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

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<table>
<thead>
<tr>
<th>Name</th>
<th>Position/Affiliation</th>
<th>Email Address</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Alejandro Eduardo Chehtman</strong></td>
<td>(keynote speaker) Associate Professor of Law, Universidad Torcuato Di Tella – Fellow, Argentine National Research Council/Universidad de Girona</td>
<td><a href="mailto:achehtman@utdt.edu">achehtman@utdt.edu</a></td>
</tr>
<tr>
<td><strong>Lachezar Dimitrov Yanev</strong></td>
<td>Assistant Professor, Tilburg University</td>
<td><a href="mailto:L.D.Yanev@uvt.nl">L.D.Yanev@uvt.nl</a></td>
</tr>
<tr>
<td><strong>Daniel Andres Kuri García</strong></td>
<td>Professor of Law, Universidad de Especialidades Espiritu Santo</td>
<td><a href="mailto:dankuri@uees.edu.ec">dankuri@uees.edu.ec</a></td>
</tr>
<tr>
<td><strong>Teodora Jugrin</strong></td>
<td>Associate Legal Officer, International Criminal Court, Judicial Divisions PhD Candidate, Leiden University</td>
<td><a href="mailto:t.s.jugrin@law.leidenuniv.nl">t.s.jugrin@law.leidenuniv.nl</a>,</td>
</tr>
<tr>
<td><strong>Yang Xie</strong></td>
<td>PhD Candidate, Leiden University</td>
<td><a href="mailto:y.xie@law.leidenuniv.nl">y.xie@law.leidenuniv.nl</a></td>
</tr>
<tr>
<td><strong>Megumi Ochi</strong></td>
<td>Post-Doctoral Research Fellow SPD of JSPS, Kyoto University</td>
<td><a href="mailto:ochi.megumi.74s@st.kyoto-u.ac.jp">ochi.megumi.74s@st.kyoto-u.ac.jp</a></td>
</tr>
<tr>
<td><strong>David Yuga Mansfield</strong></td>
<td>PhD Candidate in International Law, The University of Tokyo Research Fellow, Japan Society for the Promotion of Science</td>
<td><a href="mailto:davidyuga@g.ecc.u-tokyo.ac.jp">davidyuga@g.ecc.u-tokyo.ac.jp</a></td>
</tr>
<tr>
<td><strong>Daley J. Birkett</strong></td>
<td>Research Fellow and Ph.D. Candidate, University of Amsterdam Research Associate, University of Kiel</td>
<td><a href="mailto:daley.birkett@gmail.com">daley.birkett@gmail.com</a></td>
</tr>
<tr>
<td><strong>Suhong Yang</strong></td>
<td>S.J.D. Candidate, Georgetown University Law Center</td>
<td><a href="mailto:sy510@georgetown.edu">sy510@georgetown.edu</a></td>
</tr>
<tr>
<td><strong>Anna Głogowska-Balcerzak</strong></td>
<td>Assistant Professor, University of Lodz</td>
<td><a href="mailto:aglogowska@wpia.uni.lodz.pl">aglogowska@wpia.uni.lodz.pl</a></td>
</tr>
<tr>
<td><strong>Alejandro Sánchez Frias</strong></td>
<td>Doctoral Research Fellow, University of Malaga</td>
<td><a href="mailto:alejandro.sanchez_frias@coleurope.eu">alejandro.sanchez_frias@coleurope.eu</a></td>
</tr>
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Abstracts
“Revisiting the International vs Ordinary Crime Divide: A Turning Point for International Criminal Law?”
On the Importance of Demarcating between International and Domestic Delinquency: the Case of Universal Prosecutions of ‘Core’ International Crimes

(6th AIDP Symposium for Young Penalists, Kyoto University, Japan)

Dr. Lachezar Yanev

*Department of Criminal Law, Tilburg University, The Netherlands*

**Presentation Abstract**

On 15 December 2017, a district court in the Netherlands convicted and sentenced to life in prison Eshetu Alemu: a former official of Ethiopia’s military communist dictatorship, known as the Derg, who participated in the commission of war crimes during the infamous ‘Red Terror’ campaign of the late 1970s. The judges found him guilty of murder, arbitrary deprivation of liberty, torture and inhumane treatment, qualified as ‘violations of the laws and customs of war’ under the Dutch 1952 Wartime Offences Act. Importantly, however, the court defined the legal elements of these crimes exclusively by reference to, and in strict compliance with, the established international law, citing Common Article 3 of the Geneva Conventions and the jurisprudence of the UN *ad hoc* Tribunals. This was by no means an obvious approach. There have been examples of cases, such as *Jorgić* in Germany and *Polyukhovich* in Australia, where domestic courts exercised universal jurisdiction to try core international crimes, yet in doing so used national definitions of e.g. genocide that were in disconformity with international law, thereby prompting strong criticism for violating the rights of the accused under the legality principle.

The present research explores the significance of distinguishing between international and domestic crimes from the specific angle of universal jurisdiction trials, which have been on a steep rise in recent years. A two-fold argument for the importance of preserving that distinction is put forward. First, it is submitted that only the internationally accepted legal definitions of war crimes, crimes against humanity and genocide are amenable to universal jurisdiction. Thus, the application of divergent domestic definitions, under the false guise of the universality principle, impermissibly extends the application of a state’s municipal law to the territory of another sovereign state, thereby encroaching on its sovereignty. Second, the individual rights of the accused further underscore the importance of upholding the established international legal definitions of crimes in such universal jurisdiction trials.

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jurisdiction trials. Using conflicting domestic definitions is legally repugnant because it presents a retroactive application of criminal proscriptions, contrary to the *nullum crimen sine lege* principle.
A triple normative relation: State law, indigenous law and international law.

By: Prof. Daniel Kuri García

Many of the national constitutions have a clause that recognizes the jurisdiction of indigenous tribes within the own national jurisdiction of a country, even to the point where the *non bis in idem* still applies. Such relationship implies that the customary laws that applies to such tribes also will have a relationship with the Rome Statute, as some of the ancestral laws that these tribes have been following over centuries –and with it, the crimes that they punish- will overlap within the scope of the international crimes and ordinary offences. My proposal is an analysis of the rationale of the distinction between international and ordinary offences, and includes within this analysis another layer: the customary laws that applies to the indigenous people within the borders of a country.

The United Nations Declaration on the Rights of Indigenous Peoples, under article 34, recognizes the right to “promote, develop and maintain their (...) procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards”. This means that such practices are not only recognized, but the limit imposed to such practices by the standards of the human rights is also a recognized one within a certain hierarchy. In a similar way the ILO Indigenous and Tribal Peoples Convention (C169) guarantees that the indigenous “(...) 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 recognized human rights.” These include all juridical institutions that may be applicable to the cases in which crimes are punished respecting the basic human right. The relationship between the indigenous customary law and national law would become similar to the relation between national law (and with such, the ordinary offences) and the international law (international crimes).

Under these circumstances a national of a country could be found responsible under three different normative systems, in which the application of one of such systems should exclude the others but that would not always be the case. The application of the article 17 of the Rome Statue could have a strange situation when the jurisdiction that trialed the crime is a non-State jurisdiction (indigenous customary law) but officially recognized by the State and the International Human Rights laws. If the own states faces the “impossibility” to prosecute because the respect of the *non bis in idem* principle, can the ICC acquire jurisdiction? This is the issue that will be investigated.
Networked Organizations: A Test for the Demarcation Line between Crimes against Humanity and Ordinary Offences

Teodora Jugrin

ABSTRACT

Non-state actors have been increasingly prominent as perpetrators of human rights abuses. Their increased capability to engage in systematic mass violence has blurred the demarcation line between international and domestic jurisdiction over group criminality. Before the International Criminal Court (ICC), the conduct of non-state actors has raised particular difficulties for the concept of crimes against humanity. It is essential for this category of international crimes that they be the product of a State or organizational policy, as opposed to sporadic acts of violence or spontaneous crime waves, which remain exclusively within the jurisdiction of domestic courts.

Despite the fact that the concept of organization plays a key role in the application of the law of crimes against humanity, the ICC has been struggling to find a coherent definition for it. Difficulties arise in particular from the diversity of groups committing crimes against civilians, which can vary in terms of degree and type of organization from non-formalized, ad-hoc groups, to loose networks, centralized/hierarchical organizations and even state-like entities.

In this context and in the light of the increasing relevance and prevalence of networked organizations – in particular terrorist organizations – the question arises: can the acts of networked organizations qualify as crimes against humanity and if so under what conditions?

This presentation will look at the modus operandi of these groups and their fluid organization which involves associated and affiliated groups, shared policies and membership, decentralized decision-making and the outsourcing of violence. It will highlight the challenges that these organizations bring for the demarcation line between crimes against humanity and ordinary offences. In doing so, it will engage with a number of scenarios – some hypothetical, some real, some drawn from situations or cases currently before the ICC – and will seek to place these scenarios on either one or the other side of the demarcation line.
Implications on the Erosion of the Distinction between International and Domestic Crimes

Yang Xie
Leiden University

Two trends are emerging in recent international criminal prosecutions. On the one hand, there is a call for international tribunals to engage with crimes that are traditionally considered national or transnational crimes. On the other hand, domestic courts are encouraged to prosecute international crimes. On the positive side, the two trends combined contribute to the goal such as closing the impunity gap. The increasing number of prosecution on different levels however, suggests an erosion between international and domestic crimes. This paper intends to examine the implications of such phenomenon.

This paper discusses such implication from a normative approach and an institutional one. From a normative perspective, the erosion indicates the lack of clarity in identifying the “Rechtgut” of international crimes. On the institutional side, the phenomenon blurs the identity and of international criminal courts. This paper focuses mainly on the practice of the International Criminal Court.

From a normative approach, when international courts start to engage with conventional crimes, the line between these crimes and international ones become blur. The preamble of the Rome Statute suggests that core international crimes are those that threat “the peace, security and well-being of the world”. These crimes are so grave because they endanger protected legal values of the international community. On comparison, conventional crimes address concerns of a particular jurisdiction. Therefore, prosecuting conventional crimes does not serve the function of protecting the values shared by the international community. In addition, the nature of international crimes requires and develops a set of special procedure law. Applying this set of law on prosecuting conventional crimes is inappropriate.

From the institutional perspective, the paper argues that the erosion leads to the lack of clearance on the Court’s identity. This argument is developed in three parts. First, the Rome Statute stresses “the fight against impunity” and encourages domestic prosecution. This indicates an accountability oriented approach. Under this approach, it is more important to see those responsible for the atrocities under investigation or prosecution. Secondly, the Court’s jurisprudence on admissibility further confirms this approach. The “same person, same conduct” test allows domestic jurisdiction to prosecute the suspect using conventional criminal law. Considering a domestic crime and an international one represents distinct protected values, allowing a different characterization of the same conduct suggests the concept of “Rechtgut” gives way to the more realistic goal of ensuring accountability. It also implies that the Court is not interested in establishing a coherent regime of the protected legal interest. Lastly, the Court faces increasing challenges to prosecute traditional core crimes, which often related to State authorities, leaving the only alternative to address conventional crimes committed by non-state actors.

In conclusion, the paper suggests a cautious reading towards the attempts of codification and prosecution of conventional crimes on international level. Doing so would blur the function of international criminal law, and the identity of international criminal prosecution.
The Concept of International Procedural Criminal Law: Internationality of Institution or Jurisdiction Ratione Materiae?

Megumi OCHI

The special procedural law that are followed in international criminal justice is recognized as International Procedural Criminal Law (IPCL). Since the prototype of IPCL is that of the Nuremberg Tribunal, IPCL has been recognized as ‘international law’ on procedure before ‘international tribunal’ and against ‘international crimes’. However, recent diversification of international criminal justice bodies requires the definition of IPCL to be reconsidered. International criminal justice bodies no longer only apply international law, and judge-made law and domestic procedural law take huge part in regulating procedure in international and internationalized bodies. Tribunals and courts against international crimes now can be either purely international, partly international, partly regional, or purely domestic. International tribunals no longer only deals with so-called international crimes. Many hybrid or internationalized courts have jurisdiction on both international crimes and domestic serious crimes. Furthermore, an internationalized tribunal has been established only to try crimes under domestic law. Can the procedural rules of these tribunals be recognized as IPCL? If the concept of IPCL has been expanded to embrace the rules other than ‘international law’ on procedure before ‘international tribunal’ and against ‘international crimes’, the definition of IPCL needs to reflect such development.

This presentation aims to redefine the IPCL, reflecting the recent diversification of international criminal justice bodies. It first conducts an epistemic analysis to highlights which tribunals’ procedure is recognized as IPCL, and second, a normative analysis to discuss what should be recognized as IPCL from the international criminal justice’s purpose’s point of view.

Part I provides an analysis of existing attempts to define IPCL. It demonstrates that the key and controversial element to define IPCL is internationality. The elements of internationality of IPCL can be its source, institution, or crimes. Part II reviews the internationality of the international criminal justice bodies focusing on the three elements. Part III examines what the comprehensive definition of IPCL is. It demonstrates that academics tend to regard the internationality of institutions as the key of IPCL and ignore internationality of crimes over which the tribunals have jurisdiction. However, the internationality of crimes should be taken into account in defining IPCL. This is because prevention of international crimes is a worldwide project and the prosecution and trial of such crimes should be conducted according to international standards to certain extent. It is unrealistic at this point to homogenize diverse procedures against international crimes by an
international convention on procedure against international crimes or customary international law. The ratification and implementation of ICC Statute can 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. In this sense, the concept of international crimes has significance on the definition of IPCL.
Righting Wrongs?: Revisiting the Reparation Orders Mechanism of the ICC Through the Lens of the International/Ordinary Crimes Divide

David Yuga Mansfield*

While the notion that individuals may be tried by virtue of international law can be traced back at least to Art.227 of the Treaty of Versailles, the practice of pursuing international criminal responsibility had been largely neglective of the damages suffered by victims. Neither did the post-WWII military tribunals nor did the vast majority of the ad hoc tribunals allow victims participation. It therefore comes without surprise that neither was the question of reparations addressed as an issue that should be dealt by these tribunals.

In contrast, the ICC may, per Art.75 of the Rome Statute, make reparation orders against the convicted person. As Judge Wyngaert puts it, the ICC has shifted ‘away from a retributive judicial system to a more restorative, justice-oriented model.’ Nonetheless, the exact basis for such orders against perpetrators remains unclear; are we seeing the ICC providing a forum for civil claims or has the notion of ‘International Criminal Responsibility’ developed to such an extent as to recognise reparations as a corollary of such responsibility?

This paper argues that in fact the obligation under Art.75 of the Statute to reconstruct the status quo ante should be understood as a form of penal sanction that is imposed directly by the International Criminal Responsibility of the perpetrator, rather than a system where victims may make civil claims for damages. While the cause for confusion in the understanding in reparation orders can be traced back to the travaux préparatoires where proposals with different understandings were merged without sufficient consideration, given the fact that many crimes that fall within the Court’s jurisdiction could lead to collective or joint liability under tort law, it is difficult to see how it could be fair to transplant this without a system which would allow the defendant to make similar claims against its co-perpetrators.

At the same time, this paper intends to highlight discrepancies among the case law of the ICC on the understanding of reparation orders. More specifically, the differentiation between International and Ordinary Crimes is seemingly losing significance, especially in the Court’s determination on the extent of reparations where one the one hand, reparations are ordered for crimes which the perpetrator was found responsible for, but on the other hand damages caused by crimes which were not the basis for conviction, or other ‘ordinary crimes’ are being included. A similar phenomenon can be seen in the Court’s current president’s opinion in Ruto and Sang where Judge Eboe-Osuji, while stating that a guilty verdict is not a

* PhD Candidate, University of Tokyo; JSPS Research Fellow
precondition for Art.75 reparation orders, hints that ordinary crimes could also form a basis for reparations. This erosion of a strict division between international and ordinary crimes can be precisely linked to the understanding of reparation orders which has shifted the Court’s focus from the perpetrators responsibility to the actual damages incurred.
Implementing International Crimes in National Legal Orders:  
An Appraisal of Asian State Parties to the Rome Statute

Daley J. BIRKETT* 

Abstract:

For the International Criminal Court (ICC or Court) to be able to function effectively, its State Parties need to incorporate its constituent instrument, i.e. the Rome Statute of the International Criminal Court (Rome Statute), into their respective domestic legal orders – a process known as implementation. The implementation process serves two purposes. First, enacting national implementing legislation permits State Parties to fulfil their obligation under the Rome Statute to ensure that they possess procedures under their respective national law for “all of the forms of cooperation” specified in Part IX thereof and, further, their general obligation to “cooperate fully with the Court in its investigation and prosecution” of the offences within its jurisdiction. Second, the ICC is a “court of last resort”. In other words, by virtue of complementarity, the principle that governs the Court’s relationship with national courts, the jurisdiction of the ICC is only triggered if the national courts of the State Party are unwilling or unable to investigate or prosecute. Implementing the offences listed in the Rome Statute enables its State Parties to exercise primary jurisdiction, in accordance with the principle of complementarity.

The State Parties to the Rome Statute are not subjected to an explicit obligation to implement the crimes listed therein. In other words, despite the evident desirability of doing so, not least to fulfil the principle of complementarity, the decision to implement the Rome Statute crimes (genocide, crimes against humanity, war crimes, and aggression) remains at the discretion of the State looking to enact such legislation. Of the 123 State Parties to the Rome Statute at the time of writing, approximately 40% have yet enact specific national implementing legislation. This absence is particularly marked in Asia. This paper evaluates whether and, if so, the extent to which 13 Asian State Parties to the Rome Statute (i.e. Afghanistan, Bangladesh, Cambodia, Cyprus, Japan, Jordan, Maldives, Mongolia, Palestine, Philippines, Korea, Tajikistan, Timor-Leste) possess such dedicated legislation. The paper draws upon existing literature examining domestic implementation of the Rome Statute in certain Asian ICC State Parties, for example Cambodia, Japan, and the Republic of Korea, which have already been subjected to academic scrutiny. At the same time, the paper aims to shed light upon the Rome Statute implementation process in other domestic jurisdictions subjected to a paucity of scholarly attention.

The paper demonstrates that, where incorporated at all, in implementing the crime of genocide and war crimes, some Asian States that form the subject of the present study adopt or refer to the wording of the Genocide and Geneva Conventions, though there are notable discrepancies. The paper also shows that crimes against humanity and aggression have been implemented in a piecemeal manner. The paper concludes that any gaps in coverage ought to be filled in order that Asian ICC State Parties might be able to perform the critical role envisaged for them by the principle of complementarity and the Rome Statute system of justice more widely.

* LL.M. (Leiden); Research Fellow, War Reparations Centre, Amsterdam Center for International Law, Faculty of Law, University of Amsterdam; Research Associate, Walther Schücking Institute for International Law, Faculty of Law, University of Kiel.
African Solutions to African Problems?: Legal Dilemmas Confronting the Special Criminal Court in the Central African Republic

Suhong Yang*

Abstract

The Special Criminal Court (SCC) in the Central African Republic (CAR) is one of the most recent efforts to seek justice on the land of Africa. The SCC was established within the CAR judicial system by a 2015 domestic legislation to investigate serious violations of human rights and of international humanitarian law committed on the territory of the CAR since 1 January 2003, as defined in the CAR Penal Code and international law. From a formalist legal perspective, the SCC is a national court fully integrated into the CAR judiciary. In practice, however, the United Nations (UN) and the international community have played an instrumental role in the establishment and operation of the SCC. The UN peacekeeping mission in CAR, known by its French acronym MINUSCA, and the UN Development Programme had an outsized influence in the SCC’s Organic Law. International actors and foreign donors have provided vital logistical, technical, and financial support to the SCC. Some mixed international elements, for example, the combination of domestic and international law, and international and local personnel, make the SCC a *de facto* hybrid court, or an internationalized domestic court.

The SCC provides a platform to explore how international human rights, humanitarian, and criminal law accommodate to the domestic legal system, how domestic and international judiciaries cooperate to seek justice and accountability for atrocity crimes, and what practical considerations and strategies could be inspiring to addressing impunity for perpetrators. This paper firstly introduces the Organic Law of the SCC, including the domestication of Genocide, Crimes against Humanity, and War Crimes and the expansion of international crimes, and analyzes potential legal conflicts within relevant domestic legislations and international law, including the immunity clause under the CAR Constitution and the non-retroactivity requirement under the CAR Penal Code. Secondly, it addresses some legitimacy concerns regarding the SCC’s relationship to the International Criminal Court (ICC) and general domestic courts, its composition of judges and prosecutors, and its prosecutorial strategy. Some argue the concurrent jurisdiction among the ICC, the SCC, and other domestic courts with a priority to the ICC endangers and reverses the ICC’s principle of complementarity. It is also interesting to look into whether judges and prosecutors at the SCC represent diverse nationalities, genders and religions, and enjoy equal payment. A prosecutorial strategy for case selection is important to organize the work of the court and manage perceptions about what the SCC can or cannot realistically achieve. Finally, this paper discusses the prospects of the SCC by pointing out some practical difficulties and current progress from both international and domestic perspectives.

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*Suhong Yang is a doctorate S.J.D. Candidate at Georgetown University Law Center. Her field of interest and expertise focuses on international criminal law and human rights. She is working under the supervision of Professor Jane E. Stromseth. To contact her, please email her at sy510@georgetown.edu.
The intersection of Transnational and International Criminal Law
- example of trafficking in persons

Abstract: International response to organized crime has formed a part of a new area of law - transnational criminal law. The term 'transnationality' itself, although applied many years ago by Phillip Jessup, has found its way into treaty usage only in the year 2000, namely in Transnational Organized Crime Convention (UNTOC). From this moment we can observe emergence of 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". Most important feature of suppression conventions is the obligation to criminalize certain acts in the domestic legal systems of state-parties. That is why, unlike in the area of international criminal law, a person who commits a crime in an object, not a subject of given convention. It is however important to note, that there are crimes that belong to both these areas of law - trafficking in persons is one of the most notable examples. Interestingly - 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). The definition of trafficking in persons is to be found in so called " Trafficking Protocol" supplementing UNTOC; under certain circumstances however, trafficking in persons can constitute an international crime within the meaning of Rome Statute (crime against humanity or war crime). This relation is also 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.

Trafficking in persons has recently gathered great deal of attention from scholars, practitioners and politicians, nevertheless theoretical aspects concerning that notion and its relations with other concepts present in international law (such as slavery, practices similar to slavery, enslavements etc.) have been neglected. As this notion appears at the intersection of different areas of law, including Transnational

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1 P. C. Jessup, 'Transnational Law' (New Haven: Yale UP 1956) 3
and International Criminal Law, its closer analysis can contribute to determination of theoretical boundaries of both areas of international law.
Revisiting international and transnational crimes: perspectives from the proposal for an International Court against Terrorism

International criminal law is commonly considered as a product of the convergence of two disciplines: the criminal aspects of international law and the international aspects of national criminal law. Within the first group, we find “true” international crimes against cores values of the international community, such as the crimes of articles 5-8 of the ICC Statue. These conducts entail direct individual responsibility and the obligation of every State to punish the offender, independently of whether it is criminalized under domestic criminal law and whether the traditional grounds of jurisdiction can be applied to the case. Transnational crimes are included within the second group, and they are based on the so-called suppression conventions. In general terms, only States parties to the conventional framework have the obligation to punish the offenders based on certain principles of jurisdiction, and the individual responsibility is based on domestic criminal law. Therefore, while transnational crimes are related to international law only because of the need for cooperation’s mechanisms with other States for the application of national justice, international crimes are based in international law as far as the interest protected is, precisely, the international community as a whole.

There is little discussion nowadays about the international nature of the crimes against humanity, war crimes and genocide. Conversely, oceans of ink have been drained in attempts to define the crime of terrorism and its nature. Some authors suggest that it is an authentic international crime. Based on its exclusion from the ICC Statute, however, the majority of the doctrine agrees to consider terrorism as a transnational crime which is, nowadays, dependent on national criminal law and that only requires from international law the mechanisms of cooperation, such as extradition, for its prevention and suppression.

Despite of its general consideration as a transnational crime, recent developments in the fight against terrorism makes highly worthy to review the elements which define these two categories of crimes, as well as the consequences of belonging to one group or the other. We refer, specifically, to the recent proposal put forward by Spain and Romania for the creation of an International Court Against Terrorism. Several projects have already considered the possibility of including the crime of terrorism in an international jurisdiction with general scope, either as an exclusive competence or as a part of a wider list of crimes. However, certain legal and political obstacles have blocked the developments in this field. We propose to analyse the main elements and problems of this new proposal in order to determine its viability to evolve from lege ferenda to lege data, specially from the point of view of transnational and international crimes.