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International Criminal Organisations: Contemporary Challenges

Dear Readers,

It is a pleasure for me to write this editorial for Volume 4, Issue 1 of the *Groningen Journal of International Law*. This issue on International Criminal Organisations: Contemporary Challenges, addresses the effective regulation, which is an ongoing struggle for both international law and scholars alike. Reflecting once more upon the spirit of GroJIL, the articles of this issue strive to provide innovative insights to the present problems, which the international community is facing.

Transnational organised crime is currently a global phenomenon perceived as a severe threat to public security. Not only are international criminal organisations growing in number and diversifying in activities, but their networks are also expanding, resulting in contemporary threats that undoubtedly have destabilised the peace and stability of nations worldwide. While the crimes committed by such organisations are, indeed, of serious concern, international law is to approach the challenges around it in the most efficient manner. I therefore thank our authors for their fantastic contributions and entrusting the editorial team. The articles we publish are of excellent quality and the newfangled approaches they provide certainly uplift the academic debate on the matter.

I am extremely proud of the dedication every GroJIL member has put into making this publication successful. I could not be more grateful to the Editorial Board, without whose effort and dedicated teamwork, the ongoing growth and development of the Journal would not be possible. Further acknowledgment goes to the Editing Representative and Editing Committee who have strived to deliver top-quality editing and support throughout the entire process. Not to forget our recent incorporation, the PR Committee, which has been a key player in spreading the word and keeping the GroJIL spirit alive. The issue and the daily functioning of the Journal would have not been attainable without the commitment and enthusiasm of each member of the GroJIL team.

Happy reading!



Júlia Ortí Costa
President and Deputy Editor-in-Chief
Groningen Journal of International Law

Groningen Journal of International Law

Crafting Horizons

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The Groningen Journal of International Law (GroJIL) is a Dutch foundation (Stichting), founded in 2012. The Journal is a not-for-profit, open-access, electronic publication. GroJIL is run entirely by students at the University of Groningen, the Netherlands, with supervision conducted by an Advisory Board of academics. The Journal is edited by volunteering students from several different countries and reflects the broader internationalisation of law.

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The Groningen Journal of International Law aims to promote knowledge, innovation and development. It seeks to achieve this by serving as a catalyst for author-generated ideas about where international law should or could move in order for it to successfully address the challenges of the 21st century. To this end, each issue of the Journal is focused on a current and relevant topic of international law.

The Journal aims to become a recognised platform for legal innovation and problem-solving with the purpose of developing and promoting the rule of international law through engaging analysis, innovative ideas, academic creativity, and exploratory scholarship.

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The Groningen Journal of International Law is not a traditional journal, which means that the articles we accept are not traditional either. We invite writers to focus on what the law could be or should be, and to apply their creativity in presenting solutions, models and theories that in their view would strengthen the role and effectiveness of international law, however it may come to be defined.

To this end, the Journal requires its authors to submit articles written in an exploratory and non-descriptive style. For general queries or for information regarding submissions, visit www.grojil.org or contact [groningenjil@gmail.com](mailto: groningenjil@gmail.com).

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Groningen Journal of International Law

International Criminal Organisations: Contemporary Challenges

volume 4, issue 1

Table of Contents

Expanding Criminal Responsibility in Challenging Transnational and International Organised Crime 1–9
Harmen van der Wilt

Non-Criminalisation of Victims of Trafficking in Persons — Principles, Promises, and Perspectives 10–38
Andreas Schloenhardt and Rebekkah Markey-Towler

Student Writing Competition

International Terrorism: What are the Current Legal Challenges in Bringing Terrorists to Justice? 42–53
Jessica Möttö

Asia's Reticence Towards Universal Jurisdiction 54–67
Xing Yun

Expanding Criminal Responsibility in Transnational and International Organised Crime

Harmen van der Wilt*

Abstract

In international criminal law theory, a conceptual divide is made between international crimes *stricto sensu* (genocide, crimes against humanity, war crimes, aggression) and transnational organised crime. This differentiation sustains the direct, respectively indirect enforcement mechanism: the so called ‘core crimes’ belong to the subject matter jurisdiction of international criminal tribunals and the International Criminal Court, whereas national jurisdictions aim to counter transnational crimes, by concluding ‘suppression conventions’ and seeking international cooperation on the basis of the *aut dedere, aut judicare* principle.

Nevertheless, the division is questioned for being too rigid and simplistic, as the boundaries between the categories are increasingly blurred. On the one hand, political rebel groups and organised crime often unite to challenge the power monopoly of the state, while corrupt governments and private business conspire to exploit the local population (by pillage, deportation from their lands or pollution of the environment). On the other hand, there is an ongoing debate, triggered by the ICC Kenya Decision of March 2010, whether the commission of crimes against humanity is the ‘privilege’ of states and state-like groups, or whether the category should be expanded to cover larger organisations that are capable of committing such atrocities. In other words, there is a proliferation of state and non-state actors that engage in both ‘classic’ international crimes (war crimes, crimes against humanity) and transnational crime. These developments have fuelled the plea for supranational law enforcement in respect of transnational (organised) crime, exceeding the realm of inter-state cooperation on a horizontal basis.

This essay will pay a modest contribution to this discussion by arguing that the quest for more effective law enforcement is bedeviled by the perplexity of fitting new patterns of crime *and* new perpetrators of international crimes into the classic mould of international criminal law. These two aspects are obviously intimately related and should not be considered in isolation. Any initiative to invigorate international criminal law enforcement - by for instance establishing new (international or regional) courts or by expanding the subject matter jurisdiction of existing courts – should therefore pay attention to both the elements of crimes and the modes of criminal liability.

I. Introduction

Over the course of the last few decades, the boundaries between political crime and transnational organised crime have been gradually blurred. Terrorists have engaged in illicit drug trade, kidnapping and extortion in order to finance their operations, while

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keeping up the façade of political commitment for PR purposes. Criminal syndicates have contested the state's monopolies on violence and taxation with a view to the perpetuation of their profitable business. Benefiting from weak and fragile states, open borders and sophisticated technology, casual alliances between transnational organised crime and terrorism have become a real challenge for law enforcement authorities all over the world.¹

International legal responses to transnational organised crime and political crime have been diverse. As is well known, the International Criminal Court (ICC) and international criminal tribunals have jurisdiction over only a limited number of 'core crimes' (genocide, war crimes, crimes against humanity, aggression). Perpetrators of these crimes incur direct criminal responsibility under international law. Whereas these crimes have traditionally been associated with the abuse of state power, it is increasingly acknowledged that they also can be committed by non-state actors that possess the resources and organisational capacity to engage in these crimes, either during armed conflict or outside the context of war.² Criminal law repression of transnational organised crime, on the other hand, has preserved a horizontal, inter-state character. States have entered into so-called 'suppression conventions', in order to invigorate cooperation. These conventions enjoin states to incorporate elements of transnational crimes in their own legislation and assist each other, both in the arrest and prosecution of suspects and the gathering of criminal evidence.³ In view of the convergence between transnational organised crime and political crime, this rupture in law enforcement has been increasingly censured as obsolete or outdated.⁴

I do not intend to pursue that discussion in this contribution.⁵ I would rather like to address an aspect that transnational organised crime and international crime have in common: they are both committed by - or by means of - organisations, and are therefore by definition collective crimes. In summarising the definitional elements of international organised crime, Carrie-Lyn Donigan Guymon points at the 'hierarchical', rigid, or compartmentalized organizational structure that uses internal discipline and thereby

¹ For very forceful analyses of this phenomenon, see Shelley, LI, *Dirty Entanglements: Corruption, Crime and Terrorism* (Cambridge University Press, Cambridge, 2014); and Makarenko, T, "The Crime-Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism", 6(1) *Global Crime* (2004) 129, 133. "Thus, most criminal and terrorist groups operational in the 1990s and into the twenty-first century have developed the capacity to engage in both criminal and terrorist activities."

² Recent case law of the ICC points in that direction, see Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the *Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09, 31 March 2010, with Dissenting Opinion of Judge Hans-Peter Kaul.

³ For a comprehensive analysis of the 'horizontal' system, see Clark, RS, "Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg", 57 *Nordic Journal of International Law* (1988), 49.

⁴ See, for instance, Smith, JM, "An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity", 97(4) *The Georgetown Law Journal* (2009), 1112; and Schloenhardt, A, "Transnational Organised Crime and the International Criminal Court; Developments and Debates", 24(1) *The University of Queensland Journal* (2005), 93.

⁵ The search for the most appropriate system of law enforcement in respect of transnational and international crimes is the central topic of van der Wilt, H and Paulussen, Ch, eds, *Legal Responses to Transnational and International Crimes: Towards an Integrative Approach?* (Elgar Publishers, Cheltenham, to be published in 2016 or 2017). For highly sophisticated reflections on the essence of transnational crimes, in relation to law enforcement, see the several publications by Boister, N, "'Transnational Criminal Law'?", 14(5) *European Journal of International Law* (2003), 953; and *Id*, "Treaty Crimes, International Criminal Court?" 12(3) *New Criminal Law Review: An International and Interdisciplinary Journal* (Summer 2009), 341; and *Id*, "Further reflections on the concept of transnational criminal law", 6(1) *Transnational Legal Theory* (2015), 9.

protects the leadership (...) from detection or implication in commission of crimes.⁶ It is a conspicuous element that transnational organised crime shares with the ‘core crimes’ which are typically depicted as ‘system criminality’.⁷ The organisational ‘prong’ raises two issues in the realm of law enforcement. First, one may wonder how the organisational veil can be pierced and the leadership, that pulls the strings but remains behind the screens, can be held criminally responsible. Secondly, it might be attractive and effective to prosecute the organisation as an entity.

This article explores what legal steps have been taken to target the leadership of transnational criminal organisations and to dismantle these organisations by means of criminal law. The system of individual criminal responsibility for core crimes that is briefly discussed in Section Two serves as a normative framework. Section Three will mainly focus on and discuss the relevant provisions on criminal responsibility in the United Nations Convention against Transnational Organized Crime of 2000. In Section Four, I will address some recent initiatives within the area of corporate criminal responsibility. Section Five rounds up with some reflections, pointing out the inherent limitations of criminal law and international relations.

II. Criminal Responsibility and System Criminality

Criminal responsibility for international crimes in the strict sense, has been widely discussed in legal doctrine and will therefore only be briefly summarised in this essay.⁸ Nevertheless, it serves as a useful frame of reference for gauging the initiatives in respect of transnational organised crime.

The organisational dimension of core crimes is most clearly expressed in the Joint Criminal Enterprise-doctrine that has been further developed by the International Criminal Tribunal for the former Yugoslavia (ICTY). This concept provides for criminal responsibility for all members of a group that harbour a criminal purpose. With respect to crimes committed by other members, if they have made ‘some contribution’ and either intended to further the criminal intention of the group or the crimes were a natural and foreseeable consequence of the implementation of the criminal plan.⁹ The application of JCE Doctrine has generally received a critical reception, as scholars have pointed at the rather vague standard of ‘some’ contribution and at the dilution of the ‘common purpose’ requirement, arguing that it could easily degenerate into ‘guilt by association’.¹⁰ It bears

⁶ Guymon, CLD, “International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention”. 18(1) *Berkeley Journal of International Law* (2000), 53, 56.

⁷ Nollkaemper, A, “Introduction” in Nollkaemper, A and van der Wilt, H, eds, *System Criminality in International Law* (Cambridge University Press, Cambridge, 2009), 1. ‘The term system criminality refers to the phenomenon that international crimes – notably crimes against humanity, genocide and war crimes – are often caused by collective entities in which the individual authors of these acts are embedded.’

⁸ See for instance the contributions in Nollkaemper & van der Wilt, *Ibid*; and van Sliedregt, E, *Individual Criminal responsibility in International Law* (Oxford University Press, Oxford, 2012); and Ambos, K, *Treatise on International Criminal Law* (Oxford University Press, Oxford, 2013), 102-232; and Stewart, J, “The End of “Modes of Liability” for International Crimes”, 25(1) *Leiden Journal of International Law* (2012), 165.

⁹ The JCE-doctrine has been introduced by the Appeals Chamber of the ICTY in *Prosecutor v. Tadić*, Judgment, Case No. ICTY-94-1-A, 15 July 1999, paras 185-229 as customary international law and has subsequently been applied in numerous cases, including ICTY, *Prosecutor v. Krajišnik*, Judgment, Case No. ICTY-00-39/40, 27 September 2006; *Id*, *Prosecutor v. Brđanin*, Judgment, Case No. ICTY- 99-36-A, 3 April 2007 and *Id*, *Prosecutor v. Popović et al.*, Judgment, Case No. ICTY-05-88-T, 10 June 2010.

¹⁰ Compare, for instance, Danner, AM, and Martinez, JS, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law”, 93(1)

emphasis that the JCE-doctrine serves as a vehicle to expand criminal responsibility over members of a group. It does not provide for criminal responsibility for the group as such. Corporate criminal responsibility is not envisaged in the statutes of the ICC or international criminal tribunals.¹¹

Particular attention for the criminal involvement of political and military leaders in core crimes is reflected in the inclusion of ‘ordering’ and ‘inducement’ in Article 25 (1), sub b of the Rome Statute. Compared to the Statutes of the ad hoc tribunals, the scope of leadership responsibility is reduced in the Rome Statute, as the latter does not mention ‘planning’ of international crimes, nor ‘conspiracy’ in respect of genocide.¹² Hierarchical relations, typical for the military and of prime importance for the observance of international humanitarian law, underlie the concept of ‘superior responsibility’ which has been elaborated on and refined in the case law of the ICTY, in particular the *Celibici*-case.¹³ The notion that those who plan and organise international crimes should not escape criminal responsibility is also – negatively – expressed in the abolition of functional and personal immunities in respect of core crimes.¹⁴

In its case law, the ICC has departed from the track mapped out by the ICTY. Rather than lumping all ‘partners in crime’ together under the blanket of JCE, the ICC has made efforts to explain how persons occupying leadership positions employ organizations in order to commit (international) crimes. Borrowing from the legal concept of *Organisationsherrschaft*, developed by German scholar Claus Roxin, the (Pre-) Trial Chamber in the Katanga-case in particular has argued that ‘indirect perpetration’ (committing a crime by means of another person), as mentioned in Article 25 (3), sub a of the Rome Statute, includes ‘perpetrations by means of an organization’.¹⁵ This approach has received mixed reactions in legal literature. Some have wondered whether concepts that had been developed to address tightly organised power structures in modern bureaucracies could be applied in the much more cluttered situations that reign in African countries.¹⁶ Others have drawn attention to the doctrine’s quality of putting the

California Law Review (2005), 150; and Ohlin, JD, “Three Conceptual Problems with the Doctrine of Joint Criminal enterprise”, 5 *Journal of International Criminal Justice* (2007), 89; and Badar, ME, “‘Just Convict Everyone!’, Joint Perpetration from *Tadić* to *Stakić* and back again”, 6(2) *International Criminal Law Review* (2006), 293.

¹¹ See Article 25, United Nations, *Rome Statute of the International Criminal Court* (1998) 2187 UNTS 90 (*Rome Statute*): ‘The Court shall have jurisdiction over *natural* persons pursuant to this Statute’ (italics added). In a similar vein Article 5, UN Security Council, *Statute of the International Criminal Tribunal for Rwanda* (1994) (*ICTR Statute*) and Article 6, UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (1993) (*ICTY Statute*). On the vain efforts to introduce corporate criminal responsibility in the *Rome Statute*, see van der Wilt, H, “Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities”, 12(1) *Chinese Journal of International Law* (2013), 43-77.

¹² Article 4 (3), sub b *ICTY*, respectively 2 (3), sub b *ICTR Statute* qualify conspiracy to commit genocide as a punishable offence. ‘Planning’ of international crimes is included as a ground for individual responsibility in Article 7 (1) of the *ICTY Statute*, respectively Article 6(1) of the *ICTR Statute*.

¹³ *ICTY, Prosecutor v. Delalić and others*, Judgement, Case No. IT-96-21-T, 16 November 1998, paras 330-401. Superior responsibility features in Art. 28 of the *Rome Statute* and in Article 7(3) *ICTY*, respectively Article 6(3) of the *ICTR Statute*.

¹⁴ Article 27 of the *Rome Statute*; Article 7(2) of the *ICTY*, respectively Article 6(2) of the *ICTR Statute*.

¹⁵ Situation in the Democratic Republic of the Congo in ICC, *Prosecutor v. Katanga and Chui*, Decision on Confirmation of the Charges, ICC-01/04-01/07, 30 September 2008, paras 477-518; confirmed by the Trial Chamber in its judgement in *Prosecutor v. Katanga*, 7 March 2014, paras 1403-1416. See, however, the critical dissenting opinion by Judge Christine Van den Wyngaert.

¹⁶ See Weigend, T, “Perpetration through an Organization: The Unexpected Career of a German Legal Concept”, 9(1) *Journal of International Criminal Justice* (2011), 91-113.

limelight on both organisations and their leadership as ‘starting point of attribution in international criminal law.’¹⁷

We may observe, by way of intermediate conclusion, that the international criminal tribunals have well understood the relevance of organisations and their leadership in system criminality, but that they are still searching for the legal concepts that most adequately capture these aspects.¹⁸

III. Criminal Responsibility of Leadership and Organisations in Transnational Organised Crime

The United Nations Convention against Transnational Organized Crime (2000) (hereafter: UNCTOC) was launched as a catch-all convention, intended to improve law enforcement and international cooperation in respect of all kinds of offences committed by transnational organised crime.¹⁹ Article 2, sub (a) defines the central topic of the convention – an ‘Organized criminal group’ – as

‘a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance of this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.’

The scope of application of the Convention is limited to offences that are ‘transnational in nature’, which means that the interests of more than one State are affected. In the realm of targeting criminal organisations and their leadership, the Convention displays a number of interesting features. It calls upon States parties to criminalise

“conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in: a) Criminal activities of the organized criminal group; b) Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above described criminal aim.”²⁰

The wording shows more than a fleeting resemblance to JCE Doctrine, as expounded in the previous paragraph. Just like in JCE, it is not necessary that the person himself engages in the very crimes; activities that sustain the general purpose suffice, if done with the intention to further the criminal aim or in the awareness that they will contribute to such an objective.²¹ Whether ‘taking an active part’ is more demanding than ‘some

¹⁷ Compare Ambos, K, “Command responsibility and *Organisationsherrschaft*: ways of attributing international crimes to ‘the most responsible’” in Nollkaemper & van der Wilt, *supra* nt 7, 157. Compare also Olàsolo, H, “The Application of Indirect Perpetration through Organised Structures of Power at the International Level” in Olàsolo, H, *Essays on International Criminal Justice* (Hart Publishing, Oxford and Portland, 2012), 120, who agrees with Ambos that the notion of indirect perpetration through organized structures of power is today a serious option to hold criminal leaders to account, adding that ‘application of notions of accessorial liability in this type of case (...) relegates superiors to a secondary role which does not correspond to their actual relevance.’

¹⁸ See van der Wilt, HG, “The Continuous Quest for Proper Modes of Criminal Responsibility”, 7(2) *Journal of International Criminal Justice* (2009), 307-314.

¹⁹ UN General Assembly, *United Nations Convention Against Organized Transnational Crime*, 15 November 2000, UN 2225 UNTS 209 (UNCTOC).

²⁰ Article 5 (1), sub a, under ii, UNCTOC.

²¹ The provision bears also resemblance to Article 25 (3), sub d of the *Rome Statute*.

contribution' is difficult to say. Presumably, both qualifications would also encompass relatively passive acts, like 'being on the look-out' in case of burglary.²² Whereas the UNCTOC in this respect closely follows the precedents of international criminal case law, at other points it remarkably deviates from this normative framework. Firstly, the Convention announces the *joyeuse rentrée* of conspiracy liability. After all, Article 5 (1), sub a (i) stipulates that States should consider as criminal offences (either as an alternative to or together with) conduct defined in Article 5 (1), sub a, (ii)

“Agreeing with one or more persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group.”

The insertion 'where required by domestic law etc.' refers to the circumstance that some common law jurisdictions require, as well as an agreement, an 'overt act'.²³

Secondly, the UNCTOC demonstrates a specific awareness for the position of leaders within organised criminal groups. Article 5 (1), sub b enumerates a broad gamut of possible involvement, clarifying that '*organizing, directing, aiding and abetting, facilitating or counselling* the commission of serious crime involving an organized criminal group' involves criminal responsibility.²⁴

Finally, Article 10 of the Convention provides for liability of legal persons for participation in serious crimes involving an organised group. Section 2 of this provision adds that this liability may be criminal, civil or administrative, a reassurance that meets the concerns of states that are adamant to introduce criminal corporate liability.²⁵ Corporate liability co-exists with criminal liability of natural persons (Article 10 (3)) and each State Party 'shall, in particular, ensure that legal persons held liable in accordance with this Article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions'.²⁶ It is a formulation that is reminiscent of the language in the famous Greek Maize case of the European Court of Justice.²⁷ Article 10 of the UNCTOC has served as a model for similar provisions in other conventions on specific transnational crimes.²⁸

It is not surprising that the approaches of the UNCTOC and the Statutes of the international criminal court and international criminal tribunals towards criminal organisations and their leaders diverge. Profit-making is the *raison d'être* of commercial enterprises and it is therefore more likely that they get involved in shady affairs that yield material benefits. There is therefore a certain urgency in properly regulating the corporate (criminal) liability of such entities. A second reason for divergence is directly related to the different systems of law enforcement governing international crimes and transnational organised crime. At first blush, the (re-)introduction of 'conspiracy' in the UNCTOC seems rather spectacular. However, as indicated above, States Parties must

²² Mc Clean, D, *Transnational Organized Crime; A Commentary on the UN Convention and its Protocols* (Oxford University Press, Oxford, 2007), 64.

²³ *Id.*, 63.

²⁴ Emphasis added

²⁵ Compare Thomas, W, "Societas delinquere non potest? A German Perspective" 6(5) *Journal of International Criminal Justice* (2008), 927-945.

²⁶ Article 10(4), UNCTOC.

²⁷ European Court of Justice, *Commission v Greece*, Case 68/88, ECR 2965, 21 September 1989, para 24.

²⁸ See, for instance, UN Convention against Corruption, 2349 UNTS 41 (2003), Article 26; Council of Europe, Convention on Cybercrime, ETS No. 185 (2001), Article 12.

make a choice between criminalising conspiracy and participation in a criminal enterprise. The system of indirect criminal law enforcement that is predicated on the action of domestic jurisdictions requires greater flexibility. Drafters of suppression conventions can therefore afford to be bolder in suggesting far-reaching solutions, because, at the end of the day, states still have the discretion ‘to take it or leave it’. I will return to this topic in the final section. Meanwhile, the different legal reactions on criminal organisations and their leaders are perhaps problematic in view of the convergence between international crimes *stricto sensu* and transnational organised crime. A more coherent, integrated approach is therefore worthy of consideration.

IV. Criminal Responsibility in the Light of Convergence between International Crimes and Transnational Crimes: Some New Developments

Some internationalised or ‘hybrid’ criminal tribunals have subject matter jurisdiction over both international crimes and national offences that derive from the state that is involved in the establishment of these tribunals. An interesting example is the Special Court for Sierra Leone that combines jurisdiction over crimes against humanity, war crimes in non-international armed conflicts, other serious violations of international humanitarian law and ‘crimes under Sierra Leonean law’.²⁹ Another interesting feature of the Sierra Leone Court is its focus on ‘those bearing the greatest responsibility for serious violations of international humanitarian law’ (Article 1 of the Statute).³⁰ While the limitation of ‘the most responsible’ has resulted in the prosecution and trial of political and military leaders wielding authority during the civil war, the inclusion of domestic crimes has come to naught: none of the defenders was charged with one or more of these domestic offences. Whether these issues are related is a matter of conjecture.

Nonetheless, the Special Court for Sierra Leone has set the stage for other hybrid tribunals and regional courts. The recently established Special Court in Kosovo has subject matter jurisdiction over crimes against humanity and war crimes, but also over a host of offences under Kosovo’s law.³¹ This latter category includes corruption, so it transpires that the Kosovo Court’s jurisdiction blends core crimes and transnational crimes. Arguably the most interesting initiative is the intended extension of the African Court of Justice and Human Rights with a Criminal Chamber. In May 2014, the African Union adopted the ‘Malabo-Protocol’ with an Annex that provided for the establishment of such an International Criminal Law Section.³² The subject matter jurisdiction of this future regional court contains a mixture of international crimes *stricto sensu* and

²⁹ United Nations, *Statute of the Special Court for Sierra Leone*, U.N. SCOR, UN Doc. S/2002/246 (2002), Article 5.

³⁰ Whether this should be understood as a jurisdictional requirement or as a prosecutorial guideline was a matter of fierce legal contestation. For more details see the probing analysis of Jalloh, C, “Prosecuting Those Bearing “Greatest Responsibility”: The Contributions of the Special Court for Sierra Leone”, in Jalloh, CC, ed, *The Sierra Leone Special Court and its Legacy; The Impact for Africa and International Criminal Law*, (Cambridge University Press, Cambridge, 2014) 589-623.

³¹ Compare Article 6 of the Law on Specialist Chambers and Specialist Prosecutor’s Office, Law No.05/L-053, 3 August 2015, available at <assembly-kosova.org/common/docs/ligjet/05-L-053%20a.pdf> (accessed on 8 March 2016).

³² Assembly of States Parties to the African Union, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, adopted by the 23rd Ordinary Session of the Assembly, held in Malabo, Equatorial Guinea, 27 June 2014, with Annex: Statute of the African Court of Justice and Human and Peoples’ Rights.

transnational crimes.³³ The definitions of the core crimes have, by and large, been copied from the Rome Statute (Articles 28B – 28D), while the subsequent provisions (Articles 28E – 28L*Bis*) define the other offences.³⁴

For the purpose of this essay, it is highly interesting that Article 28N on Modes of Responsibility is largely modelled on the corresponding provision in the UNCTOC:

“An offence is committed by any person who, in relation to any of the crimes or offences provided for in this statute: (i) Incites, instigates, *organizes, directs*, facilitates, finances, *counsels* or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute (...).”³⁵

Moreover, like the UNCTOC, the Malabo Protocol provides for corporate criminal liability. Article 46C of the Protocol stipulates that ‘[f]or the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.’ The subsequent sections of the provision elaborate on the way the *mens rea* of corporations can be established.

As the African Criminal Chamber has not yet come into being, it is clearly impossible to predict how it will perform in practice.³⁶ However, the architecture of its Statute is promising, as it displays an understanding of the close connection between modes of criminal responsibility and the nature of specific crimes.

VI.1. Some Final Reflections

Criminal law enforcement acknowledges the importance of organisations and their leadership in both traditional international crimes and transnational organised crime. However, in countering these phenomena, it faces considerable difficulties. The reasons for this are not difficult to grasp. Criminal law has a natural aversion against collective responsibility; because guilt – one of the leading moral principles sustaining criminal law – is essentially an individual issue. This explains the reluctance of the Nuremberg Tribunal to accept the notion of criminal organisations as a tool to identify and punish their members.³⁷ Organisations are skilful in concealing the involvement of managing directors and these latter are therefore difficult to insulate for the purpose of holding them criminally responsible.

³³ 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.

³⁴ The ‘special part’ ends with a provision on the Crime of Aggression that, with the necessary modifications, copies Article 8b of the *Rome Statute*.

³⁵ Emphasis added.

³⁶ For a largely critical assessment, see Murungu, CB, who contends that the African Criminal Court is created out of resentment against and in order to outwit the ICC, “Towards a Criminal Chamber in the African Court of Justice and Human Rights”, 9 *Journal of International Criminal Justice* (2011), 1085-1088.

³⁷ Membership of a criminal organisation like the SS was only a punishable offence if the defendant had knowledge of the criminal purpose and had voluntarily acceded to the organisation. On this topic Pomorski, S, “Conspiracy and criminal organization” in Ginsburgs, G and Kudriavtsev, VN, eds, *The Nuremberg Trial and International Law* (Kluwer Academic Publishers, Leiden, 1990), 213 and Jørgensen, NHB, “Criminality of Organizations under International Law” in Nollkaemper and van der Wilt, eds, *supra* nt 7, 202-206.

International criminal law and transnational criminal law diverge in their approaches towards criminal organisations and their leadership. As suggested above, this can probably be attributed to the distinctions between the 'direct and the indirect' enforcement model, to use the terminology of Bassiouni.³⁸ The drafters of the Rome Statute have developed, for a limited number of core crimes, a General Part of (substantive) criminal law, containing concepts of criminal responsibility and grounds for excluding criminal responsibility.³⁹ These provisions are tightly and precisely defined, because they require the consent of all States Parties. Within the context of the indirect enforcement model, such a creation of a General Part is inconceivable – at least at the global level - because it is predicated on decentralised law enforcement by states. They will not be easily persuaded to sacrifice their historically grown concepts and idiosyncrasies. The result is that suppression conventions either contain rather vague and open concepts, or leave states parties the choice between alternatives. The convention may introduce corporate liability, but the states parties have the freedom to accomplish this by means of criminal, civil or administrative law. This is conducive to diverging interpretation and implementation of criminal law, which may be regrettable, but is probably inevitable.

One of the future developments that may break the stalemate is the emergence of a regional criminal court that could symbolise the rapprochement between the direct and the indirect enforcement model. States that have closer cultural and political affinity would probably be sooner inclined to establish a court that transcends the rigid division between international and transnational crimes and that would be able to apply the concepts of criminal responsibility that match the nature of those crimes.⁴⁰

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³⁸ Bassiouni, MC, *Introduction to International Criminal Law: Second Revised Edition* (Martinus Nijhoff Publishers, Leiden, 2012), 22-27.

³⁹ Articles 22-33, *Rome Statute*, Part 3 – General Principles of Criminal Law 9.

⁴⁰ Blomsma, CJ, "The Need to Identify a General Part of Criminal Law for the EU" in Marianne Hirsch Ballin, MH, *et al*, eds, *Shifting Responsibilities in Criminal Justice; Critical Portrayals of the Changing Role and Content of a Fragmented Globalizing Law Domain* (Eleven International Publishing, Utrecht 2012), 125 who acknowledges the urgency of introducing a General Part of criminal law 'when a system of direct enforcement enters into force'.

Non-Criminalisation of Victims of Trafficking in Persons — Principles, Promises, and Perspectives

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Abstract

Victim protection is one of the key objectives of international and domestic efforts against trafficking in persons. Existing legal instruments contain a range of mechanisms to protect the rights of victims of trafficking, providing them with material assistance, counselling, and shielding them from coercion, threats, and harm by their traffickers. An additional, more contentious protection mechanism is the principle of non-criminalisation which serves to protect victims from prosecution for offences which they may have committed during the course of their trafficking experience. The rationale of this principle is to recognise that victims often have little choice but to engage in criminal conduct during their trafficking situation and to encourage victims to cooperate with law enforcement in the investigation of their traffickers. This article examines the background and rationale of this principle, analyses existing and proposed expressions of this principle, and develops ideas and recommendations for further debate and developments in this field.

I. Introduction

Trafficking in persons is frequently described as a ‘hidden crime’ that rarely comes to the attention of the authorities and for which investigations, prosecutions, and convictions are the exception rather than the rule.¹ While the true extent of this phenomenon remains unknown, there is general consensus that this crime has a considerable ‘dark figure’, that many if not most cases of trafficking in persons remain undetected, and that very few traffickers are ever brought to justice.²

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¹ Banks, D, “The U.S. Human Trafficking Reporting System: Utility and Limitations”, 81(3) *International Review of Penal Law* (2010) 589, 591.

² Aronowitz, AA, “Overcoming the Challenges to Accurately Measuring the Phenomenon of Human Trafficking”, 81(3) *International Review of Penal Law* (2010) 493, 494; Wise, M and Schloenhardt, A, “Counting Shadows – Measuring trafficking in Persons in Australia”, 3 *International Journal of Criminology and Sociology* (2014) 249, 250.

Traffickers often go to great length to keep their offending secret and use a range of tools to intimidate their victims such that they remain hidden and unable or unwilling to have contact with law enforcement or other authorities or to speak up to persons who could help them escape their situation of trafficking. This intimidation may involve blunt measures such as restricting the freedom of movement of victims or threatening the victims or their family should they contact the authorities. In many cases, subtle forms of control and coercion suffice to intimidate the victims and ensure that they will not report the offences that have been committed against them and talk about the exploitation they have endured.

One common and simple mechanism to control the victims involves traffickers telling their victims that the authorities will not assist them, will not believe their stories and, in particular, that the authorities will punish and/or deport the victims for crimes they may have committed during the course of their trafficking experience. The illegal status that many foreign victims of trafficking have in the destination country and the fact that they may have engaged in prohibited activities such as prostitution, working without a work permit, et cetera are circumstances with which traffickers can easily control and manipulate their victims and which create a fear that makes it less likely that victims will take the initiative to contact the authorities. Some victims are also reluctant to speak up, act, or use force against their traffickers for fear that such activities may later result in criminal charges against them.

To break this cycle of control and coercion, many international organisations, academic experts, non-governmental organisations (NGOs), and some international instruments are calling for the non-criminalisation of victims of trafficking in persons. Some variations aside, the emerging ‘principle of non-criminalisation of victims of trafficking in persons’ advocates that victims should not be criminalised for offences they commit during the course of their trafficking experience or for offences that are connected in some way to their status as victims of trafficking.³

The idea here is not to confer blanket immunity upon victims,⁴ but rather to strike a balance between offences committed against victims on the one hand and offences committed by victims on the other. This, it is argued, serves to maintain the ‘interests of justice’ and enhance the protection of victims of trafficking.⁵

³ Gallagher, AT, *The International Law of Human Trafficking* (Cambridge University Press, New York, 2010) 284; Organization for Security and Co-operation in Europe (OSCE), Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Report: Policy and Legislative Recommendations: Towards the Effective Implementation of the Non-Punishment Provision with regard to victims of trafficking*, 2013, at <osce.org/secretariat/101002?download=true> (accessed 18 May 2016), 9; Mattar, MY, “State Responsibilities in Combating Trafficking in Persons in Central Asia”, 27 *Loyola of Los Angeles International and Comparative Law Review* (2005) 145, 189.

⁴ UN Office of the High Commission for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking Commentary*, UN Doc HR/PUB/10/2, 2010, at <ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf> (accessed 18 May 2016), 133. See also Court of Appeal of England and Wales, *R v N; R v LE* [2012] EWCA Crim 189, para 12; Court of Appeal of England and Wales, *L; HVN; THN; T v R* [2013] EWCA Crim 991, para 13.

⁵ OSCE, *supra* nt 3, 7; UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, *Report on the Meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010*, UN Doc CTOC/COP/WG.4/2010/6 (17 February 2010), para 108.

The non-criminalisation principle is also seen as an important tool to increase the likelihood that victims will exit their trafficking situation and cooperate freely with law enforcement and other authorities in the investigation and prosecution of their traffickers. Support for the idea of a non-criminalisation principle also comes from international law against the smuggling of migrants which does contain a — albeit very limited — clause relating to the non-criminalisation of smuggled migrants.⁶

This article explores the background, rationale, scope, and operation of the principle of non-criminalisation of victims of trafficking in persons, analyses existing and proposed expressions of this principle, and develops ideas and recommendations for further debate and developments in this field. Following this introduction, Part II of this article examines the background and context of the principle and the situations and circumstances in which victims of trafficking are likely to commit criminal offences. Part III then explores the rationale and theoretical underpinnings of the principle and how it relates to existing concepts of criminal law and criminal liability. This is followed by an outline of some of the practical consequences in Part IV. Existing and proposed manifestations of the principle, their scope and application, are examined in Part V, before Parts VI and VII explore various models and limitations of the principle. Part VIII summarises the main research findings and develops ideas and recommendations for further developments and law reform in this field.

II. Background and Context

II.1. Victims of Trafficking in Persons

Trafficking in persons is a long-standing and worldwide phenomenon which has been recognised as a serious crime in international law. The United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*,⁷ the leading international instrument on this topic, defines ‘trafficking in persons’ to

“mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”⁸

The term ‘exploitation’ is further defined to ‘include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.’⁹

Trafficking is a serious offence against the person that involves grave violations of fundamental human rights of persons who fall victims to this heinous crime.¹⁰

⁶ United Nations, *Protocol against the Smuggling of Migrant by Land, Sea and Air, supplementing the Convention against Transnational Organized Crime* (2004) 2241 UNTS 507 [*Smuggling of Migrants Protocol*], Article 5.

⁷ United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the Convention against Transnational Organized Crime* (2003) 2237 UNTS 319 [*Trafficking in Persons Protocol*].

⁸ Article 3(a), *Trafficking in Persons Protocol*.

⁹ Article 3(a), *Trafficking in Persons Protocol*.

Victimisation may occur in a myriad of ways and circumstances; the definition of trafficking in persons subsumes a number of practices and purposes including, inter alia, slavery, servitude (or serfdom), sexual exploitation, forced labour, debt bondage and bonded labour, servile and forced marriage, forced begging and trafficking for the purpose of organ removal.

II.2. Criminal Offences Committed by Trafficking Victims

The dire situation in which they are caught up often means that victims, because of threat, coercion, necessity, or lack of other choices, commit criminal offences during their trafficking experience. The risk of criminal offending is especially high in transit points and destination countries where victims are less familiar with local laws and customs and are thus at even greater mercy of their traffickers. From the place of origin to the destination, the risk of coming into conflict with the law permeates the entire trafficking journey and may involve, for instance, migration and border related offences as victims enter, transit, or leave different countries, often with no or with fraudulent documents. Even when they return to their country of origin, victims of trafficking may face charges for having left the country illegally, for using fraudulent documents, et cetera.¹¹

Victims may also be forced by their traffickers to commit certain offences ‘including, but not limited to, theft, pick-pocketing, drug trafficking, cannabis cultivation, and fraud.’¹² The offending may also relate to the particular work victims carry out because it is prohibited (such as certain forms of prostitution) or because it requires particular work permits or licenses which victims do not hold. Further, victims of trafficking may commit criminal offences in an attempt to escape the trafficking situation, especially by using force or threats against the traffickers and those associated with them.

The following sections set out a basic typology of offences. This is by no means exhaustive but attempts to provide some categorisation of the types of offences that may be committed.

II.2.1. ‘Status Offences’

Offences committed by victims of trafficking are frequently a direct result of their status in the place to or through which they have been trafficked. This is particularly relevant where trafficking occurs across international borders and where victims enter, stay, or exit from a country in violation of existing migration and border requirements.

Typically, status offences involve situations in which victims do not carry travel or identity documents required to enter, remain in, or depart from a country; in some cases they may use visas and passports that were once valid and have since expired. These offences may also arise if victims travel on fraudulent travel or identity documents which

¹⁰ OHCHR, *supra* nt 4, 3.

¹¹ UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, *Non-Punishment and Non-Prosecution of Victims of Trafficking in Persons: Administrative and Judicial approaches to Offences Committed in the Process of Such Trafficking*, UN Doc CTOC/COP/WG.4/2010/4 (9 December 2009) 2–3, paras 5–6.

¹² OSCE, *supra* nt 3, 9.

are provided to them by their traffickers or other associates.¹³ Also falling into this category are instances in which victims or persons acting on their behalf make false representations or provide fraudulent documents such as birth certificates, documents relating to enrolments or qualifications, false marriage certificates, et cetera used to apply for visas, passports, or to deceive immigration and border control officials. Once in the countries to which they have been trafficked, victims may be forced to work in breach of the terms of their visa (for example, they may only hold tourist, visitor, or student visas). In other cases, victims are left without any documents which led them to steal documents or source fraudulent documents from elsewhere in order to flee from the traffickers.¹⁴

In these circumstances, victims are particularly vulnerable and at risk of prosecution for immigration-related offences if apprehended by the authorities.¹⁵ It is still common practice in many countries to arrest, punish, and deport victims of trafficking in these circumstances without giving a moment's thought to any sign that the person may have been trafficked and to the fact that the victims' illegal status may be symptomatic of much more heinous offences committed by others against these and other victims. Aware of this practice, many traffickers threaten or warn their victims that they should not seek help from the authorities as they risk being detained, punished, and returned to their place of origin. Existing laws and their enforcement thus provide a useful tool to traffickers that make it unnecessary for them to employ more blunt methods to prevent victims from escaping.

II.2.2. 'Consequential Offences'

Victims of trafficking in persons may commit one or more criminal offences because they were coerced or forced by their traffickers to do so. In such cases, it can be said that the offending occurs as a direct consequence of the the victims' situation of trafficking. Indeed, some forms of trafficking occur merely because the traffickers want to use the victim as an instrument to commit crime.

Such 'consequential offences' committed by victims often constitute the work or services for which the victims have been recruited with the trafficker intending to obtain a financial or other material benefit from such work. This would be the case, for instance, if victims engage in forms of prostitution that are illegal or if they commit theft or petty crimes under the control and to the benefit of the traffickers. Other offences subsumed in the category of consequential offences include illicit production and trafficking of drugs or the commission of violent offences at the request of traffickers. As mentioned, in some situations, the victims merely serve as agents or instruments while the traffickers are the directing minds behind the offending but without any direct involvement in the commission of individual offences. Any proceeds deriving from such crime usually have to be surrendered to the traffickers, though in some instances the victims may retain some money as a token reward or in order to discharge their debts owed to the traffickers.¹⁶

¹³ OSCE, *supra* nt 3, 12.

¹⁴ See, for example, Court of Appeal of England and Wales, *R v O* [2008] EWCA Crim 2835, paras 2, 10.

¹⁵ OSCE, *supra* nt 3, 22; OHCHR, *supra* nt 4, 129, 131.

¹⁶ The Netherlands, National Rapporteur on Human Trafficking, *Trafficking in Human Beings: Seventh Report of the Dutch National Rapporteur*, 2009, at <dutchrapporteur.nl/reports/seventh/> (accessed 18 May 2016), 218; Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA), *4th General Report on GRETA's Activities covering the period from 1 August 2013 to 30 September*

II.2.3. 'Liberation Offences'

A victim may also feel compelled to commit an offence in an attempt to free herself or himself from the trafficking situation or to somehow improve that situation. Such offences are not 'a direct consequence of control exerted by traffickers, but [are], still linked to the trafficking experience'.¹⁷ In most cases, these offences would be directed against the traffickers, their associates, or their property, or involve offences committed to acquire weapons, other instruments, or documents needed to leave the trafficking situation and perhaps, the host country.¹⁸

By extension, it is also conceivable that victims, in a quest to improve their situation, opt to collaborate with their traffickers and directly or indirectly, become involved in recruiting, exploiting, or receiving victims of trafficking. It is not uncommon for victims of trafficking in persons to assist their traffickers or, in some cases, gradually become traffickers themselves. Some sources refer to these situations as victims 'graduating' within their trafficking environment; a phenomenon that has most often been observed in the context of trafficking for the purpose of sexual exploitation and prostitution.¹⁹ The causes and circumstances for the transformation from victim to trafficker are extremely complex and are not well documented nor researched. While there are ample case examples from a variety of countries, in light of the limited source material it is presently not possible to make generalisations about these situations and the extent, if any, to which they are or ought to be covered by existing and proposed non-criminalisation principles.

A distinction has to be drawn between, on the one hand, (former) victims collaborating as equals with their traffickers as 'partners in crime', participants, managers (such as brothel madams), and, on the other, victims acting under compulsion or out of necessity. It has been argued that concessions and non-criminalisation should be given consideration so long as the victims 'are subordinate to the principal human traffickers and perform specific tasks for the leader or other members of the organisation.'²⁰ It is not uncommon for traffickers to 'manipulate their victims to turn them into their assistants in the exploitation of others' as a 'deliberate strategy to retain control over the remaining victims by placing a former victim in charge and to render them even more afraid of seeking help.'²¹

By contrast, 'partners-in-crime and madams operate voluntarily and play a larger role in human trafficking. The actions of the women in these categories are not directly related to their being victims'²² and are thus not deserving of non-criminalisation.

2014, 2013, at <refworld.org/docid/55a67bb84.html> (accessed 18 May 2016), 53; OSCE, *supra* nt 3, 23; OHCHR, *supra* nt 4, 129; See also the cases of Court of Appeal of England and Wales, *L; HVN; THN; T v R* [2013] EWCA Crim 991; Court of Appeal of England and Wales, *R v N; R v LE* [2012] EWCA Crim 189, para 7.

¹⁷ OSCE, *supra* nt 3, 23.

¹⁸ The Netherlands, National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, *Trafficking in Human Beings: Ninth Report of the Dutch Special Rapporteur*, 2013, at <dutchrapporteur.nl/reports/ninth/> (accessed 18 May 2016), 121.

¹⁹ See further, Schloenhardt, A and Jolly, J, *Trafficking in Persons in Australia* (LexisNexis, Sydney, 2013) 34–35.

²⁰ Ninth Report of the Dutch Special Rapporteur, *supra* nt 18, 225.

²¹ OSCE, *supra* nt 3, 23.

²² Seventh Report of the Dutch National Rapporteur, *supra* nt 16, 225.

II.3. The Need for (Non)Criminalisation

Applying the conventional principles of criminal law would mean that victims may be liable for a myriad of offences, some of them punishable by serious penalties, if they fulfil the physical and mental elements (*actus reus* and *mens rea*) of the relevant offence description and if they cannot rely on a defence that would exculpate them in the circumstances. If victims are found guilty, they may be subject to imprisonment and fines; if they are non-citizens, they may also be deported or unable to obtain visas to remain in the host country.²³

Seen this way, a call for the non-criminalisation of victims of trafficking seems to be at odds with established criminal law mechanisms. Non-criminalisation may appear to be unjust and inappropriate, especially if victims intentionally commit serious offences. It can be argued that existing law makes sufficient exceptions and provides adequate defences for persons acting under duress or out of necessity.

The current law, however, fails to provide fair and satisfying outcomes in many cases, with the rights of aggrieved parties (traffickers, individuals, and/or the public) being privileged over the rights of victims of trafficking in persons. Compelling victims to commit crimes is often a deliberate tactic employed by traffickers to expose victims to the risk of criminalisation.²⁴ It prevents victims from exiting their trafficking situation as they are told that their stories will not be believed and that they will be deported and possibly incarcerated if the authorities become aware that the victim has entered the country unlawfully, has worked illegally, or has committed other offences.²⁵ In 2010, the Working Group on Trafficking in Persons, a committee established by the Conference of States Parties to the United Nations Convention against Transnational Organised Crime, specifically stressed that:

“Criminalisation limits the trafficking victims’ access to justice and protection and decreases the likelihood that they will report their victimization to the authorities. Given the victims’ existing fears for their personal safety and of reprisals by the traffickers, the added fear of prosecution and punishment can only further prevent victims from seeking protection, assistance and justice.”²⁶

III. Theoretical Underpinnings

The suggestion that victims of trafficking in person should not be criminalised for offences which they commit in the course of their trafficking experience can be justified

²³ Sembacher, A, “The Council of Europe Convention on Action against Trafficking in Human Beings”, 14 *Tulane Journal of International & Comparative Law* (2006) 435, 451.

²⁴ OSCE, *supra* nt 3, 9.

²⁵ OSCE, *supra* nt 3, 10.

²⁶ UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, *Non-Punishment and Non-Prosecution of Victims of Trafficking in Persons: Administrative and Judicial approaches to Offences Committed in the Process of Such Trafficking*, UN Doc CTOC/COP/WG.4/2010/4 (9 December 2009) 2–3, paras 5–6.

in two ways: (1) It reflects general concepts of responsibility, agency, and criminal liability on which most if not all modern criminal law systems are based. (2) It serves multiple practical purposes to prevent and combat trafficking in persons whilst protecting victims of such trafficking.

Put differently, the non-criminalisation principle ought to balance the interest of justice with the protection of victims of trafficking. This can be achieved by recognising that in some circumstances victims may not be criminally responsible for their actions, and by facilitating the work of law enforcement and prosecutors who require the cooperation of victims in investigating and building their cases.

III.1. Criminal Responsibility

For a person to be criminally liable, the individual must be ‘responsible (i.e. answerable) for something, to some person or body, within a responsibility-ascribing practice.’²⁷ Persons without control over their acts and omissions and persons who are incapable of making free choices because of force, threats, or deception are, generally, not responsible for any offence they may commit in these circumstances because they lack agency.

Much of the available literature advocating the non-criminalisation of victims of trafficking argues that this principle reflects the foundational concepts of responsibility and accountability,²⁸ though provides little explanation and analysis of this argument. Using two of the principal contemporary theories on criminal responsibility, choice and character theories, the following sections serve to provide a foundation for this argument.²⁹

III.1.1. Choice Theories

Choice theories found criminal responsibility upon capacities at the heart of human agency, namely ‘cognition (knowledge of circumstances, assessment of consequences) and volition (powers of self-control).’³⁰ Consequently, if these capacities are substantially impaired, a person should not be held criminally liable for their conduct.

²⁷ Duff, RA, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing, Oxford, 2007) 15–16, 20; see also, Crofts, T and Loughnan, A, “Introduction” in Crofts, T and Loughnan, A, eds, *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, Melbourne, 2015) 1, 2.

²⁸ See, for example, OHCHR, *supra* nt 4, 132–133; OSCE, *supra* nt 3, 10; Piotrowicz, R, “The Non-Punishment Principle in International Law” (paper presented at *Promoting the Implementation of the Non-Punishment Principle for Victims of Human Trafficking: A Workshop for Judicial and Prosecutorial Officials*, Strasbourg, 9–10 October 2014), para 2; Gallagher, *supra* nt 3, 288; Gerry, F, “Let’s Talk About Slaves ...; Human Trafficking: Exposing Hidden Victims and Criminal Profit and How Lawyers Can Help End a Global Epidemic”, 3(1) *Griffith Journal of Law and Human Dignity* (2015) 118, 139; see also, Court of Appeal of England and Wales, *L; HVN; THN; T v R* [2013] EWCA Crim 991, para 13.

²⁹ Duff, RA, “Choice, Character and Criminal Liability”, 12(4) *Law and Philosophy* (1993) 345, 345.

³⁰ Lacey, N, “Space, Time and Function: Intersecting Principles of Responsibility Across the Terrain of Criminal Justice” 1 *Criminal Law and Philosophy* (2007) 233, 236 (Space, Time and Function); see also, Lacey N, “Responsibility and Modernity in Criminal Law” 9(3) *The Journal of Political Philosophy* (2001) 249, 255; Crofts and Loughnan, *supra* nt 27, 2.

The first variant of choice theory, here referred to as ‘actual choice theory’, provides that punishment is justified when the offence is the product of the accused’s choice to act in a wrongful manner.³¹ This, in turn, means that a person should not be held responsible if they lack choice or, in other words, if their conduct was not the product of their choice.³² The actual choice theory is, to some extent, manifested in the notion of *mens rea*, namely that mental elements of an offence reflect the guilt and blameworthiness of the perpetrator.³³ As a result, so-called ‘innocent agents’ and those operating under ignorance or honest and reasonable mistakes of fact are generally not held responsible for their conduct because they made no actual, deliberate choice to do wrong.³⁴ Actual choice theory does not account for instances in which the accused has intended or otherwise chosen the requisite conduct but where the criminal law nevertheless negates responsibility, such as situations of duress or self-defence,³⁵ which may also arise in situations of trafficking.

A second variant of choice theory, the capacity or opportunity theory, provides that ‘agents should be excused if they could not have chosen to act otherwise than they did.’³⁶ According to this theory, to be held responsible for his or her conduct, the person must, first, possess the cognitive capacity to recognise ‘the relevant empirical aspects of his action and its circumstances, and of foreseeing its consequences.’³⁷ Second, the individual must have ‘fair opportunity’ to choose to act differently.³⁸ Fair opportunity is assessed not only in terms of the accused’s subjective mental state, but also by looking at objective standards of conduct such as whether the individual acted reasonably in the circumstances.³⁹ It follows that where a person’s cognitive capacities are substantially impaired, for example because the person suffers from mental impairment (insanity) or because the person is a minor, the person should not be held responsible for his or her conduct. Likewise, where a person does not have fair opportunity to act any differently, they should not be punished, for example in situations of duress or necessity.

III.1.2. *Character Theory*

The ‘character theory’ of criminal responsibility, as its name suggests, focuses less on the choice and agency of the accused and instead argues that persons are responsible for their actions only insofar as their actions reflect their character.⁴⁰ According to this theory, criminal liability does not merely arise because of certain conduct or choices by the accused, but because specific conduct is seen to reflect a criminal character trait. It is these character traits, so the theory, that the ‘law condemns and punishes.’⁴¹

³¹ Duff, *supra* nt 27.

³² Tadros, V, *Criminal Responsibility* (Oxford University Press, Oxford, 2010) 45.

³³ Lacey, *Space, Time and Function*, *supra* nt 30, 237.

³⁴ Duff, *supra* nt 27, 350.

³⁵ Tadros, *supra* nt 32 65; Sistare, CT, “Models of Responsibility in Criminal Theory: Comment on Baker”, 9 *Law and Philosophy* (1989) 295, 315.

³⁶ Duff, *supra* nt 27, 354.

³⁷ Duff, *supra* nt 27, 356.

³⁸ Duff, *supra* nt 27, 354; Hart, HLA, *Punishment and Responsibility* (Clarendon Press, Oxford, 1968) 21–24; Wilson, W, *Central Issues in Criminal Theory* (Hart Publishing, Oxford, 2002) 112; Bayles, M, “Character, Purpose and Criminal Responsibility” 1(1) *Law and Philosophy* (1982) 5, 6.

³⁹ Lacey, *Space, Time and Function* *supra* nt 30, 237.

⁴⁰ Tadros, *supra* nt 32, 22.

⁴¹ Duff, *supra* nt 27, 363.

Character theory thus involves

“an attribution of responsibility within a broader time frame than that implied by the capacity principles. For the context within which an agent has acted — a history of domestic abuse, for example — will be relevant to an evaluation of the disposition which that action expresses.”⁴²

Such an assessment of character finds expression in objective tests of reasonableness in the law.⁴³ Thus, for example, a person who acts under duress or in self-defence, as may be the case in situations of trafficking, should not be punished because an ‘inference from criminal act [...] to character-trait is [...] blocked.’⁴⁴

III.2. Understanding the Principle of Non-criminalisation through Theories of Responsibility

Choice theories and character theory can provide a foundation and plausible explanation for a principle advocating the non-criminalisation of victims of trafficking in persons. This is especially the case in situations in which it can be shown that the cognitive capacity of victims, i.e. their knowledge of circumstances, their assessment of consequences, and their powers of self-control are lacking or, at a minimum, substantially impaired.⁴⁵ Similarly, it can be argued that victims of trafficking carry no criminal responsibility for conduct in situations where they have no fair opportunity to act differently in the circumstances. In short, the non-criminalisation principle is based on the premise that even if a victim of trafficking deliberately commits an offence, they cannot be charged and prosecuted for that offence if they lacked true autonomy or agency at that time. To that end, ‘it is crucial to understand that victims of trafficking [...] are in a situation where they have no choice but to submit to exploitation.’⁴⁶

Choice theories, however, fail to provide a comprehensive and unambiguous explanation of what makes someone’s actions truly their own and therefore why such actions are worthy of punishment.⁴⁷ Also, by focusing on an individual’s choice to act at a particular moment in time, these theories potentially fail to consider the broader context in which some of these actions occur. For example, in the case of victims of trafficking, their decision to act may be coloured by the history of abuse they have been exposed to.⁴⁸

There is also a risk that these theories potentially label victims of trafficking as helpless persons, incapable of making choices and free decisions and who are thus unable to take responsibility for their conduct. This approach may be offensive to many victims and may not accurately reflect their situation as trafficked persons. It fails to view victims of

⁴² Lacey, *Space, Time and Function* *supra* nt 30, 239.

⁴³ *Id.*, 241; Gardner, “The Gist of Excuses”, 1(2) *Buffalo Criminal Law Review* (1998) 575, 579.

⁴⁴ Duff, *supra* nt 27, 363.

⁴⁵ *Id.*, 356.

⁴⁶ Inter-Parliamentary Union and United Nations Office on Drugs and Crime (UNODC), *Combating Trafficking in Persons: A Handbook for Parliamentarians*, 2009, at <unodc.org/documents/human-trafficking/UN_Handbook_engl_core_low.pdf> (accessed 8 May 2016), 43.

⁴⁷ Duff, *supra* nt 27, 362.

⁴⁸ Lacey, *Space, Time and Function* *supra* nt 30, 239.

trafficking as ‘legally competent persons with responsibility for their own acts’ who may indeed make conscious decisions to commit offences, which from the victims’ perspectives may be rational in the circumstances.⁴⁹

The character theory may thus provide a better and fairer explanation for the non-criminalisation of victims of trafficking. Taking into account the ‘character-traits’ offers a much broader insight into the duration and circumstances of the individual trafficking situation.⁵⁰ According to the character theory, it can be argued that victims of trafficking who commit crimes due to their trafficking situation should not be punished because their criminal conduct does not evidence underlying criminal character. Applying this theory, however, breaks with the basic notion that criminal law serves to punish conduct, not character.

III.3. Existing Concessions

The considerations underpinning the choice and character theories find expression in the existing criminal law, for example, in the defence of duress and in the concessions made for victims of domestic violence in some jurisdictions. These defences may arise if the freedom of choice of the person is compromised and if the person’s criminal conduct is not an expression of criminal character. Relevant provisions, as the following sections show, are cast very narrowly as they seek to ensure that the harm done by the victim is not disproportionate to the harm done to them. This limitation also ensures that victims are not granted blanket immunity for violent acts and other offences committed in situations involving coercion, abuse, or exploitation.

III.3.1. Duress

The defence of duress (or compulsion as it is termed in some jurisdictions) generally deals with personal crises. It is a complete defence and, if raised successfully, will result in the acquittal of the defendant. The defence operates to excuse a person from criminal responsibility where the person has committed an offence as a result of fear induced by a threat of physical harm to herself, himself, or to some other person, should she or he refuse to comply. The rationale of the defence is that ‘threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as justifications for acts which would otherwise be criminal’.⁵¹ The concept of duress/compulsion protects a person’s freedom to choose his or her own actions. This defence arises when this choice is undermined or otherwise impaired by overwhelming factors beyond the control of the accused.⁵²

In situations of duress, a person commits an offence under ‘threat of immediate or almost immediate death or serious bodily harm’ and thus should not be held responsible

⁴⁹ OSCE, *supra* nt 3, 10; see also, Malone, LA, “Economic Hardship as Coercion under the Protocol on International Trafficking in Persons by Organized Crime Elements”, 25(1) *Fordham International Law Journal* (2001) 64, 67–68.

⁵⁰ Lacey, *Space, Time and Function supra* nt 30, 239.

⁵¹ Court of Criminal Appeal of Ireland, *AG v Whelan* (1934) 518 IR, 526.

⁵² O’Connor, D and Fairall, P, *Criminal Defences* (3rd ed, Butterworths, Sydney, 1996), para 8.2.

for their actions.⁵³ In such situations the individual has no fair opportunity to act differently, thus reflecting considerations found in choice theories. The objective elements of the defence of duress, which requires proof that a reasonable person, too, would have succumbed to the threat, further serves to demonstrate that the accused's conduct does not evince underlying criminal traits, as required by the character theory.⁵⁴

In a paper presented in 2014, Ryszard Piotrowicz draws an analogy between the defence of duress and the non-criminalisation of victims of trafficking in persons. He argues that

“[t]he idea that a trafficked person should not be punished for criminal acts in certain circumstances is really based on the appreciation that the trafficked person is not a free agent, that they are compelled to commit unlawful acts by those who control and exploit them, that they are victims of crime rather than criminals, that they are acting under duress and are in no position to object.”⁵⁵

In the English case of *R v LM and others* (2010), Lord Justice Hughes notes that one of the ways in which the principle of non-punishment is implemented in England and Wales is through the defence of duress.⁵⁶ This case concerns the unrelated appeals of five women which were heard together because they shared common issues, namely trafficking in persons and the United Kingdom's obligations under the Council of Europe's *Convention on Action against Trafficking in Human Beings* and this Convention's non-punishment (non-criminalisation) provision, which is examined further below.

The existing defence of duress may thus serve to excuse some offences that victims of trafficking are compelled to commit by their traffickers. The defence does not have broad enough application to excuse all the possible offences a victim may have to commit to escape, endure, or survive the trafficking situation. This also — and in particular — relates to offences a victim may be compelled to commit because of means other than force or threat, for example, by manipulation or psychological coercion over an extended period of time.⁵⁷

III.3.2. Domestic Violence

There are conceptual and practical similarities between victims of trafficking who try to escape from their situation by committing offences against their traffickers and victims of domestic violence who assault or kill their violent partner after years of abuse.⁵⁸ Both kinds of victims may experience physical harm, psychological abuse, coercion,

⁵³ Simester, AP and Sullivan, GR, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th ed, Hart Publishing, Oxford, 2013), 741.

⁵⁴ Lacey, *Space, Time and Function* *supra* nt 30, 241.

⁵⁵ Piotrowicz, R, “The Non-Punishment Principle in International Law” (Paper presented at *Promoting the Implementation of the Non-Punishment Principle for Victims of Human Trafficking: A Workshop for Judicial and Prosecutorial Officials*, Strasbourg, 9–10 October 2014), 3.

⁵⁶ Court of Appeal of England and Wales, *R v LM and others* [2010] EWCA Crim 2327, para 8.

⁵⁷ OSCE, *supra* nt 3, 11; Council of Europe, *Explanatory Report on the Convention against Trafficking in Human Beings*, CETS No 197, 16 May 2005, (accessed 8 May 2016), para 273.

⁵⁸ Douglas, H, “Criminal Responsibility and Family Violence: The Relationship between (Feminist) Academic Critique and Judicial Decision-making” in Crofts, T and Loughnan, A, eds, *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, Melbourne 2015), 176–177.

exploitation, and may feel trapped in their situation, unable to see a ‘way out’ without harming their abuser.

Traditional criminal law concepts, the defences of duress, provocation, and self-defence in particular, can be difficult to prove for persons who assault or kill their abuser. Starting in the 1980s, a body of literature,⁵⁹ followed by a series of judicial interpretations,⁶⁰ emerged to enable more generous interpretations of these defences in favour of women who kill their abusive partners. Several jurisdictions have since amended their laws to allow for some leniency in cases where an abusive partner is killed by the victim of long-term abuse.⁶¹

The so-called ‘battered woman syndrome’ was first raised in *Lavallee v The Queen* [1990] 1 SCR 852 — a Canadian case in which the female defendant shot her de facto partner who abused her for several years — in order to explain why women who kill their abusive partners do so instead of leaving the relationship. The syndrome ‘purports to explain passive acceptance of violent behaviour in terms of the concept of ‘learned helplessness’ which is said to arise from ongoing and unpredictable violence’.⁶² The acceptance is often reinforced by feelings of guilt, financial dependence, and by mutual children with the abuser. The women feel unable to seek help from others for fear this may trigger further violence, which leaves them with the feeling that it is impossible to escape the dominance of the abusive partner. The Courts have admitted such ‘social framework evidence’ to ‘explain the dynamics and effects of abuse.’⁶³ It shows why and how a person’s capacity for choice may be impaired by domestic violence and helps to understand that a person’s conduct may not reflect underlying criminal character.⁶⁴

It is arguable that similar inferences can be drawn if victims of trafficking harm their traffickers, especially if the harm caused seems disproportionate and unreasonable in isolation but becomes more plausible and explicable once the context of exploitation is taken into account.

IV. Practical Considerations

The principle of non-criminalisation may also be justified on the basis of two practical considerations.

⁵⁹ Walker, L, *The Battered Woman* (Harper & Row, New York, 1979); Walker, L, *The Battered Woman Syndrome* (2nd ed, Springer, New York, 1984).

⁶⁰ Supreme Court of South Australia, *R v R* (1981) 28 SASR 321; New South Wales Court of Appeal, *R v Hill* (1981) 3 A Crim R 397; Supreme Court of South Australia, *R v Runjanjic and Kontinnen* (1991) 56 SASR 114; Northern Territory Court of Criminal Appeal, *R v Secretary* (1996) 5 NTLR 96.

⁶¹ See, for example, Sections 54–56 of the *Coroners and Justice Act 2009*; Section 304B *Criminal Code* (Qld); s 248 of the *Criminal Code* (WA); and former Sections 9AD, 9AH to the *Crimes Act 1958* (Vic).

⁶² O’Connor and Fairall, *supra* nt 52, para 10.24.

⁶³ Douglas, *supra* nt 58, 191.

⁶⁴ Lacey, *Space, Time and Function supra* nt 30, 239.

IV.1. Breaking the Trafficker's Control

'Success for traffickers only comes if they can control their victims.'⁶⁵ Traffickers may use mechanisms to prevent victims from exiting the trafficking situation including a combination of: violence and threats of violence, deception, imprisonment, collusion, debt bondage, isolation, religion, culture, and belief. Particularly relevant to the principle of non-criminalisation are situations where the traffickers tell their victims that the authorities will not assist victims, will punish them, and that officials are corrupt and cannot be trusted. These statements by the traffickers serve to frighten the victims and prevent them from making any attempts to escape. In many jurisdictions it is still common for the main focus of law enforcement investigations to rest on prosecuting victims for any offence they may have committed, rather than shifting attention to the signs of trafficking and the more heinous crimes committed to the victims. Furthermore, some victims believe the traffickers' statements because they have seen corruption first-hand or are 'aware of other victims who have been prosecuted for illegal entry or for other offences they may have been forced to commit as victims of trafficking.'⁶⁶ Hence, they may be hesitant to leave their trafficking situation.

A clear and well-known principle of non-criminalisation may encourage victims to disbelieve their traffickers and take steps to leave their control. It may also prevent traffickers from exerting 'even further control over their victims by threatening exposure to punishment by the State.'⁶⁷

IV.2. Creating Incentives to Support Law Enforcement

Prosecuting victims for offences they may have committed during their trafficking experience dissuades them from participating in the investigation and prosecution of trafficking cases.⁶⁸ Accordingly, the principle of non-criminalisation may create incentives for victims of trafficking in persons to support law enforcement efforts to combat trafficking.

The prosecution of trafficking offences poses great challenges to law enforcement officials and, as mentioned earlier, investigations, prosecutions, and convictions of trafficking cases are relatively rare. One of the main obstacles is the 'reliance on often traumatised victims as witnesses who may also be unwilling or unable to participate in prosecutions.'⁶⁹ In many cases, victims are the only witnesses for the prosecution; consequently the prosecution's case is much stronger if the victim of trafficking is cooperating and willing to testify. Many prosecutors are unwilling or unable to take up

⁶⁵ United Nations Office on Drugs and Crime (UNODC), *Anti-human trafficking manual for criminal justice practitioners*, Module 4 – Control methods in trafficking in persons, New York, 2009, at <unodc.org/documents/human-trafficking/TIP_module3_Ebook.pdf> (accessed 8 May 2016), 1.

⁶⁶ *Id.*, 4.

⁶⁷ OSCE, *supra* nt 3, 10.

⁶⁸ Gallagher, *supra* nt 3, 275; Le Cocq, P, "The Non-Punishment Principle as an Essential Element of a Human Rights-Based Approach to Action against Trafficking in Human Beings" (Presentation delivered at the *Council of Europe Workshop for Judicial and Prosecutorial Officials on Promoting the Implementation of the Non-Punishment Principle for Victims of Human Trafficking*, Strasbourg, 9 October 2014).

⁶⁹ David, F, "Prosecuting trafficking in persons: known issues, emerging responses", 358 *Trends & Issues in Crime and Criminal Justice* (2008) 1, 1.

cases or bring them to trial unless victims are willing to give accounts of their experiences.⁷⁰

Gaining the trust and cooperation of victims who are often severely traumatised and fearful of the authorities can be extremely difficult. ‘Often, because of their distrust of police in their home countries, trafficking survivors fear law enforcement agencies and are concerned that they will be treated as criminals, incarcerated or deported.’⁷¹ Many traffickers further fuel this fear and distrust. The victims are also concerned that any cooperation with the police and other authorities will put them at risk of retaliation, threats, and harm by the traffickers — not only directed at the victims, but also against their family and friends. Slow and complex criminal proceedings often further compound these issues and deter some victims from cooperating with the authorities.⁷²

The principle of non-criminalisation is an important tool to address and overcome these fears and create a more collaborative and non-threatening relationship between authorities and victims. Speaking at UN Working Group on Trafficking in Persons, John Richmond, a US prosecutor of trafficking cases, stressed that ‘the challenges that might result from non-prosecution were outweighed by the benefits of collaboration. Much of the evidence needed to convict traffickers came from testimony; without securing the cooperation of victims, that evidence would not be brought.’⁷³ A UK-based anti-trafficking organisation further argues that the threat of criminalisation of victims of trafficking ‘guarantees the impunity of traffickers’.⁷⁴ Criminalisation fails to target the real culprits of trafficking in person’s cases.⁷⁵ By protecting victims and promoting the principle of non-criminalisation, States are better equipped to combat, reduce, and eradicate trafficking in persons.

V. Current State of International Law

The principle of non-criminalisation of victims of trafficking in persons has found a mixed response in international law. Despite strong advocacy and convincing arguments by some groups and experts, some of the key international treaties in this field make no reference to non-criminalisation and make no mention of the criminal liability of victims of trafficking whatsoever. Some international documents, including binding instruments adopted by the Council of Europe and the European Union, however, promote and, in

⁷⁰ Farrell, A *et al*, “New laws but few cases: understanding the challenges to the investigation and prosecution of human trafficking cases”, 61(2) *Crime, Law and Social Change* (2014) 139, 157–158.

⁷¹ United Nations Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons*, New York, 2008, at <unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook%5B1%5D.pdf>, 176; Bales, K and Lize, S, “Investigating human trafficking: challenges, lessons learned and best practices”, 76(4) *FBI Law Enforcement Bulletin* (2007) 24, 26-27.

⁷² Farrell *et al*, *supra* nt 70, 157-158.

⁷³ UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, *Report on the Meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010*, UN Doc CTOC/COP/WG.4/2010/6 (17 February 2010) para 104.

⁷⁴ Anti-Trafficking Monitoring Group, Rachel Annison, *In the Dock: Examining the UK’s Criminal Justice Response to Trafficking*, ISBN: 9780900918797, June 2013, at <antislavery.org/includes/documents/cm_docs/2013/i/inthedock_final_small_file.pdf> (accessed 8 May 2016), 93.

⁷⁵ OSCE, *supra* nt 3, 10.

some cases, mandate the non-criminalisation or non-punishment of victims of trafficking. The following sections explore the current state of international law on this point.

V.1. UN Trafficking in Persons Protocol

The United Nations *Trafficking in Persons Protocol* does not engage with criminal liability of persons who, wittingly or unwittingly, have become victims of trafficking and who may themselves have committed offences in the course of or in relation to their situation of trafficking.⁷⁶ This is, perhaps, surprising, especially since another Protocol developed by the same committee at the same time, the UN *Smuggling of Migrants Protocol*, contains an explicit non-criminalisation principle applicable to persons who are the object of migrant smuggling.⁷⁷ Several authors have criticised the *Trafficking in Persons Protocol* for failing to protect victims from prosecution for acts they are forced to perform.⁷⁸ It has, however, been officially recognised that non-criminalisation is an essential aspect of the protection of victims of trafficking and is an extension of the *Trafficking in Persons Protocol*'s purpose 'to protect and assist the victims of such trafficking, with full respect for their human rights'.⁷⁹

V.1.1. Working Group on Trafficking in Persons

The issue of non-criminalisation was first raised in 2009 at the first meeting of the Working Group on Trafficking in Persons. In its report, the Working Group noted that:

"With regard to ensuring the non-punishment and non-prosecution of trafficked persons, States Parties should:

(a) Establish appropriate procedures for identifying victims of trafficking in persons and for giving such victims support;

(b) Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts."⁸⁰

⁷⁶ See also, UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, *Non-Punishment and Non-Prosecution of Victims of Trafficking in Persons: Administrative and Judicial approaches to Offences Committed in the Process of Such Trafficking*, UN Doc CTOC/COP/WG.4/2010/4 (9 December 2009), 3.

⁷⁷ *Smuggling of Migrants Protocol*, Article 5; see further Schloenhardt, A and Hickson, H, "Non-criminalization of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea, and Air" 25(1) *International Journal of Refugee Law* (2013) 39-64.

⁷⁸ Hyland, KE, "The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children" 8(2) *Human Rights Brief* (2001) 30-31; Fredette, K, "Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation" 17 *Cardozo Journal of International and Comparative Law* (2009) 01-129.

⁷⁹ *Trafficking in Persons Protocol*, Article 2(b).

⁸⁰ UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, *Report on the Meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009*, UN Doc CTOC/COP/WG.4/2009/2 (21 April 2009), para 12.

At the next meeting of the Working Group held in 2010 it was specifically stressed that:

“An essential element of protection of victims of trafficking and their rights must be that States do not prosecute or punish trafficked persons for trafficking-related offences such as holding false passports or working without authorization, even if they consented to hold false documents or to work without authorization. Similarly, it is argued that States should not prosecute or punish trafficked persons for crimes they may have committed in the course of trafficking. [...] Without the principle of non-liability victim assistance and support programmes are rendered ineffective and sometimes meaningless.”⁸¹

At that time, the Working Group refrained from articulating the scope and wording of a non-criminalisation principle but instead pointed to the fact that offences committed by victims of trafficking under duress may be excused under existing provisions in domestic criminal law and noted that some States have adopted a ‘causation based model’ by which victims are not to be held liable for offences that are directly connected or related to the trafficking.⁸²

IV.1.2. Model Law against Trafficking in Persons

Although the *Trafficking in Persons Protocol* provides no express basis for the non-criminalisation of victims of trafficking, the *Model Law against Trafficking in Persons*, which has been developed by UNODC, the United Nations Office on Drugs and Crime, to assist States Parties with the implementation of the Protocol, suggests the inclusion of a provision on the ‘non-liability, non-punishment or non-prosecution of victims of trafficking in persons’ in domestic law. Article 10 of the *Model Law* reads:

“1. A victim of trafficking in persons shall not be held criminally or administratively liable [punished] [inappropriately incarcerated, fined or otherwise penalized] for offences [unlawful acts] committed by them, to the extent that such involvement is a direct consequence of their situation as trafficked persons.

2. A victim of trafficking in persons shall not be held criminally or administratively liable for immigration offences established under national law.

3. The provisions of this article shall be without prejudice to general defences available at law to the victim.

4. The provisions of this article shall not apply where the crime is of a particularly serious nature as defined under national law.”

⁸¹ UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, *Non-Punishment and Non-Prosecution of Victims of Trafficking in Persons: Administrative and Judicial approaches to Offences Committed in the Process of Such Trafficking*, UN Doc CTOC/COP/WG.4/2010/4 (9 December 2009), paras 10–11.

⁸² UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, *Non-Punishment and Non-Prosecution of Victims of Trafficking in Persons: Administrative and Judicial approaches to Offences Committed in the Process of Such Trafficking*, UN Doc CTOC/COP/WG.4/2010/4 (9 December 2009), para 11.

This model provision essentially captures the three types of offences typically committed by victims during their trafficking experience: Article 10(1) covers what was earlier described as ‘consequential offences’ that are committed as ‘a direct consequence’ of the trafficking situation. Article 10(2) makes reference to offences under domestic immigration law which were earlier referred to as ‘status offences’. Offences committed under duress or out of necessity, including ‘liberation offences’, ought to be covered by general defences as recognised by Article 10(3). To ensure, that this non-criminalisation provision does not provide a ‘blank cheque’ for committing heinous crimes, Article 10(4) limits the application to offences that are not ‘particularly serious offences as defined under national law’.

V.2. Council of Europe Convention on Action against Trafficking in Human Beings

The Council of Europe *Convention on Action against Trafficking in Human Beings*, which came into existence in 2005,⁸³ mirrors the provisions and obligations under the UN *Trafficking in Persons Protocol* in many ways but expands several of its concepts, especially with regard to the protection of victims. Besides the *Trafficking in Persons Protocol*, with 44 States Parties the Council of Europe Convention is the most widely accepted, binding international instrument on this topic.

Article 26 of the Convention contains a ‘non-punishment provision’ which states that:

“Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.”

The *Explanatory Report* on the Convention further notes that

“Article 26 constitutes an obligation to Parties to adopt and/or implement legislative measures providing for the possibility of not imposing penalties on victims, on the grounds indicated in the same article.

In particular, the requirement that victims have been compelled to be involved in unlawful activities shall be understood as comprising, at a minimum, victims that have been subject to any of the illicit means referred to in Article 4, when such involvement results from compulsion.

Each Party can comply with the obligation established in Article 26, by providing for a substantive criminal or procedural criminal law provision, or any other measure, allowing for the possibility of not punishing victims when the above mentioned legal requirements are met, in accordance with the basic principles of every national legal system.”⁸⁴

⁸³ Opened for signature on 16 May 2005, Council of Europe Treaty Series No. 197 (entered into force 1 February 2008).

⁸⁴ Council of Europe, *supra* nt 57, paras 272–274.

Unlike the UNODC *Model Law*, the non-punishment provision under Article 26 and the explanatory notes give little guidance on the type of offences for which victims of trafficking should not be criminalised. Some reference is made to offences committed under duress or compulsion and there is a call on States Parties to use general criminal law provisions, i.e. defences, to excuse victims in these circumstances. The main emphasis in the Article and the *Explanatory Report* is on offences the victims was compelled to commit. This would not immediately extend to offences committed by the victim to liberate herself or himself from the trafficking situation as these offences would not be committed under the compulsion of the traffickers. From the plain wording, it is also unclear whether the provision extends to what was earlier described as ‘status offences’, especially in circumstances in which the victim knowingly enters or stays in the host country in violation of domestic immigration and residence laws.

V.3. European Union Council Directive and Framework Decision

The European Union’s initial documents to combat trafficking in persons, *Council Joint Action 97/154/JHA* of 24 February 1997 and *Council Framework Decision 2002/629/JHA* of 19 July 2002, made no specific reference to the non-criminalisation of victims. The issue was first raised at the European Conference on Preventing and Combating Trafficking in Human Beings, held from 18 to 20 September 2002, which developed a set of ‘recommendations, standards, and best practices’, later referred to as the *Brussels Declaration on Preventing and Combating Trafficking in Human Beings*.⁸⁵ In the context of ‘victim protection and assistance’, this Declaration specifically notes that:

“Trafficked victims must be recognised as victims of serious crime. Therefore they should not be re-victimised, further stigmatised, criminalised, prosecuted or held in detention centres for offences that may have been committed by the victim as part of the trafficking process.”

In 2011, the European Union revised its efforts against trafficking in persons and issued *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*. This Directive provides extensive guidance to Member States on the necessary steps to criminalise trafficking, for effective law enforcement, and for the assistance and support to victims of trafficking. Article 8 of this Directive specifically addresses the non-criminalisation principle:

“Article 8 –Non-prosecution or non-application of penalties to the victim

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.”

⁸⁵ Council of the European Union, *Brussels Declaration on Preventing and Combating Trafficking in Human Beings*, 14981/02 (29 November 2002) Annex.

This provision makes specific reference to criminal activities which victims ‘have been compelled to commit as a direct consequence of’ being a victim’. A plain reading suggests that this extends to offences committed under duress and to offences committed under the control of the traffickers. Article 8 does not specifically call on Member States not to criminalise offences committed in these circumstances; instead, it advocates that prosecution and judicial authorities exercise discretion in their decision to prosecute or punish or to refrain from prosecution and punishment. To that end, Article 8 does not mandate or propose amendments to substantive criminal laws but merely calls for the adoption of measures that entitle relevant authorities to exercise discretion as they see appropriate in the circumstances.

V.4. Other United Nations Declarations and Guidelines

V.4.1. UNHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking

The non-criminalisation principle has also been articulated in a range of United Nations declarations, resolutions, and guidelines issued over the past 16 years. One of the first and most frequently cited expressions of the principle can be found in the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* that were first published by the United Nations Office of the High Commissioner for Human Rights (UNHCHR) in 2002.⁸⁶ Principle 7 specifically states that:

“Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”

This principle is further explained in additional ‘Guidelines’, which call on States, intergovernmental and non-governmental organisations to consider:

“Ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody. [...]

Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons. [...]

Guaranteeing that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation. [...]

⁸⁶ OHCHR, *supra* nt 4.

Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.”⁸⁷

Principle 7 is a very broad expression of the non-criminalisation principle insofar as it extends to status and consequential offences. The Guidelines further stress that victims of trafficking should not be detained in any way for their offending insofar as this relates to their status or to offences committed as a direct consequence of their trafficking situation.

V.4.2. *UN General Assembly*

Starting in 2000, several UN General Assembly resolutions also call upon States to refrain from criminalising and punishing victims of trafficking in persons. The first of these resolutions was made in the context of promoting the rights of and empowering women. Here, the General Assembly recommended that Member States

“[c]onsider preventing, within the legal framework and in accordance with national policies, victims of trafficking, in particular women and girls, from being prosecuted for their illegal entry or residence, taking into account that they are victims of exploitation.”⁸⁸

In Resolution 65/190 of 21 December 2010, the General Assembly further

“urges Governments to take all appropriate measures to ensure that victims of trafficking are not penalized or prosecuted for acts committed as a direct result of being trafficked and that they do not suffer from revictimization as a result of actions taken by Government authorities, and encourages Governments to prevent, within their legal framework and in accordance with national policies, victims of trafficking in persons from being prosecuted for their illegal entry or residence.”⁸⁹

The same statement was reiterated in a General Assembly resolutions made in 2012.⁹⁰ A further 2014 resolution expands this call for action by

“[urging] Governments, in accordance with their respective legal systems, to take all appropriate measures, including through policies and legislation, to ensure that victims of trafficking are protected from prosecution or punishment for acts those victims have been compelled to commit as a direct consequence of having been trafficked and that the victims do not suffer from revictimization as a result of actions taken by Government authorities, and encourages Governments to prevent, within their legal framework and in accordance with national policies,

⁸⁷ *Id*, Guidelines 2.5, 2.6, 4.5, 5.5, 5.6.

⁸⁸ UN General Assembly, *Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action*, UN Doc A/RES/S-23/3 (16 November 2000), para 70(c).

⁸⁹ UN General Assembly, *Trafficking in women and girls*, UN Doc A/RES/65/190 (21 December 2010), para 17.

⁹⁰ UN General Assembly, *Trafficking in women and girls*, UN Doc A/RES/67/145 (20 December 2012), para 20.

victims of trafficking in persons from being prosecuted or punished as a direct consequence of their illegal entry or residence.”⁹¹

V.4.3. ILO 2014 Protocol to the Forced Labour Convention

The non-criminalisation principle has recently been added to international efforts by the International Labour Organisation (ILO) to fight labour trafficking and forced labour. In 2014, a new Protocol to the *Forced Labour Convention* was adopted to suppress all forms of forced labour, protect victims, and to take effective measures to prevent forced labour.⁹² Article 4(2) of the Protocol states that:

“Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.”⁹³

V.5. Other Regional Instruments

The non-criminalisation principle has also been recognised in recommendations made by regional organisations in Europe and the Americas. This includes the *Action Plan to Combat Trafficking in Human Beings* developed by the Organisation for Security and Cooperation in Europe in 2003, which calls on Member States to ensure ‘that victims of trafficking are not subject to criminal proceedings solely as a direct result of them having been trafficked’.⁹⁴

The 2006 *Conclusions and Recommendations of the Meeting of National Authorities on Trafficking in Persons* by the Organisation of American States (OAS) provide that

“Member States must ensure, to the extent possible and in accordance with their respective domestic legislations, that the victims of trafficking in persons are not prosecuted for participating in illegal activities if they are the direct results of their being a victim of such trafficking.”⁹⁵

The *Conclusions and Recommendations* of the 2009 meeting further call on Members States

⁹¹ UN General Assembly, *Trafficking in women and girls*, UN Doc A/RES/69/149 (18 December 2014), para 25.

⁹² *Protocol of 2014 to the Forced Labour Convention*, opened for signature 11 June 2014, ILO PO No 29 (not yet in force).

⁹³ *Protocol of 2014 to the Forced Labour Convention*, opened for signature 11 June 2014, ILO PO No 29 (not yet in force), Article 4(2).

⁹⁴ OSCE, *Action Plan to Combat Trafficking in Human Beings*, MC Dec 2/03, OSCE, MC.DEC/2/03 (2 December 2003), recommendation 1.8.

⁹⁵ Permanent Council of the Organisation of American States, *Conclusions and Recommendations of the Meeting of National Authorities on Trafficking in Persons*, 1st mtg, OEA/Ser.K/XXXIX (26 April 2006) Section IV(7).

“to avoid, in accordance with domestic laws and jurisprudence, the detention, criminal prosecution, and punishment of victims of trafficking in persons for their participation in illegal activities, to the extent that such participation was the direct result of their being the victims of trafficking and to the extent that the victims were forced or compelled to participate in such activities.”⁹⁶

VI. Scope of the Principle

The existing provisions in international law vary in the way they articulate the non-criminalisation principle. Differences can be seen in the scope and subject of the provisions, and, importantly, in the causal connection between offence and the victim required for the principle to apply.

VI.1. Non-criminalisation, Non-prosecution, Non-punishment

At the outset, the various articulations of the principle differ in the terminology used, with some referring to ‘non-criminalisation’, others to ‘non-prosecution’, and others still to ‘non-punishment’. Although these differences seem small and subtle, they have implications for the scope of the principle and the question what precisely victims are to be protected from.

‘Non-criminalisation’ is the broadest of the terms used. This seems to advocate that criminal liability does not arise in the first place and that the exemption made for victims of trafficking is not merely a matter of discretion or defences. A literal reading of the term would suggest that offences committed by victims of trafficking are not illegal and do not require prosecution and punishment. Non-criminalisation would thus provide the widest protection for victims. The term can mostly be found in the academic literature and is not used in any of the binding international instruments.⁹⁷ Only Article 10 of UNODC’s *Model Law* refers to ‘non-liability’ of victims and provides that victims of trafficking in persons should not be held ‘criminally or administratively liable for offences’ they may commit in the course of trafficking. Because of the breadth of the application, the *Model Law* is qualified by the requirement in Article 10(4) that non-liability does not apply ‘where the crime is of a particularly serious nature as defined under national law’.

The term ‘non-prosecution’ which is used in Article 8 of the European Union Directive and in Article 4(2) of the *ILO 2014 Protocol to the Forced Labour Convention* has a much narrower meaning and specifically refers to the possibility that prosecutors may refrain pressing charges against victims of trafficking. The way in which the term ‘non-prosecution’ is used here does not alter the criminality or illegality of the victims’ conduct and instead suggest that whether victims will face prosecution and punishment for any offence committed as part of the trafficking situation is a matter of discretion and decided on a case-by-case basis (‘entitled not to prosecute’). This is especially problematic in civil

⁹⁶ Permanent Council of the Organisation of American States, *Conclusions and Recommendations of the Second Meeting of National Authorities on Trafficking in Persons*, 2nd mtg, OEA/Ser.K/XXXIX.2 (18 September 2009), recommendation 21.

⁹⁷ Hoshi, B, “The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law”, 1(2) *Groningen Journal of International Law* (2013) 54.

law jurisdictions where, in some systems, authorities have a duty (and no discretion) to prosecute. Even where the discretion not to prosecute exists, this creates some uncertainty for victims of trafficking as they are unaware of the consequences they may face should they report to the authorities. It also leaves open the possibility that a decision not to prosecute may be reversed.⁹⁸ The UNHCHR *Recommended Principles and Guidelines*, the UN General Assembly Resolutions of 2010 and 2012 and the OAS *Conclusions and Recommendations* of 2006 and 2009 also refer to non-prosecution but use the term in a non-discretionary way ('must ensure that ... are not prosecuted').

The term 'non-punishment' of victims of trafficking only refers to the sanctions that victims may face for their offending. It does not engage with the question of whether such offending is illegal and ought to be criminalised; a non-punishment principle merely calls on States to refrain from imposing criminal sanctions, such as fines and imprisonment, on victims for offences they have committed as part of their trafficking experience. Article 26 of the Council of Europe Convention is limited in this way; at a minimum, this Article only requires that States Parties 'provide for the possibility of not imposing penalties on victims'. In other words, the Article calls upon States to refrain from punishment but does not discourage criminalisation and prosecution. The UNODC *Model Law*, the European Union Directives and the UN General Assembly resolutions also advocate the non-penalisation/non-punishment of victims, but do so in addition or as an alternative to non-prosecution or non-criminalisation.

The question thus arises to what extent leniency for offences committed by victims of trafficking should be exercised and whether this is a matter of deciding in individual cases that the person may not be liable, not be prosecuted, or not punished, or whether there is an underlying rule exempting victims from criminal liability altogether so long as their offending occurred in the course or as a consequence of their trafficking experience. International law has thus far been rather cautious in its approach but this caution may be too little to signal to victims that they can exit their trafficking situation and freely cooperate with law enforcement agencies without fear. Discretionary non-prosecution and non-punishment may give many victims too little certainty that they will be believed and not face consequences for offences they had to commit.

VI.2. Subject of the Provision

In the existing expressions of the principle there is some variation regarding its subject, with some referring to 'victims of trafficking' and others to 'trafficked person'; two terms that are used quite interchangeably throughout the literature.

'Victims of trafficking in persons', the term also used earlier in this paper, are not further defined in the UN *Trafficking in Persons Protocol*. The UNODC *Model Law* promotes the adoption of such a definition in domestic law and broadly defines the term to include 'any natural person who has been the subject of trafficking in persons or whom the competent authorities [...] reasonably believe is a victim of trafficking in persons, regardless of whether the person is identified, apprehended, prosecuted or convicted'.⁹⁹

⁹⁸ *Id.*, 54, 59.

⁹⁹ Article 5(v), UN Office on Drugs and Crime (UNODC) and UN.GIFT. *Model Law against Trafficking in Persons* (2009) [*Model Law against Trafficking in Persons*].

This definition reflects Article 4(e) of the Council of Europe *Convention on Action against Trafficking in Human Beings* as well as the definition of ‘victim’ set out in the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. The latter refers to victims as

“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.”¹⁰⁰

While these definitions shed some light into the category of persons who fall under the non-criminalisation principle in its various articulations, there are considerable practical difficulties in identifying victims and determining victim status with certainty.¹⁰¹ Furthermore, there is continuing discussion and controversy about the point in time at which that determination is to be made, which is important as this also determines when a person can benefit from protection and assistance mechanisms, including the non-criminalisation principle.

To be considered a victim of trafficking under the Council of Europe Convention, for instance, it suffices that the competent authorities have ‘reasonable grounds to believe that a person is a victim’. The Convention awards certain rights and protection before victim status has been formally assigned; it ‘does not require absolute certainty [which is] by definition impossible before the identification process has been completed’.¹⁰² The *Model Law* similarly makes reference to a reasonable belief that a person ‘is a victim of trafficking in persons, regardless of whether the person is identified, apprehended, prosecuted or convicted’.¹⁰³

It is unclear and debatable at what point persons presumed, but not confirmed, to be victims should benefit from the non-criminalisation principle and the existing material is mute on this point. The decisions of if and when to investigate and prosecute a person believed to be a victim ultimately rest with States and their authorities. Long delays and waiting periods may not be in the interest of justice and may create a risk that information and evidence will become unavailable. On the other hand, to best serve the non-criminalisation principle and avoid further traumatising of victims, prosecutions ought to be delayed so long as the authorities reasonably believe that the person may be a victim. It would be advisable to issue further guidance for States and their authorities on this point.

VII. Compulsion, Causation, Consequences

The most challenging aspect of the non-criminalisation principle is the nexus between the trafficking situation and the offence the victim committed in that situation.

¹⁰⁰ UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985, (96th plenary meeting) A/RES/40/34, Annex, paras 1-2.

¹⁰¹ Gallagher, *supra* nt 3, 277.

¹⁰² Council of Europe, *supra* nt 57, paras 131-132.

¹⁰³ Article 5(v), *Model Law against Trafficking in Persons*, *supra* nt 99.

Expressions such as ‘as part of’, ‘in the course of’, ‘in furtherance of’, ‘as a consequence of’, and ‘compelled to do’ all serve to establish some causal connection between the position of a victim of trafficking on the one hand and the offending on the other. Just how this connection is framed and what proof it requires is, perhaps, the most contentious aspect of the non-criminalisation principle.¹⁰⁴ In the existing laws and literature, three separate models for this connection can be identified which are generally referred to as the compulsion, causation, and presumption models.

VII.1. *Compulsion Model*

The compulsion model limits non-criminalisation, non-prosecution or non-punishment to offences that victims were forced, coerced or otherwise compelled to commit and ‘requires that the criminal act is committed under a high degree of pressure from the trafficker(s).’¹⁰⁵ The model thus primarily emphasises existing notions of duress, discussed earlier in this article, and the fact that freedom of choice of the victim is significantly impaired in these circumstances, such that they lack true autonomy and agency.¹⁰⁶ It has been argued, however, that the compulsion model is not merely a re-statement of the established defence of duress, but that it uses the means element in the definition of trafficking persons, such as threat or use of force, other forms of coercion, abduction, fraud, deception or abuse of power or of a position of vulnerability, to explain and excuse offences committed by the victim while these means are present.¹⁰⁷

This compulsion model is reflected in Article 26 of the Council of Europe Convention which advocates non-punishment for ‘involvement in unlawful activities, to the extent that [victims] have been compelled to do so’. Article 8 of the European Union Directive and the ILO 2014 Protocol contain the same phrase but qualify it further by requiring ‘a direct consequence of being’ a victim of trafficking.

The compulsion model has been criticised for being too narrow and for failing to meet the objectives of the non-criminalisation principle. Bijan Hoshi argues that the compulsion model

“fails to grasp the subtle and nefarious methods by which traffickers can exert total dominance over trafficked persons, such that even in the absence of a high degree of pressure (or, indeed, any overt pressure at all), the trafficked person may, in reality, have little choice but to commit the criminal act.”¹⁰⁸

This model may also provide insufficient protection of victims from criminalisation and punishment for immigration and status offences and for ‘liberation offences’, which the victim commits at her or his own initiative and not under the control or compulsion of the traffickers.

¹⁰⁴ Hoshi, *supra* nt 97, 54, 68.

¹⁰⁵ *Id.*, 54.

¹⁰⁶ OSCE, *supra* nt 3, 10.

¹⁰⁷ *Id.*, 10, 27; Anti-Trafficking Monitoring Group (ATMG), *In the Dock: Examining the UK’s Criminal Justice Response to Trafficking* (2013) 95; Council of Europe, *supra* nt 57, para 273.

¹⁰⁸ Hoshi, *supra* nt 97, 54, 55.

VII.2. *Causation Model*

The causal connection between the trafficking situation and the offending are the principal focus of the causation model of non-criminalisation. This model extends non-criminalisation, non-prosecution or non-punishment to offences committed ‘as a direct consequence’ of being a victim of trafficking. Unlike the compulsion model, this approach does not require the nexus to any force, coercion or duress exercised by the traffickers and thus provides a potentially greater scope of application.

Reference to the causation model can be found in the UN Working Group on Trafficking in Persons, the UNODC *Model Law*, and the UNHCHR *Recommended Principles and Guidelines*, which all refer to offences committed ‘as a direct consequence’ of the trafficking situation. The reference to ‘a direct result of them having been trafficked’ in the OSCE *Action Plan* can be understood in the same way. During the development of the Council of Europe Convention, the Parliamentary Assembly of the Council also recommended that the Convention’s non-punishment provision be expressed in causation/consequence terms;¹⁰⁹ a suggestion that was ultimately rejected in favour of the compulsion model. The European Union Directive and the ILO 2014 Protocol also use the phrase ‘as a direct consequence of’ but, as mentioned, additionally require the compulsion element.

The broader and seemingly more flexible application of the causation model has been praised for providing ‘effective and sufficient’ protection to trafficked persons.¹¹⁰ It is, however, not surprising that this model has not been adopted in the binding, more authoritative expressions of the non-criminalisation principle. There is a valid concern that, while in theory the causation model meets the objectives of the non-criminalisation principle better, it is over-inclusive and difficult to operate in practice. In particular, statements of the causation model fail to articulate clear boundaries of where the causal or consequential nexus between the trafficking situation and the offending ends, and where full responsibility of the offender begins.

VII.3. *Presumption Model*

A third model that has found very limited adoption and lacks a wider theoretical foundation is the presumption model. This takes a very pragmatic and clear-cut approach to the questions of liability and criminalisation. The approach plainly exempts victims of trafficking from certain offences or presumes that they will be not be liable, criminalised or punished, unless it can be established that the victims’ offending is unrelated to their situation of trafficking.

Article 10(2) of the UNODC *Model Law*, for instance, adopts this approach when it states that ‘a victim of trafficking in persons shall not be held criminally or administratively liable’ but limits this exception to immigration offences. Similarly, the UNHCHR *Recommended Guidelines and Principles* state that ‘trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination’.

¹⁰⁹ Parliamentary Assembly of the Council of Europe, *Draft Council of Europe Convention on Action against Trafficking in Human Beings*, 26 January 2005, Opinion 253 para 14, section xvi.

¹¹⁰ *Id.*, para 8.

This model is not suitable for wider adoption and has thus not found further support — and indeed much discussion — in the literature and by relevant international organisations. It can, however, serve to make exemptions or concessions or establish presumptions for specific offences, especially immigration and other status offences. It provides the most blunt and most clear message to victims that they will not be criminalised, prosecuted and punished for certain offences and, in the context of immigration offences, may create a real incentive for victims to exit their trafficking situation and make themselves known to the authorities. It is, however, unsuited for more complex offending and for serious offences resulting in harm or other detriments to persons.

V. Conclusion

The non-criminalisation of victims of trafficking in persons for offences they commit during their trafficking situation is a contentious issue and a topic that remains in flux and requires further consideration and development. There is, at present, no clear, uniform and universal articulation of this concept and it is premature to speak of an established principle, ready for implementation into domestic laws worldwide. The existing statements of non-criminalisation, non-prosecution, and non-punishment of victims of trafficking also differ substantially in their scope and application.

There is, however, greater and growing recognition of the fact that victims of trafficking frequently have little choice but to engage in criminal conduct and of the fact that existing criminal and anti-trafficking laws inadequately protect victims from the threat of criminal prosecution and from detention and deportation.

In the medium and long-term it would be desirable to further discuss and develop a uniform principle of non-criminalisation that is recognised in international law and adopted widely in national systems. The existing expressions of the principle share some commonalities and provide a platform for further debate on this issue. Further research is also needed on the scope and operation of the non-criminalisation principle in those jurisdictions where it is already enshrined in domestic law.

The main challenge is to articulate a model that balances the interests of justice with the protection of the victims of trafficking. This model needs to be expressed in no uncertain terms so that it sends a clear message to victims that they can exit the trafficking situation without having to be fearful of interaction with and further traumatising by the authorities. At the same time, the model cannot provide blanket immunity, especially if serious offences have been committed. The further development and implementation of a non-criminalisation principle needs to go hand in hand with clear and improved mechanisms to identify victims of trafficking and protect them from further trauma and from threats and harm by their traffickers.

The threshold required to establish a causal connection between the offences committed against victims and those committed by them is a further challenge in the development of a non-criminalisation principle. The ‘compulsion model’, which has found some recognition and adoption in international and domestic laws, is too narrow to address the relevant concerns. The ‘causation model’, on the other hand, remains

somewhat vague and potentially over-inclusive. Further work needs to be done to develop a model that reconciles these two approaches. One idea here, which is still in its infancy and lacking wider support, is the creation of a specific trafficking defence that is cast for the specific situations in which victims should be excused for committing offences because of their trafficking experience.¹¹¹ The specific requirements and elements of such a defence have yet to be explored and articulated, though the newly emerging domestic violence defences mentioned earlier may serve as a template for further discussion.

The weight of authoritative opinion persists in the view that existing criminal law, the defences of duress and necessity in particular, provide adequate solutions in most cases. Prosecutorial discretion and the mitigation of sentences are further avenues to avert criminal liability or reduce sentences for victims who have committed criminal offences. The non-criminalisation principle still faces major opposition and much work needs to be done to demonstrate that the status quo provides traffickers with a tool to coerce and threaten their victims and to show that victims are often rightfully reluctant to cooperate with the authorities for fear that they themselves may become the subject of investigations, prosecutions and deportations. It is hoped that this article serves to convince some critics that change is needed and that the article provides a small step towards protecting victims of trafficking in persons more effectively in the future.

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www.grojil.org

¹¹¹ Hoshi, *supra* nt 97, 54, 70.

Student Writing Competition

Student Writing Competition

Dear readers,

Volume 4, Issue 1 marks an interesting publishing for GroJIL as it was the first time we held a student writing competition. The aim was to give International Law students the chance to have one of their original scripts published in our Journal. It was a complete success and we were overwhelmed by the support it received. We were further delighted with the amount of submissions from students from all over the globe. After much deliberation and thought, GroJIL has picked the very best two articles which represent the GroJIL analytical style and provide new legal thinking. GroJIL remembers that many of its readers are students of International Law and due to such enthusiasm and demand, we plan to hold another student writing competition in the next annum. It is an excellent opportunity to be published and have your work read by many renowned scholars in the field.

The selected articles are written by Jessica Möttö and Xing Yun. The first focuses on the challenges in bringing terrorists to justice. The second approaches Asia's reticence towards universal jurisdiction. Once more, I would like to congratulate both of them for their contributions, which I am certain you will enjoy as much as we did.

Happy reading!

A handwritten signature in dark ink, appearing to read 'Júlia Ortí Costa', with a stylized, cursive script.

Júlia Ortí Costa
President and Deputy Editor-in-Chief
Groningen Journal of International Law

International Terrorism: What are the Current Legal Challenges in Bringing Terrorists to Justice?

Jessica Möttö*

Keywords

TERRORISM, COUNTER-TERRORISM, DEFINING TERRORISM, INTERNATIONAL CRIMINAL COURT, ROME STATUTE, STATE COOPERATION

Abstract

International terrorism has faced a definitional deadlock. While various international conventions have emerged condemning acts of terrorism and states have enacted counter-terrorism legislation, a single universal definition on the crime of terrorism has yet to be agreed upon. The cause of a definitional deadlock can be boiled down to the famous idea that one man's terrorist is another man's freedom fighter thus; acts seen as justified by some are viewed as crimes by others. Few individuals labelled as terrorists would call themselves as such. However, both the International Criminal Court (ICC) as well as domestic courts are affected by the definitional deadlock. Despite extensive discussions on the inclusion of terrorism within the Rome Statute, the lack of a commonly agreeable definition on terrorism eventually made the inclusion impossible. Therefore, the ICC can only bring terrorists to justice when acts of genocide, crimes against humanity or war crimes have occurred. On the other hand, states rely on co-operation, mutual trust and the exchange of information when prosecuting international terrorists. Due to the lack of a common definition on terrorism, states have taken fragmented approaches and counter-terrorism strategies vary considerably between states. While in some states no counter-terrorism measures exist at all, other states have taken on considerably broad laws. This makes effective cross-border co-operation challenging or even impossible. Conclusively, reaching a common definition on a crime of international terrorism cannot be stressed enough. It will allow for a new discussion to take place with regards to the creation of a crime of terrorism in the Rome Statute. Furthermore, state authorities would be restricted in the use of overly broad legislation as national laws can be harmonised to a greater extend.

[F]inally last week, I determined that we had enough intelligence to take action, and authorized an operation to get Osama Bin Laden and bring him to justice. (...) [A]fter a firefight they killed Osama Bin Laden and took custody of his body. (...) [O]n nights like this one, we can say to those families who have lost loved ones to al Qaeda's terror: Justice has been done.¹

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¹ The White House, *President Barack Obama: Osama Bin Laden Dead*, 2 May 2011, at whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead (accessed 17 May

I. Introduction

In 2011, US President Obama made the preceding statement after an attack that killed Osama bin Laden, the mastermind behind the 9/11 attacks. President Obama claims that justice has been served; a sentiment that is shared by many world leaders such as the President of the United Nations (UN) General Assembly who stated shortly after the attack that ‘terrorists must know that there will be no impunity for their barbaric and cowardly deeds’.² Terrorism has been a growing threat within the global community. Groups such as the Islamic State of Iraq and Syria (‘Islamic State’, hereinafter ISIS) have grown in size and power while executing daily attacks with deadly consequences. In return, the global community must respond with measures to end such brutality. However, one may wonder how justice is served through killing such leading terrorist figures as Osama bin Laden or whether he has truly been held accountable for his actions.

This paper will assess the how the international legal framework can hold international terrorists accountable for their acts. The first part will look at the International Criminal Court (ICC) as the only permanent international court with the power to bring terrorists to justice. The second part will focus on national courts and the imperative role that states play in fighting and preventing combating terrorism.

The difficulty in holding the leading figures of terrorist groups accountable for their crimes creates a gap in the existing international criminal law. When inadequate tools are in place to hold the highest-ranking members of terrorist groups accountable, alternative measures will inevitably arise. As a consequence, States will take matters in their own hands and assassinating men like Osama bin Laden will become the norm of ‘serving justice’. Consequently, the current challenges and deficiencies of international criminal law in bringing terrorists to justice will be highlighted in addition to providing several proposals for enhancing tools to combat international terrorism.

II. The Difficulties of Establishing a Common Definition

International terrorism has faced a definitional deadlock.³ Despite serious attempts, an agreement has not been found as to what exactly a crime of terrorism entails. The problem can be boiled down to the famous idea that ‘one man’s terrorist is another man’s freedom fighter’ thus; acts seen as justified by some are viewed as crimes by others. Therefore, terrorism is a highly politically charged topic as acts of terror are typically committed due to ideological or political motives.

2016); Paulussen, C, *Impunity for International Terrorists? Key legal questions and practical considerations*, 2012, International Center for Counter-Terrorism Research Paper, 1 at <icct.nl/download/file/ICCT-Paulussen-Impunity-April-2012.pdf> (accessed 17 May 2016).

² United Nations Security Council, *Security Council Presidential Statement, Welcoming End of Osama bin Laden’s Ability to Perpetrate Terrorist Acts, Urges States to Remain Vigilant*, 2 May 2011, at <un.org/News/Press/docs/2011/sc10239.doc.htm> (accessed 17 May 2016).

³ Maloney-Dunn, K, “Humanizing Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of Suspects, and Fundamental Human Rights at the ICC” 6 *Santa Clara Journal of International Law* (2010) 69, 70.

To attempt to define international terrorism, first it must be understood what 'international' entails. It is possible to identify two types of international terrorism. Firstly, it could refer to crimes containing a cross-border or a transnational element with regards to 'the persons implicated, means employed and the violence involved'.⁴ Such crimes would be, for example, suicide bombers conducting attacks on foreign soil hence, an act transcending national boundaries. Secondly, terrorism can also be viewed as international even when taking place in a purely domestic setting if the crimes are of such nature that they become a concern to the international community as a whole.⁵ Therefore, the second type of international terrorism refers to the so called *effects doctrine* arguing that the effects of acts taking place within one country can be felt far beyond territorial borders.⁶

In 1937, the first attempt was made to define terrorism as an international crime as the League of Nations adopted the Convention on the Prevention and Punishment of Terrorism.⁷ The convention never came into force but remains important, as it has served as a model for future Conventions regarding terrorism.⁸ The 1937 Convention defined terrorism as 'criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public'.⁹ Ever since, varying definitions have arisen. The Appeals Chamber of the Special Tribunal of Lebanon has famously forwarded one definition in 2011. It was the first time an international tribunal has forwarded an authoritative definition of the crime of terrorism under international law.¹⁰ The Chamber unanimously argues that a crime of terrorism has emerged. The customary rule of a crime of terrorism include:¹¹

(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.

⁴ Cassese, A, "Terrorism as an International Crime" in Bianci, A and Naqvi, Y, eds, *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004), 223.

⁵ Paulussen *supra* nt 1, 6-9.

⁶ Bianchi, A, and Naqvi, Y, *International Humanitarian Law and Terrorism* (Hart Publishing, 2011), 274-275; Paulussen *supra* nt 1, 6-9.

⁷ League of Nations (LoN), *Convention for the Prevention and Punishment of terrorism* (1937) (The 1937 Convention).

⁸ Ragni, C, "The Contribution of the Special Tribunal for Lebanon to the Notion of Terrorism: Judicial Creativity of Progressive Development of International Law?" in Boschiero, N, *et al*, eds, *International Courts and the Development of International Law* (Asser Press, 2013), 671.

⁹ Article 1, LoN, The 1937 Convention.

¹⁰ Scharf, MP, "Special Tribunal for Lebanon issues landmark ruling on definition of terrorism and modes of participation" 15(6) *American Society of International Law* (2011) at <asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and> (accessed 17 May 2016).

¹¹ Special Tribunal for Lebanon, Case STL-11-01/I, *Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging* STL-11-01/I/AC/R176 bis/F0936/20130530/R144057-R144210/EN/nc, 16 February 2011, para 85.

The landmark ruling faced widespread criticism in literature making the jurisprudential value of the ruling doubtful.¹² Nevertheless, it goes to show how attempts are continuously made in order to achieve a commonly accepted definition on the crime of terrorism.

While it has been clearly shown that a definition has not been established, there seems to be, nevertheless, a basic understanding as to what constitutes terrorism as the term itself is commonly referred to by states and the international community as a whole. Such a conclusion was reached at the Poelgeest Seminar. In its final report, it was suggested that an act of terrorism is an unjustifiable criminal act, intending to cause death or bodily or mental harm. Such an act would be committed with the intent to cause terror in the general public.¹³ The consequences that a lack of definition has towards effectively combatting terrorism, has been the centre of (scholarly) attention.¹⁴ It has been suggested that while an authoritative definition on terrorism does not yet exist, the term has nevertheless developed its own international legal personality. Some international tribunals as well as most national courts have in fact established a crime of terrorism. In addition, various international Conventions and UN Security Council (UNSC) Resolutions support such a finding as various treaties have emerged condemning terrorism. In fact, the Security Council declared terrorism as a threat to international peace and security in Resolution 1368 (2001)¹⁵ effectively allowing for actions to be taken under chapter VII of the UN Charter.¹⁶ Hence, by trying to combat terrorism, the international community has by default included terrorism in its international legal personality. As such, one could argue that terrorism as a concept has now become customary international law.¹⁷ Nevertheless, 'defining "terrorism" and identifying a "terrorist" are perhaps the most complex and highly charged issues of modern times'.¹⁸ As the Final report of the Poelgeest Seminar concluded: 'given the lack of a generally accepted international definition of terrorism, states are in a position to use their own national characterisations and this opens the door to a fragmented approach and abuse'.¹⁹ When consensus cannot be reached on an international level, states are free to approach terrorism in a way they see fit, hence creating opportunities of possible neglect or abuse and justice is not always being served fairly and efficiently. While commonly accepted elements of what constitutes terrorism have slowly emerged, states are not bound by any particular definition. In addition to states, the ICC is also affected by the current definitional deadlock. Therefore, the next section will come to assess the functioning of the ICC and whether the Court has jurisdiction over acts of terrorism.

¹² Paulussen *supra* nt 1, 8.

¹³ The Poelgeest Seminar organized by the Grotius Centre in Leiden, The Netherlands. The Seminar discussed the current challenges to international caused by transboundary terrorism: Final Report Poelgeest Seminar, "Counter-Terrorism Strategies, Human Rights and International Law: Meeting the Challenges" 54 *Netherlands International Law Review* (2007) 571, 574.

¹⁴ Paulussen *supra* nt 1, 7.

¹⁵ UN Security Council, *Threats to international peace and security caused by terrorist acts*, 12 September 2001, (4370th plenary meeting) S/RES/1368.

¹⁶ Chapter VII, United Nations, *Charter of the United Nations* (1945) 1 UNTS XVI (UN Charter).

¹⁷ Walter, C, "Defining Terrorism in National and International law" in Christian Walter *et al*, eds, *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer, 2003), 33-40.

¹⁸ Graham, K, "The Security Council and counterterrorism: global and regional approaches to an Elusive public good" 17(1-2) *Terrorism and Political Violence* (2005) 37, 40.

¹⁹ Paulussen *supra* nt 1, 8; Poelgeest *supra* nt 13, 574.

III. The Rome Statute and Terrorism

The Rome Statute of the ICC came into force on 1 July 2002 as 60 states ratified the treaty.²⁰ ICC marks a fundamental shift in international criminal law, as it is the first permanent, treaty based international criminal court. The duty of the ICC is to bring to justice ‘perpetrators of the most serious crimes of concern to the international community’. Such core crimes are Genocide, Crimes against Humanity, War Crimes and Crime of Aggression.²¹ However, ICC operates on the basis of the principle of complementarity. This essentially means that national courts are given the priority in establishing jurisdiction.²² The exception to the principle of complementarity is when a state, according to Article 17 of the Rome Statute is ‘unwilling or unable to genuine carry out an investigation or prosecution’²³ therefore, only when a state has the capacity and will truly hold individuals accountable for their actions, will the ICC’s jurisdiction become complementary.

Preconditions for the exercise of jurisdiction are laid down in Article 12 of the Rome Statute.²⁴ The grounds for jurisdiction are threefold. First, a State Party may refer a situation to the Court. Second, the Prosecutor may initiate investigation *proprio motu* and finally the UN Security Council (UNSC) may refer a situation to the Court.²⁵ For the first and second options, a state not party to the Rome Statute may explicitly accept the jurisdiction of the Court by lodging a declaration to the Registrar. However, under the third possibility, a Security Council referral, a situation may be referred even when it takes place outside the territory of State Parties. Therefore, a Security Council referral can be a powerful tool in enabling investigation to take place. Unfortunately, Security Council referrals have been described as experiencing a ‘referral fatigue’ as the number of situations referred remains extremely low.

ICC’s role in holding terrorists accountable is not entirely straightforward. There is no crime of terrorism hence; acts of international terrorism should constitute one of the existing core crimes. Therefore, genocide, war crimes and crimes against humanity will be assessed to examine whether an act of terrorism could potentially amount the said crimes.

Firstly, a war crime is a crime consisting of a plan or a policy and a large –scale commission of the crime according to the plan. Crucially, war crimes require the existence of an armed conflict, a requirement that may be difficult to establish for terrorist acts. Nevertheless, terrorism may under certain circumstances amount to a war crime. Article 33 (1) of the Fourth Geneva Convention of 1949²⁶ outlines that ‘all measures of intimidation or of terrorism are prohibited’.²⁷ However, such acts must be

²⁰ International Criminal Court, *About the Court*, at (*International Criminal Court*) <icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx> (accessed 17 May 2016).

²¹ United Nations, *Rome Statue of the International Criminal Court* (1998) 2187 UNTS 90 (*Rome Statute*), Article 5.

²² *Ibid.*

²³ Article 17 (1), *Rome Statute*.

²⁴ Article 12, *Rome Statute*.

²⁵ Article 13, *Rome Statute*.

²⁶ Article 33(1), International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1949) 75 UNTS 287 (Fourth Geneva Convention).

²⁷ *Ibid.*

against civilians with a 'protected status'.²⁸ In addition, the same prohibition has been established for acts taking place in internal armed conflicts.²⁹ Therefore, it is clear that terrorist acts can amount to war crimes as long the acts are directed *against civilians*,³⁰ as international humanitarian law clearly bans acts of terrorism. To establish that a war crime has occurred, in addition to the *actus reus* of attacking civilians, it is also necessary to establish the *mens rea* of conducting war crimes; the intent of causing violent acts or spreading fear and anguish among civilians.³¹

While terrorism may amount to a war crime, certain problems can be identified. Firstly, terrorism is a specific intent crime meaning that the perpetrator must intend to cause terror, such a type of intent is not mentioned in Article 8 of the Rome Statute. Secondly, terrorism is typically understood to hold underlying ideological and political motives, which are in fact not characteristic for war crimes. Thirdly, the root problem of considering terrorism as a war crime is that terrorism is not explicitly referred to in Article 8 of the Rome Statute. The underlying reasoning for the absence of terrorism as an included act of war crimes, can be explained by the fact that only armed conflicts amount to war crimes. Terrorist attacks are not commonly considered to be acts of war or armed conflicts. Only large-scale terrorist attacks amounting to armed conflicts can trigger Article 8 of the Rome Statute.³² Conclusively, categorising acts of terrorism a war crime can be possible yet only a partial solution.

Besides war crimes, terrorism could theoretically amount to genocide. Genocide, according to Article 6 of the Rome Statute,³³ requires the *mens rea* of intending to 'destroy in whole or in part, a national, ethnic, racial or religious group, as such',³⁴ which consequently forms the *dolus specialis* of genocide. The *actus reus* of Genocide varies from for example killing, forcibly transferring children, preventing birth or causing serious bodily or mental harm.³⁵ Furthermore, genocide excludes the intent to destroy a group on the basis of political or ideological grounds, an element commonly associated with terrorism. Terrorist groups rarely act with the intention of entirely annihilating a specific group. Taking the example of Osama bin-Laden and the 11 September attacks once more, while it may be argued that the victims of the attacks form part of a specific group, as required to establish genocide, this group may be a general group of Westerners or perhaps the victims could be categorised as Americans.³⁶ However, to be considered as genocide, the attack should fulfil the *dolus specialis* of 'destroying in whole or in part'³⁷ the victimised group of the attack. Al-Qaeda did not limit its actions against one target group, as violent attacks by Al-Qaeda and Osama bin-Laden were committed against varying group across the world. Conclusively, considering terrorism as a form of

²⁸ Cassese *supra* nt 4, 221.

²⁹ Article 4(2)(d), United Nations, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (1977) 1125 UNTS 609, Article 4(2)(d) (Protocol II).

³⁰ Bianchi and Naqvi *supra* nt 6, 221.

³¹ *Ibid.*

³² Article 8, *Rome Statute*.

³³ Article 6, *Rome Statute*.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Cohen, A, "Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism" 20 *Michigan State International Law Review* (2013) 219, 241.

³⁷ *Ibid.*

Genocide does not serve as a convincing or useful solution to holding terrorists accountable.

Thirdly, crimes against humanity currently require the least legal juggling in order to fit terrorism.³⁸ Article 7 of the Rome Statute³⁹ defines crimes against humanity as being acts committed in the context of a widespread or systematic attack ‘directed against any civilian population, with knowledge of the attack’.⁴⁰ The underlying crimes, the *actus reus*, of crimes against humanity vary, ranging from murder, enslavement, forcible transfer of population, forced pregnancy among others. The significant factor in allowing great space for crimes against humanity to lend itself to terrorism is that Article 7 of the Rome Statute⁴¹ does not require the crimes to be committed in a context of a war. Therefore, the crime can take place in peace time, as is often the case for acts of terrorism.⁴² While it may seem that crimes against humanity will provide the ICC with the necessary grounds to establish jurisdiction over acts of terrorism, problems nevertheless pertain. The requirement of a general policy in terms of a widespread or a systematic attack is a difficult threshold to reach with regards to acts of terrorism. To establish a crime against humanity, it must be established that a group is acting in the furtherance of a general organisational policy. Isolated attacks or randomly selected targets without clear structure or a greater plan will not amount to crimes against humanity. The fulfilment of such a requirement must be tested on a case by case basis even though it will in all instances be difficult to establish the exact linkage between a single attack and the greater organisational plan of the terrorist group.⁴³ Furthermore, terrorism has intentionally not been included in Article 7 as an underlying crime therefore acts of terrorism must fit within the context of one of the existing underlying crimes of crimes against humanity, such as enforced disappearances or torture. While Article 7 (k) acknowledges ‘other inhumane acts of similar character’⁴⁴ it does not seem plausible that the drafters of the Rome Statute intended to include terrorism under such additional inhumane acts. This lends towards a strict reading of the Rome Statute. Since terrorism was a well-established term during the time of the drafting of the Rome Statute, it can be argued that leaving terrorism out has been well intended. All in all, crimes against humanity provide the most plausible option under the current Rome Statute for the Court to establish jurisdiction over acts of terrorism.

To sum up, war crimes, genocide and crimes against humanity are three well-established core crimes within the Rome Statute. They are crimes of the gravest concern to the international community. To fill the existing legal vacuum, namely the difficulty in holding terrorists accountable for their actions before an international court, has not been fully corrected by relying on the existing core crimes of the Rome Statute. Furthermore, acts of nationals of a non-State Party that does not consent to the ICC’s jurisdiction on the soil of a non-consenting State party will fall outside the Court’s jurisdiction. Practically this would mean that had the terrorists committing the 11 September attacks on US soil survived, ICC would not have had the power to investigate or prosecute the terrorists. This essentially creates a gap in the existing criminal law and the jurisdiction of

³⁸ Cohen *supra* nt 36, 242.

³⁹ Article 7, *Rome Statute*.

⁴⁰ *Ibid*.

⁴¹ *Ibid*.

⁴² Cohen *supra* nt 36, 242-243.

⁴³ *Id*, 243.

⁴⁴ Article 7(k), *Rome Statute*.

the Court.⁴⁵ In light of the current weaknesses of the ICC, the role of domestic courts in combatting terrorism becomes increasingly important.

IV. Role of National Courts in Holding Terrorists Accountable

Most crimes are prosecuted at a national level as various conducts are domestically criminalised. In the case of cross-border crimes, co-operation among states is required and for this purpose various bilateral as well as multilateral agreements have been established to ensure the exchange of information, extradition possibilities as well as to guarantee other forms of legal assistance. Such co-operation will allow domestic courts to effectively establish jurisdiction and bring persons to justice, even when the conduct is not purely of domestic concern.⁴⁶ This is also the case for terrorism. Since the devastating 9/11 attacks by Al-Qaeda, it has become increasingly common to see national legislation taking account of the threat of terrorism. Additionally, ICC operates on basis of principle of complementarity, therefore the vast majority of cases are dealt with by national courts.

The UN, in addition to regional organisations such as the European Union (EU) have enacted various legal acts at the international level in order to ensure that all states take part in preventing terrorism and bringing perpetrators to justice. Various UNSC Resolutions have been drafted. First Convention dealing with terrorism was already seen in 1963; The Aircraft Convention,⁴⁷ condemning terrorist acts on board of an aircraft. Ever since, a number of Conventions and Resolutions have emerged condemning specific acts of terrorism, ranging from seizing aircrafts, acts against internationally protected persons, taking hostages, illegal use of nuclear material as well as protecting safe maritime navigations. Most recently, Resolution UNSC S/RES/2255 (2015) on 'Threats to international peace and security caused by terrorist acts'.⁴⁸ In addition, EU has developed its own Counter Terrorism Strategy.⁴⁹ Particularly after the Paris and Brussels attacks, EU has taken a more prominent role in preventing terrorism. All in all, the international legal framework has extensively covered acts of terrorism and states have, in general, implemented the said laws on a national level.

Several cases have arisen worldwide where domestic courts have successfully prosecuted individuals for acts of terrorism or for planning terrorist acts. In the United Kingdom, in case *Regina vs Tarik Hassane et al*, Mr. Hassane, the son of a Saudi Arabian ambassador, pleaded guilty to charges of conspiracy to murder and preparation of terrorism.⁵⁰ He was sentenced to prison for planning to kill policemen, soldiers and even

⁴⁵ Morris, M, "Terrorism: The Politics of Prosecution", 5(2) *Chicago Journal of International Law* (2005) *Law* 405, 412-413.

⁴⁶ *Id*, 405.

⁴⁷ United Nations, *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (1963) 704 UNTS 220 (Tokyo Convention).

⁴⁸ UN Security Council, Resolution 2255, *Threats to International Peace and Security caused by Terrorist Acts*, 21 December 2015, (7590th meeting) S/RES/2255.

⁴⁹ Commission, *The EU Counter-Terrorism Policy: main achievements and future challenges*, COM (2010) 386 final.

⁵⁰ *Regina vs Tarik Hassane et al* cited in Pantucci, R, "The Islamic State Threat to Britain: Evidence from Recent Terror Trials", 9(3) *CTC Sentinel* (2016) 19, p. 20 at <ctc.usma.edu/posts/the-islamic-state-threat-to-britain-evidence-from-recent-terror-trials> (accessed 24 May 2016).

civilians. Tarik Hassane, together with three other young men, obtained weapons but were captured and sentenced before the plan could be realised.⁵¹ A second example is found in case *Lodhi v. The Queen*⁵², where the Court of Criminal Appeal of Australia held Faheem Lodhi guilty of possessing an item connected with a terrorist act, collecting or making documents connected to terrorist acts, as well as acting in preparation or planning a terrorist act. He was handed down a 20-year sentence. The third example is the recently ongoing case of Salah Abdeslam⁵³, the mastermind behind the recent Paris attacks; he was captured in Brussels as a suspect for planning and taking part in terrorist acts. Capturing alleged terrorists or those planning terrorist acts and establishing prosecution for their actions is therefore common. Similar cases are frequently reported worldwide. Interesting to note, is that prosecution is not only limited over terrorist acts that have been already committed, instead national legislations have taken an active role in criminalising preparatory acts, including incitement to terrorism, as well.

So far it has been demonstrated how national courts play a decisive and important role in holding terrorists accountable for their actions. While this is certainly true, several issues may, nevertheless, be identified. First, since terrorism is a politically motivated crime, it is not unusual to see states being targets of terrorist acts or even sponsoring terrorism, as has notably been the case with for example, Iran.⁵⁴ The involvement of a State in an act of terrorism complicates the establishment of jurisdiction over the same acts as a state itself is involved. It seems unlikely that a state who sponsors terrorism, would, in fact, establish jurisdiction and bring to justice those responsible for the said acts. Therefore, an impetus exists to transfer the jurisdiction for State sponsored terrorism to an outside authority, a supranational institution, such as the ICC. This way the perpetrators of acts of terrorism will be shielded from justice by the state that sponsors their activities.⁵⁵ In the famous *Lockerbie* –case,⁵⁶ United States of America and the United Kingdom resorted to the UN Security Council as a supranational authority in order to gain custody of the defendant for criminal prosecution in domestic courts of UK and USA.⁵⁷ The suspects were Libyan nationals and Libya had announced it would prosecute the suspects in a Libyan national court. Since evidence had arisen of Libya sponsoring the bombing, national jurisdiction posed a problem.⁵⁸ Eventually, a compromise was reached as the suspects were tried in the Netherlands by Scottish judges. A second issue, related to prosecuting terrorists on a national level, is the weak national sentencing policies. It is not uncommon to see a person charged with a terrorism related crime but later be involved in a serious terrorist attack. In January 2015, the office of the Charlie Hebdo satire magazine was attacked by brothers Chérif and Saïd Kouachi. Chérif Kouachi had in fact, been earlier charged with conspiracy to commit acts of terrorism.

⁵¹ *Ibid.*

⁵² Supreme Court of New South Wales, *R v Lodhi* [2006] NSWSC 691.

⁵³ The Guardian, *Paris attacks suspect Salah Abdeslam charged with murder*, at <theguardian.com/world/2016/apr/27/paris-attacks-suspect-salah-abdeslam-appears-before-french-judges> (accessed 24 May 2016).

⁵⁴ Morris, *supra* nt 45, 405.

⁵⁵ *Id.*, 407.

⁵⁶ ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* ICJ Reports 1992, 3 March 1992.; ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)* ICJ Reports 1992, 3 March 1992.

⁵⁷ Morris, *supra* nt 45, 408.

⁵⁸ *Id.*, 406-407.

Furthermore, one of the men suspected of helping to carry out the 13 November Paris attacks was Samy Amimour. Prior to the November 2015 attacks, Amimour had already been captured and charged with terrorist conspiracy in 2012. Therefore, questions have arisen regarding national sentencing policies and how effective they are in preventing the threat of terrorism.⁵⁹ The third issue is the difficulty in establishing jurisdiction over acts of terrorism. While a state may be able to identify and detain suspected terrorists, it has often been problematic to gather the sufficient evidence of terrorist acts or plans to commit acts of terrorism in order to make prosecution possible. In March 2016, a top German prosecutor expressed his concerns over prosecuting those suspected of fighting for Islamic State of Iraq and Syria (ISIS): '[w]e often have the impression that these people were not just in Syria as sentries or to be trained in the use of weapons, but that they took part in maimings, killings and bomb attacks (...) We assume that these perpetrators have blood on their hands, but we often can't prove it'.⁶⁰ Therefore, national courts rely on co-operation by other states in order to share information and data to be able to build a case against suspected terrorists. While national laws may be in place, they are not fully enforceable as investigative problems related to gathering necessary evidence pertain. The fourth major problem is the lack of uniformity among states with regards to methods of investigation and prosecution of acts of terrorism as well as overly broad terrorism laws. When no harmonised application to investigating acts of terrorism exists, states are free to approach the matter in any way they deem best which as a consequence can complicate cooperation among states. Due to a lack of a common definition on the crime of terrorism 'states are in a position to use their own national definitions and this opens the door to a fragmented approach and abuse'.⁶¹ Varying standards, with regards to dealing with acts of terrorism, are a consequence of extremely broad terrorism laws. When laws are broad the risk of facing arbitrary arrests, human rights violations, long detention periods as well as other issues becomes commonplace.⁶² Examples of broadly defined terrorism laws can be found in the UK and China. The UK has one of the most extensive anti-terrorism laws in the Western world. The UK anti-terrorism laws of 2000 and 2006 have been widely criticised as it catches those that the law was never intended for such as, journalists who are trying to influence the Government without any intentions to coerce or intimidate.⁶³ David Anderson, the independent reviewer of the UK Terrorism Acts called for a review of the terrorist act in his 2015 report.⁶⁴ On the other hand, China adopted a comprehensive counter terrorism bill in 2016, which has been equally criticised as overly broad and vague.⁶⁵ Media is now restricted on its ability to report on terrorist attacks or government responses. Wide discretionary powers to government agents and broad definitions of 'extremism' have caused concerns as to possible prejudice caused to dissidents and religious minorities.⁶⁶ What is therefore

⁵⁹ Journalist's Source, *Terrorism Sentencing: Challenges for criminal Prosecutors in U.S. and abroad*, 8 December 2015, <journalistsresource.org/studies/government/criminal-justice/terrorism-sentencing-prison-crime> (accessed 25 May 2016).

⁶⁰ RT, *German Government struggling to build Cases against suspected ISIS Terrorists – Prosecutor*, 30 March 2016, <rt.com/news/337762-germany-prosecution-isis-terrorists/> (accessed 25 May 2016).

⁶¹ Paulussen, *supra* nt 1, 8; Poelgeest final report, *supra* nt 13, 574.

⁶² Paulussen, *supra* nt 1, 21-23.

⁶³ Terrorism Act 2000, Chapter 11; Terrorism Act 2006, Chapter 11.

⁶⁴ Anderson, D, *Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, Print ISBN 9781474109277, Web ISBN 9781474109284, London, July 2014, at <terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2014/07/Independent-Review-of-Terrorism-Report-2014-print2.pdf> (accessed 25 May 2016).

⁶⁵ Counter-Terrorism Law of the People's Republic of China (2015) as in force on 1 January 2016.

⁶⁶ Roach, K, *Comparative Counter-Terrorism Law* (Cambridge University Press, New York, 2015), 42-43.

gradually seen is, that as states aim to combat the threat of terrorism, legislation is created to enable wide discretionary powers to investigate, gain confidential information and to detain individuals whenever suspicion of terrorist activity arises. However, what such activity entails has become difficult to clearly identify.

Gross human rights violations and lack of access to a judiciary are not uncommon elements of national counter terrorism strategies and this has led to a situation where finding the truth and serving justice may not take place and co-operation among states with different counter terrorism strategies will become increasingly difficult. As a consequence, combatting terrorism may not be fully effective. Varying national standards and different investigative methods as well as the involvement of states in terrorism have shown the urgent need of greater uniformity and enhanced cooperation among state authorities. While national jurisdiction can often be established, it may however not always be possible to exercise jurisdiction.⁶⁷ Consequently, for such a grave crime as international terrorism, increased action on the international level is needed.

V. A Critical Analysis

Combating terrorism requires a multi-level approach. Domestic courts as well as the international community, including the ICC, all work towards more effective prevention of acts of terrorism. Nevertheless, majority of terrorism related cases will be dealt with by national courts. In addition, ICC plays an imperative role as the only permanent international court with the power to hold terrorists accountable. In reality, only a few cases would reach the ICC but the role of the court should nevertheless not be underestimated. ICC complements national courts, filling the gap left by unwilling, inefficient or unable states.⁶⁸

The time for increased action and coherence in combatting terrorism could not be more imperative today.⁶⁹ Nevertheless, a genuine movement towards the birth of a crime of terrorism in the Rome Statute seems, for the time being, far from fruition. While a crime of terrorism under the Rome Statute would arguably have had added value, due to its distinct nature separate from the existing core crimes, it does however not suggest that a new crime of terrorism should be enacted under the current state of international criminal law. This is due to the lack of a common definition on an international crime of terrorism, making the creation of a new crime of terrorism difficult to properly justify. As long as State Parties cannot agree on what acts of terrorism would trigger criminal jurisdiction, the Rome Statute cannot realistically be extended. The ICC cannot afford being therefore, its jurisdiction should not be artificially stretched. Doing so would cause tension instead of providing solutions. It is nevertheless, for the time being, tempting yet short-sighted to push for a crime of terrorism. Instead, combatting terrorism requires a more refined and multi-layered method of bringing perpetrators to justice. Therefore, for now the role of the ICC should remain more modest. Instead of extending the Court's jurisdiction, the ICC can rather take on a more coordinating role, assisting domestic courts in bringing terrorists to justice.

⁶⁷ Betti, S, "The Duty to Bring terrorists to Justice and Discretionary Prosecution", 4(5) *Journal of International Criminal Law* (2006) 1104.

⁶⁸ Steigen, J, *The Relationship Between the International Criminal Court and national Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers, Leiden, 2008), 189.

⁶⁹ Ragni, *supra* nt 8, 671-673.

VI. Conclusion

Since combating terrorism is a complex multi-layered process, it must be concluded that domestic courts, international institutions as well as the ICC all have a role to play. A coordinative and supportive role of the ICC will greatly improve the current methods of preventing terrorism. In addition, more importance needs to be given to enhance cooperation, such as joint investigative teams, to improve national prosecution. Mutual trust among states must be in place to enable effective cooperation to be realised. Instead of simply trying to bring as many terrorists to justice on the basis of mere suspicions of terrorist activity, greater emphasis needs to be given to serving justice while also respecting human rights, rule of law as well as criminal law procedures in general.⁷⁰ Therefore, reaching a common definition on the crime of international terrorism cannot be stressed enough. A crime of international terrorism would ensure for more harmonised national laws, improved possibilities of extradition and criminality requirements. Most importantly, prosecutors would benefit from more defined and narrow terrorism laws.⁷¹

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www.grojiil.org

⁷⁰ Paulussen, *supra* nt 1, 21-24.

⁷¹ *Ibid.*

Asia's Reticence Towards Universal Jurisdiction

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Keywords

UNIVERSAL JURISDICTION, UNIVERSALITY, INTERNATIONAL CRIMINAL LAW, ASIA, CRITICAL LEGAL STUDIES

Abstract

Universal jurisdiction is often heralded as an essential tool in the global fight against impunity. For a principle that contains the word “universal” in its name, it is striking though, perhaps unsurprising to discover that only two Asian states have ever exercised it. This paper goes on to provide some context for the Asian experience, positing a few indigenous explanations for Asia's ambivalence towards this fundamental principle of international criminal law. It will be shown that unlike other areas of international law, Asia cannot hide behind the usual excuse of “refusing to play by Western rules”. The paper concludes by arguing that Asia should take up the unique opportunity it has to shape the future of international criminal law.

I. Introduction

On 13 August 2015, the Indonesian navy announced the seizure of the *Silver Sea 2*, a large cargo ship which has gained recent infamy for its involvement in the slave-driven Thailand fishing trade. The navy had spent a week trying to capture the vessel and the ship was close to leaving Indonesian waters by the time it was finally seized. Fisheries Minister Susi Pudjiastuti could not contain her elation. “I'm so overwhelmed with happiness. It was almost impossible, but we did it.”¹ Pudjiastuti added that authorities were looking into human trafficking allegations.

On 26 September, it was announced that the captain of the ship was arrested for illegal fishing while 16 members of his crew would be deported.² The trafficking investigations were said to be continuing, but a conviction is unlikely due to jurisdictional issues. Indonesia is the forum of apprehension. Satellite imagery only links the ship to slave fishing activities in Papua New Guinea.³ The captain is Thai, as are the owners of the ship. None of the victims is from Indonesia. The instinct of Western human rights advocates might be to call for the exercise of universal jurisdiction. After all, slave trafficking must be considered a crime so heinous as to amount to a crime against the

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¹ Bangkok Post, AP, *Indonesia navy nabs Thai cargo ship*, 14 August 2015, at bangkokpost.com/print/655948 (accessed 22 May 2016).

² Today, AP, *Thai man arrested on boat believed to be carrying slave fish*, 26 September 2015, at todayonline.com/print/1538001 (accessed 22 May 2016).

³ The Telegraph, AP, *Slave boats tracked by satellite to Papua New Guinea fishing grounds*, 27 July 2015, at telegraph.co.uk/news/worldnews/australiaandthepacific/papuanewguinea/11765597/Slave-boats-tracked-by-satellite-to-Papua-New-Guinea-fishing-grounds.html (accessed 22 May 2016).

international community as a whole. Unfortunately, Indonesian law does not provide for universal jurisdiction for crimes outside a very narrow list.⁴ The list does not even include core international crimes such as war crimes or genocide.

It will be shown that Indonesia's ambivalence towards universal jurisdiction is common among Asian states. Part A presents the state practice and *opinio juris* in Asia, or more specifically the lack thereof. Part B puts forth some localised explanations for Asia's reticence towards this fundamental principle of international criminal law. Part C argues that Asia has a unique opportunity to shape the future of universal jurisdiction and international criminal law generally. Asia should grasp this opportunity for its own sake as much as for the sake of the international community. For the purpose of this paper, Asia shall be taken to refer to East, South and Southeast Asia.

II. Universal Jurisdiction and the Asian Experience

Universal jurisdiction refers to extraterritorial "criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction".⁵ Leading publicists agree that, on a customary level, universal jurisdiction can be exercised over at least piracy, slavery and the core international crimes of war crimes, genocide and crimes against humanity.⁶ The reasoning goes that certain crimes are so heinous that they constitute crimes against the interests of the international community as a whole, according every state the right to prosecute on behalf of the international community.⁷ The Sixth Committee of the UN General Assembly has been considering the scope and application of universal jurisdiction since 2009. While contentions remain as to the content of the principle, the General Assembly has repeatedly acknowledged that the principle is valid "beyond doubt".⁸ On the other hand, a preliminary review of literature, national jurisprudence and official documents shows that Asian states have not exactly embraced the principle.⁹

⁴ Article 4, Kitab Undang-Undang Hukum Pidana (Indonesian Criminal Code), Indonesia (1995).

⁵ Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction* (Princeton University New Jersey, 2001), Principle 1.

⁶ *Id*, *Princeton Principles on Universal Jurisdiction*, Principle 2; Cassese, A, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction", 1(3) *Journal of International Criminal Justice* (2003) 589, 591-592; A/63/237, Annex. Some jurists are more critical about the existence of a consensus: see Reydam, L, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, Oxford, 2003), 6; International Court of Justice (ICJ), *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Separate opinion of President Guillaume, ICJ Reports 2002, 35, 14 February 2002, 42; Yee, S, "Universal Jurisdiction: Concept, Logic, and Reality", 10(3) *Chinese Journal of International Law* (2011) 503, 511-512.

⁷ Israel Supreme Court, *Attorney General of Israel v Eichmann* (1962) 36 Int'l L. Rep. 277.

⁸ UN General Assembly - Sixth Committee, *Sixty-sixth session: Summary of work*, 2011, at <un.org/en/ga/sixth/66/ScopeAppUniJuri.shtml> (accessed 23 May 2016); UN General Assembly - Sixth Committee, *Sixty-seventh session: Summary of work*, 2012, at <un.org/en/ga/sixth/67/ScopeAppUniJuri.shtml> (accessed 23 May 2016).

⁹ The author has briefly reviewed relevant academic literature, digitised law reports of China, Hong Kong, India, Sri Lanka, Malaysia and Singapore, studies by international organisations, as well as transcripts of discussions at and written responses to the General Assembly.

II.1. National Laws Providing for Universal Jurisdiction

Universal jurisdiction has its roots in customary international law, originating from the necessity to prosecute pirates who operate with impunity on the high seas, before being expanded to other serious crimes of international concern.¹⁰ Treaties, most notably the 1949 Geneva Conventions, also provide for a limited form of universal jurisdiction between state parties over specific crimes by way of *aut dedere aut judicare* clauses. Asian states have signed the key conventions on international crimes in proportions similar to other regions of the world. On the other hand, in terms of implementation into national law, a 2011 study by Amnesty International found that Asia (and the Middle-East) lagged behind other regions.¹¹ Piracy is the only customary universal jurisdiction crime that is regularly found in the statute books of Asian states. Other crimes covered by universal jurisdiction are usually only implemented as a result of treaty obligations. Even then, many treaty-based international crimes have yet to be implemented into the domestic laws of Asian states.¹²

II.2. Judicial Practice

Among Asian states, it appears that only China and Japan have ever exercised universal jurisdiction. The two cases both involve piracy. In February 2003, the Shantou Municipal Intermediate People's Court convicted ten Indonesians of hijacking a Thai oil tanker off the coast of Malaysia. They were apprehended while trying to dispose of the stolen goods in Chinese territorial waters.¹³ In April 2011, the Tokyo District Court convicted four Somalis for the hijacking of a Bahamas-registered tanker off the coast of Oman, under a prosecution arrangement with the capturing US authorities.¹⁴ Additionally, South Korea has sought to characterise a hijacking case from 1983 as an exercise of universal jurisdiction.¹⁵ In that case, the hijacked plane was diverted to South Korea, thereby arguably giving South Korea territorial jurisdiction. Similarly, contrary to

¹⁰ Cryer, R, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2007), 44.

¹¹ See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World Annex I* (Amnesty International Publications, London, 2011). See also, Amnesty International, *Universal Jurisdiction: Strengthening this Essential Tool of International Justice* (Amnesty International Publications, London, 2012). The ICRC maintains a more up-to-date record at <icrc.org/customary-ihl/eng/docs/v2_rul_rule157>.

¹² *Id*; Chengyuan, M, "The application of universal jurisdiction in China's criminal law," 31(3) *Tribune of Political Science and Law* (2013) 88, 98-99.

¹³ Government of the People's Republic of China, *Information from and observations by China on the scope and application of the principle of universal jurisdiction* (2010), at <un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/China_E.pdf> (accessed 23 May 2016).

¹⁴ International Crimes Database, *Japanese Piracy Trial*, at <internationalcrimesdatabase.org/Case/1208/Japanese-Piracy-Trial/> (accessed 23 May 2016) Huang, Y, "Universal Jurisdiction Over Piracy and East Asian Practice", 11(4) *Chinese Journal of International Law* (2012) 623.

¹⁵ Government of Korea, *Universal Jurisdiction in the Republic of Korea*, (2010), at <un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/RepublicofKorea.pdf> (accessed 23 May 2016).

the ICRC,¹⁶ the post-WWII prosecution of *Kuroda* was not an exercise of universal jurisdiction since the war crimes were “committed against [the Philippines] people and [their] government”.¹⁷ Private efforts such as the Kuala Lumpur War Crimes Commission set up by former Malaysia Prime Minister Mahathir Mohamad cannot be considered true exercises of universal jurisdiction.

In contrast, there has been plenty of practice by non-Asian states. The 1990s-2000s in particular saw a peak in the exercise of universal jurisdiction by European states. In 2014, proceedings based on universal jurisdiction were ongoing in Africa, Europe and South America.¹⁸

II.3. Expressions of *Opinio Juris*

Asian states have been relatively silent on the topic of universal jurisdiction. Only China, Malaysia, the Philippines, South Korea and Vietnam have responded to the General Assembly’s call for information and observations over the past five years.¹⁹ Nine Asian states contributed during the General Assembly discussions (a notable minority) and those that spoke, mostly urged restraint in the exercise of universal jurisdiction outside the context of piracy.²⁰ This can be contrasted with the AU and EU’s active engagement through expert meetings and the AU’s decision to refer the topic for discussion to the General Assembly.

¹⁶ ICRC, *Practice Relating to Rule 157. Jurisdiction over War Crimes*, at <icrc.org/customary-ihl/eng/docs/v2_rul_rule157> (accessed 23 May 2016).

¹⁷ Supreme Court of the Philippines, *Shigenori Kuroda v. MG Rafael Jalandoni* (1949) G.R. No. L-2662.

¹⁸ Universal Jurisdiction Annual Review, *Make Way for Justice*, (2015), at <fidh.org/IMG/pdf/trial-ecchr-fidh_uj_annual_review_2014-2.pdf> (accessed 23 May 2016).

¹⁹ Available at:

Government of the People's Republic of China, “Information from and observations by China on the scope and application of the principle of universal jurisdiction”, 2010, at <un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/China_E.pdf> (accessed 23 May 2016); Government of Malaysia, *Malaysia’s comments on the scope and application of the principle of universal jurisdiction*, 2010, at <un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Malaysia.pdf> (accessed 23 May 2016); Government of Korea, *Universal Jurisdiction in the Republic of Korea*, 2010, at <un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/RepublicofKorea.pdf> (accessed 23 May 2016); Government of the Philippines, “Information and Observation on the scope of the Principle of Universal Jurisdiction”, 2010, at <un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Philippines.pdf> (accessed 23 May 2016).

²⁰ See summaries of work at UN General Assembly - Sixth Committee, *Sixty-fifth session: Summary of work*, 2011, at <un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml> (accessed 23 May 2016); UN General Assembly - Sixth Committee, *Sixty-sixth session: Summary of work*, 2011, at <un.org/en/ga/sixth/66/ScopeAppUniJuri.shtml> (accessed 23 May 2016); UN General Assembly - Sixth Committee, *Sixty-seventh session: Summary of work*, 2012, at <un.org/en/ga/sixth/67/ScopeAppUniJuri.shtml> (accessed 23 May 2016); UN General Assembly - Sixth Committee, *Sixty-eighth session: Summary of work*, 2012, at <un.org/en/ga/sixth/68/UnivJur.shtml> (accessed 23 May 2016); UN General Assembly - Sixth Committee, *Sixty-ninth session: Summary of work*, 2012, at <un.org/en/ga/sixth/69/universal_jurisdiction.shtml> (accessed 23 May 2016).

III. Reasons for Asia's Reticence towards Universal Jurisdiction

Judge Xue Hanqin notes that Asian countries have for a long time maintained deep scepticism towards international law due to its European origins.²¹ Rightly or wrongly, universal jurisdiction too has been characterised as a form of neo-imperialism by European powers.²² This part does not seek to defend Asia's lack of universal jurisdiction practice, nor will it reiterate notions of Asian exceptionalism or third world approaches to international law. Instead, it hopes to provide some rational explanations for Asia's reticence towards universal jurisdiction, approaching the issue from three broad categories of government, society, and residual interests. It is only with a proper understanding of Asia that we can formulate ways to engage Asia in making universal jurisdiction a truly global doctrine.

III.1. Government

As observed by many scholars, Asian states tend to jealously guard their sovereignty, preferring a strict reinterpretation of the Westphalian notion of non-intervention.²³ The principle of non-intervention, to the extent of *non-interference*, is a central theme of key Asian instruments such as the Bandung Declaration, the Five Principles of Peaceful Coexistence and the ASEAN Treaty of Amity and Cooperation (which applies to all members of the ASEAN Regional Forum). The principle of non-intervention is also integral to the foreign policy doctrines of most Asian states. This presents a huge impediment to the exercise of universal jurisdiction. Core international crimes such as genocide and crimes against humanity are often linked to political purposes or committed in politically charged circumstances. The exercise of universal jurisdiction by a third state thus represents a serious incursion into the politics of the territorial state. It has been colourfully described by Henry Kissinger as "judicial tyranny".²⁴ The insistence of Asian states on the principle of non-intervention parallels their cautious approach to universal jurisdiction. Only treaty-based universal jurisdiction, which by definition carries some form of state consent, has been regularly implemented in domestic laws. Further, the two

²¹ Xue, H, "Meaningful Dialogue through a Common Discourse", 1(1) *Asian Journal of International Law* (2011) 13, 15.

²² See e.g. examples provided in Chengyuan, M, "The Connotation of Universal Jurisdiction and its Application in the Criminal Law of China", in Bergsmo, M and Ling, Y, eds, *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher, Beijing, 2012), 180 It is respectfully submitted that nationalistic resistance may have been overstated. Despite some concerns over the unidirectional application of universal jurisdiction, African states generally support the doctrine on principle. See e.g. Memorandum annexed to AU's request for universal jurisdiction to be added agenda of sixty-third session of UNGA: A/63/237, Annex.

²³ Ginsburg, T, "Eastphalia as the Perfection of Westphalia", 17 *Indiana Journal of Global Legal Studies* (2010) 27, 28; Hitoshi, N, "Revisiting the Principle of Non-Intervention: A Structural Principle of International Law or a Political Obstacle to Regional Security in Asia?", 3(1) *Asian Journal of International Law* (2013) 25, 26.

²⁴ Foreign Affairs, Kissinger, H, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, *Foreign Affairs*, July 2001, at <foreignaffairs.com/articles/2001-07-01/pitfalls-universal-jurisdiction> (accessed 23 May 2016); In addition to being a renowned diplomat, Dr Kissinger is often criticised for his interference in the politics of Cambodia and Bangladesh (then East-Pakistan).

isolated instances of judicial practice both involved piracy, a crime committed on the high seas without any territorial state to contend with. In the context of core international crimes, the principle of non-intervention was taken to an extreme during the Cambodian genocide of the 1970s. Then, Asian states were quite content to stand still while the Khmer Rouge regime went on a murderous spree in their backyard.²⁵ China and ASEAN even publicly criticised Vietnam's subsequent intervention in Cambodia, though due consideration must be given to the Cold War context.²⁶ More than two decades went by before Pol Pot and his collaborators were brought before the Extraordinary Chambers in the Courts of Cambodia, a tribunal established mainly through the efforts of the present Cambodian government and the Western world.²⁷

Another characteristic of Asian governments is their general aversion to confrontational methods. They have historically demonstrated a preference to settle problems through informal and collaborative processes.²⁸ Miles Kahler observes that Asian institutions are informal by design and explicitly reject legalisation.²⁹ Asian leaders have also repeatedly championed the informal nature of ASEAN (with its associated forums) and APEC as an advantage instead of inadequacy.³⁰ The conduct forming the basis for universal jurisdiction prosecutions will often be official acts. Accordingly, the exercise of universal jurisdiction is a potential source of interstate conflict.³¹ This is not the 'Asian way'. If a third state is outraged that an intolerable international crime has been committed, the preferred Asian approach will be to quietly exert diplomatic pressure through "constructive engagement". Whether this approach is effective is quite another matter altogether.³² The point to be made is that universal jurisdiction is counter to the intuitions of many Asian governments.

²⁵ See generally Ratner, S, and Abrams, JS, "The Khmer Rouge Rule Over Cambodia: A Historical Overview", in *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, Oxford, 1997).

²⁶ It must be noted that the EU and US also supported the deposed Khmer Rouge regime in the immediate aftermath.

²⁷ Of the \$191 million pledged to the tribunal since 2006, Thailand is the only ASEAN country to contribute more than \$24,000; The Cambodia Daily, Peter, Zand Crothers, L, *KR Tribunal Goes After Donations From Asean Member States*, 19 August 2013, at <camodiadaily.com/archives/kr-tribunal-goes-after-donations-from-asean-member-states-39991/> (accessed 23 May 2016).

²⁸ Koh, T, "International Law and the Peaceful Resolution of Disputes: Asian Perspectives, Contributions, and Challenges", 1 *Asian Journal of International Law* (2011) 57; The Guardian, Chesterman, S and Kishore, M, *The Asian way of handling the world*, 4 March 2010, at <theguardian.com/commentisfree/2010/mar/04/global-problem-solving-asian-way> (accessed 23 May 2016).

²⁹ Kahler, M, "Legalization as Strategy: The Asia-Pacific Case", 53(3) *International Organization* (2003) 549, 565.

³⁰ Carlos Romulo (former Foreign Secretary of the Philippines) once said, "We often find that private talks over breakfast prove more important than formal meetings": Acharya, A, *Ideas, Identity and Institution-building: From the 'ASEAN way' to the 'Asia-Pacific way'?* in *Regionalism in Asia* (Taylor & Francis Ltd, London, 2009), 152.

³¹ Morris, M, "Universal Jurisdiction in a Divided World: Conference Remarks", 35 *New England Law Review* (2001) 337, 356.

³² Tay, S, "Interdependence, states and community: ethical concerns and foreign policy in ASEAN" in MacDonald, DB, et al, eds, *The Ethics of Foreign Policy* (Ashgate Publishing, New York, 2007) 141; Meanwhile, Mya Maung opines that constructive engagement "can only lead to a prolongation of the

A caveat must be drawn that China's foreign policy is taking a more assertive form under Xi Jinping. It remains to be seen if this will lead to a radical departure from Deng Xiaoping's conservative philosophy of *tao guang yang hui* ("to bide one's time"). In 2007, ASEAN took the unprecedented step of expressing "revulsion" over Myanmar's bloody crackdown on dissident monks.³³ The regional rhetoric on human rights is increasing, though Tan Hsien Li cautions that there has so far been "more smoke than fire".³⁴ It could well be that changes in regional geopolitics will bring about a diminishment of the principle of non-intervention, though a seismic shift will be needed before we start to see universal jurisdiction exercised on a frequency comparable to Europe.

III.2. Society

The *bona fide* exercise of universal jurisdiction comes at a high cost to the prosecuting state without a corresponding level of direct benefits.³⁵ Foreign relations could be seriously jeopardised as a result. In turn, trade will be affected. Even in cases of a less diplomatically-sensitive nature, international crimes prosecution can be a costly affair.³⁶ Strong popular support is thus needed before any government will embark on such a thankless venture. In this regard, despite an emerging civil society, those living in Asia have hardly taken to the streets demanding justice for crimes that they have no real nexus to. It will be shown that social realities are currently uncondusive to the application of universal jurisdiction in Asia.

III.2.1. Traditional communitarian beliefs

The "Asian values" debate of the 1990s was couched in developmental terms, pitting the autocratic governments of Asia against the liberal democracies of the West.³⁷ This paper is unconcerned with the merits or flaws of "Asian values" as a development model. For our purpose, the important idea to take away from the debate is the confirmation that Asian societies continued to accept communitarian values and strict hierarchies. Studies conducted during the period confirmed that a strong majority of Asians emphasised social order and harmony, in sharp contrast to Western respondents.³⁸ Michael Barr points out that even the opponents of "Asian values", including Aung San Suu Kyi and Lee Teng Hui, argued from the premise of social conservatism.³⁹ The respect for communitarian norms and hierarchies is instructive. It provides a rational explanation for

Burmese military's stranglehold on power": Maung, M, "The Burma Road to the Past", 39(2) *Asian Survey* (1999) 265, 285.

³³ Statement by ASEAN Chair, Singapore's Minister for Foreign Affairs George Yeo in New York, September 27 2007, at <mfa.gov.sg/content/mfa/overseasmission/washington/newsroom/press_statements/2007/200709/press_200709_03.html> (accessed 23 May 2016).

³⁴ Tan, H, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalizing Human Rights in Southeast Asia* (Cambridge University Press, Cambridge, 2011), 140-141.

³⁵ Morris, *supra* nt 31, 359.

³⁶ See, Skilbeck, R, "Funding Justice: The Price of War Crimes Trials", 15(3) *Human Rights Brief* (2008) 6.

³⁷ See, Langlois, AJ, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge University Press, Cambridge, 2001), 12-43.

³⁸ *Id.*, 43; Ghai, Y, "Human Rights and Governance: The Asia Debate", 15 *Australian Year Book of International Law* (1994) 1, 12-13; Milner, A, *What's Happened to Asian Values?*, 1999 at <digitalcollections.anu.edu.au/bitstream/1885/41912/2/values.html> (accessed 23 May 2016).

³⁹ Barr, M, *Cultural Politics and Asian Values: The Tepid War* (Taylor & Francis, London 2002), 18-19.

the relative nonchalance of those living in Asia towards the supposed “crimes of universal concern” taking place in other countries. The Japanese proverb, *deru kugi wa utareru* (“the nail that sticks out gets hammered down”), comes to mind. A society that places a premium on social order is unlikely to have too much sympathy for the cause of “renegades” elsewhere. On certain levels, a conservative mind could even rationalise that those who were harshly persecuted for going against the social order had it coming.

Nevertheless, the argument of cultural relativism must not be overstated. Simon Tay points out that culture is shaped by the politics as much as it in turn shapes politics.⁴⁰ The conservatism of the 1990s-2000s may be a product of realist developmental concerns more than any supposed deep-rooted subservience. The era of strongmen in Asia is arguably over; newer generations of Asians are growing up in increasingly rights-centric societies. The prevailing social norm will move progressively away from strict communitarian autocracy. The keyword however is “progressive”.

III.2.2. *Lack of common Asian identity*

Another uncontroverted conclusion from the “Asian values” debate is that Asia is a diverse region in cultural and historical terms. One of the main proponents of “Asian values”, the late Lee Kuan Yew, conceded as much in an interview with *Asiaweek* in 1999.⁴¹ The idea of “community” has thus far been restricted to intergovernmental interaction; there has been no real effort to extend the concept to the social and ethical spheres.⁴² On the contrary, relations between certain Asian societies (e.g. Japan/Korea, China/Vietnam) are highly volatile. The absence of a common Asian identity is significant. Luc Reydamas observes that nearly all universal jurisdiction cases that have gone to trial, involved defendants with strong links to the forum state.⁴³ This is only to be expected since few societies will proactively demand the prosecution of crimes committed by or against those they have absolutely no affinity to.

Southeast Asia provides a good case study. With the exception of Thailand, all of the Southeast Asian states were colonised for more than a century. The Dutch colonised Indonesia, the British took Malaya and Myanmar, Portugal controlled East Timor, France controlled Vietnam, the Philippines was under the administration of first Spain and subsequently the US. There are hence at least five different colonial experiences. This historical fact remains visible today in the form of different administrative languages and systems of government. On the most basic level, many Filipinos still carry Spanish names instead of anything that sounds stereotypically Asian. Economic integration in Southeast Asia is also lacking, with much room for improvement in intra-Southeast Asia trade. This absence of a social nexus explains the lacklustre reaction of Southeast Asian societies to the recent Rohingya crisis, in sharp contrast to how European societies saw the refugee crisis as a pan-European problem. Going further back, the muted response of ASEAN states to the Cambodia genocide and decades of military oppression in Myanmar show that the notion of Southeast Asian brotherhood is more honoured in its breach than its observance.

⁴⁰ Tay, S, “Human Rights, Culture and the Singapore Example”, 41(4) *McGill Law Journal* (1996) 743, 778.

⁴¹ Barr, *supra* nt 39, 3.

⁴² Tay, “Interdependence, states and community”, *supra* nt 32, 145-146.

⁴³ Reydamas, *supra* nt 6, 222.

III.2.3. *Absence of Active NGO Culture*

Well-funded NGOs such as Amnesty International (headquartered in London), Human Rights Watch (headquartered in New York), the International Committee of the Red Cross (headquartered in Geneva) and the International Federation for Human Rights (headquartered in Paris) have played a leading role in pushing the development of universal jurisdiction around the world, particularly in Europe. In states that allow for civil petitions and private prosecutions, NGOs have even initiated and ran universal jurisdiction prosecutions against foreign perpetrators of core international crimes.⁴⁴ The civil movement in Asia is still in the embryonic stages. Asia-based NGOs do not command similar levels of state support,⁴⁵ nor are their views always congruent to that of those whose interest they claim to defend.⁴⁶

III.3. **Residual Interests**

Asia has been going through a rather peaceful phase of rapid economic development. The veneer of peace may sometimes mask the uncomfortable fact that there has been a fair number of atrocities in living memory, most of them unaccounted for. These include *inter alia* the post-war displacements in Vietnam, atrocities committed by Indonesian troops in East Timor, Myanmar's string of human rights violations and China's heavy-handed crackdowns on separatist movements. Many of those allegedly responsible for international crimes remain in positions of critical influence today. They have a strong interest in self-preservation and are a formidable force against their respective states' exercise of universal jurisdiction over any international atrocity. It is worth mentioning that their worries are not unwarranted. The Spanish High Court and Argentina Federal Court have issued arrest warrants against former Chinese President Jiang Zemin for alleged genocide and crimes against humanity.⁴⁷ Any effort to increase universal jurisdiction practice in Asia must overcome the roadblocks set up by these forces.

IV. **Asia at a Crossroads**

Should Asia bother with universal jurisdiction or can it brush the principle off as yet another imposition of Western human rights ideals? Conversely, should the global

⁴⁴ See Lawyers Committee for Human Rights, *Universal Jurisdiction: Meeting the Challenge through NGO Cooperation* (2002), 17-24, available at <humanrightsfirst.org/wp-content/uploads/pdf/meeting_challenge310502.pdf>.

⁴⁵ It has been estimated that the EU funds NGOs to the tune of €7.5 billion per year: Association of Accredited Public Policy Advocates to the European Union, *NGO Funding by the EU*, available at <aalep.eu/ngo-funding-eu>; Asian governments on the other hand tend to see human rights NGOs as unwelcome cultural imperialists: see e.g. *The Singapore Government's Response To Amnesty International's Report "Singapore – The Death Penalty: A Hidden Toll Of Executions"*, available at <nas.gov.sg/archivesonline/speeches/view-html?filename=2004013005.htm>.

⁴⁶ Langlois, *supra* nt 37, 42.

⁴⁷ Reuters, Ortiz, F, *Spain orders arrest of former Chinese president, others over Tibet*, 14 February 2014, available at <reuters.com/article/2014/02/10/us-china-spain-idUSBREA1911W20140210>; Henao, LA, *Argentine judge asks China arrests over Falun Gong*, see *Id*, 22 December 2009, available at <reuters.com/article/2009/12/23/us-argentina-china-falungong-idUSTRE5BM02B20091223#tIruKJtF Yo4L04Iu.97>.

community engage Asia in the development of universal jurisdiction? This part will briefly reiterate the importance of universal jurisdiction as an essential tool to combating international crimes. It will go on to argue that Asia's attitude towards universal jurisdiction has serious implications for the future of universal jurisdiction and in turn international criminal law. It is in the interest of Asia as much as it is in the interest of the global community that international crimes are properly addressed. Asian states should progressively ramp up its involvement in the development of universal jurisdiction even if they are not currently predisposed to its exercise on the individual level.

IV.1. Universal Jurisdiction and the Fight Against Impunity

In its final report on the obligation to prosecute or extradite (*aut dedere aut judicare*), the International Law Commission noted that “[u]niversal jurisdiction is a crucial component for prosecuting alleged perpetrators of crimes of international concern, particularly when the alleged perpetrator is not prosecuted in the territory where the crime was committed.”⁴⁸ This truism has been asserted by so many of the most distinguished jurists that one would find it difficult to add anything new. Three points bear emphasis: (1) Universal jurisdiction applies only to the most abhorrent crimes in international law - crimes that no state can justifiably deny to be deserving of punishment; (2) The exercise of universal jurisdiction at the national level complements international criminal justice at the International Criminal Court and other international tribunals; (3) Impunity is a real problem for international criminal law and universal jurisdiction plugs the gap for perpetrators that seek refuge outside of the directly affected states.

IV.2. Asia's Opportunity to Shape the Future of International Criminal Law

Contrary to the zealous proclamations of human rights NGOs, the customary status of universal jurisdiction remains unsettled in international law. General Assembly discussions have reached a stalemate.⁴⁹ For all its indifference to the debate so far, Asia ironically finds itself in the position to play a decisive role in shaping the future of universal jurisdiction and consequently the development of international criminal law.

IV.2.1. The Continuing Relevance of Universal Jurisdiction

First, it is questionable whether any principle can legitimately claim to be customary international law when there has been practically no judicial practice or *opinio juris* from Asia. This objection is rooted in the “traditional approach” to customary international

⁴⁸ Final report of the International Law Commission on the Obligation To Extradite or Prosecute (*Aut Dedere Aut Judicare*) (2014), para 18.

⁴⁹ At its sixty-ninth session in 2014, the General Assembly decided that a working group of the Sixth Committee would be set up to continue a thorough discussion of the scope and application of universal jurisdiction. Many representatives also urged the International Law Commission to consider the topic. It is foreseeable that debate on this topic will go on for some time yet. UN General Assembly - Sixth Committee, *Sixty-ninth session: Summary of work* (2014), available at <un.org/en/ga/sixth/69/universal_jurisdiction.shtml>.

law, which demands evidence of actual state practice and demonstrable *opinio juris*.⁵⁰ In this regard, a vocal and unlikely ally in the form of the US had previously asserted strong objections to universal jurisdiction over war crimes.⁵¹ According to the US, there has not been enough “operational” practice and “definitive” *opinio juris* around the world to support a finding of customary universal jurisdiction over war crimes.⁵² Even taking the more liberal “modern approach” which “relies principally on loosely defined *opinio juris* and/or inference from the widespread ratification of treaties or support for resolutions and other ‘soft law’ instruments”,⁵³ it is uncertain if universal jurisdiction clears the bar when it is largely ignored by a continent that contains more than half of the world’s population. On the point of widespread ratification of treaties, the conventions on international crimes do not purport to create universal jurisdiction generally but only as between state parties by way of *aut dedere aut judicare* clauses. Furthermore, many states have not incorporated treaty-based international crimes into their national laws.

Secondly, as pointed out by Yee Sienho, there has been a noticeable decline in the fortunes of universal jurisdiction after the equivocal judgement of the International Court of Justice (ICJ) in the *Arrest Warrant* case.⁵⁴ The international court in its main judgement declined to decide on the existence of a customary right to universal jurisdiction over core international crimes, choosing instead to dispose of the case by only addressing the secondary issue of immunity.⁵⁵ Judges Higgins, Kooijmans, and Buergenthal issued a joint separate opinion in support of universal jurisdiction over the core international crimes, while President Guillaume in his separate opinion limited his recognition of universal jurisdiction to only piracy.⁵⁶ The ICJ was careful not to pronounce on universal jurisdiction but the damage was done. In Alain Pellet’s words, “the ... *Arrest Warrant Case* shows that the Court can ... slow down and maybe go as far as durably jeopardizing highly desirable evolutions in the law”.⁵⁷ Yee Sienho points out that many states that were previously the stalwarts of universal jurisdiction have since retreated to more conservative positions.⁵⁸ Asia, being the last major region that is hitherto uncommitted, has the capacity to revitalise the doctrine or sound its death knell.

⁵⁰ Erakat, N, “The US v. The Red Cross: Customary International Humanitarian Law & Universal Jurisdiction”, 41 *Denver Journal of International Law and Policy* (2013) 225, 230.

⁵¹ Bellinger, J, and Haynes, WJ, “A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law”, 89 *International Review of the Red Cross* (2007) 443, 466-467.

⁵² *Id.*, 469-471.

⁵³ Meron, T, “Revival of Customary Humanitarian Law”, 99(4) *American Journal of International Law* (2005) 817, 817.

⁵⁴ See generally Yee, *supra* nt 6.

⁵⁵ ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3, 14 Feb 2002, 19.

⁵⁶ ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Reports 2002, 63, 14 Feb 2002, 79 and 81; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Separate opinion of President Guillaume, ICJ Reports 2002, 35, 14 Feb 2002, 42.

⁵⁷ Pellet, A, “Shaping the Future of International Law: The Role of the World Court in Lawmaking”, in Arsanjani, MH, ed, *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers, Leiden, 2011), 1080.

⁵⁸ Yee, *supra* nt 6, 520-522.

IV.2.2. Universal Jurisdiction and the Complementarity Principle

The relationship between universal jurisdiction and the complementarity principle of the International Criminal Court is an interesting one. The complementarity principle is a unique creation of international law. It provides for the primacy of national investigations and prosecutions.⁵⁹ Scholars have referred to the “catalytic effect” of the complementarity principle, which encourages states to carry out domestic investigations and prosecutions in order to avoid the involvement of the ICC.⁶⁰ Even though the ICC is not itself vested with universal jurisdiction, the scope of its jurisdiction is naturally larger than that of any individual state.⁶¹ As such, some states have decided to provide their national courts with universal jurisdiction over international crimes in order to ensure that the courts can be effective complements to the ICC.⁶²

The complementarity regime means that the decisions of national courts will be crucial to the future development of international criminal law. Together with the ICC, they will form the building blocks of jurisprudence in this (relatively) young area of international law. More than ever, the decisions on *Eichmann* and *Pinochet* will be as influential as *Tadic*. Asian states should be alert to this development. Presently, a significant number of national prosecutions are based on universal jurisdiction. Simon Chesterman describes the wariness of Asian states towards the ICC due to scepticism over Western rules.⁶³ By abstaining from international criminal justice beyond the occasional specialised tribunal, Asia risks becoming further alienated from the rules of international criminal law. Protests of Western hegemony are unlikely to find sympathy if Asia consciously chooses to sit out of the process altogether. Already, current literature on international criminal law is overwhelmingly centred on Africa, Europe and the Americas. A future Jiang Zemin will be subject to Spanish or Argentinian interpretations of international criminal law once those interpretations become entrenched at the international level.

Correspondingly, by missing out on input from Asia, international criminal law risks being deprived of its legitimacy and intellectual integrity as an international body of law. The contribution of Asian jurists such as the late ICTY judge Li Haopei should not be underestimated. By giving disproportionate airtime to states that are willing to exercise universal jurisdiction, the complementarity regime may dilute the voice of scholars from other legal systems. The international community should actively engage Asia in developing the latter's capacity for international criminal justice.

⁵⁹ Article 17, United Nations, *Rome Statute of the International Criminal Court* (1998) 2187 UNTS 90 (*Rome Statute*).

⁶⁰ See generally Kleffner, JK, “Complementarity as a Catalyst for Compliance”, in Kleffner, J and Kor, G, eds, *Complementary Views on Complementarity: Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court* Amsterdam (T.M.C. Asser Press, The Hague, 2006).

⁶¹ E.g. an alleged perpetrator who is a national of a state party to the ICC, having committed genocide in his home state but currently residing in another state which is party to the ICC.

⁶² Butler, H, “The Growing Support for Universal Jurisdiction in National Legislation”, in Machado, S, ed, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, Philadelphia, 2006), 67.

⁶³ Chesterman, S, “International Criminal Law with Asian Characteristics?” *NUS Law Working Paper Series* 2014/002, April 2014, available at <law.nus.edu.sg/wps/pdfs/002_2014_Simon_Chesterman.pdf>, 32-35.

IV.3. Progressive Engagement

Given the foregoing discussion, one might wonder if Asia should reject the principle of universal jurisdiction altogether. Such a move would be unwise. When confined to its proper limits, the principle is a “desirable evolution” for both Asia and the world. By ramping up its engagement in the development of universal jurisdiction, Asia is doing itself a favour as much as it is contributing to global peace and justice.

It is uncontroversial that crimes such as genocide, war crimes and crimes against humanity are abhorrent and worthy of universal condemnation. The established categories of international crimes have long been agreed to, evident by the widespread ratification of the relevant international conventions even among Asian states. These are not some radical or ethnocentric human rights standards. Simon Chesterman opines that “[Asia] arguably has the longest history of restraining the conduct of hostilities”.⁶⁴ Zou Keyuan observes that, on the related subject of humanitarian intervention, “[China] now considers intervention acceptable ‘under exceptional circumstances, such as when a national government practices racist policies, kills its people en masse, or collapses only to leave slaughtered people in its wake’”.⁶⁵ Unless any government plans on committing genocide anytime soon, it is not too onerous a duty to incorporate universal jurisdiction over core international crimes into domestic law. These states will merely be fulfilling their existing treaty obligations. Considering the utility of universal jurisdiction in facilitating justice, Asia should rise to its responsibility of helping to rid the world of impunity. On a regional level, the widespread implementation of international crimes and universal jurisdiction into national laws can have a normalising influence in curbing government or military excesses. This will contribute to regional peace and stability, providing ideal conditions for trade and economic cooperation.

In Asia, there remains the larger problem of actually applying such laws. Given the aforementioned lack of social and political impetus, it would be naive to expect a proliferation of universal jurisdiction practice overnight. This is where the notion of progressive engagement comes in. For a start, universal jurisdiction presents a good solution to tackling transnational crimes such as human trafficking and slavery described at the beginning of this paper. Victims of multiple nationalities are involved and the perpetrators may be shielded from criminal justice in their home state due to their links to the powerful. Regional cooperation in this area is growing and universal jurisdiction can add another weapon to the arsenal. There is also the point famously made by Lord Denning that “[w]hen a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood.”⁶⁶ Tan Hsien Li points out that not all Asian states are equal in their attitudes towards human rights. In Southeast Asia, the ASEAN Intergovernmental Commission on Human Rights “would likely take more incisive action when chaired by Indonesia, the Philippines, and Thailand, but be more subdued when other members chair.”⁶⁷ The implementation of universal jurisdiction over core

⁶⁴ *Id.*, 5.

⁶⁵ Zou, K, *China-ASEAN Relations and International Law*, Chandos Publishing, 2009, 29-30; Zou further claims that this position is shared by India and ASEAN.

⁶⁶ High Court of Justice of England and Wales, *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 556. Luc Reydam's quotes Lord Denning in a similar context in *Universal Jurisdiction*, *supra* nt 6, 83.

⁶⁷ Tan, *supra* nt 34, 160.

international crimes is a process and certain states can send a strong message by becoming early adopters.

Finally, to address realist concerns, the acceptance of an interventionist principle like universal jurisdiction may ironically shield Asian states from foreign interference in other areas of greater sensitivity. It bears repeating that universal jurisdiction only attaches to the most heinous of crimes. By actively embracing the core of international criminal law, Asian states have greater legitimacy when holding out on peripheral areas of human rights. Through their jurisprudence, Asian states could even push back against contrary values and the expansionist agenda of international NGOs, ensuring that universal jurisdiction is kept within “acceptable” bounds.

V. Conclusion

Universal jurisdiction is a relatively young concept that appears counterintuitive to Asian governments and societies. It may very well not be in the nature of Asians to worry about what is going on in other countries. However, this does not mean that Asia should continue to ignore the principle altogether. Universal jurisdiction is here to stay, just like how international criminal law is already entrenched in the international legal order. Asia can and should play an important role in helping to write the rules of universal jurisdiction and international criminal law. This is the responsible way for the sake of itself and for the purpose of establishing a truly universal legal order free of impunity and atrocities.

Returning to the issue of slave boats, the European Union is exploring a ban on seafood imports from Thailand.⁶⁸ The ban may cost the Thai fishing industry some 575-730 million Euros in revenues each year.⁶⁹ There will be knock-on effects for the whole region. Putting aside all the talk about Western hegemony, should Asian states not also be doing something about problems going on in their own backyard?

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⁶⁸ AP, *EU probes illegal fishing, slave labor PIFSLBefore Thai Ruling*, 1 October 2015, available at <news.yahoo.com/eu-threatens-taiwan-comoros-ban-over-illegal-fishing-115305116.html>.

⁶⁹ *Ibid.*

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