Redrawing the Line? Serious Crimes of Concern to the International Community beyond the *Rome Statute*

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Abstract

International criminal law, like all areas of law, must continue to evolve to reflect contemporary realities. This article demonstrates that the current subject matter jurisdiction of the International Criminal Court under the *Rome Statute* is very much an artefact of history, and it argues that the historical and reactive line that the statute draws between "core" international crimes and other serious international or transnational crimes is inadequate. In order to ensure that international criminal law continues to evolve in a reasoned and principled manner, states need to better articulate the criteria by which conduct is included within the category of "the most serious crimes of concern to the international community as a whole." Using a primarily inductive approach, the article considers

Résumé

Le droit pénal international, comme tous les domaines du droit, doit continuer à évoluer pour refléter les réalités contemporaines. Cet article démontre que la compétence *ratione materiae* de la Cour pénale internationale, selon le *Statut de Rome*, est un artefact de l'histoire, et fait valoir que la ligne historique et réactive tracée dans le *Statut* entre les "principaux" crimes internationaux et d'autres crimes graves, soient internationaux ou transnationaux, est désuet. Afin de veiller à ce que le droit pénal international continue à évoluer de manière raisonnée et fondée sur des principes, l'auteure soutient que les États doivent mieux articuler les critères selon lesquels certains actes sont inclus dans la catégorie des "crimes les plus graves qui touchent l'ensemble de la communauté internationale." En utilisant une

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a number of such criteria that have been considered over the years. It concludes that, when assessed in the context of their systematic and organized perpetration, many other serious international and transnational crimes raise some of the same concerns that underpin the current core international crimes, suggesting that it may be time for the international community to consider redrawing the line.

approche principalement inductive, l'article considère un certain nombre de ces critères qui ont été examinés au cours des années. Il conclut que, lorsqu'évalués dans le contexte de leur perpétration systématique et organisée, de nombreux autres crimes graves, tant internationaux que transnationaux, soulèvent certaines des mêmes préoccupations qui sous-tendent les principaux crimes internationaux actuels. Cette analyse suggère qu'il est peut-être temps que la communauté internationale retrace la ligne les séparant.

Keywords: International criminal law; transnational criminal law; International Criminal Court; international crimes.

Mots-clés: Droit pénal international; droit pénal transnational; Cour pénale internationale; crimes internationaux.

Introduction

The preamble to the *Rome Statute of the International Criminal Court* (*Rome Statute*) identifies as its purpose: "to establish an independent permanent International Criminal Court … with jurisdiction *over the most serious crimes of concern to the international community as a whole.*"[1] The criminalization of conduct under international law indicates universal condemnation of certain behaviour independent of its criminalization by domestic laws. It implies a normative hierarchy, demonstrated by the terminology "the most serious crimes." Finally, it entails a commitment to ending impunity for these crimes by defining a role for the international community in prosecuting these crimes if they are not prosecuted domestically. And all of this, in turn, raises the important question of how states have defined this category of the "most serious crimes of concern to the international community as a whole."

Article 5 of the *Rome Statute* defines this category and, hence, the subject matter jurisdiction of the International Criminal Court (ICC), as being limited to genocide, crimes against humanity, war

[1] *Rome Statute of the International Criminal Court*, 17 July 1997, 2187 UNTS 3, preamble [*Rome Statute*] [emphasis added].

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crimes, and aggression.[2] These crimes, for the most part, resemble the subject matter jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[3]

War crimes, crimes against humanity, genocide, and aggression are regularly referred to as the "core" international crimes.[4] This terminology illustrates the increasingly entrenched distinction between crimes within the jurisdiction of the ICC and other crimes of interest to the international community ("other" international crimes, "treaty crimes," or "transnational crimes"[5]), such as drug

[2] *Ibid*, art 5. With respect to the crime of aggression, the court still does not have jurisdiction over this crime until an additional vote is taken in 2017 (so long as thirty states parties have ratified the amendment by that time). *Ibid*, art 15*bis*(2)–(3).

[3] The exception is the crime of aggression, which is not included in the Statutes of the ICTY or ICTR. *Statute of the International Tribunal for the former Yugoslavia*, Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (Annex), 3 May 1993, UN Doc S/25704 (1993), arts 2–5 [*ICTY Statute*]; *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994, UN Doc S/RES/955 (1994), Annex, arts 2–4 [*ICTR Statute*].

[4] War crimes, genocide, and crimes against humanity were referred to as "core crimes" throughout the negotiations of the *Rome Statute*: Philippe Kirsch & Valerie Oosterveld, "Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court" (2001) 46 McGill LJ 1141 at 1148. Many commentators have adopted this language, often including the crime of aggression as well. See, eg, Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford: Oxford University Press, 2012) at 18; Gerhard Werle, *Principles of International Criminal Law*, 2d ed (The Hague: TMC Asser Press, 2009) at 29; Robert Cryer, "The Doctrinal Foundations of International Criminalization" in M Cherif Bassiouni, ed, *International Criminal Law: Sources, Subjects and Contents*, vol. 1, 3d ed (Leiden: Koninklijke Brill NV, 2008) 107 at 108; Ilias Bantekas, *International Criminal Law*, 4th ed (Oxford: Hart Publishing, 2010) at 9; Robert J Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 2d ed (Toronto: Irwin Law, 2013) at 19; Terje Einarsen, *The Concept of Universal Crimes in International Law* (Oslo: Torkep Opsahl Academic EPublisher, 2012) at 137–38.

[5] Boister observes that "[t]ransnational crime is now a commonly used criminological term to describe cross-border or potentially cross-border crime." Boister, *supra* note 4 at 13. While there are a large number of international treaties addressing such crimes (the "suppression conventions," through which states codify definitions of crimes and commit to criminalizing such conduct domestically), one of the key features of transnational crimes is that the *locus* of their criminalization lies within the domestic sphere. Cryer, *supra* note 4 at 109. This differs from international crimes in the strict sense. While there is no universally accepted definition of "international crimes," there is general

trafficking and other narcotics crimes, piracy, transnational organized crime, human trafficking, torture, corruption, money laundering, environmental crimes, international terrorism, and participation in the illicit small arms trade. This distinction can also be seen in the regulation of the latter under international law and their treatment in the literature. The focus on core crimes implies that these other crimes are peripheral or somehow less important.[6] The factors on which the distinction between the *Rome Statute* crimes and other international or transnational crimes is based deserve further consideration.

International criminal law has developed in response to certain key historical events. As a result, as M. Cherif Bassiouni notes, "international crimes have developed to date, without even an agreed-upon definition of what constitutes an international crime, what are the criteria for international criminalization, and how international crimes are distinguished."[7] Similarly, Robert Cryer observes that "[i]t also seems reasonably clear that when the relevant evidence is appraised, that the development of international

agreement that one of their key distinguishing features is that the *locus* of their criminalization lies in international law directly, such that they are crimes regardless of criminalization at the state level. Boister, *supra* note 4 at 4, 13–14, 18–19. See also Currie & Rikhof, *supra* note 4 at 17, 19. Some authors limit their definition of international crimes to those that fall within the jurisdiction of international courts or tribunals (corresponding to the category of "core international crimes"). See, eg, Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, 3d ed (Cambridge: Cambridge University Press, 2014) at 4. Others include all crimes that are subject to the exercise of universal jurisdiction by states. See, eg, Currie & Rikhof, *supra* note 4 at 19–20. Another implication of categorization as an international crimes identified by some commentators is a corresponding restriction on some official immunities. See, eg, Antonio Cassese, *International Criminal Law*, 2d ed (Oxford: Oxford University Press, 2008) at 12. For a more comprehensive literature review of the variable meanings attached to "international crimes" by different commentators, see Einarsen, *supra* note 4 at 150–68.

[6] Schabas gives drug trafficking as an example, observing that it "may be an 'international crime' and 'contrary to the purposes and principles of the United Nations,' but it is almost certainly neither a crime against humanity nor a war crime, *nor can it be said to rise to the same level of gravity*." William A Schabas, "Punishment of Non-State Actors in Non-International Armed Conflict" (2002–03) 26 Fordham Int'l LJ 907 at 911 [emphasis added].

[7] M Cherif Bassiouni, "International Crimes: The *Ratione Materiae* of International Criminal Law" in Bassiouni, ed, *supra* note 4, 129 at 131 [Bassiouni, "*Ratione Materiae*"]. See also M Cherif Bassiouni, "The Discipline of International Criminal Law" in Bassiouni, *supra* note 4, 3 at 17 [Bassiouni, "Discipline"].

criminal law does not reflect the gradual development, or organic development of, a coherent plan for global society as such. It reflects a gradual accumulation of more-or-less *ad hoc* responses to significant events."[8]

The origins of some of the core crimes can be traced back over a century. Nonetheless, it was the atrocities perpetrated during the Second World War that most fundamentally changed the international legal landscape. The prosecutions by the Nuremberg and Tokyo tribunals, and a few key subsequent legal developments that arose in response to Second World War atrocities, crystallized war crimes, crimes against humanity, genocide, and aggression as the core international crimes for which there could be individual criminal responsibility under international law.

Globalization has resulted in an increasingly interconnected world with significant changes in transport, communication, and technology, all of which in turn have significant implications for international or transnational criminality.[9] For example, technological advancements, sophisticated Internet use, and digital currency (for example, "bitcoin") have changed the landscape of trafficking in drugs and other illicit goods (such as weapons and ammunition).[10] This is not to say that transnational crime is new.[11] It is important, nonetheless, to recognize the impact of these changes. For example, the UN Security Council has observed that "in a globalized society, organized crime groups and networks, better equipped with new information and communications technologies, are becoming more diversified and connected in their illicit operations, which in some cases may aggravate threats to international security."[12] International criminal law must constantly evolve to ensure that it addresses all of the most serious crimes of concern to the international community.

[8] Cryer, *supra* note 4 at 119; see also 127.

[9] See, eg, UN Office on Drugs and Crime (UNODC), *The Globalization of Crime: A Transnational Organized Crime Threat Assessment* (Vienna: United Nations, 2010) at 29–31.

[10] UNODC, *World Drug Report 2014* (New York: United Nations, 2014) at 18; "The Silk Road Trial: Bitcoin Buccaneers," The Economist (17 January 2015), online: <http://www.economist.com/node/21639525/print>.

[11] Boister cautions about "blaming the boom in transnational crime on globalization," observing that "transnational crime has a long history." Boister, *supra* note 4 at 6.

[12] Statement by the President of the Security Council, 24 February 2010, UN Doc S/PRST/2010/4 (2010).

Accordingly, there is a need for states to engage in a more reasoned and principled approach to the continued development of international criminal law. In particular, the dichotomy between core crimes and other international or transnational crimes needs to be reconsidered in order to determine whether this distinction is coherent and based on the values and principles of the international legal system. This article will begin with an examination of the historical development of international criminal law. The first part will demonstrate that the current subject matter jurisdiction of the *Rome Statute* is very much an artefact of history, in particular, the Second World War and the subsequent Nuremberg and Tokyo trials, which occurred nearly seventy years ago. It will also review the history of the International Law Commission's (ILC) *Draft Code of Crimes against the Peace and Security of Mankind* and the history of the drafting of the *Rome Statute*, with a view to investigating why other international or transnational crimes were ultimately omitted from the subject matter jurisdiction of the ICC.

History gives us an important indication of the types of atrocities that have been found to "shock the conscience of humanity" and that have prompted the international community to take action. Nonetheless, it is important that international criminal law, like all areas of law, continue to evolve to reflect contemporary realities. The second part of this article will therefore argue that the historical and reactive line drawn between core crimes and other serious crimes is inadequate, and it will address how it should be redrawn. Taking a primarily inductive approach, it will consider a number of doctrinal criteria that have been considered over the years as potential justifications for categorizing certain crimes as "the most serious crimes."

Finally, this article will consider other international or transnational crimes. This discussion gives a preliminary indication that some of these other crimes also satisfy some of the criteria identified in the preceding section. Thus, it will be shown, with a few examples, that the line currently drawn between core crimes and other international crimes is untenable. It is beyond the scope of this article to examine every other international or transnational crime in sufficient depth to reach a firm conclusion about whether it should be included in the category of "the most serious crimes of concern to the international community as a whole." Further study would be needed to address this question comprehensively. What this article aims to do instead is to argue that the historical delimitation of this category of crimes is inadequate and to propose a

framework within which a more reasoned and principled analysis of the broader question can be undertaken.

Historical Development of International Criminal Law

early developments

It was violations of the law of armed conflict that prompted discussion of the need for individual criminal prosecutions before international tribunals. Despite the proliferation of international rules governing armed conflict in the latter part of the nineteenth and early twentieth centuries, mechanisms for enforcing these rules were insufficient or absent entirely.[13] The concept of international (or, at least, multinational) war crimes trials was not seriously discussed until the negotiations following the end of the First World War.[14] However, the war crimes trials envisioned in the *Treaty of Versailles* never materialized.[15] Germany convinced the Allies that it should conduct its own trials, which resulted, ultimately, in the domestic prosecution of only twelve military officers in Leipzig.[16] Nonetheless, of note during this period was the 1919 report by the Allied Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties,[17] which is generally credited with originating the concept of crimes against humanity.[18]

[13] The three main accountability mechanisms at the time were payment of compensation, belligerent reprisals, and domestic prosecution of a state's own nationals, none of which were considered effective. See Theodor Meron, "Reflections on the Prosecution of War Crimes by International Tribunals" (2006) 100 AJIL 551 at 554; Leslie Mansfield, "Crimes against Humanity: Reflections on the Fiftieth Anniversary of Nuremberg and a Forgotten Legacy" (1995) 64 Nordic J Int'l L 293 at 296–97; Matthew Lippman, "Nuremberg: Forty Five Years Later" (1991–92) 7 Conn J Int'l L 1 at 2.

[14] See M Cherif Bassiouni, "World War I: 'The War to End All Wars' and the Birth of a Handicapped International Criminal Justice System" (2001–02) 30 Denv J Int'l L & Pol'y 244; Lippman, *supra* note 13 at 4–6.

[15] *Treaty of Peace between the Allied and Associated Powers and Germany*, 28 June 1919, art 228 [*Treaty of Versailles*].

[16] G Gordan Battle, "The Trials before the Leipsic Supreme Court of Germans Accused of War Crimes" (1921) 8 Va L Rev 1; Lippman, *supra* note 13 at 10–11; Meron, *supra* note 13 at 557–58; Bassiouni, *supra* note 14 at 281–85.

[17] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented in the Preliminary Peace Conference*, 29 March 1919, reprinted in (1920) 14 AJIL 95.

[18] See Bassiouni, *supra* note 14 at 262–64.

However, this category of crimes was not included in the *Treaty of Versailles*.

During the inter-war period, there was academic debate and discussion at the Council of the League of Nations on the establishment of an international criminal court and an international penal code, but no real substantive advances were made.[19] No state ratified the League of Nations' *Convention for the Creation of an International Criminal Court*, and the enthusiasm for the establishment of an international criminal court and code subsided.[20]

THE INFLUENCE OF THE SECOND WORLD WAR AND ITS AFTERMATH

The trials conducted after the Second World War were a turning point in international law in which it was made clear that individuals could be subject to legal obligations directly under international law and could be prosecuted for their violation.[21] The *Charter of the International Military Tribunal* (*Nuremburg Charter*) granted the International Military Tribunal (IMT) jurisdiction over crimes against peace, war crimes, and crimes against humanity.[22] Prosecutions for perpetrating a war of aggression, or crimes against peace, were in fact central to the trials in Nuremberg.[23] Additionally, the long-recognized category of war crimes (violations of the laws or customs of war) was included in Article 6(b) of the *Nuremberg Charter*. More innovative was the inclusion, for the first time in a military tribunal's jurisdiction, of crimes against humanity in Article 6(c).[24] In light of the horrific acts perpetrated by the Nazi regime against

[19] Lippman, *supra* note 13 at 12–16; Mansfield, *supra* note 13 at 302–3.

[20] *Convention for the Creation of an International Criminal Court*, 16 November 1937, 7 Hudson 878, 19 League of Nations OJ 37 (1937.VII) (not in force). See Lippman, *supra* note 13 at 14; Mansfield, *supra* note 13 at 303.

[21] Andrew Clapham, "Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court" in Philippe Sands, ed, *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003) 30 at 32–33; M Cherif Bassiouni, "The Subjects of International Criminal Law: *Ratione Personae*" in Bassiouni, *supra* note 4, 41 at 46.

[22] *Charter of the International Military Tribunal*, reprinted in (1945) 39 AJIL Supp 258, art 6 [*Nuremberg Charter*].

[23] See Lippman, *supra* note 13 at 24, 44.

[24] See M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2d ed (The Hague: Kluwer Law International, 1999) at 1.

German Jews and other German nationals, this category of crime was targeted at acts similar in nature to war crimes but committed against a state's own nationals.[25] The *Nuremberg Charter* also provided the blueprint for the proceedings against the Japanese leaders in Tokyo by the International Military Tribunal for the Far East, pursuant to the *Charter of the International Military Tribunal for the Far East*, and for the subsequent proceedings throughout Allied territory.[26]

Also emerging from the horrific atrocities of the Second World War was the term genocide, which was coined by Raphael Lemkin in his 1944 book *Axis Rule in Occupied Europe*.[27] The term was quickly adopted and used in the Nuremberg proceedings. Genocide was confirmed as a crime under international law soon after the end of the Second World War in a UN General Assembly resolution adopted unanimously at the end of 1946.[28] The *Convention on the Prevention and Punishment of the Crime of Genocide* (*Genocide Convention*) was concluded soon thereafter, on 9 December 1948.[29] The crime of genocide has repeatedly been recognized as a crime under customary international law, the prohibition of which is a peremptory norm of international law.[30] The momentum displayed by states in adopting the *Genocide Convention* led to the separation of genocide from other international crimes. The development of

[25] *Ibid.* at 10, 24–25, 29–30, 69–78.

[26] *Charter of the International Military Tribunal for the Far East*, 26 April 1946, reproduced in C Bevans, ed, *Treaties and Other International Agreements of the United States of America 1776–1949*, (1968) 4 UST 20; *Control Council Law No 10*, 20 December 1945, *Official Gazette of the Control Council for Germany*, No 3, Berlin, 31 January 1946, reprinted in *Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No 10*, vol 1 at xvi. See generally Bassiouni, *supra* note 24 at 32–37.

[27] Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace, 1944).

[28] *The Crime of Genocide*, GA Res 96(I), UNGAOR, 1st Sess, UN Doc A/231 (1946).

[29] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

[30] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep 15 at 23; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment, [2006] ICJ Rep 6 at para 64; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, [2007] ICJ Rep 43 at para 161.

those other crimes was delegated in 1947 to the ILC for further consideration.[31]

Another important substantive development in the aftermath of the Second World War occurred in the field of international humanitarian law. In 1949, the four *Geneva Conventions* were adopted with a view to protecting victims of armed conflict.[32] In an attempt to also advance the enforcement of the law of armed conflict, the *Geneva Conventions* included a grave breaches regime pursuant to which certain serious violations were subject not only to universal jurisdiction but also to mandatory prosecution or extradition by states parties.[33] Despite these significant advancements in the wake of the Second World War, no international criminal trials occurred between the conclusion of the post-Second World War proceedings and the establishment of the ICTY almost fifty years later.[34] The failure to establish a permanent international criminal court left the prosecution of international crimes to states. Occasions on which national courts exercised such jurisdiction were few and far between.

As mentioned earlier and further explored in the next section of this article, the UN General Assembly requested in 1947 that the ILC prepare a draft code of offences against the peace and security of mankind. Despite initial progress in the first half of the 1950s, there was a hiatus in the work of the ILC on the draft code after 1954 due to difficulties in defining the crime of aggression. Commentators have noted that the political implications of the Cold War prevented further development on an international criminal court.[35] First, there

[31] The evolution of the International Law Commission's (ILC) work on such other crimes in the second half of the twentieth century is discussed in more detail later in this article. See text accompanying notes 48–92.

[32] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* 12 August 1949, 75 UNTS 31 [*Geneva Convention I*]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,* 12 August 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War,* 12 August 1949, 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* 12 August 1949, 75 UNTS 287 [collectively *Geneva Conventions*].

[33] See, eg, *Geneva Convention I*, *supra* note 32, arts 49–50.

[34] M Cherif Bassiouni, "The International Criminal Court in Historical Context" (1999) 55 St Louis-Warsaw Transatlantic LJ 55 at 63.

[35] James Crawford, "The Drafting of the Rome Statute" in Sands, *supra* note 21, 109 at 119; Kirsch & Oosterveld, *supra* note 4 at 1145; Bassiouni, "*Ratione Materiae*," *supra* note 7 at 131.

was the unlikelihood of the major powers reaching an agreement on the definition of aggression. Second, establishing an international criminal court would involve the surrender of some degree of sovereignty, which the major powers were unwilling to do.[36]

In the meantime, states focused on adopting international instruments dealing with specific crimes of international concern.[37] These "suppression treaties" addressed the hijacking of aircraft, various defined acts of terrorism, drug crimes, crimes against internationally protected persons, and the recruitment of mercenaries, among others.[38] These suppression treaties primarily operated by defining certain offences and obligating states parties to criminalize these offences under their own domestic laws (an "indirect enforcement system").[39] Additionally, they included obligations for inter-state cooperation. Thus, while the ILC returned to the task of drafting a code of crimes against the peace and security of mankind in the 1980s, states continued to regulate other specific crimes of international concern by treaty, such as corruption and transnational organized crime, including human trafficking, people smuggling, and firearms trafficking.[40]

After an almost half-century hiatus in international criminal prosecutions, a renaissance in international criminal law occurred in the early 1990s. The UN Security Council revitalized the notion

[36] Kirsch & Oosterveld, *supra* note 4 at 1145.

[37] Crawford, *supra* note 35 at 119–20.

[38] Eg, *Single Convention on Narcotic Drugs, 1961, as Amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1961*, 8 August 1975, 976 UNTS 105; *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, 4 December 1989, 2163 UNTS 75, annexed to UN Doc A/RES/44/34; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, 1035 UNTS 167.

[39] Bassiouni, "Discipline," *supra* note 7 at 23; Boister, *supra* note 4 at 14; Cryer, *supra* note 4 at 109.

[40] Eg, *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2237 UNTS 319; *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime,* 15 November 2000, 2241 UNTS 507; *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, 31 May 2001, 2236 UNTS 208; *United Nations Convention Against Corruption*, 31 October 2003, 2349 UNTS 41.

of prosecutions of international crimes before international tribunals with the establishment of the ICTY in 1993 and the ICTR the following year (ad hoc tribunals). Both of the ad hoc tribunals were established by the UN Security Council pursuant to its power under Chapter VII of the *Charter of the United Nations* (*UN Charter*) to act in situations of threats to the peace, breaches of the peace, or acts of aggression.[41]

The ICTY was established in 1993 by the UN Security Council to hold accountable those who had committed serious violations of international humanitarian law during the conflicts attending the breakup of the former Socialist Federal Republic of Yugoslavia.[42] It was given jurisdiction over crimes committed anywhere in the territory of the former Yugoslavia on or following 1 January 1991. In order to avoid violating the principle *nullum crimen sine lege* (which prohibits retroactive criminalization of conduct), the jurisdiction of the ICTY was limited to serious violations of international humanitarian law that were recognized as such and that entailed individual criminal responsibility, under customary international law at the time of their perpetration.[43] This category of customary international humanitarian law was found to correspond in substance to "the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945."[44] Therefore, the subject matter jurisdiction of the ICTY was tied historically to the *Nuremberg Charter* and to those crimes that were defined shortly thereafter in the 1948 *Genocide Convention* and the 1949 *Geneva Conventions*.

The following year, in November 1994, the UN Security Council, again acting pursuant to Chapter VII of the *UN Charter*, established the ICTR to prosecute those responsible for the genocide and other serious violations of international humanitarian law

[41] *Charter of the United Nations*, 26 June 1945, 1 UNTS 16 [*UN Charter*].

[42] SC Res 827 (1993), UN Doc S/RES/827 (1993).

[43] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704 (1993) at para 34.

[44] *Ibid* at para 35.

perpetrated earlier that year in Rwanda.[45] While the ICTR was unique for being the first international criminal tribunal to deal exclusively with a non-international armed conflict, the subject matter jurisdiction of the tribunal, for the most part, resembled that of the ICTY and included genocide, crimes against humanity, and war crimes.[46]

The creation of these ad hoc international criminal tribunals was followed a few years later by the adoption of the *Rome Statute*, which created the first permanent International Criminal Court. During the process of negotiating the *Rome Statute*, delegates considered, but ultimately rejected, the inclusion of so-called "treaty crimes," such as drug trafficking, within the jurisdiction of the court.[47] Thus, the subject matter jurisdiction of the ICC is limited to four crimes as enumerated in Article 5 of the *Rome Statute*: genocide, crimes against humanity, war crimes, and aggression. The negotiation process on the subject matter jurisdiction of the ICC will be discussed later in this article in order to evaluate why other crimes were ultimately omitted from the *Rome Statute*. However, it is not hard to see that the *Nuremberg Charter* and a few other key developments in the wake of Second World War significantly shaped the jurisdiction of the ICC half a century later.

THE ILC'S DRAFT CODE OF CRIMES

As noted earlier, in 1947, the ILC was given the task of developing a draft code of offences against the peace and security of mankind (draft Code) by the UN General Assembly.[48] Almost fifty years later, in 1996, the final version of the ILC's *Draft Code of Crimes against the Peace and Security of Mankind* (1996 *Draft Code*) included only five crimes: aggression, genocide, crimes against humanity, crimes against United Nations and associated personnel, and

[45] *ICTR Statute*, *supra* note 3, art 1.

[46] The war crimes provisions of the *ICTR Statute* differ from those of the *ICTY Statute* because the conflict in Rwanda was of a non-international character.

[47] Philippe Kirsch & John T Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process" (1999) 93 AJIL 2 at 6–7.

[48] *Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, GA Res 177(II), UNGAOR, 3d Sess, UN Doc A/RES/177(II) (1947) [GA Res 177(II)].

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war crimes.[49] By comparison, the 1991 version of the draft code (1991 *Draft Code*), provisionally adopted by the ILC on first reading, listed one dozen crimes, including international terrorism, illicit trafficking in narcotic drugs, and wilful and severe damage to the environment.[50] These were all left out of the final version.

A still earlier version of the draft code had been completed by the ILC in 1951. It is important to remember that the ILC's mandate was to create a draft code of offences *against the peace and security of mankind* and not a code of international crimes more generally. Therefore, as explained by one member of the ILC, "it would exclude all international crimes not directly aimed against the peace and security of mankind, such as the traffic in narcotic drugs, or the white slave traffic."[51] In addition to crimes derived from the *Nuremberg Charter*,[52] the 1951 draft focused primarily on

[49] *Draft Code of Crimes against the Peace and Security of Mankind*, arts 16–20, reprinted in *Yearbook of the International Law Commission 1996*, vol 2, part 2 (New York: United Nations, 1998), UN Doc A/CN.4/SER.A/1996/Add.1 (1996) at 42–56 [1996 *Draft Code*]. For further discussion of the drafting history of the draft Code, see Martin C Ortega, "The ILC Adopts the Draft Code of Crimes against the Peace and Security of Mankind" (1997) 1 Max Planck YBUNL 283; M Cherif Bassiouni, "The History of the Draft Code of Crimes Against the Peace and Security of Mankind" (1993) 27 Israel LR 247; Rosemary Rayfuse, "The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission" (1997) 8 Crim LF 43; Einarsen, *supra* note 4 at 168–202.

[50] *Report of the Commission to the General Assembly on the Work of Its Forty-Third Session (29 April – 19 July)*, UNGAOR, 46th Sess, Supp No 10, UN Doc A/CN.4/SER.A/1991/Add.1 (1991) (Part 2) at 95–97 [1991 *Draft Code*]. For further commentary, see generally M Cherif Bassiouni, ed, *Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind* (Toulouse: Association internationale de droit pénal, 1993).

[51] *Statement by Mr. Amado, 17th meeting of the ILC, 9 May 1949*, reprinted in *Yearbook of the International Law Commission 1949*, vol 2 (New York: United Nations, 1956) at 131.

[52] The UN General Assembly's request to the commission was to "prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles [of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal]." GA Res 177(II), *supra* note 48 at para (b). The special rapporteur therefore noted that violations of the laws or customs of war should be included in the draft code because they were included in the Nuremberg Charter, despite observing that "[i]n reality [they] do[] not affect the peace and security of mankind and, consequently, from a purely theoretical point of view … should have no place in the draft code." *Report of J. Spiropoulos, Special Rapporteur*, UN Doc A/CN.4/25 (1950) at para 67, reprinted in *Yearbook of the International Law Commission 1950*, vol 2, UN Doc A/CN.4/SER.A/1951/Add.1 (1951) at 263.

offences "which contain a political element and which endanger or disturb the maintenance of international peace and security."[53] This included acts constituting a threat or use of force by one state against another, organized terrorist activities, the fomenting of civil strife in another state by or with the acquiescence of state authorities, the violation of treaty obligations relating to international peace and security, genocide, inhuman acts against a civilian population, and war crimes.[54] However, the notion of a "political element" was problematically vague and was criticized when the commission returned to its consideration of the topic in the 1980s.[55]

A revised draft code, taking into account comments received from governments in response to the 1951 draft, was drafted in 1954 but contained only minimal changes to the 1951 list of crimes.[56] Further progress then stalled for decades due to the inability of the international community to agree on a definition of aggression.[57] The draft code was not discussed by the ILC for a twenty-seven-year period. In the meantime, as seen earlier, international efforts to address crimes of international concern resulted

[53] "Draft code of offences against the peace and security of mankind: Introduction" in *Yearbook of the International Law Commission 1951, supra* note 51, vol 2, at 58.

[54] *Yearbook of the International Law Commission 1951, supra* note 51 at 263.

[55] See, eg, Special Rapporteur Doudou Thiam, "First Report on the Draft Code of Offences against the Peace and Security of Mankind," UN Doc A/CN.4/364 (1983), reprinted in *Yearbook of the International Law Commission 1983,* vol 2, part 1 (New York: United Nations, 1985) at paras 36–38; *Statement of Mr Calero Rodrigues at the 1758th Meeting of the ILC*, 10 May 1983, reprinted in *Yearbook of the International Law Commission 1983,* Volume I: *Summary Records of the Meetings of the Thirty-Fifth Session* (New York: United Nations, 1984) at 20. DHN Johnson, writing contemporaneously, criticized the distinction based on the political nature of the crime as "unnecessary and irrelevant" and even "harmful." DHN Johnson, "The Draft Code of Offences against the Peace and Security of Mankind" (1955) 4 ICLQ 445 at 456–57.

[56] One new offence was added: "The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character, in order to force its will and thereby obtain advantages of any kind." Additionally, the provision relating to armed bands was expanded and the provision on inhuman acts was modified. See *Yearbook of the International Law Commission 1954,* vol 2 (New York: United Nations, 1960), UN Doc A/CN.4/SER.A/1954/Add.1 (1954) at 149–52.

[57] See *Draft Code of Offences against the Peace and Security of Mankind*, GA Res 897 (IX), UNGAOR, 9th Sess, Supp No 21, UN Doc A/RES/897 (IX) (1954); *Draft Code of Offences against the Peace and Security of Mankind*, GA Res 1186 (XII), UNGAOR, 12th Sess, UN Doc A/RES/1186 (XII) (1957) at para 1. See also Johnson, *supra* note 55 at 453.

in a series of suppression treaties addressing crimes such as drug trafficking, specific acts of terrorism, and the employment of mercenaries.[58] Consensus on a definition of aggression was finally achieved in 1974.[59] However, it took another eight years before the draft code project reappeared on the ILC's agenda in 1982.[60]

The general sentiment among the members of the ILC at that time was that the scope of the draft code should be expanded beyond the 1954 version to take into account international instruments that had come into effect in the interim period.[61] Moving away from a focus on the political motivation of crimes, the ILC now stated that the draft code should cover only "the most serious international crimes" and that "[t]his seriousness may be measured either by the *extent* of the calamity or by its *horrific* character, or by both at once."[62]

Proposed additions to the list of crimes included the use of nuclear weapons, colonialism, apartheid, serious damage to the environment, economic aggression, mercenarism, hostage taking and crimes against internationally protected persons, terrorism, drug trafficking, piracy, slavery and slave trading, and the hijacking of aircraft.[63] However, the ILC itself tended not to favour such

[58] Crawford, *supra* note 35 at 119–21.

[59] *Definition of Aggression*, GA Res 3314 (XXIX), UNGAOR, 29th Sess, Supp No 31, UN Doc A/9619 (1974).

[60] *Draft Code of Offences against the Peace and Security of Mankind*, GA Res 36/106, UNGAOR, 36th Sess, Supp No 51, UN Doc A/RES/36/106 (1981).

[61] *Draft Code of Offences against the Peace and Security of Mankind: Analytical Paper Prepared Pursuant to the Request Contained in Paragraph 256 of the Report of the Commission on the Work of Its Thirty-Fourth Session*, UN Doc A/CN.4/365 (1983) at para 71 [*Analytical Paper*].

[62] *Report of the Commission to the General Assembly on the Work of Its Thirty-Fifth Session*, reprinted in *Yearbook of the International Law Commission 1983*, vol 2, part 2 (New York: United Nations, 1985), UN Doc A/CN.4/SER.A/1983/Add.1 (1983) at 14 [emphasis in original].

[63] *Analytical Paper*, *supra* note 61 at paras 71–105; *Report of the Commission to the General Assembly on the Work of Its Thirty-Sixth Session*, UN Doc A/39/10, reprinted in *Yearbook of the International Law Commission 1984*, vol 2, part 2 (New York: United Nations, 1985), UN Doc A/CN.4/SER.A/1984/Add.1 (1984) at 15–17. This reflected legal advancements that had occurred during the intervening period such as the adoption of the *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 UNTS 243; the *Declaration on the Prevention of Nuclear Catastrophe*, GA Res 36/100, UNGAOR, 36th Sess, Supp No 51, UN Doc A/RES/36/100 (1981); and the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514(XV), UNGAOR, 15th Sess, UN Doc A/RES/1514(XV) (1960).

an expansive approach, emphasizing that "[t]he code ought to retain its particularly serious character as an instrument dealing solely with offences distinguished by their especially horrible, cruel, savage and barbarous nature."[64] Accordingly, ILC Special Rapporteur Doudou Thiam concluded that offences such as counterfeiting money, passport forgery, drug trafficking, and trafficking in obscene publications, among others, lay beyond the proper boundaries of offences against the peace and security of mankind.[65]

By 1989, the ILC's perspective on drug trafficking had shifted, and more members favoured, or at least accepted, its inclusion in the draft code.[66] This shift came in the wake of the adoption in the previous year of the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* and coincided with a proposal by Trinidad and Tobago to revive the push for the establishment of a permanent international criminal court to deal, in particular, with the problem of drug trafficking.[67] In addition to recognizing the severe health impacts of illicit narcotics, the ILC recognized that drug trafficking often goes hand in hand with acts of terrorism ("narco-terrorism") and can have a destabilizing effect on some countries and could, therefore, even amount to a crime against peace.[68] As one member of the ILC noted, even if drug trafficking was not being carried out by or on behalf of states, it was being perpetrated by "individuals or by multinational or transnational corporations which

[64] *Report of the Commission to the General Assembly on the Work of Its Thirty-Sixth Session*, reprinted in *Yearbook of the International Law Commission 1984, supra* note 63 at para 63.

[65] Special Rapporteur Doudou Thiam, *Second Report on the Draft Code of Offences against the Peace and Security of Mankind*, UN Doc A/CN.4/377 (1984), reprinted in *Yearbook of the International Law Commission 1984*, vol 2, part 1 (New York: United Nations, 1986), UN Doc A/CN.4/SER.A/1984/Add.1 (1984) at paras 68–78.

[66] See discussion at the 2100th–2107th meetings of the ILC, from 11–24 May 1989, reprinted in *Yearbook of the International Law Commission 1989*, vol 1*: Summary Records of the Meetings of the Forty-First Session, 2 May – 21 July 1989* (New York: United Nations, 1992), UN Doc A/CN.4/SER.A/1989 (1989).

[67] *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95.

[68] *Report of the International Law Commission on the Work of Its Forty-First Session (2 May – 21 July 1989)*, UN Doc A/44/10 (1989), reprinted in *Yearbook of the International Law Commission 1989*, vol 2, part 2 (New York: United Nations, 1992), UN Doc A/CN.4/SER.A/1989/Add.1 (1989) at paras 205–10.

handled fabulous amounts of money and were a threat to Governments precisely because the resources they possessed were sometimes larger than the budget of the State in whose territory they operated."[69]

Illicit trafficking in narcotic drugs was therefore included in the ILC's 1991 version of the draft code and maintained in a 1995 report in which the special rapporteur reduced the list of crimes to six offences "whose characterization as crimes against the peace and security of mankind was hard to challenge."[70] However, at this time, there was still "limited support" from states for the inclusion of illicit drug trafficking as a crime against the peace and security of mankind.[71] Drug trafficking was ultimately left out of the final version, the following year, in an attempt to secure consensus among states on the text of the draft code.

While the crime of international terrorism was also included in the special rapporteur's 1995 report, its inclusion in the draft code was questioned due to the absence of agreement on a sufficiently precise definition[72] (a problem from which the crime of terrorism still suffers to date).[73] It was similarly omitted from the final 1996 *Draft Code*.[74]

As seen earlier, other crimes considered for inclusion by states when the ILC revisited the topic of the draft code in the 1980s

[69] Statement of Mr Diaz Gonzalez at the 2107th meeting of the ILC, 24 May 1989, in *Yearbook of the International Law Commission 1989*, vol 1 *supra* note 66 at 80.

[70] Special Rapporteur Doudou Thiam, "Thirteenth report on the draft Code of Crimes against the Peace and Security of Mankind," UN Doc A/CN.4/466 (1995), reprinted in *Yearbook of the International Law Commission 1995*, vol 2, part 1 (New York: United Nations, 2006), UN Doc A/CN.4/SER.A/1995/Add.1 (1995) at para 1.

[71] *Report of the International Law Commission on the Work of Its Forty-Seventh Session (2 May – 21 July 1995)*, UN Doc A/50/10 (1995) at para 130, reprinted in *Yearbook of the International Law Commission 1995*, vol 2, part 2 (New York: United Nations, 1998), UN Doc A/CN.4/SER.A/1995/Add.1 (1995) at para 139.

[72] *Report of the International Law Commission on the Work of Its Forty-Seventh Session*, *supra* note 71 at para 105.

[73] Ben Saul, "Amicus Curiae Brief on the Notion of Terrorist Acts Submitted to the Appeals Chamber of the Special Tribunal for Lebanon Pursuant to Rule 131 of the Rules of Procedure and Evidence" (2011) 22 Crim LF 365 at 366–67.

[74] Rayfuse criticizes the omission of terrorism and drug trafficking from the 1996 *Draft Code*. Rayfuse, *supra* note 49 at 60–62.

included the crimes of colonialism and apartheid.[75] In 1984, Special Rapporteur Doudou Thiam included these two crimes among those on which "there is wide international agreement ... should be placed at the head of the parade of the hideous monstrosities that constitute international crimes."[76] Doudou Thiam also included serious damage to the environment, taking of hostages, crimes against internationally protected persons, and mercenarism in the same category.

The crime of recruitment, use, financing, and training of mercenaries was also included in the 1991 *Draft Code*. However, when this version was circulated to states for comments, some states questioned whether it was sufficiently serious to warrant inclusion and whether it genuinely constituted a crime against the peace and security of mankind. The crime of intervention, which did not otherwise constitute the crime of aggression, attracted similar criticisms. These crimes, along with colonialism, apartheid,[77] and the threat of aggression were omitted from the special rapporteur's 1995 report in order to reflect the desire of the majority of states that had submitted comments.[78]

While the scope of the draft code was thus significantly reduced at this time in order to reflect the positions of states, the special rapporteur and other members of the ILC expressed concern at the limited number of states that had submitted comments (only twenty-four).[79] This was justifiably felt to be an insufficient

[75] See, eg, Statements of the German Democratic Republic and the Ukrainian Soviet Socialist Republic, reprinted in *Yearbook of the International Law Commission 1982*, vol 2, part 1 (New York: United Nations, 1984), UN Doc A/CN.4/SER.A/1982/Add.1 (1982) at 274–79; Statements of Egypt and Gabon, reprinted in *Yearbook of the International Law Commission 1985*, vol 2, part 1 (New York: United Nations, 1987), UN Doc A/CN.4/SER.A/1985/Add.1 (1985) at 85.

[76] Thiam, *supra* note 65 at para 47.

[77] However, while not explicitly including apartheid, the 1996 *Draft Code* listed as one of the enumerated crimes against humanity "institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population." 1996 *Draft Code*, *supra* note 49, art 18(f). The approach of incorporating apartheid into the category of crimes against humanity was also taken in the *Rome Statute*, *supra* note 1, art 7(1)(j).

[78] Thiam, *supra* note 70 at para 4.

[79] *Comments and Observations Received from Governments*, UN Doc A/CN.4/488 (1993), reprinted in *Yearbook of the International Law Commission 1993*, vol 2, part 1 (New York: United Nations, 2000), UN Doc A/CN.4/SER.A/1993/Add.1 (1993) at 59–109.

response rate to be able to discern the general degree of support for the draft articles, and the draft code was criticized for reflecting the opinions of only a handful of states.[80] Furthermore, the ILC noted, "third world countries had generally not expressed their views."[81] Despite this fact, a degree of political pragmatism was considered necessary in order to avoid "reducing the draft Code to a mere exercise in style, with no chance of becoming an applicable instrument."[82]

One crime that was considered for inclusion towards the end of the ILC's work on the draft code was the crime of wilful and severe damage to the environment.[83] In its final session on the draft code in 1996, a document prepared on this subject by ILC member Christian Tomuschat was presented to the ILC.[84] The report concluded that the crime of attacks on the environment met the criteria of seriousness as well as the "required disruptive effect on the foundations of human society" and had the necessary political and moral support for its inclusion.[85] Furthermore, it concluded that, in extreme circumstances, the ordinary rules of criminal law and inter-state cooperation would not be sufficient to deal with this type of crime.[86] However, despite state support for inclusion of this crime,[87] the ILC omitted it from the 1996 *Draft Code*.

[80] *Report of the International Law Commission on the Work of Its Forty-Seventh Session*, *supra* note 71 at paras 44, 127.

[81] *Ibid* at para 41.

[82] Thiam, *supra* note 70 at para 3. See Rayfuse, *supra* note 49 at 48–49.

[83] *Report of the International Law Commission on the Work of Its Forty-Seventh Session*, *supra* note 71 at para 140. The crime of wilful and severe damage to the environment (as well as apartheid and colonial domination) gained prominence in the ILC's discussion of the draft code as a result of its simultaneous work on state responsibility. See *Draft Articles on State Responsibility: Report of the International Law Commission on the Work of Its Thirty-Second Session (5 May–25 July 1980)*, UN Doc A/35/10 (1980), arts 19(2), 19(3)(d), reprinted in *Yearbook of the International Law Commission 1980*, vol 2, part 2 (New York: United Nations, 1981), UN Doc A/CN.4/SER.A/1980/Add.1 (1980) at 32. See further Ortega, *supra* note 49 at 305–12.

[84] Christian Tomuschat, *Document on Crimes against the Environment*, UN Doc ILC(XLVIII)/DC/CRD.3 (1996), reprinted in *Yearbook of the International Law Commission 1996*, vol 2, part 1 (New York: United Nations, 2008), UN Doc A/CN.4/SER.A/1996/Add.1 (1996).

[85] *Ibid* at paras 14–19.

[86] *Ibid* at paras 20–23.

[87] Ortega, *supra* note 49 at 306.

Instead, it included a more restrictive version of the crime under the category of war crimes.[88] Of course, this version does not address attacks against the environment outside of armed conflict, which could be equally devastating. While time appeared to have run out for further discussion on the crime of attacks against the environment, the crime of attacking United Nations and associated personnel was included as a last minute addition.[89]

Despite the fact that, at times, states as well as members of the ILC were willing to consider a rather expansive approach to the draft code, the final product was much more limited. Indeed, attacks against United Nations and associated personnel proved to be the only (and very late) addition to the list of crimes in the 1996 *Draft Code*, which went beyond those categories of crimes recognized in the immediate post-Second World War period.[90] Although the ILC ultimately opted for a restrictive approach, it included the following caveat in its commentary on the first article of the 1996 *Draft Code*: "This provision is not intended to suggest that the Code covers exhaustively all crimes against the peace and security of mankind." While much consideration was given to the potential inclusion of other crimes, recognizing, in particular, the severe effects of drug trafficking and attacks on the environment, these crimes were ultimately omitted in favour of an attempt to achieve consensus.[91] Furthermore, certain crimes such as piracy and human trafficking were barely considered at all. As one commentator observed, "[i]nstead of the seriousness of the criminal conduct or of its effects, the Commission preferred tradition as the criterion of the definition of the crimes."[92]

DRAFTING OF THE *ROME STATUTE*

In 1989, the push for the establishment of a permanent international criminal court was revived by Trinidad and Tobago, with

[88] 1996 *Draft Code*, *supra* note 49, art 20(g). See Rayfuse, *supra* note 49 at 73–75.

[89] Ortega, *supra* note 49 at 310–11; Rayfuse, *supra* note 49 at 75–77.

[90] Although there was some expansion of crimes recognized as coming within the definitions of crimes against humanity and war crimes.

[91] *Report of the International Law Commission on the Work of Its Forty-Eighth Session (6 May–26 July 1996)*, UN Doc A/51/10 (1996), reprinted in *Yearbook of the International Law Commission 1996*, vol 2, part 2 (New York: United Nations, 1998), UN Doc A/CN.4/SER.A/1996/Add.1 (1996) at 16–17, para 46.

[92] Ortega, *supra* note 50 at 286.

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the support of the member states of the Caribbean Community.[93] These small countries were particularly concerned with criminal accountability for the crime of drug trafficking.[94] Just under a decade later, the *Rome Statute* was adopted.[95] However, the subject matter jurisdiction of the *Rome Statute* does not include illicit trafficking in narcotics or any other so-called "treaty-crimes." As James Crawford has noted, "[i]t is a remarkable feature that the ICC's subject-matter jurisdiction began as a longish list of crimes defined by existing treaties in force, and ended as a detailed specification of a few crimes under international criminal law, without explicit reference to any existing treaties."[96]

In response to the call for the establishment of an international criminal court by Trinidad and Tobago, the UN General Assembly instructed the ILC to consider this question within the context of its work on the draft code.[97] The initial position of the ILC's working group was that the jurisdiction of the proposed court should be derived from existing international treaties defining "crimes of an international character."[98] Accordingly, the

[93] See Neil Boister, "Treaty Crimes, International Criminal Court?" (2009) 12 New Crim L Rev 341 at 343; Philippe Kirsch & John T Holmes, "The Birth of the International Criminal Court: The 1998 Rome Conference" (1998) 36 Can YB Int'l Law 3 at 5. On the position of Trinidad and Tobago, see further Delia Chatoor, "The Role of Small States in International Diplomacy: CARICOM's Experience in the Negotiations of the Rome Statute of the International Criminal Court" (2007) 7 Int'l Peacekeeping 295 at 295–301.

[94] UNGAOR 6th Comm, 44th Sess, UN Doc A/C.6/44/SR.38-41 (1989).

[95] *Rome Statute*, *supra* note 1.

[96] Crawford, *supra* note 35 at 152.

[97] *International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs across National Frontiers and Other Transnational Activities*, GA Res 44/39, UNGAOR, 44th Sess, Supp No 49, UN Doc A/RES/44/39 (1989), vol 1. This is not the first time that the ILC was mandated to consider the question of an international criminal jurisdiction. The ILC had previously considered this issue in its early years. See *Report to the General Assembly*, reprinted in *Yearbook of the International Law Commission 1949* (New York: United Nations, 1956) at 283; *Report of the International Law Commission to the General Assembly*, UN Doc A/1316 (1950), reprinted in *Yearbook of the International Law Commission 1950*, vol 2 (New York: United Nations, 1957) at 378–79.

[98] *Report of the Working Group on the Question of an International Criminal Jurisdiction*, reprinted in *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Fourth Session*, UN Doc A/47/10 (1992), reprinted in *Yearbook of the International Law Commission 1992*, vol 2, part 2 (New York: United Nations, 1994), UN Doc A/CN.4/SER.A/1992/Add.1 (1992) at paras 4(c), 57.

working group's preliminary consolidated draft text included a list of crimes defined by treaties in force, including genocide, war crimes (grave breaches of the *Geneva Conventions* and *Additional Protocol I*),[99] hijacking of aircraft, apartheid, crimes against internationally protected persons, hostage taking, and unlawful acts against the safety of maritime navigation and fixed platforms on the continental shelf.[100] The draft statute also contemplated that the court would have jurisdiction over crimes under "general international law," as well as "exceptionally serious crimes" defined in national law pursuant to the suppression treaties (such as drug trafficking), with the explicit consent of the relevant states.[101]

In 1994, the ILC adopted a draft statute for an international criminal court (ILC Draft Statute).[102] This Draft Statute envisioned a court that would operate on the basis of state consent for all crimes other than genocide (for which the court would have inherent jurisdiction).[103] The ILC noted that the ILC Draft Statute was "primarily an adjectival and procedural instrument" and that it was not its function to define new crimes or to codify crimes under general international law, thereby consciously electing not to use this opportunity to advance substantive international criminal law.[104]

[99] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 [*Additional Protocol I*].

[100] *Draft Statute for an International Criminal Tribunal: Report of the Working Group on a Draft Statute for an International Criminal Court*, UN Doc A/48/10 (1993), reprinted in *Yearbook of the International Law Commission 1993*, vol 2, part 2 (New York: United Nations, 1995), UN Doc A/CN.4/SER.A/1993/Add.1 (1993) at 106–7. This list was created with reference to two main criteria: the crimes were sufficiently defined in treaties and the treaties either established a system of universal jurisdiction over such crimes or granted an international criminal tribunal jurisdiction to try the crime (or both).

[101] *Ibid* at 109–10.

[102] See James Crawford, "The ILC Adopts a Statute for an International Criminal Court" (1995) 89 AJIL 404.

[103] *Draft Statute for an International Criminal Court and Commentary*, art 21, in *Report of the International Law Commission on the Work of Its Forty-Sixth Session*," UN Doc A/49/10 (1994), reprinted in *Yearbook of the International Law Commission 1994*, vol 2, part 2 (New York: United Nations, 1997), UN Doc A/CN.4/SER.A/1994/Add.1 (1994) at 43 [*ILC Draft Statute*].

[104] *Ibid* at 38. See also Crawford, *supra* note 102 at 411.

Article 20 of the ILC Draft Statute gave the court jurisdiction over the four main crimes under "general international law" — genocide, aggression, serious violations of the laws and customs applicable in armed conflict, and crimes against humanity.[105] This article also refers to an annex that lists fourteen treaty crimes, including specific terrorist acts such as hostage taking and hijacking, grave breaches of the *Geneva Conventions* and *Additional Protocol I*, apartheid, torture, crimes against internationally protected persons, certain maritime crimes, and drug trafficking (subject to the jurisdictional requirement that they constitute "exceptionally serious crimes of international concern").[106]

Following the work of the ILC, the UN General Assembly first established an ad hoc committee to consider the ILC Draft Statute, which met in 1995,[107] followed by a preparatory committee tasked with preparing "a widely acceptable consolidated text of a convention for an international criminal court."[108] The preparatory committee met over the course of 1996, 1997, and the early part of 1998.[109] At the end of this period, it transmitted a draft statute for a diplomatic conference of plenipotentiaries to be held in Rome (Rome conference). This draft statute envisioned a court with inherent jurisdiction over genocide, aggression, war crimes, and crimes against humanity as well as the possibility of consent-based jurisdiction over other crimes such as terrorism, drug-trafficking, and crimes against UN and associated personnel.[110]

Some states advocated for the inclusion of certain treaty crimes throughout the negotiations at the Rome conference, in part due to their seriousness, arguing that "the exclusion of these crimes from the Statute would constitute a serious lacuna in the

[105] ILC Draft Statute, *supra* note 103, art 20.

[106] *Ibid* at 67–68. See Crawford, *supra* note 102 at 412.

[107] *Establishment of an International Criminal Court*, GA Res 49/53, UNGAOR, 49th Sess, Supp No 49, UN Doc A/RES/49/53 (1994) at para 2.

[108] *Establishment of an International Criminal Court*, GA Res 50/46, UNGAOR, 50th Sess, Supp No 49, UN Doc A/RES/50/46 (1995) at para 2.

[109] For further discussion on the work of the preparatory committee, see M Cherif Bassiouni, "Observations Concerning the 1997–98 Preparatory Committee's Work" (1997) 25 Denv J Int'l L & Pol'y 397.

[110] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Addendum, *Draft Statute for an International Criminal Court*, UN Doc A/CONF.183/2/Add.1 (1998).

jurisdiction of the Court."[111] However, many states favoured limiting the jurisdiction *ratione materiae* of the court to the three or four core crimes (war crimes, crimes against humanity, genocide, and, possibly, aggression).[112] Reasons given for limiting the jurisdiction of the court included both normative and pragmatic arguments. For instance, some suggested that treaty crimes were inherently less grave than crimes under general international law.[113] On the more pragmatic side, it was suggested that the jurisdiction of the court should be limited in order to ensure the broadest acceptance of the court by states, to limit the financial burden on the international community, to avoid the more complex jurisdictional rules that would be required by the inclusion of treaty crimes, and to avoid overloading the court.[114] Ultimately, the pragmatic arguments promoting limited subject matter jurisdiction were persuasive to many states. As Neil Boister noted at the time, "it is argued that the ICC would be cheaper to start up and to run if it only had jurisdiction over core crimes, something which is almost certainly true. This is a stronger argument against inclusion of treaty crimes than most would concede."[115] Another consideration that favoured

[111] A Rohan Perera, "United Nations Diplomatic Conference to Adopt the Statute Establishing the International Criminal Court" (1998) 24 Commonwealth L Bull 1221 at 1232. See, eg, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UNGAOR, 50th Sess, Supp No 22, UN Doc A/50/22 (1995) at para 55.

[112] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, supra note 111 at para 55. See Neil Boister, "The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics" (1998) 3 J Confl & Sec L 27 at 28.

[113] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, *supra* note 111 at para 81. See also Boister, *supra* note 93 at 346.

[114] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, *supra* note 111 at paras 54, 81. See also Boister, *supra* note 93 at 352–53; Perera, *supra* note 111 at 1225, 1232. Some states suggested that drug trafficking and terrorism crimes were better dealt with by national jurisdictions due to the nature of the investigations required. See Mahnoush H Arsanjani, "The Rome Statute of the International Criminal Court" (1999) 93 AJIL 22 at 29; Boister, *supra* note 112 at 35. On the other hand, the proponents of more expansive jurisdiction argued that many countries had insufficient resources to adequately address crimes like drug trafficking and terrorism (a concern that had prompted Trinidad and Tobago to initiate discussion on the establishment of an international criminal court in the first place). See, eg, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, *supra* note 111 at para 82.

[115] Boister, *supra* note 112 at 37.

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limited jurisdiction *ratione materiae* was the desire for automatic jurisdiction for the court (as opposed to a purely consent-based or opt-in system).[116] This option was considered a necessary trade-off by many states. Finally, some commentators have suggested that powerful states also had political motivations for preferring restricted jurisdiction: they preferred existing arrangements for treaty crimes, and drug-trafficking and terrorism were considered "more likely to affect the direct political interests of Western states, and particularly the United States" than the core crimes.[117]

At the end of the Rome conference, in addition to the *Rome Statute*, the participants adopted six resolutions. One of these resolutions recommended that, when a review conference of the *Rome Statute* was convened, it should revisit the possible inclusion of the crimes of terrorism and drug-trafficking.[118] However, when the first Review Conference of the *Rome Statute* was convened in Kampala, Uganda, in June 2010 (Review Conference), the participants were primarily focused on reaching agreement on the definition of the crime of aggression.[119] While other substantive proposals were made leading up to the Review Conference, a cautious approach was advocated, pursuant to which only those proposals that had general support would be put forward, "to avoid overburdening the Conference."[120] The view was expressed that the ICC was still in its early years and should focus on effectively fulfilling its existing mandate rather than an extended mandate

[116] Kirsch & Holmes, *supra* note 47 at 5.

[117] Boister, *supra* note 112 at 38; John Dugard, "Obstacles in the Way of an International Criminal Court" (1997) 56:2 Cambridge LJ 329 at 334.

[118] *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc A/CONF.183/10 (1998), Resolution E [Final Act]. See Boister, *supra* note 93 at 344–45.

[119] Philippe Kirsch, "The International Criminal Court: From Rome to Kampala" (2009–10) 43 John Marshall L Rev at 528. See also Roger S Clark, "The Review Conference on the *Rome Statute of the International Criminal Court*, Kampala, Uganda, 31 May–11 June 2010" (2009) 16 Austl Int'l LJ 9. Some of the rules governing prohibited weapons in international armed conflicts were extended to apply in non-international armed conflicts as well. See *Review Conference of the Rome Statute of the International Criminal Court Official Records*, ICC Doc RC/11 at Resolution RC/Res.5.

[120] ICC Assembly of States Parties, Eighth Session, *Report of the Bureau of the Review Conference*, ICC Doc ASP/8/43 (2009) at paras 16–17, 26. See also Kirsch, *supra* note 119 at 529–30.

at that time.[121] Accordingly, discussion of the possible addition of the crimes of drug trafficking and terrorism was yet again deferred.

Following the Review Conference, a Working Group on Amendments began meeting to consider further substantive amendments to the *Rome Statute*. Proposed amendments included those on prohibited weapons submitted by Belgium,[122] the use of nuclear weapons as proposed by Mexico, the crime of terrorism as proposed by the Netherlands, and drug trafficking as proposed by Trinidad and Tobago and Belize.[123] However, the general sentiment remained that the ICC was already dealing with a number of challenges and was continuing to strive for universal support and, therefore, the time was still not ripe for expanding its subject matter jurisdiction.[124] In 2013, the Netherlands withdrew its proposal to add terrorism to the subject matter jurisdiction of the court.[125]

The establishment of a new permanent international criminal court was an opportunity for states to recognize other serious crimes of concern to the international community worthy of prosecution before this new court. Limiting the ICC's jurisdiction to acts occurring prospectively meant that it would not be faced with the same *nullum crimen sine lege* concerns that limited the subject matter jurisdiction of the ad hoc tribunals.[126] However, the drafters of

[121] ICC Assembly of States Parties, *supra* note 120 at para 29.

[122] The Belgian proposal would extend the list of war crimes to cover the use of chemical weapons, biological weapons, anti-personnel landmines, and weapons covered in the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, 10 October 1980, 1342 UNTS 137.

[123] ICC Assembly of States Parties, Tenth Session, *Report on the Working Group on Amendments*, ICC Doc ASP/10/32 (2011) at paras 8–24. See also Clark, *supra* note 119 at 20.

[124] *Ibid.* at paras 5–7.

[125] ICC Assembly of States Parties, Twelfth Session, *Report of the Working Group on Amendments*, ICC Doc ASP-12/44 (2013) at para 4.

[126] However, the ICC has adopted the position that states can accept its jurisdiction, pursuant to art 12(3) of the *Rome Statute*, *supra* note 1, with retroactive effect. see ICC, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, Pre-Trial Chamber III, Corrigendum to Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire (15 November 2011) at paras 10–15. This approach would have to be altered if the *Rome Statute* included crimes that were not recognized at customary international law at the time of their commission.

the *Rome Statute* concluded that it was not meant to create and define new crimes beyond those that already existed in international law.[127]

Undoubtedly, the adoption of a restrictive approach was significantly influenced by the political goal of trying to get as many states as possible to support the court and, ultimately, to ratify the *Rome Statute*. Furthermore, the brief time frames allocated to both the Rome Conference and the Review Conference prevented the inclusion of additional crimes.[128] Finally, the ICC, since coming into operation, has continued to face practical and political challenges, leaving the soundness of expanding the ICC's jurisdiction at this time in serious question. Ultimately, these factors combined to limit the ICC's substantive jurisdiction to the core crimes.

Where to Draw the Line?

Many commentators have suggested various doctrinal foundations for international criminal law.[129] Of course, the doctrinal foundations adopted will depend on one's definition of "international crimes." Antonio Cassese considered the characteristics of "international crimes proper" (which he defined as including war crimes, crimes against humanity, genocide, torture, aggression, and some forms of international terrorism), and he identified two key criteria: "What is notable is that this conduct is either (a) linked to an international or internal armed conflict or, absent such a conflict, (b) has a political or ideological dimension, or is somehow linked or otherwise connected to (instigated, influenced, tolerated, or acquiesced in) the behaviour of state authorities or organized non-state groups or entities."[130] Bassiouni concluded that there are five doctrinal bases for international criminalization:

1. the prohibited conduct affects a significant international interest, in particular, if it constitutes a threat to international peace and security;

[127] Kirsch & Holmes, *supra* note 47 at 7, n 19.

[128] Perera, *supra* note 111 at 1232.

[129] See William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006) at 152–55; Kai Ambos & Steffen Wirth, "The Current Law of Crimes against Humanity: An Analysis of UNTAET Regulation 15/2000" (2002) 13 Crim LF 1 at 13–15; Currie & Rikhof, *supra* note 4 at 19.

[130] Cassese, *supra* note 5 at 54.

2. the prohibited conduct constitutes an egregious conduct deemed offensive to the commonly shared values of the world community, including what has historically been referred to as conduct shocking the conscience of humanity;
3. the prohibited conduct has transnational implications in that it involves or affects more than one state in its planning, preparation or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries;
4. the conduct is harmful to an internationally protected person or interest;
5. the conduct violates an internationally protected interest but does not rise to the level required by (a) or (b), however, because of its nature, it can best be prevented and suppressed by international criminalization.[131]

Similarly, Terje Einarsen suggests that the concept of "universal crimes"[132] be adopted, which he suggests "shall apply to any conduct which manifestly violates a fundamental universal value or interest, is universally regarded as punishable due to its gravity, and is usually committed, organised, or tolerated by powerful actors, and which therefore may require prosecution before international courts."[133]

The first step in establishing a more reasoned and principled delineation between "the most serious crimes of concern to the

[131] However, Bassiouni includes in his analysis both international crimes *stricto sensu* as well as other crimes more properly characterized as transnational crimes. M Cherif Bassiouni, *Introduction to International Criminal Law*, 2d ed (Leiden: Martinus Nijhoff Publishers, 2013) at 142–43.

[132] Einarsen defines "universal crimes" as "certain identifiable acts that constitute grave breaches of rules of conduct usually committed, organised, or tolerated by powerful actors; and that, according to contemporary international law, are punishable whenever and wherever they are committed; and that require prosecution and punishment through fair trials, or in special cases, some other kind of justice, somewhere at some point." Einarsen, *supra* note 4 at 125, 296.

[133] Einarsen refers to this as his "theoretical definition of universal crimes." *Ibid* at 298. In addition to the core international crimes, Einarsen would include the following six categories of crimes, defined with a contextual gravity clause, within the concept of universal crimes: crimes against the United Nations and internationally protected persons, terrorist crimes, crimes of group destruction not encompassed by the *Genocide Convention*, grave piracy crimes, grave trafficking crimes, and excessive use and abuse of authorized power. *Ibid* at 305.

international community" and other international or transnational crimes is to identify the criteria that have been relied upon to justify the conclusion that the core international crimes come within the above definitions. This can be done by taking a predominantly inductive approach. This analysis does not suggest that the satisfaction of all such criteria is necessary for crimes to qualify as "the most serious crimes" nor that any one criterion is either necessary or sufficient. Some criteria may bear more weight than others, but, ultimately, they constitute a patchwork of related and overlapping doctrinal explanations as to why certain crimes have been found to fall into this category.

THREATS TO, OR BREACHES OF, INTERNATIONAL PEACE AND SECURITY

The proliferation of international instruments regulating armed conflict in the latter half of the nineteenth and early twentieth centuries indicates that armed conflict was seen to be a situation of an exceptional nature deserving the attention of the international community as a whole. As Cassese explains in relation to war crimes, "[t]he exceptional character of war (a pathological occurrence in international dealings, leading to utterly inhuman behaviour) warranted this deviation from traditional law."[134] Since this body of law originated predominantly to govern international armed conflicts, these situations clearly involved breaches of international peace and security. They also represented situations of total breakdown of normal, functional inter-state relations.

It is beyond doubt that situations that threaten or breach international peace and security are of concern to the international community as a whole. This principle is embedded in the *UN Charter* and informs the primary purpose of the United Nations.[135] The recent renaissance of international criminal law was triggered by the establishment of the ICTY and ICTR in the early 1990s by the UN Security Council, acting pursuant to its *UN Charter* Chapter VII authority to address "threats to the peace, breaches of the peace, and acts of aggression." The history of the ILC's attempts to create a draft code was also very much linked to peace and security

[134] Cassese, *supra* note 5 at 29.

[135] *UN Charter, supra* note 41, art 1(1).

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considerations, as evidenced by the UN General Assembly's mandate to establish "a draft code of offences *against the peace and security of mankind*."[136]

While situations of international armed conflict obviously fall into this category, situations of non-international armed conflict can also be found to constitute a threat to international peace and security. This can be seen in the UN Security Council's establishment of the ICTR.[137] Instability within one country can easily spill over and threaten neighbouring countries. With war crimes being the oldest of the currently recognized core crimes and with the continual attention paid by the international community to the crime of aggression, it is beyond doubt that a propensity to threaten or breach international peace and security constitutes one of the most significant doctrinal foundations for determining that a crime is one of "the most serious crimes of concern to the international community" that should be criminalized and prosecuted under international law.

STATE PARTICIPATION OR SYSTEMIC IMPUNITY

The constant rhetoric in international criminal legal circles concerning the need to end impunity for serious crimes indicates that there is a role for the international community in situations that may result in systemic impunity under national law. When individuals, for domestic systemic reasons, are unlikely to face prosecution in domestic courts for serious crimes, the argument is that an international system is needed to hold accountable those who would otherwise escape responsibility.

The involvement of state leaders in the perpetration of atrocities is often pointed to as a justification for international criminal law.[138]

[136] GA Res 177(II), *supra* note 48 [emphasis added].

[137] Security Council Resolution 955 (1994), UN Doc S/RES/955 (1994).

[138] See, eg, Schabas, *supra* note 129 at 155; Virginia Morris & Michael P Scharf, *The International Criminal Tribunal for Rwanda*, vol. 1 (Irvington-on-Hudson, NY: Transnational Publishers, 1998) at 169 (re: genocide); William A Schabas, "State Policy as an Element of International Crimes" (2007–08) 98 J Crim L & Criminology 953 at 982 (re: crimes against humanity). The ILC special rapporteur on the draft code, Doudou Thiam, referred to three different categories of international crime: (1) crimes that are inherently international because they "assail sacred values or principles of civilizations"; (2) crimes that have become international by conventions for the purpose of punishment; and (3) crimes that have moved from the realm of domestic law to international

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The rationale for this argument is two-fold. First, state leaders control vast resources (financial, personnel, and military), which puts them in a position to perpetrate atrocities beyond the scale of any other potential perpetrator.[139] State-led atrocity implies an inherent gravity as well as an abuse of a position of power. Second, it is unlikely that a government will hold trials of its own leaders.[140] Therefore, unless there is a change of regime followed by domestic prosecution of past government leaders, state-led atrocities often result in systemic impunity for the perpetrators.[141]

Consider the evolution of the definition of crimes against humanity. While a link to an international armed conflict was considered a necessary jurisdictional limitation on the IMT in prosecuting crimes against humanity, this link was dropped from the definition of crimes against humanity in the subsequent proceedings in Nuremberg pursuant to Control Council Law No. 10.[142] Additionally, whereas a link to "other offences" was maintained in the ILC's 1951 version of the draft code, this limitation was removed in its subsequent 1954 version.[143] By removing the requirement of a

law because "*a State becomes the author of or an accomplice in the offence.*" Doudou Thiam, special rapporteur, *First Report on the Draft Code of Offences against the Peace and Security of Mankind*, UN Doc A/CN.4/364 (1983), reprinted in *Yearbook of the International Law Commission 1983,* vol 2, part 1 (New York: United Nations, 1985), UN Doc A/CN.4/SER.A/1983/Add.1 (1983) at para 34.

[139] See, eg, ICC, *Situation in the Republic of Kenya* (ICC-01/09-19-Corr), Pre-Trial Chamber II, 31 March 2010, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, at para 60.

[140] *Ibid.* at para 64; Claus Kress, "On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision" (2010) 23 Leiden J Int'l L 855 at 866.

[141] See Timothy McCormack, "Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their 'Own Nationals' for International Crimes" in Mark Lattimer & Philippe Sands, eds, *Justice for Crimes against Humanity* (Oxford: Hart Publishing, 2003) 107 at 108–9; Dapo Akande & Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2010) 21 Eur J Int'l L 815 at 816.

[142] Control Council Law No 10, *supra* note 26, art II(1)(c).

[143] See *Debates of the ILC during Its 267th–270th meetings*, 13–17 July 1954, in *Yearbook of the International Law Commission 1954,* vol 1, *Summary Records of the Sixth Session*, 3 June–28 July 1954 at 131–48. The Commission initially voted to remove the words "when such acts are committed in execution of or in connexion with other offences defined in this article" but then realized that the resulting

connection to international armed conflict in the 1954 draft code, the ILC turned to another "internationalizing factor" for inhuman acts, namely that such acts were perpetrated "by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities."[144]

Contemporary developments in international criminal law have moved away from this state-centric focus[145] (with the exception of the crime of aggression, which is defined in the *Rome Statute* as the perpetration of an act of aggression "by a person in a position effectively to exercise control over or to direct the political or military action of a State").[146] Non-state actors have been prosecuted and convicted of international crimes at the contemporary international criminal courts and tribunals (including the ICC, ICTY, ICTR, and Special Court for Sierra Leone (SCSL)). This shift can also be seen in the ILC's 1991 version of the draft code, which contained a provision on "systematic or mass violations of human rights." This provision removed the requirement that the

provision was unsatisfactory because it did not adequately distinguish between ordinary crimes and those which violated international law. After considering the issue, the Commission adopted a proposal in which inhuman acts constituted crimes against the peace and security of mankind only when perpetrated "by the authorities of a State or by private individuals acting under the instigation or toleration of the authorities against a civilian population." Despite the reference to the perpetration of crimes against humanity in an armed conflict in Article 5 of the ICTY Statute, the ICTY, in its first case, determined that this was only a jurisdictional requirement and not a substantive element of crimes against humanity under customary international law. ICTY, *Prosecutor v Duško Tadić* (IT-94-1-AR72), Appeals Chamber, 2 October 1995, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, at para 141 [*Tadić* Interlocutory Appeal on Jurisdiction]; ICTY, *Prosecutor v Duško Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999 at para 249.

[144] *Documents of the Sixth Session including the Report of the Commission to the General Assembly*, reprinted in *Yearbook of the International Law Commission 1954*, vol 2 (New York: United Nations, 1960, UN Doc A/CN.4/SER.A/1954/Add.1 (1954) at 150.

[145] See, eg, *Rome Statute*, *supra* note 1, art 7: "[A] course of conduct … pursuant to or in furtherance of a State *or organizational* policy to commit such attack" [emphasis added]. See also rejection of the "public official" requirement for torture as a war crime or crime against humanity. ICTY, *Prosecutor v Kunarac* (IT-96-23-T&IT-96-23/1-T), Trial Chamber, 22 February 2001, at paras 465–97, aff'd ICTY, *Prosecutor v Kunarac* (IT-96-23&IT-96-23/1-A), Appeals Chamber, 12 June 2002 at paras 142–48.

[146] *Rome Statute*, *supra* note 1, art 8*bis*(1).

proscribed acts be perpetrated by or with the instigation or toleration of state authorities. Instead, it referred to the perpetration of specific violations of human rights "in a systematic manner or on a mass scale."[147] In its commentary, the ILC explained that "[i]t is important to point out that the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone."[148] While recognizing the factual opportunities for state authorities to perpetrate mass atrocities, it noted that "the article does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article."[149]

Emphasis on the involvement of state actors in the perpetration of international crimes tends to presume that perpetration by non-state actors does not raise the same concerns of impunity because governments will be willing to prosecute the latter domestically.[150] However, there are many reasons for which perpetration of certain acts by non-state actors might also raise concerns of impunity.[151] These include the possibilities that governments may not control the entire territory of a state, that the devastating effects of armed conflict may have reduced the capacity of a state to conduct trials,[152] or that domestic prosecutions of certain crimes may be undesirable. The latter factor may be particularly significant in circumstances of inter-ethnic violence, as prosecutions might raise questions about judicial impartiality or concerns about re-igniting

[147] *Report of the Commission to the General Assembly on the Work of Its Forty-Third Session*, UN Doc A/46/10 (1991), reprinted in *Yearbook of the International Law Commission 1991,* vol 2, part 2 (New York: United Nations, 1994), UN Doc A/CN.4/SER.A/1991/Add.1 (1991) at 96–97.

[148] *Ibid* at 103.

[149] *Ibid* at 103–4.

[150] Schabas, *supra* note 138 at 974, 982.

[151] See, eg, Antonio Cassese, "The Role of Internationalized Courts and Tribunals in the Fight against International Criminality" in Cesare PR Romano et al, eds, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford: Oxford University Press, 2004) 3 at 5, 10.

[152] Eg, this reason was cited by the president of Sierra Leone in his letter to the president of the Security Council requesting the help of the UN in establishing a court. UN Doc S/2000/786 (2000). See also Sylvia De Bertodano, "East Timor: Trials and Tribulations" in Romano et al, *supra* note 151, 79 at 89.

tension or conflict.[153] In short, the perpetration of international crimes by non-state actors may also give rise to situations of systemic impunity. Accordingly, there may be a role for the international community in ensuring that those who perpetrate serious crimes are held accountable, whether they are government actors or not.

CRIMES THAT "SHOCK THE CONSCIENCE OF HUMANITY"

Discussions about the need to end impunity regardless of the status of the perpetrator tend to focus on the "extreme gravity of certain crimes"[154] or the fact that the criminal conduct in question may "shock the conscience of humanity."[155] This shifts the focus from the status of the perpetrator to that of the norm violated. Focusing solely on the norm violated has been criticized as an insufficient criterion in and of itself because there are many crimes, such as murder, which are universally condemned but do not, as such, rise to the status of international crimes.[156] Furthermore, as Robert Cryer rightly points out, "what is 'shocking to the conscience of mankind' is by no means a given."[157] Generally, it is the scale, gravity, and systematic perpetration of crimes, as well as those perpetrated with specific discriminatory intent, which have been found to "shock the conscience of humanity."[158] This can be

[153] This was one of the reasons for the involvement of UNMIK and international judges in criminal trials in post-conflict Kosovo. See John Cerone & Clive Baldwin, "Explaining and Evaluating the UNMIK Court System" in Romano et al, *supra* note 151, 41 at 51–52.

[154] Ambos & Wirth, *supra* note 129 at 13. See, eg, *Analytical Paper*, *supra* note 61 at para 65.

[155] See *Rome Statute*, *supra* note 1, preamble. Sir Ian Sinclair, a member of the ILC, noted that "the notion of offences against the peace and security of mankind should be taken to denote crimes of such magnitude and intensity that they shocked the conscience of all mankind." 1757th Meeting of the ILC, 9 May 1983, in *Yearbook of the International Law Commission 1983, Volume I, Summary records of the meetings of the thirty-fifth session* (New York: United Nations, 1984), UN Doc A/CN.4/SER.A/1983 (1983) at 14, para 27. See also Currie & Rikhof, *supra* note 4 at 17.

[156] Schabas, *supra* note 129 at 155.

[157] Cryer, *supra* note 4 at 126.

[158] Eg, the ILC agreed that there was a criterion of seriousness which characterized crimes against the peace and security of mankind and explained that "[s]eriousness can be deduced either from the nature of the act in question (cruelty, monstrousness, barbarity, etc.), or from the extent of its effects (massiveness, the victims being peoples, populations or ethnic groups), or

seen in the contemporary definition of crimes against humanity and genocide. Crimes against humanity include certain proscribed acts when perpetrated "as part of a widespread or systematic attack directed against any civilian population," and the definition of genocide focuses on the specific genocidal intent of the perpetrator in relation to a national, ethnical, racial, or religious group.[159]

INTERNATIONAL OR CROSS-BORDER CONDUCT

Another justification for the involvement of the international community in regulating and criminalizing certain conduct is the international or cross-border nature of the conduct. War crimes were recognized in international armed conflicts long before similar conduct was accepted as falling under the category of war crimes when committed in a non-international armed conflict. This reflects the traditional position that states were entitled "to deal with their own citizens more or less as they pleased."[160] This position began to shift with the prosecution of crimes against humanity at Nuremberg, the dawn of the international human rights era, and the extension of rules of international humanitarian law to non-international armed conflicts.[161] However, it was not until 1995, with the ICTY's first case, that it was confirmed that there was individual criminal responsibility under international law for war crimes committed in non-international armed conflicts.[162] Despite these important advancements, states have traditionally been more willing to bring international or cross-border conduct under the purview of international regulation as opposed to conduct that occurs wholly within the territory of one state.

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from the motive of the perpetrator (for example, genocide), or from several of these elements." *Report of the International Law Commission on the Work of Its Thirty-Ninth Session (4 May – 17 July 1987)*, UN Doc A/42/10 (1987), reprinted in *Yearbook of the International Law Commission 1987*, vol 2, part 2 (New York: United Nations, 1989), UN Doc A/CN.4/SER.A/1987/Add.1 (1987) at 13.

[159] *Rome Statute*, *supra* note 1, arts 6, 7(1).

[160] *Cryer et al*, *supra* note 5 at 275.

[161] *Ibid* at 275–76; Henry T King Jr, "The Legacy of Nuremberg" (2002) 34 Case W Res J Int'l L 335 at 338–39. See art 3 common to the *Geneva Conventions*, *supra* note 32; and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 [*Additional Protocol II*].

[162] *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 143 at paras 128–37.

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In addition to the sovereignty-based argument (that states should not interfere in the internal matters of other states), states may also consider international or cross-border conduct as more serious and more worthy of international attention due to the practical challenges faced by states attempting to prosecute such crimes domestically.[163]

PROTECTED PERSONS AND VULNERABLE PERSONS

It is also informative to look at the evolution of the treatment of core crimes by the contemporary international criminal tribunals and courts. The recognition of "new crimes" within the established categories of crimes against humanity and war crimes reveals some of the values and interests that the international community deems worthy of protection. For example, the crime of attacking peacekeepers was newly included as a war crime in the *Rome Statute* (whereas previously it had been criminalized through a suppression convention regime).[164] It was subsequently included in the *Statute of the Special Court for Sierra Leone*, which entered the first convictions for this crime in 2009.[165] The commentary to the *Rome Statute* observes that "delegations felt a need to explicitly condemn and criminalize attacks against humanitarian assistance and peacekeeping missions and thereby visibly signal the exceptional seriousness of such most serious crimes of international concern."[166] This crime recognizes that there are certain categories of persons who are worthy of special international protection based on the role they play in the international community.

[163] As Ambos & Wirth state, "a crime can obtain an international character since it cannot be prosecuted effectively on a national level and there is a common interest of states to prosecute. This practical reason applies to piracy, probably the most ancient international crime, or damaging submarine telegraph cables." Ambos & Wirth, *supra* note 129 at 13.

[164] *Rome Statute*, *supra* note 1, arts 8(2)(b)(iii), 8(2)(e)(iii).

[165] *Statute of the Special Court for Sierra Leone,* Annex to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002, 2178 UNTS 138 [*SCSL Statute*]; SCSL, *Prosecutor v Sesay, Kallon & Gbao* (SCSL-04-15-T), Trial Chamber I, 2 March 2009.

[166] Michael Cootier, "Article 8" in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed (Munchen: Beck, 2008) 275 at 330.

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Other examples of "new" crimes include the war crime of enlisting, conscripting, and using child soldiers[167] and the expanded list of sexual violence crimes that can be found to constitute either war crimes or crimes against humanity.[168] These crimes are based on the recognition that there are certain categories of vulnerable persons who have been deemed worthy of special protection by the international community, in particular women and children.[169] For example, the preamble to the UN *Declaration on the Rights of the Child* recognizes that "the child, by reason of his physical and mental immaturity, needs special safeguards and care."[170] Similarly, the commentary to Article 4(3) of 1977 *Additional Protocol II* to the *Geneva Conventions*, which was the first international instrument to explicitly prohibit the recruitment of children into armed forces, observes that "[c]hildren are particularly vulnerable; they require privileged treatment in comparison with the rest of the civilian population."[171] In a similar vein, in the *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, the secretary-general noted that "[t]he breakdown of the social fabric and disintegration of families during times of armed conflict often leave women and girls especially vulnerable to gender-based violence and sexual exploitation, including rape and forced prostitution."[172]

[167] A prohibition on enlisting child soldiers was first included in *Additional Protocol II*, *supra* note 161, art 4(3)(c). It was first defined as a war crime in the *Rome Statute*, *supra* note 1. See *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc S/2000/915 (2000) at para 17.

[168] Compare *ICTY Statute*, *supra* note 3, art 5(g) with *Rome Statute*, *supra* note 1, art 7(g).

[169] Men can also be victims of sexual violence but it is predominantly women and girls who are victimized by this kind of conduct. For example, the Security Council has noted with concern "that sexual violence in armed conflict and post-conflict situations disproportionately affects women and girls, as well as groups that are particularly vulnerable or may be specifically targeted, while also affecting men and boys." UN Doc S/RES/2016 (2013).

[170] *Declaration on the Rights of the Child*, GA Res 1386(XIV), UNGAOR, 14th Sess, Supp No 16, UN Doc A/4354 (1959). This is reiterated in the preamble to the almost universally ratified *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (195 states parties as of 24 June 2015).

[171] *Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (1987), online: ICRC <www.icrc.org>. See also *Report of the Special Representative of the Secretary-General for Children in Armed Conflict*, 12 October 1998, UN Doc A/53/482 (1998).

[172] UN Doc S/1999/957 (1999) at paras 18, 53.

BALANCING STATE SOVEREIGNTY

Establishing a system of international criminal law based on the values and principles of the international community requires consideration not only of those principles that favour international criminalization but also those that may weigh against increasing the scope of international crimes. In particular, consideration must be given to the principle of sovereignty as entrenched in the *UN Charter*.[173] A common criticism of the continued expansion of international crimes is the corresponding infringement on state sovereignty.[174] The need to protect state sovereignty must be balanced with other factors that may be relied upon to justify the criminalization of certain conduct by the international community. However, the international criminal system has evolved with a view to safeguarding the sovereignty of states. For example, whereas the ICTY and ICTR were granted primacy in respect of domestic jurisdictions,[175] the ICC operates on the principle of complementarity, whereby the primary obligation to prosecute lies with states. The ICC only has jurisdiction to prosecute in cases where states are unable or unwilling genuinely to prosecute perpetrators.[176]

Furthermore, the discussion should not only focus on the doctrine of state sovereignty in the abstract. Consideration should also be given to its application in particular circumstances. For example, if countries suffering from certain types of criminality seek the international community's help by, for example, including drug crimes within the *Rome Statute*'s subject matter jurisdiction, this should bear some weight in the debate on the approach to be taken.[177]

[173] *UN Charter*, *supra* note 41, art 2(1).

[174] ICC, *Situation in Kenya* (ICC-01/09-19-Corr), Pre-Trial Chamber I, 31 March 2010, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Dissenting Opinion of Judge Hans-Peter Kaul) at para 10.

[175] *ICTY Statute*, *supra* note 3, art 9(2); *ICTR Statute*, *supra* note 3, art 8(2).

[176] *Rome Statute*, *supra* note 1, art 17.

[177] E.g. Caribbean states greatly affected by illicit trafficking in narcotics to the fact that "[t]hey were midway between the centres of production and the centres of consumption of narcotic drugs." Dame Nita Barrow, Representative of Barbados, UNGAOR, 44th Sess, 6th Comm, UN Doc A/C.6/44/SR.39 (1989) at para 30. However, admittedly, some other states that suffer from drug-related crime opposed the proposition, such as Myanmar. *Ibid* at paras 5–55.

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Other Crimes of Concern to the International Community

As noted earlier, there are multiple potential justifications for criminalizing conduct at the international level, including that the acts in question shock the conscience of humanity (due primarily to their scale, gravity, systematic perpetration, or specific discriminatory intent), that they have international or cross-border impacts, that they violate certain core values or target vulnerable groups deemed worthy of protection by the international community, that they may result in systemic impunity, or that they threaten international peace and security. Some of these criteria may bear more weight than others, but all should be taken into consideration in deciding what should be criminalized as a matter of international law. Preliminary research indicates that other crimes of concern to the international community satisfy some of these criteria, calling into question the coherence of the line currently drawn between the core crimes and such other crimes of concern to the international community.

a preliminary issue: understanding transnational crime in its broader context

While the core crimes focus on prohibited conduct in the broader context of widespread violence, the same approach is not taken with respect to transnational crimes in the suppression treaties. For example, it is not the crime of murder alone that qualifies as a core crime but, rather, murder committed in the context of a widespread or systematic attack against a civilian population (crime against humanity),[178] unlawful killing perpetrated in the context of an armed conflict (war crime),[179] or murder committed with the specific intent to destroy, in whole or in part, a protected group "in the context of a manifest pattern of similar conduct directed against that group or ... that could itself effect such destruction" (genocide).[180] By contrast, the suppression treaties rely on domestic jurisdictions to criminalize conduct. Therefore, the offences proscribed in the latter more closely resemble other domestic crimes. For example, they include individual acts of unlawful

[178] *Rome Statute*, *supra* note 1, art 7.

[179] Including both international and non-international armed conflicts. *Ibid*, art 8.

[180] *Ibid*, art 6. See also ICC, *Elements of Crimes*, ICC Doc ICC-ASP/1/3 (Part II-B), art 6(a)-(e).

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possession, offering, sale, or transport of narcotic drugs.[181] This different approach to criminalization may lead to comparisons between transnational crimes and core crimes that underestimate the aggregate harm caused by transnational crime.[182]

Many of these transnational crimes are not perpetrated by individuals acting alone but, rather, in the context of large-scale, systemic criminality.[183] Systemic and large-scale criminality can result in associated large-scale violence. Furthermore, the systemic and organized nature of certain types of criminality also suggests that the international community might best be served by pursuing the leaders and those at the top of criminal hierarchies (in the same way that the Office of the Prosecutor (OTP) of the ICC has stated that ICC prosecutions should focus on "those who bear the greatest responsibility" for the core crimes, such as leaders of government or of non-state armed groups).[184] Large-scale systemic criminality associated with transnational organized crime can result in high levels of violence, corruption, and, ultimately, threats to the stability of states. In order to appreciate the impact of transnational crime, it cannot solely be viewed as individual conduct akin to ordinary domestic crime.

THREATS TO, OR BREACHES OF, INTERNATIONAL PEACE AND SECURITY

Transnational crime is not only committed for personal gain or other private purposes. Organized criminal activity such as drug

[181] *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95, art 3(1)(a)(i), (2).

[182] Eg, Neil Boister notes that, in comparison with the core international crimes, "[d]rug supply offences, on the other hand, do not involve harms of this severity within this context (conviction may be based on something as tenuous as a presumption of trafficking based on volume of drug carried) and thus there is no agreement among states to subject them to individual penal responsibility under international law." Boister, *supra* note 4 at 58.

[183] See UNODC, *World Drug Report 2012* (New York: United Nations Publications, 2012) at 84.

[184] Office of the Prosecutor (OTP), *Report on Prosecutorial Strategy*, 14 September 2006, online: ICC <icc-cpi.int> at 5. The Statute of the SCSL explicitly mandated the SCSL to "prosecute *persons who bear the greatest responsibility* for serious violations of international humanitarian law and Sierra Leonean law." *SCSL Statute*, *supra* note 165, art 1(1) [emphasis added]. See also Meron, *supra* note 13 at 563: "It makes sense for international tribunals to focus on top officials who helped to orchestrate atrocities … [T]rials of those who orchestrate atrocities help to disseminate international condemnation of the crimes and yield vindication for substantial numbers of victims."

trafficking can be used to fund insurgent groups and participants in armed conflict.[185] As one UN document reveals, "Taliban insurgents earn at least US $125 million annually from the opium economy through taxation of cultivation, production and trafficking."[186] Similarly, the Autodefensas Unidad de Colombia (AUC), an umbrella organization of Colombian paramilitary groups, made an estimated 70 percent of its total income from the cocaine business in the late 1990s.[187] Other examples include the Fuerzas Armadas Revolucionarias de Colombia (FARC) and the Ejército de Liberación Nacional (ELN) in Colombia and the Sendero Luminoso (Shining Path) in Peru.[188] Recognition of this link between drug trafficking and illegal armed activity in both Peru (with respect to the Shining Path) and in Colombia (with respect to FARC) prompted the governments of those states to increase efforts to fight drug trafficking.[189] As the *World Drug Report 2012* states, "[e]fforts to reduce illicit drug production and trafficking helped to reduce the income of the illegal armed groups and thus their capacity to fight."[190]

Colombia has been the subject of preliminary investigation by the OTP of the ICC since 2004. The OTP has concluded that there is a reasonable basis to believe that crimes against humanity and war crimes have been perpetrated by both state and non-state actors, including the FARC, the ELN, and other paramilitary groups.[191] Afghanistan has also been the subject of preliminary investigations by the OTP of the ICC.[192] This demonstrates the often intertwined nature of transnational and core crimes.

[185] *Geneva Declaration: Global Burden of Armed Violence* (Cambridge: Cambridge University Press, 2011) at 4 [*Geneva Declaration*].

[186] UNODC, *supra* note 9 at 248.

[187] *Ibid.* at 229.

[188] *Ibid.*

[189] UNODC, *supra* note 183 at 85.

[190] *Ibid.*

[191] However, no cases have yet been formally brought before the ICC due to ongoing examination by the OTP of the effectiveness and genuineness of national investigations. Office of the Prosecutor, *Situation in Colombia – Interim Report*, November 2012, online: ICC <icc-cpi.inti>.

[192] The OTP has concluded that there is a reasonable basis to believe that crimes within the jurisdiction of the ICC have been perpetrated in Afghanistan. OTP, *Report on Preliminary Examination Activities 2013*, November 2013, online: ICC <icc-cpi.int> at para 35.

Illicit trafficking in natural resources[193] has also been a source of funding for armed groups, particularly in Africa, such as the diamond mines in Sierra Leone[194] and the current illicit mineral smuggling in the Democratic Republic of the Congo (DRC).[195] One group that has been cited as benefiting the most from illicit traffic in minerals in the DRC are the Forces Démocratiques de Libération du Rwanda (FDLR),[196] a group whose top military commander stands charged with nine counts of war crimes in an outstanding arrest warrant issued by the ICC.[197] The United Nations Office on Drugs and Crime (UNODC) has stated with respect to the DRC: "Until the mineral trafficking is addressed, the prospects for peace will be seriously undermined."[198]

Links between drug trafficking and organized crime as sources of funding for terrorist activities have also raised concern.[199] It is not disputed that international terrorism constitutes a threat to international peace and security. The UN Security Council has affirmed this on multiple occasions.[200] Other crimes of concern to the international community that are linked to terrorist organizations may similarly pose a threat to international peace and security.

[193] Illicit trafficking in natural resources is not an explicitly recognized "transnational crime" but it may fall under the *United Nations Convention against Transnational Organized Crime*, *supra* note 40, arts 2–3, if it is characterized as a "serious crime," is transnational and involves an organized criminal group.

[194] UNODC, *supra* note 9 at 14–15.

[195] "The United Nations has established a clear link between illicit mineral extraction and trafficking and armed conflict in the eastern DRC." *Ibid* at 261–65.

[196] *Ibid.* at 265.

[197] ICC, *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Sylvestre Mudacumura* (ICC-01/04-01/12-1-Red), Pre-Trial Chamber II, 13 July 2012, Decision on the Prosecutor's Application under Article 58.

[198] UNODC, *supra* note 9 at 262.

[199] UNODC, *World Drug Report 2011* (New York: United Nations Publication, 2011), online: United Nations Office on Drugs and Crime <www.unodc.org/documents/data-and-analysis/WDR2011/World_Drug_Report_2011_ebook.pdf> at 8; Statement by the President of the Security Council, 24 February 2010, UN Doc S/PRST/2010/4 (2010).

[200] Eg, the UN Security Council has affirmed that "terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security." SC Res 2083 (2012), UN Doc S/RES/2083 (2012). See also SC Res 748 (1992), UN Doc S/RES/748 (1992); SC Res 1373 (2001), UN Doc S/RES/1373 (2001); SC Res 1566 (2004), UN Doc S/RES/1566 (2004); SC Res 1636 (2005), UN Doc S/RES/1636 (2005).

It has recently been reported that there are concerns about links between piracy in the Gulf of Guinea and funding of insurgent groups and terrorist organizations in the region.[201] In the aftermath of 11 September 2001, the UN Security Council noted with concern "the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials."[202]

While international terrorism was not ultimately included in the *Rome Statute*'s subject matter jurisdiction, this was due primarily to difficulties in agreeing on a definition rather than to doubts as to the severity of the crime. Indeed, in the Final Act of the Rome Conference, the participants noted that terrorist acts "are serious crimes of concern to the international community."[203] Recently, the UN Security Council has reiterated its concern that "terrorists benefit from transnational organized crime in some regions, including from the trafficking of arms, persons, drugs, and artefacts and from the illicit trade in natural resources including gold and other precious metals and stones, minerals, wildlife, charcoal and oil, as well as from kidnapping for ransom and other crimes including extortion and bank robbery."[204]

The ability to profit from transnational organized crime is linked to the continuation of instability and insecurity. This can clearly be seen in the case of Afghanistan, which grows opium poppies used to produce 90 percent of the world's heroin.[205] As the UNODC explains, "[t]here is a symbiotic relationship between drug traffickers and the insurgency in Afghanistan, and both groups have an interest in prolonging the instability."[206] Furthermore, instability and insecurity often spills over to neighbouring countries.

Transnational crimes often have substantial destabilizing effects on countries and regions around the globe and can pose a threat

[201] Lolita C Baldor, "US Eyes Anti-Piracy Effort along West Africa Coast," *Associated Press*, 26 March 2013, online: <http://www.stripes.com/news/africa/us-eyes-anti-piracy-effort-along-west-africa-coast-1.213563>.

[202] SC Res 1373, *supra* note 200 at para 4.

[203] Final Act, *supra* note 118. The Final Act also referred to drug trafficking as "a very serious crime" (*ibid*).

[204] SC Res 2195 (2014), UN Doc S/RES/2195 (2014), preamble.

[205] UNODC, *supra* note 9 at 109.

[206] *Ibid* at 248.

to international peace and security.[207] This has been recognized by the UN Security Council which "notes with concern the serious threats posed in some cases by drug trafficking and transnational organized crime to international security in different regions of the world."[208] In 2004, the High-Level Panel on Threats, Challenges and Change established by UN Secretary-General Kofi Annan concluded that transnational organized crime was one of the six major threats to international security with which the world is now faced.[209] As the UNODC explains, "[c]ombating organized crime serves the double purpose of reducing this direct threat to State and human security, and also constitutes a necessary step in the effort to prevent and resolve internal conflicts, combat the spread of weapons and prevent terrorism."[210]

In West Africa, the trafficking of cocaine, among other forms of organized crime, has threatened stability in the region.[211] This is not surprising when the value of a ton of cocaine in Europe exceeds the military budgets of some West African countries.[212] The UNODC has observed that these illicit flows are not merely a consequence of weak governance in certain countries in the region but also a cause.[213] It has also expressed concern that drug trafficking in the region could be used to fund non-state armed groups and terrorist organizations in the region such as Al Qaeda in the Islamic Maghreb (AQIM).[214] Examples of situations in which drug trafficking has been linked to ongoing conflict include Afghanistan, Colombia, and Myanmar.[215] The UN Security Council has also recognized on multiple occasions that the crimes of terrorism and

[207] "Illicit trafficking of drugs is increasingly recognized as a threat to international, regional, and national security, as well as public safety." *Geneva Declaration*, *supra* note 185 at 4.

[208] Statement by the President of the Security Council, 24 February 2010, UN Doc S/PRST/2010/4 (2010).

[209] *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-level Panel on Threats, Challenges and Change*, UN Doc A/59/565 (2004) at 2.

[210] *Ibid* at 52–53.

[211] UNODC, "Transnational Organized Crime in West Africa: A Threat Assessment" (Vienna: United Nations Office on Drugs and Crime, February 2013) at 3.

[212] *Ibid* at 18.

[213] *Ibid* at 3.

[214] *Ibid* at 4.

[215] *Geneva Declaration*, *supra* note 185 at 33.

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piracy constitute threats to international peace and security.[216] On this issue, the president of the UN Security Council has also expressed concern about other crimes including kidnapping, hostage taking, and cybercrime.[217]

STATE PARTICIPATION AND SYSTEMIC IMPUNITY

Transnational crime is often characterized as being perpetrated by private actors without state involvement.[218] An implication of this characterization is the suggestion that there is no need for prosecution of transnational crime at the international level because states will be willing and able to prosecute such crimes domestically. However, systemic impunity can arise in situations of large scale and systemic organized crime as a result of the power and influence of certain criminal groups, corruption, and violence. As Neil Boister recognizes, "[t]ransnational crime can in extreme cases undermine the internal sovereignty of states."[219]

In supporting the call of the Caribbean Community for the establishment of an international criminal court in 1989, the representative of Saint Lucia noted that "some domestic courts of middle-sized countries had been subjected to large-scale intimidation by powerful drug cartels."[220] Perhaps the most extreme example of this phenomenon is the so-called "narco-state."[221] The UNODC has noted that "[c]ocaine-related corruption has clearly undermined governance in places like Guinea-Bissau."[222] Allegations that drug-related corruption has permeated senior levels of the military and government are compounded by high levels of violence and intimidation.[223] These factors, combined with an under-resourced police force and an absence of functioning prisons, demonstrate the inability of a country such as Guinea-Bissau

[216] SC Res 1851 (2008), UN Doc S/RES/1851 (2008).

[217] Statement by the President of the Security Council, *supra* note 208.

[218] See, eg, Boister, *supra* note 4 at 4.

[219] *Ibid* at 7.

[220] UNGAOR, 6th Comm, 10 November 1989, UN Doc A/C.6/44/SR.38 (1989) at para 37.

[221] See, eg, Ed Vulliamy, "How a Tiny West African Country Became the World's First Narco State," *The Observer (The Guardian)* (9 March 2008), online: <www.theguardian.com/world/2008/mar/09/drigstrade/print>.

[222] UNODC, *supra* note 211 at 4.

[223] *Ibid* at 5, 16.

to prosecute these crimes domestically.[224] The UN Security Council has noted "the threats to national and subregional security and stability posed by the growth in illicit drug trafficking and organized crime in Guinea-Bissau."[225]

CRIMES THAT "SHOCK THE CONSCIENCE OF HUMANITY" OR IMPACT VULNERABLE PERSONS

Some transnational crimes, such as human trafficking, directly impact the same rights and values protected by core crimes. According to the UNODC, trafficking in persons is "a crime that is more accurately described as enslavement."[226] In fact, human trafficking is explicitly referred to in the definition of the crime against humanity of enslavement in the *Rome Statute*.[227] However, the ICC can only exercise jurisdiction over human trafficking as enslavement when it fits under the *chapeau* requirements of crimes against humanity, namely when it is "committed as part of a widespread or systematic attack directed against any civilian population."[228] The question remains whether human trafficking deserves recognition as one of the "most serious crimes of concern to the international

[224] Raggie Johansen, "Guinea Bissau: A New Hub for Cocaine Trafficking," *Perspectives* (UNODC), Issue 5, (May 2008) at 4–7.

[225] SC Res 2030 (2011), UN Doc S/RES/2030 (2011). See also SC Res 2103 (2013), UN Doc S/RES/2103 (2013).

[226] UNODC, "Global Report on Trafficking in Persons" (2009) at 6, online: UNODC <www.unodc.org/documents/human-trafficking/Global_Report_on_TIP.pdf>.

[227] *Rome Statute*, *supra* note 1, art 7(2)(c) specifies that "'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." See Darryl Robinson, "Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93 AJIL 43 at 53, n 60; Christopher K Hall, "Crimes against humanity - para. 1(c)" in Triffterer, *supra* note 166, 191 at 191–94; Christopher K Hall, "Crimes against humanity - para. 2(c)" in Triffterer, *supra* note 166, 244 at 246–47. See also Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010) at 214–17; Tom Obokata, "Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System" (2005) 54 ICLQ 445 at 445–46, 448–50. It has been suggested that acts of human trafficking can also fall under other crimes against humanity, including forcible transfer or other inhumane acts. *Ibid* at 450–51.

[228] *Rome Statute*, *supra* note 1, art 7(1). For further discussion of the *chapeau* elements of crimes against humanity, see Robinson, *supra* note 227.

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community" in its own right and not only when perpetrated in the context of crimes against humanity.[229]

Not only does human trafficking violate the same norms that underlie crimes against humanity, it also impacts vulnerable groups in need of protection as identified by the international community. For example, an estimated 79 percent of victims of human trafficking are women and girls, and an estimated 22 percent are children (male or female).[230] The gravity and scale of the crime is also substantial. The International Labour Organization estimates that 2.45 million people are in forced labour as a result of human trafficking.[231]

Other transnational crimes that are superficially non-violent are often linked to high levels of violent crime when understood in the broader context of their systematic perpetration. The most obvious example of this is drug trafficking.[232] For example, the increased violence related to the "drug war" in Mexico has resulted in an estimated 35,000 deaths in the period from 2006 to 2010.[233] In comparison, the 2007–08 post-election violence in Kenya (which has given rise to a case of crimes against humanity currently before the ICC) resulted in an estimated 1,113–1,220 deaths.[234] Thus, the impact of transnational crime, when considered

[229] As noted by Obokata, *supra* note 227 at 453: "[I]t should also be stressed simultaneously that not all instances of trafficking amount to a crime against humanity."

[230] These are 2006 numbers. UNODC, *supra* note 226 at 48.

[231] International Labour Organization (ILO), "A Global Alliance against Forced Labour," *Report of the Director-General* (2005), International Labour Conference, 93rd Session at 14, online: ILO <www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>.

[232] *Geneva Declaration*, *supra* note 185 at 4. The UNODC has noted that, "[o]f the countries with the highest murder rates in the world today, many are primary drug source or transit countries." UNODC, *supra* note 9 at 223.

[233] Geneva Declaration, *supra* note 185 at 30.

[234] ICC, *Situation in the Republic of Kenya* (ICC-01/09-19-Corr), Pre-Trial Chamber II, 31 March 2010, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya at para 131. There have certainly been criticisms of the decision to prosecute the post-election violence in Kenya as crimes against humanity, with those opposed arguing that the extent of the violence in Kenya and the category of alleged perpetrators does not meet the historical threshold that the definition of crimes against humanity was meant to address. See ICC, *Situation in Kenya* (ICC-01/09-19-Corr), Pre-Trial Chamber II, 31 March 2010, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an

in its broader context, may be found to "shock the conscience of humanity" due to its scale and severity.

INTERNATIONAL OR CROSS-BORDER CONDUCT

The majority of non-core international or transnational crimes have either international or cross-border effects. This, of course, is inherent in the categorization of many of these crimes as international or transnational in the first place. In fact, some of the suppression treaties only apply to transnational or cross-border conducts.[235] National responses are insufficient to tackle such crime. Successful prosecution in one country often results merely in the diversion of trafficking routes or displacement of the problem to another state.[236] For example, at the same time that a successful campaign in Colombia reduced cocaine production in that country, manufacture of cocaine in Peru and Bolivia increased.[237] Organized crime groups have proved sophisticated in their ability to adjust trafficking routes in order to prey on weaker states. This can be seen in the rapid expansion of cocaine trafficking throughout West Africa.[238] As the UNODC has concluded, "[b]ecause [transnational organized crime] markets are global in scale, global strategies are required to address them, and anything else is likely to produce unwanted side effects, often in the most vulnerable countries."[239]

CONCLUSION

States and the United Nations have taken steps to end decades of impunity for war crimes, crimes against humanity, and genocide with the creation of the ad hoc tribunals, other "internationalized" courts and tribunals, and the ICC. However, the problem of international crime does not end there. It is time to move beyond

Investigation into the Situation in the Republic of Kenya (Dissenting Opinion of Judge Hans-Peter Kaul). Nonetheless, charges of crimes against humanity were confirmed in relation to the post-election violence in Kenya and one case is currently at trial in The Hague.

[235] See, eg, *United Nations Convention against Transnational Organized Crime, supra* note 40, art 3(1).

[236] UNODC, *supra* note 9 at ii, v.

[237] *Ibid* at 228.

[238] UNODC, *supra* note 211 at 9.

[239] UNODC, *supra* note 9 at 276.

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the historically demarcated line between core crimes and other serious crimes of concern to the international community. It is essential that international criminal law continue to evolve in a reasoned and principled manner. In order for this to occur, states need to better articulate the criteria that justify the inclusion of conduct within the category of "the most serious crimes of concern to the international community as a whole." This article suggests a number of criteria that can help inform inquiries into which other crimes may deserve to be included in this "most serious" category.

It cannot be disputed that war crimes, crimes against humanity, genocide, and aggression are among the most serious crimes of concern to the international community. However, they are not the only ones. There are other crimes of interest to the international community that are grave, which impact the same values and vulnerable groups deemed worthy of protection by the international community and which have serious destabilizing effects that threaten international peace and security. Undue focus on the currently recognized core crimes may have the effect of pushing to the periphery other widespread crimes affecting the international community.

This is not to say that transnational crime has been, or is being, ignored by the international community. The large number of suppression treaties demonstrates that this is not the case. However, the suppression treaties rely on domestic courts for prosecution. Given the large-scale perpetration of transnational crime, the systematic and organized nature of some forms of transnational crime, and the violence, corruption, and instability it generates, this approach may be inadequate. Transnational crime has significant global impacts. The UNODC has estimated the annual value of flows related to transnational organized crime at US $870 billion in 2009.[240] In other words, if transnational organized crime was the economy of a country, it would have the sixteenth largest national gross domestic product in the world.[241]

Many other international crimes have substantial impacts around the globe as well. They are regularly in the news and are the focus of the international community, including the UN Security

[240] UNODC, "Factsheet: Transnational Organized Crime: The Globalized Illegal Economy," online: UNODC <www.unodc.org/documents/toc/factsheets/TOC12_fs_general_EN_HIRES.pdf>.

[241] According to the World Bank's 2009 numbers. World Bank, online: <databank.worldbank.org>.

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Council and other UN agencies. For example, the crime of piracy, once thought to be essentially obsolete,[242] has flourished in recent years off the coast of Somalia[243] and, more recently, in the Gulf of Guinea off the coast of Nigeria and Benin.[244] When assessed in the context of their systemic and organized perpetration, many transnational or other international crimes appear to raise some of the same concerns that underpin the core international crimes. They often affect the same rights and values and can be perpetrated on a scale that may be considered to "shock the conscience of humanity." The relationship between transnational crime and insurgent or terrorist groups can cause instability in countries or regions and may even amount to threats to international peace and security. They have international or cross-border effects, which prevent countries from being able to tackle the problem independently. And the systematic perpetration of some of these crimes has led to situations of systemic impunity through violence, corruption, and destabilization.

Furthermore, the notion that core crimes form a category distinct from other international crimes ignores the often-intertwined nature of transnational organized crime and conflict or instability. Insurgent groups regularly profit from illicit activities in unstable countries or regions. This may, in turn, give them an incentive to prolong the situation of instability. The symbiotic relationship that can arise between insurgency and transnational crime demonstrates that it is difficult to tackle one without addressing the other: "Rebels who make more money by participating in illegal markets than they possibly could in civilian life may be difficult to attract to the negotiating table."[245]

The impact of other international or transnational crimes should be assessed in the broader context in which they occur in much the same manner that acts constituting war crimes, crimes against humanity, and genocide are defined in their broader context in international criminal law. Similarly, if the subject matter jurisdiction of the *Rome Statute* were to be expanded, or other mechanisms of criminalizing conduct under international law were to be implemented, definitions of offences could not merely be

[242] See, eg, Cassese, *supra* note 5 at 4.

[243] SC Res 1846 (2008), UN Doc S/RES/1846 (2008).

[244] SC Res 2018 (2011), UN Doc S/RES/2018 (2011).

[245] UNODC, *supra* note 211 at 5.

transposed from the suppression treaties, which focus on criminalization under domestic law.[246] It is factors such as the large scale or systematic and organized perpetration of these crimes that make them particularly grave or even, possibly, threats to international peace and security. This was recognized by the ILC when it considered the inclusion of drug trafficking in its 1991 draft code, which referred to "illicit traffic in narcotics *on a large scale*."[247]

Transnational crimes are often presumed to differ from core crimes on the basis that they are motivated purely by a desire for personal enrichment. However, this does not always prove true in light of recent reports on the increasing inter-connectedness of some forms of transnational crime and armed insurgent and terrorist groups and activities. In the *World Drug Report 2012*, the UNODC observed: "In the past, drug trafficking may have personally enriched the key actors involved; in recent years, however, significant profits from the illicit drug trade have in some cases been used to fund illegal armed activities."[248]

While the current division between core crimes and other international or transnational crimes is inadequate, this does not mean

[246] See Crawford, *supra* note 35 at 122. See also Boister, *supra* note 112 at 32–33; Einarsen, *supra* note 4 at 212–13, 253–55. Einarsen suggests, as a possible gravity element for grave trafficking crimes (including human trafficking, drug trafficking, weapons trafficking, and money laundering), the fact that the crimes are "committed as part of organised large-scale transboundary crimes." *Ibid* at 285.

[247] 1991 *Draft Code*, *supra* note 50, art 25 [emphasis added]. Similarly, the proposal of Trinidad and Tobago and three other states to the Rome Conference regarding the crime of drug trafficking suggested four threshold criteria, namely when prohibited drug trafficking activities are committed:

(a) on a large scale (and) (or) in a transboundary context;
(b) within the framework of an organized and hierarchical structure;
(c) with the use of violence and intimidation against private persons, juridical persons or other institutions, or members of the legislative, executive or judicial arms of government, (thereby) creating fear or insecurity within a State or disrupting its economic, social, political or security structures or with other consequences of a similar nature; or
(d) in a context in which corrupt influence is exerted over the public, the media and public institutions.

See UN Doc A/CONF.183/C.1/L.48 (1998). See also Boister, *supra* note 93 at 347; Chatoor, *supra* note 93 at 303.

[248] UNODC, *supra* note 183 at 83. See also *Geneva Declaration*, *supra* note 185 at 4: "Criminal activities such as trafficking in drugs or other illegal goods have also been used to finance war efforts in places such as Afghanistan, Bosnia and Herzegovina, Colombia and Liberia."

that the answer is necessarily to add all of the latter to the subject matter jurisdiction of the ICC. There would be a number of difficulties with such a proposal. First, the addition of multiple new crimes to the jurisdiction of the ICC would risk overburdening the limited resources of the ICC and flooding the OTP with an excessive number of complaints.[249] It is important to balance the needs of the international community to address serious crimes with the ability of the ICC to function effectively. Additionally, there may be jurisdictional issues raised with respect to crimes that are not considered as such under customary international law.[250] Finally, and perhaps most significantly, the ICC is still struggling with the practical challenges of prosecuting the existing core crimes, often in situations of ongoing conflict and instability. Adding new crimes to the *Rome Statute* may not be the best option for an institution that is still struggling to find its footing.

However, these potential difficulties do not mean that the idea of expanding the subject matter jurisdiction of the ICC should be abandoned altogether. The Assembly of States Parties of the ICC and the broader international community should continue to engage with the question of potential additions to the subject matter jurisdiction of the ICC on an incremental basis. Any such additions to the ICC's jurisdiction should also be supported with the necessary resources required to enable the ICC to function effectively. However, an important first step is for states and the international community to reassess the line currently drawn between core crimes and other crimes of concern to the international community, moving beyond the historical foundations of the current delimitation and engaging in a reasoned approach based on the values and principles of the international legal order. The international community can then consider the question of enhancing accountability for such crimes, whether doing so involves amending the *Rome Statute* or whether the problems associated with that option favour alternative approaches. While analysis of such potential alternative approaches is beyond the scope of this article, a few proposals can at least be mentioned.

Boister suggests two possible alternative mechanisms for addressing other international or transnational crimes: regional treaty-based criminal courts[251] or an international court of residual

[249] See Boister, *supra* note 93 at 352–53.

[250] *Ibid* at 347–49.

[251] *Ibid* at 359–60.

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jurisdiction, to which states could opt to refer cases in certain circumstances (that is, an "international procedural mechanism" that would not purport to define the substantive content of the crimes within its jurisdiction).[252] Creating such new institutions would be costly and time consuming, but it is worth consideration. The suggestion of regional courts may gain some traction when a region is plagued by a particular form of criminality. However, given the sophistication of some of the criminal organizations operating today and advancements in transportation and technology, taking a regional approach may ignore the truly global nature of some of these crimes.

In defining the contours of a system of international criminal law, respect for state sovereignty must be balanced with other factors justifying the involvement of the international community in relation to certain crimes. Consideration for state sovereignty means that the international community should also consider alternatives to expanding the subject matter jurisdiction of an institution such as the ICC (or other international tribunals). These alternatives might include further strengthening of interstate cooperation and domestic capacity building. However, the current suppression treaty regime presumes that states are able to prosecute serious transnational crimes domestically, which is not always the case. Domestic capacity building and the possible expansion of the ICC's jurisdiction or creation of other international institutions should not be considered mutually exclusive options.

In short, the time has come for the international community to reconsider the distinction between core crimes and other crimes of concern to the international community. It should evaluate those other crimes with a view to appreciating their impact in the broader context of their systematic perpetration. The criteria that may be relied upon to justify the expansion of the international criminal regime must be balanced with respect for state sovereignty. Accordingly, in evaluating whether to subject other crimes to international criminal enforcement mechanisms, consideration should be given to their gravity, the threat they pose

[252] *Ibid* at 360–64. Boister refers to the failed *Convention for an International Criminal Court*, 16 November 1937, (1938) League of Nations OJ Special Supp 156, League of Nations Doc C.547(I)M.384(I)1937V (not in force), which would have been a procedural mechanism that applied national law, as a potential model.

to international peace and security, their international or transnational dimensions, their impact on core values and vulnerable groups protected by the international community, their interrelatedness with existing core crimes, the current mechanisms in place for their international regulation, and their amenability to effective domestic suppression.

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