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van der Wilt, H.

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1. Legal responses to transnational and international crimes: towards an integrative approach?

Harmen van der Wilt

1 INTRODUCTION

In international criminal law doctrine, a distinction is usually made between international crimes *stricto sensu* and transnational crimes. The first mentioned category covers the most heinous crimes that ‘threaten the peace, security and well-being of the world, are of concern to the international community as a whole and must not go unpunished’, as the Preamble to the Rome Statute of the International Criminal Court (ICC) puts it eloquently.¹ They include a limited number of ‘core’ crimes – genocide, crimes against humanity, genocide, aggression – that involve criminal responsibility under international law. Moreover – and related to this – they entail a number of specific legal consequences, like not being subjected to statutes of limitations and the abolition of immunities for perpetrators of those crimes.² But most important of all, the suspects of these crimes can be exposed to the jurisdiction of international criminal tribunals and the ICC.

Transnational crimes do not arouse a similar moral and legal opprobrium. They concern harmful activities, whose volatile nature constitutes a nuisance for national law enforcement. The fact that they often simultaneously affect the ‘parochial’ interests of several states is an

¹ Preamble to the Rome Statute of the International Criminal Court, Rome, 17 July 1998, U.N. Doc. A/CONF. 183/9, International Legal Materials, 1998, 999.

² Compare, respectively, Articles 29 and 27 of the Rome Statute (n 1).

incentive for closer cooperation between those states.³ Transnational crimes are the subject of so-called ‘suppression conventions’, which instruct states parties to incorporate elements of transnational crimes – like, for instance, illicit trafficking in drugs or cybercrime – in their own legislation, create a watertight system of criminal law enforcement on the basis of the *aut dedere, aut judicare* (either surrender or prosecute) principle and render mutual assistance in criminal matters. While criminal law enforcement thus acquires a vigorous international component, it essentially remains a domestic affair.

The distinction between the two categories has old credentials,⁴ and is still current in modern legal literature.⁵ Nonetheless, the taxonomy has increasingly been contested and has been censured as being flawed or at least obsolete. One of the earlier writers favouring a more comprehensive approach was Mahmoud Cherif Bassiouni who, for the purpose of drafting a Code of International Crimes, identified no less than 22 criminal offences, including, next to the ‘core crimes’, such disparate crimes as theft of nuclear waste, piracy and environmental crimes.⁶ In the opinion of Cherif Bassiouni, these crimes should ideally be investigated, prosecuted and tried by a permanent international criminal court (the so-called *direct enforcement model*), but as long as such a court had not materialised, their criminal repression should be undertaken by bold inter-state cooperation, spurred and sustained by ‘suppression conventions’ (*indirect enforcement model*). It is clear that the Rome Statute has not followed Cherif Bassiouni’s suggestions, but the discussion on possibly expanding the jurisdiction of the ICC has continued unabated.⁷ Generally, three arguments are advanced in favour of extension of the

³ For a profound discussion of the distinction between ‘parochial and universal’ legal interests, see George P. Fletcher, ‘Parochial versus Universal Criminal Law’ (2005) 3 *Journal of International Criminal Justice* 20.

⁴ See for instance H.H. Jescheck, ‘Gegenstand und neueste Entwicklung des internationalen Strafrechts’ in F.C. Schroeder (ed.), *Festschrift für Reinhart Maurach zum 70 Geburtstag* (C.F. Müller 1972).

⁵ See for instance the latest edition of *Cassese’s International Criminal Law*, revised by: A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting (Oxford University Press 2013) 18–21.

⁶ M. Cherif Bassiouni, *International Criminal Law; A Draft International Criminal Code* (Dordrecht 1987).

⁷ A strong champion of expansion of the subject-matter jurisdiction of the ICC with transnational (organised) crime is Andreas Schloenhardt, ‘Transnational Organised Crime and the International Criminal Court: Developments and Debates’ (2005) 24 *University of Queensland Law Journal* 93.

Court's jurisdiction with (some) transnational crimes.⁸ For one thing, the criterion of 'extreme seriousness' is censured as being arbitrary, especially since crimes may easily spill over from one category to the other. The dividing line between trafficking in human beings and slavery, for instance, is porous and the former may qualify as a crime against humanity, provided that the contextual elements are met.⁹ Secondly, transnational offences and 'core crimes' are often intertwined in the sense that they facilitate each other. Both rebels and state officials engage in illicit drugs trade in order to finance their operations which entail the commission of core crimes. And finally, one may wonder whether, in view of the close connection between the two categories, criminal law enforcement in respect of transnational crimes will not encounter similar difficulties (as the repression of core crimes) that might warrant the search for other solutions at a supranational level.

The relationship between transnational crimes and 'core crimes' (or international crimes *stricto sensu*) and the quest for finding the most appropriate level of criminal law enforcement in respect of transnational crimes is the central topic of this book. A number of the chapters address specific crimes and investigate whether these crimes would qualify to be 'upgraded' to a supranational level of law enforcement. Other contributors have reflected more generally on the pros and cons of the direct and indirect enforcement model in relation to the special nature of transnational crimes. The reader should not expect a clear-cut and commonly held conclusion. Apart from reflecting personal preferences, the chapters demonstrate that 'the most appropriate solution' may differ from crime to crime. The objective of this work is rather to increase our understanding of the ways in which crime and criminal law enforcement are interrelated.

This introduction draws heavily on and is inspired by the interesting contributions. It will give due credit to them whenever appropriate. It serves to give a bit of structure to the discussion and put the issues in a somewhat broader perspective. To that purpose, I intend to explore the following aspects. First, I will address the original rationales for creating a system of supranational criminal law enforcement in respect of core

⁸ On the reasons for leaving out particular crimes, like drug offences, terrorism and mercenarism, see Patrick Robinson, 'The Missing Crimes' in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002).

⁹ Compare Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (2005) 54 *International Comparative Law Quarterly* 445.

crimes (Section 2). Next, I will give a brief impression of the differences and commonalities between core crimes and transnational crimes and how these affect the choice of law enforcement. The assumption here is that transfer of transnational crimes to a supranational level is only warranted if the current system of law enforcement appears to be deficient (Section 3). In Section 4, I will investigate whether expansion of the powers of the ICC with subject-matter jurisdiction over transnational crimes is likely to yield benefits in terms of efficiency and fair trial. In Section 5 I will inquire whether there are any feasible alternatives, for instance through the creation of regional criminal courts. And I will end with some final reflections (Section 6).

2 ON THE RATIONALES OF SUPRANATIONAL LAW ENFORCEMENT

The investigation into the conceptual relationship between transnational crimes and international crimes *stricto sensu* should start with an inquiry into the question of what makes the latter category so special. As indicated before, the Preamble to the Rome Statute of the ICC stipulates that the intent to end impunity relates to the perpetrators of ‘the most serious crimes of concern to the international community as a whole’. This obviously begs the question which crimes would affect these universally shared interests. A restrictive understanding would probably limit the category to a worldwide ecological disaster or similar global Armageddon caused by nuclear warfare.¹⁰ The recognition in the Rome Statute that these grave crimes ‘threaten the peace, security and well-being of the world’ points in that direction. However, a brief look at the subject-matter jurisdiction of the ICC immediately makes clear that such a limited interpretation was never intended. Many scholars and commentators have observed that the core crimes under the jurisdiction of the

¹⁰ It is ironical that Article 8 of the Rome Statute does not explicitly acknowledge the use of nuclear weapons as a war crime. Article 8, section 2(b), sub (xx) mentions ‘the employment of weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict’. However, the provision continues that ‘such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123’. Nuclear weapons do not feature in such an annex to the Statute.

ICC are forms of system criminality that require involvement of or at least condoning by the state.¹¹ Their identification as a special category has both moral underpinnings and pragmatic reasons. Mass atrocities committed by a state against its own people ignite our special reprobation, because we feel that the state perverts its powers and forsakes its prime function, that is to safeguard the security and well-being of its citizens. Moreover, the state's unwillingness or incapacity to exercise its powers of law enforcement not only justifies but requires intervention of the international community by proxy of the ICC. Larry May has aptly condensed the state's moral and political decay and concomitant right or duty of the international community to intervene in his security principle.¹² May argues:

If a State deprives its subjects of physical security or subsistence, or is unable or unwilling to protect its subjects from harms to security or subsistence, (a) then that State has no right to prevent international bodies from 'crossing its borders' in order to protect those subjects or remedy their harms; (b) and then international bodies may be justified in 'crossing the borders' of a sovereign State when genuinely acting to protect those subjects.¹³

In his book, May contends that such a deprivation of physical security or subsistence is characteristic for crimes against humanity. The security principle is the first important hurdle to take, in order to justify international interference in criminal law enforcement, but according to

¹¹ Compare M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd edn Kluwer Law International 1999) 243–6; Antonio Cassese, *International Criminal Law* (2nd edn Oxford University Press 2008) 7: 'Strikingly, most of the offences that international criminal law proscribes and for the perpetration of which it endeavours to punish the individuals that allegedly committed them are also regarded by international law as wrongful acts by states to the extent that they are large-scale and systematic: they are international delinquencies entailing the "aggravated responsibility" of the state on whose behalf the perpetrators may have acted.' G. Werle, *Principles of International Criminal Law* (2nd edn T.M.C. Asser Press 2009) 41: 'Crimes under international law typically, though not necessarily, presume state participation.' William Schabas, *Unimaginable Atrocities* (Oxford University Press 2012) 44: 'crime is internationalized primarily because of impunity before the national jurisdiction, that is, because national justice systems fail to prosecute. The reason why they fail is, as a general rule, because the government itself is complicit.'

¹² Larry May, *Crimes against Humanity: A Normative Account* (Oxford University Press 2005) 72–5.

¹³ *ibid* 68.

May it does not suffice for an intervention in the sovereign affairs of the state. The individual defendant's right to be judged by his or her 'natural judge' (*ius de non evocando*) is at stake as well and this can only be overruled by the international harm principle. This principle is triggered when the crimes display collective features, either in respect of the perpetrators or of the victims.¹⁴ There is the suggestion here that 'group-based' crimes cannot be contained to one geographical region and may easily spill over, thus affecting international peace and security. In a similar vein, David Luban has sought the gist of crimes against humanity in the state's betrayal of its populace.¹⁵ As political animals, we human beings are doomed to live and organise ourselves in groups under the shelter of governments, wielding monopoly of sword power. Luban argues that 'the legal category of "crimes against humanity" recognizes the special danger that governments, which are supposed to protect the people who live in their territory, will instead murder them, enslave them, and persecute them, transforming their homeland from a haven to a killing field'.¹⁶ Luban's observation that 'crimes against humanity are committed against groups or population; they are also committed *by* groups – by states or state-like organisations' echoes May's analysis of crimes against humanity as group-based crimes.¹⁷ And he also agrees with May that the state's betrayal of its citizens constitutes the ultimate justification for the international community to intervene: 'To criminalise acts of government toward groups in its own jurisdiction, and thus to pierce the veil of sovereignty through international criminal law, is tantamount to recognizing that the cancerous, autpolemic character of crimes against humanity represents a perversion of politics, and thus a perversion of the political animal.'¹⁸

If we accept May's and Luban's normative analysis, we should perhaps concede that transnational crimes generally do not meet the parameters of the security and harm principle. Transnational crimes are usually not

¹⁴ *ibid* 83: 'Only when there is serious harm to the international community, should international prosecutions against individual perpetrators be conducted, where normally this will require a showing of harm to the victims that is based on non-individualised characteristics of the individual, such as the individual's group membership, or is perpetrated by, or involves a State or other collective entity.'

¹⁵ David Luban, 'A Theory of Crimes against Humanity' (2004) 29 *Yale Journal of International Law* 85.

¹⁶ *ibid* 117.

¹⁷ *ibid* (emphasis in original).

¹⁸ *ibid*.

committed by the state.¹⁹ Nor are they generally targeting a particular group. To a large degree these are profit-driven crimes of opportunity. From a purely phenomenological point of view it may therefore make sense to distinguish between transnational crimes and international crimes *stricto sensu*. However, this conclusion is too quick. At first blush, the security principle reflects the paradigmatic case of a strong, dictatorially governed state oppressing its own population. But May's analysis allows for inclusion of 'weak states', whose power position is challenged by mighty contenders, as well. After all, he ties the right of the international community to intervene explicitly to the state's unwillingness or *inability* to secure the life, liberty and property of its subjects. This seems to suggest that crimes against humanity can also be committed by powerful non-state actors. Article 7 of the Rome Statute itself acknowledges that crimes against humanity can be committed by non-state actors by defining an "attack against any civilian population" as a course of conduct involving the multiple commission of acts ... pursuant to or in furtherance of a State *or* organisational policy to commit such attack'.²⁰ The use of the disjunctive 'or' already clarifies that the perpetrator need not be a state. The question of what features organisations must possess in order to reach the threshold of potential perpetrators of crimes against humanity was discussed by the ICC in its Kenya case.²¹ According to the majority of the Pre-Trial Chamber, 'the formal nature of a group and the level of its organisation should not be the defining criterion. Instead ... a distinction should be drawn on whether the group has the capability to perform acts which infringe on basic human values'.²² The Chamber noted that 'the determination whether a group qualifies as an organisation under the Statute must be made on a case-by-case basis' and identified a number of parameters that should be taken into consideration when making such an assessment.²³ It came to the conclusion that 'various groups including local leaders, businessmen and politicians associated with the two leading parties, as

¹⁹ Compare Schabas (n 11) 45: 'Drug crimes probably do not belong in the list, because they are not as a rule committed by states or with their complicity. National justice systems are usually more than willing to prosecute such offences and fall short only because of failings in international cooperation mechanisms.'

²⁰ Rome Statute (n 1), Article 7 (2), sub (a).

²¹ *Situation in the Republic of Kenya*, Decision of the Pre-Trial Chamber Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010.

²² Kenya decision (n 21) § 90.

²³ Kenya decision (n 21) § 93.

well as members of the police force constituted organisations within the meaning of Article 7(2)(a) of the Statute'.²⁴ In his dissenting opinion, Judge Kaul, adhering to the principle of strict construction and following a historical-teleological interpretation, favoured a more restrictive approach.²⁵ He argued that an organisation within the meaning of Article 7 of the Statute must partake of some characteristics of a state and mentioned these characteristics.²⁶

In other words: there is a certain tendency to expand the concept of 'organisation' for the purpose of supranational law enforcement, but it is still rather difficult to draw the line, because of the differing opinions on the proper limits. Claus Kress has correctly observed that the selection of organisations that would qualify as perpetrators of crimes against humanity should be guided by the deeper rationales to establish the ICC in the first place.²⁷ After having noted that the chances of genuine investigations into international crimes are slight if the state itself is involved he contends that 'a similar measure of doubt will arise when the non-state organisation behind the attack has established so powerful a presence in a given state that it can prevent the exercise of criminal jurisdiction in that state. In both cases, the judicial intervention by the international community is warranted.'²⁸ The comment refers to Larry May's principles and seems an adequate yardstick to assess whether the ICC's jurisdiction should be expanded to cover transnational organised crime.

²⁴ Kenya decision (n 21) § 117.

²⁵ *Situation in the Republic of Kenya*, Dissenting Opinion of Judge Hans-Peter Kaul, ICC-01/09, 31 March 2010.

²⁶ Dissenting Opinion of Judge Kaul (n 25) § 51: 'Those characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; (f) which has the capacity and means available to attack any civilian population on a large scale.'

²⁷ Claus Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *Leiden Journal of International Law* 855.

²⁸ Kress (n 27) 866.

3 TRANSNATIONAL ORGANISED CRIME AND DOMESTIC LAW ENFORCEMENT

The persisting confusion on the question of which organisations would qualify as potential perpetrators of crimes against humanity has offered the advocates of a broader jurisdictional mandate of the ICC, including transnational crime, opportunities to develop their claims. Organised crime is often presented as a bulwark of highly structured networks, engaging in a host of illegal activities, like drugs trade, human trafficking, corruption and money laundering, which defy official power and are immune to law enforcement. Taking the yakuza – members of Japanese transnational organised crime syndicates – as a glaring example, Jennifer Smith argues that ‘states cannot effectively protect their citizens from organised crime because organised crime groups have important economic power and may have political influence’.²⁹ The main thrust is that organised crime does not differ essentially from powerful political contenders in their capacities to subvert law and order. In language, strongly reminiscent of May’s analysis, Smith contends:

large criminal organisations pose the same dangers of group-based harm as political organisations, paramilitaries, and state-like entities. Groups like the yakuza have a similar hierarchical structure to such organisations. The yakuza command as much obedience as political organisations, paramilitaries and state-like entities, if not more. Further, the yakuza’s strict code of conduct magnifies the group-based harm it poses.³⁰

The plea for engaging the ICC in the suppression of transnational organised crime is sustained by the complaint that domestic law enforcement, even when boosted by international cooperation, is chronically inadequate.³¹

To be sure, there is some truth in these contentions. Especially in politically weak and poor countries, domestic criminal law enforcement is no match for transnational organised crime and the horizontal system

²⁹ Jennifer M. Smith, ‘An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity’ (2009) 97 *The Georgetown Law Journal* 1111, 1133.

³⁰ Smith (n 29) 1134.

³¹ Schloenhardt (n 7) 94, for instance, asserts that ‘the current system of domestic and international law on transnational organised crime leaves too many loopholes for criminals; it allows for too many concessions which can be made by Signatories; and it has in many instances failed to bring the principal organisers of global criminal operations to justice’.

of state cooperation is ineffective.³² Moreover, national jurisdictions might well be biased and lack impartiality in dispensing justice in respect of transnational crimes, which might lead to either laxity or uncommon harshness and the incapacity to guarantee a fair trial. In discussing the legal control of international terrorism, M. Cherif Bassiouni points at the patchwork of international treaties that contain divergent definitions and lack a coherent approach, integrating the modalities of international cooperation. He mentions in particular the deficiencies in the exchange and sharing of intelligence, where poor regulation and petty competitiveness at the national level are repeated and even multiplied in international collaboration.³³

While it is submitted that the indirect – horizontal – enforcement model is far from perfect, the plea for bringing transnational organised crime under the jurisdiction of the ICC raises two, interrelated questions. First of all, one may wonder whether the focus on the disadvantages of the current model of inter-state cooperation is not slightly exaggerated or lopsided. Secondly, it should be investigated whether the ICC can be expected to do a better job.

The criticism on indirect enforcement by international cooperation sometimes reveals poor understanding of the inherent limitations of the model that partially hail from the principle of sovereign equality of states and partially serve to protect the rights of criminal defendants. In

³² Neil Boister, 'Treaty Crimes, International Criminal Court' (Summer 2009) 12(3) *New Criminal Law Review: An International and Interdisciplinary Journal*, 341, 342: 'Unfortunately, the existing treaty crimes do not always provide procedural mechanisms effective in solving the problems that some developing states have with the suppression of these crimes.' Christopher 'Kip' Hale, 'Does the Evolution of International Criminal Law End with the ICC? The "Roaming ICC": A Model International Criminal Court for a State-Centric World of International Law' (2007) 35 *Denver Journal of International Law and Policy* 429, 441: '[S]overeign States using universal jurisdiction have patently failed and will continue to fail at bringing justice to the commission of international crimes.'

³³ M. Cherif Bassiouni, 'Legal Control of International Terrorism: A Policy-Oriented Assessment' (2002) 43 *Harvard International Law Journal* 94: 'National systems ... distribute these functions between competing bureaucratic agencies, thus reducing their individual and combined effectiveness. Furthermore, each separate national agency tends to develop ad hoc relationships with its counterparts in a select number of countries; so whatever information that is shared between corresponding agencies of different countries runs into the same intra-national bureaucratic impediments to information sharing and cooperation.'

discussing time-honoured tenets of extradition law, like the non-extradition of nationals, the dual criminality rule and the political offence exception, and presenting these as impediments to effective law enforcement, Andreas Schloenhardt seems to forget that these legal constructions have been invented to accommodate precisely those aspects.³⁴ And when Jennifer Smith laments that the UN Convention against Transnational Organised Crime ‘only requires legislatures to pass crime control laws and executive branches to share information with other states and extradite criminals’, adding that ‘it does not speak to judiciaries, which ultimately punish criminals and thus vindicate the harms that criminals have wreaked upon society’, she distorts the working of international law that creates obligations for states and is never directed to state organs.³⁵ Moreover, she fails to explain whether the direct enforcement model can release itself from the dependence on state cooperation, an issue that will be addressed in the next section.

A choice between the indirect – inter-state – enforcement model and the direct enforcement model cannot be made in the abstract, because it depends on the nature of the crime. The proponents of expansion of the jurisdiction of the ICC acknowledge this by submitting that domestic law enforcement in combination with international cooperation is ineffective *in relation to* transnational organised crime. Their plea for ‘upgrading’ transnational organised crimes to the level of international crimes hinges on the similarity between transnational crimes and international crimes *stricto sensu*. As in the case of core crimes, they seem to argue, there is no other option than to resort to supranational law enforcement.

The strongest case for such a minimalist position, based on the commonalities between the two categories, is probably the situation in which these types of crimes coincide. It cannot be denied that transnational organised crime, war crimes and terrorism often occur in tandem and therefore cannot be easily distinguished. Louise Shelley’s book is replete of such ‘dirty entanglements’.³⁶ She vividly describes how corruption and terrorism are entwined in multifarious ways. Pervasive corruption can create a fertile ground for the recruitment of disenfranchised youths who radicalise due to lack of opportunities. Terrorist groups can act as service providers, supplanting the corrupt state. The linkage is

³⁴ Schloenhardt (n 7) 95.

³⁵ Smith (n 29) 1120.

³⁶ Louise I. Shelley, *Dirty Entanglements: Corruption, Crime and Terrorism* (Cambridge University Press 2014).

more direct when corruption facilitates terrorism.³⁷ In these instances transnational crime furthers or procures terrorism, but the connection becomes even more intimate when the perpetrators coincide. The currency of the term *narco-terrorism* reflects the reality of terrorist groups financing their activities with the revenues of illicit drugs trade.³⁸ One may perhaps retort that it is not entirely clear whether terrorism constitutes an international crime *stricto sensu* itself. This is indeed a contested issue, as terrorism is not a separate offence under the jurisdiction of the ICC. However, when committed during and in connection with an armed conflict it certainly qualifies as a war crime.³⁹ The interaction between core crimes and transnational crimes may reside in the person of the perpetrator, but it may be situational or causal as well. Transnational crimes may breed conflicts that offer a rich environment for the commission of war crimes or even crimes against humanity.⁴⁰ In short, the interaction between transnational (organised) crime and international crime can take two forms, as Mark Galeotti has aptly observed. For one thing, organised crime can facilitate international crimes by providing valuable goods and services to terrorists, insurgents or state actors that engage in terrorism or war crimes. And secondly, there may be a complete merger of both categories in the person of the perpetrator, when state or non-state actors that fight each other engage in transnational crimes in order to finance their operations.⁴¹

Now it could be argued that these crimes can be prosecuted and tried by different – international and domestic – courts. In the case of distinct perpetrators that might indeed be feasible, although for reasons of procedural efficiency, evidence gathering and to obtain a comprehensive picture concentration of cases in one legal system would be preferable. If perpetrators engage in the commission of both transnational crimes and

³⁷ Shelley (n 36) 83: ‘Beslan could not have been perpetrated without endemic corruption of civilian and military law enforcement in the North Caucasus. In another deadly attack in southern Russia, for a bribe, a police officer even escorted the terrorist and his deadly explosives to the scene in a police van.’

³⁸ Shelley (n 36) 112–13 and 220–1.

³⁹ Compare Braber, Chapter 5 in this volume, pp. 92–106 and Ben Saul, ‘Terrorism and International Humanitarian Law’ in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) Chapter 13.

⁴⁰ Compare Ilias Bantekas, ‘Corruption as an International Crime and Crime against Humanity’ (2006) 4 *Journal of International Criminal Justice* 466, observing that ‘corrupt behaviour also fuelled and continues to fuel civil wars.’

⁴¹ Mark Galeotti, ‘Transnational Organised Crime: Law Enforcement as a Global Battlespace’ (2002) 13 *Small Wars and Insurgencies* 29, 35–6.

terrorism or war crimes – and these crimes are interrelated – dispersal over several jurisdictions is even more arbitrary and far-fetched. Whereas a strong argument can thus be made for some form of supranational law enforcement in the case of fusion of international crimes and transnational organised crime in general, developing countries in particular are likely to benefit from such institutional initiatives. Organised crime and terrorism benefit from the decline of the state.⁴² Their union in particular thrives on weak and fragile states.⁴³ It obviously does not imply that they do not operate in stronger states with well-developed institutions as well, but deficient law enforcement is an additional advantage. All the arguments that have been advanced in this section and the previous one to sustain a potential transfer of transnational organised crime to a supranational or regional level would *a fortiori* apply in the case of merger of transnational crimes and international crimes in weak and fragile states. Transnational crime and international crime have much in common in that domestic law enforcement is either unwilling or unable to cope with it. The prime incentive for ‘upgrading’ transnational crimes to the category of international crimes is therefore that it would authorise the transfer of criminal jurisdiction to a regional or international level, in view of the incapacity of the state to counter transnational (organised) crime. This reminds us of Larry May’s first security principle, legitimising the intervention of the international community. It should be recalled in this context that the initiatives of Trinidad and Tobago to establish a permanent international criminal court emerged from its being overwhelmed by gangs engaging in drug trafficking which threatened the very existence of the state.⁴⁴ For third world developing countries in

⁴² See the ‘classic’ work of Martin van Creveld, *The Rise and Decline of the State* (Cambridge University Press 1999) 394–408.

⁴³ Shelley (n 36) 156–7: ‘There is a widely held perception and a significant literature that support the idea that the interactions of criminals and terrorists are most pronounced in fragile state and conflict regions ... These international support networks are crucial because failed states lack communications, infrastructure for travel, and an environment in which criminals and terrorists can coordinate their activities transnationally and keep their supply chains functioning.’

⁴⁴ In Resolution 44/39 (4 December 1989), the General Assembly requested the International Law Commission to consider the establishment of an ICC with jurisdiction over drug trafficking and acknowledged the ‘established link between illegal trafficking in narcotic drugs and other recognised criminal activities which endanger the constitutional order of states and violate basic human rights.’ For a vivid description of the quest of Trinidad and Tobago which did not yield success, see Neil Boister (n 32) 342–4.

particular the multilateral treaties on cooperation in criminal matters often do not suffice, especially if organised crime and terrorism join forces.⁴⁵

This section and the previous one have demonstrated that, while transnational crimes and international crimes can conceptually be distinguished, there may be situations in which the reasons for transfer of jurisdiction to a supranational institution equally apply. That interim conclusion encourages the search for other solutions, but it does not imply that the ICC would be the most eligible one. Whether involvement of the ICC would be an improvement is the topic of the next section.

4 SHOULD THE JURISDICTION OF THE ICC BE EXPANDED WITH TRANSNATIONAL CRIMES?

The search for more effective systems of law enforcement in respect of transnational crimes, beyond the realm of domestic jurisdictions, raises a number of legal and practical questions. The most principled issue is whether states are at liberty to expand the notion of international crimes by adding new (transnational) offences. After all, international crimes derive their special status from the fact that individuals directly incur individual criminal responsibility on the basis of customary international law.⁴⁶ This *Tadić* principle was confirmed by the International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu* case, where the Trial Chamber held:

Even if Article 6 of the Statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Otherwise, it

⁴⁵ Compare John Hatchard, 'Combating Transnational Crime in Africa: Problems and Perspectives' (2006) 50 *Journal of African Law* 145.

⁴⁶ Responding to the applicant who denied that serious violations of international humanitarian law in non-international armed conflicts triggered individual criminal responsibility, the ICTY Appeals Chamber in *Tadić* held that 'All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.' *Prosecutor v. Tadić*, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, § 134.

might be argued that these instruments only state norms applicable to States and Parties to a conflict, and that they do not create crimes for which individuals may be tried.⁴⁷

In the case of transnational crimes, individual criminal responsibility is ultimately predicated on national law, even if the state is duty bound by treaty law to create such responsibility.⁴⁸ It is therefore open to doubt whether states, by entering into a convention, could create individual criminal responsibility under customary international law for other (transnational) crimes. On the other hand, the Appeals Chamber in *Tadić* has downplayed its previous finding that only customary international law could be the appropriate source for individual criminal responsibility by holding that:

the International Tribunal is authorised to apply, *in addition to customary international law*, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law.⁴⁹

Moreover, the Rome Statute allows both for amendments to and a review of the Statute, explicitly mentioning the possibility of expanding the list of crimes contained in Article 5.⁵⁰ The second sentence of Article 121, section 5, which stipulates that the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by a state party's nationals or on its territory if that state party has not accepted that amendment, is still reminiscent of the consensual character of the Statute.

⁴⁷ *Prosecutor v. Akayesu*, Judgment of the Trial Chamber, Case No. ICTR-96-4-T, 2 September 1998, § 611.

⁴⁸ See *Cassese's International Criminal Law* (n 5) 20–21.

⁴⁹ *Prosecutor v. Tadić*, Ap. Ch. (n 46) § 143 (emphasis added).

⁵⁰ Rome Statute, Article 121, section 5 and Article 123, section 1 respectively. Article 123, section 1 provides that 'Seven years after the entry into force of this Statute, the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5.' It is noteworthy that, during the first Review Conference of the Statute in Kampala, Uganda in 2010, the Netherlands proposed to expand Article 5 with the crime of terrorism. As the Review Conference was entirely preoccupied with the debates on the crime of aggression, the proposal was not put on the table for discussion. ICC, Assembly of States Parties, Report of the Working Group on Amendments, 10th session, ICC-ASP/10/32, New York, 9 December 2011, Annex III, Netherlands, Proposal for the inclusion of the crime of terrorism in the Rome Statute.

However, in view of the potential universal jurisdiction of the ICC, based on a resolution of the United Nations Security Council, it is reasonable to assume that states, in line with the *Tadić* dictum, can create individual criminal responsibility by means of a convention.⁵¹

While there may thus not be a legal impediment against expansion of the realm of international (core) crimes with transnational crimes, there may still be some other objections. One difficulty might be that the elements of transnational crimes lack precision, are vaguely defined and would not therefore meet the requirements of the *nullum crimen* principle.⁵² Mention is often made of the crime of terrorism, which resisted, until recently, all attempts to reach consensus on a comprehensive definition.⁵³ In view of the 2011 decision of the Special Tribunal for Lebanon, which presented an – admittedly contested – general definition of terrorism under customary international law, that may be a foregone conclusion.⁵⁴ Codification of other transnational crimes for the purpose of incorporation in statutes of international criminal tribunals may benefit from multilateral conventions seeking the criminal repression of those offences. Many of these conventions provide quite detailed and comprehensive definitions, exhorting states parties to adopt legislative measures in order to incorporate transnational crimes as criminal offences in their national law.⁵⁵ It would be rather far-fetched and impractical for regional or international tribunals to transfer all these detailed offences ‘lock stock

⁵¹ It bears emphasis that the Resolution of the Security Council does not *establish* individual criminal responsibility, but only triggers the subject-matter jurisdiction that the ICC already possesses, cf. Article 13, section 1 of the Rome Statute.

⁵² See Boister (n 32) 345–6, who mentions this aspect without necessarily agreeing with it.

⁵³ See for instance *United States v. Yousef*, 327 F.3d 56, 98 (2003): ‘customary international law currently does not provide for the prosecution of “terrorist” acts under the universality principle, in part due to the failure of States to achieve anything like consensus on the definition of terrorism’.

⁵⁴ Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/1, A Ch., 16 February 2011. For a ‘mild’ appraisal, see Manuel J. Ventura, ‘Terrorism According to the Special Tribunal for Lebanon’s Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?’ (2011) 9 *Journal of International Criminal Justice* 1022.

⁵⁵ Compare, for instance, the UN Convention against Corruption, New York, 31 October 2003, which, apart from the ‘core’ offence of *Bribery of national public officials* (Article 15) contains a host of other offences, like embezzlement of public funds and trading in influence. See for a brief discussion of this Convention, Nessi, Chapter 9 in this volume, pp. 168–80.

and barrel' to their statutes. They would rather be well advised to stick to the core definitions of transnational crimes.

It can therefore be safely concluded that states are not legally precluded from establishing regional or international courts with jurisdiction over transnational crimes. This does not imply, however, that the ICC should take on that responsibility. In order to assess whether the ICC would constitute an appropriate forum for the prosecution of transnational crimes, it is worthwhile to revisit the rationales for engaging in supranational law enforcement in the case of transnational crimes. Initiatives to 'outsource' the prosecution of those crimes to international criminal tribunals are generally prompted by two considerations. For one thing, it is seriously doubted whether domestic jurisdictions, even if they were to cooperate more closely together, would be able to mount an effective barrier against transnational organised crime. Secondly, the concern is often expressed that in inter-state cooperation in criminal matters the fundamental rights of suspects may be at stake.⁵⁶ In both respects, the ICC would, at least theoretically, be expected to perform better. In discussing an international court with special and exclusive jurisdiction over terrorism, modelled on a previous ICC that was proposed in 1937, but never saw the light, Neil Boister elegantly combines the two aspects, just mentioned: 'A court modeled on the 1937 ICC could be activated on demand to break deadlocks such as that which occurred in the Lockerbie dispute, while *preserving a fair trial* and in some cases *providing for superior logistical capacity* than that available nationally.'⁵⁷ Some scholars contend that the ICC would yield considerable added value in effectively combating transnational crime.⁵⁸ Such claims are generally not supported by solid evidence. As is well known, for an effective law enforcement the ICC – and, for that matter, any international or regional criminal court – is fully dependent on the assistance of states. Simultaneously, the very fact that the ICC exercises jurisdiction is proof of the 'unwillingness or inability' of a state to genuinely

⁵⁶ Compare on the way how the '*ne bis in idem*' principle can evaporate in a transnational context: Gless, Chapter 12 in this volume, pp. 220–42.

⁵⁷ Boister (n 32) 363 (emphasis in original).

⁵⁸ Schloenhardt (n 7) 122: 'Thus, an international criminal court would be of enormous practical assistance to these states.' Smith (n 29) 1152: 'Targeting organised crime acts of human trafficking, murder, and other violent acts through ICC prosecution will cripple organised crime by (1) depriving organised crime groups of billions of dollars from trafficking proceeds, (2) subverting their means of self-preservation through violence, and (3) strongly condemning organized crime acts, which will eviscerate condonation of organized crime.'

investigate or prosecute a case. Such incapacity or disinclination may easily backfire on the state's performance in the realm of cooperation.⁵⁹ It is a systemic flaw that is nearly impossible to resolve. Whereas the ICC is currently already wrestling with the problem (*vide* its tense relations with some African countries), the situation is likely to aggravate in the case of expansion of the Court's jurisdiction with transnational crimes, in view of the Court's limited competence. In this volume, Dirk Van Leeuwen contends that, for the purpose of the criminal repression of money laundering, the ICC should have similar powers as national authorities to 'freeze, make compulsory information requests, seize and confiscate'. Currently, the Court lacks such powers, 'nor can [the ICC] execute such powers as swiftly'. Without such powers, Van Leeuwen concludes, 'prosecuting money laundering would not accomplish the goal to be set for it'.⁶⁰

The potential accomplishments of the ICC in the field of rendering a fair trial are not unambiguously positive either. While the Statute offers all procedural guarantees and the record of the trials of the ICC on average is good, Trial Chambers have encountered problems in finding proper solutions for pre-trial violations of defendants' rights during arrest and surrender. Moreover, there is the lingering problem whether flagrant violations of due process rights in a state will warrant a finding of 'unwillingness or inability' and render a case admissible before the Court.⁶¹ In this volume, balancing the current systems of horizontal and

⁵⁹ See A. Cassese, 'Is the ICC Still Having Teething Problems?' (2006) 4 *Journal of International Criminal Justice* 434. The paradox is lucidly exposed by Bert Swart and Göran Sluiter, 'The International Criminal Court and International Criminal Co-operation' in H.A.M. von Hebel, J.G. Lammers, J. Schukking (eds), *Reflections on the International Criminal Court; Essays in Honour of Adriaan Bos* (T.M.C. Asser Press 1999) 92: 'The Court will have to act in situations in which national systems of justice have shown themselves to be unable or unwilling to bring to justice persons suspected of having committed international crimes. However, the same reasons that underlie a State's failure to live up to its obligations to investigate and adjudicate international crimes itself may also determine its ability and willingness to provide assistance to the Court.'

⁶⁰ Van Leeuwen, Chapter 10 in this volume, pp. 181–99. Nessi, Chapter 9 in this volume, pp. 168–80, is more positive about the powers of the ICC in the realm of freezing and confiscating assets.

⁶¹ On this topic, see, especially, Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 *Criminal Law Forum* 255 and Frédéric Mégret and Marika Giles Samson, 'Holding the Line on Complementarity; The Case for Tolerating Flawed Domestic Trials' (2013) 11 *Journal of International Criminal Justice* 571.

vertical law enforcement, Maria Laura Ferioli, draws our attention to the adverse consequences of the application of the complementarity principle on the rights of suspected and accused persons.⁶²

One frequently advanced argument against the expansion of the subject-matter jurisdiction of the ICC with transnational crimes is the high incidence of the latter. Incorporation in the jurisdiction of the ICC of those crimes would potentially saddle the Court with an infinite caseload and would aggravate the already difficult issue of selecting proper cases and situations. In view of the slow pace of current proceedings at the ICC this is not a very attractive prospect. To a certain degree, the noted deficiencies in the realm of efficiency and legitimacy coincide in this objection. Boister, while acknowledging the problem, contends that ‘a stronger practical argument against international jurisdiction is that “serious” transnational crimes are likely to involve activities subject to great domestic regulatory complexity beyond the capacity of most international courts to either understand or take proper account’.⁶³

Ultimately, as already indicated in the introduction to this chapter, there is no consensus amongst the contributors of this volume on the question whether (some) transnational crimes should be included in the jurisdiction of the ICC. Like Van Leeuwen in respect of money laundering, Marta Bo and Giulio Nessi express reluctance whether respectively piracy and corruption would qualify.⁶⁴ Bo questions the analogy between piracy and core crimes, favouring a regional solution, instead of the ICC, and Nessi predicts unsurmountable political obstacles, giving preference to improvement of existing legal instruments on inter-state cooperation. The surest candidate for ‘promotion’ to the category of international crimes *stricto sensu* is undoubtedly terrorism. Subtly canvassing the different modalities of state and ‘private’ terrorism and pointing out the differences but especially the similarities between terrorism and war crimes/crimes against humanity, both Inez Braber and Alejandro Chehtman defend the position that the ICC should at least gain jurisdiction over certain categories of terrorist acts.⁶⁵ The scholars who argue in favour of a wholesale inclusion of transnational crimes into the jurisdiction of the ICC seem to limit their position to those situations

⁶² Ferioli, Chapter 11 in this volume, pp. 203–219.

⁶³ Boister, Chapter 2 in this volume, pp. 27–49.

⁶⁴ Bo, Chapter 4 in this volume, pp. 71–91 and Nessi, Chapter 9 in this volume, pp. 181–99.

⁶⁵ Chehtman, Chapter 6 in this volume, pp. 107–27 and Braber, Chapter 5 in this volume, pp. 92–106.

in which these crimes truly and fully coincide with crimes against humanity.⁶⁶

In view of the lingering doubts, discussed in this section, whether the ICC would provide an adequate forum for the investigation and prosecution of transnational crimes, it seems useful to discuss some alternatives.

5 IN SEARCH OF ALTERNATIVES: COOPERATION BETWEEN STATES AND INTERNATIONAL ORGANISATIONS AND REGIONAL CRIMINAL COURTS

Apart from the drawbacks of involving the ICC in the prosecution of transnational crimes, discussed in the previous section, there is a general hunch that the ICC is too 'detached'. Physically and mentally far removed from the *locus delicti*, the Court often has difficulties in winning the hearts and the minds of the people and it has been accused of depriving them from their 'ownership'.⁶⁷ It is a fate that the ICC shares with the ad hoc tribunals (International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda) and it has given impetus to the establishment of the so-called internationalised tribunals, like the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.⁶⁸ These tribunals were supposed to

⁶⁶ Compare Bantekas, Chapter 7 in this volume: pp. 128–67, noting that: 'given that cybercrimes producing a serious impact on states or communities are akin ... to other international crimes, such as crimes against humanity, and in fact may under strict circumstances even fit the definition of such crimes, it may not be all that far-fetched to claim that most domestic and international criminal tribunals would have subject matter jurisdiction to prosecute these crimes as core international crimes' and Olásolo, Chapter 3 in this volume, pp. 50–67: 'Nevertheless, this does not prevent the most serious acts of violence by clandestine business structures from amounting to international crimes, in particular crimes against humanity.' See also Bussolati, Chapter 8 in this volume, pp. 146–67 who discusses the fusion between cybercrime and terrorism.

⁶⁷ See for instance Payam Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice' (2013) 11 *Journal of International Criminal Justice* 529: 'ICC trials can be at the expense of domestic ownership of post-conflict transitions, including experience in democratic processes and judicial capacity building to ensure the sustainable and lasting rule of law.'

⁶⁸ See Charles Chernor Jalloh, 'Assessing the Legacy of the Special Court for Sierra Leone' in Charles Chernor Jalloh, *The Sierra Leone Special Court and Its Legacy; The Impact for Africa and International Criminal Law* (Cambridge

reside in the state where the crimes had allegedly been committed, the trial chambers and other organs were of mixed composition, counting international and national judges or officials, and the subject-matter jurisdiction comprised both international crimes and national offences.⁶⁹ It is a part of a broader movement to bring justice to the people most affected and encompasses the efforts of the ICC to encourage domestic jurisdictions to investigate and prosecute international crimes in the context of ‘positive complementarity’.⁷⁰

In the context of the topic of this book such initiatives are of major importance, because they are likely to acknowledge the connection between international crimes and transnational crimes in the suffering of the victimised population. In their contribution to this volume, Hanna Bosdriesz and Sander Wirken highlight how the Inter-American Court of Human Rights has reminded states parties of their positive obligations to counter massive human rights violations, making no distinction between private violence of drug cartels and crimes of states. Moreover, they explain how the international community has boosted the establishment of the International Commission against Impunity in Guatemala (CICIG) and has assisted CICIG in its investigations of corruption, drugs offences and crimes against humanity.⁷¹

Another example of the quest for intermediate solutions is the rise of regional criminal courts.⁷² In May 2014 the African Union presented a Draft Protocol containing a Statute for an African Criminal Chamber that would be institutionally linked to the existing African Court of Justice and Human Rights.⁷³ The initiative emerged from a general sense of

University Press 2004) 1, observing that the ‘SCSL was designed to address the perceived shortcomings of the ICTY and ICTR, in particular, ... their geographic and emotional distance from the local population in whose names they were asked to render justice.’

⁶⁹ Jalloh (n 68) 10.

⁷⁰ See for instance William W. Burke-White, ‘Implementing a Policy of Positive Complementarity in the Rome System of Justice’ (2008) 19 *Criminal Law Forum* 59. See, however, on the inherent tensions and paradoxes of this approach the explorative study of Sarah M.H. Nouwen, *Complementarity in the Line of Fire; The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013).

⁷¹ Wirken and Bosdriesz, Chapter 13 in this volume, pp. 245–71.

⁷² William W. Burke-White, ‘Regionalisation of International Criminal Law Enforcement: A Preliminary Exploration’ (2003) 38 *Texas International Law Journal* 729.

⁷³ African Union, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, First Meeting of the

discontent about the ICC's selective policy of only targeting African countries in general and the issue of an arrest warrant against Sudan's incumbent president Al Bashir in particular.⁷⁴ For the purpose of our investigations into the relationship between international crimes and transnational crimes, this so-called Malabo Protocol is highly interesting, as the subject matter jurisdiction of this future court encompasses a cocktail of international crimes *stricto sensu* and transnational crimes.⁷⁵ The definitions of the core crimes have, with small but telling differences, been adopted from the Rome Statute (Articles 28B–28D), while the subsequent articles contain more or less detailed definitions of the other (mainly transnational) crimes. Another remarkable aspect of the Malabo Protocol is that it provides for corporate responsibility.⁷⁶

While some have expressed some cautious optimism on this initiative,⁷⁷ others are far more sceptical, (dis)qualifying the move as a rather obvious strategy to outmanoeuvre the ICC.⁷⁸ Admittedly, one of the weak spots in the Malabo Protocol is that it does not address the jurisdictional relationship between the African court and the ICC.⁷⁹ In view of the fact that the African Criminal Chamber has not yet been established, perhaps each assessment is premature. What is interesting for our present research is that the Malabo Protocol represents another attempt to overcome two rigid divides: between international and transnational crimes and between global and national law enforcement.

Specialised Technical Committee on Justice and Legal Affairs, Addis Ababa, 15 May 2014, STC/Legal/Min/7(I) Rev. 1.

⁷⁴ For a political and legal analysis, see Ademole Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects' (2013) 60 *Netherlands International Law Review* 27.

⁷⁵ Article 28A of the Malabo Protocol indicates that the Court shall have the power to try persons for: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.

⁷⁶ Article 46C, section 1: 'For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of the State.'

⁷⁷ See Jalloh, Chapter 14 in this volume, pp. 272–301.

⁷⁸ Compare Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067, 1085–8.

⁷⁹ On this point, see Max Du Plessis, 'Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes' (June 2012) *Institute for Security Studies Paper No. 235* 10–11.

6 SOME FINAL REFLECTIONS

Discussions on the relationship between international crimes and transnational offences and the most appropriate forum of law enforcement pull in different directions. On the one hand, there is the legitimate concern that national states are no match for criminal organisations whose powers and crimes often equal mighty political contenders. Proponents of this approach argue that international and transnational crimes should be considered on the same par and favour inclusion of the latter within the jurisdiction of the ICC. On the other hand, it is often rightly observed that the ICC is a default option, an instrument of last resort that should only be used if the state, as harbinger of law and order, is not available. This position underlines the primacy of states in (criminal) law enforcement and cautions against dilution or inflation of the concept of international crimes.

Ultimately, these distinct opinions are symptomatic for our difficulties to come to terms with vast political, social and criminological changes. The current system of the Rome Statute is tailored on the strong, repressive state, bullying its own citizens and engaging in flagrant violations of fundamental rights. But that is no longer the only, or even prevalent, paradigm. Today's political landscapes are much more complex, populated by rebel groups, terrorists and organised crime, fighting each other and official powerholders and wreaking havoc amongst the population, whom fragile and weak states are unable to protect.⁸⁰ Such new patterns of conflict require a reconstruction and adaption of the organisation of law enforcement. The choice of the most adequate forum need not necessarily be defined by the nature of the crime – transnational or international. For purposes of norm expression, it might be argued that the ICC should concentrate on the most conspicuous forms of state criminality, like aggression, genocide and state sponsored crimes against humanity. Depending on their scale and effects, transnational crimes, terrorism and war crimes might be prosecuted and tried by the ICC, ad hoc tribunals, like the Special Tribunal for Lebanon, regional courts, like the African Criminal Chamber, or in domestic jurisdictions. Each decision should be inspired by the question whether the eligible jurisdiction has the capacity to cope with the magnitude of the threat and would be

⁸⁰ Compare J.D. Fearon and D.D. Laitin, 'Ethnicity, Insurgency and Civil War' (2003) 97 *American Political Science Review* 75, 76: 'Where states are relatively weak and capricious, both fears and opportunities encourage the rise of local would-be rulers who supply a rough justice while arrogating the power to "tax" for themselves and, often, a larger cause.'

able to render effective and fair justice. In making the proper choice, international and national jurisdictions are well advised to work more closely together and follow an integrative approach on international and transnational crimes.