

The intersection of transnational and international criminal law – example of trafficking in persons

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Abstract: The paper addresses the possible intersection of transnational and international criminal law, using the example of the crime of trafficking in persons. In recent years trafficking in persons has gathered a great deal of attention from scholars, practitioners and politicians, nevertheless theoretical aspects concerning that notion and its relation with other concepts present in international law – such as slavery, practices similar to slavery, enslavements etc. – have still been neglected. As this notion appears at the intersection of different areas of law, including transnational and international criminal law, its closer analysis can contribute to determination of theoretical boundaries of both areas of international law.

1. Introduction

International response to organized crime has formed a part of a new area of law - transnational criminal law. The term ‘transnationality’ itself, although applied many years ago by Phillip Jessup¹, has found its way into treaty usage only in the year 2000, namely in the Transnational Organized Crime Convention (hereinafter: UNTOC). From this moment we can observe emergence of transnational criminal law - a branch of international law that

¹ All law which regulates actions or events that transcend national frontiers. Both public and private international law are included; Philip C. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956), 3.

deals with “indirect suppression, through domestic laws and measures, of criminal activities which have actual or potential cross-boundary effects”².

The term “transnational criminal law” derives from the concept of transnational crime, which has been applied by the United Nations since its fifth Congresses on the Prevention of Crime and the Treatment of Offenders that took place in 1975³. It was designed to identify crimes that transcended national borders, infringed laws of more than one state or caused effects in other states. Nevertheless, for many years the concept remained undefined. This has changed with the adoption of UNTOC, which stipulates in its Article 3 that “an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State”⁴. Most important feature of the UNTOC and other suppression conventions is the obligation to criminalize certain acts in the domestic legal systems of state-parties. These instruments do not impose obligations on individuals. That is why, unlike in the area of international criminal law, a person who commits a crime in an object, not a subject of the given convention⁵. However, under certain conditions, it is possible for a crime to belong to both these areas of law. As proven by the analysis of its internationally agreed definition, trafficking in persons is an example of such crime.

² Neil Boister, “Transnational Criminal Law?” *European Journal of International Law* 14, no. 5 (2003): 955.

³ Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford: Oxford University Press, 2012), 3.

⁴ United Nations, Convention against Transnational Organized Crime, Palermo/ New York, 15 November 2000, 2237 UNTS 319 (Hereinafter: UN TOC)

⁵ As Crawford and Olleson put it: “pirates do not acquire international legal personality by being hanged at the yardarm”, see: James Crawford, Simon Olleson, “The Nature and Forms of International Responsibility,” in *International Law*, ed. Malcolm Evans (Oxford: Oxford University Press, 2003), 447.

1.1. How transnational are transnational crimes?

As pointed out by R. Clark, transnational crimes are transnational because they transcend borders, not because they are subject to a treaty establishing an obligation to criminalize them⁶. Interestingly, like many other transnational crimes, trafficking in persons has been defined without incorporating the transnational element⁷. The definition of trafficking in persons is found in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter: Palermo Protocol)⁸. In the course of analysis of the Palermo Protocol it is crucial not to omit its parent convention - unless provided otherwise, provisions of the UNTOC apply *mutatis mutandis* to all of its three protocols and therefore its general rules constitute a part of the anti-trafficking framework⁹. According to the Article 3 of the UNTOC, the Convention applies to the prevention, investigation and prosecution of certain offences that are “transnational in nature and involve an organized criminal group”. This provision has led to uncertainty regarding the scope of application of this instrument and even has caused strong criticism¹⁰. Nonetheless, in order to get the whole picture, it is necessary to invoke Article 34 of the UNTOC, according to which the offences established in accordance with the Convention and its Protocols “shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group.” Therefore the Trafficking Protocol serves as a tool to harmonize criminal laws of state-parties, requiring criminalization of trafficking in their domestic legal systems,

⁶ Roger Clark, “Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and the Lotus,” *Criminal Law Forum* 22, no. 4 (2011): 522.

⁷ Migrant smuggling is a rare example of a crime that can only be committed transnationally - without border crossing there is no smuggling.

⁸ United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing UN Convention against Transnational Organized Crime, UNTS vol. 2237, p. 319.

⁹ Trafficking Protocol, Art. 1(2).

¹⁰ James Hathaway, “The Human Rights Quagmire of Human Trafficking,” *Virginia Journal of International Law* 49, no. 1 (2008): 9–10.

regardless of their transnational nature. In fact, an obligation to criminalize trafficking is a central and mandatory obligation of all states that have ratified that instrument¹¹.

1.2. Suppression of trafficking in persons

The definition of trafficking in persons found in the Palermo Protocol consists of three elements and was designed to embrace all persons engaging in trafficking process and simultaneously - to recognize that trafficking occurs in various forms: most importantly, that it is not limited to the exploitation of prostitution of others, as it was perceived for almost a century¹². The three constituent elements are: the act (what is done - recruitment, transportation, transfer, harbouring or receipt of persons), the means (how it is done - by threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim), the purpose (why it is done - for the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs). The definition of trafficking in children consists of only two elements, as it is not required for any of the special means to be employed by the trafficker in cases of where victims are underaged¹³.

Before the year 2000 there was no internationally agreed definition of trafficking in persons. The term 'trafficking' had been used by different actors to describe activities ranging from voluntary, facilitated migration, to the exploitation of prostitution, to the movement of persons through the threat or use of force, coercion, violence, etc. for certain exploitative

¹¹ UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, New York and Geneva (2010): 186.

¹² Before adoption of Palermo Protocol there were series of *suppression* conventions concerning trafficking, however their scope was much more limited (both *ratione materiae* and in terms of obligations imposed on the state parties): International Convention for the Suppression of the "White Slave Traffic", LNTS, vol. 9, p. 415; International Convention for the suppression of the Traffic in Women and Children, LNTS vol. 9, p. 415; International Convention for the Suppression of the Traffic in Women of the Full Age, LNTS vol. 150, p. 431;; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Lake Success/New York, UNTS vol. 98, p. 101.

¹³ Trafficking Protocol, Art. 3(c) and (d).

purposes¹⁴. But since the adoption of the Palermo Protocol, trafficking definition has been widely recognized by states, many of whom have incorporated the concept of the crime of trafficking in persons into their legal systems for the first time only after adoption of this treaty¹⁵. It was also incorporated in other international instruments, such as the Council of Europe Convention on action against trafficking in human beings¹⁶, the Convention Against Trafficking in Persons adopted by Association of Southeast Asian Nations (hereinafter: ASEAN) and - with minor changes - in the European Union Directive 36/2011¹⁷. Only *South Asian Association for Regional Cooperation (hereinafter: SAARC) adopted a different approach and has limited this crime to instances of „moving, selling or buying of women and children for prostitution”*, which resembles more of a historical understanding of this concept, as reflected in the treaties adopted in the first part of the 20 century¹⁸.

Same definition can also be found in Malabo Protocol – Draft protocol on amendments to the protocol on the statute of the African Court of Justice and Human Rights, being another peculiar example of intersections of international and transnational criminal law. Adopted in June 2014, the Protocol extends the jurisdiction of the yet to be established African Court of Justice and Human Rights both to international and transnational crimes¹⁹.

¹⁴ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, E/CN.4/2000/68 (2000) p. 8.

¹⁵ According to the Global report on trafficking in persons, which analysed legislation of 155 states, 45% of the them have introduced the definition for the first time and many others have adopted changes in their, as their laws criminalized only certain aspects of the definition of trafficking. United Nations Office on Drugs and Crime, Global report on trafficking in persons (2009) p. 24.

¹⁶ Council of Europe, Convention on Action against Trafficking in Human Beings and its Explanatory Report, Warsaw, ETS no. 197.

¹⁷ Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (O.J.E.C. L101/1, 5 April, 2011).

¹⁸ SAARC, Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution, Art. 1(3).

¹⁹ „1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have power to try persons for the crimes provided hereunder: 1) Genocide 2) Crimes

2. Trafficking in persons as an international crime

In the course of the analysis of trafficking in persons definition it becomes clear that some of the acts classified as trafficking could in the same time constitute international crimes – crimes against humanity or war crimes. As it is stated in article 7.1(c) of the Rome Statute of the International Criminal Court (hereinafter: ICC): ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children²⁰. The Elements of Crimes add that exercising “any or all powers attaching to the right of ownership over one or more persons” includes, but is not limited to, “purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.” Nevertheless, some of the drafters were afraid, that this phrase is focused too much on the commercial character of the act and therefore footnote 11 has been added: “It is understood that such deprivations of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children”²¹.

Although there are doubts concerning the meaning of the notion of “trafficking in persons” as contained in the Rome Statute and in the Elements of Crime, it is reasonable to assume that the definition found in the Palermo Protocol would apply. This supposition goes in line with findings of scholars who contend that the ICC should, and eventually

Against Humanity 3) War Crimes 4) The Crime of Unconstitutional Change of Government; 5) Piracy 6) Terrorism 7) Mercenarism 8) Corruption 9) Money Laundering 10) Trafficking in Persons 11) Trafficking in Drugs 12) Trafficking in Hazardous Wastes 13) Illicit Exploitation of Natural Resources 14) The Crime of Aggression (...)” African Union, Draft protocol on amendments to the protocol on the statute of the African Court of Justice and Human Rights, 27 June 2014, STC/Legal/Min/7(I) Rev.1, Art. 28A.

²⁰ The Rome Statute of the International Criminal Court, UNTS vol. 2187 p. 90 (hereinafter: the Rome Statute).

²¹ International Criminal Court, Elements of Crimes (as amended), U.N. Doc. PCNICC/2000/1/Add.2, Art. 7(c).

will embrace the definition found in the Palermo Protocol²². As pointed out by Aston and Paranjape: “Lack of a precise and accurate definition of trafficking is one of the biggest impediments in the prosecution of trafficking cases by the ICC. The definition of trafficking given by the Palermo Protocol is very precise and the ICC needs to adopt it so that the aim of establishing the Rome Statute to include and expand all forms of exploitation and slavery as a consequent of trafficking could be taken up and prosecuted in an effective manner”²³. Such an example of incorporation of the notion created within the framework of transnational criminal law into international criminal law would not be unusual. Trafficking in persons definition has already been applied in other fields of international law, most importantly by the European Court of Human Rights - for the first time in the *Rantsev v. Cyprus and Russia* judgment, where the Court has decided that this practice, as such, falls within the scope of Article 4 of the ECHR prohibiting slavery, servitude and forced or compulsory labour²⁴.

Also Statutes of the two *ad hoc* tribunals: the International Criminal Tribunal for Rwanda (hereinafter: ICTR) and the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) enumerate ‘enslavement’ as a crime against humanity - these instruments do not mention trafficking in persons though, as their creation has preceded adoption of the internationally agreed definition of this crime. The ICTY – both Trial and Appeal Chamber – has engaged in the analysis of the term “enslavement” in its judgment in *Kunarac, Vukovic and Kovac* case (or so called:

²² Allain, Jean, “The Definition of “Slavery” in General International Law,” *Howard Law Journal* 52, (2009): 239-275; Joshua Aston and Vinay N. Paranjape, “Human Trafficking and its Prosecution: Challenges of the ICC,” Social Science Research Network accessed April 1, 2022, <https://ssrn.com/abstract=2203711>; Jane Kim, “Prosecuting human trafficking as a crime against humanity under the Rome Statute,” *Columbia Law School Gender and Sexuality Online* 2, (2011):1–32.

²³ Aston and Paranjape, “*Human Trafficking*,” 10.

²⁴ ECtHR Judgement of 10 October, Case *Rantsev v. Cyprus and Russia*, application no. 25965/04, hudoc.int., par. 282, see also: Vladislava Stoyanova, “Dancing on the Borders of Article 4. Human Trafficking and the European Court of Human Rights in the *Rantsev* case,” *Netherlands Quarterly of Human Rights* 30, no. 2 (2012):163–194.

Foča case)²⁵. As it was established in the course of the proceedings, the defendants have kept imprisoned and repeatedly raped a group of Muslim women and girls in the town of Foča. These events could be classified as trafficking in persons, as all of three elements of the definition set forth in the Palermo Protocol were present: victims were harboured and transferred, by means of threat and use of force for the purpose of sexual exploitation. The judges have engaged in very detailed analysis of the notion of enslavement in customary international law, in which they used indicators based on the notions constituting elements of the trafficking definition²⁶. However some scholars claimed that the ICTY in the Foča judgment has actually blurred the conceptual borders of these two notions²⁷. It seems apparent that the relationship of the definition of “trafficking in persons” and “enslavement” is very complex and this topic clearly requires further attention.

Nevertheless, crimes against humanity have been defined differently in the Rome Statute - when it comes to crimes against humanity and the ICC, trafficking could also be classified as sexual slavery within the meaning of Article 7.1(g). The understanding of this act is similar as enslavement, with the additional requirement that “the perpetrator caused such person or persons to engage in one or more acts of a sexual nature.” Important remarks regarding sexual slavery have been made by the ICC in the Katanga judgment²⁸. “To prove the exertion of powers which may be associated with the right of ownership or which may ensue therefrom, the Chamber will undertake a case-by case analysis, taking account of various factors. Such factors may include detention or captivity and their respective duration;

²⁵ ICTY Judgment of 22 February 2001, Case Prosecutor v. Kunarac, Vukovic and Kovac, IT-96-23-T and IT-96-23/1-T; ICTY Judgment of 12 June 2002, Case Prosecutor v. Kunarac, Vukovic and Kovac, IT-96-23/1-A.

²⁶ Nicole Siller, “The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals,” *European journal of comparative law and governance* 3, no. 2 (2015): 236–261; Anna Głogowska-Balcerzak, *Standardy zwalczania handlu ludźmi w prawie międzynarodowym* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2019), 219–223.

²⁷ Harmen Van der Wilt, “Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts,” *Chinese Journal of International Law* 13, (2014): 305.

²⁸ ICC Judgment of 20 March 2014, Case Prosecutor v. Germain Katanga, application no. ICC-01/04–01/07, paras. 978 and 985.

restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure taken to prevent or deter any attempt at escape. The use of threats, force or other forms of physical or mental coercion, the exaction of forced labour, the exertion of psychological pressure, the victim's vulnerability and the socioeconomic conditions in which the power is exerted may also be taken into account." Similar practices were analysed by the Special Court for Sierra Leone in the context of forcing women and girls to become so called „jungle wives" or „rebel wives" - a euphemism for a sex slave²⁹.

Obviously in order to prosecute a trafficking case at the ICC as a crime against humanity contextual and mental elements of this crime need to be fulfilled - acts must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"³⁰. The term "widespread" is understood as referring to a large-scale nature of the act involving multiplicity of victims, whereas 'systematic' conduct requires "the organized nature of the acts of violence"³¹. Some authors however tend to construe these terms extensively. As T. Obokata claims, the widespread nature of trafficking is connected to the fact that at least 800,000 people are trafficked every year and virtually every state in the world is affected by this crime. Nevertheless this kind of interpretation is definitely too far-reaching – the ICC analyses specific situations in which attacks take place, not general statistics concerning certain types of crimes committed worldwide³². Furthermore, the attack must be conducted "pursuant to or in furtherance of a State or organizational policy"³³. The latter requirement depends on the definition and interpretation of terms "policy" and "organization", which – as such – is beyond of the scope of this

²⁹ SCSL Judgment of 18 May 2012, Case Prosecutor v. Taylor, application no. SCSL-03-01-T, par. 393–394.

³⁰ On detailed analysis of all requirements see: Kim, "Prosecuting human trafficking," 20.

³¹ ICTY Judgment of 11 November 1999, Case Prosecutor v. Tadic, application no. IT-94-1-T, par. 648.

³² Tom Obokata, "Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System," *The International and Comparative Law Quarterly* 54, no. 2 (2005): 445–457.

³³ The Rome Statute, Art. 7.2(a).

presentation³⁴. It suffices to observe, that this requirement is rather demanding. What is more - most authors, including M.Ch. Bassiouni, claimed that crimes against humanity cannot be committed by non-state actors³⁵. Some scholars however accept such a possibility and claim that the term “organizational policy” refers not only to States, but also to the policies of organizations. “Criminal organizations either in association with or independently of national policies, and particularly those of a certain size which are active in international organized crime may fall within the scope of Article 7 – when their activity may be characterized as widespread or systematic”³⁶. On top of everything, the gravity threshold found in the art 17(d) of the Rome Statute can render potential trafficking cases inadmissible.

In conclusion - theoretically the possibility of prosecution of some of trafficking in persons cases before the ICC remains open and it has been discussed by scholars³⁷. Focusing solely on the jurisdiction *ratione materiae* it seems possible to qualify crimes committed over the last few years by Daesh against civilians in Syria and Iraq as both trafficking in persons and enslavement or sexual slavery within the meaning of Rome Statute³⁸.

³⁴ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2016), 157; Carsten Stahn, *The law and practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), 705–731; Mathias Holvoet, “The state or organisational policy requirement within the definition of crimes against humanity in the Rome statute: an appraisal of the emerging jurisprudence and the implementation practice by ICC states parties.” *International Crimes Database 2* (2013). This issue has also been analyzed in the ICC case law, see for example: ICC Judgment of 20 March 2014, Case Prosecutor v. Germain Katanga, application no. ICC-01/04–01/07, par. 1106.

³⁵ Mahmoud Cherif Bassiouni, “Crimes against Humanity: The Case for a Specialized Convention,” *Washington University Global Studies Law Review* 9, no. 4 (2010): 575–594.

³⁶ Kristina Touzenis, “Trafficking in Human Beings Human rights and transnational criminal law, developments in law and practices,” *UNESCO migration studies* (2010): 64; Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: New Press, 2006), 431; Clare F. Moran, “Beyond The State: The Future Of International Criminal Law,” *International Crimes Database*, accessed April 1, 2022, <http://www.internationalcrimesdatabase.org/>.

³⁷ Tom Obokata, “Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System,” *The International and Comparative Law Quarterly* 54, no. 2 (2005): 133;; Touzenis, “*Trafficking in human beings*”, 63–65.

³⁸ Obviously, when it comes to crimes of Daesh, we must leave aside other jurisdictional aspects, as neither Syria nor Iraq is a party to the Rome Statute and the referral by UN Security Council is not possible due to political reasons.

If we look at the *modus operandi* of Daesh members it seems clear that their acts could fall within the scope of the trafficking definition - victims were recruited, transported and harboured by means of threat, abduction or deception, for the purpose of sexual exploitation or other forms of exploitation stipulated in the Article 3 of the Palermo Protocol. The same acts could also qualify as crimes against humanity, which has been suggested, among others, by the former ICC Prosecutor herself³⁹.

3. Implications

What are the implications of this short analysis? As some scholars point out, “trafficking remains classified as a transnational crime, but its elevation to an international crime appears to be on the horizon”⁴⁰. This kind of statements seem too far-reaching – it is possible that a crime classified as trafficking in persons will also meet the criteria of crimes against humanity of enslavement or sexual slavery or war crime of sexual slavery and will be adjudicated by the ICC. But should that influence perception of trafficking in general, and list it among “the most serious crimes of concern to the international community as a whole”⁴¹? I would rather claim that it would simply mean that some – and only some – instances of crimes against humanity/war crimes and trafficking in persons can overlap.

Possibility of overlapping of some transnational and international crimes poses a question about jurisdiction and state obligations resulting from suppression conventions. The obligation of state-parties to the Palermo Protocol to extradite or prosecute traffickers is incorporated in Article 16 par. 10 of the UNTOC and was based on so called ‘Hague formula’, deriving from Hague Convention for the Suppression of Unlawful Seizure

³⁹ “Since the summer of 2014, my Office has been receiving and reviewing disturbing allegations of widespread atrocities committed in Syria and Iraq by the so-called Islamic State of Iraq and al-Sham/Greater Syria (“ISIS” aka “ISIL”, “Daesh” or “IS”). Crimes of unspeakable cruelty have been reported, such as mass executions, sexual slavery, rape and other forms of sexual and gender-based violence, torture, mutilation, enlistment and forced recruitment of children and the persecution of ethnic and religious minorities, not to mention the wanton destruction of cultural property.” Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, 8 of April 2015, available at: <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>>

⁴⁰ Siller, “*The Prosecution*,” 259.

⁴¹ The Rome Statute, Art. 5.

of Aircraft⁴². The potential overlapping of transnational and international crimes is visible in the works of the International Law Commission (hereinafter: ILC) concerning obligation *aut dedere aut judicare* in which, in addition to prosecution and extradition, the Commission has envisaged a third option - surrendering the suspect to a competent international criminal tribunal⁴³. With the establishment of international criminal tribunals, there is the possibility that a State bound by an obligation to extradite or prosecute a suspect could recourse to a third alternative and surrender that person to a competent international criminal tribunal (*ad hoc* tribunal or the ICC). This alternative has already been included in treaty law - it has been prescribed by Article 11 par. 1 of the Convention for the Protection of All Persons from Enforced Disappearance, which reads: "1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution"⁴⁴.

It is not clear however, whether this third alternative needs to be specifically mentioned in a treaty, or is it enough, that there is an international court, whose jurisdiction extends over a specific crime. In 1952 the International Committee of the Red Cross has envisaged that the third option would satisfy *aut dedere aut judicare* obligation arising from Article 49 of the first Geneva Convention⁴⁵. More recently, Judge Xue in her dissenting opinion in the *Belgium v. Senegal* judgment (case concerning Questions relating to the Obligation to Prosecute or Extradite) argued that had Senegal surrendered Mr. Habré to an international tribunal created by the African

⁴² International Law Commission, The obligation to extradite or prosecute (*aut dedere aut judicare*), Final Report of the International Law Commission Adopted at its sixty-sixth session, 2014, par. 10.

⁴³ International Law Commission, Preliminary report on the obligation to extradite or prosecute ("*aut dedere aut judicare*"), Geneva, 7 June 2006, A/CN.4/571, paras. 52–53.

⁴⁴ United Nations, International Convention for the Protection of All Persons from Enforced Disappearance, UNTS, vol. 2716, p. 3.

⁴⁵ International Committee of the Red Cross, The I Geneva Conventions of 12 August 1949, Commentary, p. 366.

Union, they would not have been in breach of their obligation to prosecute him under article 7 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As she has pointed out, “even if the AU ultimately decides to establish a special tribunal for the trial of Mr. Habré, Senegal’s surrender of Mr. Habré to such a tribunal could not be regarded as a breach of its obligation under Article 7, paragraph 1, because such a tribunal is created precisely to fulfil the object and purpose of the Convention; neither the terms of the Convention nor the State practice in this regard prohibit such an option”⁴⁶.

In its final report regarding the topic, the ILC stated that the obligation to extradite or prosecute may be satisfied by surrendering a suspect to a competent international criminal tribunal⁴⁷. Such an interpretation has been also supported by Council of Europe experts⁴⁸. Taking into account increasing significance of international criminal tribunals, the ILC has suggested that provisions of new treaties concerning the obligation to extradite or prosecute ought to incorporate the third alternative, as should domestic legislation of state-parties thereto⁴⁹. As indicated in an Amnesty International study, some states, including Argentina, Brasil, Croatia, France, Georgia, Portugal, Switzerland, Uruguay, already have legislation that includes this third alternative⁵⁰. These developments however could have possible influence on the application of the principle of complementarity, which stipulates that the case is not admissible before the ICC if it is being investigated or prosecuted by a State having jurisdiction over it, unless that State is unwilling or unable to genuinely carry out the investigation

⁴⁶ Dissenting Opinion of Judge Xue, ICJ Judgment of 20 July 2012, Case Questions relating to the Obligation to Prosecute or Extradite (Belgium v.Senegal), I.C.J. Reports 2012, par. 42.

⁴⁷ ILC, The obligation to extradite or prosecute (*aut dedere aut judicare*), Final Report of the International Law Commission Adopted at its sixty-sixth session, 2014, par. 34

⁴⁸ “In the era of international criminal tribunals, the principle may be interpreted *lato sensu* to include the duty of the state to transfer the person to the jurisdiction of an international organ, such as the International Criminal Court.” Extradition, European Standards: Explanatory notes on the Council of Europe convention and protocol and minimum standards protecting persons subject to transnational criminal proceedings, Strasbourg, 2006.

⁴⁹ ILC, The obligation to extradite or prosecute (*aut dedere aut judicare*), Final Report of the International Law Commission Adopted at its sixty-sixth session, 2014, par. 29.

⁵⁰ Amnesty International, International law commission: the obligation to extradite or prosecute (*aut dedere aut judicare*), IOR 40/001/2009, p. 17.

or prosecution⁵¹. Within the framework of transnational criminal law the question of concurrent jurisdiction among states remains an up-to-date issue - especially with regard to priority among different bases for jurisdiction. As pointed out by R. Clark, there are no such rules in the multilateral suppression conventions and the issue is left to decide on an *ad hoc* basis⁵². Would it be the same with concurrent jurisdiction of a third state and of the ICC, or should extradition to that state have priority as a result of the complementarity principle? This issue requires closer attention as complementarity is the key principle that governs exercise of the Court's jurisdiction, requiring state-parties to carry the main burden of investigating and prosecuting cases and is considered necessary for the ICC to operate more effectively.

4. Conclusions

The tendencies described in this article should be seen as evidence of possible overlapping of some crimes, rather than of erosion of the division between international criminal law and transnational criminal law. Nevertheless it must be noted that there is a trend towards expansive interpretation of existing crimes, and it is particularly visible in case of trafficking in persons. Whereas it still seems unlikely for the ICC to adjudicate trafficking cases, the potential of overlapping with acts such as enslavement or sexual slavery as crimes against humanity or war crimes could have positive effect in the context of the concept of positive complementarity. To some extent, the ICC has already encouraged the development of domestic prosecutions of transnational crimes. In Uganda, the government has decided to establish a special judicial division mandated to prosecute both international and transnational crimes. The International Crimes Division, a special division of High Court of Uganda was established in 2011, it has jurisdiction over, *inter alia*, crimes against humanity, war crimes, terrorism as well as human trafficking and piracy. Developments of this kind could contribute to closing the impunity gap, which is desirable both in the field of international and transnational criminal law.

⁵¹ The Rome Statute, Art. 17.1(a).

⁵² Roger Clark, "Jurisdiction over transnational crime," in *Routledge handbook on transnational criminal law*, ed. Neil Boister, Rober R. Currie (Abingdon: Routledge, 2015), 91–106.

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