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Globalization, terrorism, constructivism

Historically, crime has been primarily a local issue. The basic jurisdiction of any sovereign state includes the right to define, establish due process and punish crimes. This is time-consuming, laborious and complicated process under any legitimately accepted legal systems. In the United States of America, under adversarial legal system, the power to make certain conduct illegal is granted to Congress by virtue of the Necessary and Proper Clause of the United States Constitution (Art. I, § 8, col. 18). Domestically, the Constitution of the United States empowers the United States Congress to define and punish crimes whenever it is necessary and proper to do so, in order to accomplish and safeguard the goals of government and of society in general. State legislatures have the exclusive and inherent power to pass a law prohibiting and punishing any act, provided that the law does not contravene the provisions of the U.S. or state constitution. When classifying conduct as criminal, state legislatures must ensure that the classification bears some reasonable relation to the welfare and safety of society. Laws passed by Congress or a state must define crimes with certainty. Any citizen and the courts must have a clear understanding of a criminal law's requirements and prohibitions. The elements of a criminal law must be stated explicitly, and the statute must embody some reasonably discoverable standards of guilt. If the language of a statute does not plainly show what the legislature intended to prohibit and punish, the statute may be declared void for vagueness. In deciding whether a statute is sufficiently certain and plain, the court must evaluate it from the standpoint of a person of ordinary intelligence who might be subject to its terms. A statute that fails to give such a person fair notice that the particular conduct is forbidden is indefinite and therefore void. Courts will not hold a person criminally responsible for conduct that could not reasonably be understood to be illegal. Mere difficulty in understanding the meaning of the words used, or the ambiguity of certain language, can nullify a statute for vagueness. Internationally, the U.S. Constitution provides (Art. I, sec. 8, col. 10) that Congress shall have power "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Laws of Nations." Under this provision, Congress may identify and declare criminal under U.S. law, acts that are criminal under international law. Normally this is done by legislation. The domestic law of the United States is part of the fabric of

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international criminal law insofar as that national law provides for the recognition and punishment of international offenses. It has generally been the practice of the United States to recognize and punish international crimes only when they are embodied in U.S. treaties and implemented by federal legislation.

Wartime crimes eroded sovereign control and caused states' collective recognition of international crimes. Rice and Patrick identified four sets of critical sovereign responsibilities: fostering an environment conducive to sustainable and equitable economic growth; establishing and maintaining legitimate, transparent, and accountable political institutions; securing their populations from violent conflict and controlling their territory; and meeting the basic human needs of their population. Barbaric invasions of weaker neighbors culminating in victor's unchecked crimes are not new in world's history. However development of typography in nineteenth and twentieth century delivered the graphic tale of violence to public domain, causing sovereigns to re-examine the concept of securing its population. Violent conflicts between sovereigns combined with rapid development of weapon systems in nineteenth and twentieth century responsible for massive human death and suffering of combatants as well as civilian population caused sovereigns to recognize necessity for collective criminalization of certain war related activities. First came unilateral codes of conduct. In the United States, a German immigrant, Francis Lieber drew up a code of conduct in 1863, which came to be called the Lieber Code in his honor, for the Northern army. The Lieber Code included the humane treatment of civilian populations in the areas of conflict, and also forbade the execution of POWs. Multinational treaties promptly followed said codes. The First Geneva Convention in 1864 focused on the need to protect civilians and those who can no longer fight in an armed conflict. It was signed by fourteen European states. Then in 1872 Gustave Moyneir articulated the need for accountability following the atrocities committed in Franco-Prussian war (1870-1871) by both sides. Gustave Moyneir was a prominent Swiss jurist, who co-founded the International Committee for Relief to the Wounded, which later became the International Committee of the Red Cross. Moyner, shocked and disgusted by war's violent atrocities proposed International Criminal Court to try persons accused of war crimes. At that time, states did not provide any support for this novel concept of International Criminal Court in fear of diluting its sovereignty. Nevertheless, the thought of recognizing international crimes and an idea of creating an international tribunal to punish said crimes was firmly planted. In response to the changing nature of warfare, especially its increasing mechanization and lethality, Emperor Alexander II of Russia convened a conference in Brussels in 1874, which resulted in an International Declaration Concerning the Laws and Customs of War. It detailed rules for treatment of civilians, civilian territory, the wounded, prisoners of war and outlined the rules of surrender and treatment of those

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who have capitulated. Article VIII of the Declaration Concerning the Laws and Customs of War provided for prosecution of violators at the international level. The Declaration never received enough support to be adopted. It is noteworthy that just a few years later in 1878, General Ulysses Grant of the United States wrote to the Universal Peace Union requesting that an international court be established that "shall be recognized by all nations, which will take into consideration all differences between nations" (Grant in Ferencz 1980: 6).

The concept of International Criminal Court (ICC) was revisited again after World War I, when the framers of the Treaty of Versailles were searching for venues to bring to trial defeated Kaiser and German military officers. The atrocities and devastation of WW I caused proposals to the League of Nations (established in 1919) to found an ICC with an international army to enforce the decisions of the court. Notably, the United States delegation refused to support court's establishment without precedence of international law and unknown to state practices. As such, idea of establishment of ICC failed again delegating punishment for alleged war crimes to existing National Military Tribunals (Bassiouni 1997). The issue was addressed again at conference held in Geneva under the auspices of the League of Nations on 1–16 November 1937, but no practical results followed because of the beginning of World War II. The United Nations states that the General Assembly first recognized the need for a permanent international court to deal with atrocities of the kind committed during WW II in 1948, following the Nuremberg Trials in 1946. At the request of the General Assembly, the International Law Commission (ILC) drafted two statutes by the early 1950s but these were shelved as the Cold War escalated.

The idea of ICC was revived in 1989 when Trinidad and Tobago facing increasing drug trafficking and lack of mechanisms to deal with illegal international drug trade, proposed the creation of a permanent international court again. Following years of negotiations, the General Assembly convened a conference in Rome in June 1998, with the aim of finalizing a treaty. On 17 July 1998, the Rome Statute of the International Criminal Court was finally adopted. The history of proposals to establish ICC spans almost 140 years. Since Gustave Moyneir's first call to found ICC many violent and disruptive conflicts occurred before ICC became a reality on July 1, 2002.

Now comes globalization and transborder crime. Globalization is a popular term with nearly as many meanings as its users. Oxford Dictionary defines globalization as an "act pertaining to or involving the whole world" (www.oxforddictionaries.com). While the definition of globalization can vary to accommodate the context of its analysis, it generally refers to an increasing interaction across national boundaries that affect many aspects of life: economic, social, cultural and political. Enhanced flow of goods, capital, labor and services from one sovereign to another (with possible multiple transit stops) combined with less restrictive travel barriers, decreasing transportation costs and expansion of

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telecommunications provides for fast pace, virtually borderless environment where a wide range of products and services can be accessed virtually anywhere and anytime in the world. Today, transborder crimes are prevalent. But the process of globalization has outpaced the growth of mechanisms for global governance, and this deficiency has produced just the sort of regulation vacuum in which transnational organized crime can thrive.

Constructivism lands itself as international security theory to develop effective tools to establish international institutions to combat global criminal trends. "Constructivists have taken up the idea that states form more than a system – that they form a society – and they have pushed this idea to new levels of theoretical and conceptual sophistication" (Reus-Smit 2009). Constructivism is founded on inclusion and can be viewed as an opportunity to examine international security. It provides inclusive and an open invitation to different legal systems, cultures and religions represented by different sovereigns, international and non-government institutions with its vastly varying political goals to constructively contribute to this effort.

The history of the establishment of the International Criminal Court (ICC) spans over more than a century. The "road to Rome" was a long and often contentious one. While efforts to create a global criminal court can be traced back to the early 19th century, the story began in earnest in 1872 with Gustav Moynier – one of the founders of the International Committee of the Red Cross – who proposed a permanent court in response to the crimes of the Franco-Prussian War. The next serious call for an internationalized system of justice came from the drafters of the 1919 Treaty of Versailles, who envisaged an ad hoc international court to try the Kaiser and German war criminals of World War I. Although Kaiser was never brought to justice, the idea of international cooperation in prosecuting war criminals remained. Even before World War II was over, during the Yalta Conference in February of 1945, the Heads of Government of Great Britain, the United States (US) and the Union of Soviet Socialist Republics (USSR) had declared the punishment of the principal war criminals to be one of their main war objectives. In August 1945 Great Britain, the USA, the USSR and the Provisional Government of France signed the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, as well as the Charter of the International Military Tribunal (IMT). The impetus for IMT served three key functions: 1) bringing vindication for the atrocities, 2) establishing record of said atrocities and 3) generate deterrence against future atrocities (Ferencz 1980). Following World War II, the Allies set up the Nuremberg and Tokyo tribunals to try Axis war criminals. The international trial, better known as Nuremberg Trial, conducted by the victorious Allies at the end of World War II, at which those primarily responsible for the war and war crimes in Germany had to answer for their

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actions, was designed to meet the legal standards of the time insofar as was possible. The principles of this International Military Tribunal in Nuremberg went on to become an important source of international law. They thus had to be put on a generally recognized legal footing for future trials. In 1946 The United Nations General Assembly (UN GA), at its first session, reaffirmed the principles of the Nuremberg trial. This endorsement, which came only weeks after the end of the trial, marked the first step towards their recognition as general principles of international criminal law. In 1947 The International Law Commission was established by the UN GA. The members of the International Law Commission (ILC) were independent international law experts, and were charged to foster the progressive development of international law and its codification. In 1948, UN GA adopted the Convention on the Prevention and Punishment of the Crime of Genocide in which it called for criminals to be tried "by such international penal tribunals as may have jurisdiction" and invited the International Law Commission (ILC) "to study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide." It is noteworthy that former allies the United States and Soviet Union led the opposition for an independent judicial organ with compulsory jurisdiction (Ferencz 1980). While the ILC drafted such a statute in the early 1950s, the Cold War stymied these efforts and the General Assembly effectively abandoned the effort pending agreement on a definition for the crime of aggression and an international Code of Crimes. In June 1989, motivated in part by an effort to combat drug trafficking, Trinidad and Tobago resurrected a pre-existing proposal for the establishment of an ICC and the UN GA asked that the ILC resume its work on drafting a statute (Sadat 2002). The conflicts in Bosnia-Herzegovina and Croatia as well as in Rwanda in the early 1990s and the mass commission of crimes against humanity, war crimes, and genocide led the UN Security Council to establish two separate temporary ad hoc tribunals to hold individuals accountable for these atrocities, further highlighting the need for a permanent international criminal court. In 1994, the ILC presented its final draft statute for an ICC to the UN GA and recommended that a conference of plenipotentiaries be convened to negotiate a treaty and enact the Statute. To consider major substantive issues in the draft statute, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995. After considering the Committee's report, the UN GA created the Preparatory Committee on the Establishment of the ICC to prepare a consolidated draft text. From 1996 to 1998, six sessions of the UN Preparatory Committee were held at the United Nations headquarters in New York, in which NGOs provided input into the discussions and attended meetings under the umbrella of the NGO Coalition for an ICC (CICC). In January 1998, the Bureau and coordinators of the Preparatory Committee convened for a meeting in the Netherlands to technically consolidate and restructure the

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draft articles into a draft. Based on the Preparatory Committee's draft, the UNGA decided to convene the United Nations Conference of Plenipotentiaries on the Establishment of ICC at its fifty-second session to "finalize and adopt a convention on the establishment" of an ICC. The "Rome Conference" took place from 15 June to 17 July 1998 in Rome, Italy, with 160 countries participating in the negotiations and the NGO Coalition closely monitoring these discussions, distributing information worldwide on developments, and facilitating the participation and parallel activities of more than 200 NGOs. At the end of five weeks of intense negotiations, 120 nations voted in favor of the adoption of the Rome Statute of the ICC, with seven nations voting against the treaty (including the United States, Israel, China, Iraq and Qatar) and 21 states abstaining. The Preparatory Commission was then established and charged with completing the establishment and smooth functioning of the Court by negotiating complementary documents, including the Rules of Procedure and Evidence, the Elements of Crimes, the Relationship Agreement between the Court and the United Nations, the Financial Regulations, the Agreement on the Privileges and Immunities of the Court. On 11 April 2002, the 60th ratification necessary to trigger the entry into force of the Rome Statute was deposited by several states in conjunction.

The treaty entered into force on 1 July 2002. As of April, 2011, 114 states are members of the court. Further 34 countries, including Russian Federation have signed but not ratified the Rome Statute. Israel, Sudan and the United States—have "unsigned" the Rome Statute, indicating that they no longer intend to become states parties and, as such, they have no legal obligations arising from their former representatives' signature of the statute. It is noteworthy that neither China nor India signed the statute.

Currently ICC's jurisdiction is limited. It is recognized as a court of last resort (pursuant to Article 17 of Rome Statute), where ICC can investigate and prosecute only where sovereigns have failed. Article 5 of Rome Statute grants the Court jurisdiction over four groups of crimes: genocide, crimes against humanity, war crimes and aggression. ICC's members have not agreed on definition of aggression yet. The target date of 2017 has been established to develop said definition and for ICC to assume jurisdiction.

ICC is structured to have six organs. Presidency is responsible for the overall administration of the Court, with the exception of the Office of the Prosecutor. The Presidency is composed of three judges of the Court elected for three year terms by their fellow judges. Judicial Division consists of eighteen judges organized into the Pre-Trial Division, the Trial Division and the Appeals Division. The judges of each Division sit in Chambers, which are responsible for conducting the proceedings of the court at different stages. Office of the Prosecutor is responsible for receiving referrals and any substantiated information on crimes within jurisdiction of the Court for examining them and for conducting investigations and prosecutions before the Court. The Registry is responsible

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for the non-judicial aspects of administration and servicing of the Court. Office of the Public Counsel for the Defense represents and protects the rights of the accused during the initial stages of an investigation, provides assistance to Defense Counsel and to persons entitled to legal assistance. Although part of the Registry Office, Office of Public Counsel is an independent organ. Office of Public Counsel for Victims ensures effective participation of victims in proceedings before the Court. (www.icc-cpi.in)

Crimes are traditionally classified by its harm and punishment. International Law attempted to define and classify criminalized activities for many years with little success. Different legal systems, cultural and historical characteristics of different sovereigns combined with its vastly varying political goals hinder development of viable definitions for practical use. Currently, international institutions and sovereigns distinguish two types of activities deemed as criminal. First is viewed as international crime, where criminalized activity causes grave injury to the interests of international community in peace and humanity. Second, is trans-national criminalized activity, which in totality does not rise to humanitarian disaster, but causes harm to international community.

International crimes deal with aggression, genocide, and crimes against humanity, war crimes and torture. International law has defined very few crimes, proscribing only acts recognized as a serious threat to international community's fundamental values. International criminal law is a body of international law designed to prohibit certain categories of conduct commonly viewed as serious atrocities and to make perpetrators of such conduct criminally accountable for their perpetration. Piracy is a good example. For centuries piracy has been recognized as an international crime under customary international law and aggressive international enforcement, facilitated by agreeable different legal regimes that was the model of international cooperation, has been key to suppressing piracy on the high seas (Kontorovich 2009). While dormant for a while, on-going hijacking of ships of the coast of Somalia in recent years demanded invocation of old legal traditions. The crime of piracy was then and is now recognized as a breach of international norm. Those committing thefts on the high seas, inhibiting trade and endangering maritime communication are considered by sovereign states to be enemies of humanity (Kissinger 2001). The United Nations Convention on the Law of the Sea (UNCLOS) of 1982 defined piracy in nutshell as any illegal act of violence committed by a private actor on the high seas (place outside the jurisdiction of any state). The International Maritime Bureau defines piracy as the act of boarding any vessel with an intent to commit theft or any other crime, and with an intent or capacity to use force in furtherance of that act. Slave trading joined the list of international crimes in nineteenth century when that practice was outlawed by Slave Trade Act of 1807 and multitude of treaties thereafter. As technological advances, along with increasing trade and globalization, have made the world

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seem smaller, more such crimes have gained recognition. Some of the key categories of international crimes are briefly discussed below, but this list is far from exhaustive.

Aggression. Throughout history, the world community has sought to prevent war and eliminate aggression. In the Middle Ages, theories on "just" and "unjust" war were formulated. After World War I, efforts to curb war resulted in the establishment of the League of Nations. The Treaty of Versailles of 1919 called for the prosecutions of Kaiser Wilhelm II for waging unjust war, but efforts to carry out this provision never materialized. The Kellogg-Briand Pact of 1928 provided for the formal renunciation of war as an instrument of national policy. This renunciation became the basis of the London Charter of 8 August 1945, which established in Nuremberg the International Military Tribunal for the prosecution of the major Nazi war criminals, and of the 1946 charter for the International Military Tribunal for the Far East, establishing a similar tribunal in Tokyo. These charters, the indictments and judgments of the tribunals, and the 1947 United Nations resolutions embodying the "Nuremberg Principles," are among the legal sources for considering aggression a "crime against humanity." In 1946, the United Nations charter prohibited "aggression," but did not define it. No real consensus on the meaning of "aggression" was reached until the United Nations' "Definition of Aggression" was agreed upon on 14 December 1974. The definition states that "[a]ggression is the use of armed force against the sovereignty, territorial integrity, or political independence of another state, or in any manner inconsistent with the charter of the United Nations." The definition also enumerates (not exhaustively, however) seven specific examples of aggression and sets forth their legal and political consequences. Thus far, no definition of aggression has been embodied in an international convention, although the issue has been much discussed in the multilateral negotiations. The Statute of the International Criminal Court (ICC), as adopted in Rome in 1998, lists aggression as a crime within the jurisdiction of the ICC, but delays any prosecution for aggression until such time as the parties to the statute can agree upon and adopt a definition of the crime. It is noteworthy that the five principles of just war are currently recognized: 1) Presence of just cause (Saving lives), 2) Presence of competent authority to act (United Nations Charter and/or resolution), 3) Right intention in action (Saving lives, again), 4) Reasonable hope of success (Humanitarian as well as military), and 5) Overall proportionality of good (Butler 2003).

Genocide. In 1948, only a few years after the Nazi Holocaust ended, the United Nations General Assembly adopted the text of the Genocide Convention. A legal definition is found in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG). Article 2 of this Convention defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: killing members of the group; causing serious bodily or

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mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group" (http://www.hrweb.org/legal/genocide.html). It is noteworthy that there is another definition targeting other actions and/or inactions leading to the same result. As such, genocide can be expansively described as ethnic conflict causing intentional and targeted destruction, in whole or in part, of an ethnic, religious or national group by opposing ethnic, religious or national group. Therefore saving lives can be a justification of outside intervention (Kaufman 2009). That text of CPPCG enshrined what was then a new international consensus defining and condemning the crime of genocide. The Convention has since achieved very broad international acceptance. In ratifying the Genocide Convention, the parties "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish" (Article I). The parties also agree to enact the domestic legislation necessary to provide effective penalties for those committing genocide. This provision anticipates and establishes a decentralized control scheme under which the crimes defined by treaty are subject to enforcement under the national criminal law of states. At the same time, the Genocide Convention also refers to the possibility that those charged with genocide might be tried by "such international penal tribunal as may have jurisdiction" (Article VI). This set the stage for efforts to create a permanent International Criminal Court.

War crimes. The humanitarian law of armed conflict owes its development in large to the military, who recognized that violence and destruction, in excess of that required by achieving military goals is not only inhumane, but also destructive to the attainment of the political objectives for which military force is used. The most universally accepted source of rules on the regulation of war is the four Geneva Conventions of 12 August 1949, and their two additional protocols of 1977. Almost every country in the world, including the United States, is a party to the Geneva Conventions. The term "war crimes" refers to a broad category of acts prohibited during armed conflict that have come to be recognized as crimes under international law. Persons protected under the Geneva Conventions include wounded, sick, and shipwrecked persons, medical and religious personnel, prisoners of war, and civilians. For the most part, its protections apply to these persons only when they are in the hands of a foreign power. War crimes includes torture, inhuman treatment, the taking of hostages, the destruction of protected property, physical mutilation, the performing of medical experiments, and refusal to release protected yet detained civilians or military personnel after cessation of active hostilities. Most war crimes are defined by treaty, although some are outlawed principally by unwritten customary international law. In some cases, even where there is a treaty prohibiting a specific war crime, the treaty's

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effectiveness is limited by the fact that many states have failed to sign and ratify it. It is noteworthy that many sovereigns, including the United States, incorporated Geneva Convention into its own codes related to Military Justice. The Geneva conventions obligate each party to prevent and suppress acts contrary to their provisions. They directly incorporate an element of criminal law when they identify and define "grave breaches" of their terms. Under Geneva Conventions parties agree (1) to enact legislation under their domestic law to criminalize these grave breaches; (2) to search for those believed to have committed them; and (3) either to prosecute them or to extradite them to another party that will do so. The enforcement regime applicable to these grave breaches became the model for other treaties establishing international crimes such as the Convention Against Torture.

Crimes against humanity. The concept of crimes against humanity was only recently developed, emerging in the early part of the twentieth century, well after the notion of war crimes was developed in the nineteenth century. The Charter of the Nuremberg Tribunal was the first multilateral legal instrument that expressly provided for the prosecution of crimes against humanity as an offense separate from war crimes. The legal concept of crimes against humanity was developed in large part to remedy the argument that international law did not apply to criminal acts directed by a government against its own civilian population, a matter that was traditionally seen as falling exclusively within the sovereignty of a state. The fundamental element in the definition of crimes against humanity is widespread or systematic atrocities committed against civilians, for example, enslavement. States have often objected to extending international law so far into the domestic sphere of activity, and they have proposed, at various times, a number of additional conditions limiting the application of this concept. The 1945 Nuremberg Charter, for example, authorized prosecution for crimes against humanity only if the alleged crimes were committed in execution of or in connection with a crime against peace or a war crime. It is now generally recognized that crimes against humanity can be committed in time of war or in time of peace, and even if there is no armed conflict as such. Nonetheless, states are still reluctant to endow international institutions with the authority to investigate and /or prosecute crimes other than those committed in connection with an international armed conflict. The United Nations has adopted (or at least considered) a number of variations on the definition of crimes against humanity. Among these are a General Assembly resolution endorsing the standards of the Nuremberg Charter, the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind, and the Statutes of the two ad hoc international criminal tribunals established by the United Nations in the 1990s. Negotiations leading to the 1998 adoption of the Statute of the International Criminal Court (ICC) produced consensus on a very narrowly defined core concept of crimes against humanity to be applied by that institution.

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Torture. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by, or with the consent or acquiescence of, a public official in order to achieve certain purposes. The most common purposes are to obtain information or a confession, punishment, intimidation, coercion, or discrimination/persecution. This definition of torture does not include pain or suffering arising only from, inherent in, or incidental to lawful penal sanctions. The Torture Convention has achieved very broad acceptance by states. It establishes an enforcement regime similar to that of the 1949 Geneva Conventions, in which the parties agree to make torture punishable under their domestic law and also agree to take the steps necessary to prosecute those offenders within their jurisdiction. The convention's definition of torture is extremely narrow. It excludes acts of torture committed by individuals in a personal capacity, except in cases where there is some government, or official, complicity. The concept of torture as an international crime is therefore constrained.

Transnational crimes are recognized as a violation of law that involve more than one state in its planning, execution and impact. Transnational crimes are distinct from international crime, which involves crimes against humanity that may or may not involve multiple countries. These offenses are distinguished from other crimes in their multinational nature, which poses unique problems in understanding their causes, developing prevention strategies, and in mounting effective adjudication procedures. Transnational crimes can be grouped into three broad categories involving provision of illicit goods (drug trafficking, trafficking in stolen property, weapons trafficking, and counterfeiting), illicit services (commercial sex and human trafficking), and infiltration of business and government (fraud, racketeering, money laundering, and corruption) affecting multiple countries (Albabese 2011). Transnational crime has become central issue in international affairs, an important factor in the global economy, and an immediate reality for people around the world. Aside from the direct effects – drug addiction, sexual exploitation, environmental damage and a host of other scourges – organized crime has the capacity to undermine the rule of law and good governance, especially in developing countries. An efficient market depends upon the expectation by its participants that the rules governing their economic interactions will be stable and fair. It is the political framework in which markets exist that provides these rules. Without these rules markets function poorly (Art 2009). Aside from the damages directly caused by specific forms of crime, there is one that is common to all: the insidious erosion of state control. Transborder crime displaces state authority, by filling the governance niches neglected by the official structures and by co-opting whatever vestigial state agents remain. In other words,

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transborder crime gradually undermines the authority and the health of the official government. This may lead to state's failure. In 2008 Rice and Patrick defined weak states as countries that lack the essential capacity and/or will to fulfill four sets of critical government responsibilities: fostering an environment conducive to sustainable and equitable economic growth; establishing and maintaining legitimate, transparent, and accountable political institutions; securing their populations from violent conflict and controlling their territory; and meeting the basic human needs of their population. Insofar as the official state structures provide value, this value is threatened by the growth of parallel structures. Perpetrators of transborder crime remain inherently unaccountable, they are not subject to democratic controls, and their chief aim is the enrichment of their membership, not the advancement of society. Where they are predominant, development can become impossible, because any contract that is not to the advantage of the dominant groups will be nullified (Friederichs 2007). Failure to identify the market-driven dimension of transnational organized crime is one of the reasons for its global prevalence today. Law enforcement seems to have had trouble making the leap from focusing on groups to focusing on markets. Police officers, investigators and prosecutors are employed to make cases against individuals and groups of individuals in a particular jurisdiction. They lack the authority and the tools to take on an entire transborder flow. The situation is further complicated because the problem is international while the tools are inherently national. Penal law is a matter of national legislation, which itself is the codification of long-standing cultural norms. The basic jurisdiction of any sovereign state includes the right to define, establish due process and punish crimes. This is time-consuming, laborious and complicated process under any legitimately accepted legal systems. Further, the criminal justice system is an essential mechanism for the maintenance of internal stability. As each breach of the criminal law represents a kind of governance failure, this activity is often regarded as a matter of national security. High-level corruption and bribery of government officials is often involved, which can be embarrassing for affected states. It is noteworthy that the bribery of foreign public officials, first outlawed by the United States in the Foreign Corrupt Practices Act of 1977, is gaining recognition as a crime under international law. The 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions has been signed by thirty-four countries and entered into effect in February 1999. This treaty sets a general standard to be met by its parties in outlawing such bribes, but does not explicitly require states to impose sanctions on corporations as opposed to individuals. It has also been criticized for its failure to establish any uniform penalties for bribery, and for its failure to ban the tax deductibility of bribes paid to foreign officials. Another concern is that only a small number of states have ratified the treaty so far. There are also legal issues involved in discussing the facts of pending cases and strategic reasons

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for silence on ongoing investigations. In short, the subject matter is sensitive, making international information-sharing and multilateral interventions difficult.

Terrorism acts of September 11 fostered new era in responding to international and transborder crime. Terrorism established itself as an extremely dangerous form of criminal activity that needs suppression at both national and international levels. As such it must be viewed as both international and transborder crime where acts of terrorism pose serious threat to international community's fundamental values, viewed as an atrocity against humanity, while its planning, execution and impact transborder. Terrorism is a crime. Historically, crime has been primarily a local issue. The basic jurisdiction of any sovereign state includes the right to define, establish due process and punish crimes. This is time-consuming, laborious and complicated process under any legitimately accepted legal systems. In the United States of America, under adversarial legal system, the power to make certain conduct illegal is granted to Congress by virtue of the Necessary and Proper Clause of the United States Constitution (Art. I, § 8, col. 18). United States Law Code – the law that governs the entire country and used in formulating international treaties language – contains a definition of terrorism embedded in its Title 22, Section 2656f(d) providing in a nutshell: the term "terrorism" means premeditated, politically motivated violence, including training, fundraising, financing and recruitment perpetrated against noncombatant targets by sub-national groups or clandestine agents. Cursory review of the following working definitions adds complexity just within the American attempts to corner said definition. United States Department of Defense uses the following definition: The calculated use of unlawful violence to inculcate fear, intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological. Federal Bureau of Investigations relies on the following: The unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. United States Department of State uses the following definition: Premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience. This definition further states: "For purposes of this definition, the term "noncombatant" is interpreted to include, in addition to civilians, military personnel who at the time of the incident are unarmed and/or not on duty." As such the following elements are present: violence, fear, government, civilians, unarmed/off duty military, noncombatants, society, political/religious/ideological/social goals, sub-national groups, clandestine agents and audience. What complicates defining terrorism today is its transborder and international nature, which provides additional layers of input from different sovereigns and international institutions.

The Arab Convention for the Suppression of Terrorism was adopted by the Council of

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Arab Ministers of the Interior and the Council of Arab Ministers of Justice in Cairo, Egypt in 1998.Terrorism was defined in the convention as: Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources. The European Union defines terrorism for legal/official purposes in Art.1 of the Framework Decision on Combating Terrorism (2002). This provides that terrorist offences are certain criminal offences set out in a list comprised largely of serious offences against persons and property which: given their nature or context, may seriously damage a country or an international organization where committed with the aim of: seriously intimidating a population; or unduly compelling a Government or international organization to perform or abstain from performing any act; or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization. The United Kingdom's Terrorism Act 2000 defines terrorism to include an act "designed seriously to interfere with or seriously to disrupt an electronic system". An act of violence is not even necessary under this definition.

United Nations Security Council Resolution 1566 (2004**)** gives the following definition: criminal acts, including those against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act. United Nations panel on Combating Terrorism, on March 17, 2005, described terrorism as any act "intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act." United Nations, unable to bring its members to consensus on defining terrorism, provides the following all inclusive statement from its General Assembly Resolution 60/1 (2005): "We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security". As such and for now definition of terrorism lies in the terror's manifestations and remains within individual sovereign's domain. Therefore, we know terrorist act when we see one! Or do we? It is noteworthy that laws or statutes must define crimes with certainty. Any citizen and the courts must have a clear understanding of a criminal law's requirements and prohibitions. The elements of a criminal law must be stated explicitly, and the statute must embody some reasonably discoverable standards of

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guilt. If the language of a statute does not plainly show what the legislature intended to prohibit and punish, the statute may be declared void for vagueness. In deciding whether a statute is sufficiently certain and plain, the court must evaluate it from the standpoint of a person of ordinary intelligence who might be subject to its terms. A statute that fails to give such a person fair notice that the particular conduct is forbidden is indefinite and therefore void. Courts will not hold a person criminally responsible for conduct that could not reasonably be understood to be illegal. Mere difficulty in understanding the meaning of the words used, or the ambiguity of certain language, can nullify a statute for vagueness.

Above-stated review of terrorism's definition (or lack thereof) reveals current deadlock nationally and internationally to arrive at a universally acceptable definition. Beyond sub-national and clandestine groups as perpetrators of terrorism, some commentators and sovereigns see terrorism as a tool of states also, viewing, for instance, the allied strategic bombing campaigns during World War II, and the dropping of two atomic bombs by the United States against Japan during the same conflict, as examples of state terrorism. Past and present totalitarian regimes such as those, which once existed in Germany, Italy, Spain, Soviet Union and China, as well as, more recently, the military dictatorships, which have previously ruled some South American countries as Chilean junta and Panama drug state could also been debated to use terrorism. So, too, could some of today's governments such as Iran, Syria, Libya and Israel complicating definitional efforts by directly participating in covert acts, which could be described as terrorism, such as killing and kidnapping opposition leaders. Adding to the mix is the different legal systems, cultural and historical characteristics of different sovereigns combined with its vastly varying political goals. Further, for definitional purposes, it must be recognized that there are no limits on issue areas motivating terrorist groups. In fact we must not recognize terrorism as a goal in itself, but just a tool to achieve goal. Therefore any aggrieved party can resort to terrorism to address its grievances. Typical motivation includes promotion of religion, politics and socioeconomic objectives. Shughart (2006) in his review of terrorism is true to political, social and religious motivation of terrorism in separating terrorism history in three "stylized" waves: Islamists movements, left wing movements, national liberation and ethnic separatism. Therefore, we can define killings of tourists in Egypt in so-called Luxor massacre in 1997 (62 dead) by Al-Gama'a al-Islamiyya (designated as terrorist organization by the United States) and explosion in Sharm El-Sheikh in 2005 killing 88 people as acts of terrorism motivated by political/religious factors. Said killings caused harm to political structure of the Egyptian government by affecting tourism industry. However, motivators as financial gain and enrichment may guide perpetrators of terrorism independent from religious, political or socioeconomic objectives. Kidnapping of foreign tourists for ransom in Mexico and piracy from Somalia are examples of terrorism

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where political/social/religious motivators have neither been articulated by the perpetrators nor by the commentators. Yet, their actions do cause harm to political stability in Mexico affecting flow of tourists and as sadly established by the killings of American sailors in 2011 by Somali pirates raise questions about safety of Americans around the globe. Therefore, universal definition of terrorism combining elements of international and transborder crime is far from being developed. Yet it appears to be necessary for effective international prosecution of the crime of terrorism.

Constructivism is a fast developing theory in understanding International Relations and International Security. Contemporary discussion of international security and its evolution must rest on the inclusiveness afforded by constructivism theory. Constructivism provides that human behavior determines their identity shaped by society's values, history, practices, and institutions. Constructivists hold that all institutions, including the state, are socially constructed and reflect an "inter-subjective consensus" of shared beliefs about political practice, acceptable social behavior, and values (Pauly, 2011). Constructivism provides for a broad process of analyzing and articulating global events within multitude of social structures to find consensus. Alexander Wendt (1995) views the analyzing of social structure as a tool to shape said actors' identities and interests within the international system. (Wendt, 1995) Constructivism looks at the shared understanding of social actors' within any given system and then projects it as actors' function within broader events. As such, constructivism offers inclusive understandings of a number of the central themes in international relations theory, including: the meaning of anarchy, balance of power, the relationship between state identity and interest, an elaboration of power, and the prospects for change in world politics (Hopf 1998, 172). "Constructivists have taken up the idea that states form more than a system – that they form a society – and they have pushed this idea to new levels of theoretical and conceptual sophistication" (Reus-Smit 2009). Any scientific theory or academic development depends on its developed paradigm. Paradigm is a set of assumptions where said theory or development rests. In the arena of international relations inclusive of international security paradigm is meant as a set of assumptions about how to study politics (Barkin 2003). Assumptions utilized by constructivists are more inclusive than other theories. As such inclusion of additional assumptions broadens the scope of the analysis. This line of argument suggests that constructivism can be viewed as an additional opportunity to examine International Relations (Barkin 2003). Constructivism is characterized by an emphasis on the importance of normative as well as material structures, on the role of identity in shaping political action and on the mutually constitutive relationship between agents and structures (Reus-Smit 2009). Ruggie (1998) asserts that "[s]ocial constructivism seeks to account for what neo-utilitarianism assumes: the identity and/or interests of actors. It views international politics on the basis of a more 'relational

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ontology'… than the more atomistic framing of neo-utilitarianism". Furthermore, it seeks to incorporate culture, norms, and most importantly ideas into the study of international relations. Ruggie (1998) urges for the inclusion of culture-such as the norm of non-intervention- and identity in international relations discourse. Wendt (1999) articulated "the structures of human association are determined primarily by shared ideas, rather than material forces, while the identities and interests of purposive actors are construed by these shared ideas rather than given by nature". Constructivism, therefore, demands inclusion, accounting, tabulation, review and analysis of additional variables before reaching theoretical conclusions. This notion to recognize the state as a society as well lies in the core of constructivism paradigm. Adaptation of expansive, multidisciplinary paradigm is a necessary prerequisite to analyze global phenomenon as terrorism. It will require development of innovative methodology to effectively connect all of said paradigm's disciplines in a coherent unit. Constructivism as an explanatory theory of international relations serves well to identify and describe areas within the international system that undergo explanation based on social and cultural situations. Further, Ralph Pettman (2000) adds that human's ability to articulate utilizing language skills provides for more inclusive understanding of world affairs. It is with words that we record the world affairs and thus write history and therefore, it is these words that can be inclusive in finding elusive definitions describing events.

Constructivism lands itself as globalization's contemporary. It accounts for societal changes. Societies are fluid. Its qualities change with time and these changes recreate social constructions (Pauly, 2011). Constructivism provides understanding of globalization as a normative process that results in the promoting of social change (Wendt, 1995). Constructivism provides for respected role of each society within international system including different societal norms, practices allowing its inclusion in relationships that states pursue and develop between themselves in order to pursue their individual and ultimately mutual interests. Constitutive norms define an identity by specifying actions that will cause others to recognize that identity and respond appropriately (Hopf, 1998). As such, constructivism is readily adjustable with time promoting ongoing, more inclusive cooperation between sovereigns necessary to develop effective tools to combat terrorism.

CONCLUSIONS

In 1945 victorious sovereigns managed to agree on the following principles as a foundation for international law, which became known as Nuremberg Principles later to be adopted in the United Nations' Charter. Nuremberg Trials came to life as a result of human consensus that international action is necessary to effectively deter future atrocities. Many sovereigns with different, if not conflicting, political ideologies stemming from different histories, societal, political and economic norms were able to reach

comprehensive agreement in developing said principles. Said principles provide in a nutshell that: 1) Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment; 2) The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law; 3) The fact that a person who committed an act which constitutes a crime under international law acted as Head of or responsible government official does not relieve him from responsibility under international law; 4) The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him; 5) Any person charged with a crime under international law has the right to a fair trial on the facts and law; 6) The crimes hereinafter set out are punishable as crimes under international law: a) **Crimes against peace**: (i) Planning, preparation, initiation or waging of a war of or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i); b) **War Crimes**: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation of slave labor or for any other purpose of the civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; c) **Crimes against Humanity**: Murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial, or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime and 7) Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

The codification of the Nuremberg Principles reflected a changing ideology - one of universally applied law. An image of an international society became more predominant. This included language used by non-governmental organizations that focused on international humanitarian laws perceived as an inherent right for all mankind. Ralph Pettman (2000) stated that human's ability to articulate utilizing language skills provides for more inclusive understanding of world affairs. It is with words that we record the world affairs and thus write history and therefore, it is these words that can be inclusive in finding elusive definitions describing events. The Nuremberg Principles conveyed a cultural message even though there was no permanent ICC for enforcement (Rothe and Mullins 2006).

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Creation of ICC in 2002 came yet again after the atrocities of terrorism came to universal focus in 9/11. Creation of International Criminal Court represents an evolution in international law and strengthens international relationships specifically in area of combating international and transborder crime. It provides a venue for international cooperation notwithstanding ideological, political and legal divide between the sovereigns. Notwithstanding the fact that creation of ICC is a paramount step in international criminal justice system, there is extremely limited amount of research examining its current influence and mapping its possible, if not necessary development. Presence and operation of ICC changed the landscape of criminal justice by extracting it (at least relatively) from the local arena where states maintained monopoly on crime's definition within its own social, economic, political, cultural and religious interests and placing criminal justice within international debate. As such, actions that are deemed to violate international criminal law, humanitarian law, common law and states' own domestic law committed by either individual actors or state actors even for sovereign's interest can be internationally criminalized and adjudicated accordingly (Kramer and Michalowski 2005; 448).

Terrorism established itself as an extremely dangerous form of criminal activity that needs suppression at both national and international levels. As such it must be viewed as both international and transborder crime where acts of terrorism pose serious threat to international community's fundamental values, viewed as an atrocity against humanity, while its planning, execution and impact transborder. Defining terrorism and its prosecution must account for its complexities including, but not limited to history, culture, politics, ideology, economics and time. Currently nations are unable to come to consensus defining terrorism due to the differences in legal systems, cultural and historical characteristics of different sovereigns combined with its vastly varying political goals. Further, terrorists' motivations are different as well, including but not limited to promotion of religion, politics and socioeconomic objectives.

As such ICC, developed on international consensus, is uniquely positioned to prosecute terrorism apolitically with indifference to religious and socioeconomic goals of the perpetrators. However, as with aggression, acceptable definition of terrorism is necessary. Utilization of Constructivism provides for inclusion of participants' political, historical, socioeconomic and religious values in an assumption that deterrence of terrorism unites actors, leaving their differences acknowledged, yet not divisive to achieve the final goal. As such, a two-step process must be recognized: 1) development of universally accepted definition of terrorism and 2) development of universal criminal justice system capable to prosecute, enforce and ultimately deter terrorism.

Constructivism provides a framework for the development of universally accepted definition of terrorism. Above listed review of universally accepted definitions

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of crimes as aggression (although not fully developed); genocide, crimes against humanity and torture provide for long and complicated history of debates not only promoted by humanitarian ideals of policymakers, academicians and practitioners, but by historical events focusing the light on the shear necessity of consensus. Constructivism provides for a broad process of analyzing and articulating global events within multitude of social structures to find consensus. It views the analyzing of social structure as a tool to shape said actors' identities and interests within the international system (Wendt, 1995). Constructivism looks at the shared understanding of social actors within any given system and then projects it as actors' function within broader events. As such, constructivism offers inclusive understandings of a number of the central themes enabling participating actors to find consensus. Universally acceptable definition of terrorism lies within said broad consensus inclusive of political, societal, economic, historic and religious norms of different sovereigns. Wendt (1999) articulated "the structures of human association are determined primarily by shared ideas, rather than material forces, while the identities and interests of purposive actors are construed by these shared ideas rather than given by nature". Shared idea of deterring terrorism lands itself as a common purpose for willing actors to construe its norms in a way consistent with said goal's achievement.

Constructivism provides a framework to develop universally accepted judicial system capable of prosecuting, enforcing and ultimately deterring terrorism. Constructivism provides understanding of globalization as a normative process that results in the promoting of social change (Wendt, 1995). Development of criminal justice system which ensures legitimacy of said institutions to control the process will take universal effort. Rome Statute producing ICC can be recognized as a stepping stone to develop said institution, as Nuremberg Principles laid foundation to the United Nations. Constructivism provides for respected role of each society within international system including different societal norms, practices and shared allowing its inclusion in relationships that states pursue and develop between themselves in order to pursue their individual and ultimately mutual interests. Deterring terrorism is a mutual goal indeed. Constitutive norms define an identity by specifying actions that will cause others to recognize that identity and respond appropriately (Hopf, 1998). As such, constructivism is readily adjustable with time promoting ongoing, more inclusive cooperation between sovereigns necessary to develop effective tools to combat terrorism.

How well this challenge will be met remains to be seen. No one foresees a reversion to the Nuremberg Principles notwithstanding their position on the current jurisdiction and function of the International Criminal Court. However, it is not impossible to foresee nationalist or populist backlashes within various countries against what is seen to be excessive international activism. If there is one lesson that the history of international law

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teaches, it is that the world at large—the 'outside world' if you will—has done far more to mold international law than *vice versa* (Neff, 2003). By the beginning of the twenty first century, international cooperation is changing the world to a greater extent than ever before. But it is (or should be) sobering to think that the great forces of history—religious, economic, political, psychological, scientific—have never before been successfully 'managed' or tamed. Constructivism provides an opportunity to go further. Perhaps the most interesting chapters of our history remain to be written.

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Стаття присвячена нагальній проблемі міжнародної та трансграничної злочинності, що становить постійну загрозу для безпеки міжнародного співтовариства. Тероризм розглядається як особливий злочин, що поєднує елементи міжнародних та трансграничних правопорушень. Привертаючи увагу до того факту, що для успішної боротьби з тероризмом слід надати загальне визначення тероризму та створити міжнародні інституції, які розглядатимуть злочини, пов'язані з тероризмом, автор висвітлює історію створення, структуру та завдання Міжнародного кримінального суду (МКС), звертається до теорії конструктивізму і доводить, що саме в рамках застосування теорії конструктивізму можливо створити прийнятну для всього світу судову систему, здатну здійснювати обвинувачення, притягувати до відповідальності і зрештою стримувати тероризм.

***Ключові слова**: глобалізація, тероризм, міжнародна безпека, конструктивізм.*

Статья посвящена актуальной проблеме международной и трансграничной преступности, представляющей постоянную загрозу безопасности международного сообщества. Терроризм рассматривается как особенное преступление, включающее элементы международных и трансграничных преступлений. Обращая внимание на то, что для успешной борьбы с терроризмом следует дать общее определение терроризма и создать международные институции, которые будут рассматривать преступления, связанные с терроризмом, автор освещает историю создания, структуру и задачи Международного уголовного суда (МУС), обращается к теории конструктивизма и приходит к выводу, что именно в рамках применения теории конструктивизма возможно создать приемлемую для всего мира судебную систему, способную осуществлять обвинение, привлекать к ответственности и в конечном итоге удерживать от терроризма.

***Ключевые слова**: глобализация, терроризм, межнародная безопасность, конструктивизм.*

The article addresses an urgent issue of international and transborder crimes that represent immanent threat to national and international security. Terrorism is viewed as a unique crime combining elements of international and transborder offenses. Focusing on the fact that for successful terrorism combating, international community needs to adduce a universal definition of terrorim and create international forums to adjudicate terrorism

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related crimes, the author highlights history, structure and function of the International Criminal Court (ICC), focuses on constructivism theory and concludes that it is the utilization of constructivist theory that provides a framework to develop a universally accepted judicial system capable of prosecuting, enforcing and ultimately deterring terrorism.

***Key words**: globalization, terrorism, international security, constructivism.*

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