SUPRANATIONAL PROTECTION AND THE ROME STATUTE: SHOULD DRUG TRAFFICKING JOIN THE RANKS?

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A. INTRODUCTION

The International Criminal Court (ICC) was established in 2002 to decrease impunity for the "perpetrators of the most serious crimes of concern to the international community."[1] Since then, it has adjudicated 32 cases and issued 60 arrest warrants for crimes recognised under the Rome Statute (the Statute).[2] The crimes that fall under the ICC's jurisdiction through the Statute are genocide, war crimes, crimes against humanity, and the crime of aggression.[3] The Rome Statute itself emerged after years of negotiation over which crimes should, and which should not, fall under the jurisdiction of the court.[4] The four ultimately included crimes are formally known as international crimes or core crimes.

Since the foundation of the ICC, questions have been raised as to whether it is justified to have these four core crimes enjoy an additional level of supranational protection under the Rome Statute and the jurisdiction of the ICC. Understanding a possible justification for these crimes extends both to what makes these crimes so special that an extra level of protection is needed, and to why other crimes are not provided with the same protection.

This paper seeks to clarify the justification for having the crimes as the core crimes of the Rome Statute that require additional supranational protection. While it concludes that the special nature of these crimes warrants additional supranational protection through the ICC, it also argues that drug trafficking should be similarly recognised.

This paper therefore addresses a twofold research question: Are the currently selected core crimes under the Rome Statute justified in receiving an additional level of supranational protection, and should drug trafficking be granted similar status under the ICC? To answer this question, the paper will commence by explaining what distinguishes core crimes from other types of crimes, followed by a historical and social analysis of the currently existing core crimes which justifies their supranational protection. It will then proceed to examine the crime of drug trafficking to assess whether its exclusion from being a core crime is justified or whether, on the contrary, the Rome Statute should be amended to include it. It will be concluded that while the currently existing core crimes are justified in enjoying an additional level of supranational protection because of their historical background and their seriousness, the same protection should also be extended to the crime of drug trafficking.

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[1] International Criminal Court, 'The ICC at a Glance' (ICC 2024) <https://www.icc-cpi.int/sites/default/files/ICCAtAGlanceEng.pdf> accessed 14 April 2025, 1.
[2] International Criminal Court, 'About the Court' (ICC) <https://www.icc-cpi.int/about/the-court> accessed 14 April 2025.
[3] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 5.
[4] Paola Gaeta, 'International criminal law' (2010) International Law for International Relations 258, 272.

B. JUSTIFYING THE CORE CRIME UNDER THE ROME STATUTE

To understand whether an additional level of supranational protection for the core crimes under the Rome Statute is justified, two steps need to be undertaken. First, it is necessary to understand what core crimes are and what distinguishes them from other types of crimes. Second, the four core crimes under the Rome Statute need to be specifically analysed to understand whether their identification as core crimes is legitimised and warrants additional supranational protection.

(1) What Distinguishes Core Crimes from Other Types of Crimes?

The label core crime emerged during diplomatic discussions over the establishment of the ICC, though without a clear legal definition distinguishing what can and what cannot be classified as such a crime.[5] The label nevertheless conferred a new level of supranational protection through the existence of the ICC.[6] To understand what makes core crimes so peculiar as to warrant an additional level of protection, it is necessary to compare them to other 'ordinary' crimes, specifically domestic crimes and transnational crimes. Domestic crimes and core crimes are distinct in their locus of criminalisation.[7] Core crimes occur on the international plane, and thus warrant international prosecution, whereas domestic crimes fall exclusively within national jurisdiction.[8] Such a distinction between domestic and core crimes seems relatively straightforward.

The boundaries between ordinary and core crimes become more difficult to draw when considering transnational crimes. Transnational crimes have been defined as "conduct that has actual or potential trans-boundary effects of national and international concern."[9] These crimes are often addressed in treaties or suppression conventions, earning the label "treaty crimes."[10] The level of internationality inherently implied in the definition of transnational crimes makes distinguishing them from core crimes more difficult. Scholars have brought forward different theories to understand the distinction between these types of crimes.

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[5] Rafael B da Silva, 'Synergies between core and transnational crimes: An analysis from the perspective of the Rome Statute' (2020) 21(1) Melbourne Journal of International Law 1, 5.
[6] ibid.
[7] da Silva (n 5) 6.
[8] ibid; Christine Schwöbel-Patel, 'The Core Crimes of International criminal Law', in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (online edn, Oxford Academic 2020) 774.
[9] Neil Boister, 'Transnational Criminal Law?' (2003) 14(5) EIJL 953, 954.
[10] Schwöbel-Patel (n 8) 771.

Transnational crimes require cross-border impact, whereas core crimes may not.[11] For example, an act of genocide, a core crime, may occur entirely within one state but still be subject to international concern because of its seriousness and harmfulness to humankind broadly speaking.[12] With transnational crimes, on the other hand, the crime needs to, at the very least potentially, impact more than one country. Such a distinction has, however, not received much credit, as core crimes can often involve more than one state, which makes the line between the types of crimes anything but clear-cut.

The difference in perpetrators committing core crimes and transnational crimes has been argued to be the distinctive factor between the two.[13] Core crimes are claimed to be perpetrated by individuals on behalf of the state or by state officials themselves.[14] Transnational crimes, on the other hand, do not have state participation when being committed.[15] By using such a distinction, it is argued that transnational crimes do not warrant supranational prosecution as state parties are not involved and can therefore prosecute the crime at the domestic level themselves.[16] With core crimes, on the contrary, since the states are directly involved in the perpetration of the crime, supranational prosecution is needed to avoid impunity. While logically such a justification for supranational protection of core crimes is clear, the reality discredits this type of distinction. Indeed, transnational crimes have been found to be connected to states parties almost as much as core crimes, having state officials directly or indirectly involved in the perpetration of such crimes.[17] Simultaneously, non-state parties have been prosecuted for core crimes.[18]

The characteristic that defines core crimes is their direct impact on common international values and interests.[19] Crimes that infringe upon these are seen as the most severe and heinous international violations that need an additional level of supranational protection to be combatted. Transnational crimes are seen as lacking the degree of seriousness required to classify them as core crimes.[20] Even though they have an international aspect to them, the lack of seriousness of violation of common values only warrants domestic prosecution.[21] Notably, domestic prosecution can be uniformised with other states through suppression conventions; these do not include the creation of a supranational body to prosecute them.[22] When keeping this argument theoretical, such a theory can capture the difference between these types of

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[11] da Silva (n 5) 6.
[12] United Nations, 'Definition of Genocide' (*UN Office on Genocide Prevention*) <https://www.un.org/en/genocide-prevention/definition> accessed 14 April 2025.
[13] da Silva (n 5) 6.
[14] Andre Nollkaemper, 'System Criminality in International Law: Introduction' (2008) Amsterdam Center for International Law 1, 7.
[15] Sara Wharton, 'Redrawing the Line? Serious Crimes of Concern to the International Community beyond the Rome Statute' (2015) 52 Canadian Yearbook of International Law 129, 174.
[16] ibid.
[17] da Silva (n 5) 16.
[18] Wharton (n 15) 161.
[19] da Silva (n 5) 9.
[20] ibid.
[21] ibid 10.
[22] ibid.

crimes. Practically, when considering cases of crimes against humanity (qualified as core crimes) against cases of human trafficking, drug trafficking, or terrorism (qualified as transnational crimes), scholars have found it difficult, if not almost impossible, to support the claim that the latter types of crimes are not serious enough to infringe upon common international values.[23] As such, having this seriousness as the distinctive element between core crimes and transnational crimes has found little support.

Considering all the above, scholars have tried to find clear-cut theories to understand the distinction between core crimes and transnational crimes, giving the former a justification for an additional level of supranational protection denied to the latter. Such theories have, however, been hard to find, and it seems as though the distinguishing factor between these types of crimes rather comes from arbitrary decisions on which crimes qualify as core crimes through diplomatic discussions than from substantive characteristics that core crimes possess and transnational crimes do not.[24] Consequently, a clear cut-off point to differentiate between these types of crimes has not been found, which brought scholars such as Roger O'Keefe to refer to social and historical reasons that make certain crimes qualify as core crimes by claiming that "you know one (core crime) when you see it."[25]

While this section argued that it is difficult to justify an additional level of supranational protection for core crimes as compared to ordinary crimes when looking at theoretical reasons distinguishing these types of crimes, such justification might lie more specifically in the four crimes currently protected in the Rome Statute. The next section will therefore discuss how the international community agreed on having these four crimes enjoy an additional layer of supranational protection and whether this justifies the additional protection.

(2) Justifying the Four Core Crimes

There is a possibility that states could simply decide that theft could infringe on some common values and ignore the four core crimes of the Rome Statute.[26] Such an example demonstrates the ability that a lack of theory defining core crimes could be exploited, and it remains essential to comprehend how states came to the decision of the four core crimes under the Rome Statute, which warrants the existence of the ICC. To do so, a historical account of the process in drafting the Rome Statute is necessary.

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[23] ibid 11-12.
[24] ibid 6-7.
[25] Roger O'Keefe, 'The Concept of an International Crime' (2015) Oxford International Law Library 47, 56.
[26] Mayeul Hiéramente, 'The Myth of 'International Crimes': Dialectics and International Criminal Law' (2011) 3(2) Goettingen Journal of International Law 551, 556.

While the existence of international law was a topic that had arisen before the Second World War, only after its conclusion did the possibility of holding individuals accountable for wartime atrocities under international law materialise.[27] During the Nuremberg Trials and before the International Military Tribunal, perpetrators of crimes against peace, war crimes, and crimes against humanity committed during the Second World War were prosecuted.[28] Furthermore, the term genocide was coined and became subject of international law soon after the end of the war.[29] The Nuremberg Trials presented an opportunity to create permanent international tribunals to ensure that certain atrocities would not go unpunished, which brought the UN General Assembly to request the International Law Commission (ILC) to draft a code of offences that should become the blueprint for the foundation of a permanent international court.[30] Because of the Cold War, however, the progress in creating a permanent court and a draft code was stagnant for over fifty years.[31] Indeed, the Cold War made it impossible to find an agreement on the definition of some of the crimes under the draft code, as well as an agreement on surrendering some degree of sovereignty.[32]

Since the process of creating an international tribunal was blocked for years, states started adopting suppression conventions specific to certain crimes with an international aspect, such as drug trafficking.[33] Such conventions, however, criminalised these crimes still under domestic law with only domestic prosecution. Only in the 1990s, with the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, did the idea of establishing a permanent international court dealing with atrocity crimes resurface.[34] The process of drafting the Rome Statute was shortly thereafter started. While discussions about including in the Rome Statute the crimes that were, during the Cold War, regulated through suppression conventions were considered, the final statute excluded all of these and merely focused on the four core crimes that were also the subject matter of the Nuremberg Trials.[35] The choice of crimes was restricted to extremely serious crimes that "shock the conscience of humanity."[36] The four core crimes were deemed the most serious violations of international law because of the "scale, gravity and systematic perpetration" in which they occur.[37]

The idea that the four core crimes of the Rome Statute should enjoy an additional level of supranational protection evolved during a century of uncertainties and wars that culminated with the

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[27] Schwöbel-Patel (n 8) 777.
[28] Gaeta (n 4) 260-261.
[29] Wharton (n 15) 137.
[30] Schwöbel-Patel (n 8) 777.
[31] Wharton (n 15) 139.
[32] ibid.
[33] Gaeta (n 4) 262-263.
[34] ibid 263-264; Schwöbel-Patel (n 8) 777.
[35] Wharton (n 15) 141.
[36] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, preamble.
[37] Wharton (n 15) 163.

establishment of the ICC. The seriousness and gravity of these crimes legitimise the need to have an international tribunal that ensures that these crimes are not left unpunished. Furthermore, as per Article 17 of the Rome Statute, the jurisdiction of the ICC is limited by the principle of complementarity, which entails the ICC being able to exercise authority only in cases where national states are unwilling or unable to do so themselves.[38] The additional level of supranational protection therefore only comes into play to avoid impunity when national states cannot do so themselves.

Notably, even without a clear definition of what 'core' refers to when deciding which crimes should fall under the jurisdiction of the ICC, historical and societal factors around the seriousness of these crimes for the international community can justify the need for additional supranational protection for the four core crimes included in the Rome Statute. Nonetheless, questions remain as to why other crimes should not be able to enjoy similar protection. The next section will therefore analyse such questions specifically with reference to drug trafficking, as it has historically been one of the most discussed crimes that could be under the jurisdiction of the ICC and presents therefore an interesting case study.

C. SHOULD DRUG TRAFFICKING BECOME A CORE CRIME

(1) A Historical Account

Including drug trafficking under the jurisdiction of the ICC has been a recurrent topic throughout the process of the ILC discussing the draft code and later the drafting of the Rome Statute, as well as in the years following the entry into force of the Statute. The process of developing a draft code extended throughout the better part of the second half of the 20th century, mainly because of its stagnation due to the Cold War.[39] In the 1980s, when the process of drafting the code regained prominence, the ILC aimed to include in the draft "the most serious international crimes", which had to be identified through the "extent of the calamity or by its horrific character, or by both at once."[40] Discussions around whether drug trafficking was serious enough to be included in such a code happened throughout that decade and culminated in 1989 with the inclusion of drug trafficking in the draft code.[41] The reasons for including drug

[38] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 17; Gregory S McNeal, 'ICC Inability Determinations in Light of the Dujail Case' 39 Case Western Reserve Journal of International Law 325, 325.
[39] Schwöbel-Patel (n 8) 777.
[40] International Law Commission, *Report of the International Law Commission on the Work of Its Thirty-Fifth Session* (3 May-22 July 1983) UN Doc A/38/10, para 48.
[41] Wharton (n 15) 145.

trafficking were twofold: (1) in 1988, the adoption of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances showcased the seriousness of drug trafficking and the impact on individuals' health that illicit narcotics can have; (2) Trinidad and Tobago issued a proposal to resurface the idea of a permanent international court specifically for combating drug trafficking.[42] Drug trafficking remained in the draft code up until 1995, as it was deemed part of the six most serious offences against the peace and security of mankind.[43] Nonetheless, in the final version of the draft code in 1996, drug trafficking was left out as majority consent amongst states as to its inclusion was not found.[44] The discussions around including drug trafficking under the jurisdiction of the ICC did not end in 1996 with the draft code, but continued throughout the process of developing the Rome Statute. As mentioned above, the push to create the ICC came from the proposal from Trinidad and Tobago to have such a court specifically to prosecute drug trafficking.[45] Finding consent in the inclusion of drug trafficking in the Rome Statute was, however, impossible. While some states argued for the inclusion because of the seriousness of the offence, many others argued to limit the jurisdiction of the ICC only to the currently existing four core crimes.[46] The main reasons for the latter position were to avoid overburdening the ICC from its beginning, especially since drug trafficking was already prosecuted under suppression treaties, and making this crime both a transnational crime and a core crime would have caused complexities in its prosecution.[47] The final version of the Rome Statute that entered into force in 2002 excluded drug trafficking as a core crime, but it included a resolution recommending the revision of drug trafficking as a possible core crime during the first review conference of the Rome Statute.[48]

In 2009, Trinidad and Tobago, together with Belize, once again renewed their proposal to include drug trafficking as a core crime under the Rome Statute.[49] This came right before the 2010 Kampala Conference to Review the Rome Statute in Uganda which, as per Resolution E of the Final Act establishing the Rome Statute, should have included a discussion about possibly including drug trafficking.[50] Nonetheless, to avoid overburdening the conference and through distractions on the topic of how to define

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[42] ibid.
[43] International Law Commission, *Thirteenth Report on the Draft Code of Crimes against the Peace and Security of Mankind* (24 March 1995) UN Doc A/Cn.4/466, 35.
[44] Wharton (n 15) 146.
[45] Permanent Representative of Trinidad and Tobago to the United Nations, Letter to the President of the General Assembly, UN Doc A/44/532 (19 September 1989).
[46] Wharton (n 15) 152-153.
[47] ibid 153.
[48] Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) UN Doc A/CONF.183/10, Resolution E; Markus Wagner, 'The ICC and its Jurisdiction – Myths, Misperceptions and Realities' (2003) 7 Max Planck Yearbook of United Nations Law 409, 475.
[49] Daniel Bertram, 'Should Ecocide be an International Crime? It's Time for States to Decide' (*Blog of the European Journal of International Law,* 12 September 2024) <https://www.ejiltalk.org/should-ecocide-be-an-international-crime-its-time-for-states-to-decide/> accessed 14 April 2025; United Nations, 'Proposal on Amendments by Trinidad and Tobago to the Rome Statute of the International Criminal Court' (29 October 2009) UN Doc C.N.737. 2009.TREATIES-9, 2.
[50] Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) UN Doc A/CONF.183/10, Resolution E.

the crime of aggression, the discussion about adding drug trafficking as a core crime was dropped.[51] The main reason given for not starting discussions on adding drug trafficking was that the ICC was still recently created, and it needed to focus on the four crimes already under its jurisdiction without being overburdened with other crimes.[52]

This section showcased that, when analysing the historical background around the exclusion of drug trafficking as a core crime under the jurisdiction of the ICC and consequently denying this crime an additional level of supranational protection, the main reasons given were focused on not overburdening the ICC with having to prosecute another crime. Far fewer arguments were given about the characteristics of the crime of drug trafficking itself, which do not warrant an additional level of supranational protection. The continuing attempts by Trinidad and Tobago to include drug trafficking under the subject matter of the Rome Statute showcase the country's belief in the seriousness of the crime and the importance of ensuring prosecution for its perpetrators. While the beliefs of one country are not enough to include drug trafficking in the Rome Statute, questions remain as to the possibility of including it, especially when considering that the main opposition presented focuses on pragmatic reasons to avoid overburdening the court, without considering the seriousness of the crime. The next section will therefore analyse formal and normative arguments as to how a possible inclusion of drug trafficking as a core crime could play out, questioning whether additional supranational protection through the ICC for this crime can be justified.

(2) Can Additional Supranational Protection for Drug Trafficking be Justified?

To possibly justify an additional level of supranational protection for drug trafficking and a consequent amendment of the Rome Statute to include it, this section will first analyse the formal requirements that a crime needs to fulfil to be considered suitable to be included in the Rome Statute. It will then discuss normative arguments around the inclusion of drug trafficking in the Rome Statute.

(a) Formal requirements

When proposals are suggested to the Assembly of States Parties to be considered as amendments to the Rome Statute, the Working Group on Amendments considers these proposals before deciding which ones

[51] Wharton (n 15) 154-155.
[52] Assembly of States Parties to the Rome Statute of the International Criminal Court, *Report of the Working Group on the Review Conference* (29 October 2009) ICC-ASP/8/20, 56.

to bring before the Assembly.[53] Even though the final decision on amending the Rome Statute falls within the competences of the Assembly of State Parties, the recommendations of the Working Group on Amendments are fundamental.

According to the Terms of Reference of such a group, when considering amendments specifically about the introduction of a new crime to the Statute, the decision is based on "whether the (new) crime can be characterised as one of the most serious crimes of concern to the international community as a whole and whether the crime is based on an existing prohibition under international law."[54] For drug trafficking to become a core crime and warrant additional supranational protection, it should therefore be analysed in terms of these criteria.

When discussing the seriousness of the crime, the harms caused by drug trafficking need to be considered. Arguments have been provided that, unlike the current core crimes, drug trafficking is a non-violent crime that does not result in the death or suffering of many individuals.[55] Such arguments are, however, inherently flawed. Indeed, when considering the systemic context in which drug trafficking occurs, the violence perpetrated through it is impossible to overlook.[56] The drug war in Mexico, for example, has brought over 28,000 deaths over the years, which are higher numbers than some cases prosecuted by the ICC for the core crimes.[57] Furthermore, the seriousness of drug trafficking does not only come from the deaths involved with it, but also from the severe health impacts the consumption of illicit narcotics has and from the consequences drug trafficking can have for the (economic) stability of many states in which the crime is occurring.[58] Drug trafficking has been found to implicate a whole network of individuals and organisations involved in systematic criminality that impact the international community as a whole and causes high rates of violence, corruption, and instability.[59]

Drug trafficking seems to be an already existing prohibition in international law. Currently, three main treaties exist under international law prohibiting drug trafficking: the Single Convention on Narcotic Drugs; the Convention on Psychotropic Substances; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[60] These conventions aim to regulate and control

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[53] Assembly of States Parties to the Rome Statute of the International Criminal Court, 'Resolution ICC-ASP/11/Res.8: Strengthening the International Criminal Court and the Assembly of States Parties' (Adopted at the 8th plenary meeting, 21 November 2012) ICC-ASP/11/Res.8, 55 para 1.
[54] ibid 56 para 9.
[55] Wharton (n 15) 176.
[56] ibid.
[57] Rory Carroll, 'Mexico drug war: the new killing fields' (*The Guardian*, 3 September 2010) <https://www.theguardian.com/world/2010/sep/03/mexico-drug-war-killing-fields> accessed 14 April 2025.
[58] Wharton (n 15) 145-146.
[59] ibid 169.
[60] United Nations Office on Drug and Crime, 'Legal Framework for Drug Trafficking' (UNODC) <https://www.unodc.org/unodc/en/drug-trafficking/legal-framework.html> accessed 14 April 2025; Single Convention on Narcotic Drugs (adopted 30 March 1961, entered into force 13 December 1964) 520 UNTS 151; Convention on psychotropic substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175; United Nations Convention Against

narcotic drugs and combat the illicit trafficking of these. Furthermore, especially the last convention named above specifically prohibits the illicit trafficking of narcotic drugs and establishes measures to combat this by ensuring international cooperation.[61] Even though this convention still requires domestic states to implement these measures and supranational prosecution is not established, the convention recognises illicit drug trafficking as an "international criminal activity" and not merely as a transnational one.[62]

Considering the two requirements set out in the Terms of Reference of the Working Group on Amendments to the Rome Statute, drug trafficking can be seen as satisfying both requirements and should be able to qualify, at least formally, as a core crime. As, however, the final decision on whether to introduce drug trafficking in the Rome Statute falls within the competences of the Assembly of States Parties, not only formal arguments are considered, yet as seen above, normative and pragmatic considerations also play a role for states to vote in favour of such amendment.

(b) *Normative and pragmatic arguments*

As previously stated, a recurrent argument against including drug trafficking as a core crime is that broadening the jurisdiction of the court will result in overwhelming the system and in ineffective prosecution.[63] This argument was one of the main reasons why drug trafficking was not even discussed during the Review Conference in Uganda. If, however, at the time, the reasoning behind it was to not overwhelm the still relatively new court, such an argument now, after over twenty years of the ICC operating, lacks validity. Furthermore, the ICC still operates under the principle of complementarity enshrined in Article 17 of the Rome Statute.[64] The primary prosecution of perpetrators of this crime would therefore still fall on domestic judicial systems and would only fall back on the ICC if these systems are unable or unwilling to prosecute. Including drug trafficking as a core crime could incentivise domestic systems to prosecute to avoid the ICC having to prosecute and possibly be overburdened. The current system would therefore be upheld and, if effective, suffice to prosecute offenders; if, however, the current system would not be effective the ICC would be able to intervene and avoid impunity.[65] Consequently, the mere risk of

Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 19 December 1988, entered into force 11 November 1990) 1582 UNTS 95.

[61] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (n 60) art 3.

[62] ibid preamble.

[63] Molly McConville, 'A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court' (2000) 24 Am. Crim. L. Rev. 75, 98-99.

[64] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 17.

[65] Anne H Geraghty, 'Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World's Most Pervasive Problems' (2004) 16(2) Florida Journal of International Law 371, 395.

overburdening the ICC does not seem sufficient to decide not to include drug trafficking as a core crime while risking impunity for many perpetrators.[66]

Another argument presented by states opposing the inclusion of drug trafficking in the Rome Statute is that its existence as a transnational crime and as the subject matter of many suppression treaties, would make its characterisation and prosecution as a core crime under the ICC complex.[67] As discussed at the beginning of the paper, a common characteristic between transnational crimes and core crimes is that both have an international element to them. Satisfying this element, drug trafficking by its nature has an international level as it usually involves multiple states as part of the manufacturing, transportation, and consumption phases of the crime.[68] The paper further argued that there are no other clear ways to distinguish between a transnational crime and a core crime, which brought many states to argue that drug trafficking qualifies as a transnational crime mainly because of its presence in suppression conventions.[69] Genocide and war crimes are, however, also the subject matter of suppression conventions, which did not disqualify them as core crimes.[70] The qualification of drug trafficking as both a transnational crime and as a core crime would therefore make its prosecution no more complex than those of genocide or war crimes.

Finally, against adding drug trafficking as a core crime is the argument that it will function as an example to start adding any other transnational crime to the jurisdiction of the ICC.[71] Indeed, the two arguments provided above, and their counterarguments, can conceivably be applied to almost any other transnational crime, which could possibly then legitimise the risk of overburdening the court or make the whole reasoning behind having an additional level of supranational protection for certain crimes void. While such an argument can receive some credit, drug trafficking has a certain uniqueness which could still speak in favour of its introduction in the Rome Statute. The Statute contains a clear amendment procedure which implies the possibility retained by states to include more crimes as core crimes if certain specific characteristics are fulfilled. As argued above, drug trafficking satisfies both conditions. While arguments can be made that the currently existing core crimes under the Rome Statute also fulfil both criteria, this paper showed that their qualification as core crimes came from social and historical reasons and not through clear criteria that unified these four crimes and excluded any others. Drug trafficking, as the historical account provided above showcased, is not only present in many of the historical moments that made the Rome Statute what it is today (which already qualifies it as a possible core crime), but furthermore fulfils

[66] George S Yacoubian, 'The Most International of International Crimes: Toward the Incorporation of Drug Trafficking into the Subject Matter Jurisdiction of the International Criminal Court' (2007) Criminology Research Focus 1, 28.
[67] Wharton (n 15) 153.
[68] Yacoubian (n 66) 4.
[69] Wharton (n 15) 139.
[70] Schwöbel-Patel (n 8) 772.
[71] Geraghty (n 65) 397-398.

the later established criteria that a crime needs to have to be able to qualify as a core crime in need of supranational protection.

All of this makes drug trafficking unique in its characteristics and justifies its classification as a core crime in need of additional supranational protection. The fear that its inclusion would result in many other transnational crimes being claimed as possible core crime cannot be seen as discrediting such inclusion for two reasons. On one hand, many other serious transnational crimes that satisfy all requirements, like drug trafficking, to be included as core crimes, should in fact enjoy additional supranational protection to avoid impunity, discrediting this fear. The focus should therefore not be on the fear that the ICC would have many other crimes under its jurisdiction and should rather be on how to ensure a successful international system that makes the supranational prosecution under the ICC effective. On the other hand, even if this fear of having many transnational crimes be classified as core crimes finds some justification, the solution cannot be to exclude drug trafficking that fulfils all of the current requirements to be a core crime, but it should rather be to amend the Rome Statute to introduce a clear legal definition of core crimes which includes a more detailed and comprehensive list of characteristics that the current four core crimes have and any other crime possibly added to the Statute needs to have.

Considering all the above, the normative and pragmatic arguments are not sufficient to justify the exclusion of drug trafficking from the Rome Statute. On the contrary, the seriousness of the crime and its international character showcase the need for an additional level of supranational protection for this crime to ensure that perpetrators do not remain unpunished.

D. CONCLUSION

This paper provided a discussion on the justification of having an additional level of supranational protection for the core crimes under the Rome Statute. Starting with a general discussion on what makes core crimes a distinct type of crime from domestic and transnational crimes, the paper concluded that a clear differentiation based on legal definitions and theories is not present. History, however, can be used to justify the need for additional supranational protection when it comes to the core crimes currently under the jurisdiction of the ICC. This provided an answer to the first part of the research question of this paper.

The second part of the research question was answered by looking specifically at the crime of drug trafficking to understand whether it should enjoy the same additional protection as the current core crimes, warranting an extension of the jurisdiction of the ICC. A historical account of the international concern that drug trafficking brings, as well as the seriousness of this offence, demonstrates the importance of

including drug trafficking as a core crime in need of supranational protection and rebutted arguments against its inclusion in the Rome Statute.

The aim of the paper was not to provide an argument for the inclusion of all other transnational crimes to the Rome Statute, but it was to focus on the crime of drug trafficking and to analyse the status of the amendment procedure of the Statute and its criteria for classifying a crime as a core crime warranting supranational protection. Future research should be conducted to further evaluate these criteria and determine whether they are appropriate to decide if a crime can qualify as a core crime or not.