branch. Although accused of being primarily 'a functional rather that normative descriptor'[16] , the term was first used by the above UN body, '*in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country.*' [17] The Fourth UN Survey of Crime Trends and Operations of Criminal

[13] Boister Neil, Transnational Criminal Law?, [Hereinafter Boister, EJIL, 2003], 14 European Journal of International Law, No 39, 2003, pp. 953-976 at 953
[14] The Cnidus text in 64 Journal of Roman Studies 1974, pp 195-220
[15] Not all treaty crimes are transnational crimes, e.g. torture as an individual crime.
[16] Boister, EJIL, 2003, at 954, supra note 13
[17] Mueller Gow, Transnational Crime: Definitions and Concepts in Williams and D Vlassis (eds), Combating Transnational Crime: Concept, Activities, Responses, Frank Cass, 2001, p. 13

Justice Systems of 1976 defined transnational crimes as 'offenses whose inception, perpetration and/or direct or indirect effects involved more than one country'. [18]

Some criminologists are critical of the over-inclusive nature of transnational crime.[19] However, this tendency towards broad definition is reflected in article 3 (2) of the 2000 UN Convention against Transnational Organised Crime (CATOC)[20]. An offense is transnational if it satisfies one or a number of alternative conditions: (a) It is committed in more than one state; (b) It is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; (c) It is committed in one state but involves an organised criminal group that engages in criminal activities in more than one state or (d) It is committed in one state but has substantial effects in another State.[21]

Pursuant to the aforementioned criteria, which are applicable to both transnational crimes regulated by international law such as treaties and to ordinary crimes with a transnational aspect, some commentators[22] conclude that 'transnational criminal law includes the rules of national jurisdiction under which a State may enact and enforce its own criminal law where there is some transnational aspect of a crime. It also covers methods of co-operation among States to deal with domestic offences and offenders where there is a foreign element and the treaties which have been established and encourage inter-state co-operation'.

In academic literature, it has been suggested that 'as an ideal-type transnational criminal law does not create individual penal responsibility under international law. Instead it is an indirect system of interstate obligations, generating national penal laws. Even so, transnational treaty crimes can be distinguished from purely national crimes (even from those that have transnational elements) insofar as purely national crimes

[18] United Nations, Fourth UN Survey of Crime Trends and Operations of Criminal Justice Systems UN Doc/A/CONF.169/15/Add.1 (1995)

[19] See for example Friedrichs D., Transnational Crime and Global Criminology: Definitional, Typological and Contextual Conundrums, 32 (2), Social Justice (2007), p. 4-5

[20] Fijnaut C, Transnational Crime and the role of the United Nations, 8 European Journal of Crime, Criminal Law and Justice, 2000, pp 119-120

[21] Boister Neil, An Introduction to Transnational Criminal Law, [Hereinafter, Boister, 2012], Oxford University Press, 2012, p. 4

[22] Cryer Robert, Friman Håkan, Robinson Darryl, and Wilmshurst Elizabeth, An Introduction to International Criminal Law and Procedure, [Hereinafter Cryer et. al., 2010] 2nd Ed., Cambridge University Press, 2010, p. 6 . Nevertheless, they still conclude that TCL remains a body of ICL.

are criminalized solely at the election of the state and are not initiated through international treaty.'[23]

On the basis of this observation, the present thesis and its suggestions refer to those transnational crimes that are regulated by treaties, thus bearing the conclusive presumption that are of international concern, such as transnational organised crime, illicit drug trafficking and related offenses, human trafficking and migrant smuggling, terrorism, illicit firearms trafficking, money laundering, cybercrime and international traffic in obscene materials, corruption and bribery of foreign public officials, falsification and counterfeiting, piracy and maritime crime, unlawful use of the mail, unlawful acts against certain internationally protected elements of the environment, destruction and/or theft of national treasures. Conversely, the study of ordinary crimes, such as armed robbery or kidnapping with trans-boundary elements, falls outside the scope of the present thesis, them being national crimes subject to the criminal procedures and the modalities of TCL we examine below.

1.3 The tale of Two Systems

As previously implied, ICL enforcement embodies two legal regimes. The tale of the direct enforcement system begins with the establishment of the IMT and IMTFE. Previous sporadic experiences cannot be considered as part of the same continuum, since, as Bassiouni observes, 'that is essentially the product of ICL's protagonists' desire to give historical substance to this discipline', quoting Robert Jackson, who noted to the President of the United States in his report on the Nuremberg Trials that 'If Nuremberg was not the embodiment of a custom, it was the emergence of one' in that he relied on the words of the French philosopher Blaise Pascal, that 'every custom has its origin in a single act'.'[24]

The direct enforcement system is 'a regime applicable to international judicial institutions which have the power of enforcing their orders and judgements without going through states or any other legal authority.' Under this reasoning, the only two

[23] Boister, EJIL, 2003, at 962, supra note 13. Boister also argues that the term transnational law is apposite because it is functional and because it points to a legal order that attenuates the distinction between national and international.
[24] Bassiouni 2013, supra note 10 at 29

comprehensive examples of a direct enforcement system are the IMT and IMTFE, while the ICTY, ICTR and the ICC are less comprehensive examples, because they depend on other institutions for the enforcement of their orders and judgements. [25] Nevertheless, the restriction of the definition only to judicial bodies seems unjustified. The SC for instance has the competence of enforcing its decisions directly. Likewise, for the purpose of this thesis, 'direct' refers, as a stipulative term, to any undertaking of action by the international community, either represented by international organizations and their organs or by international and internationalised criminal tribunals or even individual states or group of states, exercising for instance universal jurisdiction over certain crimes.

Parallel to the evolution of the international criminal justice through the direct enforcement system is the evolution of ICL through the indirect enforcement system. The indirect enforcement system is the legal regime whereby the enforcement of ICL is accomplished through national legal systems. One can identify three main reasons for transnational crimes' complete fusion with the indirect enforcement system: First of all, the suppression treaties, whose subject matter is the regulation of transnational crimes, rely exclusively on this particular modus operandi, thus giving the impression that a sufficient international response to the threat is in place, making the suggestions of any alternative course of action sound redundant. Secondly, while historical events, led to the inclusion of core crimes in the direct enforcement system, this has not been the case with transnational crimes. However, the recent debate surrounding the crime of terrorism, following the 9/11 terrorist attacks, evince the random nature of the choice, more on the basis of mainstreaming trends rather than on a justifiable legal reasoning. Moreover, the fact that there have been no initiatives for the progressive development and codification of the substantive norms of TCL certainly hinders any similar notions.

For at least one commentator, 'essentially because the indirect enforcement system functions as the intermediation of states and thus impinges minimally, if at all, on the sovereignty, that system is making greater strides than its counterpart the direct enforcement system.' [26] This could mean that the indirect system could serve as a locomotive or a model system for ICL in general. However, it is the author's view

[25] Id., p. 22
[26] Id., p. 23

that the indirect enforcement system's expansion is only in quantity, which can easily be explained by the high frequency in which instances of transnational criminal behaviours occur. Nevertheless, as we shall see, the supremacy of the indirect enforcement system in frequency does not translate in quality too.

Chapter 2

The Current Legal and Institutional Framework for TCs

2.1 The Suppression Treaties Regime and Case Study of Individual TCs

Suppression treaties are part of what has been characterised as global prohibition regimes. According to Nadelmann [27] 'International prohibition regimes are intended to minimise or eliminate the potential havens from which certain crimes can be committed and to which criminals can flee to escape prosecution and punishment. They provide an element of standardisation to co-operation among governments that have few other law-enforcement concerns in common. And they create an expectation of co-operation that governments challenge at the cost of some international embarrassment'.

Suppression conventions are multilateral treaties that oblige states to criminalise certain forms of conduct and to provide legal assistance to other states in order to suppress treaty crimes or crimes of international concern. The international community began coordinating suppression conventions at the beginning of the 19th century in response to the globalization of harmful conduct. [28] There are over 200 of these conventions,[29] all dealing with very specific aspects of criminal conduct with actual or potential trans-boundary effect.

Although suppression treaties seem like an ideal solution in order to deal with crimes of such nature, the review of the relative conventions reveals otherwise. In order to support this argument, in the following section, we selectively examine the

[27] Nadelmann A. Ethan, Global Prohibition Regimes: The Evolution of Norms in International Society, 44 International Organization, 1990, pp 479-526 at 481

[28] Boister Neil, Human Rights Protections in the Suppression Conventions, 2 Human Rights Law Review, 2002, pp. 199-227

[29] Bassiouni , 2013, supra note 10, pp 143-146 lists 281 conventions that contain at least one of the then penal characteristics that he identifies as a prerequisite for an international crime, list of the conventions at pp. 255-85

legal framework that is currently employed for the prevention and suppression of transnational organised crime, illicit drug trafficking and related offenses and terrorism, as well as the various institutional initiatives that have been developed in relation to those crimes. Taking into consideration that any in-depth analysis of the entire spectrum of international and regional instruments regulating transnational crimes and the exhaustive enumeration of the total initiatives that have been developed under the auspices of international and regional organizations for their suppression would require a volume on every individual transnational crime's own right, far exceeding the purpose of the present thesis, the selection process relied on the following reasoning: Transnational organised crime was picked on the grounds of its umbrella effect for a series of specific related crimes such as illicit trafficking of drugs, arms and human beings, money laundering, corruption etc. Illicit drug trafficking was chosen as a representative of all unlawful trafficking offenses. Terrorism is also included as demonstrative example of crimes manifesting extensive fragmentation in their substantive norms.

(i) Transnational Organised Crime

Transnational organised criminal networks engage in an impressive range of criminal activities, from drug trafficking, counterfeiting, illegal arms trade, unlawful disposal of dangerous waste, human trafficking and smuggling of immigrants to money laundering and corruption of public officials as a means of achieving their profit-oriented goals. Apart from thriving in these illegal markets, which yield an annual turnover of roughly $870 billion, [30]organised criminal groups are now forging dangerous alliances with terrorists.[31] In response to the increasing threat posed by transnational organised crime, the international community has adopted a series of international instruments, three of them standing out as they aspire to change the landscape.

[30] New UN Campaign Highlights Financial and Social Costs of Transnational Organized Crime, UN News Centre, July 16, 2012, available at http://www.un.org/apps/news/story.asp?NewsID=42480&Cr=Drugs&Cr1= , last accessed on 07-07-2014

[31] For a scrutiny of the linkage between organized crime, illicit flows and terrorism see UNODC, Thematic Program: Actions against Transnational Organized Crime and Illicit Trafficking, Including Drug Trafficking, 2011

In 1994, the UN General Assembly adopted the Naples Political Declaration and Global Action Plan against Organised Transnational Crime, [32] in order to address problems with illegal drug, arms and human trafficking.[33] The Naples Declaration eventually led to sister declarations around the world: the Buenos Aires Declaration in Latin America and the Caribbean, the Dakar Declaration for the African States, and the Manila Declaration in Asia.[34] The members of the Ministerial Conference at Naples requested the Commission on Crime Prevention and Criminal Justice to examine the feasibility of a convention to combat transnational organized crime. Shortly after the adoption of the Naples Declaration, member states began to work on a convention to address the problem.[35]

The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organized crime. It opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003. The Convention is further supplemented by three Protocols, which target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.[36]Countries must become parties to the Convention itself before they can become parties to any of the Protocols. UNODC is the guardian of the United Nations Convention against Transnational Organized Crime (Organized Crime Convention) and the three Protocols that supplement it.

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[32] ECOSOC, Naples Political Declaration and Global Action Plan Against Organized Transnational Crime, G.A. Res. 49/159, (Dec. 23, 1994), available at http://www.un.org/documents/ga/res/49/a49r159.htm, last accessed on 08-07-2014

[33] ECOSOC, Comm. On Crime Prevention and Crime Justice, Review of Priority Themes: Implementation of the Naples Political Declaration and Global Action Plan Against Organized Transnational Crime: Rep. of the Secretary General Addendum, par 7, 12, U.N. Doc. E/CN.15/1996/1 (Apr. 3, 1996), available at http://www.uncjin.org/Documents/5comm/2add1e.htm, last accessed on 08-07-2014

[34] Crime Prevention and Criminal Justice: Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on the Work of its First to Eleventh Sessions, U.N. GAOR Ad Hoc Comm., 55th Sess., 9, 11, 14. U.N. Doc. A/55/383 (2000), available at http://www.unodc.org/pdf/crime/final_instruments/383e.pdf. last accessed on 08-07-2014

[35] Adamoli Sabrina et al., Organized Crime around the World, European Institute for Crime Prevention and Control, Series No. 31, 1998, p. 94-96

[36] For the full text and general information visit the UNODC official page on the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, available at http://www.unodc.org/unodc/en/organized-crime/index.html, last accessed on 07-07-2014

Despite being seemingly endorsed by a large number of states as well as international organizations, [37] CATOC has become the target of significant criticism. Legal limitations stemming from the absence of a precise definition of transnational organized crime, the lack of focus on victims[38], and weak extradition procedures all render CATOC rather ineffective. [39] On the positive side, the lack of a precise definition allows, as the UNODC states in its official website, for a greater range of applicability of the Convention to new types of crime that emerge over time. On the negative side, "different legal standards [by the authorities enforcing the relevant provisions] on what constitutes organized crime, corruption, and terrorism" have created vulnerabilities in enforcement systems, thereby allowing transnational criminal networks to accomplish their objectives with ease.[40]

CATOC does, however, provide a definition for transnational crime (Art 3) as well as for 'organized criminal group' (Art 2), defining the latter as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly, or indirectly, a financial or material benefit."[41]

CATOC's regime is complemented by the United Nations Convention against Corruption (UNCAC), as there is an evident interplay between the two conventions.[42] UNCAC, was adopted in 2003,[43] after the adoption of local anti-corruption treaties and the Organization for Economic and Co-operation and Development (OECD)

[37] For example, the European Union is a party to CATOC.

[38] NGO Joint Statement: The CATOC 5th Conference of Parties, Global Alliance against Trafficking in Women (Oct. 18, 2010), available at : http://www.gaatw.org/index.php?option=com_content&view=article&id=627:ngo-joint-statement-the-CATOC-5th-conference-of-parties-18-october-2010-&catid=102:Briefers&Itemid=22, last accessed on 08-07-2014. NGOs argue that although the Convention provides for the material elements of crimes, in reality, assistance to victims and further support is not detailed in the Convention.

[39] Paulose Menachery Regina, Beyond the Core: Incorporating Transnational Crimes in the Rome Statute, Cardozo Journal of International Law and Comparative Law, 2012, p. 77-109 at 94

[40] Standing Andre, Transnational Organized Crime and the Palermo Convention: A Reality Check. International Peace Institute, 2010, p. 10, discussing global trends in organized crime and critiques the CATOC and Palermo Convention and finds that the "measurements tell us little." available at http://www.ipinst.org/media/pdf/publications/e_pub_palermo_convention.pdf, last accessed on 08-07-2014

[41] United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, Vol. 1, art. 2(a), U.N. Doc. A/55/49 (2001)

[42] Paulose Menachery Regina, supra note 39 at 94

[43] United Nations Convention Against Corruption: Background to the United Nations Convention Against Corruption, UNODC, available at http://www.unodc.org/unodc/en/treaties/CAC/index.html, last accessed on 08-07-2014

Convention[44], which paved the way for reaching a multilateral and global instrument. UNCAC represents the international community's resolution to strengthen and implement a strong anti-corruption regime.[45] It primarily obliges member states to criminalize corruption in the public sector, to enact anti-corruption legislation, to develop investigative and police enforcement measures, and to implement standards with regards to public bodies and public officials. [46]

Both conventions deal with matters relating to asset recovery and preventative measures as well as mutual cooperation of technical assistance, information exchange, criminalization and law enforcement. Like its counterpart, UNCAC does not have a standing definition of corruption. In 2009 there was a call for an effective UNCAC review mechanism. [47] However, it was not until September 2011 that the first compliance report cards were published regarding four countries. [48]

The multiplication of legal regimes (international and regional conventions, protocols etc.) in respect to transnational organised crime raises a series of issues, especially if we take into account the reluctance of domestic courts to apply international norms, let alone a multitude of provisions contained in conventions with no specific definitions of their objects of focus. Moreover, it allows for tailored applications by the individual states in the pursuit of their own interests and political agendas, which are not always identical with those of the international community, which relies on the application of these regimes holistically to combat transnational

[44] The 1997 OECD Convention was the first global treaty on corruption. The full text of the Convention and the Related Documents are available at UN Doc CAC/COSP/IRG/I/1/1, Conference of the States Parties to the United Nations Convention Against Corruption, Implementation, Vienna, Austria, Sept. 7-9, 2011, Review of Implementation of the United Nations Convention Against Corruption, at 1, (June 7, 2011), available at http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/7-9September2011/V1183525e.pdf. , last accessed on 06-07-2014. The Convention was limited in a number of respects and, in particular, only mandated that member states criminalize bribery as a criminal offense. See Bantekas Ilias, Corruption as an International Crime Against Humanity, 4 Journal of International Criminal Justice, 2006, p. 466, at 469

[45] Press Release, UNODC, Consensus Reached on UN Convention Against Corruption: High Level Signing Conference Planned for December in Merida, Mexico, U.N. Press Release UNIS/CP/447 (Oct. 2, 2003), available at http://www.unodc.org/unodc/en/treaties/CAC/background/press-release-consensus.html, last accessed on 08-07-2014

[46] Bantekas, 2006,supra note 44 , at 472.

[47] CSO Coalition Calls for Adoption of Effective Review Mechanism, UNCAC Coalition November 9 2000, available at http://www.uncaccoalition.org/en/home/58-coalition-calls-for-effective-uncac-review-mechanism.html, last accessed on 07-07-2014

[48] See Benton A. Leslie et al., Anti-Corruption, 46 International Law, 2012, p 353 at 371; See also Conference of the States Parties to the United Nations Convention Against Corruption, Implementation, Vienna, Austria, Sept. 7-9, 2011, Review of Implementation of the United Nations Convention Against Corruption, at 1, U.N. Doc. CAC/COSP/IRG/I/1/1 (June 7, 2011), available at http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/7-9September2011/V1183525e.pdf., last accessed on 08-07-2014

organised crime. For that reason, scholars note that in order to resolve these issues 'the international community should focus on a convergence of interests with the aim of creating a sound "normative" infrastructure.' [49]

(ii) Illicit Drug Trafficking and Related Offences

The illicit trade in narcotic drugs, which includes the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws, constitutes a global shadow economy, rivalling the GDP of many nations. International criminal networks parasitically pray on under-developed countries for the production of their illicit drugs, further deepening the instability that typically characterises these states, on addicts and their families, tearing the fabric of society apart. They take advantage of corrupted public officials to secure the international paths of their illicit flows and forge dangerous alliances with terrorists and insurgents that have long been alienated from their initial ideological goals and are now concentrating on securing sovereign-free areas for the undisturbed perseverance of their profit-oriented criminal activities, as the case of FARC demonstrates. The international community has struggled to remain proactive in the face of the multifaceted threat, through the establishment of a complex legal framework for the control of illicit drug trafficking and the development of various institutional initiatives in the field.

The construction of an international legal framework has gone through several stages since the first 1912 Hague Opium Convention and the treaties negotiated afterwards under the aegis of the League of Nations[50], which were more regulatory than prohibitive in nature and aimed to control the excesses of an unregulated free trade regime, substantially regarding opium. These early series of conventions in effect established administrative import and export regulations for opiates, cocaine and, from 1925, cannabis, without criminalising the substances, users or growers of

[49] Cryer et al, 2010, supra note 22, at 335; In the same vein, Boister, notes that 'The multitude of legal regimes with regard to transnational organized crime needs to become cohesive', Boister, EJIL, 2003, supra note 13, at 959

[50] For a synoptic yet comprehensive review of the history of the international control system, see Jay Sinha, The History and Development of the Leading International Drug Control Conventions, a briefing prepared for the Canadian Senate Special Committee On Illegal Drugs by the Law and Government Division, Library of Parliament, 2001, available at http://www.parl.gc.ca/content/sen/committee/371/ille/library/history-e.htm , last accessed on 18-08-2014

the raw materials. United States' and China's, the most ardent prohibitionists', withdrawal from the 1925 International Opium Convention preparatory negotiations, is most indicative, as in their view 'sufficiently restrictive measures would not be imposed.' [51]

Similarly, the majority of the 23 international instruments that have been documented and of the 32 more that have been enlisted as applicable in relation to this crime, is essentially designed to regulate the licit cultivation, manufacture, trade and use of narcotic drugs.[52] 'The prohibitions and penalties for drug violations contained in these agreements developed as a consequence of this objective, with the exception of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which is purely penal in nature and for the 1972 Protocol Amending the 1961 Single Convention on Narcotic Drugs[53] which is also penal in nature.'[54]

The overall effect of the 1961 Convention was to codify and amalgamate previous multilateral drug conventions. [55] It includes the requirement that State Parties should control and licence individuals and commercial entities involved in the trade or distribution of licit drugs. Parties are also obliged to 'prevent the accumulation in the possession of traders, distributors, state enterprises or duly authorised persons […] of quantities of drugs and poppy straw in excess of those required for the normal conduct of business, having regard to the prevailing market conditions'[56] There are provisions in the Convention ensuring that licit drugs are issued under prescription, are properly labelled and that trade in drugs is regulated and conforms with the estimates system, as well as encouraging full legal and administrative co-operation between counties. Further developments were brought with the 1972 Protocol. Article 12 of the Protocol strengthens measures concerning the illicit cultivation of opium and cannabis under

[51] TNI Drug Policy Briefing, Rewriting History: A Response to the 2008 World Drug Report, Transnational Institute, 26, June 2008

[52] Bassiouni, 2013, supra note 10, at 212

[53] The full texts of the three major UN Conventions, i.e. The Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971 and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, as well as their final acts and related resolutions are available at http://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pd, last accessed on 05-08-2014

[54] Id.

[55] See generally Lopez-Ray, A Guide to United Nations Criminal Policy, 1985, [Hereinafter Lopez – Ray, 1985] Aldershot: Gower, p. 52

[56] Supra note 53, The 1961 Single Convention, Article 30 (2) (a)

the 1961 Convention, in that parties are not only obliged to take measures prohibiting illicit cultivation, but also to seize and destroy plants used for illicit production. The Protocol also provides that the offenses set out in the 1961 Convention shall be extraditable and that it may serve as an extradition basis where no other provision exists.

Given the shortcomings of the 1961 and 1971 Conventions[57] and the persisting increase of drug offenses the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances was adopted in 1988 to complement and supplement the previous instruments. It provides for a more detailed normative framework, extending the control regime to precursors, covering inter alia modes of participation, aggravating factors, offences relating to money laundering, confiscation of proceeds and provisions on extradition and mutual legal assistance.

At the institutional level, the UN has created a number of agencies with specific responsibilities in relation to illicit drug trafficking. The Commission on Narcotic Drugs[58] was established in 1946 as an organ of the Economic and Social Council (ECOSOC). According to its mandate, the Commission considers and reports on all aspects of international drug control and it can initiate work and make recommendations to ECOSOC and to governments. In addition, the Commission oversees the effective implementation of the provisions of the 1961 Single Convention and 1972 Protocol. The International Narcotics Control Board [59], comprised by members selected by the ECOSOC on the basis of their impartiality, was established by the 1961 Convention and is in charge of controlling the international trade in narcotic drugs and to ensure the execution of the provisions contained in the Convention. The UN Fund for Drug Abuse Control was established in 1971 and is funded by State contributions. Its primary faction is to provide professional and technical assistance to governments on law enforcement and social measures for drug control. [60]

[57] Supra note 53

[58] For general information on the Commission's on Narcotic Drugs activities, visit its official page, available at https://www.unodc.org/unodc/commissions/CND/, last accessed on 18-08-2014

[59] For general information on the Commission's activities, visit its official page, available at https://www.incb.org/, last accessed on 18-08-2014

[60] See generally Lopez-Ray, 1985, supra note 55 ; The resolutions establishing the UN Fund for Drug Abuse Control and a comprehensive description of its functions is available at: https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1971-01-01_2_page002.html, last accessed on 19-08-2014

At the European level, the EU has taken a series of measures aimed at a range of criminal problems, including drug – trafficking and the improvement of police co-operation, culminating in the establishment of Europol Initiatives against drugs which is 'a priority to the Council of Ministers for Justice and Home Affairs'. Under the 1990 Schengen Implementing Convention, provisions were included to improve judicial and police co-operation and the Convention provides a means of implementing the measures set out in the UN Conventions in the Member – States to the Schengen Acquis.[61]

The Pompidou Centre[62] is a co-operation group against the abuse of drugs, operating under the auspices of the Council of Europe for more than 30 years, favouring a multi-disciplinary approach. ASEAN's Meeting of Senior Officials on Drug Matters (ASOD) has a mandate that includes enhancing the implementation of the ASEAN Declaration of Principles to Combat the Drug Problem of 1976, to consolidate and strengthen collaborative efforts in the control and prevention of drug problems in the region, to bring about the eventual eradication of narcotic plants cultivation in the region and to design, implement, monitor and evaluate all ASEAN programmes of action in drug abuse prevention and control.[63] NATO has also entrenched the fight against narcotics trafficking in its 2010 strategic concept.[64]

Even from such a selective citing of the most basic international instruments and initiatives for the suppression of illicit drug trafficking and its related offences, it becomes evident that the international community has adopted a highly fragmented framework in relation to this crime, both legally and institutionally. And while the most significant drawbacks of the fragmentation in institutional activities are the squandering of funds and the compromise of their efficiency, especially taking into account the reluctance of law enforcement agencies to share their information in fear of compromising their operations, the repercussions of the fragmentation of the substantive norms of the relevant Conventions or to be more accurate, their inherent

[61] Meijers H., Schengen, Internationalization of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police, Dordrecht: Stichting Noem-Boekerij, 1991, p. 107

[62] http://www.coe.int/t/dg3/pompidou/default_en.asp, last accessed on 11-07-2014

[63] Cooperation on Drugs and Narcotics Overview, available at http://www.asean.org/communities/asean-political-security-community/item/cooperation-on-drugs-and-narcotics-overview, last accessed on 16-07-2014

[64] Nato's New Strategic Concept of 2010, available at http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_publications/20120214_strategic-concept-2010-eng.pdf , last accessed on 16-07-2014 , p. 13,32

permissiveness of fragmented and diverse application through the national legislations, under the rubric of the indirect enforcement system tend to be much more serious.

The General Assembly in a resolution on measures to strengthen international cooperation against illicit drug trafficking[65] asked for the impact of the United Nations drug control treaties to be evaluated. The goal was to identify weaknesses as well as strengths in the treaty provisions.[66] There are a couple of cases that exemplify the problems caused by the systemic fragmentation the treaties allow. The first one relates to coca chewing and the drinking of coca, which is tolerable according to the legislation of three countries in Latin America. This is a contradiction to the provisions of the 1961 Convention, which make it mandatory that those habits be prohibited, after a transitional period, which has elapsed. A second issue relates to the possible revision of the classification and control of the cannabis plant and product. It is suggested that the potency of those products should be taken into account, rather than the type of products per se. The Board has on several occasions called attention to the emergence of new varieties of cannabis with leaves with THC content much higher than the flowering or fruiting tops. Cannabis leaves as such do not fall under international drug control. Similarly there are now resins available with very high THC content. [67]

Moreover, Article 3 of the Vienna Convention of 1988 provides that '*subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention'*. Apart from the reservation in regards to the compatibility 'to the constitutional principles and basic concepts of each member-state's legal system', it is unclear whether this provision actually mandates prohibition of drug possession for personal use due to the caveat that such possession need only be prohibited if it is

[65] A/RES/48/12 (1993), available at http://www.un.org/documents/ga/res/48/a48r012.htm, last accessed on 16-07-2014

[66] For a comprehensive analysis of the problems arising from the UN Conventions see: Bewley-Taylor R. David, Challenging the UN drug control conventions: problems and possibilities, International Journal of Drug Policy 14, 2003, pp. 171-179, available at http://www.unawestminster.org.uk/pdf/drugs/UNdrugsBewley_Taylor_IJDP14.pdf, last accessed on 03-08-2014

[67] Ghodse Hamid, International Drug Control in the 21st Century, Ashgate Publishing, 2008 p. 4

contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention'. The American National Commission on Marijuana and Drug Abuse found that the provisions of the 1961 Single Convention on Narcotic Drugs against possession apply only to possession related to illicit trafficking while the Canadian Le Dian Commission of Inquiry into the Non-Medical use of drugs found otherwise. [68] Needless to say that this kind of diversification of opinions between the judicial authorities of states often leads to the violation of the double criminality principle, especially taking into account that illicit drug trafficking is a crime type that is usually included in the provisions of national penal codes that establish universal jurisdiction of their authoritative state for the prosecution of certain criminal acts.

It is suggested that some of the shortcomings of the international drug control system relate to the fact that the conventions were intended to be universal but have not yet been adopted universally nor applied. A hint of the intention –or recognition- that there is a necessity to apply these Conventions outside the narrow boarders of the state can be traced in Article 17 of the 1988 Vienna Convention, which introduces a scheme whereby a party to the Convention may request from the Flag State of a vessel permission to broad, search and take appropriate measures against it under the suspicion of drug-trafficking. The measures under Article 17 have been implemented by the Council of Europe in its Agreement on Illicit Traffic by Sea Implementing Article 17 of the UN Convention against Illicit Drugs and Psychotropic Substances. [69] Nevertheless, such an approach is abolished as Article 2 (3) of the Vienna Convention explicitly prohibits the exercise of extraterritorial jurisdiction thereby making it plain that the offenses under the Convention shall not be subjected to universal prosecution. Thus notwithstanding the rhetoric of a unified fight against illicit drug trafficking, state sovereignty still prevails in this area of transnational criminal law.

(iii) Terrorism

There is no transnational crime of terrorism per se but a patchwork of multilateral treaties [70] aimed at supressing certain criminal acts that have been

[68] Cannabis Report Canadian Foundation for Drug Policy, Appendix A
[69] Meijers H., Schegen, supra note 61, at 107
[70] There is apparently no unanimous opinion on which conventions are true conventions. See Fiona de Londras 'Terrorism as an International Crime' In: William Schabas & Nadia Bernaz (eds). Routledge Handbook on

characterised as terrorist activities, such as hijacking, hostage taking, attacks on diplomats and internationally protected persons and bombings. The reason behind this thematic approach[71], is because, although the term 'terrorism' is commonly used in everyday parlance with varying political and criminal connotations, as a legal designation it remains elusive, in the sense that it has never been singly defined under international law, at least at the global level. Likewise, historical events, whose force and impact in certain periods outraged the international community, prompted its members to conclude subject specific anti-terrorist agreements. This was the case for instance of the alarming number of incidents regarding seizure or interference with civil aviation in the 1960s and 1970s, which led to the adoption of three distinct international treaties: the 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft[72], the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft[73] and the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation[74].

The first international attempt at the codification was made in 1937 through the League of Nations by the adoption of a Convention for the Prevention and Punishment of Terrorism.[75] Article 1 (2) of that Convention which required merely three ratifications to come into force but received only one and was subsequently abandoned defines acts of terrorism as '*criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or groups of persons or the general public*.' Such a definition has been dismissed by scholars as it 'does not accurately describe a criminal act of terrorism as distinct from

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International Criminal Law, Routledge, 2010, p. 171 listing 12 international treaties, Wilmshurst, Transnational crimes, p 339, in Cryer et al, 2010, supra note 17, referring to 11 global agreements that were concluded to fight terrorism by way of state cooperation.

[71] Besides the Conventions relating to aircraft safety and hijacking we refer to below, see also the UN Convention for the Suppression of Terrorist Bombings of 1997, available at http://www.un.org/law/cod/terroris.htm, last accessed on 20-08-2014; the International Convention for the Suppression of the Financing of Terrorism, available at http://www.un.org/law/cod/finterr.htm, last accessed on 20-08-2014; International Convention against the Taking of Hostages of 1979, available at http://www.un.org/en/sc/ctc/docs/conventions/Conv5.pdf, last accessed on 20-08-2014

[72] Convention on Offenses and Certain Other Acts Committed on Board Aircraft of 1963, available at https://treaties.un.org/doc/db/Terrorism/Conv1-english.pdf, last accessed on 07-08-2014

[73] Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, available at http://www.oas.org/juridico/MLA/en/Treaties/en_Conve_Suppre_Unlaw_Seiz_Aircr_Sig_The_Hague_1970.pdf, last accessed on 07-08-2014

[74] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, available at http://www.un.org/en/sc/ctc/docs/conventions/Conv3.pdf, last accessed on 08-08-2014

[75] Convention for the Prevention and Punishment of Terrorism LNOJ, 19, 1938

a common crime and leaves a wide margin of discretion as to the specific mens rea of a terrorist offence, that is the creation of a state of terror'[76]

There were considerable efforts to codify a crime of terrorism in the 1970s when the General Assembly set up an Ad Hoc Committee on International Terrorism.[77] However in 1979 the Committee concluded that it was unable to agree on a definition of terrorism.

Contrary to the majority of legal scholars, the Special Tribunal for Lebanon STL Appeals Chamber came to the conclusion that an international crime of terrorism did exist under customary law. [78] According to the Chamber there is a settled practice concerning the punishment of acts of terrorism and this practice is evidence of a belief of states that the punishment of terrorism responds to a social necessity opinion necessitates and is hence rendered obligatory by the existence of a rule requiring it opinion juris.[79] Regarding the definition of terrorism this rule would provide for three elements: 1) the perpetrating or threatening of a criminal acts; 2) the intent to spread fear among the population or coerce a national or international authority to take some action or to refrain from taking it and 3) a transnational element as part of the act.[80] To support its findings the chamber relied on resolutions of the General Assembly and the Security Council and the widespread criminalization of terrorism in domestic criminal law.[81]

Although one could argue that the multitude of specific subject –matter treaties constitute a functional system for the suppression of international terrorism, the multiplication of the related regimes, can trigger contradictions that hinder the classification of terrorist acts and their subsequent prosecution. For example, a very

[76] Bantekas Ilias, Susan Nash, International Criminal Law, Routledge, 2009, p. 195

[77] A/RES/3034 (XXVII), 18 December 1972, Measures to Prevent International Terrorism, available at http://unispal.un.org/unispal.nsf/a06f2943c226015c85256c40005d359c/69cb600fbde9eddd852570840050c345?OpenDocument, last accessed on 20-08-2014

[78] STL Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, No. STL-11-01/I/AC/R176 bis, para 42, 85, 102 (16 February 2011) For a critical analysis of the decision regarding its findings on terrorism, see Saul, B., Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism. Leiden Journal of International Law, 24(3), 677-700, 2011; Saul B., The Special Tribunal for Lebanon and Terrorism as an International crime: Reflections on the Judicial Function, pp. 79-80,84 in Schabas A William., McDermott Yvonne, Hayes Niamh (Eds.), The Ashgate Research Companion to International Criminal Law: Critical Perspectives,Farnham, Ashgate

[79] Id. Interlocutory Decision, para 102

[80] Id. para 85,111

[81] Id. para 104.

specific form of unlawful aircraft seizure is that of air piracy, as defined under Article 15 of the 1958 Geneva Convention on the High Seas[82] and Article 101 of the 1982 UN Convention on the Law of the Sea (UNCLOS).[83] Unlike areal hijacking under the Hague Convention, air piracy under UNCLOS involves an illegal act of violence, namely an unlawful diversion to a destination other than that of the aircraft's original flight plan and originating from outside the attacked aircraft – thus requiring an aircraft of assault and occurring in a place outside the jurisdiction of any state. 'Although the Hague Convention obliges state parties to consider offences described therein as extraditable offences, in effect denying the culprits a political motive excuse, the application to this rule of air piracy under UNCLOS would be problematic, since piracy exists only where the illegal act of violence was committed for private ends, thus excluding action undertaken on political grounds. One is therefore presented with the regulation of this issue by two distinct legal regimes: one the one hand, UNCLOS and on the other the anti-terrorist treaties. The former allows the invocation of a political motive, whereas the latter does not. Clearly the two regimes are contradictory and there do not exist any discernible guidelines as to which should prevail.'[84]

What is more, the absence of a single definition, apart from the potential abuse of the term by judicial authorities in the pursuit of specific political agendas, and the problematic between the distinction between terrorist violence and national liberation movements it entails, is of seminal importance in the face of the so called 'political offence exception'. [85] The only anti-terrorist convention that does not follow a purely thematic approach is the 1976 European Convention on the Suppression of Terrorism[86]. However far from adopting a single definition, Article 1 enumerates all existing counter-terrorism treaties and reiterates the obligation of state parties not to characterise the acts therein as political offences for the purposes of extradition.

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[82] Geneva Convention on the High Seas of 1958, available at: http://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf, last accessed on 20-08-2014

[83] United Nations Conventions on the Law of the Sea of 1982, available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, last accessed on 20-08-2014

[84] Bantekas, supra note 76, pp 201-202

[85] For this matter see generally, Bassiouni M. Cherif (ed), International Terrorism and Political Crimes, International Institute for Advanced Criminal Sciences, Thomas, 1974

[86] European Convention on the Suppression of Terrorism of 1976, available at http://conventions.coe.int/Treaty/en/Treaties/html/090.htm, last accessed on 21-08-2014

The diversification emanating from the lack of a universally accepted definition of terrorism reproduces at the institutional level as well. With the exception of UNSC Resolution 1373 of 2001[87], which criminalised all activities falling within the remit of terrorist financing, directly binding all states, there is a multitude of regional mechanisms such as the Inter-American Committee against Terrorism (CICTE)[88] and the SAARC Terrorist Offences Monitor Desk[89] combatting terrorism as well as a series of related regional instruments, such as the Arab Anti-Terrorism Agreement of 1998 [90] or the EU Council Framework Decision 2002/475/JHA on Combatting Terrorism[91]. Given the internationalisation of terrorist activity, it is beyond doubt that the efficiency of so many independent mechanisms and separate instruments is heavily compromised.

Last but not least, and as it is repeatedly stressed in the present thesis, human rights violations are more likely to happen without the direct guidance and supervision of the international community, when the prosecution of suspected terrorists is left solely at the discretion of individual states. Following the terrorist attacks of 11 September against the US and subsequent related terrorist activity through the attempted use of chemical and biological agents, the use of mail as well as terrorist bombings against tourist resorts, some states have taken measures to adopt legislation that either departs from human rights standards or disregards fundamental principles of international law, even the thought the vast majority of states agree that legality at all levels should be fortified. That said, it should be clarified that international or supranational intermediation has not always risen to these high standards, as is the case of the European Court of Human Rights, whose jurisprudence has evinced the enjoyment of a margin of discretion which member states may utilise

[87] S/RES/1373 (2001), available at http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20%282001%29.pdf, last accessed on 20-08-2014

[88] Inter – American Committee against Terrorism (CICTE) (OAS), official website: http://www.oas.org/en/sms/cicte/default.asp, last accessed on 22-08-2014

[89] SAARC Terrorist Offences Monitoring Desk (STOMD), official website: http://saarc-sec.org/areaofcooperation/detail.php?activity_id=24, last accessed on 20-08-2014

[90] Arab Anti-Terrorism Agreement of 1998, available at https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf, last accessed on 20-08-2014

[91] EU Council Framework Decision 2002/475/JHA on Combatting Terrorism, available at: http://www.refworld.org/docid/3f5342994.html, last accessed on 20-08-2014

in order to determine a state of emergency, [92] but merely that it would be far more easy to ameliorate these derogations at an international rather than the national level.

2.2 The fragmentation of the Current Legal and Institutional Framework

In theory suppression conventions seem like a logical and ideal solution to the global problem as they create a consensus on how the issue needs to be addressed. Reality however does not meet such expectations. According to some commentators, the weakest elements of the treaties are their enforcement mechanisms. [93] Some treaties provide for reporting mechanisms to independent technical agencies, while others favour the supervision by a conference of states. Nonetheless, under the rubric of the indirect enforcement system, these mechanisms prove, to say the least, inadequate. Moreover, as we shall see in the following chapter, the modalities employed pursuant to the relative provisions of suppression treaties are also the cause of numerous problems originating from the absence of a unified procedural framework.

Apart from the provisions that oblige state-parties to criminalise the described conduct through their respective domestic laws and the clauses regulating the inter-state co-operation for the suppression of transnational crimes, the provisions concerning jurisdiction over such crimes are also noteworthy for the purposes of the present thesis, as they reveal both the flaws of the fragmented application of TCL and contemporaneously they reinforce the notion that transnational crimes - or at least a selection of them - are considered punishable by any state.

To begin with, it is clear that every form of jurisdiction, except for universal, requires a jurisdictional link to the crime. Interestingly, almost every convention prescribes the compulsory jurisdiction of the territorial state. [94] The voluntary jurisdictional principles that are capable of extending the jurisdictional link vary form

[92] See for example Ireland v UK (1978), 5310/71 [1978] ECHR 1, available at http://www.bailii.org/eu/cases/ECHR/1978/1.html, last accessed on 20-08-2014. Although UK interrogation techniques violated the European Convention for the Protection of Human Rights, Art. 3, the court held that due to the wave of terrorist attacks prevalent in 1972, the UK could validly decide that its legislation was insufficient under the European Convention, Art. 15

[93] Cassese Antonio (Ge. Ed), The Oxford Companion to International Criminal Justice, Oxford University Press, 2009 p. 542

[94] Boister, 2012, supra note 23, p. 138-139

the active [95] or passive[96] nationality of the perpetrator and the victim, the place of planning and execution of the crime and the impact of the crime in accordance to the protective principle, [97] to the principle '*aut dedere aut judicare'* [98] (subsidiary universality or the principle of representation). Originally the jurisdiction of the apprehending state depended on a denied extradition request by the state with a jurisdictional link to the crime, but nowadays the suppression conventions that follow the Hague Model[99] do not require an extradition request and oblige the apprehending state to prosecute in any case if non-extradition, indicating there is a broad consensus for the necessity to prosecute those crimes in any forum available.

The various jurisdictional principles of the suppression conventions do not stand in a hierarchical order. Concurrent jurisdiction is therefore likely. In order to overcome this issue, a normative hierarchy may be inferred, taking into account the legal recognition and strength of the different jurisdictional bases. It has been suggested for instance that 'territorial jurisdiction, being an expression of state sovereignty and given its compulsory character in the suppression conventions prevails over other jurisdictional principles.'[100] Nevertheless, the problem remains in the absence of an agreed evaluation in regards to the remaining jurisdictional bases, which are not as easily classified as the jurisdiction of the territorial state.

Most importantly, because these agreements require that these crimes be prosecuted under domestic law, detailed descriptions of the material and mental elements of the offenses do not exist, even if states adopt the exact wording of these conventions.[101] This inevitable fragmentation of TCs' substantive aspects inflates if

[95] E.g. Article 42 (2) (b), of the United Nations Convention against Corruption, A/RES/58/4 (2003), available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, last accessed on 07-07-2014 and Article 15 (2) (b) of the CATOC, A/55/25 (2000), available at https://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf , last accessed on 07-07-2014

[96] E.g. Article 5 (1) (d) of the International Convention against the Taking of Hostages, A/RES/146[1] (1979), available at http://www.un.org/en/sc/ctc/docs/conventions/Conv5.pdf, last accessed on 07-07-2014 or Article 15 (2) (a) of CATOC, supra note 31.

[97] E.g. Article 4 (1) (b) (ii) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. The Protective principle is a rule of international law that allows a sovereign state to assert jurisdiction over a person whose conduct outside its boundaries threatens the states security or interferes with the operation of its government functions

[98] e.g. Article 4, 6 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, available at https://www.unodc.org/pdf/convention_1988_en.pdf , last accessed on 07-07-2014

[99] Ambos Kai, Treatise on International Criminal Law: Volume II: The Crimes and Sentencing, Oxford University Press, 2014, p. 225

[100] Boister, 2012 pp 152-153 with case law references at 248-249

[101] Cryer Robert et al, 2010, supra note 17, p. 336

we take into account the diversification of definitional provisions in various international instruments in relation to their respective crimes, as the foregoing analysis of transnational organised crime, illicit drug trafficking and terrorism illustrated. A more optimistic approach would suggest that as a substantive normative complementarity between international and national legal norms exists, in time these norms are bound to become initially harmonized and then integrated. Since the different components of ICL are functionally interrelated, progress in any one area brings about overall progress.[102] Even if, for the sake of argument we were to accept such a position, it is still imperative for the international community to address in the meantime the existing issues deriving from the suppression treaties regime.

Chapter 3

Modalities of the Indirect Enforcement System

3.1 The Modalities of the Indirect Enforcement System

There are eight modalities states usually employ within the frame of the indirect enforcement system, i.e. extradition, mutual legal assistance, execution of foreign penal sentences, recognition of foreign penal judgements, transfer of criminal proceedings, freezing and seizing of assets deriving from criminal conduct, intelligence and law-enforcement information-sharing and the creation of regional and sub-regional judicial spaces. These modalities are identical to the methods of the 'inter-state cooperation in penal matters', where the sources of the obligations may be treaties and national laws but the subject – matter is domestic crimes.

They are also common in the direct enforcement system.[103] Still, each system casts its own light which reflects dramatically on the way these modalities are applied and on the results they produce. The difference lies in the indirect system's reliance on the national legal orders. The impact of this modus operandi, that necessitates the intermediation of the concerned states, is quite multifaceted. It primarily manifests in the unequivocal fragmentation of the substantive and procedural aspects of the

[102] This line of thought is articulated by Bassiouni in Bassiouni, 2013, supra note 10, p. 35
[103] Id. p. 487

modalities, which compromises their application due to the substantial differences between the respective national legal orders, leaving numerous loopholes in their path. This in turn victimises the effectiveness of the indirect system, allowing forum shopping, sustenance of crime 'safe harbours', ranging from money laundering heavens to shadowy "sovereign-free" areas[104] and at the same time, in a peculiar twist, it also compromises 'due process'[105] and the rights of the accused.

(i) Extradition

Extradition is the world's oldest modality of international cooperation in penal matters. The first recorded treaty dealing with extradition dates back to 1268 B.C. In a peace treaty between Ramses II, Pharaoh of Egypt and Hatussilli, Prince of Hittites, the parties solemnly promised to surrender to one another their nationals who were fugitives.[106] Since then, extradition has been the subject of numerous bilateral treaties, specialised regional instruments, while it has also been included as a provision in the majority of the multilateral suppression treaties we referred to above. The national legislation of many states contains provisions on extradition but it is estimated that half of the world's countries do not have such legislation.[107]

Regional intergovernmental organizations have promoted multilateral treaties to enhance extradition and harmonize state practices. Among them, the Council of Europe has concluded the European Convention on Extradition of 12th December 1957[108], the Organization of American States (O.A.S.) amended the Inter-American Extradition Convention, concluded in Montevideo on January 23, 1889[109] and the League of Arab States reached the Arab League Extradition Agreement in September 1951[110] and the Agreement on Extradition and Judicial Cooperation, also referred to

[104] Godson Roy and Williams Phil, Strengthening Cooperation Against Transnational Crime, Survival 40, no. 3 ,1998, pp 66-88.
[105] Zimmermann Frank, Glaser Sanja, Motz Andreas, Mutual Recognition and its Implications for the Gathering of Evidence in Criminal proceedings: a Critical Analysis of the Initiative for a European Investigation Order, European Criminal Law Review, p. 56, Vol. 1, No 1, 2011 , p. 71
[106] Bassiouni M. Cherif, International Extradition and World Public Order, Sitjhoff-Ocean Publications, 1974, p. 32-33
[107] Bassiouni M. Cherif, 2 International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms, Martinus Nijhoff Publishers, 2008,[Hereinafter Bassiouni, 2, 2008] p. 5
[108] The full text of the Convention with its Additional Protocols as well as an Explanatory Report is available at : http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm , last accessed on 21-09-2014
[109] The full text of the Convention along with its Preamble is available at: http://www.oas.org/juridico/english/treaties/b-47.html , last accessed on 21-09-2014
[110] League of Arab States, Collection of Treaties and Agreements, 1978, p. 95

as the Riyadh Agreement, ratified by 16 Arab States, in 1983[111]. The European Union has developed a European judicial space; an idea proposed by France in the Council of Europe in the late 1970s but which was not followed through. According to the European approach, a duly authorised prosecutorial or judicial authority, issues a European Arrest Warrant which is to be executed in any European Country without the need for going through extradition procedures.[112]

It is noteworthy that, in spite of the extensive practice[113] states seem to favor in concluding treaties on extradition, there is no multilateral convention on the matter under the auspices of the UN, with the exception of a model bilateral treaty.[114]The motive instigating this bilateral treaty practice, which at first glance seems rather irrational, considering its lengthy, cumbersome and costly character, compared to the more efficient approach of multilateral treaties, is none other than the opportunity it provides to tailor each treaty to the political relations and interests of the contracting states.

Both treaties and national legislation contain similar requirements, as well as grounds for the denial of extradition. For start, the principle of 'double or dual criminality', which has risen to customary law, whereby the crime charged in the requesting state must also be found in the criminal law of the requested state. With respect to double criminality, some states require that the crime be identical in the two legal systems, while others require only that the underlying facts give rise to a criminal charge in the requested state's legal system. Apart from this implication, which further contributes to the fragmented application of extradition, there is a series of other issues that arise in relation to the dual criminality principle. [115] Another

[111] The full text of the Riyadh Agreement is available at http://www.refworld.org/docid/3ae6b38d8.html , last accessed on 21-09-2014

[112] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA), available at : http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002F0584&from=EN , last accessed on 21-09-2014

[113] The number of estimated bilateral extradition treaties is over 1.000. The U.S. alone has treaties with over 110 states. On this matter, see Bassiouni, International Extradition and World Public Order, supra note 106, p.985 et seq.; Kavass Igor & Sprudzs Adolf (eds.), Extradition Laws and Treaties, Hein, 2001

[114] See UN Model Treaty on Extradition, U.N. Doc. A/Res/45/116 (1990), available at http://www.un.org/documents/ga/res/45/a45r116.htm , last accessed on 21-09-2014

[115] For a comprehensive review on the matter see Hafen O. Jonathan, International Extradition: Issues Arising under the Dual Criminality Requirement, Brigham Young University Law Review, Vol. 1992, Issue 1, Article 4, p. 191, available at http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1739&context=lawreview&sei-redir=1&referer=http%3A%2F%2Fscholar.google.gr%2Fscholar_url%3Fhl%3Del%26q%3Dhttp%3A%2F%2Fdigitalcommons.law.byu.edu%2Fcgi%2Fviewcontent.cgi%253Farticle%253D1739%2526context%253Dlawreview%26sa%3DX%26scisig%3DAAGBfm2O-plbnQQ5Vr_qUatQb8G_I89h3Q%26oi%3Dscholarr%26ei%3DhKceVKDjN6n9ygPsn4G4Aw%26ved%3D0CB4QgAM

requirement is the principle of speciality,[116] whereby the requesting state can only prosecute the surrender person for the crime for which the extradition was granted. Some states allow the surrendered person to raise the issue *sua sponte* if the requested state deviates in its prosecution from the charges for which the person was surrendered, while others provide only for an inter-state procedure with the submission of an official protest with the requiring state.

In Bassiouni's opinion, these divergences reflect the two perspectives of extradition. In his words, 'One view is that it is a contract between the states and that individuals are merely the objects of the proceedings. The other view is that individuals are the subjects of the proceedings and the contractual undertakings of the states include stipulations in favour of the individual who is the beneficiary of certain rights he may himself claim.[117]

The most significant and likely hurdles to extradition are the grounds on which denial of extradition may be based, often referred to as exclusions, exceptions and defences. They include the exclusion of nationals, non-extradition of persons charged with political offences or sought for political purposes, non-extradition when certain penalties are likely to be inflicted such as the death penalty and physical punishment or treatment amounting to torture and denial of extradition when double jeopardy exists or when statutes of limitations apply. Non – extradition of nationals is probably the most significant of these exclusions and it is contained in many state constitutions. Nevertheless in any case of suspicion of unfair treatment the requested state can always require assurances from the requesting state to insure a fair trial, including the excessive long periods of detention. Still, in reality, states are unlikely to make use of these rights.

Even though it is possible to find ways around these exceptions, they nonetheless hinder the extradition process. The same applies to certain exceptions such as the political offence exception, although, some authors maintain that 'state practice in the last two decades has significantly reduced its application due to

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oADAA#search=%22http%3A%2F%2Fdigitalcommons.law.byu.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1739%26context%3Dlawreview%22 , last accessed on 21-09-2014

[116] Bassiouni, International Extradition and World Public Order, supra note 106, p. 551-568

[117] Bassiouni,2013, supra note 10, p. 501

specific treaty obligations on the prevention and suppression of terrorism and to the jurisprudential narrowing of the exception in most legal systems.[118]

As opposed to the maxim's aut dedere aut judicare more absolute character in relation to the international crimes, the obligation to extradite an offender in the ambit of transnational criminal law, is according to the foregoing analysis, subject to series of restraints, even if there is a statutory obligation that requires the state to extradite the person or persons charged, which may not always be the case as the spread of 'non-extradition heavens' illustrates. As far as the latter are concerned, they not only provide serious and potentially dangerous offenders with the means to evade criminal law's punitive arm, but may also, in a peculiar twist, result in the violation of their rights, as many states resort in immigration techniques and even kidnapping as a way of obtaining custody over persons of particular interest.

(ii) Mutual Legal Assistance in Penal Matters

Mutual Assistance in Penal Matters is a relatively new practice among states, developed primarily since the 1960s. Its origins can be traced back in an almost century old practice known as 'Letters Rogatory'. This earlier practice, in which the judicial and prosecutorial authorities still resort to when it comes to civil matters, was based on comity as there was no legal obligation for the requested state to accept the request or act pursuant thereto.[119] As of the 1960s the practice of states, within Europe, Latin America, the United States and Canada, shifted to bilateral mutual legal assistance treaties (MLATs). The Council of Europe adopted the European Convention on Mutual Assistance in Criminal Matters on 6th December 1962,[120] while OAS and the League of Arab states also promoted their respective regional MLATs. On 29 May 2000, the European Council adopted the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [121] to provide mutual assistance in a fast and efficient manner compatible with the basic principles of the Member States' national laws.

[118] Bassiouni, 2, 2008, supra note 107, p 6
[119] Bassiouni 2013, supra note 10, p. 504
[120] The full text of the Convention, the list of declarations, reservations and other communications as well as an explanatory report is available at: http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=030&CM=8&DF=21/09/2014&CL=ENG, last accessed on 21-09-2014. The Convention was thereafter amended by an additional protocol in 1978 (ETS No. 99, entered into force on 12 April 1982)
[121] OJ 2000 C 197/1; entered into force on 23 August 2005

The forms of legal assistance vary widely, ranging from taking of witness testimony and securing tangible evidence to conducting criminal investigations. The second part of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union deals with specific forms of mutual assistance, like the restitution of articles obtained by criminal means to their rightful owner (art. 8), the temporary transfer of persons held in custody for purpose of investigation (art. 9) and the hearing of witnesses or experts by videoconference (art. 10) or telephone conference (art. 11). Detailed provisions for the interception of telecommunications can be found in arts 17-22.

MLATs, like extradition treaties, have requirements, exclusions, exceptions and defences. MLAT procedures also vary considerably in civilistic and common law states. In the context of the European Convention for instance, the Parties were allowed, to let the execution of letters rogatory for search and seizure depend on different preconditions, such that the offence is punishable under the law of both States (requirement of double criminality), that the offence is an extraditable one in the requested State or that the execution of the letters rogatory is consistent with the law of the requested Party (art. 5). Furthermore, assistance could be refused for many other reasons that were mainly based on political considerations – for instance if the request concerned a behaviour that the requested Party considered a military, political or fiscal offence, or if the requested Party considered the execution of the request likely to prejudice its sovereignty, security, *ordre public* or other essential interests (art. 2).

Generally speaking, the principle of mutual recognition tends to combine different systems of criminal procedure because the required measure is ordered according to the law of the issuing Member State and executed under the law of another one[122]. Due to the variety of procedural rules, such a 'patchwork system' can weaken the suspect's position considerably: if the production of evidence in the pre-trial stage is not subject to strict control in the executing State, the latter's procedural concept may nevertheless be well-balanced and fair if it guarantees essential defence

[122] Zimmermann et al, 2011, supra note 105 at 71

rights in the trial stage.[123] By contrast, the legal conditions for obtaining evidence in the issuing State may be much lower in the trial stage than in the pre-trial stage. If evidence gathered according to the rules of the executing State was introduced in a trial in the issuing State, procedural safeguards during the pre-trial stage, concerning for instance the participation of the defence during the hearing of a witness, would be bypassed.[124] In such a case, there are basically two possibilities; either the piece of evidence gathered in the executing State is declared inadmissible –or it is admitted – then the suspect would lose essential guarantees in the pre-trial phase.

The entire spectrum of these arbitrary actions that simultaneously threaten the integrity of the criminal procedure and the defendant's rights is because MLATs use as frame of reference states, thus depriving the individuals of the right to benefit from them. Likewise, governments can make exclusive use of the evidence they exchange between them and, subject to their respective laws, they can deny access by the interested individuals to evidence that they have received from foreign governments, including exculpatory evidence. On the other hand, these kinds of arbitrary interpretations, taking into account the highly personalised nature of criminal procedures, are less likely to happen under the auspices of the direct enforcement system, which is bound in a more straightforward manner to the international legality standards.

(iii) Execution of Foreign Sentences

It has been suggested that the purpose of this modality is 'to enhance the re-socialization of foreign – sentenced persons by returning them to their countries of origin and that it also has a humanitarian goal in that it brings sentenced persons physically closer to family in their respective countries.'[125] Irrespective of whether the execution of foreign sentences also serves these noble and somewhat romantic goals, the main reason this modality prevailed was the eruption of foreign population growth, during the 1950s-1970s, due to the large immigration flows that swept through Europe at the time. This lead to the conclusion of the European Convention on

[123] Gleß S., Mutual Recognition, Judicial Inquiries, Due Process and Fundamental Rights, in Vervaele J. [ed.], European Evidence Warrant, Antwerp, 2006, pp. 121 et seq., at p. 124 calling this a 'specific balance in national legal systems'.
[124] Satzger H., The Future of European Criminal Law between Harmonisation, Mutual Recognition and Alternative Solutions, 1 Journal of European Criminal Law 2006, pp. 27 et seq., at p. 36
[125] Bassiouni, 2013, supra note 10, p. 507

Transfer of Sentenced Persons of 1983 [126] , an example soon followed by counties all around the world, as it was felt that the return of the sentenced persons was beneficial to all parties concerned.

Execution of foreign sentences presents us with a legal peculiarity, the paradox being that it presupposes the recognition of foreign penal judgements on behalf of the executing state, while the latter has only scantly been accepted. The legal structure that has been developed in order to avoid this hurdle, i.e. the development of a theory that the execution of foreign sentences is not the enforcement of foreign penal judgements, but the administrative execution of their consequences[127], does not seem to rest on solid foundations. At the same time, the desperate need for legal justification, though theoretical legal structures that readily collapse, in addition to the circumvention of the individual's rights that occurs mainly due to the common practice of some states to bargain for the cooperation of the sentenced person in exchange for transfer from a foreign country but also due to the substantially differentiated detention conditions in the correctional facilities worldwide[128], would largely be avoided if a direct enforcement system was to apply.

(iv) Recognition of Foreign Penal Judgements

The modality of recognition of foreign penal judgments challenges traditional concepts of sovereignty, which, among other sensitive domains, manifest in the exercise of a state's criminal jurisdiction. At present, only a European Convention exists on the matter, namely the European Convention on the Validity of Criminal Judgements of 28 May 1970 [129], ratified by 22 countries. Nonetheless, in the age of globalization, when states –and crime- are becoming increasingly inter-linked, the widespread employment of the remaining modalities of the indirect enforcement system, bereaves the meaning of such a rigid position, as in one way or another they

[126] The full text of the Convention, the list of declarations, reservations and other communications as well as an explanatory report is available at: http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=112&CM=8&DF=21/09/2014&CL=ENG , last accessed on 21-09-2014

[127] See for instance Bassiouni, 2013, supra note 10, p. 507, where the author maintains that 'This reasoning which is based on a valid legal fiction, separates the execution of the sentence from the recognition of the penal judgement which gave rise to the sentence. '

[128] Bassiouni, 2, 2008, supra note 107, p 11

[129] The full text of the Convention ,the list of declarations, reservations and other communications as well as an explanatory report is available at: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&CM=1&NT=070 , last accessed on 21-09-2014

imply the recognition of a foreign penal judgement. For example, states concede extradition and freezing of assets on the basis of a foreign penal decision.[130]

As is the case with the other modalities employed in the indirect enforcement system, the recognition of foreign penal judgements operates like a double-edged sword. On the one hand, it can favor the accused as the *ne bis in idem* principle may come to effect. On the other hand, an automatic execution of judicial decisions issued in another State can be problematic, due to differences between national provisions of substantive criminal law.[131] Bassiouni, in his work, recommends in regards to such potential problems, the adoption by the states of 'a more discerning position, by recognising the judgements of other states where due process of law exists and where the crime satisfies the requirement of double criminality'.[132]

(v)Transfer of Criminal Proceedings

This is a procedure whereby one state transfers criminal proceedings to another state on the basis that the transferee state has more significant contacts with the parties, and is therefore *forum conveniens*. It should be noted that the rationale for transfer of criminal proceedings is different from that of aut dedere aut judicare, which requires a state refusing to extradite to assume the obligation to prosecute.[133]

(vi) Freezing and Seizing of Assets

The request by one state of another to assist it in the tracing, freezing and seizing of assets is no different than other forms of obtaining evidence of criminal activities.[134] Nevertheless, it differs from being limited to purely legal assistance because the confiscation of assets is in the nature of a criminal sanction, even if it is not always legislatively identified as such.[135]

It was not until the 1980s that international efforts were developed to trace, freeze and seize assets, deriving from or used in connection with criminal activity, as a way of combating, primarily, the laundering of funds derived from drug

[130] The same train of thought is followed by Bassiouni in Bassiouni, 2013, supra note 10, p. 509.
[131] Zimmermann et al, 2011 , supra note 105, p.62 et seq.
[132] Bassiouni, 2013, supra note 10, p. 509
[133] Bassiouni, 2, 2008, supra note 107, p 12
[134] Zagaris Bruce, Developments in International Judicial Assistance and Related Matters, 18 Denver Journal of International Law and Policy, 1990, 339.
[135] Bassiouni, 2, 2008, p 13

trafficking,[136] an endeavour that still meets strong opposition, as for some countries with limited resources or underdeveloped infrastructures these funds remain the sole means of financing their economies. As a result, the United Nations adopted in 1988 the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[137], which contained such provisions. Then, in 1991, the Council of Europe adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[138] Unlike the 1988 UN Convention which focuses on drug trafficking as the predicate offense, the Council of Europe's Convention considers any crime as the predicate offense.

In the context of the European Union, the first instrument that implemented the principle of mutual recognition in the field of obtaining evidence was the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution of orders freezing property or evidence.[139] It addresses the need for immediate mutual recognition of orders intended to prevent the destruction, transformation, moving, transfer or disposal of evidence. To this end, it allows Member States to issue 'freezing orders' to secure evidence or facilitate the subsequent confiscation of property, pursuant to Article 3 of the Decision. If the freezing order is transmitted correctly, as provided by Art. 4, the judicial authority of the executing State is obliged to execute it *without any formality and legal scrutiny* (art. 5). A provision of particular relevance is Article 3(2), which abolishes the requirement of double criminality for a catalogue of 32 roughly defined categories of offences such as 'terrorism', 'sabotage', or 'computer-related crime'. As a consequence, Member States cannot deny requests on the ground that the offence for which assistance is sought is not punishable under their national law as long as it falls within one of the categories contained in this so called 'positive list'.[140]

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[136] Bruce Zagaris & Papavizass Constantine, Using the Organization of American States to Control International Narcotics Trafficking and Money – Laundering, Revue Internationale de Droit Pénal, 57(1/2), 1986, pp119-132; Bassiouni M. Cherif, Critical Reflections on International and National Control of Drugs, 18 Denver Journal of International Law and Policy 11, 1990

[137] UN Drug Control Conventions, supra note 60

[138] The Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime is available at http://conventions.coe.int/Treaty/en/Treaties/Html/198.htm, last accessed on 21-09-2014;See also Hans G. Nilsson, The Council of Europe Laundering Convention: a Recent Example of a Developing International Criminal law, Criminal Law Forum, Vol 2, No 3, p. 419 et seq., 1991

[139] The full text of the decision is available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003F0577 , last accessed on 21-09-2014

[140] Klip A., European Criminal Law, Antwerp, 2009, pp. 344 at p. 353: The vagueness of these categories could invite Member States to abuse the 'positive lists'.

In overall, although admittedly far from perfect, the Decision is characterised by a high level of sophistication and, with the exception of the vague wording of Article 3 (2), provides for sufficient safeguards for the rights and interests of all parties concerned. Likewise, Article 7(1) (b) allows the executing State not to recognise and execute a freezing order, if there is an immunity or privilege under the law of the executing state that makes it impossible to execute the freezing order, or if it is instantly clear that rendering judicial assistance would infringe the '*ne bis in idem'* principle [Article 7(1) (c)]. The executing state can postpone the execution if it might damage an ongoing criminal investigation or if the evidence concerned has already been subjected to a freezing order in criminal proceedings [Art. 8(1)(a) and (b)]. It should be noted however that this kind of elaboration does not appear in the majority of the relevant international instruments, as it implies a level of coherence and integration which by definition is opposed to the core elements of the indirect enforcement system.

Moreover, the effectiveness of this modality is essentially hampered by the duality of its nature which is in part administrative and in part penal. The scheme of the aforementioned multilateral conventions is based on the existence of a predicate criminal offence, thereby making the confiscation an additional sanction to other criminal sanctions for the crime from which the proceeds are derived, whereby the seizure can be deemed only an investigatory or precautionary measure since it is of a temporary nature.[141] In addition to this, it presents the opportunity for abuse by law enforcement and prosecutorial officials, in cases when the freezing of assets is used as a pressure tactic. The situation deteriorates when the freezing of assets is forced upon third parties, often reversing the fundamental presumption of innocence and placing the burden to prove that the assets claimed are free from the taint of illegality on the not- even- accused party.

(vii) Intelligence and Law Enforcement Information – Sharing

Since the 1960s, the rise of terrorism, in Europe and Latin America combined with the worldwide increase in drug trafficking and money-laundering[142] gave new

[141] See the United States, President's Commission on Organized Crime, Interim Report to the President and the Attorney General, the Cash Connection: Organized crime, financial Institutions and Money – laundering e7 (1984)
[142] Leroy Bernard, Bassiouni M. Cherif and Thony Jean-François, The International Drug Control System, Chapter 7.1, in Bassiouni M. Cherif (ed.), International Criminal Law, Volume 1 Sources, Subjects and Contents, 3rd Edition, Martinus Nijhoff Publishers (Brill Publishers), [Hereinafter, Bassiouni,1,2008]2008

impetus to intelligence and law enforcement information sharing. Nevertheless, it is practised selectively between states having close political ties and also between agencies from these states that have confidence in their respective reliability for confidentiality.

Although an important form of international cooperation, it has not been recognized as an equivalent to the other forms of legal cooperation in penal matters and for that reason has not been included in MLATs. Consequently, there are no legal or judicial safeguards in this de facto modality to insure effective and regulated modalities of information-gathering and information-sharing between intelligence, law enforcement and prosecutorial agencies, which affects the accuracy of information and can lead to undue invasion of privacy.

It is beyond doubt that the eruption in manifestations of transnational organised crimes, necessitates an increase in the flow of information, but this does not imply that it could happen in a legal vacuum. On the contrary, it calls for the development of initiatives toward the adoption of a consistent legal framework along with the possible modification of the Charters of Organizations like Interpol[143] or Europol[144], in order to grant them with a more proactive role. Moreover, since we operate within the indirect enforcement system, where the presence of a higher judicial authority in a parallel way of what may be in the context of the direct enforcement system, is absent and we rely on the intermediation of individual states, a level of self-containment is also required. Some countries like the US have legislation such as the Freedom of Information Act[145] to protect against errors and presumably against abuses but only when committed by us governmental agencies.

The problem however as stated above is the absence of legal regulation. The courts in many countries take the position that in the absence of specific legislation, such extraterritorial activities are beyond the reach of domestic law. This argument goes even beyond that proposition and allows conduct deemed unconstitutional or illegal domestically to ripen into lawful conduct only because it took place in another

[143] For the role of Interpol in combatting transnational crime see Harold E. Smith, Transnational crime: investigative responses, Office of International Criminal Justice, University of Illinois at Chicago, 1989

[144] For more information on the work of Interpol, visit https://www.europol.europa.eu/ , last accessed on 21-09-2014

[145] For general information on FOIA, visit the United Stated Department of Justice webpage on the matter, available at: http://www.foia.gov/ , last accessed on 21-09-2014

country. Thus, when national agents kidnap a person abroad, national courts allow such a person to be tried on the supposition that *mala captus* is nonetheless *bene detentus.* Similarly, evidence seized abroad, either in the nature of coerced confessions or illegally obtained tangible evidence which would not have been allowed into evidence had it been seized domestically is allowed into evidence,[146] the assumption being that national laws, including the constitution, do not extend nor apply extra territorially.[147] In some cases, courts have recognized that applicability of the national constitutional and national laws extraterritorially if both the agent and the persons in question are nationals of the same state before whose courts the evidence is sought to be introduced.[148]

On the other side of Atlantic, the European Court of Human Rights has ruled in several cases against extraterritorial activities by national law enforcement agents, as constituting violations [149] of the European Convention on Human Rights and Fundamental Freedoms, but, it has been noted,[150] since the European Court can only provide monetary awards and not restore the status quo ante, these decisions, have had a more limited deterring effect. Nevertheless, within the European context, there is a much higher level of voluntary compliance by states with judicial decisions than in other regions of the world.

(viii) Regional and Sub-Regional Judicial Spaces

Some regions and sub-regions of the world have cultural, legal, political and economic ties. On that basis, they have established regional organization and sub-regional cooperative arrangements. Among them are: The council of Europe, the European Union, the Organization of American States, the League of Arab States, the

[146] Saltzburg A Stephen, The Reach of the Bill of Rights Beyond the Terrra Firma of the United States, 20 Virginia Journal of International Law, 1980, p741 ; Caplan M. Steven., The applicability of the exclusionary Rule in Federal Court to Evidence seized and confessions obtained on foreign countries, 16 Columbia Journal of Transnational Law, 1977,p. 495 ; Kolb C. M. Charles, the Fourth Amendment Abroad: Civilian and Military Perspectives, 17 Virginia Journal of International Law, 1977, p.. 515

[147] The United States Supreme Court upheld the position that the Fourth Amendment does not apply to United States agents who are searching and /or seizing properties owned by a non U.S. Citizen which is located outside the United States, United States v Verdugo – Urquidez. 494 U.S. 259 (1990), available at https://supreme.justia.com/cases/federal/us/494/259/case.html, last accessed on 21-09-2014.

[148] The Supreme Court in Reid v. Covert, 354 U.S. 1 (1957), for a commentary visit http://www.constitution.org/ussc/354-001jr.htm, last accessed on 21-09-2014

[149] See Robertson H. Arthur, Human Rights in Europe (1978). See also Bozano v. France, Eur. Ct. H.R. 5/1985/91/138 (18 Dec. 1986); Amekrane v. United Kingdom, 16 Y.B. Eur. Ct. H.R. 356 (1973)

[150] Bassiouni M. Cherif, 2, 2008, p.24

organization of African Unity, the Commonwealth Secretariat, the Baltic states, the Benelux countries, the Andean countries and others.

In addition, there are many regional, inter-regional and sub-regional organizations and agreements regulating different aspects of international cooperation for these countries. Most of them deal with economic and social matters, but the relatively recent post –conflict justice initiatives in various contexts brought some of these and other inter-governmental organizations in the field of criminal justice, including international criminal justice. The OSCE for instance, which originated for the purposes of pressuring communist states in becoming more liberal, reinforcing democracy and strengthening human rights and has developed into an organization which engages in support of democracy, human rights and peace keeping operations in Europe, while its War Crimes Justice Programme has successfully transferred knowledge on war crimes cases from the ICTY to the region and supported the consolidation of the capacity of national jurisdictions handling the war crimes caseload.[151]

Undisputedly, the most successful attempt of creating a judicial space is the experiment of the European Union, which was to a great extend reinforced by the European Arrest Warrant. The accomplishment of such a comprehensive and effective, though arguably not entirely free of deficits, space could serve both as an example of the positive outcome of integrating criminal procedures and as a locomotive for the creation of a universal judicial space.

3.2 Assessing the Indirect Enforcement System

We cannot claim that the current system in not, at least to a certain extent, workable nor that is has not produced any positive results. However it is ridden by its inherent systemic flaws. While the suppression treaties on transnational organised crime, migrant smuggling, trafficking in persons, arms smuggling etc. have created a system for Signatories to deal with alleged perpetrators by either prosecuting or extraditing them, and have established a basic framework for mutual legal assistance and judicial cooperation, perhaps the greatest failure of the existing regime is that it leaves enforcement, prosecution, and punishment of the offences to individual nations.

[151] For a comprehensive review on this initiative visit OSCE, The War Crimes Justice Project, available at http://wcjp.unicri.it/press_material/factsheet/docs/WCJP%20factsheet%20ENG.pdf, last visited on 21-09-2014

Likewise, the indirect enforcement system leaves too many loopholes for criminals, it allows for too many concessions which can be made by state-parties , and it has in many instances failed to bring the principal organisers of global criminal operations to justice. It has also failed to establish mechanisms that ensure that suspected offenders are properly charged, investigated, prosecuted, and punished fairly and adequately.[152] This is most convincingly demonstrated in the drug industry which is booming in countries such as Afghanistan and Myanmar, or the money laundering that is occurring in many South Pacific and Caribbean nations. The opportunities offered by globalisation have enabled sophisticated criminal organisations to take advantage of the discrepancies in different legal systems and the non-cooperative attitude expressed by many nations.

It is for this reason that several academics preach the harmonization of national legislations so as to produce new synergies that enhance complementarity. At the same time, it has been suggested that a new approach, in which all modalities of international cooperation, which are now applied in a piecemeal fashion, will be integrated into a unified system, is needed, as, in the advocates' point of view, "in [such] an integrated comprehensive system of cooperation, more options will be available to enhance the success of the process." [153] In the same vein, there is a strong argument to centralise powers to investigate, prosecute and punish transnational organised crime in an international agency which complements the activities of national authorities and is activated when those agencies are unable, incapable, or unwilling to intervene.[154]

But before diving into such complicated enterprises as the harmonization of occasionally diametrically opposed legal positions, national legislations and legal philosophies or attempting to establish brand-new institutions and agencies, it may be far more prudent to incorporate transnational crimes into existing norms and institutions. Simplicity is the ultimate sophistication as Leonardo Da Vinci noted six

[152] On the principle aut dedere aut judicare, generally see M. Cherif Bassiouni & Edward M Wise, Aut dedere aut judicare : The Duty to Prosecute or Extradite in International Law. On extradition for drug trafficking see Patel Faiza, "Crime without Frontiers: A Proposal for an International Narcotics Court" (1989-90) 22 NYU Journal Int'l Law & Politics 709 at 719-723.

[153] Bassiouni, 2013, supra note 10, p. 30

[154] Schloenhardt Andreas, Transnational Organized Crime and the International Criminal Court, Towards Global Criminal Justice, The University of Queensland , Speaking notes, Crime in Australia, Australian Institute of Criminology Conference, Melbourne, 19-30 Nov 2004 , published in Vol 24 No 1 University of Queensland Law Journal, p. 3

centuries ago, especially when, as we shall see in the following chapters, there is a strong legitimization basis to support it.

Part 2

Unification #Trends

'Isolated material particles are abstractions'
- Bohr Niels, Atomic Physics and the Description of Nature, 1934-

A. The Doctrinal Framework for an Integrationist's Rhetoric

Chapter 4
A Holistic Approach to International Criminal Law

The term "holism" was coined in 1926 by Jan Smuts, a South African statesman, in his book 'Holism and Evolution', where he defined holism as the "tendency in nature to form wholes that are greater than the sum of the parts through creative evolution[155]. Social scientist and physician Nicholas A. Christakis explains[156] that "for the last few centuries, the Cartesian project in science has been to break matter down into ever smaller bits, in the pursuit of understanding. And this works, to some extent... but putting things back together in order to understand them is harder, and typically comes later in the development of a scientist or in the development of science."

As the legal science of International Law and the discipline of ICL, mature and evolve through the course of time, it is the author's view that transnational crimes, and ICL in general, could largely benefit from the former's recognition as *international crimes*, following an holistic approach in labelling criminal acts with international features and in the mode of their suppression. The unsystematic and incoherent way international criminal law evolved remains an undisputed truth; the content and mode of implementation of each norm reflects the immediate historical context of this period in which the norm emerged and the way in which legal recognition came about. However, 'when systematically considered this holistic approach to international crimes (core crimes, transnational crimes and other international crimes) may serve to meet the pre-assigned need for synthesizing seemingly isolated bits and pieces of International Criminal law.'[157]

In doing so, the inherent problems that arise from TCL's fragmentation and/or its fragmented application via the indirect enforcement system, could largely be avoided, as international crimes demand internationalised, i.e. universally unified, approaches. In other words, by ensuring a more prominent and direct international guidance, fragmentation of legal norms, legal uncertainty or even direct abuse of

[155] Smuts Jan, Holism and Evolution, MacMillan and Co Limited, London, 1926, p. 88
[156] Christakis, Nicholas A Shorthand abstractions and the cognitive toolkit, Edge, 2011
[157] Einarsen Terje, The Concept of Universal Crimes in International Law, Torkel Opshal Academic Epublisher, Oslo, 2012, [Hereinafter Einarsen, 2012] p 5

substantive criminal law concepts are less likely to happen than at the national level[158], while efficiency is also likely to be enhanced.

Chapter 5

Defining An International Crime

5.1 A Babel of Voices

Despite its pivotal character within the discipline of ICL, the term *'international crime'*, has proven quite controversial. Moreover, as an acute commentator points out, 'it is unclear if the status [of international crimes as such] should be regarded primarily as a legal one, a social or a philosophical one'[159]

By all means, one could maintain that different meanings of ICL and its ratione materiae crimes have their own utility for their different purposes, serving as stipulative definitions, which would imply that 'there is no necessary reason to decide upon one meaning as the right one'[160] Nevertheless, the multileveled impact of the characterization of a criminal offence as an international crime, and in our case the characterization of transnational crimes as international, as far as the subsequent legal consequences, the enforcement mechanisms and the modes of their integration within the already existing paradigms and structures of the international community are concerned, illustrate that the issue goes beyond simple lexical semantics.

ICL has undoubtedly come a long way from the first nihilistic approaches, almost 65 years ago, when George Scwarzenberger,[161] described, in the 1950s, six different meanings that have been attributed to the term, all of which related to international law, criminal law and their interrelationship but none of which referred to any existing body of international law which directly created criminal prohibitions addressed to individuals since he did not believe such a branch existed. 'An international crime, he said, in reference to the question of the status of aggression, presupposes the existence of an international criminal law. Such a branch of

[158] Einarsen 2012, supra note 157, p.316, bringing as an example the labelling of protestants as terrorists during the events of the Arab Spring.
[159] Id. p. 236
[160] Cryer et al, 2010, supra note 17 , p. 8.
[161] Scwarzenberger George, The problem of An International Criminal Law (1950) 3 Current Legal Problems, 263

international law does not exist.'[162] Today, a comprehensive review of the relevant subject matter scholarly literature will demonstrate a remarkable wide variety of different concepts in terms of the number of crimes included; ranging from 3 [core crimes] to almost 30 recognized crimes, notwithstanding the occasional choice by some authors not to include a definition in their work at all, presupposing that the definition is clear.[163] On first note, as far as the definitions that appear more restrictive by their limited enumeration of international crimes are concerned, we could readily concede that[164], no matter how much the label core international crimes seems justified, the reason why, according to these more restrictive definitions, these crimes rose to this status whereas others, such as the transnational crimes did not, remains unsettled by their introduced criteria.

But before we attempt to answer the intriguing question of what constitutes an international crime and whether transnational crimes ought to be characterised and dealt with as such, it is worth mentioning that the term international crime or its equivalent has never been specifically used in international conventions, with the exception of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[165] and the International Convention on the Suppression and Punishment of the Crime of Apartheid,[166] though at times it was proposed during drafting sessions[167]. More frequently but still very rarely drafters use the term *'crime under international law'*. In overall, an explicit recognition that a given conduct constitutes an international crime or a crime under international law can be found only in 34 /281 instruments and none of these 34 has been drafted in the last 2 decades.[168]

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[162] Schwarzenberger George, The Judgement of Nuremberg, 1947 21 Tulane Law Review 329 at 349

[163] See Sluiter G. and Zahar A., International Criminal Law: A Critical Introduction, Oxford University Press: Oxford 2008, although one can deduce from the content of their work that they only consider war crimes, crimes against humanity and genocide as international crimes.

[164] This is also pointed by Terje Einarsen in Einarsen, 2012, supra note 157, p. 149

[165] The 1948 Convention on the Prevention and Punishment of the Crime of Genocide Adopted by the United Nations General Assembly on 9 December 1948 (A/RES/260) and entered into force on 12 January 1951

[166] International Convention on the Suppression and Punishment of the Crime of Apartheid , A/RES/ 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976

[167] See for instance the Draft Convention for the Prevention and Suppression of Torture, 1984, 48 REV. INT'L DROIT PENAL 267 (1977). It stated torture is a crime under international law. However the adopted convention did not contain this text; See also Burgers J. Herman & Danelius Hans, The U.N. Convention against Torture : A Handbook on the Convention against torture and other cruel, inhuman or degrading treatment or punishment (1988); Derby Daniel, The International Prohibition of Torture in Bassiouni M. Cherif (ed.), International Criminal Law: Sources, Subjects and Contents, Martinus Nijhoff Publishers, 2008, p. 621

[168] Bassiouni 2013, supra note 10, pp. 226-227.

The hesitant character and sparing use of the term 'international crime', by the Drafters of the relevant subject matter international instruments puts some of the more formalistic and positivistic approaches to the test. Within the context of the general debate surrounding the legal theory, dominated by the dipole of legal positivism on the one hand versus the principles of natural law on the other[169], views as those asserted by Dinstein, who claims that "while international crimes typically are grave offenses that 'harm fundamental interests of the whole international community', an offense becomes an international crime only when defined as such by positive international law"[170] should be dismissed as misleading and unfit for the legal debate and/or the evolution and progressive development of legal science. In addition, by not advancing any substantive criteria to determine which crimes merit the adjective 'international', such definitions contribute to the alienation of ICL from the de facto reality and the necessities this reality dictates.

Other definitions, underpinned by the same formalistic sense, are those reserving the label of international crimes exclusively for crimes that are currently subject to the jurisdiction of international criminal courts and tribunals. In this line of thought, Edward Wise's position[171], that international crimes and international criminal law differ from transnational crimes and transnational criminal law, as international criminal law strictu sensu is the law applicable in an international criminal court having general jurisdiction to try those who commit acts which international law proscribes and which it provides should be punished, provides an illustrative example of this fallacious reasoning.

In fact, if we accept such a definition as accurate, we are unequivocally led to the conclusion that the entire spectrum of international obligations has the potential of falling within the scope of ICL, and could be legitimately criminalised should the political will arise to establish corresponding criminal tribunals for the prosecution of their breaches. Another argument that highlights the erroneous nature of such definitions which, taking into account the current ratione materiae of the already established international criminal courts, lead to the exclusion of transnational crimes,

[169] For general information on this subject, see also Hall Stephen, The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, EJIL, Vol. 12, No 3, 2001, p. 2469-307
[170] Dinstein Y., 'International Criminal Law', Israel Law Review, Vol. 20, 1985, p. 221
[171] Wise Edward Codification: Perspectives and Approaches in International Criminal Law: Crimes 283,285 in Bassiouni M. Cherif ed., International Criminal Law, Transnational Publishers, 1999

is the 1937 Terrorism Convention.[172] Regardless of the fact that the convention never came into effect, it did contain provisions for the establishment of an International Criminal Court, destined to deal with the prosecution of terrorist acts, in other words with the prosecution of a crime that traditionally and setting aside the more recent debate surrounding its potential international status, is classified under the title of transnational crimes. Last but not least, the idea of introducing what should be viewed as a consequence of the characterization of a criminal act as an international crime, namely the international jurisdiction over its prosecution, as a substantive criterion for determining its international character, via a circular mode, is at the very least problematic.

Cryer et al.[173] seem, on first reading, to operate under the same principle, stating that 'the approach taken in this book is to use 'international crime' to refer to those offences over which international courts or tribunals have been given jurisdiction under general international law. They comprise the so called core crimes.' Nevertheless, they continue to clarify that their approach 'does not differentiate the core crimes from others as a matter of principle, but inly pragmatically by reason of the fact that no other crimes are currently within the jurisdiction of international courts.' They are also aware of the fact that, since other crimes, have a basis in international law, they are also regarded by the international community as violating or threatening values protected by general international law, as the preamble to the Rome Statute of the International Criminal Court provides, thus leaving room for their future inclusion in the material jurisdiction of international fora.

H. Jescheck[174], can also be included in the category of authors who followed a formalistic way of determining whether a certain criminal offense falls in the scope of international criminal law. He advanced the following three criteria which are to be satisfied to attribute the status of international crime: 1) The criminal norm has to emanate directly from international conventional or customary law; 2) There have to be provisions allowing prosecution by international courts or third states, on the basis of universal jurisdiction; 3) The international status requires bindingness of a wide majority of states.

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[172] Convention for the Prevention and Punishment of Terrorism, supra note 75
[173] Cryer et al, 2010, supra note 17, p. 4
[174] Jescheck H., International Crimes in Rudolf Bernhardt (ed) Encyclopedia of Public International Law, Volume II (1992), 1119,1120.

Moving towards more naturalistic definitions of international crimes, Wright[175] described, in 1947, a crime against international law as "an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state". Through the insertion of the 'violation of a fundamental interest' parameter, Wright inaugurates the inclusion of one of the most debatable, abstract and yet most frequently invoked criterion for the determination of the international status of a criminal offence.

Wright's approach was verified a year later, when the Judges in the 1948 *Hostages* case characterised an international crime as "such an act universally recognized 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".[176] Both the tribunal's and Wright's standpoint imply that in order to attribute international status to any criminal act, this act must fulfil two cumulative preconditions, namely 1) to satisfy the necessary gravity threshold and 2) to present a necessity for their international prosecution.[177]

Cassese[178] defines ICL as 'a body of international rules designed both to proscribe certain categories of conduct and to make the persons who engage in such conduct criminally liable'. He then identifies four cumulative elements that all must be present in order to constitute an international crime:

(1) They consist of violations of international customary rules. This criterion, which is diametrically opposed to the preponderance in scholarly literature of conventional law as the primary source of international crimes, is propounded by the author on the grounds of the universality customary law is capable of achieving. However, it has also been the subject of fierce criticism, not only because of the

[175] Wrigth Quincy, The Law of The Nuremberg Trial, The American Journal of International Law, Vol 41, No 1 , 1997, p. 38-72

[176] US Military Tribunal Nuremberg, Judgment of 19 February 1948, in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume X1/2 , P. 1241, available at http://werle.rewi.hu-berlin.de/Hostage%20Case090901mit%20deckblatt.pdf , (p. 10 of the pdf document)

[177] For a different rapprochement of the gravity clause as a tool for the selection of the prosecutorial forum, international or domestic, of international crimes, instead of its consideration as a criterion for the characterization of a criminal offence as international, see below, Chapter 6, Sense and Sensibility in the Selection of the Prosecutorial Forum of International Crimes and par. 6.1

[178] A. Cassese, International Criminal Law, Oxford University Press, 2003, pp 16, 23-24

exclusion of a large proportion of international sources but even more so, because of the panellists' –not so unfounded- resolution to decline customary law as a source of ICL in general, in accordance to the legality principle's demand for certainty and non-retroactivity, which is presumably threatened by the non-scripta and non-certa nature of customary law, unless the latter happens to be codified in a conventional instrument. Furthermore the argument of the universality of customary law does not seem persuasive on its own when compared to multilateral treaties ratified by an overwhelming majority of states, as is the case with many TCs.

(2) Such rules are intended to protect values considered important by the whole international community,

(3) A universal interest in repressing these crimes exists, in the sense that, subject to certain conditions, alleged perpetrators may in principle be prosecuted and punished by any state, and

(4) If the perpetrator has acted in an official capacity, the state on whose behalf he has performed the prohibited act is barred from claiming immunity -with the exception for a serving head of state, foreign minister, or diplomatic agent.[179]

According to Cassese's reasoning, international crimes include war crimes, crimes against humanity, genocide, torture (as distinct from torture as one of the categories of war crimes or crimes against humanity), aggression and some extreme forms of terrorism (serious acts of Sate sponsored or tolerated international terrorism).

By contrast, the notion at issue does not embrace other classes, such as piracy, which, according to the author, is not punishable for the sake of protecting a community value, -disregarding the notion of navigation and maritime safety and security- or transnational crimes, which apart form not fulfilling the customary law condition, they do not, as a rule involve states and even if they involve states agents, 'these agents typically act for private gain, perpetrating what national legislation normally regards as ordinary crimes' This additional justification for the exclusion of transnational crimes from the list of crimes with international status, implies that, in Cassese's opinion, the classification depends on the involvement of a state or state

[179] The problematic nature of a round bound mode of identification of international crimes, analysed in relation to E. Wise's definition of international crimes above, is also applicable in regards to the 3rd and 4rth element of international crimes in Cassese's theoretical structure.

actor. Arguably, this is quite an anachronistic and outdated perspective, especially if we take into account the generalised swift of attention at the international level from states to non-state actors, the sui generis individualised nature of criminal responsibility and the jurisprudence of the ICC, even if it is still at an embryonic stage.

One can continue like this[180] and add more lists of features, but overall, the following five (non-cumulative) characteristics could be deduced from scholarly literature [181] , crimes which violate or threaten fundamental values or interests protected by international law and which are of concern to the international community as a whole; criminal norms emanating from an international treaty or from customary international law, without requiring intermediate provision of domestic law;[182] criminal norms which have direct binding force on individuals and therefore provide for direct individual criminal responsibility; crimes which may be prosecuted before international or domestic criminal courts in accordance with the principle of universal jurisdiction; a treaty provision or a rule of customary international law establishing liability for an act as an international crime binds all (or a great majority of) States and individuals.

As explained earlier[183], one definition of transnational criminal law[184] is that it includes the rules of national jurisdiction under which a state enacts and enforces its own criminal law where there is some transnational aspect of a crime. This definition constitutes a direct aftereffect of the criteria listed above and in particular of the 2nd and, depending on its interpretation, maybe the 3rd. Nevertheless, *the key question for international law should not be whether these crimes are also dealt with in domestic*

[180] Naqvi for instance, mentions, in the context of the exercise of jurisdiction, even a list of eight features that would appear to characterise an international crime: 1) It is a norm of such a fundamental character that its violation attracts the criminal responsibility of individuals, 2) Individual criminal liability exists at international law, 3) The act is universally recognised as criminal and is considered a grave matter of international concern, i.e., it is recognised under customary law, 4) The enforcement of this norm requires universal jurisdiction because it is not sufficient to leave it to the forum of primary jurisdiction, 5) Such an act endangers international relations (peace and security), 6) The act breaches a moral obligation fixed by international law, 7) There is a collective responsibility to enforce such rules 8) International crimes are violations of jus cogens norms, Y.Q. Naqvi, Impediments to Exercising Jurisdiction over International Crimes, T.M.C. Asser Press: The Hague 2010, p. 31

[181] See Principal Author: Zgonec-Rožej, Miša International Criminal Law Manual p. 27, available at http://www.google.gr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3DAB401EC0-3FF8-4440-A7CD-FB41BBE3A473&ei=ez0DVJ_NBs7XaPTTgbgJ&usg=AFQjCNHCse8eHH7vovmsRBr7dzPWhNX5yQ&sig2=iRWRJQIOIxpZ8XrvC2m8Ng&bvm=bv.74115972,d.d2s, last accessed at 25-08-2014

[182] For a critical evaluation of this feature, see Chapter 5, par. 5.2.1 (i) and (ii)

[183] See Chapter 1, par. 1.2

[184] Cryer Robert et al., 2010, supra note 17, p. 3

law, but whether they are crimes of only domestic concern or crimes of international concern that may be added to a list of 'international [core] crimes'[185]. With the exception of some issues concerning extraterritorial jurisdiction and international police cooperation, it is quite straightforward that the former crimes, where the original source of proscription is national law, simply fall outside the scope of ICL, whereas the latter might meaningfully be included as substantive 'international crimes', on the grounds discussed below.

In that direction, Terje Einarsen, in his work[186], provides his normative proposition for a legal definition of international crimes, consisting of five cumulative and inter-related conditions: 1) The type of conduct manifestly violates a fundamental universal value or interest; 2) It is universally regarded as punishable due to its inherent gravity; 3) It is recognised as a matter of serious international concern; 4) The proscriptive norm is anchored in the law creating sources of international law; 5) Criminal liability and prosecution is not dependent upon the consent of a concerned state.

Although transnational crimes do not necessarily today satisfy all five criteria, this, he notes, this is without prejudice to their status as international crimes, since it is often due to practical and political rather than legal or conceptual considerations. For that reason, he distinguishes between lex lata international crimes and lex ferrenda international crimes. Subsequently, his consolidated list of international crimes encompasses both actual and potential lex lata international crimes, with terrorism financing and grave piracy crimes being enlisted under the first category, while crime types such as money laundering, trafficking in drugs or humans are included in the lex ferrenda category of grave trafficking crimes. Finally, he propounds, as a means of unification, the term 'universal crimes', as a substitute for 'international crimes', adding that 'in contrast to the adjective 'international' which foregrounds the relationships between sovereign states or nations as a rationale for ICL the adjective 'universal' emphasizes the justification for international criminal law in common human values embedded in the UN paradigm of international law.

[185] See the distinctions - Robert J. Currie in International and Transnational Criminal Law, Irwin Law, Toronto, 2010

[186] Einarsen, 2012, supra note 157, pp. 141, 278, 285

Going one step beyond and taking into account the way the list of international crimes has come into being by graded accretion, shaping in a corresponding way the criteria selection and their occasional combinations by the different commentators, which tainted the process with an arbitrary tone, instead of anteriorly formulating a conceptual definition under which all criminal acts would be subjected to - should they fulfil the preconditions, the key question for international law is whether transnational crimes *are*, as opposed to '*ought to be'*, international crimes and should therefore be integrated as such into the direct enforcement system.

5.2 The Deductive Approach

For this project the preferred method of inquiry is the deductive approach. 'An inductive approach would be more consonant to an international legislative function which would seek to establish what ought to be as opposed to an identification of what is'.[187] In accordance to the question imposed above in reference to the true international nature of transnational crimes, the deductive approach relied upon herein is based on what the international legislator has already established and on the empirical identification of international crimes on the basis of that which is so recognized in accordance with the sources of international law.

5.2.1 TCs' International Nature

As a point of departure that means that the substantive norms proscribing the conduct can be derived from at least one of the legal sources capable of creating binding norms of international law that is, conventional law, customary law and the general principles of law, as article 38 of the ICJ Statute provides, and more arguably the Law- Creating Resolutions of the Security Council.

(i) Conventional Law

Since conventions are the international law source par excellence, they are the starting point in this inquiry. Reliance on conventional international law as the primary source of international criminal law is justifiable on the grounds that: 1) conventions are a source of binding legal obligations qua with respect to their state

[187] M. Cherif Bassiouni follows the same method of inquiry, adopting this argument in favour of his choice, see Bassiouni M. Cherif, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal, Martinus Nijhoff Publishers, 1987, p. 23

parties 2) they frequently embody or reflect customary rules and general principles of international law 3) conventional obligations frequently ripen into customary rules 4) conventions frequently codify jus cogens rules.[188]

One of the most dedicated chronicler of the evolution and progressive development of ICL, M. Cherif Bassiouni, was able to identify and review 267 conventions to distil no less than 28 international crimes[189]: aggression, genocide, crimes against humanity, war crimes, unlawful possession, use, emplacement, stockpiling and trade of weapons including nuclear weapons, nuclear terrorism, apartheid, slavery, slave-related practices, and trafficking in human beings, torture and other forms of cruel, inhumane or degrading treatment, unlawful human experimentation, enforced disappearances and extra-judicial executions, mercenarism, piracy and unlawful acts against the safety of maritime navigation and the safety of platforms on high seas, aircraft hijacking and unlawful acts against air safety, threat and use of force against internationally protected persons and United Nations personnel, taking of civilian hostages, use of explosives, unlawful use of the mail, financing of terrorism, unlawful traffic in drugs and related drug offences, organised crime and related specific crimes, destruction and/or theft of n0ational treasures, unlawful acts against certain internationally protected elements of the environment, international traffic in obscene materials, falsification and counterfeiting, unlawful interference with international submarine cables and corruption and bribery of foreign public officials.

(ii) Customary Law and Jus Cogens Norms

Customary Law as a source of International Criminal Law remains the cornerstone of some of the most heated debate, with advocates and adversaries propounding diametrically opposed arguments from their respective sides. On the one hand, advocates of customary law as a legitimate source of ICL emphasise its universality, some even arguing that international crimes are only those that derive form this particular source, dismissing conventional law altogether[190], unless the latter codifies customary norms or has evolved to customary law in the meantime.

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[188] Id.
[189] Bassiouni, 2013, supra note 10, pp. 143-145
[190] A. Cassese, 2003, supra note 178, p. 23-24; Y.Q. Naqvi, 2010, supra note 180, p. 31

On the other hand, contestants, mainly with a penal theoretical background, openly criticise customary law on the basis of the legality requirements of 'nullum crimen nulla poena sine lege' and its derivative principles (praevia, scripta, stricta et certa lege), that need to be maintained when we are dealing with legal norms with such coercive protractions. Likewise, and even as the call for tightening the elements of certain international crimes that initially originated from customary law becomes ever growing, customary law is considered to be too vague to define those particular elements in a categorical manner, let alone to found criminal liability in the first place[191].

Although the penalists' concerns are under no circumstances unfounded or unjustified, this has not been the position of the Nuremberg or Tokyo MITs, nor is it that of the ad hoc Tribunals. On the contrary, the ICTY has explicitly accepted that when its Statute does not regulate a matter, customary international law and general principles ought to be referred to.[192]

In regards to transnational crimes, indicatively apart from the obvious example of piracy, there may be arguments to support a position that narco-trafficking amounts to customary international criminal law. The offence of trafficking in narcotic drugs and psychotropic substances has a long history in international law, dating back to the 1912 Hague International Opium Convention[193], provides for the obligation to extradite or prosecute, and has been for some time a truly transnational offence, as its commission involves multiple jurisdictions, perhaps even more than genocide or crimes against humanity which have less conventional history and often do not even cross international borders.[194]

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[191] On customary law's unsuitability to found criminal liability, see also Djuro – Degan Vladimir, On the sources of International Criminal Law, 2005, 4 Chinese Journal of International Law 45 at 67

[192] Kupreskic, ICTY, T. Ch. II 14.1.2000, par 591.

[193] 23 January 2009 - 23 January 1912, the International Opium Convention was signed in the Hague by representatives from China, France, Germany, Italy, Japan, the Netherlands, Persia (Iran), Portugal, Russia, Siam (Thailand), the UK and the British overseas territories (including British India). Three years later, it entered into force in five countries. The Convention gained, however, near-universal adherence after 1919 when all the countries signing the Peace Treaties of Versailles, St. Germain-en-Laye etc. also became party to the International Opium Convention, Source : U.N.O.D.C. The 1912 Hague International Opium Convention, available at http://www.unodc.org/unodc/en/frontpage/the-1912-hague-international-opium-convention.html, last accessed on 20-09-2014

[194] Boister Neil, "The Exclusion of Treaty Crimes From the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics" (1998) 3 Journal of Armed Conflict Law 27 at 30; Patrick Robinson, "The Missing Crimes" in Antonio Cassese et al (eds), The Rome Statute of the International Criminal Court: A Commentary, vol 1, Oxford University Press, 2000 497 at 507-510.

Customary law is also closely linked to the concept of jus cogens. Some scholars think of the two as the same[195], others distinguish between them[196], while still others question whether jus cogens is simply not another semantical way of describing certain general principles.[197] All jus cogens are customary international law, but not all customary international laws rise to the level of peremptory norms, as states can deviate from it by enacting treaties and conflicting laws, but jus cogens is peremptory and non-derogable, bearing erga omnes obligations.[198]

International law has dealt with both concepts, namely jus cogens and obligations erga omnes, but mostly outside the framework of International Criminal Law.[199] Under this discipline, jus cogens refers to the legal status that certain international crimes reach, while obligations erga omnes pertain to the legal implications arising out of a certain crime's characterization as jus cogens.[200] However, the critical question is whether such a status places obligations erga omnes upon states or merely gives them certain rights to proceed against perpetrators of these crimes. For some commentators[201], as for this writer, the implications of jus cogens are those of a duty and not of optional rights, otherwise jus cogens would not constitute a peremptory norm of international law. Consequently, the recognition of certain international crimes as jus cogens entails the infusion of several legal obligations deriving from this superior norm, namely among others: the duty to prosecute or extradite[202], the non-applicability of statutes of limitation for such

[195] D'Amato Anthony, The Concept of Custom in International Law, Cornell University Press, 1971, p 132

[196] Cordon A. Christenson, Jus Cogens: Guarding Interests Fundamental to International Society, 28 V.A. J. INT'L L 585, 1988; Mark Janis, Jus Cogens : An Artful Not a Scientific Reality, 3 CONN. J. INT'L L 370 (1988)

[197] Bassiouni M. Cherif, A functional approach to general principles of international law, 11 MICH. J. INT'L L., 1990

[198] Bassiouni M. Cherif, International Crimes : Jus Cogens and Obligation Erga Omnes, Law and Contemporary Problems, Vol. 59, No 4, 1997, p. 63-74, available at :http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1016&context=lcp, last accessed 29/07/2014 , p. 71

[199] See for instance the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/CONF. 39/27 ; G.C. Rozakis, The Concept of Jus Cogens in the Law of Treaties (1976); Hoogh Andre, Obligation Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States, Martinus Nijhoff Publishers,1996, embodying the author's doctoral dissertation, which is rich in public international law material and mostly based on the work of ILC.

[200] Bassiouni, 1997, supra note 198, p. 63

[201] Id.

[202] A well-known example of this duty as well as of the non-applicability of immunity to Heads of States, when charges of committing a jus cogens crime are investigated, is the Pinochet Case. In March 1999, the House of Lords (UK) ruled that an international obligation arose to extradite Augusto Pinochet on the charge of torture insofar as it constituted a jus cogens crime, See Regina v. Bartle and the Comm's of Police for the Metropolis and others ex parte Pinochet, 38 ILM 581,589 (H.L. 1999), available at http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm, last accessed at 06-09-2014. On the duty to prosecute or extradite see generally: Bassiouni Cherif & Wise M. Edward, Aut dedere aut Judicare, The Duty to Extradite or Prosecute in International Law, 1995

crimes[203], the non-applicability of the defence of "obedience to superior orders", with the exception of mitigation of sentence, their non-derogation under a "state of emergency,"[204] and the universality of jurisdiction[205] over such crimes, irrespective of where they were committed, by whom, including Head of States, against what category of victims and irrespective of the context of their occurrence (peace or war).

But the most crucial consequence of the characterization of certain crimes as jus cogens is that it places upon states the obligation erga omnes not to grant impunity to the perpetrators of such crimes[206], with the added value that the obligation in question is conceived as due to the international community as a whole, meaning that any state may invoke the responsibility of a state that is violating such obligations. The multileveled implications of this particular obligation and the subsequent burden it entails for both states in their singular form as well as for the state community as whole, i.e. of taking the fitted measures and establishing the necessary institutions in order to ensure accountability for the perpetrators of jus cogens international crimes, underlines the importance of specifying the international crimes that fall under this heading, including several transnational crimes.

Although it remains debated which norms rise to this higher level, the legal literature discloses that the following international crimes have gained the status of jus cogens: aggression, genocide, crimes against humanity, war crimes, piracy, slavery, slave-related practices, trafficking in human beings, and torture.[207] Sufficient legal basis exists to reach to the conclusion that all these crimes are part of jus cogens.[208]

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[203] Convention on the Non – Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, opened for signature Nov 26, 1968, entered into force Nov 11 1970; See also Vaden Wyngaert Christine (ed,) International Criminal Law and Procedure. Dartmouth - Ashgate, 1996

[204] See Bassiouni M. Cherif, States of Emergency and States of Exception: Human Rights Abuses and Impunity under the Color of Law, in Daniel Premont ed, Non-derogable Rights and States of Emergency, 1996, 125

[205] See Kenneth Randalla, Universal Jurisdiction Under International Law, 66 TEX.L. REV. 785, 1988; Reydams Luc, Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice, 1 EUR.L.CRIME CR L. CR. J. 18, 1996

[206] 8 Guisse E.H. & Joinet L., Progress Report on the Question of Impunity of Perpetrators of Human Rights Violations, UN Commission on Human Rights, Sub- commission on the Prevention and Protection of All Minorities, 45th Sess. Item 10 (a), U.N. Doc E/CN.4/Sub 2/1993/6, pursuant to Sub – commission Res 1922/23; L. Joinet, Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political Rights): Final Report UN Commission on Human Rights, Sub-commission on the Prevention and Protection of all Minorities, 48th Sess. Item 10 (a), U.N. Doc E/CN.4/Sub 2/1996/18, pursuant to Sub – commission Res 1995/35; Naomi Poht – Arriaza (ed), Impunity and Human Rights in International Law And Practice,Oxford University Press, 1995, p. 14

[207] Cassese, 2003, supra note 178, p. 24-25; Y.Q. Naqvi, 2010, supra note 180, p. 27.

[208] The Statutes of the 1993 ICTY and the 1994 ICTR include genocide, crimes against humanity and war crimes. The 1996 Code of Crimes includes these three crimes, plus aggression and crimes against UN Personnel. In regards to the crime of genocide and the prohibition of torture see para. 161 of the ICJ Judgment of 26-02-2007, on the case concerning the application of the convention on the prevention and punishment of the crime of genocide, Bosnia and Herzegovina v Serbia and Montenegro, available at http://www.icj-

This legal basis consists of a) international pronouncements, opinion juris b) language in preambles or other provisions of treaties applicable to these crimes which indicates that these crimes have higher status in international law c) the large number of states which have ratified treaties related to these crimes and d) the ad hoc international investigations and prosecutions of perpetrators of these crimes.

As to the evolving question of the discernible contents of jus cogens, in relation to the remaining transnational crimes, especially those encompassed in multilateral treaties, with high ratification volumes, it may be recalled that a comment of the UN International Law Commission, in its travaux preparatoires on the law of the treaties[209], suggested as being incompatible with the rules of jus cogens, treaties which contemplated the illicit use of force, contrary to the principle of the UN Charter, or *any other criminal act under International Law*, such as slave trade, piracy, genocide. To back this position, it has been proposed in legal literature that a certain crime can develop into a customary international rule of jus cogens if "all the significant components of the international community […] show that they perceive that principle *as aiming to protect an essential common* interest and therefore see its breach as indivisibly violating the rights of each and all.[210] In the same train of thought, Bassiouni notes that 'Certain crimes affect the interests of the world community as a whole because *they threaten the peace and security of humankind* and because they shock the conscience of humanity. If both elements are present in a given crime, it can be concluded that the crime is part of jus cogens.[211]

The argument is less compelling, though still strong enough, if only one of these two elements is present'. Furthermore, the ICTY concluded in the Čelebići case that *"in human rights law, the violation of rights which have reached the level of jus cogens, such as torture, may constitute international crimes"*[212] By logical reference

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cij.org/docket/files/91/13685.pdf, last accessed at 06-09-2014 and para. 454 ICTY Judgment on Case No IT-96-21-T/16-11-1998, Prosecutor v. Zejnil Delalic Zdravko Mucic also known as Pano Hazimdelic, available at http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf, last accessed on 06-09-2014, respectively.

[209] Cit in Sinclair I.M, The Vienna Convention on the Law of the Treaties, Manchester, University Press/Oceana, 1973 pp 121-122, p. 130-131

[210] Condorelli L., "Customary International Law: The Yesterday, Today and Tomorrow of General International Law', in: A. Cassese (ed.), Realizing Utopia: The Future of International Law, Oxford University Press: Oxford 2012, p. 153.

[211] Bassiouni, 2013, supra note 10, p. 241-242

[212] See para. 172, n. 225 of: Case No IT-96-21-A/20-02-2001, Prosecutor v. Zejnil Delalic, Zdravko Mucc aka Pavo, Hazim Delic and Esad Landzo aka Zenga, Elebici, ICTY Appeal Chamber,, available at http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf, last accessed at 07-09-2014; See also, A.A.

to the foregoing analysis, we are led to the conclusion that transnational crimes, constituting criminal acts under international law, which under the emerging doctrine of human security are increasingly recognised as threatening to the peace and security of the world and to the human rights of the individuals, are, not only international crimes but even more so, that they are jus cogens international crimes. However, the gap between legal expectations and legal reality is unfortunately quite wide. It may be bridged by certain international pronouncements and scholarly writings but the question remains whether such a bridge can be solid enough to allow for the passage of these concepts from desiratum to enforceable legal obligations under ICL, as prescribed above, with the consequence of, in case of non-compliance, the arise of state responsibility.

(iii) General Principles of Law

The general principles of law recognised by civilised nations, as a law-creating source of international law[213] is an ambiguous notion that has generated much academic debate and confusion, even apart from the unintended ethnocentric connotations of the term 'civilised nations'. Moreover, the invocation of general principles of law in relation to criminal law is not ideal for a series of reasons.[214] Apart from the problematic impingement to the nullum crimen nulla poena sine lege principle we encountered in customary law, general principles are just that, i.e. too general, so they tend to be the last resort. Conversely, as the Erdemovic case showed, at times there is simply no general enough principle to apply.[215]

Still, these concerns did not deter either the ICC or the ad hoc criminal tribunals from including general principles in their arsenal to help them deliver their respective judgements. Likewise, the ICC is to apply general principles of law derived from national laws of legal systems of the world, including as appropriate and the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with the statute, international law or internationally recognized norms and standards, whenever the other categories of law

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Cancado Trindade, Jus Cogens in Contemporary International Case Law, available at http://www.oas.org/dil/esp/3%20-%20cancado.LR.CV.3-30.pdf, p. 9, last accessed at 07-09-2014

[213] ICJ Statute, Article 38 (1) (c)

[214] This is the position of most authors in the field of ICL, see for example, Cryer et al, 2010, supra note 10, p. 11-12.

[215] Erdemovic ICTY A. Ch 7-10-1997, Opinion of Judges McDonald and Vohrah 56-72

do not provide an answer.[216] It may also apply principles and rules of law as interpreted in its previous decisions.[217] Furthermore, both the ICTY and the ICTR have resorted to national laws to assist them in determining the relevant international law.[218]

History has shown that the role of general principles can exceed its interpretation and clarification of norms usual orientation to even founding a crime on their own. For example, the UN Convention on the Prevention and Punishment of the Crime of Genocide of 1948 was premised on the normative fact that "genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world", as noted in its preamble. Two years earlier, in 1946, the General Assembly had in Resolution 96(I) on "The Crime of Genocide" affirmed that "genocide *is* a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices –whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable".[219] It is thus noteworthy that the Genocide Convention of 1948 did not make genocide a crime. This raises the following question: if the Genocide Convention did not constitute the legal basis for the specific crime of genocide in international law, what was its legal basis? Obviously it was neither other treaties nor customary international law, since nobody had ever been convicted of the crime of genocide prior to the Genocide Convention.[220] It was also quite a new concept, invented a few years earlier by the Polish jurist Raphael Lemkin.[221]

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[216] 50 Art 21 (1) (c) of the ICC Statute.
[217] Art 21 (1) (2) of the ICC Statute
[218] See for instance, Tadic ICTY A. Ch. 15-07-1999 paras 255-70
[219] UN General Assembly Resolution 96 (I), "The Crime of Genocide", 11 December 1946.
[220] Antonio Cassese, International Criminal Law, 2nd ed., Oxford University Press, Oxford, UK, 2008, p. 127, Cassese notes that in dealing with the extermination of the Jews and other ethnic, racial, or religious groups during World War II, the Nuremberg Tribunal referred in its judgment to the crime of persecution, and while the extermination of the Jews as a crime against humanity was also discussed in some other cases, and the word "genocide" was sometimes used to describe the criminal conduct, the crime of genocide was not elevated "to a distinct category of criminality". He mentions in particular "Hoess, decided by a Polish court in 1947 (at 12–18), and Greifelt and others, heard in 1948 by a US Military Tribunal (at 2–36)". The literature on the Genocide Convention is vast. See for example William A. Schabas, Genocide in International Law, 2nd ed., Cambridge University Press, Cambridge, UK, 2009; Paola Gaeta (ed.), The UN Genocide Convention: A Commentary, Oxford University Press, Oxford, UK, 2009 etc
[221] Raphael Lemkin, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress, Carnegie Endowment for International Peace, Washington, DC, 1944, pp. 79–95. Before Nuremberg, Lemkin had further elaborated on the term in two other works: "Genocide –A Modern Crime", in Free World, April 1945, vol. 4, pp. 39–43, and "Genocide", in American Scholar, April 1946, vol. 15, no. 2, pp. 227-230.

That seems to leave us with the 'general principles' of international law as the primary – or possibly an independent – legal foundation of genocide as an international crime. This finding has important repercussions for one thesis of this project: it indicates that within the prevailing UN paradigm some acts or behaviour, such as transnational crimes, might at some time be considered, as in Nuremberg, an international crime or a crime under international law by the international community through its established courts and institutions that is, by personnel acting independently in their individual capacity as judges or commissioners even though no clear prior legal basis exists either in a treaty or in customary international law.

However, while it is recognised that general principles are of considerable significance to the ILC, the concept is still often exclusively equated with rules originating from domestic law and with the legal principles already recognised by the world's major legal systems.[222] In this context the ICTY cautioned that a mechanical importation as transposition from national law into international criminal procedures has to be avoided.[223] Although this was meant as a restraint, it has been suggested that 'the formulation could also be used to expand non-mechanical access, thus facilitating the formation of new general principles of international criminal law regardless of whether they are already fully recognized domestically'.[224] This would grand the general principles the constitutive character naturalists seek, with potential protractions in relation to the transnational crimes, the overwhelming majority of which is criminalised in national laws and the probability of their recognition as internationally prosecuted crimes.

Finally, it should also be noted that general principles could also serve as an important tool for the fragmented nature of the substantive transnational criminal law. When the ICTY, for instance, were confronted with the problem that the crime of rape had not been defined, the ICTY Trial Chamber, in the Kunarac case, first examined the criminal laws in many different countries in order to ascertain a general principle underlying the crime of rape in national laws.[225] The definition of rape it extracted from these national sources was then accepted as part of international law by the

[222] See Werle Gerhard, Principles of International Criminal Law, 2nd ed., TMC Asser Press, The Hague, 2009. p. 53
[223] See ICTY Trial Chamber, Prosecutor v. Anto Furundžija, Judgment,IT-95-17/1,1998,para. 178
[224] Einarsen, 2012, supra note 2012, p. 109
[225] ICTY Trial Chamber, Prosecutor v. Kunarac et al., Judgment, IT-96-23, 2001, para. 439

ICTY Appeals Chamber.[226] This indicates that general principles of law are particularly important at this stage of globalisation and development of international criminal law, and that law-creating mechanisms other than international customary law and treaty law are needed to meet the new legal challenges and seek harmonised international crimes norms.[227]

(iv) Security Council Legislative Resolutions

In regards to this neglected – and arguably unconventional – source, what the authors of the ICJ Statute arguably failed to recognize, when enumerating the sources of international law, was the full potential of the newly created powers of the United Nations Security Council to take actions and decisions for the maintenance of international peace and security, under Chapter V, art 24 (1) and Chapter VII of the UN Charter. By being granted those specific powers to act on behalf of all members of the UN, the Security Council has repeatedly confirmed the linkage between peace and justice. It has acted in a number of innovative ways that demonstrate a capacity and willingness to lay down rules and principles of general application, binding all states and taking precedence over other legal rights and obligations.[228]

Law-making by the Security Council can take various forms and produce various legal effects. One can distinguish for example among determinations with regard to the illegality or competences in general,[229] interpretations of the UN Charter, establishment of courts and exercise of legislative acts on matters relating to peace and security.[230] Consequently the Security Council has asserted and extended its authority where the inadequacies of law-making by treaty might undermine the pursuit of its objectives.[231] Under this contextual framework, a typical example of the Security Council's exercise of legislative power, which is in addition in relation to a transnational crime, is Res. 1373/2001 against terrorism,[232] which largely corresponds

[226] ICTY Appeals Chamber, Prosecutor v. Kunarac et al., Judgment, IT-96-23/1, 2002, para. 127
[227] Einarsen, 2012, supra note 157, p. 119
[228] See Boyle Alan and Chinkin Christine, The Making of International Law, Oxford University Press, 2007, p. 109
[229] Gray Christine, International Law and the Use of Force, 3rd edition, Oxford University Press, 2008, pp. 13–17. Two controversial issues are whether the findings by the Security Council are conclusive or not and whether judicial review by the ICJ is possible and can override the opinion of the Security Council
[230] In the same vein, Boyle Alan and Chinkin Christine, 2007, supra note 228, p. 110-115
[231] Id. pp. 109–110
[232] S/RES/1373/2001, full text available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement, last accessed at 07-09-2014; See also Chapter 2, par. 2.1, (iii)

to what could be expected from a conventional instrument for creating obligations under international law.

Such a resolution being imposed on its subjects has a vertical legislative character rather than being a horizontal agreement upon equal and sovereign states.[233] Indeed, from a functional point of view 'Res 1373 satisfies even the strictest definitions of international legislation'[234]. Furthermore, it provided for an enforcement mechanism, the counter – terrorism committee, which is a body subordinate to the Security Council. Yet, this resolution has not been an isolated incident. In its Resolution 1540/2004,[235] the Security Council legislated once again in general terms, this time to ensure that non-state actors are prevented from obtaining nuclear, chemical or biological weapons. These features have led commentators to use the term legislation[236] or quasi–legislation.[237]

On the other hand, some authors maintain that a systemic interpretation of the UN Charter contradicts the power of the Security Council to impose general legislative measures on member states.[238] However, for those favouring the expansion of international criminal law and an integrative approach insofar as its ratione materiae crimes are concerned, an interpretation of Charter VII as broad as that on which Resolution 1373 is based, 'could easily serve as a precedent for Security Council legislation in other areas',[239] notwithstanding the need for the imposition of restraints, considering the potential abuse and the seriousness of the implications such an enterprise may inflict.[240]

5.2.2 TCs' Criminal Nature

In terms of the distinction between 'mala in se acts', that are criminal because they are clearly wrong and 'mala prohibita acts', that are criminal because they are

[233] See Einarsen, 2012, supra note 157, p. 120; Erling Johannes Husabø and Ingvild Bruce, Fighting Terrorism through Multi-level Criminal Legislation: Security Council Resolution 1373, the EU Framework Decision on Combating Terrorism and their Implementation in Nordic, Dutch and German Criminal Law, Brill, Leiden, Netherlands, 2009, p 36.
[234] Id. pp. 39
[235] S/RES/1540/2004, full text available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1540%282004%29, last accessed at 07-0902014
[236] Erling Johannes Husabø and Ingvild Bruce, 2009, supra note 233, p 36-39 with further references.
[237] Boyle and Chinkin, 2007, supra note 228, p. 114
[238] Husabø and Ingvild Bruce, 2009, supra note 233, p. 46, with further references
[239] Einarsen, 2012, supra note 157, p 123
[240] On this matter, see Chapter 9, ar. 9.1.1 below

proscribed, international crimes are definitely a prime example of the former.[241] The paradox however in relation to international crimes is that the asseveration of criminal liability is, more often than not, elaborated in conjunction with the adjective 'international' rather than the noun 'crime' and that which is legitimately criminalised. In this convoluted narrative of perplexing the criminal dimension with the acknowledgement of an international status for some criminal offences, is partially because many authors incorporate the assessment of the criminal liability in their respective definitions of international crimes, as discussed below. Nevertheless, in accordance to the deductive approach employed here, every conduct that can be backtracked to an international source of law is by definition of international nature, while the resolution of the conduct's penal characteristics merits to the said conduct its criminal nature.

(i) TCs' Penal Characteristics

Initially, it should be stressed that criminal liability under international law is neither a self-explanatory concept nor a self-executing legal norm. On the contrary and, even though, as explained earlier, criminal liability is not per se linked to the affirmation of an *international* crime, the methods by which the law provides for it can form the basis for various lists of international crimes, including those that encompass transnational crimes.

Ratner et al.[242] define ICL as 'the international law assigning criminal responsibility for certain serious violations of international law'. Under the auspices of this definition, they note that its scope not only extends to responsibility for violations of HR and IHL, but is in fact wider, to include for instance drug crimes and terrorism offences. In order to resolve what it means to say that international law assigns criminal responsibility they suggest that a further inquiry should take into account the legal need both to elaborate the specific crime and to prescribe the role for states in supressing it. In their view such an inquiry must examine three different strategies for prescribing international criminal responsibility: 1) direct provisions for individual culpability 2) obligating some or all states or the global community at large

[241] Einarsen, 2012, supra note 157, p. 84

[242] Ratner R. Steven, Abrams S Jason., and Bischoff L. James, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy, 3rd ed., Oxford University Press, Oxford, UK, 2009. p. 10-11

to try and punish or otherwise sanction offenders or 3) by means of international law authorizing states or the global community to do the same.

Another author that has dealt with the determination of the penal characteristics of international crimes is M. Cherif Bassiouni.[243] In his detailed catalogue he enlists the following: 1) Explicit recognition of the proscribed conduct as constituting an international crime, or a crime under international law or a crime; 2) Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish or the like; 3) Criminalization of the proscribed conduct; 4) Duty or right to prosecute; 5) Duty or right to punish the proscribed conduct; 6) Duty or right to extradite; 7) Duty or right to cooperate in prosecution, punishment, including judicial assistance; 8) Establishment of a criminal jurisdictional basis or theory of criminal jurisdiction or priority in criminal jurisdiction; 9) Reference to the establishment of an international criminal court or international tribunal with penal characteristics or prerogatives 10) Elimination of the defence of superior orders.

Each of these penal characteristics is similar or analogous to provisions that may be found in the penal laws of most legal systems in the world. Thus by analogy to national penal legislation, where the existence of a penal provision is sufficient to characterize that legislation as penal or quasi penal, Bassiouni came to the judgement that the presence of any such provision in any given convention in the category of international criminal law. He admits that this is based on a value judgement. However, when such a penal provision is found contextually in a convention, the purpose and scope of which is regulatory or proscriptive the judgement in question is warranted.[244]

(ii) The Issue of Direct Criminal Liability

According to Orentlichter[245] "[international criminal law] in its broadest sense comprises of offenses which conventional or customary law either authorizes or requires states to criminalize, prosecute, and/or punish." Consequently, the presence of one of the aforementioned penal provisions in an international instrument should

[243] Bassiouni,2013, supra note 10, p. 143
[244] Bassiouni, 1987, supra note 187, p. 26
[245] Orentlicher D.F., 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', Yale Law Journal, Vol. 100, No. 8 (June 1991), p. 2552

suffice for the affirmation that its subject matter offences constitute international crimes, bearing direct criminal liability for the individuals concerned.

However, what has been widely suggested in academic literature is that direct criminal liability under international law refers to the absence of the necessity to employ domestic provisions in order to prosecute those crimes. Taking a step further, some authors even argue that the competence of directly prosecuting a crime before an international forum is a condition sine qua non for its characterization as an international crime. Werle, for instance, who defined crimes under international law as 'all crimes that involve direct individual criminal responsibility under international law', proceeded to additionally identifying three cumulative conditions for an offence to fall within the scope of international criminal law: 1) it must entail individual responsibility and be subject to punishment; 2) the norm must be part of the body of international law; 3) the offense must be punishable regardless of whether it has been incorporated into domestic law."[246] In the same vein, Einarsen states that in the case of international crimes, 'criminal liability and prosecution is not dependent upon the consent of a concerned state treaties', also noting that 'direct criminal liability under international law does not add specific legal consequences but rather is almost a restatement of the fact that a certain crime is an international crime'[247]

Three arguments can be used to contradict this approach, the first one referring to the erroneous conception of the way treaties, which are normally addressed to states, are structured, as indicative of the fact that they do not entail direct implications or effects for the individuals, since there is simply no legal basis as to assume that the provisions contained in a treaty (or for that matter in any other source of international law), which refers to sovereign states, hold any prejudice against recognizing the prohibited conduct as an international crime.

Consecutively, the absence of specified penalty provisions, particularly in treaties dealing with transnational crimes, which necessitates the employment of a national corpus of penal law, does not transform them, as it has been suggested, into domestic crimes. A feature of binding rules is their 'if – then' character, that is singular norms often form part of larger structural norm, encompassing abstract

[246] Werle ,2009, supra note 222, p. 29
[247] Einarsen, 2012, supra note 157, ,p. 235

conditions (if) for certain legal consequences (then). In parallel with 'white criminal law', a concept which is well – known in most legal systems, where the prohibition of a certain conduct (if) can be located in one body of law and the penal provision in another (then), treaties can contain implicitly or explicitly the primary material norms prohibiting certain acts while the punitive provision can be provided for in another law body, national or international.

Lastly, the problematic nature of introducing a circular argument in the process of international crimes identification, as was previously discussed, also applies in regards to conditioning the international status of certain crimes, upon the origin, national or international, of the currently employed prosecutorial forums, especially taking into account that the current preferences reflect choices that are based on practical, resources –wise, and political considerations rather than legal or conceptual ones.

Chapter 6

Sense and Sensibility in the Selection of the Prosecutorial Forum of TCs

The aforementioned penal characteristics serve as a utilitarian means for concluding that a prescribed conduct is in fact criminal. Still, they do so in a conclusively formalistic manner and they do not address the ratio underlying the criminalization of that conduct whatsoever. The aim of this chapter is not to provide the reader with a theoretical or philosophical analysis of the process of criminalization, which would exceed the scope of this thesis. What it aspires to do is to demonstrate how the use of one of the most dominant theories of the criminalization process, namely the Rechtsgutstheorie,[248] could be used in order to determine the party, state or international community, whose legal good is affected *the most* from the commission of a transnational crime, on the basis of an evaluative gradation, thus granting this party with the *primal and overriding legal interest* to pursue the punishment of the international crime in question. The merit of this approach is

[248] For a comprehensive overview see Lauterwein Carl Constantine, The limits of Criminal Law, A Comprehensive Approach to Legal Theorizing, Ashgate, 2010, pp. 5-40; The theory is also used in Hieramente Magel, The Myth of International Crimes. Dialectics and International Law, Goettingen Journal of International Law, 3 (2011) 2, 551-288, at p. 562 This article scrutinizes why the current doctrine of ICL singles out a certain category of criminalized human rights abuses as international. It concludes that there is no substantive reason for classifying these crimes as international they are per se no threat to peace and that they don't share a contextual element.

primarily its concordance with the deductive method set above, since it does not lead to an arbitrary fragmentation of the crime that has been characterised as international in its whole, as it happens with the introduction of gravity clauses in many author's definitions of international crimes,[249] although such a dichotomy has never been legally stipulated in any of their respective treaties.[250]

6.1 The Gravity Clause through the Lens of Rechtsgutstheorie of Legal Goods

The German Rechtsgutstheorie defines the function of criminal law as the protection of *Rechtsgüte*r, which in literal means legal goods.[251] The idea is that all offences are there to defend, from either direct attacks or endangerments, specific Rechtsgüter, legally protected interests or goods, which denote the substantial sphere of protection that penal provisions present. In continental legal thought, the concept of Rechtsgüter has played an important role in the theory of criminalization. While the Hegelian criminal law philosophy did not need any theory of the Rechtsgüter, since these premises had been abandoned, the route was now clear for theorists of Roman law to develop an objective view on wrongfulness through Rechtsgutstheorie. Thus, the new doctrine became popular in German science from the late 19th century and had a connection with the jurisprudence of interests (Interessenjurisprudenz) of that time.[252]

It was previously hinted that some authors[253] favor for their determination of international criminal law's scope the appraisal of the values which are protected by international law's prohibitions. According to this more substantive approach, international crimes are considered to be those which are of concern to the international community as a whole or acts which violate a fundamental interest or legal good protected by international law. By conclusive presumption, transnational

[249] See for example Einarsen, 2012, supra note 157, p. 73 'Gravity may be essential for the distinction between universal or international crimes

[250] As for the Statutes of the International Court and the Ad hoc Criminal Tribunals, the reason for the exclusion of milder forms of their ratione materiae crimes is due to practical considerations and resources restraints rather than positive legal grounds.

[251] Gareis Carl also defined Rechtsgut as an interest protected by a norm, Cit in F. von Liszt, Der Begriff des Rechtsguts im Strafrecht in der Encyklopädie der Rechtswissenschaft (1888) 8 Zeitschrift fur die gesamte Strafrechtswissenschaft 133 (transl. F. Liszt, the concept of legal interest in criminal law in the Encyclopedia of Law (1888) 8 Journal for the entire criminal justice science 133).

[252] See Nuotio Kimmo, Theories of Criminalization and the Limits of Criminal Law : A Legal Cultural Approach, p. 238-262 in Duff R.A., Farmer Lindsay, Marshall S.E., Renzo Massimo and Tadros Victor (Ed.), The Boundaries of Criminal Law, Oxford University Press, 2010, p 244.

[253] Cryer et al, 2010, supra note 17, p 6-7; Einarsen, 2012, supra note 157, p 14

crimes,[254] which are regulated or created by international law are of concern to the international community and by logical reference, transnational crimes are an indispensable part of international criminal law, as they are conceived to be threatening to the international community's interests or fundamental values.

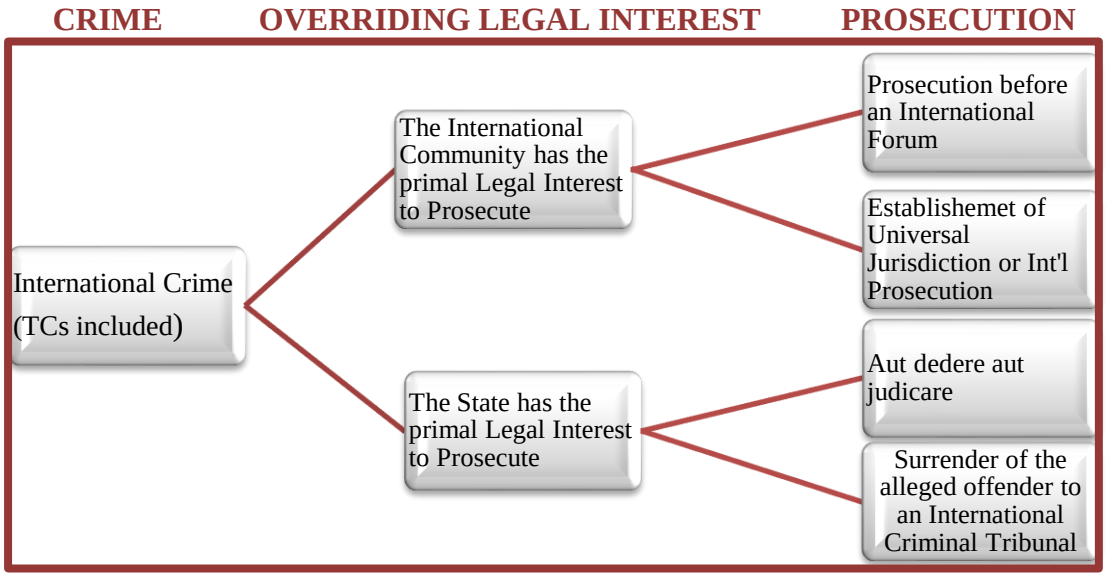
Nevertheless, there are voices cautioning about the risk in defining international criminal law in this manner, as 'it implies a level of coherence in the international criminalization process which may not exist'. [255] Among the reasons of Rechtsgutstheorie's prevalence from the 19th century till today is its functionalist tone, which suited a regulatory state. Although, it is beyond doubt that the behaviour which is directly or indirectly subject to international law is not easily reducible to abstract formulae,[256] the expeditious regulatory steps in the organization and structure of today's international community and the accelerated legal developments in the field of international criminal law in the recent decades, and especially after the 1990s, allows for the gradual advancement of such formulae, as the idea of collective legal goods of the international community as a whole. Moreover, it has been noted that 'disassociating criminal law from the protection of fundamental rights or even loosening such association – albeit for the sake of addressing transnational crime by means of enhancing judicial cooperation- is liable to emasculate elemental values inherent in democratic societies which subject the exercise of State authority to the Rule of Law'.[257]

One can deduce at least two distinct legal goods or *mega-goods* international criminal law is designated to protect: on the one hand we have the peace and the [human] security of the world and on the other hand the notion of humanity, which can be classified under the category of legal goods *of* the international community and legal goods accepted *by* the whole international community, according to Kohler's subtle distinction.[258] Barbara Yarnolds has also considered that "[a]n international element raises conduct to an international crime, if one of two factors is present: first, the conduct must constitute a direct threat to world peace and security; second, the

[254] For discussion in relation to the core crimes, see Bruce Broomhall, International Justice and the International Criminal Court: Between State Sovereignty and the Rule of Law, Oxford 2003 44-51
[255] Cryer Robert, The doctrinal foundations of the international criminalization process in Bassiouni, 1, 2008, p. 107
[256] Cryer et al, 2010, supra note 10, p 6-7
[257] Manoledakis I., General theory of criminal law [in Greek], Sakoulas Editions, 2004, p. 29
[258] Kohler M, Zum Begriff des Volkerstrafrechts 11 Jahrbuch Ethik (2003) 440

conduct must either "shock the conscience" of the world community or constitute an indirect threat by rising to the level of threatening world peace and security due to the magnitude of the offense. [259] Each of these legal goods or interests can be threatened by the perpetrators of international crimes, which, as it has already been established, include transnational crimes as well.

Even so, the violation of international criminal prohibitions, when small in scale or relatively mild in quality, *in addition to* threatening or attacking these legal mega-goods of the international community when considered cumulatively, they can also threaten, singularly, legally protected goods of the national legal orders of the respective states. Moreover, the claim of humanity for a criminal prosecution exists in another level than that of the respective states, which can only be founded via the path of 'actio pro socio'.[260] Thereafter, the existence of these two parallel legal orders necessitates the introduction of an additional criterion for the determination of the party that has the primal legal interest and therefore right to prosecute, as illustrated in the graphical depiction below (Figure 1).



For the purpose of determining the prosecutorial forum of a transnational crime, (as opposed to the determination of when a transnational crime can be termed as international) national or international according to who has the primal and overriding

[259] Yarnold B.M., 'Doctrinal Basis for the International Criminalization Process', Temple International & Comparative Law Journal, Vol. 8 (1994), p. 90.
[260] Neumann U., The principle of Universal Jurisdiction p. 14 in Manoledakis I., Prittwitz C. (eds) The Internationalisation of Criminal Law, Sakoulas Editions, 2003 [in Greek]

legal interest to prosecute, the use of a gravity clause proves to be a practical solution. The concept of 'grave breaches' was firstly articulated with authority in the Geneva Conventions of 1949. The same method has also been applied in the Statutes of the International Tribunals and the ICC.[261] Yet, in spite of being frequently invoked, the concept of gravity is under no circumstances self-explanatory. Instead, it is a complex abstraction, whose corpus accumulates a series of multifaceted factors, ranging from a quantity threshold to a contextual evaluation of the criminal act itself or an assessment of whether it was organised, committed or tolerated by a powerful actor.

To begin from the end, the most emblematic example of a powerful actor is undoubtedly the state itself. Either by the employment of private militia groups or through direct action, the governments and ruling parties of states are most commonly those who commit grave international crimes, with Hitler's Third Reich and the genocide against the Tutsis in Rwanda leading the queue. This also extends to powerful governmental agencies, with wide discretion and ample funding, as was the case of the Central Intelligence Agency and its involvement in large scale drug trafficking.[262] Another typical example of a powerful actor, capable of committing grave international offenses is that of international terrorist organizations, such as the Al-Qaeda network,[263] which, in addition, was tolerated by another powerful actor, namely the former Taliban Government of Afghanistan. Nevertheless, even small terrorist groups may be capable of committing serious violations, as was the case with the violent kidnapping and later execution by the Red Arm Function of the German industrial leader and economic advisor to Chancellor Hellmut, Dr. Hanns Martin

[261] See, for example, Article 4 of the Statute for the International Tribunal for Rwanda: "serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977"

[262] CIA has been accused more than once for engaging in drug trafficking activities as well as for money-laundering of the proceeds, especially in the regions of Eastern Asia and Central and Latin America. The most notorious case was the Iran-Contras Affair, with the official Kerry Committee affirming the connection; See especially p. 42-43 of the Senate Subcommittee Report on Drugs, Law Enforcement and Foreign Policy (Kerry Committee Report), available at http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB113/north06.pdf, last accessed at 09-09-2014. There have also been allegations about CIA's American Air's involvement in the trafficking of opium out of Laos in exchange for the support of Laotian opium farmers during the Vietnamese war. However, since there are no official declassified documents to support these allegations they can easily be reducible to the sphere of conspiracy theories, although they were serious enough to force CIA to publicly refute them.

[263] The bibliography concerning Al-Qaeda is quite extensive and even more so is the bibliography concerning terrorist organizations in general that dedicate a large part of their content to the Al-Qaeda network. Indicatively see Burke Jason Al-Qaeda: The True Story of Radical Islam I.B. Tauris, 2004

Schleyer, in an attack that also killed 4 other people[264] or the killing of 11 Israeli participants during the Olympic Games of Munich in 1972 by the Palestinian Organization Black September.[265] Last but not least, one of the aftermaths of globalization, was the transformation of regular criminal organizations to 'one of the world's foremost economic and armed powers',[266] capable of committing such grave offences that they can justify their international prosecutions.

One of the reasons why there is a strong connection between a powerful actor's applied force and the capacity to inflict serious harm is because, in an ordinary fashion, this type of criminal behaviour occurs as part of a systematic plan and targets large proportions of the population.[267] Nonetheless, being a part of a larger criminal conspiracy, plan, or policy in legal terms is not a condition sine qua non for the fulfilment of the gravity requirement. This is not necessary even with respect to the crime of genocide:[268] a general genocidal policy is not a legal requirement of the genocidal crime types of 'killing' and 'causing serious bodily or mental harm',[269] although it has been recognised in the jurisprudence of the ICTR and ICTY that "it frequently happens in practice that acts of genocide are accompanied by or are based on a plan or a sort of conspiratorial scheme".[270] In the same vein, Cassese[271] notes that

[264] For the tactics of the Red Arm Function and other terrorist organizations in Europe, see Alexander Yonah, Pluchinsky A. Dennis, Europe's Red Terrorists: The Fighting Communist Organizations, Psychology Press, 1992, p. 45

[265] In regards to the Black September and other terrorist organizations operating in the Middle East, see Rubin M. Barry, Judith Colp Rubin, Chronologies of Modern Terrorism, M.E. Sharpe, 2008, p. 187-188.

[266] Costa Maria Antonio, Executive Director of the United Nations Office on Drugs and Crime (UNODC), Press Release: "Organized Crime Has Globalized and Turned into a Security Threat", available at http://www.unodc.org/unodc/en/press/releases/2010/June/organized-crime-has-globalized-and-turned-into-a-security-threat.html, last accessed on 01-08-2014

[267] In the same vein, Werle , 2005, supra note 222, p 31-32: As a rule, it is a collective that is responsible for this use of force, typically a state."

[268] It should be noted that the question of whether genocide in conceivable in a singular event is highly debatable. The Elements of Crime supplementing the Rome Statute hint, however, in the direction of a quantitative element The Elements of crime specify Art. 6 of the Rome Statute by insisting on "a manifest pattern of similar conduct", Elements of Crimes (Art. 6) ICC-ASP/1/3(part II-B) (09.09.2002), available at http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf, last accessed on 12-09-2014 *Pro*: Prosecutor v. Jelisić, Judgment, IT.95-10-T (Trial Chamber I), International Criminal Tribunal for the Former Yugoslavia, 14 December 1999, para. 100; Cassese in Cassese A. et al. (eds), The Rome Statute of the International Criminal Court: A Commentary, vol. I, (2002), p. 349. Contra: Schabas W., Genocide in International Law, 2nd ed. 2009, p. 246. For an overview see McKay L., 'Characterising the System of the International Criminal Court; An Exploration of the Role of the Court through the Elements of Crimes and the Crime of Genocide', 6 International Criminal Law Review (2006) 2, p. 257

[269] Convention on the Prevention and Punishment of the Crime of Genocide, Article II(a) and (b). See the identical genocide definition in the Rome Statute, Article 6

[270] See in particular: ICTR Trial Chamber, Prosecutor v. Clément Kayishema and Obed Ruzindana, ICTR95-1-T, 21 May 1999, paras. 94 and 276, and ICTY, Appeals Chamber, Prosecutor v.Goran Jelisić, IT-95-10, 5 July 2001, para. 48.

[271] Cassese Antonio, "Is Genocidal Policy a Requirement for the Crime of Genocide?", In Gaeta Paola (ed.),The UN Genocide Convention: A Commentary, Oxford University Press, Oxford, UK, 2009 p. 136.

"To hold otherwise is to confuse a requirement demanded by a legal rule with a factual occurrence in practice: one simply mixes up *quod plerumque accidit*, i.e. what in fact occurs very frequently in real life, with a specific and distinct ingredient required by legal rules for a conduct to be characterized as genocide.[272]

On the other hand, neither the 'quantity' of the crime's victims or of the concurrent offenses can be used as a conclusive criterion for the gravity threshold, although admittedly the large scale of the violations can offer a reputable presumption for the need of an international prosecution. It becomes apparent that each and every one of the aforementioned factors needs to be taken into account for the assessment of the gravity of the crime in question. However their relative nature necessitates their examination within their contextual framework. Tallgren puts it as follows: "The unambiguously devastating quantity and quality of the suffering of the victims of serious international crimes calls for intuitive-moralistic answers, in the manner of certain things are simply wrong and ought to be punished. And this we do believe.[273] To feel compelled nevertheless to subject also international criminal law to the question 'why' bears the risk of being misunderstood, the risk of being defined in terms of for or against the violence and injustice the crimes represent."[274] C. Prittwitz[275] even stresses a quasi-religious belief in International Criminal Law. Similarly, Koskenniemi states: "[...] I often wonder to what extent international law is becoming a political theology in Europe [...]."[276]

In order to avoid such allegations and based on the lessons learned and on best practices derived from the international tribunals, it is important to additionally establish clear guidelines in regards to the criteria of gravity and highest responsibility for the selection and prioritization of cases. For this reason, the following principles, as suggested by Agirre Aranburu[277] are worth recalling for the purpose of this inquiry

[272] For a contradictory opinion, see Schabas A. William, Rome Statute, Oxford University Press, 2010, pp. 124–125
[273] Hirsch Andrew, Doing Justice : The Choice of Punishments, Report of the Committee for the Study of Incarceration, 1976, p. xxxix
[274] See Tallgren I., 'The Sensibility and Sense of International Criminal Law',13 European Journal of International Law (2002) 3, 561-595, p. 564.
[275] Prittwitz C.,'Internationales Strafrecht: Die Zukunft einer Illusion?', in 11 Jahrbuch für Recht und Ethik (2003), p. 471
[276] Koskenniemi M., 'International Law in Europe: Between Tradition and Renewal' 16 European Journal of International Law (2005) 1, 113, p. 120
[277] Aranburu Xabier Agirre, "Gravity of Crimes and Responsibility of the Suspect", pp. 233–234 in Morten Bergsmo (ed.),Criteria for Prioritizing and Selecting Core International Crimes Cases, 2nd ed., FICHL Publication Series No. 4, Torkel Opsahl Academic EPublisher, Oslo, 2010, pp. 205–234. The book contains a number of articles on the matter.

as well: a. Determine the substantive offences that are regarded gravest (such as possibly killing and rape) and develop the selection process mainly around them. b. Define clear parameters of gravity, including quantitative and qualitative aspects (number of victims, manner, specific intent, etc.) and considering sentencing criteria.c. Adopt an explicit hypothesis of the case as the outline for selection and investigation. d. Adopt a clear definition of "most responsible", focusing on the primary causal actors and presuming that they are the same as senior leaders only under certain factual circumstances. e. Beware of the existence of multiple types of power structures, discrepancies between their formal definition and real functioning, and variations over time and space. f. Utilize systematically analytical techniques, including crime pattern databases, statistics, standard indicators checklists, mapping, chronologies, network analysis, etc. to determine both gravity and highest responsibility. g. Beware of the risk of confirmation bias in suspect driven investigations and take measures to control it.

(i) The Legal Goods of Peace and [Human] Security

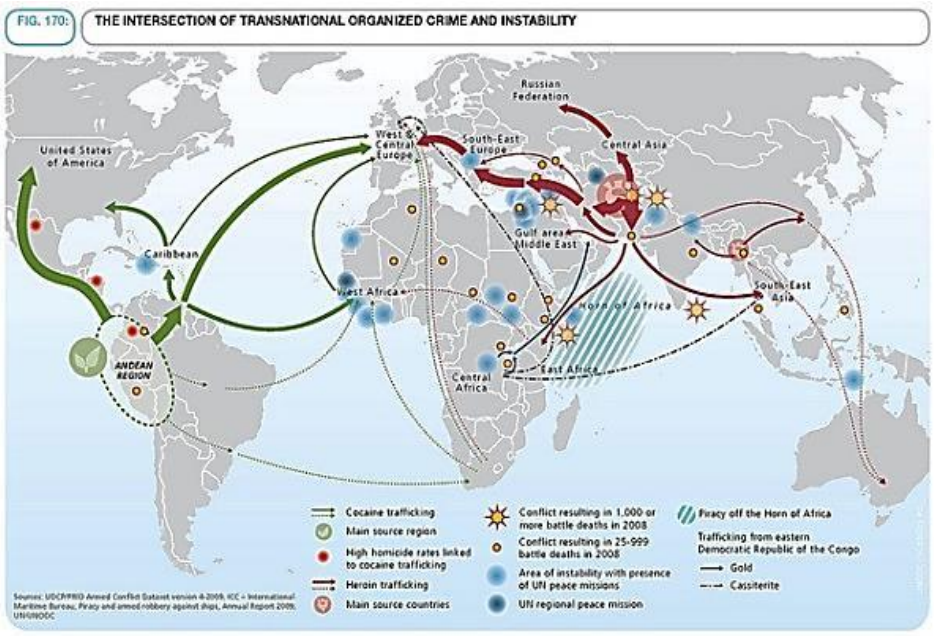
In the past few years, perspectives on international crime have become increasingly associated with security considerations. At the same time scholarly literature affirms the linkage between the two, by defining international crimes as those, among other attributes, that threaten the peace and security of the world.[278] However, in order to ensure objectivity, we should not omit to mention the riposte to this position, no matter how generalised this premise of international crimes being threats to international peace and security may be in the academic -and not only- community. Hieramente for instance,[279] after examining several 'potential' legal goods, concludes that there is no distinct legal good or feature that could explain the difference between 'international crimes' and 'ordinary crimes'. The sole anchorage for such a distinct treatment could be the purely hypothetical and thereby abstract, according to him, peace-threatening nature of these crimes. He distils the wording of the Security Council 955/1994 Resolution, which established the ICTR and notes that

[278] 'Certain crimes affect the interests of the world community as a whole because they threaten the peace and security of humankind'. Bassiouni, 2013, supra note 10, p. 241; [International crimes] have a basis in international law and they are also regarded by the international community as violating or threatening values protected by the general international law as the preamble of the ICC provides.' ; Cryer et al, 2010, supra note 17, p. 5

[279] Hieramente Mayeul, The Myth of International Crimes: Dialectics and International Criminal Law,. Goettingen Journal of International Law 3 (2011), 551-588

what the UN Security Council stated was that the acts committed *in Rwanda* constitute a 'threat to peace', to further conclude that this is not to say that every occurrence of such crimes constitutes ipso facto a threat. So as to reinforce his argument, he draws from the wording of Article 13(b) of the Rome Statute: A Security Council referral has to be based on Chapter VII of the UN Charter and a determination of a 'threat to peace' pursuant to its Art. 39. Thereafter he wonders why such a restriction would be necessary – especially recalling the gravity criterion in Art. 17 (d) of the Rome Statute[280] – if the crimes committed are *ipso facto* to be considered as peace threatening. The reason why Hieramente is mistaken is mainly because he perplexes the insertion of gravity criteria for practical purposes and the sparing reaction of an organ that is political in nature, with the attribution of international status to certain crimes on a normative basis.

However, the testimonies that prove that international crimes either directly attack or endanger the legal goods of peace and security are overwhelming. What is striking is that if you take a map of global conflicts and superimpose a map of global trafficking routes they overlap almost perfectly, as shown below:



Source: U.N.O.D.C., Crime and Instability, Case Studies of International Threats, 2010

[280] See Article 17 (d) of the Rome Statute (Issues of Admissibility), available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, last accessed on 15-09-2014 : Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (d) The case is not of sufficient gravity to justify further action by the Court

Insofar as transnational crime is concerned, after the war against organized crime was promoted by former U.S. President Clinton to a national security threat, the issue has risen to new stardom in the wars of international security rhetoric.[281] According to a U.N.O.D.C. report,[282] the reason why transnational organised crime is attracting increased attention is because whereas in the past the problem was mostly national (mafia, mobsters, cartels, triads), now, as a result of globalization, it poses a threat to international security. Other international pronouncements that affirm the connection between transnational crime and international peace and security vary, from presidential statements of the Security Council,[283] reports of the Secretary General to the Security Council stating that 'transnational organised crime remains a major threat to peace and security' of certain regions,[284] EU statements stressing that 'transnational organized crime and corruption pose serious threats to the welfare of citizens and peace and security worldwide',[285] and numerous press releases on behalf of the U.N.O.D.C. such as the one in 2010[286] under the inclusive head-title 'Organised crime has globalised and turned into a security threat', to OSCE Resolutions,[287] and decisions of the AU's Peace and Security Council.[288]

Dissecting the reasons why transnational crimes threaten the peace and security of the regions they inflict as well as of the world in general, the U.N.O.D.C.'s Case

[281] Berdal R. Mats, Serano Monica, Transnational Organised Crime and International Security: Business as usual? Lynne Rienner Publishers, 2002, p. 13

[282] UNODC, Crime and Instability, Case Studies of International Threats, 2010, preface

[283] such as S/PRST/2013/22 of 18-12-2013 concerning the threat to the international peace and security posed by transnational organised crime and especially drug trafficking in West Africa and the Sahel Region

[284] See S/2013/359 Report of the Secretary-General on transnational organized crime and illicit drug trafficking in West Africa and the Sahel region

[285] See for instance, EU Statement – United Nations 3rd Committee: Crime Prevention and Criminal Justice and International Drug Control: 'http://eu-un.europa.eu/articles/en/article_14060_en.htm, last accessed on 11-09-2014

[286] UNODC Press Release of 17-06-2010, title 'Organised crime has globalised and turned into a security threat'

[287] Such as the Baku Final Declaration and the Resolution on The Fight Against Terrorism adopted by the Parliamentary Assembly, available at http://www.oscepa.org/meetings/annual-sessions/2014-baku-annual-session/2014-baku-final-declaration/1853-09,last accessed on 11-09-2014

[288] The most recent of those decisions by The Peace and Security Council of the African Union (AU), was adopted at its 455th meeting, held on 2 September 2014, at the level of Heads of State and Government. For the full text of the decision, and especially par. 5 which explicitly recognises transnational crime as a threat to international security: http://www.au.int/en/content/peace-and-security-council-455th-meeting-level-heads-state-and-government-nairobi-kenya, last accessed on 11-09-2014 ; For a comprehensive review of the mail latest statements and developments in this matter, within the framework of UN see the synopsis in the French permanent delegation's website, available at: http://www.franceonu.org/france-at-the-united-nations/thematic-files/peace-and-security/transnational-threats-to/france-at-the-united-nations/thematic-files/peace-and-security/transnational-threats-to/article/transnational-threats-to, last accessed on 11-09-2014

Study on Crime and Instability,[289] provides an illuminating view. After examining the cases of cocaine trafficking in the Andean Region, Mesoamerica and West Africa, heroin trafficking in South/West and Central Asia, South East Europe and South East Asia, the impact on Central Africa from the smuggling of minerals and maritime piracy in the Horn of Africa, the report concludes that it is a vicious, downward cycle, which feeds upon itself, as vulnerability attracts crime and crime deepens vulnerability. In cases where the rule of law in a particular state is weakened transnational organised crime can pose a genuine threat to stability but, even where the state is strong, it can present a major challenge. For example from the 1970s to the 1990s, fuelled by money gained in processing and trafficking heroin to the U.S., Cosa Nostra was able to threaten the stability of Italy, a G8 country and one of the largest European economies.

In more detail, drugs pay for bullets for insurgents, something that undermines the probability of them coming to the negotiations table, thus hampering the peace building process. This practice of engaging in illicit drug trafficking and other criminal activities, such as arms or human trafficking, has its origins in the Post-Cold War early years, when foreign funding ceased to flow in and insurgents had to achieve sustenance from the lands they controlled. Smuggling of minerals and plundering of natural resources also threatens peace and security as the diamond fuelled wars in Angola and Sierra Leone demonstrate.[290] Moreover, organised crime can gain momentum when rebels gain exclusive control of a portion of a country. The pseudo states thus created have no international accountability and become trafficking hubs and retail centres in for all manner of illicit goods and services. They also continue to pose a threat to national and international security, providing a safe haven for international fugitives, including terrorists.[291]

The connection between transnational crime and what the preamble of the Rome Statute preached in regards to grave violations that threaten the peace, security and well-being of the world, did not go unnoticed. In the final act of the diplomatic conference in 1998, it was recommended that a future review conference would

[289] UNODC, Crime and Instability, Case Studies of International Threats, 2010, available at https://www.unodc.org/documents/frontpage/Crime_and_instability_2010_final_low_res.pdf, last accessed on 11-09-2014

[290] For general information on these diamond fuelled wars, see Williams D. Paul, War and Conflict in Africa, John Wiley & Sons, 2013

[291] U.N.O.D.C., supra note 289, p. 8

consider the crimes of terrorism and drug crimes, with a view to inclusion in the list of crimes within the jurisdiction of the court. It was explicitly recognised that terrorist acts by whomever and wherever perpetrated and whatever their forums, methods and motives are serious crimes of concern to the international community. It was also recognised that the international trafficking or illicit drugs is a very serious crime sometimes destabilizing the political social and economic order in States. Both crimes were thus considered to pose serious threats to international peace and security.[292]

In conclusion, for organised crime to be characterised as a security problem it must be something that can threaten the sovereignty or independence of a state itself.[293] Hence one may legitimately interpret transnational organised crime as a security threat.[294]

Nevertheless, it is not only the state's security that is threatened by transnational crimes but of people as well. With an accent on the individual, 'Human Security' has been characterised as 'a concept rather well substantiated, attractive and modern. It seems that it is a concept of the future for interpreting and approaching most security situations as it integrates human rights, security and sustainable development'.[295]

Perhaps the most comprehensive approach to security after the end of Cold War was substantiated by the "Copenhagen School", led by Barry Buzan, Ole Waever, Jaap de Wilde and others. In their key publications, [296]its representatives defined security as an inherently multi-sectorial phenomenon consisting of military, environmental, economic, political and societal sectors. What actually happened with the security at the conceptual level after the end of Cold War is simultaneous horizontal and vertical broadening. This is where the roots of human security are to be found. Horizontal broadening refers to incorporating new non-military aspects of

[292] United Nations, Final Act of the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CON F.183/13, vol. 1, Annex I, Resolution E, p. 71, 2002, available at http://legal.un.org/icc/statute/finalfra.htm, last accessed on 11-09-2014. For the developments pursuant to this Resolution, see Chapter 10, par. 10.2.2

[293] Buzan, Barry, Waeve Ole and Wilde Jaap, Security: A New Framework for Analysis, Lynne Rienner Publishers, London, 1998

[294] Lipschutz D. Ronnie, On Security, Columbia University Press, 1995, p. 10

[295] Prezelj Itzok, Challenges in Conceptualizing and Providing Human Security, HUMSEC Journal, Issue 2, available at: http://www.humsec.eu/cms/fileadmin/user_upload/humsec/Journal/Prezelj.pdfp, last accessed 10-09-2014 p. 1

[296] Buzan, 1998, supra note 291; Buzan, Barry, People, States and Fear, An Agenda for International Security Studies in the Post-Cold War Era, Harvester Wheatsheaf, London, 1991;Buzan, Barry, Kelstrup Morten, Lemaitre Pierre, Tromer Elizabeta and Waever Ole, The European Security Order Recast: Scenarios for the Post-Cold War Era, Pinter Publishers, 1990.

security, such as environmental, economic, demographic, criminal, terrorist, health, information, immigration and other aspects (or sectors and dimensions as called be some), while vertical broadening of security referred to incorporation of other non-state referent objects, such as individuals, local communities, groups of people by common ethnic, religious or ideological characteristics, global community etc.

Human Security was finally conceptualized and presented to the global public in a Human Development Report in 1994[297] and has been characterised by UN's Human Security Unit as an added value.[298] According to the definition propounded by the Commission on Human Security (CHS), which operates under the aegis of OCHA, 'human security is to protect the vital core of all human lives in ways that enhance human freedoms and human fulfilment […] It means protecting people from critical (severe) and pervasive (widespread) threats and situations.'[299] The definition proposed by CHS reconceptualises security in a fundamental way by moving away from traditional state-centric conceptions of security that focused primarily on the safety of states from military aggression to the one that concentrates on the security of individuals, their protection and empowerment, drawing attention to a multitude of threats that cut across different aspects of human life. Under this structure, one of the possible types of human security threats is crime, with terrorism being singled out – probably as a reflection of the mainstream trends and with human trafficking being used as the principle example of such human security threats.[300]

Human Security threats are interlinked in a domino effect in the sense that each threat feeds on the other. One must also note that human security is directly related to the concept of international peace and security. The report by the UN High-level Panel on 'Threats, Challenges and Change' entitled 'A More Secure World: Our

[297] For the full Human Development Report of 1994 visit http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf, last accessed on 11-09-2014

[298] Human Security in Theory and Practice, Application of the Human Security Concept and the United Nations Trust Fund for Human Security, Human Security Unit, Office of Coordination of Humanitarian Affairs, United Nations.

[299] See the full Report, Human Security Now, Commission on Human Security, 2003, p. 4, available at: http://www.unocha.org/humansecurity/chs/finalreport/English/FinalReport.pdf, last accessed on 12-09-2014

[300] See for instance (Ed) Okubo Shiro and Shelly Louise, Human Security, Transnational Crime and Human Trafficking: Asian and Western Perspectives, Routledge, 2011

Shared Responsibility,[301] makes a distinction between threats from non-state actors and states to human security as well as state security.

In conclusion, we refer to the European Council's observations which summarize in its statement the interlinked nature of the different aspects of security with the role of criminal justice: "[T]he challenge will be to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe", while "it is of paramount importance that law enforcement measures and measures to safeguard individual rights, the rule of law, international protection rules go hand in hand in the same direction and are mutually reinforced".[302] In its Action Plan implementing the Stockholm Program, the Commission notes, also for the first time, that "the Union must resist tendencies to treat security, justice and fundamental rights in isolation from one another."[303]

(ii) The Notion of Humanity

The concept of 'hostes humani generis', first coined by Marcus Tullius Cicerone in the 1600s and then used in order to describe the perpetrators of piracy and slave trade in the 1800s[304] reflected the philosophical perspective of Roman Law and it presupposed the existence of a civitas maxima, which existed within the context of an international community. The latter can be perceived either as a collectivity of human beings, which according to an epitimological holistic approach has attributes that exceed those of its components or as the holder or trustee of the intrinsic human values of each individual. If peace and security of the world is the core legal good of the international community as an entity, the notion of humanity is represents the primal interest that is protected by it. From the Preamble of the Rome Statute,[305] declarations in Security Council Resolutions and statements of international

[301] See UN High-level Panel on 'Threats, Challenges and Change entitled A More Secure World: Our Shared Responsibility, available at http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf, last accessed on 12-09-2014

[302] European Council 17024/09 of 2. 12. 2009, p. 3.

[303] See COM (2010) 171 final of 20. 4. 2010, Action Plan Implementing the Program, p. 3.

[304] Bassiouni M. Cherif, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary practice, 42 Virginia Journal of International Law, 2001, p. 81 ; Bassiouni M. Cherif, Enslavement : Slavery , Slave – related practices, and Trafficking in Persons for sexual exploitation, in Bassiouni, 1, 2008, supra note 142, p. 535

[305] The preamble states in par. 2 that the parties in this treaty are 'mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'

organization's spokesmen[306] to the overwhelming consensus in academic literature[307] and even its incorporation in the official description of crimes such as genocide,[308] it has been repeatedly recognised that international crimes shock the conscience of humankind as they violate their fundamental values of interests.

It is true that on first reading the concept of 'core values' of the international community and 'crimes that shock the conscience of mankind' may appear to be somewhat ambiguous. In this context, Einarsen notes that 'why such a vague phrase remains instrumental in shaping legal thinking on certain kinds of criminal behaviour may be hard to explain rationally, yet almost any rational person will intuitively understand why some crimes shock fellow human beings'.[309] Notwithstanding the fogginess surrounding the notion of humanity, Cassese remarks that it is not comprised from values "propounded by scholars or thought up by starry-eyed philosophers but are rather laid down, although sometimes not very directly, in international instruments, such as the 1945 UN Charter, the 1948 Universal Declaration of Human Rights, the 1950 European Convention on Human Rights and the two 1966 UN Covenants.[310] Under this line of thought, transnational organised crimes do have the ability to offend the notion of humanity either because of their shock value, as is usually the case with terrorist attacks or through the violation of fundamental human rights, as it happens with human trafficking, piracy, drug trafficking etc, which are protected by the international community as a carrier of these individual rights.

It has been implied that 'the assumptions of an already existing international community apart from disappointments may also encourage rhetoric of universality that might become a cloak for the hegemonic tendencies by states with the power to decide what is and what is not a universal interest binding on all states.'[311] It is the authors view however that these risks should not deter us from the difficult journey

[306] See for example the New York , 21 August 2014 statement, Statement attributable to the Spokesman for the Secretary-General on the one year anniversary of the chemical weapons attack in Ghouta, Damascus, available at http://www.un.org/sg/statements/index.asp?nid=7938, last accessed on 12-09-2014

[307] Cryer et al, supra note 17, 2010 p. 4: They [international crimes] are also regarded by the international community as a whole as violations that threaten values protected by international law; Cassese, 2003, supra note 178, p. 23; Einarsen, 2012, supra note 157, p. 23; Distein Y., International Criminal Law Review, Vol. 20, 1988, p.221: 'While international crimes typically are grave offences that harm fundamental interests of the whole international community…' and many others

[308] See GA/Res/96/1946 at (I)

[309] Einarsen, 2012, supra note 157, p.23

[310] Cassese, 2003, supra note 178, p. 23

[311] Bassiouni, 1, 2008, supra note 142, p.30

towards an eventually much more consistent interpretation and prosecutions of serious international crimes everywhere, a concern which should outweigh the potential risks and disappointments.

Chapter 7

TCs as International Crimes: Legal Consequences

The affirmation of transnational crimes' international status and their subsequent equation to international crimes denotes a series of legal consequences. Firstly, it legitimizes their prosecution before international fora should, on the basis of the gravity criteria set above, it is concluded that the criminal act in question primarily affects the legal goods of the international community as a whole, thus granting the latter with the overriding legal interest to prosecute. In case of concluding that the crime in question primarily affects the national legal order, the latter is still obliged to implement international law and to act in accordance to the international legal standards of due process.

Secondly, the admission of the connection between transnational crimes and peace and security, places them under the jurisdiction of the UN Security Council, a notion that translates to the possible activation of a whole spectrum of legal consequences according to the Security Council's broad competence in regards to the maintenance of the peace and security of the world, as we shall see in the following chapter.

Thirdly, the assertion of transnational crimes as international generates substantive legal consequences that traditionally stem from the characterization of a crime as international, as far as matters of jurisdiction, statutes of limitation, permissible defences etc. are concerned. The consequences of the classification of a transnational crime in the category of international crimes are, first and foremost, those incorporated in the Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, as they were affirmed by the General Assembly, with its 95 (I) Resolution on 11 December 1946,[312] and

[312] See GA/RES/1/95, available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement ,last accessed on 12-09-2014

later adopted by the International Law Commission at its second session, in 1950.[313] By "affirming" those principles, the General Assembly clearly intended to express its approval of and support for the general concepts and legal constructs of criminal law that could be derived from the IMT Charter and had been set out, either explicitly or implicitly, by the IMT, with the aim to enable their application to future prosecutions of international crimes. 'Translated into law-making terms, this approval and support meant that the world community had robustly set in motion the process for turning the principles at issue into general principles of customary law binding on member States of the whole international community'.[314]

Ever since, the Nuremberg Principles have been incorporated, although in slightly differentiated formulations and in a more elaborate manner, in the Statutes of the ICTY, ICTR and of the ICC and have also been reaffirmed in their respective jurisprudence and embraced by the case law around the world. For instance, in the *Eichmann* case, the Israeli Supreme Court held that General Assembly resolution 95 (I) is evidence that the Nuremberg principles form part of customary international law. According to the Court, "if there was any doubt as to this appraisal of the Nuremberg Principles as principles that have formed part of customary international law 'since time immemorial,' such doubt has been removed by two international documents. We refer to the United Nations Assembly resolution of 11.12.46 which 'affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal, and the judgment of the Tribunal […]'[315] The European Court of Human Rights recognized the "universal validity" of the Nuremberg principles in Kolk and Kislyiy v. Estonia. According to the Court, "Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, *inter alia*, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission".[316]

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[313] The report of the ILC, which also contains commentaries on the principles appears in Yearbook of the International Law Committee, 1950, Vol 2, para 97

[314] Cassese Antonio, Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal, United Nations Audiovisual Library of International Law, available at http://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_e.pdf , last accessed on 12-09-2014.

[315] Attorney General of Israel v. Eichmann, Supreme Court of Israel (1962) 36 International Law Review, p. 277.

[316] Kolk and Kislyiy v. Estonia, Decision on Admissibility, 17 January 2006.

The legal consequences that derive from the aforementioned principles are : 1) direct individual liability under international law applies; 2) the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law; 3) the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law; 4) the defence of superior orders in not permissible; 5) the person charged with an international crime has the right to a fair trial on facts and law, in accordance with the international legality principle and the other international standards.

Special reference needs to be made in relation to the obligation 'aut dedere aut judicare', which on the first glance may seem redundant, considering that this particular obligation is not only already incorporated and applied for transnational crimes within the context of the indirect enforcement system but even more so, it constitutes one of the cornerstones upon which the whole system is built. Nevertheless, the characterization of a transnational crime as international embeds the obligation 'aut dedere aut juricare' with an additional legal basis which is not founded on or dependant from any relevant explicit provision that may or may not be included in a treaty. The 1996 Draft Code of Crimes against the Peace and Security of Mankind,[317] in Article 9, contained a provision on the obligation of the states to either prosecute or extradite, but only for core crimes and 'without prejudice to the jurisdiction of an International Criminal Court'.[318]

In 2008, the ILC established a working group on the topic under the chairmanship of Mr Alain Pellet. Following its establishment, the group prepared a general framework for the consideration of the topic, which was reproduced in the ILC annual report of 2009.[319]

[317] For the full text adopted by the International Law Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 50)., visit: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf , last accessed on 12-09-2014. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1996, vol. II (Part Two)

[318] This could also be a key addition for what the present thesis suggests in regards to the prosecution of an international crime by the actor with the primal legal interest to do, as illustrated in Figure 1 above.

[319] See ILC, Report of the International Law Commission, Sixty -first session (4 May–5 June and 6 July–7 August 2009), A/64/10, 2009, Chapter IX: "The Obligation to Extradite or Prosecute (aut dedere aut judicare)" pp. 344–347, para. 204

Item (b)[320] on the material scope of the obligation to extradite or prosecute is the most interesting for our purposes and in particular the three sub-questions posed under it : 1) whether the recognition of an offence as an international crime is a sufficient basis for the existence of an obligation under international customary law. 2) If not what is / are the distinctive of the jus cogens character of a rule criminalizing certain conduct? 3) Whether, and to what extent, the obligations also exists to crimes under domestic law.'[321] These questions highlight the lack within the ILC of an authoritative definition of international crimes with predictable legal consequences, which colours the enumeration attempted in this chapter with an indicative tone.

What is more, labelling a transnational offense as an international crime may have an impact on the perpetrator and his rights stemming from provisions contained in bodies of international law other than ICL. For example Art 14 (1) of the Universal Declaration of Human Rights[322] states that everyone has the right to seek and to enjoy in other countries asylum from prosecution but art 14 (2) makes an exception in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the UN. At the same time, Article 1F of the Refugee Convention expressly excluded from refugee status "any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes" or "(c) he has been guilty of acts contrary to the purposes and principles of the United Nations".[323] It has always been clear that the 'international instruments' referenced are not confined to those already drawn up when the Refugee Convention was adopted, but also include all future international instruments for the same purpose.

[320] See ILC, Report of the International Law Commission, Sixty -first session (4 May–5 June and 6 July–7 August 2009), A/64/10, 2009, Chapter IX: "The Obligation to Extradite or Prosecute (aut dedere aut judicare)", p. 345, para 204

[321] See Einarsen, 2012, supra note 157, p. 204-205

[322] The full text of the Declaration is available here: http://www.un.org/en/documents/udhr/index.shtml , last accessed on 12-09-2014

[323] There is a vast literature on Article 1F of the Refugee Convention, but for a comprehensive introduction and overview see Krieken J. Peter (ed.), Refugee Lawn Context: The Exclusion Clause, TMC Asser Press, The Hague, 1999.

Chapter 8

Collective Codification of International Criminal Law

Examining the blueprint of the present legal framework of transnational crimes, which results in the transposition of international crimes into national law, we come face to face with the extensive fragmentation of their substantive norms, as it was demonstrated in the first part of the present thesis. In such cases the criminal character of the proscribed acts has already been defined in international law and the international norm has a legal basis in the law creating sources of international law. Nonetheless, when a crime becomes part of a national criminal law statute, the norm acquires a national legal basis as well, with applicable interpretative sources stemming from national preparatory works, national criminal law traditions, domestic jurisprudence and so on. In practice, it will vary from state to state how the 'imported crimes' are interpreted and implemented, and to what extent state authorities and courts seek to apply autonomous ICL concepts. Therefore, the 'imported international' crimes are usually not equivalent in content with the international crimes on which they are based. The problem exacerbates even more as a specific crime type at the international level may not even have the same material content under all the law-creating sources of international law. For each crime type, there might be several autonomous proscriptions under international law with slightly different formulations depending on the particular legal context.

At the international level, the problem of the fragmented nature of ICL has only been dealt with in a piecemeal approach, through either the conscious choice of incorporating the international crimes verbatim in various Resolutions, Statutes of Criminal Tribunals, Declarations and so on or by creating, for instance, common Appeal Chambers for the Ad Hoc Criminal Tribunals of ICTY and ICTR. Even so, these sparse attempts are restricted to the so called core crimes, while the international community seems unable to address the issue of transnational crimes, for which the matter gets even more complicated under the current legal framework and its dependence on the indirect enforcement system. It is apparent that the only logical solution to the global problem of transnational criminality and to the requirement set by the international legality principle, *certa lege*, is a global one itself. This is what

the concentrated codification of transnational crimes along with the other international crimes can offer.

It is important to note that the United Nations has never adopted a truly comprehensive codification of international crimes whether in the form of a General Assembly Resolution or a Convention. The organ endowed with the competence of the promotion and progressive development of international [criminal] law and its codification would be the International Law Commission pursuant to article 1 of its Statute.[324] The ILC has worked on different parts of international law and 'extensively in the field of international criminal law beginning with the formulation of the Nuremberg Principles and the consideration of the question of international criminal jurisdiction at its first session in 1949 and culminating in the completion of the draft Statute of the ICC at its 46th session in 1994 and the draft code of Crimes against the Peace and Security of Mankind at its 48th session in 1996',[325] which covered: aggression (art. 16), genocide (art. 17), crimes against humanity (art. 18), crimes against the United Nations and associated personnel (art. 19) and war crimes (art.20).[326]

On a first level, the Draft Code's historical background reveals that this is not the first time less restrictive options emerge in the discussion surrounding the ratione materiae of the code, compared to what was ultimately adopted in the 1996 version, whose analytical sense was dictated by political considerations and practicalities concerning the potential capacity of institutions that might be involved of the time. On a second level, it reveals that the fragmentation of international crimes was in fact initiated and then cultivated by the Special Rapporteurs of the ILC and that the dichotomy was actually due to and interrelated with the aforementioned concerns.

[324] See Statute of the International Law Commission, adopted by the General Assembly, in Resolution 174 (II), as amended by resolutions 485 (V) of 12 December 1950 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981, available at http://legal.un.org/ilc/texts/instruments/english/statute/statute_e.pdf , last accessed 13-09-2014.

[325] International Law Commission (ILC), Survey of multilateral conventions which may be of relevance for the Commission's work on the topic "The obligation to extradite or prosecute (aut dedere aut judicare)", Study of the Secretariat, New York, 26 May 2010.

[326] For the full text adopted by the International Law Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 50)., visit: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf , last accessed on 12-09-2014. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1996, vol. II (Part Two)

Likewise, the ILC appointed Jean Spiropoulos as Special Rapporteur in 1949 and directed him to prepare a working paper on the Draft Code.[327] Jean Spiropoulos suggested two methods of approaching the subject, the first being to elaborate a text with detailed substantive and procedural provisions, an ideal draft similar to the penal codes of municipal law, without paying any regard to whether such a draft would have any chance of obtaining the approval of the governments, while the second consisted of the elaboration of a text which based on a realistic approach that could serve as a useful basis of discussion at an international conference.[328] Taking into account the newly-founded character of the UN paradigm, the second method prevailed and the ILC excluded from this draft code the transnational crimes, thus establishing the distinction between the two categories of international crimes, which has been a constant thread in ICL ever since.

Special Rapporteur Doudou Thiam (1981-1991), echoing the earlier decision by the ILC in the 1050s, clarified that this was a more limited task than preparing an international penal code,[329] that is a general penal code purporting to cover all types of international crimes. According to Thiam, many offences, which undoubtedly constitute international crimes, will not for that reason alone be included in the proposed draft. (para 7) He described the relationship between the two categories in these terms: 'all offences against the peace and security of mankind are international crimes but not every international crime is necessarily a crime against the peace and security of mankind'. (Para7) In that his second report, Thiam also defined international crimes as all offences which seriously disturb international public order, (para 10) in the sense that an international crime results from the breach of an international obligation so essential for the protection of the fundamental interests that its breach is recognised as a crime by the international community as a whole. (para 11)

The breakthrough from this fragmenting tradition for transnational crimes came in the form of the 1991 Provisional Draft Code, which set out a list of 12 crime

[327] Yearbook of the International Law Commission, 1949, part I, 33rd meeting.
[328] United Nations, Draft Code of Offences against the Peace and Security of Mankind–Report by J. Spiropoulos, Special Rapporteur, A/CN.4/25, 26 April 1950, para. 1.
[329] United Nations, Second Report on the Draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/377and Corr.1, in Yearbook of the International Law Commission, 1984, vol. II, part I, para. 7

categories, including international terrorism, illicit traffic in narcotic drugs and wilful damage to the environment.[330]

However, the 1996 version of the Draft Code presented the substantially reduced the scope that was ultimately chosen but it is noteworthy that the ILC underlined that the inclusion of crimes in the 1996 Draft Code and its adoption neither affected the status of certain crimes under international law nor did it, in any way, preclude the further development of this important area of law. What is more, the commentary accompanying article (1) of the Code states that the restricted scope of the code is not intended to suggest that the present version covers exhaustively all crimes against the peace and security of mankind.[331]

The aforementioned historical review implies that we should neither draw general conclusions from what was included as a crime against peace and security in the Code nor should we interpret the absence of a crime from the various draft codes as evidence of its absence from a comprehensive list of international crimes. Furthermore, it reinforces the argument about a concentrated codification of international crimes, without any exempt. If the realistic approach in the 1950s was to propound a more restrictive approach to the codification process, the pragmatic needs of today's globalised international community, the inefficiency of the indirect enforcement system to address these needs, the circumvention of the legality principle and certa lege on the one hand and the invasion of ICL's punitive arm through the system's loopholes or the forum shopping it allows on the other hand, dictate the promotion of a broad codification, bound to include transnational crimes as well. Last but not least, as Bassiouni points out 'when a value oriented neutral approach is impossible the only practical solution is the codification'.[332]

[330] United Nations, Report of the International Law Commission on the work of its forty-third session, 29 April – 19 July 1991, A/46/10, Official Records of the General Assembly, Forty-sixth session, Supplement No. 10. pp. 95-97.
[331] United Nations, Report of the International Law Commission on the work of its forty-eighth session, 6 May–26 July 1996A/51/10, Official Records of the General Assembly, Fifty-first session, Supplement No. 10, para. 46. Reprinted in Sir Arthur Watts, The International Law Commission, 1949–1998, vol. 3, Final Draft Articles and Other Materials, Oxford University Press, Oxford, UK, 1999, pp. 1686, 1671.
[332] Bassiouni, 1997, supra note 198, p. 63- 74, at p. 72

B. Integrating TCs in the Direct Enforcement System – Alternative Options

The recognition of transnational crimes as international crimes provides the international community with the necessary legitimate unification basis for their integration in direct enforcement systems towards a more coherent form of governance. As it was previously noted, for the purpose of this thesis, 'direct' refers, as a stipulative term, to any undertaking of action by the international community, either represented by international organizations and their organs or by international and internationalised criminal tribunals or even individual states or group of states, exercising for instance universal jurisdiction over certain crimes.

Chapter 9

Under the Cover of [Human] Security

9.1 The Concept of Peace and Security in its Classic Form

The connection between international crimes and the peace and security of the world fully justifies the increased attention by the Security Council to the threat posed by them in the last few years. '[Transnational] organised crime to be characterised as a security problem must be something that can threaten the sovereignty or independence of a state. 'Transnational crime in extreme cases can undermine international sovereignty of states by providing an alternative system of authority, which patronises its supporters and eliminates its opponents.[333] Recent examples include the attempt in 2006 by the 'Primeiro Comando de Capital', a prison based gang to take over Sao Paolo[334] and the 2010 violence in Kingston, Jamaica precipitated by the attempt to capture the wanted drug trafficker Christopher 'Dudus' Coke in order to extradite him to the US.[335] These direct threats are unusual but

[333] Boister, 2012, supra note 23 , p. 7

[334] Rollings J., Wyler L.S., Rosen S., International Terrorism and Transnational Crime: Security, Threats, US Policy and Considerations for Congress, Congressional Reasearch Service Report for Congress, 2010, p. 32

[335] Klein A. Peculiar and Perplexed – The Complexity of Ganja Cultivation, in the English-Speaking Caribbean, in Decorate T., Potter G. and Bouchard M., World Wide Weed: Trends in Cannabis Cultivation and its Control, Farnham Ashgate, 2010, p. 23,29

dangerous situations can emerge when transnational crime and state authorities enter into 'such a close symbiotic relationship that in fact the state is captured criminals'[336] The breakaway borderline of Moldova, Transnistria is considered an example of a criminal state, run by a small criminal clique.[337] Hence one may legitimately interpret transnational organised crime as a security threat,[338] which places it under the jurisdiction of the Security Council and its broad competences to take the appropriate measures for the maintenance of the peace and security of the world.

In this realm, in December 2009, the Presidential Statement concerning the issue of 'Peace and Security in Africa', noted that: 'The Security Council invited the Secretary General to consider mainstreaming the issue of drug trafficking as a factor in conflict-preventing strategies, conflict analysis, integrated missions' assessments and planning and peacebuilding support'.[339] This statement has been followed by a series of Resolutions that attest to the admission that transnational crime can indeed threaten the peace and security of a certain region,[340] as well as by reports of the Secretary General to the Security Council with identical content.[341]

It has been suggested that 'some interests are so fundamental to the international community as a whole that the latter has recognised their breaches as crimes. Hence, there are certain essential *obligations* that must be honoured by states, international organizations, non – state actors and even individuals.'[342] Although the obligatory nature of the Security Council's competence to take the appropriate measures to maintain or restore international peace and security, pursuant to article 39 of the UN Charter is at least questionable considering its usual laggard reactions, those can range from legislative measures, resolutions, such as S/RES/748 (1992) Resolution addressing Libya's refusal to extradite the Lockerbie bombing suspects[343] to the establishment of international criminal tribunals or even to humanitarian intervention

[336] Boister, 2012, supra note 23, p. 7
[337] Spinner M. , Civil War and Ethnic Conflict in Post – Soviet Moldova: The cases of Gagauzia and Transnistria Compared, Munich Grin Verlag, 2003, p. 24 cit in Boister, 2012, id.
[338] Lipschutz D. Ronnie On Security Columbia University Press, 1995, p. 10
[339] See Statement by the President of the Security Council, 8-12-2009, S/PRST/2009/32, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DT%20SPRST%202009%2032.pdf , last accessed on 15-09-2014
[340] S/PRST/2013/22 of 18-12-2013 concerning the threat to the international peace and security posed by transnational organised crime and especially drug trafficking in West Africa and the Sahel Region
[341] See S/2013/359 Report of the Secretary-General on transnational organized crime and illicit drug trafficking in West Africa and the Sahel region
[342] See Einarsen, 2012, supra note 157, p. 63, 64
[343] S/Res/748 (1992), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Disarm%20SRES731.pdf, last accessed on 15-09-2014

or any other form of action that will be deemed fit in order to preserve or restore the legal order.

9.1.1 Legislative Initiatives by the Security Council

(i) Precedents and Restraints

Previously,[344] we referred to the Security Council's legislative competence. We also referred to Resolution 1540/2004, with which the Security Council legislated in general terms to ensure that non-state actors are prevented from obtaining nuclear, chemical or biological weapons and to Resolution 1373/2001 against terrorism, which largely corresponds to what could be expected from a conventional instrument for creating obligations under international law in a vertical manner and also provided for an enforcement mechanism, the counter – terrorism committee, a body subordinate to the Security Council, as typical examples of the exercise of such power by the Security Council, which led commentators to use the term legislation or quasi–legislation.

For those favouring the expansion of international criminal law and an integrative approach insofar as its ratione materiae crimes are concerned, an interpretation of Charter VII as broad as that on which Resolution 1373 is based, 'could easily serve as a precedent for Security Council legislation in other areas',[345] always under the premise of the maintenance of the peace and security of the international community and in cases of other transnational crimes apart from terrorism.

Owing to the potential abuse and the seriousness of the implications such an enterprise may inflict, apart from the obvious restraint of these legislative competences strictly within the domain of peace and security, it may be necessary to read further limitations on the Security Council's legislative power into the UN Charter. It is also important to note that peace and security under current international law are not narrowly defined. In order to prevent these potential abuses and to mitigate a possible disproportionate eruption in legislative activity by the Security Council, which, in addition, would be doomed to failure under the current state-

[344] Chapter 5, par. 5.2.1, (iv)
[345] Einarsen, 2012, supra note 157, 123

centric structure of the international community, it would also be useful to encourage the practice of the General Assembly's ability to request the judicial review of such initiatives by the ICJ.[346]

(ii) Establishment of a Universal Jurisdictional Basis

The identification of a crime as an international crime has often been associated with the concept of universal jurisdiction. Under the current regime, international crimes (according to the definition which doesn't elevate transnational crimes to the same level) can be prosecuted by any state regardless of where they occur under the principle of universal jurisdiction whereas jurisdiction for transnational crimes is more limited.[347] According to Principle (1) of the Princeton Principles on Universal Jurisdiction,[348] universal jurisdiction is criminal jurisdiction based solely on the nature of the crime and may be exercised with respect to serious crimes under international law. That latter concept includes piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture.

Penal Codes from all around the world contain provisions that provide for a universal jurisdiction of the state over the prosecution of these crimes. There are also cases that these provisions expand the ratione materiae of the state's universal jurisdiction to crimes that are not traditionally regarded as penalised offences under international law, such as transnational crimes. Indicatively, the entire material scope of the newly minted German International Penal Code, articles 6, n.5 and 8 on trafficking of illicit drugs of the German Penal Code, article 8 of the Greek Penal Code referring inter alia to trafficking of illicit drugs, human trafficking and piracy, all fall under the universal jurisdiction of the state, irrespective of the principles of active or passive nationality, territoriality etc.

Perhaps the most notorious case of universal jurisdiction law was the "Act concerning Punishment for Grave Breaches of International Humanitarian Law." In 1993, Belgium adopted the Act that permitted Belgian courts to try persons accused of genocide, crimes against humanity and war crimes, regardless of whether there was

[346] For a detailed and critical assessment of this competence see Tzanakopoulos Antonios, Disobeying the Security Council: Countermeasures against Wrongful Sanctions, Oxford University Press, 2011.
[347] Currie, 2010, supra note 185,,p.16
[348] Princeton Principles on Universal Jurisdiction, available at: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf , last accessed on 13-09-2014

any link between Belgium and the criminal act, the perpetrator or the victim.[349] Although, a number of other states adopted universal jurisdiction law, Belgium's was the broadest. Perhaps because of its breadth and the existence of another Belgian Law that permitted anyone not just the government to initiate a criminal action, it became the target of fierce criticism, especially from the United States, in the context of their generalised opposition to International Criminal Justice at large. Defence Secretary Donald H. Rumsfeld effectively threatened Belgium that it risked losing its status as host to NATO's headquarters if it did not rescind a law that has been used to lodge accusations of war crimes against American officials.[350] The subsequent Belgian Parliament's repeal of its landmark "universal jurisdiction" statute was characterised by many as 'a step backwards in the global fight against the worst atrocities'.[351]

The pressures concerning those legislative initiatives in the direction of ending impunity for international crimes, which are more often than not disguised under a cloak or legitimate legal concerns, ranging from implementation problems to sovereignty issues and the nature and legality of criminal jurisdiction by proxy, could effectively be succumbed by the intervention of the Security Council and its universal competence. The establishment of a universal jurisdictional basis for a certain crime does not constitute a novice concept for the Security Council. On the contrary, it has done it before by recognising, with its 1976/2011 Resolution (para 14)[352], that the crime of piracy is a crime under universal jurisdiction, thus extending the jurisdiction for its prosecution beyond the one assigned to the seizing state by UNCLOS.[353]

Moreover, under the same principle, the Security Council has the ability to provide for international prosecutions of transnational crimes, in the sense that the international law scope for the establishment of international prosecution of international crimes is at least as broad as that for universal jurisdiction and possibly broader. The reason why international prosecutions may have a more catholic effect

[349] See Belgium : Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, translated and reprinted in 38 ILM, 918,921, (1999)
[350] New York Times Achieves, 'Rumsfeld Says Belgian Law Could Prompt NATO to Leave', available at http://www.nytimes.com/2003/06/12/international/europe/12CND-RUMS.html , last visited at 10-09-2014
[351] Amnesty International Belgium, La Ligue des Droits de l'Homme, Liga voor Mensenrechten, la Fédération Internationale des Droits de l'Homme, Avocats sans Frontières and Human Rights Watch http://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed, last visited at 10-09-2014
[352] S/Res/1976 (2011), avalable at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1976%282011%29 , last accessed on 13-09-2014
[353] See United Nations Convention on the Law of the Sea, Part VII, High Seas, Article 105, available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/part7.htm , last accessed on 13-09-2014

compared to a universal jurisdictional basis relates to one disputed requirement of universal jurisdiction for third states, namely that the alleged offender has to be present in its territory before its authorities can lawfully investigate the crime, arrest etc as well as its (also disputed) non – applicability for all transnational crimes, as long as the latter are not accepted as international crimes, as this thesis argues.

9.1.2 Prosecutions before International Fora Initiated by the SC

(i) Referral to the International Criminal Court

According to Article (13) (b) of the Rome Statute[354] the Court may exercise its jurisdiction with respect to a crime referred to in article (5) in accordance with the provisions its Statute if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. This happened in the cases of Darfur, Sudan, in 2005 and Libya in 2011.[355]

The competence of the Security Council to extend the jurisdiction of the ICC over nationals of non- member states is imperative as it grants the latter, under certain circumstances, with global jurisdiction This effort to integrate the ICC within the core structures of the UN can be seen as an attempt to avoid further fragmentation of ICL but the effort will remain incomplete if the Security Council cannot expand the material jurisdiction of the Court to other international crimes, including transnational crimes, as well. However, such an inquiry cannot be addressed at this point without further elaborating on the question of integrating transnational crimes into the legal framework of the International Criminal Court, by either expanding its ratione materiae or by following a broad interpretation of the crimes that already fall under its material jurisdiction and should be seen in conjunction with these matters, which are examined in more depth below.[356]

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[354] Statute of the International Criminal Court, available at http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf , last visited on 10-08-2014

[355] See UN Security Council Resolution 1593 (2005), 31 March 2005, and Resolution 1970 (2011), 26 February 2011.

[356] See Chapter 10, par. 10.1 et seq.

(ii) Establishment of Ad Hoc International Criminal Tribunals

The option of establishing ad hoc international criminal tribunals has the merit of not being dependant on such restraints, but for the peace and security parameter. Furthermore, it can be implemented on a case by case basis, either in regards to certain affected states or regions, as was the case with the establishment of ICTY and ICTR or for the prosecution of certain preconcerted crimes[357] or by the correlation of the two.

Likewise, the establishment of such an Ad Hoc Anti-Piracy Criminal Tribunal, primarily for the prosecution of Somali pirates has been in the centre of the debate.[358] On 27-04-2010, the Security Council unanimously adopted a resolution in which an important step in this direction was taken. According to Resolution 1918/2010,[359] the UN Secretary General was called upon to present within three months 'a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at the sea off the coast of Somalia, including in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements […]

Toward this end, the UN summoned Jack Lang, a French politician, to study the issue and produce a report which was published in January 2011. The Jack Lang report recommended the creation of a Somali extra - territorial court.[360] In other words, as it was also suggested in the report of the Secretary General on the modalities for the establishment of specialised Somali anti – piracy courts that followed, the choice of preference was the establishment of a *national court*, which would sit in another

[357] See for example the proposal for the establishment of an International Court for the Prosecution of drug traffickers in Patel Faiza, "Crime without Frontiers: A Proposal for an International Narcotics Court" (1989-90) 22 NYU Journal Int'l Law & Politics 709 at 709

[358] Zimmerman Dominik, The Case for an International Piracy Court, 2010, International Law Observer blog, available at http://www.internationallawobserver.eu/2010/04/30/the-case-for-an-international-piracy-court/, last visited at 10-9-2014; Craig Thedwall, Choosing the Right Yardarm: Establishing an International Court for Piracy, 41 Geo J. Int'L 501 (2009/2010), available at Heinonline, http://heinonline.org/HOL/LandingPage?handle=hein.journals/geojintl41&div=18&id=&page=, last visited on 10-09-2014

[359] S/Res/1918 (2010), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/331/39/PDF/N1033139.pdf?OpenElement, last visited at 10-09-2014

[360] France at the United Nations, Somalia-Report by Jack Lang on the legal issues related to piracy off the coast of Somalia statement by the spokesperson of the Ministry of Foreign and European affairs, 26 January 2011 at http://www.franceonu.org/spip.php?article5354, last accessed on 10-09-2014.

state in the region, located extraterritorially, which would apply Somali law, instead of an international tribunal.[361]

The same approach was followed with the Special Tribunal for Lebanon, which was established in cooperation with the government of Lebanon with the primary purpose of prosecuting the terrorist attack which killed former Prime Minister Raqif Hariri. The Court prosecuted criminal terrorist attacks within the meaning of the Lebanese Criminal Code although its Appeals Chamber has concluded that a customary rule of international law has evolved on terrorism, at least with respect to peacetime.[362] In general, the UN Security Council has outlawed terrorism but prosecution has generally not been raised from the national to the international level except for acts of terror that might also be subsumed under heading such as war crimes or crimes against humanity in the jurisdictional clauses of international tribunals.

In overall, it appears that the Security Council usually favours the establishment of Internationalised Hybrid or Special Courts instead of Ad Hoc International Criminal Tribunals, nevertheless this does not exclude the possibility to do so in the future in regards to transnational crimes. Admittedly, although this seems thus far to be the most popular course of action, in the ambit of the raging discussion, it is also the target of criticism as it has been accused of leading to a piecemeal approach, of encouraging fragmentation and of operating as a fig leaf to conceal international apathy. According to this train of thought, it is highly doubtful whether the establishment of ad hoc criminal tribunals by the Security Council –or following similar multilateral initiatives by the international state community- could substantially serve the unification of international criminal law and the integration of transnational crimes into a direct enforcement system but in the worst case scenario it still contributes to the integration of crime policies to an already well-established and competent supranational entity, namely the United Nations.

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[361] UN Security Council, Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-piracy Courts, S/2011/360,15 June 2011. http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S%202011%20360.pdf

[362] See STL Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176bis, Decision of 16 February 2011.

9.1.3 Use of Force?

Indisputably, the highly controversial issue of the use of force against non-state actors, such as transnational criminal organizations, including international terrorist networks, under the chapeau either of Article 51 or Article 39 in combination with Article 42 of the UN Charter is one of the most interesting and controversial subjects of modern international law, with high practical relevance; nevertheless it exceeds the scope of this thesis, whose primal enquiry focuses on the implications caused by the application of the indirect enforcement system in relation to transnational crimes and the possibility of their integration into direct enforcement systems. For this reason but also taking into account that the concepts of peace and [human] security are hereinabove employed in order to establish a legitimization framework for the unification of international criminal law as well as that they do create an opening for direct action and enforcement in broader terms, we briefly refer to the key issues of the debate for the sake of plenitude.

(i) Article 51 of the UN Charter

The prohibition of use of force under Article 2 (4) and the principle of non-intervention stipulated in Article 2 (7) of the UN Charter are considered to be, and rightfully so, the cornerstones upon which the post-war international community was built. It is also in broad agreement that the prohibition of the use of force is a general and authoritative principle,[363] which operates between states.[364] At the same time Article 51 provides for an exception to the general prohibition of use of force in case of self-defence.

In today's contextual framework, dominated by an expanded concept of self-defence and an even more broad conceptualization of security, the debate revolves around the meaning of an *'armed attack*', which is set as a pre-condition for the legitimate exercise of the right to self-defence in accordance with Article 51, the legitimacy of the use of force in self-defence against non-state actors in the territory

[363] Henkin Luis, Use of Force and US Policy in Right v. Might, International Law and the Use of Force, NY, Council of Foreign Relations Press, 1991, p. 38

[364] Milanovic Marko, Self- Defence and Non-State Actors: Indeterminacy and the Jus ad Bellum, Blog of the European Journal of International Law, 2010, available at http://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/ , last accessed on 15-09-2014

of another state, which is the most relevant to our discussion, and the question about the applicable law in such occasions, namely that of IHL or HRL.[365]

At the same time states have not been shy when it comes to the extraterritorial use of force against individuals or other non-state groups. Extraterritorial forcible action has taken many forms, ranging from targeted killings to kidnapping[366] and large scale military operations.[367] The United States has carried out airstrikes targeting and killing individuals in Pakistan and Somalia, European States have engaged in force against pirates in the Horn of Africa, Colombia bombed a guerrilla rebel base in Ecuador and Turkey was engaged in heavy military operations against Kurdish fighters in Iraq. From the distant past the Caroline Case in 1837 involved the British taking forcible measures against Canadian rebels in US territory.[368]

Several authors have suggested that the use of force against a non state actor is legitimate if the state in whose territory the latter resides is either unable or unwilling to address the threat.[369] How states must make this assessment remains unclear as the ICJ refrained from pronouncing the outlines of such an assessment even when it had the chance to do so.[370] In regards to the terrorist attacks against the United States and the World Trade Centre Twin Towers, on the 11th September 2001 and the events that followed, the Security Council, recognised them as attacks against which the use of force in self – defence was appropriate, through the adoption of its 1373/2001 Resolution.[371]

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[365] The literature covering these hot subjects is vast, reflecting equally opposite positions. For a comprehensive review see: Lubell Noam, Extraterritorial Use of Force Against Non-State Actors, Oxford University Press, 2010, Mekonnen Aragaw Demissie, Erasmus Universiteit Rotterdam. Faculteit der Rechtsgeleerdheid, International Law and the Use of Force Against Non-state Actors, Erasmus Universiteit, 2009; Mweemba Kasongo, Invocation of Un Charter Right of Selfdefence Against Non-State Actors, Lambert Academic Publishing, 2010, Wettberg Gregor, The International Legality of Self-defence Against Non-state Actors: State Practice from the UN Charter to the Present, P. Lang, 2007; Matthias Schmidl, The Changing Nature of Self-defence in International Law, Nomos, 2009

[366] Israel is the state which most frequently engages in kidnapping operations, at least as far as it is widely known. Such was the case of the abduction of Nazi leader Adolph Eichman by Israel agents from Argentina in the 1960s or the kidnap of Israeli citizen Mordechai Vanunu, accused of publicizing secret information on Israel's nuclear capacity, from Rome in 1986

[367] Noam Lubell, Extraterritorial Use of Force Against Non-State Actors, Oxford University Press, 2010, p. 3

[368] Id.

[369] Id, p. 39-41, 67; Schmitt Michael N., Counter-Terrorism and the Use of Force in International Law, DIANE Publishing, 2002, p. 33; Dinstein Y., War, Aggression and Self-Defence Cambridge University Press, 2005, p. 245

[370] Armed Activities in the Territory of the Congo, [Dem.Rep. Congo v. Uganda) ICJ Reports, 2005

[371] The full content of S/Res/1373 (2001) is available at http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20%282001%29.pdf , last accessed on 15-09-2014

However, the overwhelming preference to use as frame of reference terrorism can prove to be extremely prejudicial and misleading in the ambit of the more generalised discussion surrounding the legitimacy of extraterritorial use of force against non – state actors by invoking Article 51 and self-defence and that is because while terrorism is most likely to engage in 'armed attacks' as the article demands, the same cannot be said for other non-state actors, such as transnational criminal organizations engaging in drug trafficking or human trafficking activities, with the exception of piracy. Nevertheless, as illustrated in the US invasion of Panama in 1989, such activities are capable of triggering countries to militarily intervene in foreign nations in pursuit of their anti-drug policy.[372] The scale of the problem manifested in the enormous amount of money and resources that have been invested in fighting the phenomenon at least since US President Nixon declared the "war on drugs" and only the resources invested in the "war on terror" may have recently outstripped those spent on fighting the drug problem.[373]

Before anyone dismisses the possible invocation of Article 51 in order to use force against international criminal networks, which don't, as a rule, launch armed attacks against states, one final remark should be made. It is common knowledge that the proceeds of transnational crime, more often than not, finance 'armed attacks', as is the case of opium trafficking in Afghanistan which provides the funds for terrorist attacks or the case of FARC and ELN, operating in Columbia.[374] Taking into consideration especially this last case, with guerrilla fighters having under their exclusive control large areas, guarded by improvised landmines, which are used for the cultivation of coco and marihuana plantations for the funding of their armed attacks, it is not inconceivable for someone to argue that a state could invoke self – defence if the only way to avoid an imminent attack was to stop the funding by

[372] The official U.S. justification for the invasion was articulated by President George H. W. Bush on the morning of 20 December 1989, a few hours after the start of the operation. Bush listed four reasons for the invasion: Safeguarding the lives of U.S. citizens in Panama, defending democracy and human rights in Panama, combating drug trafficking and protecting the integrity of the Torrijos–Carter Treaties. Members of Congress and others in the U.S. political establishment claimed that Noriega threatened the neutrality of the Panama Canal and that the U.S. had the right under the treaties to intervene militarily to protect the canal. Transcript of President's Bush's Address to the Decision to Use Force, New York Times, 21 December 1989; See also Patel Faiza, "Crime without Frontiers: A Proposal for an International Narcotics Court" (1989-90) 22 NYU Journal Int'l Law & Politics 709 at 709, 712-713.

[373] the views expressed in UN, Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee during the period 25 March to 12 April 1996, UN Doc A/AC.249/1 (1996) paras 71-72; Sunga Lyal L, The Emerging System of International Criminal Law, Development in Codification and Implementation (Kluwer Law, 1997) 21, 206.

[374] The situation in Columbia is under preliminary consideration by the Prosecutor of the ICC.

seizing control of the areas used for narco-plantations via military operations. Although this would stress the limits of legitimacy to lengths it simply cannot maintain under the current international norms, the connection between transnational crime and financing of attacks that would qualify as legitimate reasons for the use of force under Article 51 of the UN Charter demonstrates the complexity of the issue.

(ii) Article 42 of the UN Charter

In situations where self-defence cannot be justified, the only legitimate use of force is that authorised by the Security Council. The Security Council has broad powers, under Chapter VII of the UN Charter, to determine the existence of any threat to the peace, breach of the peace or act of aggression and to take or to authorise those measures, including ultimately the use of force, that it deems necessary to address the situation. The language of the Security Council resolutions under Chapter VII may be recommendatory – calling upon states or particular states to take action or it may be mandatory, deciding that are binding on member states, which, under Article 25 are required to accept and carry out the Councils resolutions. In practice the Security Council has discharged its enforcement mandate, under article 43, by delegation.[375]

Having already established the threat transnational organised crime poses to the international peace and security and with the size of and violence associated with the illicit drug industry in countries such as Colombia or Afghanistan destabilising the security and institutions of these and other countries, article 42 provides a more straightforward course of action. It has been said that 'in practice the standard to be applied by the Council has come to be viewed as fairly flexible, with security against overuse residing in the collective mechanism that applies it rather than in the confines of its terms, by contrast to the stricter standards governing unilateral use of force.[376] Still, the nature of the use of force and article 42 as extrema ratio makes it the highly unlikely to be invoked as far as transnational criminal actors are concerned, yet not entirely inapplicable.

[375] Thomas M. Franck, Recourse to Force: State Action against Threats and Armed Attacks, Cambridge University Press, 2002 p. 43 refers to the Security Council authorization of action and others as opposed to the Security Council itself taking action, as the 'adapted power' of the Council. Gray C., From Unity to Polarisation: International Law and the Use of Force against Iraq, 13 (2001) EJIL 1 at 2-3 notes increasing concern, since the 1991 Iraq invasion, to ensure that the Security Council retains control over UN authorised but state executed operations.

[376] Duffy Helen, The War on Terror and the Framework of International Law, Cambridge University press, 2008, p. 170

9.2 The Emerging Concept of Human Security and R2P

Two decades ago, in a prescient tone, the Human Development Report referred to the idea of human security and its potential, to revolutionize society in the 21st century, in spite of its simplicity as a concept.[377] At the same time, the concept of 'Responsibility to Protect' (R2P) originated from a challenge by UN Secretary-General Kofi Annan to the Millennium General Assembly in April 2000 and a subsequent initiative by the Canadian government to establish an Ad Hoc International Commission on the matter.[378] The main focus of R2P discussions has been on the disputed right of humanitarian intervention: the question of when, if ever, it is appropriate for states to take coercive and in particular, military action, against another state for the purpose of protecting people at risk in that other state,[379] which can be said to include an obligation to facilitate prevention and suppression of certain crimes, if necessary, through international prosecution. In the same vein, Evans notes that 'International criminal prosecution is recognised as an element of the R2P doctrine both as prevention before the crisis ('responsibility to prevent') and as a rebuilding tool thereafter ('responsibility to rebuild').[380]

At a second level, many commentators were perceptive enough to realize that 'the acceptance of basic human security as a fundamental universal value and/or interest and of the complementarity notion of Responsibility to Protect has expanded the power of the Security Council under Chapter VII with respect to measures undertaken with the aim of protecting civilians who are exposed to international crimes'.[381]

Indeed, the Human Security concept is for these purposes a promising, yet under-developed pragmatic approach. Even so, while general security politics includes both domestic and international issues, human security allows us to transcend sovereign prerogatives and to address emerging trans-regional threats more

[377] United Nations Development Programme, Human Development Report, 1994, NY, Oxford University Press, Chapter 14, p. 22

[378] See International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect, International Development Research Centre, Ottawa, 2001. See also Gareth Evans, The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All, Brookings Institution Press, Washington, DC, 2008.

[379] On this classical issue, see generally: Nicholas J. Wheeler, Saving Strangers: Humanitarian Intervention in International Society, Oxford University Press, Oxford, UK, 2000

[380] Gareth Evans, The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All, Brookings Institution Press, Washington, DC, 2008, pp. 99–100 and 166–168

[381] Einarsen, 2012, supra note 157, p. 113

effectively.[382] The acceleration of the UN involvement in humanitarian interventions throughout the 1990s was a watershed in expanding the security paradigm, as was the increased interest taken by the UN – Secretary General in building up that organization's humanitarian infrastructure. As the UN expanded its collaboration with private sector humanitarian organizations the old bloc politics of the Cold-War evolved, within a few short years, into what the analysts labelled 'embedded humanitariasm'.[383]

The humanitarian based international norms underweighting the human security approach also fostered[384] the belief that the international community was responsible for safeguarding individual rights where states failed to do so, especially taking into account that the transnational dimensions may compromise a state's natural propensity to provide maximum security for its own citizens. However, the use of the human security theoretical structure, with crime constituting one of its many components, as a foundation for a humanitarian intervention within the framework of the R2P doctrine, may present us with many challenges both on pragmatic, legal and moral grounds.

First of all, if the human security concept is to be analytically useful it must provide tangible security threats against which security environments and situations can be measured. Nevertheless, it has been pointed out that the implied breadth of this application may have devalued the human security aspect by broadening the idea beyond measurable limits.[385] Secondly, although the human security framework, places transnational crimes under the umbrella of a direct enforcement system, the outcome is not conclusively that which would have been expected and hoped for, from such a unified, direct and integrated approach. This is mainly due to the

[382] Thomas Nikolas and Tow T. William T, The Utility of Human Security: Sovereignty and Humanitarian Intervention Centre of Asian Studies, University of Hong-Kong and International Relations and Asian Politics, Research Unit University of Queensland, Brisbane, Australia, Security Dialogue, Vol. 33, no 2, June 2002, p. 180

[383] Suhrke Astri, Human Security and the Interest of States, Security Dialogue, vol 33, no 3, September 1999, p. 268-269

[384] Brown Chris, Moral Agency and International Society, Reflection on Norms, the UN, Southampton FC, the Gulf War and the Kosovo Campaign, paper presented at the 41st Annual Convention of the International Studies Association, Los Angeles, California, 14-18/03/2000

[385] Thomas Nikolas and Tow T. William, 2002, supra note 378, p.181-182 . For this reason they distinct between general human security threats such as extreme poverty and specific human security threats such as a particular natural disaster or an eruption of criminal activity. Using the distinction as a point of departure they propose the application of the human security concept on the basis of an evaluative assessment.

insufficient interaction between different actors that implement human security policies such as OSCE, EU, NATO, OAS, G7 and G8, UN, the Human Security Network, the Commission on Human Security and so on. Moreover, the exploitation of these possibilities should take into account the already existing activities of other actors, as is the case in Kosovo, where the EU for example is looking for possible ways to increase human security in its mission.[386]

Last but not least, there is an inevitable subjectivity in assessing human security situations and a challenge of conflicting perceptions. Great Greek Philosopher, Aristotle argues in his 'Metaphysics' that there is a difference among the truth, its appearance and our perceptions. At the same time, we would be naïve not to admit that immediate or long term interests can influence the perspectives of those who decide, whether they are individual states, regional organizations or global ones.

Chapter 10

Prosecutions before International Fora

The existence and significance of the element of internationalization in transnational crimes, in accordance to the architecture of the form previously introduced (Figure 1), in regards to the determination of the actor with the primal legal interest to prosecute, reflects the necessity for their direct international prosecution. In this context, perhaps the most tangible manifestation of applying a direct enforcement system in the case of transnational crimes is their integration into the already existing one, namely that of the International Criminal Court.

On a first note, subjecting the transnational crimes in the jurisdiction of the ICC is by far one of the most practical solutions, along with the establishment of Specialised International Tribunals, given the straightforward character of such an enterprise and the reliance on already available resources and infrastructures. In addition, even though the Court has primarily jurisdiction over nationals of its

[386] Prezelj Itzok, Chgallenges in Conceptualizing and Providing Human Security, HUMSEC Journal, Issue 2, available at: http://www.humsec.eu/cms/fileadmin/user_upload/humsec/Journal/Prezelj.pdfp, last accessed 10-09-2014 p.18

member-states, the statutory recognition of the UN Security Council's competence of referring a situation to the Prosecutor of the Court, potentially grants the latter with universal jurisdiction. In a more substantive note, the complementarity fashion in which the ICC operates and the co-operation required between the ICC and state-members during the investigation phase and the gathering of evidence, is most likely to influence, if not shape, the future of modalities of international cooperation in penal matters, including substantive and procedural norms. Similarly, the rules of procedure of the ICC, which derive from comparative criminal procedure, will bring about a greater harmonization between the criminal procedures of states.[387]

At the same time, the international status of transnational crimes dictates a non-discrimination approach in regards to their prosecution, should the gravity threshold is met. Even though, it has been argued that turning away from the label 'international crime' should not be perceived as a setback or a problem for their prosecution,[388] the foregoing analysis of the lex lata normative framework of the indirect enforcement system revealed that the problems caused by its fragmented nature present more than a simple setback for the effective suppression of these crimes.

10.1 The International Criminal Court

'In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end'. That is how UN Secretary General Kofi Annan chose to address the Conference of Plenipotentiaries, during the convention that took place in Rome, Italy, in 1998, from June the 15th till July the 17th for the establishment of the International Criminal Court.

The establishment of the ICC as it exists today goes back to an initiative of the year 1989 in which Trinidad and Tobago made a request to the UN General Assembly to explore the possibility of establishing an international court with jurisdiction over drug trafficking offences.[389] By now, the ideological war between Socialist and Western nations had faded and with strong support from Caribbean nations the

[387] Bassiouni, 2013, supra note 10, discussing the procedural area.
[388] Hieramente 2011, supra note 279, 551-288
[389] UN General Assembly, Letter dated 21 Aug 1989 from the Permanent Representative of Trinidad and Tobago to the UN Secretary-General, UN Doc A/44/195 (1989) and UN General Assembly, UN Doc A/44/49 (1989).

General Assembly asked the ILC to commence work on an ICC statute. The ILC completed this task in 1994 and submitted a draft statute to the General Assembly.[390]

The 1994 and 1996 Draft Code of the Crimes against the Peace and Security of Mankind, analysed above, played a central role in the preparation of the Rome Statute. The Draft Code is considered to be an "authoritative international instrument."[391] The discourse concerning transnational crimes during the Draft Code discussions was a symbolic starting point in recognizing that the international community did, in fact, believe that these particular crimes deserve international attention. Notwithstanding, the outcome of the negotiations during the Draft Code only served to foreshadow what would happen during the negotiations of the Rome Statute and as a result, the crimes that were ultimately included in the ambit of the Court's material jurisdiction were limited to the so called core crimes.

In the following chapters, we explore the feasibility of expanding the material scope of the Rome Statute to enable the International Criminal Court to prosecute some transnational organised crimes, either through the broad interpretation of the crimes that already fall under the material jurisdiction of the Court or through the expansion of its mandate with the possible addition of transnational crimes.

(i) Broad Interpretation of the Ratione Materiae Crimes of the ICC

Contemplation on a possible broad interpretation of the elements of the crimes under the jurisdiction of the ICC is neither a novice concept for the international community and the academic circle nor has it been limited to strictly predetermined pairings, in the sense that a certain transnational crime could inclusively fall under the heading of only one, predefined core crime. For instance, terrorism against peacekeeping or humanitarian assistance missions has been characterized as a war crime,[392] while some scholars have characterized it as a crime against humanity.[393]

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[390] UN General Assembly, Report of the ILC of its 46th Session, UN Doc A/49/10 (1994). See further John Crawford, "The ILC Adopts a Statute for an International Criminal Court: (1995) 89 American J Int'l L 404.

[391] Schabas William A., An Introduction to the International Criminal Court, 2nd Edition, 2004, p. 10, quoting the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v. Furundzija

[392] See S.C. Res 1402, UN SCOR, 58th Session, 4814th mtg., UN Doc S/Res/1502 (2003)

[393] Shrijver J. Nico, Responding to International Terrorism: Moving the Frontiers of International Law for Enduring Freedom?, 48 Netherlands International Law Review,. 271, 289 (2001). or an act of aggression. Aviv Cohen, Prosecuting Terrorists at the International Criminal Court: Re-evaluating an Unused Tool to Combat Terrorism, Michigan State International Law Review, available at

Using the much talked about crime of terrorism as a case study to demonstrate how the employment of this interpretation method could result in the incorporation of terrorist acts in the definitional frame of core crimes, we can start from the exclusion of the crime of genocide. Even if the terrorist act was committed against members of a distinct group, it would have a much harder time meeting the specific intent requirement.[394] The purpose of terrorist acts isn't as a rule the annihilation of the victimized group,[395] with rare exceptions, such as in the case of Hezbollah, a terrorist organization that has declared that one of its primary goals is to destroy the State of Israel. Instead, and as exhibited in the definition of terrorism in the Financing Convention, terrorists use the deaths and injuries they cause as leverage to achieve another goal, and not as an end in itself. In the author's view, after the adoption of its definition by the Review Conference held in the summer of 2010 in Kampala, the crime of aggression should also be excluded as the reference to acts of *states* effectively leaves out the majority of terrorist acts.

Perhaps, of all the core crimes currently under the jurisdiction of the ICC, crimes against humanity require the least 'legal juggling', to quote Stephens Tim,[396] in order to lend itself to terrorism. What is more, there is already a large consensus- at least to the academic literature –maintaining it is possible to prosecute terrorists before the ICC, based on the wording of crimes against humanity, without further elaboration of its elements.[397]

There is also some debate as to whether other transnational crimes, with extra emphasis being put on the case of trafficking in persons, can amount to crimes against humanity within the meaning of art (7) of the ICC Statute. The essence of a crime against humanity is an act (or omission), which constitutes or results in a very serious breach of human rights committed as part of a widespread or systematic practice.[398] In

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http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1080&context=ilr , last accessed at 10-09-2014 p. 239-249

[394] Martinez Lucy, Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems, 34 RUTGERS L.J. 1, 18 (2002)

[395] Arnold Roberta, The ICC as a New Instrument for Prepressing Terrorism ,2004, p. 54-56

[396] Stephens Tim, International Criminal Law and the Response to International Terrorism, 27 U New S. Wales L. J., 2004, p. 479

[397] See for example Much Christian, The International Criminal Court (ICC) and Terrorism as an International Crime, 14 Michigan State Journal of International Law, 121, 2006; Boister Neil, Treaty Crimes, International Criminal Court?, 12 New Criminal Law Review, at 341 ,2009, p. 356; Pouyan Afshar Mazandaran, An International Legal Response to an International Problem: Prosecuting International Terrorists, 6 International Criminal Law Review, at p. 503, 2006, p. 527

[398] See article 7(1) of the ICC Statute.

order to establish criminal responsibility for a crime against humanity, it needs to be proven that one of the acts specified in art 7(1)(a)-(k) — such as, murder, extermination, enslavement etc — were committed as part of 1. A widespread or systematic attack, art 7(1) (2) (a); 2. Against any civilian population, art 7(1) (2) (a); 3. By a perpetrator; 4. Pursuant to a Government policy, or tolerated by the State, art 7 (2) (a); 5. With knowledge of the attack, art (7) (1). [399]

1. Widespread or systematic attack

The elements of Article 7 have been unanimously interpreted as requiring a very high threshold. The crimes to be brought before the ICC must be of extreme gravity, of mass scale and constitute an attack on humanity. Sporadic, isolated, uncoordinated, and random incidents are regarded as insufficient to amount to a widespread or systematic attack.[400] With a view to transnational organised crime, this stringent requirement will exclude many, if not most cases from the jurisdiction of the International Criminal Court.

However, examples of highly sophisticated trafficking networks which systematically recruit their victims from specific areas, often involving the use of severe violence, rape, kidnappings, and sexual slavery, are plenty, thus justifying their inclusion in the list of acts that can be characterised as crimes against humanity. The same applies in the case of terrorism, nevertheless the questions that arise in regards to the required linkage between a single attack and a larger plan and the amount of distance the provision in question can tolerate, does not allow us to draw general conclusion but rather necessitates a case by case evaluation.

2. Victim: any civilian population

The attack must be directed not just against a random group of persons or isolated individuals. There is consensus that the victim of a crime against humanity must form a clearly identifiable group, usually — but not exclusively — of persons

[399] The features identified in Robinson Darryl, "Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93 American Journal of International Law 43 at 45.

[400] Cassese, 2003, supra note 178, pp 65-66; Id. at 47-48; Than Claire & Shorts Edwin, International Criminal Law and Human Rights Law (Thomson, 2003) para 5-004, 5-005. See also ICC Assembly of State Parties, Elements of Crimes, ICC Doc ICC-ASP/1/3 (3-10 Sep 2002) 116, requiring "a course of conduct involving the multiple commission of acts".

who share a religious, national, ethnic, or linguistic or other background.[401] Setting aside the case of terrorism, which indeed seems to target a clearly identifiable group as it happens with radical Jihadists, this requirement eliminates most transnational organised crimes, including many instances of trafficking in persons which are driven by financial motives and do not target specific groups. There are, however, multiple instances of trafficking committed by State actors or criminal organisations which are directly targeting groups of victims of specific background, from specific geographical areas, in specific socioeconomic circumstances, or of specific gender.[402]

3. Perpetrator

A crime under Article 7 of the ICC Statute can be committed by an individual, groups of persons, or an organisation, both in official and unofficial capacities. It is noteworthy that the attack does not have to come from the State or a State organ. With respect to trafficking in persons, it is possible to charge organisers and financiers of the operations, those who recruit and transport persons across borders, and those who harbour them, prostitute, buy or otherwise exploit trafficked persons.[403]

4. Government policy or tolerated by a State

The question remains whether the criminal act must either be authorised by the State, or must be part of official or unofficial State policy. The case law and literature does not offer a conclusive answer.[404] As far as case of terrorist acts is concerned, the case of Al –Qaeda and its tolerance by the former Taliban regime of Afghanistan is largely undisputed. The same cannot be said for the Pan Am Flight 103 incident, for which there is still much debate as to whether it was an isolated act or if the ex-Libyan Government had indeed a policy of committing terrorist acts, although it was certainly widely accused of doing so.

In the case of trafficking persons, and even more so in drug trafficking activities, there are examples where countries have been reluctant to take action against traffickers, where corrupt officials have cooperated with trafficking organisations, or

[401] Hebel Herman & Robinson Darryl, "Crimes within the Jurisdiction of the Court", in Lee S Roy (ed), The International Criminal Court, The Making of the Rome Statute (Kluwer Law, 1999) 79 at 95-97; Piotrowicz Ryszard, "Pre-empting the Protocol: Protecting the Victims and Punishing the Perpetrators of People Trafficking" in Kreuzer Christine (ed), Frauenhandel – Menschenhandel – Organisierte Kriminalitaet (Nomos, 2003) 1 at 25.
[402] Schloenhardt ,2004 , supra note 154
[403] Piotrowicz, 2003, supra note 401, at 24.
[404] Id. at 21; Cassese, 2003, supra note 178, at 83

where governments have encouraged, openly or subtly, the recruitment of foreign sex workers or the sale and kidnapping especially of children and young girls in rural and remote country areas. It would follow, that those instances of trafficking in persons, if committed repeatedly and systematically, can indeed be regarded as crimes against humanity.[405]

5. Fault element: knowledge of the attack

The mental elements for offences under article 7 require that the specific act was committed intentionally,[406] and that the accused acted with some awareness that his/her acts are part of a widespread or systematic attack against the civilian population.[407] Thus, with a view to trafficking in persons along with other forms of transnational organised crime, it has become possible to charge those offenders who intentionally engage in, organise, aid, abet, facilitate or otherwise participate in specific acts such as enslavement and sexual slavery, forced prostitution, rape, or trafficking, being aware that their actions are part of an orchestrated operation.

Based on the foregoing analysis, it becomes evident that a broad interpretation of the crimes that already fall under the jurisdiction of the International Criminal Court, in a way that they would encompass transnational crimes as well, at least at first glance, possible. However, the real question does not revolve around the feasibility of such an endeavour but around its advisability. The international legality principle along with the general principle of interpretation in favor of the accused, dominant in the majority of the penal systems around the globe, renders broad interpretation in the field of criminal law prohibitive. In harmony with this general prohibition, Article 22 (2) of the Rome Statute addresses the issue of interpretation and explicitly calls for a strict interpretation and precludes their expansion by way of analogy. We are not going to suggest that the absolute commitment to the legality principles regulating the entire criminal procedure does not come with a cost. Nevertheless, with the elemental core of legality being in line, the values that criminal law itself claims to preach are at stake. For this reason, it is much more prudent, instead of struggling with the definitional limits of the core crimes to follow a neater

[405] Piotrowicz, 2003, supra note 401, at 25.
[406] See Article 30(2)(a) of the ICC Statute
[407] Cassese, 2003, supra note 178, at 82; Piotrowicz, 2003, supra note 401, at 21

path, namely that of extending the mandate of the Court by the inclusion of additional crimes.

(ii) Expanding the Ratione Materiae of the ICC

For those who have studied the history of drafting the Rome Statute, the possibility of including transnational crimes under the jurisdiction of the International Criminal Court doesn't seem to be a farfetched suggestion. On the contrary, from the very beginning, when the appeal of Trinidad and Tobago[408] for the establishment of an international court with jurisdiction over drug-trafficking offenses triggered the entire enterprise of the establishment of an International Criminal Court, to the drafting sessions and the negotiations that followed, every phase and every stop in this journey has been dominated by such debates.

This was well reflected in the 1994 Draft Statute, in which the crimes within the jurisdiction of the court were set out by enumeration in Article 20, which read: a) The crime of genocide; b) The crime of 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 regard to the conduct alleged, constitute exceptionally serious crimes of international concern.* [409]

The "Annex" referred to in letter (e) listed nine other international crimes that should be included as crimes within the jurisdiction of the proposed court, including the unlawful seizure of aircraft as defined in treaty, crimes against internationally protected persons as defined in treaty, hostage taking and related crimes as defined in treaty, crimes against the safety of marine navigation as defined in treaty, crimes involving illicit traffic in narcotic drugs and phototropic substances that according to treaty are crimes with an international dimension. The specific treaties and provisions

[408] In 1989, Trinidad and Tobago -frustrated with the inability to investigate international drug trafficking rings, the lack of capacity of smaller states to prosecute offenders, and the obstacles of cross-border law enforcement and judicial cooperation -- formally proposed to the United Nations to establish an international court with jurisdiction over such offences. However, after many years of controversial debate, in 1998, the Rome Conference ultimately decided that drug trafficking was not to be included in the final text of the ICC Statute

[409] The 1994 Draft Court Statute and the ILC commentary to it is reprinted in, Watts Arthur, The International Law Commission,1949–1998, vol. 3, Final Draft Articles and Other Materials, Oxford University Press, Oxford, UK, 1999, p. 1676. 1999, pp. 1454–1552 Watts provides some short overviews and background notes to accompany the reprinted ILC documents

referred to for each crime or crime type were scrupulously set forth in the Annex.[410] Furthermore, all the directly relevant treaty provisions were annexed to the 1994 Draft Court Statute, in Appendix II.[411]

In its commentary of the annex the ILC discussed several other treaty provisions that were not included explaining the reasons.[412] For example piracy as defined in Article 15 of the convention on the High Seas and Article 101 of the UN Convention on the Law of the Sea was seriously considered. Weighing against the inclusion however was the fact that the said provisions only confer jurisdiction to the seizing state. That is, the treaties did not give other state parties jurisdiction over the pirates with an aut dedere aut judicare provision. 'On balance the ILC decided not to include piracy as a crime under general international law in article 20'.[413]

It should be noted however that the commentary in Article 20 stressed that it was not the function of the statute to codify all crimes under international law. Therefore, the classification used by the ILC does not provide a clear distinction between the four international core crimes and other international crimes, especially taking into consideration, as Einarsen acutely observes, that the 'serious violation' requirement was used in the proposed Article 20 to even qualify war crimes, themselves regarded as one of the core crimes.[414]

During certain negotiation stages, the inclusion of "treaty crimes" of the Rome Statute became increasingly difficult to manoeuvre because of the varied interests of each state party.[415] The U.S. openly stated that it did not favor empowering the Court to prosecute drug trafficking and terrorism, despite the Court's international dimensions.[416] Bolton argued that the potential adoption of other crimes, such as drug trafficking, proves that the ICC's range of power is enormous and that the unpredictable nature of customary international law and how it could evolve can

[410] Id. P. 1676
[411] Id. pp. 1543–1549.
[412] Id. pp 1540-1542
[413] Id. p. 1540.
[414] Einarsen 2012, supra note 157, p. 193
[415] NGO Coalition, Definition of Crimes, INT'L CRIM. CT. MONITOR (Nov. 1998), http://www.iccnow.org/documents/monitor10.199811.pdf
[416] Is a U.N. International Criminal Court in the U.S. National Interest?; Hearing Before the S. Sub-commission on Int'l Operations of the Comm. on Foreign Relations, 105th Cong. 31 (1998) (statement of Hon. John Bolton, Former Assistant Secretary of State for International Organization Affairs; Senior Vice President, American Enterprise Institute, Washington, D.C.), available at http://www.gpo.gov/fdsys/pkg/CHRG105shrg50976/pdf/CHRG-105shrg50976.pdf., last accessed on 20-09-2014

cause arbitrary and unpredictable prosecution to occur. Other state parties, such as Israel, noted that the ICC should not be deprived of the ability to try such crimes especially in instances where the national trial procedures "were unavailable or ineffective."[417] The delegates from the Caribbean (CARICOM) consistently argued that an effective international legal regime was needed to deal with crimes such as drug trafficking.[418] The outcome of these negotiations is evident in the language of the final enacted statute.[419]

Trafficking in small arms was one of the crimes considered at the Rome Conference. It, too, similarly to drug trafficking, has wide-reaching impacts and dire consequences especially on smaller countries. This may explain why the Madagascan delegation orally proposed the inclusion of this offence. Madagascar, too, considered the dumping of nuclear waste in foreign countries as an international crime over which the ICC ought to have jurisdiction. Further, money laundering was considered by some as a crime worth including in the ICC Statute; this view was expressed orally by Nigeria at the Rome Conference. None of these offences were seriously discussed for inclusion into the ICC Statute by the Rome Conference and they were not mentioned for possible consideration by a Review Conference.[420]

Perhaps surprisingly, piracy, the oldest of all international criminal offences was at no time considered for inclusion into the ICC Statute. Unlike any of the other crimes within and outside the ICC's mandate, piracy is one of the most universally recognised international offences and there is general consensus that even outside the relevant Law of the Sea conventions piracy is an offence under customary international criminal law.[421]

Despite the tumultuous history of the formulation and determination of the ratione materiae of the International Criminal Court, the scenario of transnational crimes being incorporated in its material jurisdiction is under no circumstances

[417] Press Release, Preparatory Committee on Establishment of International Criminal Court, Terrorism Should be "Core Crime" of Proposed International Court India Tells Preparatory Committee, U.N. Press Release L/2766 (Mar. 27, 1996), available at http://www.iccnow.org/documents/Terrorism27Mar96.pdf. , last accessed on 20-09-2014.
[418] Boister, 1998, supra note 194, p. 29
[419] See Mundis A. Daryl The Assembly of State Parties and the Institutional Framework of the International Criminal Court, 97 AM. J. INT'L L. 132 (2003). See also Cryer et al.,2010, supra note 17, p. 152 Although other proposed crimes were not added to the list, if an acceptable definition of crimes can be determined then additional crimes may be included, by amendment, to the Rome Statute, pursuant to Article 123.
[420] Kriangsak Kittichaisaree, International Criminal Law , Oxford University Press, 2001, p. 229.
[421] This observation is shared by Silverman, An Appeal to the United Nations: Terrorism must come within the jurisdiction of an international criminal court (1997) cited in Boister, 1998, supra note 194, at 31

eliminated as a possibility. Still a final remark is due in regards to such an enterprise. As Schabas points out "Article 5 seems to set a quasi-constitutional threshold for the addition of new crimes. It is true of course, that the States Parties can always amend this, just as they could, theoretically at least, decide that genocide no longer belongs to the species. But in future debates about expanding the subject-matter jurisdiction, the Rome Conference has bequeathed a potent and influential standard. Only crimes that meet this high threshold, those that are ejusdem generis with the four enumerated categories, belong in the Statute."[422] The ejusdem generis principle is a general principle of law and legal methods and it usually means that an enumeration of samples in a legal text should be interpreted as equals or in the same manner, hence implying certain coherence and excluding interpretations that would substantially expand the scope of the provision.

Last but not least, before jumping into any kind of effort to expand the scope of the ICC, if we want to be realistic and pragmatic, the international community should firstly address the issue of the limited resources available to the International Criminal Court that are already hindering its functions even with such restricted mandate.[423] This was also perhaps the more convincing argument for the exclusion of treaty crimes from the Statute in the first place as it was implied that jurisdiction over drug trafficking would overwhelm the resources of an international criminal court. As Boister bluntly put it "the ICC would be cheaper to start up and to run if it only had jurisdiction over core crimes."[424]

10.2 An Additional Basis for Int'l Prosecutions-The Complementarity Principle

The principle of complementarity, which is fundamental to the whole of international criminal law enforcement, shows that national courts both are and are intended to be, an integral and essential part of the enforcement of international criminal law. [425]Judges Higgins, Kooijmans and Buergenthal have stated that: 'the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established

[422] Schabas, 2010, supra note 387, refers to the ejusdem general principle of interpretation, p. 108.
[423] On the matter of the limited resources available to the ICC see Bergsmo M., Bekou O. and Jones A., Complementarity After Kampala : Capacity Building and the ICC's legal tools, Goettingen Journal Of International Law (2010) 2, 791,800
[424] Boister, 1998, supra note 194, at 37
[425] See art 17 and 18 of the ICC Statute

international criminal tribunals, treaty obligations and national courts all have their part to play'.[426]

Nevertheless, pursuant to the mode of selecting the prosecutorial forum of a transnational crime introduced above,[427] even if the state has the overriding legal interest to prosecute a criminal offence, should it not have the capacity to do so, it could resolve to the surrender of the person or persons charged to an international forum,[428] on the basis of the complementarity principle, thus ensuring accountability and the effective suppression of even small –scaled offences, that when considered cumulatively threaten the legal goods of the international community as a whole.

[426] Case concerning the Arrest Warrant 11 April 2000 (Democratic Republic of Congo v. Belgium) 14.02.2002 Separate Opinion para 51

[427] Infra, Chapter 6

[428] This alternative option was one of the items that the working group on the matter of the obligation 'aut dedere aut judicare', included for further elaboration in its 2009 Report. See ILC, Report of the International Law Commission, Sixty-first session (4 May–5 June and 6 July–7 August 2009), A/64/10, 2009, Chapter IX: "The Obligation to Extradite or Prosecute (aut dedere aut judicare)"

In Conclusion before a New Beginning

The purpose of this thesis was to reconsider and remap the conceptual boundaries of International Criminal Law in the face of the ever less entrenched boundaries of states that Transnational Criminal Law reveals. The specific standpoint of international criminal law, as probably the most fragmented and diversified among all branches of the international legal order is particularly challenging for such a reconceptualization. Attempts towards this direction can also be seriously compromised by claims of cross-fertilization between the penal aspects of international law and national criminal law, a phenomenon that is rendered sufficient for the harmonization of substantive and procedural norms in international and national criminal justice systems.

Nevertheless, from the foregoing analysis, it became evident that the substantive and institutional fragmentation/diversification of transnational criminal law is essentially occurring in disregard of fundamental principles of international criminal law in the context of the autonomous regimes and their enforcement mechanisms. At the same time, the alarming rate at which transnational organised criminal networks accumulate power, threatening the legal goods of the international community as a whole, while the latter appears to remain, both legally and institutionally, ill-equipped to address the threat, evince that a more radical solution is needed.

In search for such a solution, we concluded that, contrary to the generalised acceptance of the division between international criminal law stricto sensu and sensu largo as a well-established structural principle, there is a strong argument and a solid legitimization basis for a holistic consideration of the ratione materiae crimes of ICL. Following a deductive method, we were led to the conclusion that the entire spectrum of transnational [treaty] crimes, irrespective of their scale or force, falls under the category of international crimes. And although this is without prejudice in regards to their international or national prosecution, for the determination of which we introduced the theory of the actor with the primal interest to prosecute, it is not without legal consequences.

If we wanted to name one core consequence, underlying all other, that would be the need for the internationalisation of the legislative measures and actions in respect to transnational crimes, as their international status demands. This internationalisation

has the meaning of a universally accepted single approach so as a unified corpus of law would be implemented in relation to the prosecution of those crimes. In addition, such an enterprise will not be possible without the subordination of transnational crimes into direct enforcement systems of the international community. Machiavelli in 1537 warned that 'there is nothing more difficult to take in hand, more perilous to conduct or more uncertain in its success than to take the lead in the introduction of a new order of things[429] Likewise, from the inclusive codification of international and transnational crimes as a condition sine qua non of this enterprise and the universal recognition of a certain body of norms and substantial legal consequences attached to these crimes to their incorporation in direct enforcement systems of the international community, the road is full of challenges and technical difficulties.

More than that, every action undertaken by someone or something as powerful as the international community as a whole, is by definition dangerous and susceptible to potential abuse, yet the likelihood of establishing an international structure that is perfect from its very beginning is virtually non-existent. Likewise, instead of propounding such a utopian approach, it is much more realistic to firstly establish a direct enforcement system for the suppression of transnational crimes and then work from within in order to ameliorate it.

And this is because the international community as a collective entity is the only actor with enough power and resources, to address the rising threat of transnational crime in a decisive manner. In the insightful words of Pascal 'Justice without force is impotent, Force without justice is tyrannical. Justice without force is infringed because there is always the means to overcome it. One must therefore combine justice and force and therefore make strong what is right and make right what is wrong[430] These words echo Locke's that 'the Law of Nature would be in vain if nobody […] had the power to execute that law'[431] As fragmentation leads to the loss of TCL's power and potential to suppress the increasing incidences of transnational criminal behaviour, it is therefore time to strengthen this neglected branch of international law through a unified approach of ICL and its enforcement systems.

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[430] Blaise Pascal, Pensees par V 298 (William F. Trotter trans 1941)
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