
'Transnational Criminal Law'?

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Abstract

International criminal law is currently subdivided into international criminal law stricto sensu — the so-called core crimes — and crimes of international concern — the so-called treaty crimes. This article suggests that the latter category can be appropriately relabelled transnational criminal law to find a doctrinal match for the criminological term transnational crime. The article argues that such a relabelling is justified because of the need to focus attention on this relatively neglected system, because of concerns about the process of criminalization of transnational conduct, legitimacy in the development of the system, doctrinal weaknesses, human rights considerations, legitimacy in the control of the system, and enforcement issues. The article argues that the distinction between international criminal law and transnational criminal law is sustainable on four grounds: the direct as opposed to indirect nature of the two systems, the application of absolute universality as opposed to more limited forms of extraterritorial jurisdiction, the protection of international interests and values as opposed to more limited transnational values and interests, and the differently constituted international societies that project these penal norms. Finally, the article argues that the term transnational criminal law is apposite because it is functional and because it points to a legal order that attenuates the distinction between national and international.

1 Introduction

The term 'transnational crime' is commonly used by criminologists, criminal justice officials and policymakers,¹ but its complementary term, 'transnational criminal law' (TCL), is unknown to international lawyers. International lawyers embrace the division of criminal law, based on the legal order of reference, into national and international. In this article it is suggested that a useful doctrinal match for

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¹ See, e.g., N. Passas (ed.), *Transnational Crime* (1999); P. Williams and E. Savona (eds), *The United Nations and Transnational Crime* (1996).

transnational crime can be constructed by recasting an existing sub-category of international criminal law as TCL.

The appropriate point of departure is the term describing the activity criminalized. According to Mueller, ‘transnational crime’ is a criminological rather than a juridical term, coined by the UN Crime Prevention and Criminal Justice Branch ‘in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country’.²

The term is primarily a functional rather than normative descriptor, and as such it has definitional problems. Fijnaut complains that the term is a general purpose concept that contains many different types of crime, including organized, corporate, professional and political crime.³ He also attacks the use of the adjective ‘transnational’, when in fact not all transnational crime crosses state boundaries. In this regard he points to the dependency of illicit trans-boundary drug supply on national production and on the purely localized nature of much of transnational organized crime’s control of local economies. Fijnaut concludes that the ‘term ‘transnational crime’ is misleading and does no justice to the multiplicity of this type of crime and to its local and/or national dimension’.⁴

‘Transnational crime’ is, however, in widespread use as a generic concept covering a multiplicity of different kinds of criminal activity. Moreover, while Fijnaut’s point about the local impact of these crimes is well made, the harmful effects that these crimes have abroad means that they are hardly ever of entirely local interest.⁵ International society’s concern with the upsurge in certain kinds of criminal activities within a state is considered legitimate because of the fear that these activities will have a knock-on effect in other states. At its simplest, then, transnational crime describes conduct that has actual or potential trans-boundary effects of national and international concern. The issue explored here is whether a coherent ‘juridical match’ can be found to complement transnational crime.

‘Transnational criminal law’ conjoins transnational crime with Jessup’s term ‘transnational law’. Jessup used ‘transnational law’ to describe ‘all law which regulates actions or events that transcend national frontiers’.⁶ The implication of his use of transnational was that cross-border relations of a legal kind involve

² Mueller, ‘Transnational crime: Definitions and Concepts’, in P. Williams and D. Vlassis (eds), *Combating Transnational Crime* (2001) 13. Bassiouni cites Mueller as the author of the term. See Bassiouni and Vetere, ‘Towards Understanding Organized Crime and Its Transnational Manifestations’, in M. C. Bassiouni and E. Vetere (eds), *Organized Crime: A Compilation of UN Documents, 1975–1998* (1998) 31.

³ Fijnaut, ‘Transnational Crime and the role of the United Nations’, 8 *European Journal of Criminal Law and Criminal Justice* (2000) 119, at 120.

⁴ *Ibid.*

⁵ In *Somchai Liangsiriprasert v United States Government* [1990] 2 All ER 866, the Privy Council, in an appeal from Hong Kong, held that Hong Kong’s jurisdiction could be extended to conspiracies carried out entirely abroad. In a classic justification of such an extension Lord Griffiths, speaking for a unanimous Board stated: ‘Unfortunately in this century crime has ceased to be largely of local origin and effect. Crime is now established on an international scale and the common law must face this new reality’ (at 878).

⁶ See P. Jessup, *Transnational Law* (1956), at 2. See generally, O. Schachter, ‘Phillip Jessup’s Life and Ideas’, 80 *AJIL* (1986) 878, at 893–894.

international and national elements that do not fit within the traditional divisions. 'Transnational criminal law' has been used in Jessup's expansive sense, including within it all criminal law not completely confined to a single national entity.⁷ Focusing on the central element of Jessup's term, the trans-boundary dimension, I suggest a more restricted use of TCL: the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects.

The 'suppression conventions', crime control treaties concluded with the purpose of suppressing harmful behaviour by non-state actors ranging from counterfeiting to corruption, drug prohibition to the financing of terrorism, can already, it is submitted, be said to establish a system of TCL. These conventions provide, through a range of complex provisions for the criminalization by state parties in their domestic law of certain offences, for severe penalties, for extra-territorial jurisdiction, and for a variety of procedural measures. The conventions serve as the legal frameworks for what Nadelmann terms 'prohibition regimes'.⁸ He explains:

International prohibition regimes are intended to minimise or eliminate the potential havens from which certain crimes can be committed and to which criminals can flee to escape prosecution and punishment. They provide an element of standardisation to co-operation among governments that have few other law enforcement concerns in common. And they create an expectation of co-operation that governments challenge at the cost of some international embarrassment.⁹

The use of treaty law to establish these regimes is not a recent development.¹⁰ International society responded to the globalization of harmful conduct by beginning to develop suppression conventions in the 19th century, and this approach has steadily become more significant. The offences these conventions establish are currently considered to fall within a broad system of international criminal law. The other part of this system is international criminal law *stricto sensu*, consisting of the crimes that provide for individual penal responsibility for violations of international law before an international penal tribunal. The offences established by the suppression conventions are, in contrast, classed by international lawyers as 'crimes of international concern' or 'common crimes against internationally protected interests'¹¹ because although the origin of the norm is international, penal proscription is national. But these are laborious and ambiguous labels. The term advocated here to

⁷ A. Eser and O. Lagodny (eds), *Principles and Procedures for a New Transnational Criminal Law* (1992), at v; Clark, 'Countering Transnational and International Crime: Defining the Agenda', in P. J. Cullen and W. C. Gilmore (eds), *Crimes Sans Frontieres: International and European Approaches: Hume Papers on Public Policy* Vol. 6, nos 1 and 2 (1998) 20.

⁸ See Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society', 44 *International Organisation* (1990) 479. Gregory refers to them as 'international policing regimes': see Gregory, 'Private Criminality as a Matter of International Concern', in J. W. E. Sheptycki (ed.), *Issues in Transnational Policing* (2000) 100.

⁹ See Nadelmann, *supra* note 8, at 481.

¹⁰ For an early example see 'Convention between Her Majesty and the Republic of Hayti [sic] for the more Effectual Suppression of the Slave Trade', signed at Port-au-Prince, 23 December 1839.

¹¹ The phrases used generally in M. C. Bassiouni (ed.), *1 International Criminal Law: Crimes* (2nd ed., 1999).

describe the system that suppresses these ‘transnational crimes’ is TCL. Why engage in this re-labelling?

2 Focusing Attention on TCL

Taxonomy must have a purpose. Identifying ‘TCL’ helps us to know how international law is used to suppress socially, economically and morally undesirable inter- and intra-state conduct. Three points may be made.

First, TCL is a very powerful system. Transnational crime is a rapidly growing phenomenon¹² and, responding to this growth, TCL is probably the most significant existing mechanism for the globalization of substantive criminal norms. The suppression conventions are codifying treaties. There are over 200 such treaties,¹³ far more transnational than purely international offences, far more transnational offenders than purely international criminals and far greater scope for legal ambiguity and abuse of rights in TCL than in ICL *stricto sensu*.

Second, increasing our knowledge of this system of law is important because its study has been neglected. It is an area of law where sovereignty is still a dominant value but somewhat contradictorily, interstate cooperation is often extensive although beyond the reach of the public eye. This contradiction is partly explained by the fact that this system of law is both the province of law enforcement specialists and the product of an international order dominated by a few powerful states that jealously guard their interests.

Third, it seems that scholars originally labelled the crimes in the suppression conventions as crimes against internationally protected interests under the general rubric of a broad international criminal law in order to reinforce the case for that law in the post-Nuremberg doldrums when that case was most doubted. Re-labelling these crimes as transnational within a system of TCL is designed to draw attention to the deficiencies of this increasingly important system.

These deficiencies result from the lack of attention given, firstly, to the development of the international components of TCL, the suppression conventions, and, secondly, to the impact of these conventions on the national components of TCL, the crimes themselves. These deficiencies are only outlined here as all require further investigation.

A *Transnational Criminalization*

An important reason for systematizing the study of TCL is to expose the relationship between TCL and transnational crime. More questions need to be asked about the social construction of transnational threats and the appropriateness of transnational penal responses. Rhetorical assertion of such a threat may presume a common

¹² See, for example, Fijnaut, *supra* note 3, at 122.

¹³ See Bassiouni, ‘The Sources and Content of International Criminal Law: A Theoretical Framework’, in Bassiouni, *supra* note 11, at 32–33 and 62–69, for the full list.

interest in suppression where none exists, and may lead to legal overkill.¹⁴ TCL has developed in response to the pressing issues of the time. Thus, for example, when hijacking was a significant feature of the global landscape in the late 1960s and early 1970s, a number of hijacking conventions were adopted.¹⁵ This kind of rapid expansion of TCL's material scope has not been complemented (or complicated) by general discussion of coherent principles justifying or constraining criminalization, like individual autonomy, welfare, harm and minimalism.¹⁶ Transnational criminalization today rests upon assumptions about the legitimate political, social and economic interests of states, and assertions about the harm caused to these interests by the conduct criminalized. Direct harms to individuals are relatively uncontroversial. There is a strong case for using TCL to reinforce general obligations on citizens, such as driving a motor vehicle with a licence.¹⁷ The role of TCL in criminalizing the self-harming conduct of adults is more controversial, and more dependent on claims to consequential harm to society as a whole. In addition, the dangers of the use of TCL as a mechanism for disseminating transnational morality are many. Broadly held rational convictions may be defensible, yet narrowly held prejudices may also be disseminated through TCL. There is an obvious need to adopt a set of clear principles for transnational criminalization.

B Legitimacy in the Development of the System

TCL must be produced by an authentic political process in order to justify the use of state and inter-state authority against individuals. Unfortunately, TCL's existing process of development exhibits a democratic deficit, which raises doubts about its legitimacy. Sheptycki¹⁸ notes that the assumption in a democratic society is that the elected control penal policy. Against this assumption he highlights the important role of the 'transnational law enforcement enterprise' — the complex global network of transnational law enforcement agencies — in the development of the suppression conventions and the resulting domestic law. Sheptycki's point is that law enforcement agents have been establishing legal standards rather than applying standards established by elected law-makers.¹⁹ Sheptycki's work reflects Nadelmann's insight as to how the suppression conventions are used to develop a cosmopolitan international

¹⁴ Deflem suggests that international police cooperation was founded not in response to transnational crime but on the myth of that crime generated by a newly autonomous policing profession; see M. Deflem, *Policing World Society* (2002), at 143, 150. Perversely, as Fijnaut *supra* note 3 points out at 123, the international suppression of drugs may actually have increased crime.

¹⁵ See Friedlander, 'The Crime of Hijacking', in M. C. Bassiouni, *1 International Criminal Law* (1st ed., 1986) 455 and 456.

¹⁶ See, e.g., A. Ashworth, *Principles of Criminal Law* (3rd ed., 1999), at Ch. 2.

¹⁷ See, e.g., Convention on International Road Traffic, dated at Geneva 19 September 1949.

¹⁸ Sheptycki, 'Law Enforcement, Justice and Democracy in the Transnational Arena: Reflections on the War on Drugs' 24 *International Journal of the Sociology of Law* (1996) 61.

¹⁹ He gives as an example (*supra* note 18, at 67–68) the influence of the US Drug Enforcement Administration on the legalization of controlled delivery in Europe and its globalization through Article 11 of the 1988 Drug Trafficking Convention (United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, UN Doc. E/CONF.82.15, 28 ILM 493).

morality without the citizens of state parties having much to do with their adoption or application.²⁰ The *de jure* nature of international society — a democracy of states rather than individuals within states — makes it easy for the generation of global crime control treaties implementing contentious policies. The laws these treaties propagate do not threaten powerful constituencies or vested interests in the states invited to participate, ensuring willing participation in the prohibition regime.²¹ In order to ensure greater legitimacy, the development of transnational criminal policy and its transformation into criminal law is a process that should be more transparent and open to greater public participation.

C Doctrinal Weaknesses in the System

Analysis of the suppression conventions reveals the neglect of doctrinal coherency in the pursuit of multi-state application to widely varying forms of criminality. Little attention has been paid to the scope of criminal liability in the sense of degrees of participation, and to the conditions of criminal liability in the sense of the elements of conduct, fault, criminal capacity and so forth. The principle of legality demands that if someone engages in a transnational crime, the offence should be dealt with in any state that has jurisdiction using the same general principles, procedures and penalties, but this is not commonly the case. Little or no attempt is made to define the fault element of the crimes to be enacted,²² which can result in very different domestic offences. The conduct elements of these crimes also suffer from definitional incoherence or ambiguity, which also makes them questionable from the point of view of the principle of legality.²³ Finally, there is little in the way of punishment policy.

There are a variety of reasons for these weaknesses. TCL relies on domestic law to flesh out the skeletal provisions of the suppression conventions. It assumes the existence of fully developed domestic penal systems, when in reality these systems may be poorly developed. States have shown themselves to be unwilling to harmonize their penal systems to a greater degree than absolutely necessary due to domestic resistance to the application of unfamiliar penal principles. The signatories of the suppression conventions assume that a common understanding of criminal law and punishment exists among state parties, yet this general grammar of criminal and penal policy is difficult to identify. In its stead, resort is frequently made to ideas about criminal law and punishment held by influential states. Each convention tends to be a legal response to a specific threat, developed in relative isolation from conventions

²⁰ *Supra* note 8, at 481.

²¹ *Ibid.*, at 511.

²² Article 36(1) of the 1961 Single Convention on Narcotic Drugs, for example, adopts the rule that each of the proscribed acts must be 'committed intentionally'. How each party defines such intention and whether they extend it to concepts such as constructive intention (*dolus eventualis*), conscious recklessness or something approaching negligence, is a domestic issue.

²³ See, e.g., Article 2(1)(b) of the International Convention for the Suppression of the Financing of Terrorism, Annex to GA Res. 54/169, 9 December 1999. It penalizes the financing of the use of violence used for a purpose which 'by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.'

dealing with other threats. States have shown little interest in making a sustained effort to apply principles developed in respect of one offence to others. Altering the substantive penal norms of domestic law through international law without paying attention to the other elements of a modern criminal justice system is problematic because it leaves these norms in a vacuum. A suitable doctrinal basis for TCL must be developed or massive variation in its application, in violation of the principle of legality, will continue.

D Human Rights Considerations²⁴

TCL is a system dominated by sovereignty, effective law enforcement and the objectification of individuals as criminals. There is little express protection of human rights within the suppression conventions. The conventions rely primarily on existing domestic protection of human rights and secondarily on general international human rights law. The problem is that the conventions are adopted at the international level, and then applied at the national level, but human rights only come into play, if at all, at the national level, reactively rather than proactively. Moreover, the conventions encourage a 'law and order' attitude from state parties which may cause them to go further than strictly obliged to, with negative consequences for individual rights. Attention needs to be paid to integrating the system of TCL with the general human rights framework, thus instilling the basic constitutional values of international law.²⁵

E Legitimacy in the Control of the System

The breadth and depth of the normative power of TCL has attracted the interest of powerful states that are sensitive and vulnerable to many of the activities it proscribes. These states play a conspicuous role in the control of TCL, and use it to extend their own domestic criminal jurisdiction while simultaneously influencing the penal laws of weaker states. Although weaker states find this erosion of their sovereignty difficult to take, they are often not in a position to resist.²⁶ The formal equality of treaty law provides some defence against this penal overreach. Indeed, TCL adheres in many respects to Heymann's²⁷ 'international law' model of international criminal cooperation because it provides for a normative structure that can be used to control cooperation between any states, to guarantee respect for sovereignty and for the principles of international cooperation, and to ensure judicial supervision. However, the systemic slack and ambiguity of TCL tends also to encourage the functioning of

²⁴ See Boister, 'Human Rights Protections in the Suppression Conventions' 2 *Human Rights Law Review* (2002) 199.

²⁵ See generally White, 'The World Court, The WHO and the UN System', in N. M. Blokker and H. G. Schermers (eds), *Proliferation of International Organizations* (2001) 85.

²⁶ Consider, e.g., the difficulties Central and South American states have in resisting the US in its war on drugs.

²⁷ Heymann, 'Two Models of National Attitudes toward International Co-operation in Law Enforcement', 31 *Harvard International Law Journal* (1990) 99.

Heymann's alternative 'prosecutorial' model of international criminal cooperation.²⁸ This highly informal goal-driven model championed by law enforcement officials uses flexible means, regards cooperation as crucial, and bases controls on levels of reasonable demand and reciprocity rather than legal principle. While TCL serves both to formalize and to informalize the suppression of certain offences, because the primary aim of the system is the domestic social order of certain powerful states, law enforcement effectiveness tends to predominate over values like international legality, at the expense of legitimacy.

F Enforcement of the System

TCL suffers from the fact that the treaty provisions for enforcement are weak and hardly ever used, and as a result an informal gradient of inducement has taken the place of these provisions. Diplomacy and political influence are crucial first steps, with the UN criminal justice agencies playing key roles. In more difficult situations, influential states assume the role of international enforcer through economic sanctions,²⁹ powerful intergovernmental organizations may do the same,³⁰ and in extreme situations there has been recourse to the international machinery for maintaining peace and security.³¹ In order to avoid fuelling the suspicion that the system is policed by and thus serves the purposes of a few powerful states, more effective conventional methods for enforcement need to be developed. Such methods might formalize the existing gradient of inducement and place it under international supervision. They might also stipulate precisely in which circumstances, if at all, the international machinery for peace and security can be used to sanction the use of force in the enforcement of TCL.

There are good reasons for focusing attention on TCL, but is it possible to sustain a distinction between ICL, TCL and national criminal law?

²⁸ See Brown, 'Towards a Prosecutorial Model for Mutual Assistance in Criminal Matters', in Cullen and Gilmore, *supra* note 7, at 50, for a similar view in respect of mutual assistance.

²⁹ For example, section 490 of the US Foreign Assistance Act of 1961 requires the US executive to consider the extent to which major drug-producing and transit countries have met the goals and objectives of the 1988 Drug Trafficking Convention. If it decides they have not, the Act requires the executive to decertify the country in question, which results in the suspension of most forms of assistance by the US together with the application of optional trade sanctions.

³⁰ The World Bank's Internal Guidelines debar the making of loans or payment of the balance of loans on the discovery of corruption (which is criminalized by treaties like the Inter-American Convention against Corruption, 35 ILM (1996) 724). See Low, 'Transnational Corruption: New Rules for Old Temptations, New Players to Combat a Perennial Evil', *Proceedings of the American Society of International Law* (1998), at 151–156.

³¹ See, e.g., SC Res 748 (1992), SC Res. 883 (1993) and SC Res. 1192 (1998) applying UN sanctions in the case of the Lockerbie bombers.

3 Distinguishing TCL from International and National Criminal Law

Although, as noted above, what I refer to as TCL is considered by some to be part of international criminal law in the general sense of international laws concerned with penal measures,³² there are several ways of distinguishing it from 'ICL *stricto sensu*'³³ on the one hand, and from purely national criminal law on the other. The following distinguishing features are suggested rather than definitive, given that the demarcation of TCL is emergent rather than established.

A Direct and Indirect Criminal Liability in International Law

Prior to the conclusion of the Rome Statute founding the International Criminal Court (ICC),³⁴ the distinction between an international criminal law with an international element and an international criminal law with a transnational element was not considered to be that significant.³⁵ Nevertheless, scholars did identify a core ICL. Wise explains that

[i]n its strictest possible sense, international criminal law would be the law applicable in an international criminal court having general jurisdiction to try those who commit acts which international law proscribes and which it provides should be punished.³⁶

The development of the ICC solidified the distinction between this ICL *stricto sensu* and TCL. While the International Law Commission (ILC) had included the crimes created by the suppression conventions, the so-called 'treaty crimes', in all the drafts of the Code of Crimes against the Peace and Security of Mankind from 1991 up to and including the 1995 Draft Code,³⁷ opposition within the ILC meant that they were excluded from the 1996 Draft Code, which was restricted to a catalogue of 'core' crimes.³⁸ That distinction was carried forward into the Rome Statute. The core international crimes, those over which Articles 5 to 9 of the Rome Statute give the ICC

³² The approach, e.g., adopted by Bassiouni, *supra* note 11.

³³ An expression used by Wise, 'Terrorism and the Problems of an International Criminal Law', 19 *Connecticut Law Review* (1987) 799, at 805. Schwarzenberger uses the expression 'International Criminal Law in the material sense of the word': see 'The Problem of an ICL', 3 *Current Legal Problems* (1950) 263. Kremnetzer uses 'International Criminal Law in the strong sense of the word': see 'The World Community as an International Legislator in Competition with National Legislators', in Eser and Lagodny, *supra* note 7, at 342. The XIV International Congress of the International Association of Penal Law held in Vienna in 1989 unanimously designated the subject 'International Criminal Law in the narrow sense': see Trifflerer, 'Present Situation, Vision and Future Perspectives' in Eser and Lagodny, *supra* note 7 at 369–370.

³⁴ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 37 ILM 999.

³⁵ See Bassiouni, 'Policy Considerations on Inter-State Co-operation in Criminal Matters' in Eser and Lagodny, *supra* note 7, at 807, n.1.

³⁶ Wise, 'Codification: Perspectives and Approaches', in Bassiouni, *supra* note 11, at 283 and 285.

³⁷ See Report of the ILC, 47th Session, UNGAOR 50th Sess., Supp. No.10 (A/50/10), paras. 112–118.

³⁸ 'Draft Code of Crimes against the Peace and Security of Mankind: Titles and Texts of Articles on the Draft Code of Crimes against Peace and Security of Mankind Adopted by the International Law Commission at its Forty-eighth Session (1996)', UN GAOR 48th Sess., UN Doc A/CN.4/L.532. It includes only aggression, genocide, crimes against humanity, crimes against UN personnel, and war crimes (Articles 16–20).

jurisdiction, are offences that are firmly established in customary international law.³⁹ Uniquely, however, these core offences provide for individual criminal liability for their violation, even in the absence of a domestic prohibition,⁴⁰ and are now subject to a direct enforcement scheme where the individual may be prosecuted before a permanent international criminal court.⁴¹

TCL is concerned with the treaty crimes excluded from the jurisdiction of the ICC. Unlike ICL, TCL does not create individual penal responsibility under international law. TCL is an indirect system of interstate obligations generating national penal laws.⁴² The suppression conventions impose obligations on state parties to enact and enforce certain municipal offences.⁴³ A failure to comply with the prescribed international model results in an international tort or delict; the remedies for the failure of state parties to take action in their domestic law are the ordinary remedies of treaty law and the law of state responsibility. If a state fails to meet its obligations it cannot plead the insufficiency of its own criminal law or administration of justice. However, in contrast to the core crimes, the authority to penalize comes from national law and individual criminal liability is entirely in terms of national law.⁴⁴ States

³⁹ Genocide, aggression, serious violations of the laws and customs of armed conflict and crimes against humanity.

⁴⁰ The 1996 Draft Code used the term 'crimes under international law' to describe only those crimes which lead to individual penal responsibility in terms of international law. See Triffterer, *supra* note 33, at 370–371; Kremnetzer, *supra* note 33, at 337. Boss notes that the principle of individual responsibility has been spelled out in Article 25 of the Rome Statute and then fleshed out in the other provisions of the Statute. See Bos, 'The International Criminal Court: Recent Developments', in *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999) 43.

⁴¹ The Rome Statute may be reliant on state authority to enforce its orders and thus constitute only a partially direct enforcement scheme (see Bassiouni *supra* note 13, at 4 and 6), but it is undeniable that a permanent international criminal tribunal now exists to prosecute the core crimes. The establishment of the ICC does not preclude the establishment of ad-hoc international penal tribunals in response to a particularly egregious violation of what is currently a treaty crime, which may appear to undermine the thesis that a direct scheme is characteristic of ICL. However, the establishment of such a tribunal could reasonably be explained as an example of direct enforcement of a newly promoted core crime (see text *infra* note 100).

⁴² See Bassiouni, 'An Appraisal of the Growth and Developing Trends of ICL', 45 *Revue internationale de droit penal* (1974) 405, at 429. Although the 1993 Draft Statute for an ICC distinguished between crimes under self-executing treaties and crimes under the suppression conventions — draft Articles 22 and 26(2)(b) respectively: see 'Report of the ILC, 45th Session' UNGAOR 48th Sess., Supp. No. 10, UN Doc. A/48/10 (1993) at 255–335, that distinction was later done away with. Self-executing treaties still require state application and thus do not detract from the thesis that the suppression conventions are applied indirectly: see Bassiouni *supra* note 13, at 7 n.22. See also Triffterer, *supra* note 33, at 377.

⁴³ Thus, e.g., the Hague Hijacking Convention (Convention for the Suppression of Unlawful Seizure to Aircraft, signed at the Hague, 16 December 1970, in force 14 October 1971, 860 UNTS 12325, 10 ILM (1971) 133) has been transformed into penal obligations through legislation like the UK's Aviation Security Act 1982 (as amended).

⁴⁴ Compare Article 6(c) of the Nuremberg Charter ('Charter of the International Military Tribunal (IMT)' in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 August 1945, 82 UNTS 280), which provides for individual responsibility for crimes against humanity 'whether or not in violation of the domestic law of the country where perpetrated', with Article 36(4) of the 1961 Single Convention on Narcotic Drugs, which provides that nothing contained in Article 36 on the subject of penal provisions 'shall affect the principle that the

recognize this distinction explicitly. For example, while Article 1 of the Genocide Convention records that genocide is a 'crime under international law', the treaty crime of drug trafficking is considered in the preamble of the 1988 Drug Trafficking Convention only to be 'an international criminal activity'. Although convenient, it is strictly speaking a misnomer to speak of a treaty 'crime'. A treaty crime is a criminological phenomenon described in normative terms for the purpose of binding states. Unlike ICL, which is usually customary, a characteristic reinforced by the selection of crimes in the Rome Statute, TCL is usually treaty based, enabling groups of states to respond rapidly to new forms of criminality. In principle, however, ICL can be established solely by treaty and TCL solely by custom.⁴⁵ Moreover, TCL may have other sources.⁴⁶

Purely national crimes can in turn be distinguished from transnational crimes because they are criminalized solely at the election of the state and are not initiated through international treaty.

B *Extra-territorial Jurisdiction*

Differences in the scope of extra-territorial criminal jurisdiction over international, transnational and national crimes also reveal a basis for distinguishing international, transnational and national criminal law. In this regard, the nature of the jurisdictional connection required between the state establishing extra-territorial jurisdiction and the offence in question is important.

With regard to international crimes, the jurisdictional connection is said to be in the interests of international society as a whole. In addition to other less tenuous forms of extra-territorial jurisdiction, these crimes are subject to a permissive⁴⁷ 'pure' or 'absolute' universal jurisdiction established by general international law because they

offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.'

⁴⁵ With respect to ICL, in the *Tadic* Appeal Chamber decision the ICTY affirmed that an international criminal tribunal could apply international agreements binding on the parties to a conflict as a basis for individual penal responsibility even though these agreements were not part of customary international law. *The Prosecutor v. Dusko Tadic*, 2 October 1995, Case No. IT-94-1-AR72, paras 143–144. See also *The Prosecutor v. Tihomir Blaskic*, 3 March 2000, Case No. IT-95-14-T, para. 169. With respect to TCL, Clark, *supra* note 7, at 25 cites the *US v. Arjona* 120 US 479 (1887) as a good example of transnational crime based on custom. In it the US Supreme Court upheld the constitutionality of a Federal power to suppress the counterfeiting of foreign currency at home on the basis of an obligation generated by the law of nations, more than 40 years before the adoption of the 1929 Counterfeiting Convention, 112 LNTS 371.

⁴⁶ The influence of soft law in the creation of anti-money-laundering norms is highlighted by G. Stessens, *Money Laundering: A New International Law Enforcement* (2000), at 15 *et seq.*

⁴⁷ Hays Butler, 'The Doctrine of Universal Jurisdiction: A Review of the Literature', 11 *Criminal Law Forum* (2000) 353, at 363. *Sed contra*, Dinstein, 'International Criminal Law', 20 *Israel Law Review* (1985) 206, at 214.

are of such exceptional gravity that they impinge on international society's fundamental interests.⁴⁸ The *Princeton Principles on Universal Jurisdiction*⁴⁹ remind us that

universal jurisdiction is 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.

Jurisdiction over extra-territorial transnational crimes is more limited, because it is ordinarily only established when a direct injury is threatened or caused to the state taking responsibility. Such jurisdiction is usually dependent on the terms of a particular suppression convention, one of the main legal reasons why transnational crimes are excluded from the jurisdiction of the ICC.⁵⁰ Although the *Lotus* case⁵¹ provides that a state may establish jurisdiction over acts that occur abroad in the absence of an international rule prohibiting such jurisdiction, out of respect for the sovereignty of others, states are generally only willing to take responsibility for extra-territorial transnational offences if there is a 'genuine link'⁵² between them and the offence in question. Various familiar principles of extra-territorial jurisdiction such as objective territoriality and nationality may be relied upon in a treaty to underpin such a link, but at its most general, and most tenuous, this link is generated by a treaty-based obligation to apply a form of 'subsidiary universality' created by the duty to extradite or prosecute. Closely associated with universality, it is not universal jurisdiction because it is subsidiary to the failure to extradite and thus has a limiting territorial element; it depends on the presence of the accused within the territory of the state establishing jurisdiction.⁵³ The application of the subsidiary form of universal jurisdiction through a suppression convention to a particular transnational offence is usually heavily qualified. Such application serves to flag that states have chosen to establish an extraordinary criminal jurisdiction, but it also indicates that they recognize that absolute universality does not apply.

⁴⁸ See *Demjanjuk v. Petrovsky*, (1985) 603 F. Supp. 1468, affd. 776 F. 2d 271; Mann, 'The Doctrine of Jurisdiction in International Law', *RdC* (1964, I) 1.

⁴⁹ *Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, Princeton, New Jersey, 2001.

⁵⁰ See 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc. A/51/22 (1996), UNGAOR, 51st Sess., Supp. No. 22, at 26.

⁵¹ (1927) PCIJ Reports Series A, No.10.

⁵² See Blakesly and Lagodny, 'Competing National Laws: Network or Jungle?' in Eser and Lagodny, *supra* note 7, at 47 and 95.

⁵³ Based on the *aut dedere aut punire* principle advanced by Grotius (*De Jure Belli et Pacis* Book II, ch. XXI, paras IV-V) the term subsidiary universality was coined by Carnegie in 'Jurisdiction over Violations of the Laws and Customs of War', 39 *BYbLL* (1963) 402, at 405. Clark, 'Offences of International Concern: Multilateral Treaty Practice in the Forty Years since Nuremberg', 57 *Nordic Journal of International Law* (1988) 49, uses the terms 'secondary' or 'last resort' universal jurisdiction. *Obiter dicta* by members of the ICJ in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of DRC v. Belgium)*, 14 February 2002, General List no. 121, help to clarify this distinction with pure universality. See President Guillaume's Separate Opinion at para. 7; see also Judges Higgins, Kooijmans and Buergenthal's Joint Separate Opinion at para. 41.

Jurisdiction over purely national crimes is ordinarily territorial. In contrast to transnational crimes, when extra-territorial jurisdiction is established over purely national crimes it is usually done so unilaterally and not as a result of an international obligation or invitation.⁵⁴

C Values and Interests

Differences in systemic nature and jurisdiction are substantive manifestations of a hierarchy of international, transnational and national crimes. It is intrinsic to this hierarchy that these crimes threaten different values and interests. This is not a novel proposition.⁵⁵ Bassiouni suggests two alternative requirements for proscribed conduct to fit into his omnibus definition of an international crime: the presence of either an international or a transnational element.⁵⁶ Examination of these two elements reveals that they have little in common because they describe conduct that threatens different kinds of interests. This examination provides one of the strongest reasons for distinguishing ICL and TCL.

According to Bassiouni, crimes have an international element if they are inconsistent with a fundamental norm of international law and thus violate a *jus cogens* norm.⁵⁷ They will do so if they are (a) sufficiently serious to constitute a threat to the international community, and/or (b) so egregious that they shock the conscience of humanity.⁵⁸ In other words, protecting international interests like international peace and security or the most important basic common values of mankind like life and human dignity is the principal purpose of ICL.⁵⁹ International criminality may involve many small actions that threaten individual human rights and interests, but its collective public nature marks out an extraordinary gravity⁶⁰ that gives the individual acts the singular potential to threaten international values or interests.⁶¹ International criminality is also characterized by state involvement, which makes it impossible to expect justice to be carried out by the state itself and requires the exceptional measure of international law superseding national law.⁶² In essence then,

⁵⁴ Extradite or prosecute obligations in extradition treaties, such as Article 6(2) of the Council of Europe's European Convention on Extradition, 13 December 1957, ETS 24, do not impose this obligation with regard to offences that they themselves oblige states to establish, and extraditability is not an independent condition of transnational criminality. See Wise in M. C. Bassiouni and E. M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995) 11.

⁵⁵ See, for example: Bassiouni, *supra* note 13, at 97; and Gregory, *supra* note 8, at 101.

⁵⁶ *Supra* note 13, at 28–29. See also his *International Law: A Draft Criminal Code* (1980), at 40–44.

⁵⁷ Bassiouni, *supra* note 13, at 4, 39–46.

⁵⁸ See Bassiouni, *supra* note 13, at 42; Hays Butler, *supra* note 47, at 356; *R v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No. 3), [1999] 2 All ER 97 at 177 (Lord Millet); Schwarzenberger *supra* note 33, at 273; and Wright, 'The Scope of ICL: A Conceptual Framework', 15 *Virginia Journal of International Law* (1975) 561, at 567.

⁵⁹ Bassiouni, *supra* note 13, at 12, and Kremnetzer, *supra* note 33, at 339 share the view that the two conditions are disjunctive *contra* Lord Millet in the *Pinochet* case, *supra* note 58.

⁶⁰ Kremnetzer, *supra* note 33, at 339.

⁶¹ See Bassiouni, *supra* note 42, at 421.

⁶² See Kremnetzer, *supra* note 33, at 339; Bassiouni, *supra* note 13, at 42; and Wise, *supra* note 36, at 288.

ICL has a unique international element in the sense that it proscribes conduct that threatens international order or international values.

As noted, however, Bassiouni classifies certain types of offences as international even though they do not have this element. Bassiouni's alternative 'transnational' element describes the essence of a multitude of activities affecting the social, economic, cultural and other interests of concern to all or a substantial number of states. These activities may have an indirect public nature,⁶³ but more commonly involve private individual conduct: even when committed by small groups, their motive is private, and they harm persons or private interests.⁶⁴ Expanding upon Bassiouni's analysis, it appears that state interest in suppressing such conduct is triggered in either one of two situations.

The first situation: these offences may be established to suppress conduct that crosses borders and thus has a factual or phenomenological transnational element in its planning or commission.⁶⁵ This element has received an explicit expression in Article 3 on the 'Scope of Application' of the United Nations Convention against Transnational Organized Crime.⁶⁶ Article 3 provides that the Convention applies to a range of offences that the Convention criminalizes⁶⁷ when they are transnational in nature, and then spells out that such an offence is

transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.

The material scope of Article 3 expresses an expanded view of trans-boundary criminality, where criminal activity, its consequences, or criminal relationships, transcend international boundaries. The scope of this phenomenological transnational element can be further expanded to include those situations where after the fact the fugitive offender seeks refuge abroad and as a matter of international necessity states cooperate by either extraditing or prosecuting the individual.⁶⁸ Strong evidence

⁶³ Wise, *supra* note 36, at 289, notes that terrorist offences are often the subject of international concern because of apparent state complicity, which may provide a ground for promotion of these offences to international crime status.

⁶⁴ See Bassiouni, *supra* note 42, at 421. See also Gregory, *supra* note 8, at 104.

⁶⁵ See Bassiouni, *supra* note 42, at 421–422; Gregory, *supra* note 8, at 100; Nadelmann, *supra* note 8, at 479–481; Trifflerer, *supra* note 33, at 371; and Wise, *supra* note 33, at 810.

⁶⁶ Opened for signature 16 December 2000, UN Doc. A/55/383, 40 ILM (2001) 335.

⁶⁷ Organized crime, money laundering, corruption and obstruction of justice in Articles 5, 6, 8 and 23 respectively.

⁶⁸ Yarnold, 'Doctrinal Basis for the International Criminalisation Process,' 8 *Temple International and Comparative Law Review* (1994) 85, reprinted in Bassiouni, *supra* note 11, at 127, considers (at 131–132) such situations to be distinct from trans-boundary crimes because the crime itself is entirely intrastate and that the international community is motivated to ensure effective control in these situations as a matter of necessity because one state acting alone will not succeed in bringing the criminal to justice. The benchmark of phenomenological transnationality is, however, engagement of the interests of more than one state, and from this base line there is little distinction between the situation where a crime crosses borders and a situation where a criminal fugitive crosses borders.

of this phenomenological transnational element or 'transnational hook', as Nadelmann terms it,⁶⁹ is the principal rationale used to convince states that they should participate in the construction of a prohibition regime by adopting a suppression convention that creates intra- and/or interstate offences. Creation of intrastate offences may seem unnecessary in meeting the transnational threat, but one of the central purposes of the suppression conventions is to build a foundation in national law in order to make international cooperation in the suppression of the particular form of conduct effective. Such a foundation is necessary, for example, in the suppression of a domestic supply of contraband feeding into the transnational supply, and in the harmonization of domestic offences in order to enable the extradition of a fugitive by satisfying the principle of double criminality.

The second situation: transnational offences may, however, also be established to suppress conduct where no phenomenological transnational element exists, but there is a sufficiently influential cosmopolitan belief that this conduct should be outlawed in all states because of its moral repugnance. In other words, the citizens of different states share the belief that these activities must be prohibited by means of international treaty law solely because, as Nadelmann puts it, 'each is an evil in and of itself'.⁷⁰ The intrastate offences that result are transnational in origin and have what can thus be termed a normative transnational element.⁷¹ Necessity provides the orthodox rationale for the duty of states to help other states suppress intrastate conduct of this kind. Yarnold recognizes the moral basis of this necessity in her analysis of the rationale of the treaty crime of torture, which she recognizes 'tends to shock the conscience of the civilised world'.⁷² Torture may not yet shock the conscience of international society sufficiently for it to take the step of classifying torture as an international crime *stricto sensu*, but it does undoubtedly shock the conscience of sufficient citizens in influential states for a treaty to be adopted to protect the citizens of other states from torture. The normative transnational element usually involves a cosmopolitan moral response to a violation of human rights of this kind, but not necessarily.⁷³ It may, for example, also be present when the convention signatories find what individuals are doing to themselves to be repugnant.⁷⁴ The normative transnational element is distinct from the normative international element that underpins offences like genocide because the threat suppressed is not sufficiently

⁶⁹ *Supra* note 8, at 482.

⁷⁰ *Ibid.*, at 525.

⁷¹ See Nadelmann, *supra* note 8, at 480 on how the suppression conventions are used to set up prohibition regimes which globalize norms that govern intra-societal interactions as well as inter-state relations.

⁷² *Supra* note 68, at 136.

⁷³ See, e.g., *Pushpanathan v. Minister of Citizenship and Immigration and others* [1998] 1 SCR 982; [1998] 4 LRC 365, where the Canadian Supreme Court held that drug trafficking was not contrary to the purposes and principles of the UN and thus could not, unlike a true international crime, be taken into account to deny a refugee claimant asylum under the 1951 UN Refugee Convention, 189 UNTS 150.

⁷⁴ The criminalization of simple possession of drugs under Article 3(2) of the 1988 Drug Trafficking Convention, for example, clearly has moral roots. It is an intra-state offence to which none of the provisions for inter-state cooperation within the Convention apply.

serious to engage a sufficient consensus in international society to use ICL to suppress it.

In a nutshell then, the aim of TCL is to suppress inter- and intra-state criminal activity that threatens shared national interests or cosmopolitan values. It tries to achieve this aim through the suppression conventions projecting substantive criminal norms beyond the national boundaries of the state in which they originated. These norms may have a phenomenological and/or normative transnational element and the presence of either one or the other is sufficient, it is submitted, to classify them as transnational. They apply to both inter- and intra-state conduct, and, as a result, transnational crimes may be defined in the suppression conventions either with⁷⁵ or without⁷⁶ explicit transnational elements. Expanded upon in this way, Bassiouni's transnational element is clearly distinguishable from the international element characteristic of international crimes.

Purely national offences lack either an international or transnational element. As Triffterer puts it, in respect of national offences, 'each national legislator has the power to decide for itself which values should be protected through penal sanctions'.⁷⁷

D The Suppression of Different Types of Threats That Impact on International Society Constituted in Different Ways

As should already be apparent, there is a link between the type of interest threatened and the kind of society to which these interests belong. In simple terms, different harms affect different human interests, and the nature of these interests depends on the kind of social arrangements that humans have adopted. Different societies in turn generate different types of normative order to suppress these harmful activities. Müllerson makes the point crisply when he says that 'every legal system has its own society'.⁷⁸

The 'English School' of international relations theory provides a convenient typology of the arrangements of states within different international orders that can be put to use in trying to find an appropriate match between crime, interest and society.⁷⁹ Bull suggests three possible ideal types of international order, a 'world

⁷⁵ They can be made applicable exclusively to inter-state conduct. For example, Article 8(2) of the Transnational Organized Crime Convention recommends that states criminalize the transnational corruption of foreign public officials.

⁷⁶ The omission of an explicit transnational element makes it possible to apply the offence to both intra- and inter-state conduct. For example, Article 3(1)(a)(i) of the 1988 Drug Trafficking Convention requires the criminalization of the supply of drugs, and can be applied to intra- and inter-state drug supply.

⁷⁷ *Supra* note 33, at 371.

⁷⁸ R. Müllerson, *Ordering Anarchy: International Law in International Society* (2000), at 88.

⁷⁹ This typology has been borrowed by Wise (*supra* note 33, at 818–820) from the threefold analysis of international society developed by members of the 'English School' of international relations, in particular Martin Wight and Hedley Bull. See Bull, 'The Grotian Conception of International Society', in H. Butterfield and M. Wight (eds), *Diplomatic Investigations: Essays on the Theory of International Relations* (1966); Bull, 'Martin Wight and the Theory of International Relations', 2 *British Journal of International Studies* (1976) 101; H. Bull, *Anarchical Society: A Study in World Politics* (2nd ed., 1995) 13; and M. Wight, 'An Anatomy of International Thought', 13 *Review of International Studies* (1987) 221. For a

order', an 'anarchical society', and a 'system of states'.⁸⁰ A 'world order' is more than just international order or order among states; it is an order of the whole of mankind. A 'society of states' has common rules and interests and member states cooperate to protect them through international law. A 'system of states' is not necessarily a society of states; in such a system states may have relations with each other but they do not have common rules and values. According to this analysis, community, society and a simple system of states are points on the range of modes in which groups of states can be organized. These three kinds of international legal order correspond roughly in turn to Kantian universalism, Grotian rationalism and Hobbesian realism. Significantly, these different international orders, and by extension the penal laws they generate, may exist simultaneously.⁸¹

Using this typology, we might conclude that very shocking or state-implicated harmful conduct which threatens general human interests has to be suppressed by humanity acting as a whole. Going down the scale, harmful conduct that crosses borders or threatens cross-border morality may only require affected states to act together. Finally, harmful conduct that only affects interests within states can be dealt with adequately by states acting alone. In other words, this typology suggests the convenient model that different kinds of criminal conduct threaten international society constituted variously as a community of humanity or '*civitas maxima*', and as an 'anarchical society of states', which in turn generate international and TCL, while national law is generated in response to threats to the individual state. Many international lawyers embrace the thesis that ICL plays a significant role in preserving and protecting the world community or *civitas maxima*.⁸² According to this thesis, the international community, acting collectively, uses ICL against the enemies of mankind as a whole, *hostis humanis generis*. Protecting core values, and originating from a higher authority, it follows that ICL is a higher-order law than TCL.⁸³ The legal relationship is vertical — the international community is superordinate, the individual subordinate. In principle, the state should play no part in this system and all sovereignty-based objections to ICL must fail.⁸⁴ The attractions of this thesis are obvious, not the least because it establishes unequivocally that ICL is a foundation of a

useful summary of the English School's theory of international society see D. Boucher, *Political Theories of International Relations* (1998), at 13–14, and T. Dunne, *Inventing International Society: A History of the English School* (1998). For a more legal perspective see Bassiouni and Wise, *supra* note 54, at 28–36; H. Mosler, *The International Society as Legal Community* (1980); Müllerson, *supra* note 78, at 93.

⁸⁰ See Bull (1977), *supra* note 79, at 13 and 23–26.

⁸¹ See Bull (1977), *supra* note 79, at 39.

⁸² See Bassiouni, *supra* note 42, at 405; Bassiouni and Wise, *supra* note 54, at 28 *et seq*; and Trifflerer, *supra* note 33, at 372.

⁸³ The implication is that ICL is 'naturalist' while crimes of international concern (TCL) is 'positivist', a conclusion drawn by many: see J. Dugard and C. van den Wyngaert (eds), *International Criminal Law and Procedure* (1996), at xiii; A. P. Rubin, *The Law of Piracy* (2nd ed., 1997), generally; and Yarnold, *supra* note 68, at 127 *et seq*.

⁸⁴ The French Court of Appeal put it well in the *Barbie* case, 78 ILR (1985) 125, at 131, when it dismissed argument relating to his disguised extradition as rendering his detention a nullity on the basis that the international crimes with which he was charged made him 'subject to an international legal order to which notions of frontiers and extradition rules arising therefrom are completely foreign'.

world order that is morally prior to other forms of international order. The principal evidence for this thesis is the establishment of a supra-national institution in the area of penal law, the ICC, which suggests that the traditional rejection of supranational authority has been modified fundamentally and we are moving towards a society to which all individuals belong and through which all interests are expressed.⁸⁵ It follows that the negative reaction of states like the United States to the ICC⁸⁶ can be viewed as a reaction against the disruption of the existing society of states, and its replacement by a world order. Yet at present there is little other evidence of the existence of a *civitas maxima*, and it is difficult to establish the attractive notion that ICL, in the narrow sense, is in fact being transformed into a supranational criminal law, the product of such a world order.

Although such a world order remains a normative ideal, it is more plausible to suggest that ICL is currently the product not of a community of humanity but of an international society of states acting in a more combined way than the looser society of states used to generate the indirect system contained in the suppression conventions. Simma and Paulus expand the central category of Bull's typology, an expansion which proves useful in providing a more nuanced view of the kind of international society that produces ICL.⁸⁷ Following Bull himself, they divide the Grotian society of states into two models. The Vattellican model, advocated by the likes of Oppenheim,⁸⁸ views international society as international in the narrow sense and emphasizes the individual interests of states. It allows for limited international cooperation and limited institutionalization of this cooperation — the international law of coexistence. The dominant value is international order. In contrast, the neo-Grotian position, advocated by the likes of Lauterpacht,⁸⁹ is communitarian. It makes for common interests, values and institutions — an international law of cooperation. The dominant value is solidarity among peoples. Following this revised typology, it appears that ICL is a product of an international society that exhibits many of the features of a neo-Grotian international community. There is evidence of common interests, common values and common institutions. The development of the ICC can be viewed as a step towards, in Bull's words:

The fulfilment of the Grotian or solidarist doctrine of international order, which envisages that states, while setting themselves against the establishment of world government, nevertheless seek, by close collaboration among themselves and by close adherence to the constitutional principles of the international legal order to which they have given their assent, to provide a substitute for world government.⁹⁰

⁸⁵ See J. G. Ruggie, *Constructing the World Polity* (1998), at 47–48.

⁸⁶ See Bradley, 'U.S. Announces Intent Not to Ratify International Criminal Court Treaty', *ASIL Insights*, May 2002. www.asil.org/insights/insigh87.htm.

⁸⁷ Simma and Paulus, 'The "International Community": Facing the Challenge of Globalization', 9 *EJIL* (1998) 266, at 269–271, following Bull (1966), *supra* note 79, at 51.

⁸⁸ L. Oppenheim, *International Law*, vol. I, *Peace* (1905), vol. II, *War and Neutrality* (1906). See further Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law', 13 *EJIL* (2002) 401, at 409 *et seq.*

⁸⁹ See Lauterpacht, 'The Grotian Tradition in International Law', 23 *BYIL* (1946) 1, at 37 and 51–52.

⁹⁰ See Bull (1977), *supra* note 79, at 230.

The notion that ICL is currently more Grotian than Kantian appears to be substantiated by the way in which the ICC has been firmly moored to the inter-state system through the relationship of complementarity embedded in the Rome Statute. State parties are not likely to let the ICC slip its Westphalian moorings, because if it does so it will threaten the existing international order, and order is important in the neo-Grotian society of states. However, in the neo-Grotian view the society of states is secondary to the universal community of mankind, which is primary, and the former gets its legitimacy from the latter.⁹¹ As modern ICL emerges, it may be that the primary community that underpins international law is slowly being revealed. The ICC, for example, seeks to protect general human values, something not required by the necessity of coexistence among states.⁹² It should be cautioned, however, that resistance to the Rome Statute suggests that solidarity has not yet been achieved.

In my view, the distinction between ICL and TCL depends on the realization that international society has a variable nature that depends upon the problem faced. The general point is recognized by Abi-Saab: 'Rather than referring to a group as a community in general, it is better, for the sake of precision, to speak of the degree of community existing within the group in relation to a given subject, at a given moment.'⁹³

The distinction in the type of international society protected by ICL and TCL is revealed most concretely by a distinction in the density of institutionalization of these legal systems. Abi-Saab's law of legal physics is that 'each level of normative density requires a corresponding level of institutional density in order to enable the norms to be applied in a satisfactory manner.'⁹⁴ The establishment of individual penal responsibility under ICL has required a greater density of institutionalization than that required to suppress transnational crime. In order to suppress state-implicated conduct in war crimes and the like, conduct performed by the individual agents of states, states have had to cooperate to hold individuals responsible for these actions. Friedman notes that individual criminal responsibility 'presages the inclusion of individuals as passive subjects of international law'.⁹⁵ The establishment of the ICC, the application of absolute universal jurisdiction and the classification of crimes as international crimes are all institutional manifestations of the application of individual criminal responsibility under international law to certain offences.

The product of a manifestly less extensive international solidarity, TCL does not exhibit this degree of institutional density. This is not to deny that TCL exhibits neo-Grotian tendencies. TCL is built on a presumption of a community of interests, a

⁹¹ See Bull (1966), *supra* note 79, at 68.

⁹² Bull's early work recognized the role of values in the Grotian view of international society; see Bull (1966), *supra* note 79, at 67–68. His later views of international society focused solely on order and abandoned values entirely; see Harris, 'Order and Justice in the Anarchical Society', 69 *International Affairs* (1993) 725, at 734–739.

⁹³ Abi-Saab, 'Whither the International Community?', 9 *EJIL* (1998) 248, at 249.

⁹⁴ *Supra* note 93, at 256.

⁹⁵ W. Friedman, *The Changing Structure of International Law* (1964), at 168 and 247.

presumption crucial to the neo-Grotian law of cooperation.⁹⁶ When either or both a phenomenological or normative transnational element is present, states institutionalize international cooperation in order to suppress a specific activity. Sovereignty is not entirely inviolable; TCL is about the alteration of national penal practice, and international society has a direct interest in monitoring the effective implementation of the resulting national laws. However, the influence of the pluralist international society identified by Vattel is clear. The dominant value is international order. Sovereignty remains the key restrictive factor, the level of cooperation is relatively low and highly conditioned, and the responsibility of states is limited. Crucially, while in respect of ICL international society exhibits the necessary solidarity to enforce the law directly against individuals, in respect of TCL the degree of international solidarity is weaker, with the result that the state remains the locus of penal power. The legal relationship is horizontal (state to state or transordinate⁹⁷) and vertical (the state is superordinate, the individual subordinate). Because enforcement is indirect it is more contingent. TCL creates a transnational crime control regime encompassing principles and norms, rules and decision-making procedures, around which the expectations of the various states participating in the regime converge but stop well short of unity.⁹⁸

Greater convergence is possible, but it is not likely to be systemic. Instead, particular transnational crimes may change status and be reclassified as international crimes should international society agree that such reclassification is necessary.⁹⁹ As the object of the threat offered by a particular activity broadens from national to international peace and stability, or the cosmopolitan base of moral reprehensibility in regard to this activity broadens, so the legal steps taken against it will tend to progress from TCL into ICL. A current example is large-scale terrorism, which arguably threatens not only national but international peace and security and engages not only transnational but international moral reprobation.¹⁰⁰ The obvious mechanism for reclassification is an increase in the catalogue of core crimes under the jurisdiction of the ICC provided for in the Rome Statute.¹⁰¹ This institutionalization of the ability to change position indicates that the distinction between TCL and ICL is, at least on a positivist conception of international law, ultimately a political choice by international society. International society may of course choose not to change the status

⁹⁶ See Abi-Saab, *supra* note 93, at 249.

⁹⁷ See Ruggie, *supra* note 85, at 61.

⁹⁸ For a general definition of international regimes see S. D. Krasner (ed.), *International Regimes* (1983), at 2.

⁹⁹ See Mueller, 'Transnational crime: Definitions and Concepts', in Williams and Vlassis, *supra* note 2, at 13 and 21.

¹⁰⁰ In a discussion forum on the terrorist attacks of 11 September 2001, Professor Antonio Cassese states: 'In my opinion, it may be safely contended that . . . trans-national, state-sponsored or state-condoned terrorism amounts to an international crime, and is already contemplated and prohibited by international customary law as a distinct category of such crimes.' See http://www.ejil.org/forum_WTC/ny-cassese.html.

¹⁰¹ In terms of Article 111 of the Rome Statute. Resolution E annexed to the Final Act of the 1998 Conference recommends that a Review Conference pursuant to Article 111 should at some undisclosed future date consider the inclusion of new crimes within the jurisdiction of the court.

of an offence. For example, offences like drug trafficking may find progression from TCL to ICL difficult because of the absence of a sufficiently broad cosmopolitan moral consensus in regard to the harmfulness of drugs or a sufficiently broad international consensus with regard to the threat of drug trafficking to international peace and security.¹⁰² As a consequence, international society may find it difficult to take the step of incorporating these offences into the jurisdiction of the ICC. Other pragmatic considerations such as case load, the difficulties of agreeing upon a definition of the offence,¹⁰³ and the political influence of powerful states over TCL may also retard such a transformation.¹⁰⁴ Finally, there may also be tendencies at play that will actually undermine the classification of a crime as part of TCL and lead to divergence. States differ in sensitivity to criminal activities, for example, to the impact of terrorism. States also differ in vulnerability to these activities, for example, to the extent to which they can control their sensitivity to terrorism. Greater sensitivity and vulnerability may result in states pushing for provisions in suppression conventions that serve purely national interests. These provisions may increase the level of international cooperation, but they may also play a less benign role — to be used in the absence of acceptable levels of cooperation as tools to prise open the lid of sovereignty and let sensitive, vulnerable and powerful states reach transnational criminals located in other states and suppress transnational criminality perceived as a threat. This kind of disguised Hobbesian realism may ultimately thrust certain offences back into the category of purely national offences, where international cooperation in the suppression of these offences, instead of increasing, breaks down completely.

In the absence of a system of TCL we are left only with purely national offences, where states act in isolation and establish appropriate offences to protect the interests and values they consider important. The legal relationship is vertical — state to individual. While many national offences cross borders or generate moral concern, they will remain purely national until they exhibit a strong transnational dimension and attract the concern of other states and, given the international political will, are transformed into transnational crimes. What this potential for national expansion suggests, however, is that TCL is only a part of a much larger 'field of inquiry' into

¹⁰² In this regard, one of the reasons why drug offences were not incorporated within the jurisdiction of the ICC from the outset is revealing: because these offences did not have a qualifying criterion of seriousness; see the Preparatory Committee on the Establishment of an International Criminal Court, 'Summary of the Proceedings of the Preparatory Committee during the Period 25 March–12 April 1996', UN Doc. A/AC.249/1, paras 71–72. However, the labelling of the treaty crimes listed in Resolution E as 'very serious' and 'a threat to international peace and security' suggests that there is significant international political will to transform these crimes, while the technical difficulties asserted in the Preparatory Committee simply disguise the political inclinations of some major powers to prevent this transformation; see Dugard, *infra* note 104.

¹⁰³ Another reason why drug trafficking and terrorism were excluded from the jurisdiction of the ICC: see Annex I E of the Rome Statute.

¹⁰⁴ See, for example, Dugard, 'Obstacles in the Way of an International Criminal Court', 56 *Cambridge Law Journal* (1997) 329, at 334, who states: '[O]ne suspects that the main reason for resistance to the inclusion of treaty crimes is that powerful states prefer the present arrangement under the treaties creating international crimes that obliges signatory states either to extradite or try offenders (*aut dedere aut judicare*).'

criminality that crosses borders.¹⁰⁵ This field of inquiry includes all such criminality irrespective of whether it has been suppressed in a convention or not, regardless of the position currently taken on such issues by the subsisting positive law of any given jurisdiction, and even if the current national and international law is utterly silent on such matters. This field of enquiry includes all those national offences subject to regimes of purely procedural international cooperation established by extradition and mutual assistance treaties, but it is important to note that these regimes differ significantly from TCL in that they are not concerned with substantive rules that establish guilt in principle, but rather with procedural rules concerned with determining guilt in fact.¹⁰⁶ Although these regimes do frequently specify common schedules of offences through enumeration, they do not impose criminal norms, but rather recognize the pre-existence in national law of at best broadly equivalent offences. Academic opinion supports a distinction between procedural and substantive regimes,¹⁰⁷ and the various distinguishing factors of TCL isolated here — the source of penal norms, jurisdiction, threats and the kinds of society threatened — relate to matters of substance, not procedure.

4 Why Use the Term ‘Transnational Criminal Law’?

The distinctions pointed out above between the system of law under discussion, ICL *stricto sensu*, and national criminal law, call for the use of a distinctive label. The terms international and national criminal law indicate both the legal order of reference and the particular kind of criminality suppressed. TCL can be similarly tested.

With regard to the legal order of reference, the problem is that the term used to describe the system of law established by the suppression conventions must adequately describe a system determined by international and national law. The existing terms for the crimes created by the suppression conventions are inadequate in this regard. Including these crimes within a broadly defined ICL makes ‘ICL’ a hold-all for all international law that has penal implications.¹⁰⁸ Moreover, the term ‘ICL’ implies a direct relationship between international society and the criminal in question, and in the indirect system there is none. A drug trafficker may break the law of a particular state, but he or she is not an international criminal and there is no international crime of drug trafficking. On the other hand, including this system within national criminal law obscures its provenance and the international obligations that exist to implement and enforce it. Recognizing the inadequacies of the existing terms, publicists have attempted hybrid labels. However, the potential for terminological confusion abounds. Consider the label ‘crimes of international

¹⁰⁵ I must thank Paul Roberts for this insight.

¹⁰⁶ The distinction between substance and process is outlined by G. P. Fletcher in *Basic Concepts of Criminal Law* (1998), at 7. In Fletcher’s terms substantive rules provide the major premise in the ‘syllogism of legal guilt’, procedural rules establish the facts of the minor premise.

¹⁰⁷ Schwarzenberger, *supra* note 33, at 271; Bassiouni, *supra* note 42, at 406–409; Wise, *supra* note 33, at 803 and 805.

¹⁰⁸ See, for example, Bassiouni, *supra* note 42, at 409.

concern', and the fact that the preamble to the Rome Statute refers to 'the most serious crimes of concern to the international community as a whole'. The term suggested in this piece for the system of law established by the suppression conventions is a hybrid label that avoids long and complicated phrasing. Jessup used transnational in order to deliberately attenuate the distinction between national and international legal orders, thus avoiding the difficulties of positing an international society acting as a community generating international law.¹⁰⁹ Using the label TCL for this system is sympathetic to Jessup's purpose, and suggests perhaps the existence of something slightly more elusive — a transnational legal order.

With respect to a description of criminality, the case for the use of the term 'TCL' is clearer. It has long been recognized that transnational relations can be governed by both domestic and international law.¹¹⁰ The generic or systemic identity of TCL flows primarily from the fact that TCL is a set of international and national norms pursuing a particular function addressing a particular class of subjects. These norms have been established primarily to suppress, through indirect penalization, certain forms of undesirable conduct that have phenomenological or normative transnational elements, carried out by individuals within the jurisdiction of the state parties to the enabling treaties. Penal and jurisdictional provisions, together with associated forms of legal assistance, are common structures embedded in the different parts of the system, the various treaties. The fact that these provisions perform standard functions in different treaties, illustrates the functional nature of this system. TCL is, it is submitted, an appropriate descriptive term to encapsulate offences spanning — 'transcending' — two or more national jurisdictions.

The use of TCL is not an attempt to coin novel terminology for its own sake. Nor is it an attempt to establish a new division of legal normative science. It is rather an attempt to highlight the existing distinction between international criminal law *stricto sensu* and the norms established by the suppression conventions, using an admittedly mainly descriptive rather than normative label.

5 Conclusion

By adopting the Rome Statute with jurisdiction over core crimes, international society has focused public attention on these crimes, and has accepted the challenge of dealing with ICL in a more coherent manner. But identifying all forms of international penal cooperation with the core international crimes gives a distorted view of the extent and nature of this cooperation because it ignores the role of the suppression conventions.¹¹¹ Moreover, it leaves unanswered the challenge of developing the coherence of the system of law that these conventions establish. This challenge is

¹⁰⁹ Wise, *supra* note 33, at 804.

¹¹⁰ See R. Keohane and J. Nye (eds), *Transnational Relations* (1972), at xii, cited by Müllerson, *supra* note 78, at 174.

¹¹¹ See Clark *supra* note 7, at 29.

likely to grow in significance, because this system is likely to increase in importance. Jurisdictional barriers between states will continue to be eroded by the forces of transnational criminality. Political pressure for the convergence of the substantive criminal laws of states will increase. The system of law established by the suppression conventions will be developed to enable this convergence, despite the fact that in its present form it is not a particularly satisfactory vehicle for sponsoring convergence. The poverty of many of its provisions is striking, especially when addressed from perspectives other than effective law enforcement. Greater attention should be focused on this system. It should be tested against the benchmarks that have informed the development of the penal function in domestic law. A first step in focusing attention on this system would be to give it an easily identifiable label — ‘transnational criminal law’.