International Association of Penal Law (AIDP)
the 6th AIDP Symposium for Young Penalists

“Revisiting the International vs Ordinary Crime Divide: A Turning Point for International Criminal Law?”

22 August 2018
At the Large Conference Room, 4th Floor,
Law and Economics Building, Main Campus, Kyoto University

Symposium Materials
Vol. 2

1. Presentation Slides
Presentation Slides

“Revisiting the International vs Ordinary Crime Divide: A Turning Point for International Criminal Law?”
*The slides in this volume are tentative. The contents might be changed when shown at the symposium.

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On the Importance of Demarcating between International and Domestic Delinquency: The Case of Universal Prosecutions of ‘Core’ International Crimes

Dr. Lachezar Yanev  Department of Criminal Law, Tilburg University

War Crimes: IHL/Customary International Criminal Law vs ICC

• IHL/customary ICL: members of the armed forces can commit war crimes against their own fellow-soldiers, but only if the latter are:
  • wounded or sick, as per Geneva Convention I and II; or
  • protected persons, as described in Common Article 3 of the Geneva Conventions, i.e.:
    (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.

• ICC Ntaganda Appeals Chamber ruling: members of the armed forces can commit war crimes against their fellow soldiers, irrespective of whether the latter can be categorized as protected persons under IHL.

65. The Appeals Chamber agrees with the Trial Chamber’s finding that “there is never a justification to engage in sexual violence against any person, irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law”. Accordingly, in the absence of any general rule excluding members of armed forces from protection against violations by members of the same armed force, there is no ground for assuming the existence of such a rule specifically for the crimes of rape or sexual slavery.
The Rise of Universal Jurisdiction Trials before Domestic Courts

- TRIAL International 2018 Report on Universal Jurisdiction
  - 106% increase of such trials in 2017, compared to previous year
  - Sweden, Denmark, Switzerland etc.

- Germany
  - Up to May 2017: 22 person-specific investigations against 28 war crimes suspects from Syria

- Netherlands: *Eshetu Alemu* case of December 2017

Universal Prosecutions: International or Domestic Definitions of ICL Crimes?

- Article 99, Lithuanian Criminal Code:
  - “Article 99. Genocide
  A person who, seeking to physically destroy, in whole or in part, the persons belonging to any national, ethnic, racial, religious, social or political group, organizes, is in charge of, or participates in their killing, torturing, causing bodily harm to them, hindering their mental development, their deportation or otherwise inflicting on them the conditions of life bringing about the death of all or a part of them, restricts the birth of the persons belonging to those groups or forcibly transfers their children to other groups shall be punished by imprisonment for a term of five up to twenty years or by life imprisonment.”

- Can Lithuania use Article 99 to convict of genocide a non-Lithuanian national who kills homosexual persons in State X, with the intent to destroy in whole or in part the said social group in State X?
Argument I: Limitations under International Jurisdictional Law

- Proposition: use of conflicting domestic definitions of ICL crimes in universal jurisdiction trials is contrary to international jurisdictional law, therefore encroaching on state sovereignty and violating the principle of non-interference under Article 2(4) UN Charter?

Jurisdiction is an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by, the State’s sovereignty. [...] If a State assumed jurisdiction outside the [territorial] limits of its sovereignty, it would come into conflict with other States which need not suffer any encroachment upon their own sovereignty.

(F. Mann, The Doctrine of Jurisdiction in International Law, 1964)

In the modern understanding, sovereignty and thus jurisdiction are grounded in international law. As a consequence, a State’s jurisdiction is defined and limited by international law. [...] The presumption of criminal jurisdiction with regard to extraterritorial matters may amount to interference in the internal affairs of the territorial State, since its questions its exclusive jurisdiction and forces it to tolerate a foreign exercise of jurisdiction; in turn, the foreign State thereby exercises its own penal power on foreign territory.


Argument I: Continued…

- General rule of territoriality, but recognized exceptions:
  - active personality
  - passive personality
  - protective principle

- Universal jurisdiction: extraterritorial use of jurisdiction that does not encroach on the sovereignty of other states as long as the forum state acts to enforce the international community’s common interest to suppress and punish the ‘core’ international crimes.

  in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say “piracy by law of nations”, because the municipal laws of many States denominate and punish as “piracy” numerous acts which do not constitute piracy by law of nations, and which therefore are not of universal cognizance, so as to be punishable by all nations.1 (Judge Moore, PCIJ Lotus Case)
Argument II: *Nullum Crimen Sine Lege*

- Proposition: the use of conflicting domestic definitions of crimes in universal jurisdiction trials is legally repugnant because it constitutes a retroactive application of criminal proscriptions, contrary to the principle of legality?

- *Nullum crimen sine lege praevia* principle: criminal conviction is only possible on the basis of a law that existed and applied to the accused at the material time.

- *Jorgić v Germany* [ECtHR Judgment, 12 July 2007 (Application no. 74613/01)]
  - Article 220a of the German Criminal Code, genocidal intent (physical/biological destruction dilemma)
  - Key to determining whether Germany's courts retroactively applied German law on genocide to convict Jorgić was to analyze whether the said broad interpretation of genocide's *mens rea* element was "consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time." (paras 103-104.)
A Triple Normative Relation:
Do State Law, Indigenous Law and International Law overlap?

Prof. Daniel Kuri García
Universidad de Especialidades Espíritu Santo, Ecuador

A genocide in the Amazon...
In 2013 a group of huaroni, as an act of tribal justice, wiped out a whole community of tagaeri-taromenani.
The number of victims was uncertain (between 15 and 50, depending on the reports)

The act was known to public as the perpetrators bragged about it. Even so, no bodies were found.

They even took a 3 year old and a 6 year old girl as “spoils of war”.

1.
THE MANY LAYERS OF THE LAW
Rome Statute

Article 6  Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a)  Killing members of the group;
(b)  Causing serious bodily or mental harm to members of the group;
(c)  Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d)  Imposing measures intended to prevent births within the group;
(e)  Forcibly transferring children of the group to another group.

Ecuadorean Penal Code (1971)

Who, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, commits one of the following, will be punished:

1.-  Killing members of the group, will be punished with reclusion of 16 to 25 years;
2.-  Causing serious bodily or mental harm to members of the group, will be punished with reclusion of 6 to 9 years;
3.-  Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, will be punished with reclusion of 6 to 9 years;
4.-  Imposing measures intended to prevent births within the group, will be punished with reclusion of 6 to 9 years (...);
5.-  Forcibly transferring children of the group to another group, will be punished with reclusion of 6 to 9 years.
**Article 8**

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

**Article 9**

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

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**A COMPLEX MATTER**

- On an internal law basis: Recognition of such rights by Constitutions (Ecuador, Bolivia...)
  - Or by the Constitutional Court, who has recognized the indigenous jurisdictions and rights (Ecuador, Colombia)
- On an external basis: the Interamerican Court of Human Rights has recognized the principle.
2. A problem of applicability

Which law shall be applied?

**International**
By historical reasons, the International Criminal Law was created to pursue this type of conducts on a political or international context... but is it the most effective tool?

(Even the ICC looses competence when the national system applies)

**National**
Many of the countries adapt their internal legislation in accordance to the RS. They will share some common elements of the crimes, but in some cases they will differ. (I.E.: Torture)

**Indigenous**
Usually it is reserved for crimes committed inside the community, in order to restore its peace and values –as long as the proceeding doesn’t violate the international human rights laws–.
Ne bis in idem?

Yes

Article 20 of Rome Statute is clear about the application of the NBII principle. It even states the prior judgement would be recognized if it was held by the “norms of due process recognized by international law”.

Does this include the ILO 169?

No

Are they really protecting the same interests? Are they really the same crimes?

The “La Cocha” sentence, and what to do about it.

CRIMINAL DEFENSES AGAINST GENOCIDE?

- Verbotsirrtum?
- Unzumutbarkeit?
- Cultural defense?
3. Different scopes and functions

A matter of conjuncts?
A matter of recognition?

Conclusion(s)

Different norms
Norms directed to protect the community are different than norms to protect the individuals or the internal relationships.

Same primary norm?
Even so, the prohibitions could be the same, in which it is its legal interests (rechtguts) what we would protect in either case.

Aplicability of RS to Indigenous
We should expect that the general humanitarian principles to be applied by all peoples.

Non aplicability of the RS?
Can we really expect that tribes in voluntary isolation and non contacted to know such principles?

Aplicability of ne bis in idem
As a principle it should be applied in all the cases where the different jurisdictions are recognized.

Non Applicability of the ne bis in idem?
If the norm is different, and so is the crime, or if the application of the indigenous law would leave a great injustice, it should be ignored.
Networked Organizations: A Test for the Demarcation Line between Crimes against Humanity and Ordinary Offences

22 August 2018

Teodora JUGRIN

Outline

1. Why does organization matter?
2. The practice of the International Criminal Court
3. Challenges brought by networked organizations
4. Setting the demarcation line between crimes against humanity and ordinary offences
5. Conclusion
1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

   (a) Murder;
   (b) Extermination;
   (c) Enslavement;
   (d) Deportation or forcible transfer of population;
   (e) Imprisonment or other severe deprivation of physical liberty [...];
   (f) Torture;
   (g) Rape, sexual slavery, enforced prostitution, forced pregnancy [...];
   (h) Persecution [...]
   (i) Enforced disappearance of persons;
   (j) The crime of apartheid;
   (k) Other inhumane of a similar character [...].

2. For the purpose of paragraph 1:

   (a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
The practice of the ICC

- What is an ‘organization’ within the meaning of article 7(2)(a) of the Rome Statute?
- What types of groups qualify as ‘organizations’ within the meaning of article 7(2)(a) of the Rome Statute?
- Do networked organizations qualify?

Networked organizations: Challenges

Three ways in which networked organizations operate and which raise challenges:

- through affiliated or associated groups or organizations;
- by enabling the commission of crimes;
- by inspiring the commission of crimes.
Which of these crimes may qualify as crimes against humanity?
Implications on the Erosions of the Distinction between International and Domestic Crimes

Yang Xie | Kyoto University 22 August 2018

Outline

1. A Trend of Erosion
2. The Normative Implication
3. The Procedural Implication
4. The Institutional Implication
5. Conclusion
1. A Trend of Erosion

- Advocating that new crimes be incorporated into the Rome Statute
- ‘Expansive interpretation’ of existing crimes
- Encouraging domestic courts to prosecute international crimes

2. The Normative Implication

- Does the erosion erase the distinct legal interest that international criminal law protects?
- Core international crimes
- Transnational crimes
- Crimes being prosecuted at an international level
3. The Procedural Implications

- Broadening the scope of ‘international crimes’ will have unintended impacts on the procedural law concerned.
- Immunity
- Admission of evidence
- State cooperation

4. The Institutional Implication

- What is the primary focus of the ICC?
- Would addressing ‘new crimes’ defeat such purpose?
- Does the Court has enough resources to address ‘new crimes’?
5. Conclusion

• There exists a trend of erosion.
• Under the context of the Rome Statute, blurring core international crimes and other crime would result in negative consequences from normative, procedural, and institutional perspectives.
• Attention should be given to the ‘protected legal interest’ of ‘core international crimes’. The study should not only focus on the contextual elements, but also underlying acts.

Thank you.
The special procedural law that are followed in international criminal justice is recognized as International Procedural Criminal Law (IPCL).

The definition IPCL?

- ‘international law’ on procedure before ‘international tribunal’ and against ‘international crimes’?
This presentation aims to redefine the IPCL, reflecting the recent diversification of international criminal justice bodies.

1. An epistemic analysis to highlight which tribunals' procedure is recognized as IPCL.
2. A normative analysis to discuss what should be recognized as IPCL from the international criminal justice's purpose's point of view.

Part I

Defining the IPCL
The essences of IPLC

- the key and controversial element to define IPCL is **internationality**
  1. Of source
  2. Of institution
  3. Or crimes

Definition focusing on the **source**

- To define IPCL as criminal procedural law the source of which is **international law**
- Sluiter
  - “specialized body of international law that governs the conduct of criminal proceedings, (…), in the context of the international legal order”
  - “The first and crucial parameter of the definition is the origin of the procedural standards in international law”

Definition focusing on the crimes

- To define IPCL as the law to be followed at the criminal proceedings against international crimes
- Knoops
  - “a body of international rules promulgated to regulate and implement international substantive criminal law”
- Safferling
  - "the procedural order which is to be followed in executing the code of international crimes at the international level."
  - => Limit to direct implementation of ICL


Definition focusing on the institution

- Turner
  - "the procedures used at the international criminal courts and tribunals created to address some of the most serious offenses"

Question

- Which of the factors is the determinant (Source? Crimes? Institution?)?
The origin of IPCL

- The Nuremberg Tribunal

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<th>The Carter: International law Rules of Procedure: judge-made</th>
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<td>Equal participation of the four allied powers</td>
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The fertilization of IPCL

- ICTY/ICTR

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## The Crystallization of IPCL

### ICC

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## The Diversification of IPCL 1

### SCSL

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### ECCC

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### The diversification of IPCL 2

#### Kosovo panel/EULEX Panel

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#### East Timor Panel

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### The diversification of IPCL 3

#### Extraordinary African Chamber

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#### Special Tribunal for Lebanon

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The diversification of IPCL 4

- Iraqi High Court (IHC)/ International Criminal Tribunal (Bangladesh)

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- Kosovo Specialist Chambers (KSC)

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Result

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## Defining IPCL focusing on source

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### Defining IPCL focusing on crimes

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### Defining IPCL focusing on institution

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<td>STL</td>
<td>Mix</td>
<td>Domestic</td>
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<tr>
<td>IHC/ICT</td>
<td>Domestic</td>
<td>Domestic</td>
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<tr>
<td>KSC</td>
<td>Mix</td>
<td>International</td>
</tr>
</tbody>
</table>
Tendency of focusing on institution

- Safferling, Turner…
- IMT, ICTY/R, ICC, SCSL, ECCC + STL

Types of internationality of institution

- Mégret
  - “seeing it as a constant process of "becoming international“ provides a more compelling explanation of what is at the root of international criminal procedure.”

- Indirectness (Special rules on state cooperation
- Remoteness (Special rules on evidence gathering
- Multi-nationality (Special rules on employment of international staff

Internationality of crime?

- The internationality of crimes should be taken into account in defining IPCL.
- because prevention of international crime is a worldwide project and the prosecution and trial of such crimes should be conducted according to international standards to certain extent
- Wright
  - “A comprehensive international criminal code should include provisions to assure fair indictment and fair trial of those indicted.”


Conclusion
Homogenizing or Harmonizing the Various Procedural Law?

- It is unrealistic at this point to homogenize diverse domestic procedures against international crimes by an international convention on procedure against international crimes.
- The ratification and implementation of ICC Statute can also be seen as the first step.
- The harmonization will be induced by the general principles of international criminal law.
- The new definition of IPCL should be and will be: procedural law against international crimes.

Summary: The Concept of International Procedural Criminal Law: Internationality of Institution or Jurisdiction Ratione Materiae?

- Aim: to redefine the IPCL, reflecting the recent diversification of international criminal justice bodies
  - Part I Defining the IPCL
  - Part II Diversification of international criminal justice institutions
  - Part III The comprehensive definition of IPCL
  - Argument:
  - The new definition of IPCL should be and will be: procedural law against international crimes

Megumi Ochi ochmgm@gmail.com
This work is supported by JSPS KAKENHI
Grant Number JP 15J07414 (Grant-in-Aid for JSPS Fellows)
Righting Wrongs?:
Revisiting the Reparation Orders Mechanism
of the ICC Through the Lens of the
International/Ordinary Crimes Divide

DAVID YUGA MANSFIELD
PhD Candidate, University of Tokyo
JSPS Doctoral Research Fellow (DC1)

OUTLINE

• I. Introduction

• II. Reparations as a Penal Sanction?

• III. The Int./Ord. Crimes Divide in ICC Reparation Orders

• IV. Conclusion
‘The rules a of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage……The damage suffered by an individual……can only afford a convenient scale for the calculation of the reparation due to the State’

-Factory at Chorzów, PCIJ Ser.A No.17 (1928)
ICTY/ICTR

- Restitution of Property
  ‘In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.’ (ICTY St. Art.24(3), RPE 98ter (B)/105)

- Compensation
  ‘Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation’ (RPE 106 (B))

Other Courts

- Restitution (SCSL)

- Identification of Harm (STL)

- Limited parte civile proceedings (ECCC, KSC)
ICC St. Art.75 Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
1998 - Rome Statute adopted

2012 - *Lubanga* Art.74 Judgment /Reparation Order (TC)

2015 - AC Reparation Order

6th AIDP Symposium for Young Penalists 22nd August 2018
OUTLINE

• I. Introduction

• II. Reparations as a Penal Sanction?

• III. The Int./Ord. Crimes Divide in ICC Reparation Orders

• IV. Conclusion

ORIGINS–ILC DRAFT (1991–)

• Strict division between criminal/civil matters
  (Robinson, Yamada, Rosenstock, Fomba…)

• State Responsibility as a prerequisite
  (Vereshchetin)
**ORIGINS–ILC**

(A/CN. 4/L. 490 (1993))

**Article 53. Applicable Penalties**

3. The Chamber may also order:
   (a) the return to their rightful owners of any property or proceeds which were acquired by the convicted person in the course of committing the crime;
   (b) the forfeiture of such property or proceeds, if the rightful owners cannot be traced.

**ORIGINS–DRAFTING OF THE ICC ST.**

- French (*parte civile*) + British (punitive) Proposals

- Merged without sufficient consideration?
**WHY THE NATURE MATTERS**

- (Primary) Purpose of Reparation Orders
- Relationship with future domestic proceedings (if any)
- Applicable standards

---

**CLAIMS OF A CIVIL NATURE?**

- Claims of a civil law nature that should be dealt with civil law standards?
- Extent of reparations and the relevance of international criminal responsibility
- The more broader effect of Art.75 on general international law

---
A PENAL SANCTION?

• Characters which cannot be explained by a civil claims model
e.g. individual reparation + collective reparations (Shelton, 2005)

• Practical impossibility of assuming ‘claims of victims’]

• The problem of collective responsibility

BURDEN OF PROOF

• ‘Wholly flexible approach’ (Lubanga TC)

• ‘Balance of Probabilities’ (Post Lubanga AC)

• A more strict standard for restitution? (Norman et al.)
OUTLINE

• I. Introduction

• II. Reparations as a Penal Sanction?

• III. The Int./Ord. Crimes Divide in ICC Reparation Orders

• IV. Conclusion

SCOPE OF REPARATION ORDERS

• *Lubanga* TC (2012)
  ⇒ Inclusion of victims of gender crimes?

• *Al Mahdi* TC (2017)
  ⇒ ‘Proximate Cause’ as the standard for causality
  ⇒ damage suffered by the international community?
**Prosecutor v. Ruto and Sang**

- Termination of proceedings, (ICC-01/09-01/11-2027)
  ‘The Victims should be invited to express views and concerns in relation to reparation or assistance in lieu of reparation’

- *Decision on Requests Regarding Reparations, Dissenting Opinion of Judge Eboe-Osuji* (ICC-01/09-01/11-2038)
  ⇒ Reparations without determination of international criminal responsibility?

(Cont)

- Failure to protect on the part of the Kenyan Government as a basis for a right to reparations

- Reparation obligations under CIL?
  ‘any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation’
INCORPORATION OF HUMAN RIGHTS LAW

• Incorporation of flexible standards through Art.21 ICC St.

• The effect of IHL on the scope of victims as a cause for the erosion of a strict division between International/Ordinary Crimes

CONCLUSION

This work was supported by JSPS KAKENHI Grant Number 18J20949

6th AIDP Symposium for Young Penalists 22nd August 2018
Implementing International Crimes in National Legal Orders
An Appraisal of Asian State Parties to the Rome Statute

In a nutshell

1. Introduction
2. Defining ‘Asia(n)’
3. Asian participation in the Rome Statute system
4. National implementing legislation in Asia:
   a. The crime of genocide
   b. Crimes against humanity
   c. War crimes
   d. The crime of aggression
5. Concluding remarks
1. Introduction

- Why implement the Rome Statute? Dual purpose:
  - Obligation to cooperate and
  - Principle of complementarity.

- Methodology
  - Focus on jurisdictions subjected to limited scrutiny and
  - Limited to State Parties to the Rome Statute.

2. Defining ‘Asia(n)’

- UN Asia-Pacific Regional Group
  “[R]arely adopts common positions on issues and discusses only candidacies for international posts. Such sub-regional groupings that exist within Asia have tended to coalesce around narrowly shared national interests rather than a shared identity or aspirations”

2. Defining ‘Asia(n)’

- UN Statistics Division list of geographic regions:
  1. Central Asia, comprising five States;
  2. Eastern Asia, comprising five States and two Special Administrative Regions;
  3. South-eastern Asia, comprising eleven States;
  4. Southern Asia, comprising nine States; and
  5. Western Asia, comprising eighteen States.

3. Asian participation in the Rome Statute

<table>
<thead>
<tr>
<th>Sub-region</th>
<th>Parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central Asia</td>
<td>1 (Tajikistan)</td>
</tr>
<tr>
<td>Eastern Asia</td>
<td>3 (Japan, Mongolia, Republic of Korea)</td>
</tr>
<tr>
<td>South-eastern Asia</td>
<td>3 (Cambodia, Philippines,* Timor-Leste)</td>
</tr>
<tr>
<td>Southern Asia</td>
<td>3 (Afghanistan, Bangladesh, Maldives)</td>
</tr>
<tr>
<td>Western Asia</td>
<td>3 (Cyprus, Jordan, Palestine)</td>
</tr>
</tbody>
</table>

- 13 of the 48 (or fewer than 30% of) Asian States.
- But this need not be accompanied by a failure to implement.
4. National implementing legislation in Asia

No explicit obligation to implement crimes, but:

“when domestic law criminalizes a narrower range of conduct than the Statute … States risk relinquishing their competence to investigate and prosecute, because the ICC may declare them to be ‘unable’ [to do so].”


4.a. Implementing the crime of genocide

Two initial observations:

- Five Asian ICC State Parties fail to criminalise genocide.
  - Afghanistan, Japan, Jordan, Maldives, and Palestine.
  - Must therefore rely on ‘ordinary’ domestic provisions.
- Legislation pre-dating entry into force of Rome Statute.
  - Ten Asian ICC State Parties have ratified or acceded to the Genocide Convention.
4.a. Implementing the crime of genocide

- Consequences of failure to implement:

  “prosecuting genocide as ‘multiple homicide’ – the strategy favored by ... Japan – is not commensurable with the purpose of the Rome Statute precisely because it would in such an instance be unable to communicate the fact that aside from a (typically sizable) number of individual victims, humanity is also under attack.”


- Two further observations:
  - First, States are inclined to refer to or replicate wording:
    - For referral, see Cyprus:
      “‘genocide’ means any of the acts specified in article 6 of the Rome Statute.”
    - For replication, see Tajikistan (or the Republic of Korea).
    - Jordan also replicates in its draft legislation.
4.a. Implementing the crime of genocide

- Second, where States do implement, they are either over- or under-inclusive in terms of the protected groups and/or the prohibited acts.
  - For over-inclusiveness, see the inclusion of “political groups” by Bangladesh or the inclusion of “social or any other similar stable and permanent group” by the Philippines.
  - For under-inclusiveness, see the exclusion of “causing serious … mental harm” in Mongolia’s Criminal Code.

Consequences of over-criminalising?

“Extending the protection to groups that are vulnerable in a given state may be important for a particular jurisdiction, but … there is always the risk of diluting the crime of genocide the prosecution of which is normally reserved for the most serious atrocities.”

4.b. Implementing crimes against humanity

- No specific international convention similar to those addressing genocide and war crimes.
- CaH were therefore not widely criminalised in 2002.
  - Cf. Bangladesh: The International Crimes (Tribunals) Act, 1973, whose definition largely reflects that applied by the IMT and the tribunals established under CCL No. 10.

4.b. Implementing crimes against humanity

- Two initial observations:
  - Seven Asian ICC State Parties fail to criminalise CaH.
    - Afghanistan, Japan, Jordan,* Maldives, Mongolia, Palestine, and Tajikistan.
  - Under-inclusiveness can be observed in terms of grounds on which the CaH of persecution can be committed.
    - E.g. Bangladesh omits national, gender, and other grounds universally recognised as impermissible under IL.
4.b. Implementing crimes against humanity

- One further observation:
  - Concern expressed regarding implementation of CaH of “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” under Article 7(1)(k) ICCSt.
  - But not borne out in practice.
    - See Bangladesh, Cambodia, Cyprus, the Philippines, the Republic of Korea, and Timor-Leste. But cf. Jordan.

4.c. Implementing war crimes

- Two initial observations:
  - Legislation pre-dating entry into force of Rome Statute.
    - All Asian ICC State Parties have ratified the four Geneva Conventions and their Additional Protocols I and II.
  - Again, certain States refer to or replicate wording.
    - See, e.g., the Mongolian Criminal Code, which proscribes: “use of the means of warfare prohibited by an international treaty to which Mongolia is a party.”
4.c. Implementing war crimes

- Two further observations:
  - Tendency to conflate war crimes in IACs and NIACs or to extend protection afforded in IACs to NIACs.
    - See Korea, Timor-Leste, Tajikistan, Cambodia.
  - Notable aberrations from Rome Statute regime.
    - See, e.g., the implementation of grave breaches by Japan, omission of child soldiers crimes by Tajikistan, Cambodia.

4.d. Implementing the crime of aggression

- Definition of aggression and the conditions for the exercise of jurisdiction agreed in Kampala in 2010.
- Kampala definition does not appear in many Asian ICC State Parties’ legislation.
4.d. Implementing the crime of aggression

- Other Asian ICC State Parties do criminalise aggression, at least to a certain extent.
  - Bangladesh criminalises “Crimes against Peace”, largely following the IMT Charter definition.
  - Tajikistan criminalises “Aggressive War” as well as “Public Appeals to Unleashing an Aggressive War”.
  - Timor-Leste criminalises “Incitement to war”.
  - Mongolia criminalises “Stirring up of an armed conflict”.

5. Concluding remarks

- Implementation has been piecemeal.
- Genocide and war crimes more widely criminalised than CaH or aggression (as defined in Kampala).
- Advisable for Asian ICC State Parties to implement.
- Implementation of cooperation provisions?
African Solutions to African Problems?: Legal Dilemmas Confronting the Special Criminal Court (SCC) in the Central African Republic (CAR)

Suhong Yang
S.J.D. Candidate, Georgetown University Law Center
22/08/2018

I. BACKGROUND
2. RELEVANT LAWS

- DOMESTIC:
  - 1. Organic Law No. 15.003
  - 2. CAR Penal Code
  - 3. CAR Code of Criminal Procedure
  - 4. CAR Constitution 2015

- INTERNATIONAL:
  - 1. Rome Statute
  - 2. ICCPR
  - 3. Geneva Conventions and Protocols
  - …
3. LEGAL CONFLICTS

• DIVIDE OF CRIMES:
  • 1. Domestication of Genocide, Crimes against Humanity and War Crimes
  • 2. Expansion of International Crimes

• OTHER ISSUES:
  • 1. Immunity
  • 2. Non-Retroactivity

4. REVERSE COMPLEMENTARITY
5. COMPOSITION OF JUDGES AND PROSECUTORS

<table>
<thead>
<tr>
<th>Division</th>
<th>National Personnel</th>
<th>International Personnel</th>
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<tr>
<td>Pre-Trial Investigation Chamber</td>
<td>2. Mr. Patience Guerengbo, Mr. Michel Ngokpou</td>
<td>2. Ms. Emmanuelle Ducos (France), Ms. Adelaide Dembélé (Burkina Faso)</td>
</tr>
<tr>
<td>Special Indictment Chamber (Appeals of Pre-Trial Investigation)</td>
<td>1. Mr. Jacob Damin Sanny (President)</td>
<td>2. Mr. Koffi Kumelio A. Afande (Togo), Ms. Bernadette Houndékandji-Codjovi (Benin)</td>
</tr>
<tr>
<td>Assize Chamber (Trial)</td>
<td>To be appointed</td>
<td>To be appointed</td>
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<tr>
<td>Appeals Chamber</td>
<td>To be appointed</td>
<td>To be appointed</td>
</tr>
<tr>
<td>Prosecutor Office</td>
<td>2. Mr. Alain Ouaby-Bekai (Deputy), Mr. Alain Tolmo (Substitute)</td>
<td>2. Mr. Toussaint Muntazini Mukimapa (Chief) (Democratic Republic of Congo), Mr. Dieudonné Detchou (Substitute) (Canada)</td>
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</tbody>
</table>

6. PROSPECTS

- DOMESTIC STABILITY
- INTERNATIONAL ASSISTANCE
- PROGRESSIVE EFFORTS
QUESTIONS & DISCUSSION?
THANK YOU!

EMAIL: SY510@GEORGETOWN.EDU
The Intersection of Transnational and International Criminal Law
- Example of Trafficking in Persons

Anna Głogowska-Balcerzak

Presentation outline – work in progress

1. Trafficking in persons as transnational and international crime
2. *Aut dedere, aut judicare* and the „third option”.
3. Possible developments of the ICC statute - other crimes of dual nature?
The term 'transnationality' itself, although applied many years ago by Phillip Jessup, has found its way into treaty usage only in the year 2000 – in the Transnational Organized Crime Convention (UNTOC).

Transnational criminal law - a branch of international law that deals with „indirect suppression, through domestic laws and measures, of criminal activities which have actual or potential cross-boundary effects” (N. Boister)

Transnational crimes?

2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if:
(a) It is committed in more than one State;
(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
(d) It is committed in one State but has substantial effects in another State.

Like many other transnational crimes, trafficking in persons was defined without incorporating transnational element (migrant smuggling, drugs smuggling are rare examples of crimes that can only be committed transnationally).
**Trafficking in Persons as transnational crime**

The definition of trafficking in persons is to be found in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing UNTOC (Palermo Protocol).

Art. 3(a): “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

---

**Trafficking in Persons as international crime**

Some of the acts that are classified as trafficking in persons can in the same time constitute an international crime within the meaning of Rome Statute.
Art. 7.1(c): ‘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.

Elements of Crimes: “exercising any or all powers attaching to the right of ownership over one or more persons” includes, but is not limited to, “purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”

Elements of Crimes, footnote 11:
“it is understood that such deprivations of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”
"Trafficking remains classified as a transnational crime, but its elevation to an international crime appears to be on the horizon." (N. Siller)

This kind of statements seem too far-reaching - it is possible that a trafficking in persons case will meet the criteria of crime against humanity of enslavement and will be adjudicated by ICC. Would that influence perception of trafficking in general, and list it among "the most serious crimes of concern to the international community as a whole"? Or would it simply mean that some instances of crimes against humanity and trafficking in persons can overlap?

**Aut dedere, aut judicare**

Possibility of overlapping of some transnational and international crimes poses a question about jurisdiction and state obligations resulting from suppression conventions.

The obligation of state-parties to Palermo Protocol to extradite or prosecute traffickers is incorporated in art. 10 of the UNTOC and was based on so called "Hague formula."
The relation of transnational and international crimes is visible in the works of International Law Commission concerning obligation *aut dedere aut judiciare* in which, in addition to prosecution and extradition, the Commission has envisaged a third option - surrendering the suspect to a competent international criminal tribunal.

**Article 11 of the International Convention for the Protection of All Persons from Enforced Disappearance:**

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.
Aut dedere, aut judicare

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Aut dedere, aut judicare

„At the same time there is nothing in the paragraph to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties. On this point the Diplomatic Conference declined expressly to take any decision which might hamper future developments of international law.”

Commentary to art. 49 of The I Geneva Conventions of 12 August 1949
"Aut dedere, aut judicare"

"More importantly, even if the AU ultimately decides to establish a special tribunal for the trial of Mr. Habré, Senegal’s surrender of Mr. Habré to such a tribunal could not be regarded as a breach of its obligation under Article 7, paragraph 1, because such a tribunal is created precisely to fulfil the object and purpose of the Convention; neither the terms of the Convention [UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] nor the State practice in this regard prohibit such an option."

ICJ, Belgium v. Senegal, Dissenting Opinion of Judge Xue

"Aut dedere, aut judicare"

"In the era of international criminal tribunals, the principle may be interpreted *lato sensu* to include the duty of the state to transfer the person to the jurisdiction of an international organ, such as the International Criminal Court."

**Aut dedere aut judicare v. complementarity**

The question of concurrent jurisdiction among states within the framework of transnational criminal law remains an up-to-date issue - especially with regard to priority among different bases for jurisdiction.

**International crimes - possible evolution**

„The most serious crimes of concern to the international community as a whole.”
International crimes - possible evolution

• Resolution E of the Rome conference recommends that Review Conference „consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.”

• New York Working Group on Amendments

Draft protocol on amendments to the protocol on the statute of the African Court of Justice and Human Rights

Art. 28A
1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have power to try persons for the crimes provided hereunder:

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

Thank you for your attention

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Contents

- BACKGROUND
- WHAT ACTS COULD BE JUDGED?
- WHAT WOULD BE ITS RELATIONSHIP WITH OTHER TRIBUNALS?
- WHAT WOULD BE ITS LEGAL BASIS?
- TOWARDS A POLITICAL SOLUTION FOR THE LEGAL OBSTACLES?
- CONCLUSIONS
Background

- Terrorist attacks of Daesh.
- Madrid Declaration July 2015: “creative ideas and new approaches for developing legal tools to further counter terrorism, including the phenomenon of Foreign Terrorist Fighters, in line with obligations under international law”.
- Spain-Romania initiative for an International Criminal Court Against terrorism.

What acts could be judged?

1. **The eternal search of the definition of terrorism**
   - Sectorial approach: “an unsystematic hodge-podge of treaties concerning specific modes of terrorism” (Goldstone and Simpson).
   - Three methodological options (Bassiouni):
     1. Elaboration of a general (generic) definition.
     2. The selection of certain specific acts which are phrased in a manner stating the specific content of the behavior sought to be proscribed.
     3. A mixed formula which combines a general (generic) statement and some illustrative applications phrased with specificity of content as to the proscribed conduct.
What acts could be judged?

1. The eternal search of the definition of terrorism

   - Spain-Romania initiative, third option (Aurescu):
     (i) the acts listed in the UN sectorial counter-terrorist conventions and
     (ii) an “open” general definition, founded on elements recognized in customary international law and jurisprudence (especially the case law of the Special Tribunal for Lebanon): the existence of criminal intent in the perpetration of the acts (*dolus*), the specific intent of causing terror or coercing authority (*dolus specialis*), the perpetration of a criminal act, and, where applicable, the gravity of the acts, that may constitute a threat to international peace and security.

   - Sources: League of Nations and The Special Tribunal for Lebanon (STL).

   - Criticism against the proposed definition:


     2. *Dolus specialis*: intent of causing terror or coercing authority, distinction from an ordinary crime. However, not enough international agreement to consider it as a part of customary international law (Ambos).
What acts could be judged?

2. International crime vs transnational crime

- International criminal law as a convergence of two disciplines (Bassiouni):
  1. Criminal aspects of international law: body of international proscriptions which criminalize certain types of conduct irrespective of particular enforcement modalities and mechanisms (war crimes, agression, genocide...). International crimes: most of them in the Rome Statute.
  2. International aspects of national criminal law: national crimes with transnational elements. Transnational crimes: repression conventions

- Terrorism: international crime? Not included in the Rome Statute despite of several efforts. Proposals for indirect jurisdiction of the ICC as war crimes or crimes against humanity (Arnold).

What acts could be judged?

2. International crime vs transnational crime

- International crime under customary international law? Three requirements (Ambos):
  1. Prohibited conduct in international law.
  2. The aim of the prohibition must be the protection of universal values.
  3. The infringement of the prohibition generates individual criminal responsibility. Every State has the obligation to prosecute and punish the individual, regardless its domestic law.

- Cassese: “discrete international crime perpetrated in time of peace”.
- Ambos: not (yet) a crime independent from national criminal law.
What would be its relationship with other tribunals?

**Primacy vs complementarity**

- **Primacy**: preference over national jurisdictions (Yugoslavia, Rwanda, Lebanon). ICTY: “when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes", or proceedings being "designed to shield the accused", or cases not being diligently prosecuted”. ICTR: lack of material means.

- **Complementarity**: investigation and prosecution only when national jurisdictions are unable or unwilling to do so genuinely (ICC).

- **Spain-Romania proposal**: complementarity. Three reasons: respect for sovereignty, relationship between national and international courts, effective distribution of resources. ICC: “it should be complementary to the jurisdiction of the International Criminal Court in those cases of acts of terrorism which amount to crimes within the established jurisdiction of the ICC” (Aurescu). Problem: what happens when the ICC has jurisdiction but does not exercise it?

What would be its legal basis?

**Legitimacy and consensus vs promptness and effectiveness**

- **International treaty**: consensus, legitimacy. Problem: length of the negotiations.


  - **Problems of UNSCR**:
    1. Does not adress a specific threat (time and place), but terrorism in general terms.
    2. Lack of legitimacy: restricted nature of the UNSC.

  - **Advantage of UNSCR**: “With this option, one would avoid the dragging process of negotiations by the interested states. After all, in this option only 9 of the 15 Security Council members will have to cast a concurring vote to adopt a resolution” (Van Ginkel).
Towards a political solution for the legal problems?

- “The simple fact of the matter is that law does not remain the same, immovable, unchanging and rigid until the end of time. Law does not sit still” (Ventura).

- Adoption of the Comprehensive Convention on International Terrorism? Two main obstacles:
  1. State terrorism
  2. National liberation movements

Conclusion

- New tool based on the rule of law.
- Structural problems of the proposal:
  1. Lack of consensus of the international community on the definition.
  2. Lack of consensus on the international nature of the crime.
  3. Vagueness about its relationship with the ICC.
  4. Lack of legitimacy of the legal basis proposed.
- New step in the discussion on the development of criminal law cooperation against terrorism.
- The proposal is a sign of the importance of applying, at least, the existing UN conventions on criminal cooperation among States.
Thank you very much for your attention