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Part I Introduction, 2 What is Transnational Criminal Law?

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(p. 17) 2 What is Transnational Criminal Law?

2.1 Introduction

In the 1970s, the UN's Crime Prevention and Criminal Justice Branch developed a concept of transnational crime as the 'criminal activities extending into and violating the laws of several countries'.[1] The Director of the Branch and author of this concept Gerhard Mueller noted: 'The media, and indeed, many criminologists, think of any form of criminality, which transcends even a single international frontier as "international crime". That is far from accurate.'[2]

In a working paper delivered to the Fifth UN Crime Congress in Geneva in 1975 the Branch argued that 'a trend from national to transnational and finally international action is clearly discernible' in the suppression of crime.[3] This transnational action relies implicitly on Jessup's definition of transnational law as 'all law which regulates actions or events that transcend national frontiers',[4] but limits it to action against transnational crime. Transnational criminal law thus describes the law that suppresses crime that transcends national frontiers;[5] it can be defined as 'the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects'.[6]

States have long been interested in suppressing crime that occurs in or emanates from other states. The difficulty has been in deciding precisely what degree of international cooperation is required to take effective action. In 1931 the League of Nations Fifth Committee produced a lengthy report for the League Assembly on 'the possible intensification of the war upon crime through international cooperation'.[7] It revealed some confusion about how to achieve this goal. For the League Assembly the goal (p. 18) appeared to be 'achieving a gradual unification of criminal law and the cooperation of states in the prevention and suppression of crime'.[8] It recommended 'standardization' of certain criminal laws and procedures necessary for the suppression of internationally significant offences. Britain's response was illustrative of more pragmatic concerns. It thought standardization could only be achieved in regard to specific topics such as the traffic in woman and drugs because here there was some hope of unanimity. It did not, however, consider unification of criminal laws the goal; rather the goal was to address the problem of policing crime through prosecution and punishment.[9] Kuhn commented at the time:

> The crux of the problem is that the divergences of law and procedure be fully recognized and yet that the administration of criminal police and criminal justice be coordinated throughout the world by a full exchange of information, by active cooperation in apprehending criminals, and in a logical and just division among the various countries of their sovereign jurisdiction to punish for crime.[10]

International society still struggles to settle clearly whether the means to the goal of suppression of transnational crime is substantive standardization of national criminal laws or a more utilitarian procedural cooperation of dissimilar systems. This uncertainty has led to some indeterminacy about the nature of transnational criminal law.

2.2 Transnational Criminal Law as a Legal System

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2.2.1 Transnational criminal law distinguished from transnational criminal procedure

Transnational criminal law consists of (a) horizontal international obligations between states to criminalize and cooperate, and (b) the vertical application of criminal law and procedures by those states to individuals in order to meet these international obligations. This transversal arrangement exists in respect of some crimes, such as hijacking, and not in regard to others, such as theft. If a thief crosses a border into another state and their extradition is requested, then the offence becomes an inter-state—some might say transnational—legal problem. But just because theft is an offence from Kiribati to Kazakhstan does not mean that states are under an international obligation to adopt theft as an offence or to extradite the thief. A treaty obligation to criminalize theft would illustrate that a transnational interest had manifested a degree of coordinated concern about the offence.[11] Theft is left to national law because there is insufficient transnational interest in national coordination of substantive criminalization or specific allied procedural cooperation. This is because in its general form it is so commonly criminalized in national law and many instances are so trivial or parochial. Only specific forms of theft such as theft of cultural property discussed in Chapter 14 are of transnational interest. The transnational enforcement of a national (p. 19) crime that is not the product of such an international obligation through, for example, a bilateral extradition treaty, is, however, more accurately described as transnational criminal procedure than transnational criminal law because of the absence of any reciprocal obligation to criminalize.[12]

2.2.2 The inter-state dimension

The history of most transnational crimes suggests that their development has been driven by the desire to extend national interest across borders. The reciprocal cooperation of other states is required because of the limitations sovereignty imposes on the validity and effectiveness of criminal law outside a state's territory. A state acting alone cannot succeed in suppressing serious threats from non-state actors beyond its borders, so states cooperate out of mutual interest, as a matter of international necessity.[13] As the Supreme Court of Canada put it in *Libman v Queen*,[14] '[i]n a shrinking world, we are all our brother's keepers'. But Nye notes that in international relations '[c]ontrary to some rhetorical flourishes, interdependence does not mean harmony. Rather, it often means unevenly balanced mutual dependence.'[15]

The adoption of an international instrument to provide for a mutual obligation to criminalize conduct provides evidence of a legal inter-sovereign relationship, and distinguishes transnational criminal law from international relations. States usually rely on a crime control treaty or 'suppression convention' to multilateralize this transnational interest. From early beginnings such as Britain's bilateral anti-slave-trading treaties in the early nineteenth century,[16] through early multilateral treaties like the 1929 Anti-Counterfeiting Convention,[17] to the large framework conventions of the late twentieth century such as the 1988 Drug Trafficking Convention[18] and more recent emphasis on regional treaties, the suppression conventions have been the main vehicle for state coordination against transnational crime. They provide for a tortious or delictual treaty obligation on states parties to criminalize specified activities in their national law and to engage in international cooperation in regard to these activities. Article 20 of the 1794 Jay Treaty between Britain and the US[19] is a very early example:

> The Contracting Parties shall not only refuse to receive any Pirates into any of their Ports, Havens or Towns, or permit any of their Inhabitants to receive, protect, (p.

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> 20) harbour, conceal or assist them in any manner, but will bring to consign punishment all such Inhabitants as shall be guilty of such acts or offences.

It sets a model for all such treaties, requiring the contracting parties to criminalize the specified behaviours, establish their jurisdiction, and enforce it.

Suppression conventions generate a downward cascade of norms which impacts heavily on domestic criminal law. Some states directly transpose these norms into their national law, others translate their essence.[20] The traffic is not all one way; the relationship between the vertical and horizontal elements is recursive in the sense that adaptations in national law can feed back into alterations of the international template and on to other national laws.

There are multiple reasons why some harmful activities generate sufficient transnational interest leading to calls for international cooperation: the level of societal anxiety, media interest, strategic concerns, morality, security, and so forth. The legitimate boundaries of this transnational interest are not clear, and depend on the influence of interested states and willingness of others to go along. The sum of these cosmopolitan concerns is much 'thicker' in regard to some offences than others; currently, for example, there is more concern about terrorism than environmental crime. This imbalance is unsurprising because certain states and groups of states have a greater capacity to project self-interest than others. The history of transnational criminal law reveals that many of the suppression conventions are rooted in the crime control policies of powerful Western states battling to block criminal flows originating in developing states. In particular, Britain—the nineteenth-century 'global policeman'—and the US—the twentieth-century global policeman—have driven the development of transnational criminal law in directions that suited them. An 1817 Anti-Slavery Convention between Great Britain and Portugal is an expression of the overweaning transnational interest of a more powerful state, and of how that interest is to be achieved through normative harmonization with the laws of the powerful state.[21] Article III reads

> His Most Faithful Majesty engages, within the space of two months of the ratifications of the Present Convention, to promulgate in His Capital, and in other parts of his dominions, as soon as possible, a Law, which shall prescribe the punishment of any of His Subjects who may in the future participate in the illicit traffic of Slaves … and *engages to assimilate, as much as possible*, the Legislation of Portugal in this respect, to that of Great Britain.

State sponsors of new transnational crimes usually turn to their own law to provide a model. The 'forerunner' legislation for the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention,[22] for example, is the US Foreign Corrupt Practices Act.[23] Regional political bodies can act as normative entrepreneurs, hawking their regional models for transplantation. For example, the Council (p. 21) of Europe Cybercrime Convention[24] was effectively cloned with strong European support in the Economic Community of West African States (ECOWAS) Directive on Fighting Cybercrime.[25] Self-interest can also be cajoled into paternalistic global moralism by individual norm entrepreneurs. For example, when the many colonial powers attending a conference on the control of opium held in 1925 in Geneva failed to limit the production of opium to the chagrin of the US, one of the architects of the global drug control system, the Episcopal Bishop to the Philippines Charles Brent appealed to them: 'Is it just for an International Conference of such weight and solemnity as this to deal with the ten percent of the subject which affects Europe and America, leaving almost untouched the other ninety percent which affects Asia?'[26]

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This normative activity produces what Nadelmann calls ‘global prohibition regimes’—international regimes prohibiting piracy, slavery, drugs, and so forth established for pragmatic purposes such as the elimination of safe havens, but which also serve to enforce the contingent, parochial morality of their authors.[27] That the goals of these regimes can shift over time is nicely illustrated by this quote from the pirate William Kidd’s indictment in 1701. He was charged because he did

> pyratically and feloniously set upon, board, break, and enter a certain ship called the *Quedagh Merchant* and pyratically and feloniously assault the mariners of said ship, and put them in corporeal fear of their lives, and did pyratically and feloniously steal, take, and carry away the said ship, with … seventy chests of opium …[28]

As new regimes are added expanding the subjects of regulation, transnational criminal law expands. The different prohibition regimes emerge and evolve through different phases of interstate order, exhibiting looser and tighter degrees of coordination, depending on the international context at the time. Their development, however, is governed by the dominant political perceptions that they are necessary to respond to the problem of crime control.[29]

The construction of these prohibition regimes does not necessarily require formal treaty obligations.[30] The binding resolutions of international organizations such as the Security Council have been used to build prohibition regimes in regard to terrorism.[31] It is uncertain whether counterterrorism is a special case or whether this (p. 22) ‘supreme’ executive law-making will be used to suppress other transnational crimes in the future. A more commonly used normative source is soft law. The conferences of states parties to suppression conventions and the UN’s functional commissions like the Commission on Narcotic Drugs can and do adopt resolutions, which do have domestic legal effects. The virtues of soft law are that it is faster to make, easier to adapt to changing patterns of transnational criminality, and in many states can be implemented directly by national executives without domestic legislation. Perhaps the ‘hardest’ soft laws are the recommendations of the Financial Action Task Force (FATF),[32] which provides the governing standards on anti-money laundering (AML) and counter-terrorist financing (CTF). They have proved powerful instruments in fleshing out the AML and CTF regimes because they have allowed a small group of powerful states to achieve a consensus and then implement these norms more broadly through economic pressure. There is, however, a clear tension between using treaties to formalize cooperation in the suppression of transnational crime, and the turn to novel forms of softer power by those states most interested in suppression—the dominant powers in the OECD and the G7/G8. As Rose puts it, the formation of the FATF was a ‘pivot away’ from the UN’s approach to suppression.[33] She points out that the UN in its treaty making is ‘trapped’ in meeting general concerns in a way that less representative organizations like the FATF are not.[34] It is true that treaties capture a response to transnational crime that is by definition outdated by the time it is adopted and implemented. More intriguingly, the decisions of these international organizations and those of international banking organizations,[35] transnational corporations,[36] non-governmental organizations (NGOs),[37] and transnational law enforcement agencies[38] can appear disconnected from state authority and consent[39] and suggest the emergence of a separate transnational criminal law-making space.[40]

Although transnational criminal law does require a horizontal element, it appears that this can be constituted by a treaty, a custom, a resolution, soft law, any form of (p. 23) international arrangement making for coordination of approach among states and for legal acts at a domestic level. Different kinds of international instrument can be used for different purposes, depending on levels of domestic resistance to change. It should be noted, however, that the suppression conventions provide a penal anchor for much of this transnational governance, even when it takes on a more administrative or regulatory form.

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The vertical dimension of transnational criminal law can also be deepened to include all forms of coercive power operative in the transnational space including regulatory offences, labour laws, immigration laws, property laws, even states' enforcement of contract, corporate, and banking laws.[41] This more sociologically complete picture has the advantage of capturing the full range of activities against transnational crime, penal and non-penal, in both the international and vertical dimensions of suppression of transnational crime. It risks doctrinal coherence,[42] but doctrinal incoherence is common in criminal justice systems that embrace administrative control of crime. The view of transnational criminal law being described here does, however, subordinate all these elements to state interest[43] mainly because powerful states still control the regulatory agenda.[44]

2.2.3 Transnational crimes and penalties

The obligation to criminalize in these international instruments (whether a clear treaty obligation or in a 'softer' form) ultimately serves two purposes: (i) to suppress the targeted activities domestically; and (ii) to enable inter-state cooperation in this suppression by ensuring double criminality (ie ensuring the same crime exists in both states). The suppression conventions leave the right to criminalize—the *ius puniendi*—with the state. Thus the 'crimes' in the conventions are not 'crimes' at all. In order to protect sovereignty over criminal justice, the suppression conventions are not generally designed to be self-executing. The treaty provisions are 'incomplete' in that the international norms they set out are not fully defined. References in provisions like article 1 of the Hague Hijacking Convention (discussed in Chapter 7) to the 'unlawful' commission of offences confirms, somewhat circularly, that the convention itself does not criminalize that action, but that national law does, and any exemptions are for national law. It is left to national criminal law to complete them by giving them penal authority within domestic conceptions of legality. The suppression conventions thus oblige parties to adopt a base line of criminalization and punishment and they cannot adopt narrower offences or more lenient punishments without being in breach of their treaty obligations; this does not prevent them from adopting offences with a broader scope or more severe punishments. The suppression conventions leave parties a very broad discretionary margin of appreciation as how precisely to implement their (p. 24) criminalization provisions through incorporation of standard provisions such as article 11(6) of the UN Convention against Transnational Organized Crime:[45]

> Nothing contained in this Convention shall affect the principle that the description of offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of the State Party and that such offences shall be prosecuted and punished in accordance with that law.

The legislative context in which transnational criminal laws are applied thus determines their meaning in a particular state,[46] and as Wise notes, the 'application of criminal law involves any number of local peculiarities'.[47] For dualist and weakly monist states which require domestic criminalization, further legislation enacting the offence produces the crime. Even if the international obligation is applied directly into national law the resulting criminal laws derive their normative authority from the state that applies them, not from international law. In terms of article 8(2) of Portugal's Constitution, for example, treaties are self-executing except for provision for criminalization; they must be concretized by adoption in domestic law. Article 9 of the Criminal Law of the People's Republic of China (CLPRC), in further example, provides that the CLPRC shall be applicable to all crimes

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which are stipulated in international treaties concluded or acceded to by China. It is article 9 which makes the provisions they contain crimes in Chinese law.

The form of the national norm is, however, shaped by international obligation, although the degree differs from norm to norm and state to state. Paradoxically, where the criminalization provision in a suppression convention is entirely novel it will tend to be followed very closely by national legislative drafters.[48] But where offences exist prior to the development of the suppression convention, parties to the treaties will tend to adapt and thus dilute the substance of the treaty obligations into existing statutory schemes.[49]

The high cost of developing suppression conventions suggests that states would only bother to use them to criminalize cross-border activity if that activity was serious. However, much of transnational criminal law involves systems not of crimes *malum in se* (evil in themselves) but of crimes *mala prohibita*—regulatory offences involving exchanges of goods and services which usually do not harm those involved in the exchange but where wrongfulness derives from violation of a rule laid down for policy reasons by states.[50] Only in crimes like human trafficking and terrorism is violence intrinsic to the 'production' of the services. It is not usually the intrinsic nature of the activity but rather the inability to control transnational criminal markets that provoke (p. 25) international cooperation. Logically then these offences depend on a stipulation of what is lawful as opposed to unlawful behaviour in regard to a particular good or service. Two broad forms of prohibition system can be distinguished. In absolute prohibition systems the scope of lawful behaviour is usually very narrowly prescribed by the relevant suppression conventions. For example, the drug conventions do not prohibit drugs—they spell out that only supply and use of drugs for 'medical and scientific purposes' is lawful, and they expressly prohibit all other forms of behaviour.[51] In derivative prohibition systems the scope of lawful behaviour is broad and variable, and the treaty will not spell it out. For example, the Protocol to Eliminate the Illicit Trade in Tobacco Products[52] does not spell out all forms of lawful behaviour, but it does spell out the situations in which otherwise lawful behaviour becomes unlawful, such as the non-payment of income duty on the importation of tobacco.[53]

The suppression conventions usually define the (i) material/conduct/*actus reus* elements and (ii) mental/fault/*mens rea* elements of these crimes. A product of lowest common denominator inter-state agreement, these definitions may only set a standard designed to produce the degree of correspondence between national definitions of crimes sufficient to enable international cooperation.

The kinds of conduct criminalized vary widely from suppression of actions that use violence and are heavily invasive of human rights such as hijacking to others more regulatory in nature such as import of contraband of various kinds. The different conventions describe in great detail a bewildering array of forms of conduct (eg 'trafficking' in persons involves inter alia the 'recruitment' of persons), circumstances (eg piracy must take place 'on the high seas'), states of affairs (eg drug 'possession'), and causation (eg unlawful acts against civil aviation include inter alia the causing of damage to an aircraft rendering it 'incapable of flight'). There is only very limited provision for liability for omissions in situations such as the corruption offence of failure to perform an official function, although this is likely to increase as conventions set out more complex regulatory frameworks in areas such as the environment. Only a very few offences include a specific transnational element among their conduct elements. An example is article 3 of the 2010 Arab Convention on Combating Information Technology Offences, which include both cross-border conduct and effects.[54] Most transnational crimes are defined without a transnational element. An offence such as money laundering, for example, can encompass conduct that crosses borders as well as conduct that does not. The omission is deliberate; the conventions are designed to suppress intra-state as well as inter-state offences because of the tendency of the former to lead to the latter. Transnational criminal law therefore includes behaviour that (i) actually crosses borders; (ii) has substantial effects in other states; and (iii) local crime that has only the

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most tenuous potential extraterritorial impact but which is of transnational interest whether for moral[55] or other more prudential reasons.

(p. 26) *Mens rea* standards are normally only set in more recent treaties, and then in a subjective form because of the need for states to meet legality obligations. This usually means they require intention if the objective element takes the form of an action (eg intention to supply drugs), and knowledge if there is a circumstantial element involved (eg knowledge that funds are going to be used for terrorist financing, knowledge that the person assaulted has an internationally protected status, knowledge that the material stolen is nuclear). The conventions thus usually require criminalization of 'intentional' commission of the offence; this does not preclude a party of its own accord broadening the scope of the offence by relying on principles to increase the scope of the offence like *dolus eventualis*, recklessness, or negligence. A trend towards risk-based preventive criminalization is clearly indicated by heavy reliance on ulterior intentions or knowledge in terrorism offences (eg the purposive element in hostage-taking of compelling a government to do or abstain from doing an act), usually in order to restrict liability but also to anchor liability where the conduct itself is fairly innocuous. Negligence is seldom stipulated as a form of fault, although many of the later conventions expressly permit the use of inference to establish this subjective element.

In an effort to extend criminal liability 'up' the chain of involvement, most of the suppression conventions provide specifically for complicity for secondary participation (aiding and abetting, accomplice liability) and in more recent treaties for common purpose/ joint enterprise liability as well as inchoate forms of liability such as criminalize 'association or conspiracy' and 'attempts'. The conventions never define these provisions, leaving it to the parties which may rely on the general provisions in their domestic criminal law to cover these obligations. However, the introduction of 'alien' doctrines may require fundamental change of domestic principles of participation and obligations of this kind are commonly subject to chapeaus that make their application dependant on compatibility with the basic legal or constitutional concepts of the parties. Again, in spite of the alien nature of the notion to many states' legal systems, an increasing number of suppression conventions oblige parties to provide for the criminal liability of legal persons because of the involvement of companies in transnational crime, although they do not prescribe what theory of liability should be followed.

The suppression conventions make no provision for defences in the sense of justifications or excuses, but they do, on occasion, remove defences. The anti-terrorism conventions have, for example, progressively removed any defence based on political, ideological, racial, ethnic, or religious considerations if the accused possessed an intention to terrorize.

The suppression conventions say very little about penalties, because of massive variation in value systems and punishments schemes among states. The little that can be gleaned from the suppression conventions in regard to punishment includes:

(a) the agreement in the early suppression conventions to the application of severe penalties to these offences;

(b) provisions in later treaties to apply severe penalties proportional to the gravity of the offences; and

(p. 27) (c) provisions in regard to selected crimes to apply certain aggravating factors, such as the involvement of an organized criminal group.

Transnational criminal law provides no further guidance on severity, proportionality, or aggravation—these remain national legal variables (both in legislation and in the sentences handed down by judicial organs).

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These substantive crimes and penalties in transnational criminal law are discussed in detail in Part II of this book. The chapters roughly follow the historical development of the substantive transnational crimes in order to illustrate the evolution of transnational interest and the modes adopted to suppress transnational crime. The analysis proceeds by first identifying the nature of the activity suppressed, in order to get some idea of why these offences were created and how they are likely to be applied. The bulk of each chapter provides a technical legal analysis broken down into the material and mental elements of a crime required for a conviction and the principles to be applied to punishment or sentencing. Note is made of any provisions for different forms of complicity (perpetrators, accomplices) and inchoate offences (attempts, conspiracy, incitement).

2.2.4 Provisions for procedural cooperation

The legal regimes created by these suppression conventions also provide for procedures for international cooperation in order to pursue alleged offenders. The substantive provisions are linked to this allied procedural regime because such cooperation is impossible on a global scale without some standardization of criminalization; states will not cooperate in regard to conduct they do not regard as criminal.

In order to take effective steps against transnational crime, national law must first establish jurisdiction and then enforce it. If, for example, someone engages in conduct in State A which causes harm in State B, prosecution in State B will depend on whether it establishes extraterritorial jurisdiction over the particular offence, whether State A will give it information on the suspect's location and legal assistance in the gathering of evidence, and ultimately whether State B can extradite the alleged offender. Only then can the duties of procedural cooperation between states meet the Grotian maxim, 'dedere, judicare, punire' (deliver, adjudicate, punish).[56]

States rely on provisions in the suppression conventions to permit the establishment of extraterritorial jurisdiction, although these jurisdictional provisions stand somewhat apart from the other provisions of transnational criminal procedure because of their dual substantive and procedural nature. In the suppression conventions (i) obligatory jurisdiction is still primarily territorial with some limited extensions of the doctrine, but (ii) permissive jurisdiction is much broader and includes controversial principles such as the 'potential effects' doctrine and the rapidly expanding (in scope) protective principle. In practice this does not result in a globally harmonized system of jurisdiction over transnational crime but rather (i) a minimum standard adhered to by most, and (ii) a maximum standard adhered to by a few. In situations of concurrent (p. 28) jurisdiction, although there is no extant principle, there is clearly support for the view that the state with the greatest centre of gravity in regard to the crime should take precedence.

The provisions in the suppression conventions designed to enable the enforcement of jurisdiction permit the procedural interaction of national criminal justice systems. The development of transnational criminal law has seen progressively more extensive provisions for transnational procedural cooperation, to facilitate the sharing of information between law enforcement agencies, to gather evidence abroad, to retrieve assets, and to extradite alleged offenders. These procedural provisions overlap with the much larger system of international criminal cooperation that has been developed to deal with serious crime. The conventions largely ignore the criminal trial itself, which they leave to the state concerned.

The specific concern in regard to law enforcement cooperation is to make sure articulation between different systems is possible through, for example, provisions for information storage and exchange. Limited provision is also made for operational cooperation such as in regard to joint investigation teams. Again, a minimum/maximum dualism appears to be

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emerging: many states will accept operational cooperation at home; few engage in it abroad but are permitted by the others to do so.

More formal legal assistance involves a request from one state to another for the latter to exercise its enforcement jurisdiction on the former's behalf. The suppression conventions reinforce the general trend to less formality, to greater speed, and to more forms of assistance at ever earlier stages in the investigation, to counterbalance the fact that the requested state can only be asked to exercise the powers that it can exercise in its own right. The suppression conventions have also been used to expand the scope of asset recovery and provide for mutual assistance in this regard on the basis of the rationale that the state has the right to relieve anyone of an asset tainted by any crime.

Finally, the suppression conventions have been used to reform extradition law in two ways. First, there has been a strong effort to expand the numbers of extraditable offences. This has been achieved by relying on the modifying influence of the suppression conventions to shift from enumerative to evaluative thresholds, and by moving from exclusively bilateral/regional-treaty-based extradition to extradition on the basis of national law or even the suppression conventions themselves. Second, there has been a major effort to remove the barriers to extradition. States have agreed to reduce even further what remains of a substantive inquiry into the criminal laws of the requesting state, to scrap inquiry into the evidence that the requesting state has to support trial, to abandon any possible exceptions that they might take to the process, and to remove any political influence over the process.

Effective cooperation does not require states to apply the criminal laws of other states in their own jurisdictions, it requires states to apply their own laws to assist other states. Law enforcement cooperation is still governed by the general principle that the law of the receiving/requested state is paramount. These different forms of international cooperation do not involve a choice of law problem of the kind endemic to conflict of laws. To apply the criminal laws of another sovereign would be to negate (p. 29) the sovereignty that criminal law expresses.[57] They involve rather a question of which state shall get the chance to apply its laws.[58]

The different forms of procedural cooperation in transnational criminal law are examined in Part III of this book. This part is organized thematically rather than by specific crime, with selective examples from different suppression conventions. It deals first with rules for establishing jurisdiction, and then with the three modes of cooperation in regard to enforcing jurisdiction over transnational crime: international law enforcement cooperation (including law enforcement on the high seas and through the anti-money laundering regime), formal legal assistance in gathering of evidence (including in regard to asset recovery), and extradition. These chapters explore the framework for enforcement activity provided by the suppression conventions; they are not a comprehensive account of international law enforcement cooperation, something beyond the scope of this book.

As noted above, many of the newer measures adopted in the suppression of transnational crime are of an administrative nature. Often they involve preventive and regulatory measures, such as the risk assessment tools used in the anti-money laundering regime, or the passport control measures used to combat people smuggling. Considerations of space militate against a full treatment of these measures here; instead the book treats these measures as elements of the procedural enforcement regime covered in Part III, dealing with them on a selective basis.

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2.2.5 Subjects and objects of transnational criminal law

Identifying the subjects of transnational criminal law depends on which part of the bifurcated system we are talking about. States are the subjects of the treaty obligations that serve as the framework for the system. Those obligations generate responsibility to other states. If, for example, a party to the 1988 Drug Trafficking Convention does not legislate drug trafficking offences into their law, or deliberately chooses not to apply them, that party may be in breach of its obligations under the treaty to the other parties and state responsibility may follow. On those rare occasions when parties to a suppression convention engage directly or indirectly in the perpetration of transnational crimes the legal consequences are two-fold: the individuals involved commit criminal offences while the state breaches its treaty obligations opening it to state responsibility. Actions of this kind may also serve to establish one or more of the elements of a core international crime. State-sponsored drug trafficking within another state may, for example, constitute evidence of the crime of aggression.[59]

Persons, whether natural or juridical, that actually commit the crimes, are the objects, not the subjects, of the obligations in the suppression conventions. Crawford and Olleson note pithily that pirates '[do] not acquire international legal personality (p. 30) by being hanged at the yardarm'.[60] Individuals do, however, enjoy national personality under the national criminal laws enacted as a result of those treaty obligations (although juridical persons represent a particular challenge in this regard). The treatment of the individual as an object reflects the top-down approach pursued by states to the problem of transnational crime. It has been criticized for ignoring the procedural and due process concerns of individual defendants facing this normative onslaught.[61] Some of these concerns arise because of the incoherence of the system; it is a patchwork of laws made of overlapping national criminal jurisdictions.[62] In a system where states retain their independent authority to enforce their jurisdiction, yet are urged to cooperate, defendants may find themselves subject to multiplications of penal power in a transnational space where they may have very little in the way of positive legal protections.

2.2.6 Distinguishing transnational criminal law from international criminal law *stricto sensu*

Transnational criminal law is a part of international criminal law in a broad sense of criminal law with an international legal dimension. However, it is distinguishable from the core international criminal law. The core international crimes in articles 5–8 of the Rome Statute[63]—genocide, war crimes, crimes against humanity, and aggression—involve a direct customary international law-based obligation on individuals regardless of the position in national law.[64] A transnational crime may find its original normative source in international law, but the suppression conventions do not make provision for direct criminalization in international law; the actual criminal prohibition on individuals is entirely national. In principle, a custom could create an indirect transnational crime, and a treaty, a direct international crime, so it is not the source but rather the nature of the obligation which distinguishes them. It follows that adjudicative jurisdiction over transnational crimes is exclusively national; there is no international criminal jurisdiction such as that over the core international crimes.

The 'supranational character of international criminal law'[65] flows from its naissance in the international community. Article 5 of the Rome Statute limits the International Criminal Court's jurisdiction 'to the most serious crimes of concern to the international community as a whole'. States have chosen not to cede their sovereign criminal jurisdiction over transnational crime to some larger international jurisdictional unit; they seek rather to accommodate their systems, over which they still (p. 31) retain sovereignty, with other states' systems. The suppression conventions establish transnational crime control regimes that encompass principles, norms, rules, and procedures around which the ideals and

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expectations of the participating states converge, but stop well short of uniting because the commission of these crimes is neither subject to universal opprobrium nor threatens the security of the international community.[66] Although their suppression does require cooperation and a certain erosion of sovereignty, international solidarity is much weaker. Suppression of transnational crime does not require (and nor would states welcome) the density of institutionalization that the core international crimes require in the form of an international criminal tribunal.

This was something understood by early writers. Trainin, for example, saw the suppression conventions solely as vehicles for mutual assistance in the struggle against crime.[67] In 1950, Pella distinguished 'international crimes', which he said involve the 'irregular exercise of its sovereignty by a state' and consist 'of acts against the peace and security of mankind', from 'so-called international crimes, such as piracy, slave trade, traffic in women and children, drug traffic', which unlike the former 'did not prejudice international relations'.[68] The former required an international jurisdiction, the latter could be left to national jurisdiction as '[a]ll civilized states are interested in the repression of such offenses and there is no reason to suppose that national courts are not objective in dealing with them'.[69] More recently, Fletcher considered these treaty-based crimes too parochial to deserve the status of core international crime.[70] Courts agree. In *Pushpanathan v Canada*[71] the Canadian Supreme Court held there was no indication that drug trafficking on any scale was contrary to the purposes of the UN or that its prohibition protected core human rights. A transnational crime may, however, increase in scale and systematicity to the point where it does threaten international peace and security or shock the conscience of mankind, thus becoming a core international crime.[72] State support for the introduction of individual criminal liability for this crime in international law would be a clear indicator of this change of status.

International and transnational criminal law do, nevertheless, share many (although not all) tools of a procedural kind because they confront similar problems of investigating and apprehending fugitive offenders.[73] Moreover, both systems are (p. 32) fractured and have issues with implementation and legitimacy.[74] Critics who point this out take issue with the idealized account that the neat dichotomy between international and transnational criminal law presupposes, and argue that transnational criminal law should be placed back into the broader context of all international law relating to crime.[75] In German doctrine *Internationales Strafrecht* is an umbrella term containing all of the doctrinal categories which involve international aspects of criminal law and criminal aspects of international law.[76] Adopting this kind of taxonomy may help to expose similar social and political realities, and allow useful comparisons between protection of rights and application of general principles in the core international criminal law and their neglect in transnational criminal law. It would, however, obscure the different levels of intensity of international cooperation that international and transnational criminal law entail. The idealized account of international criminal law held by its exponents at the beginning of the twenty-first century tended to submerge transnational criminal law and its peculiar social and political character including the heavy sovereign interests that shape it, to the detriment of a better understanding of its character.[77] Transnational criminal law provides a methodological lens[78] of sufficiently sharp focus to avoid the supranational connotations associated with 'international criminal law' and reveal the 'transnational interest' obscured by more ambiguous labels like 'crimes of international concern'.[79]

2.2.7 Transnational criminal law as a system of laws

Transnational criminal law is not a coherent legal order with a hierarchy or rules and an ultimate arbiter on the meaning of those rules.[80] There is no single point of origin for these transnational criminal laws; there are multiple points of origin. These points of origin may be the unilateral domestic actions of states, or agreements based on treaties or other more informal relations between states, or perhaps even arise out of the actions of transnational

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actors. The system is plural—the order dispersed in nature. All of these rules are, however, specifically created to deal with transnational criminal matters.[81] That functional goal has, as this book illustrates, led to the adoption of rules with similar forms. While the variation of practice among states (p. 33) undermines any claim to global codification, the substance of elements of crimes and rules of procedure are now becoming standardized at the international level, and at the national level there are indications of a slow convergence of domestic laws—they are conformal in nature. Normative correspondence exists across the various prohibition regimes that make up transnational criminal law. The process of development of new treaties frequently borrows innovations already adopted in older treaties concerned with different crimes, because of their supposed effectiveness and acceptability. For example, the provision in article 3(c) of the Terrorist Bombings Convention which obliges states parties to extend criminal liability for terrorist bombing based on a version of the common purpose or joint criminal enterprise doctrine, has found its way into many other anti-terrorist treaties including for example, article 4(5)(c) of the 2004 Protocol to the South Asian Association for Regional Co-operation (SAARC) Regional Convention on the Prevention of Terrorism,[82] but now applied to all terrorist offences. This kind of normative borrowing arguably increases the normative integration of transnational criminal law, although it leaves intact the plurality of sources of authority—international, regional, national—that enforce these norms. It is too loose to describe transnational criminal law as a non-hierarchical field of norms of similar content, type, and purpose.[83] Transnational criminal law is more accurately described as non-hierarchical order of formally equal national centres of legal authority based on reciprocity, equality, and sovereign consent,[84] which are interlinked, coexist, and overlap,[85] and uses norms of similar form to coordinate suppression of transnational crime. A domestic criminal lawyer dealing with the local impact of a transnational crime will only be concerned with that part of their national system that is transnational in origin and purpose. But the perpetration of a transnational crime has multifarious normative impacts; it reveals that the alleged transnational criminals are members of multiple normative communities.[86] Only a view which takes account of the inter-relationship of the rules of all those communities gets the full picture.

2.3 The System's Goals and Values

2.3.1 Effective suppression

The primary goal of transnational criminal law is effective suppression of transnational crime. Article 2(1) of the 1988 Drug Trafficking Convention, for example, provides that the purpose of the convention 'is to promote cooperation among the parties so that they may address more effectively the various aspects of the illicit traffic in narcotic drugs and psychotropic substances having an international dimension'. However, there are a number of factors that militate against the effectiveness of (p. 34) international cooperation. Not all states are always equally committed to the effective suppression of every transnational crime. At the same time that Britain was working to suppress slavery, for example, it was engaged in the opium trade into China.[87] Moreover, pursuit of legal suppression at an international level does not always translate into practical suppression at a national level, and it is easy to overstate the coercive power of the suppression conventions, which is why in areas such as anti-money laundering and anti-terrorism there has been increasing resort to more easily mobilized norms in soft law and to Security Council resolutions.

2.3.2 Supply interdiction

Transnational criminal law can be conceived of as a system of trade barriers. The domestic consumption of goods, illicit in national law, that originate in other jurisdictions, drives resort to transnational criminal law. In most part it expresses a policy of supply interdiction, the idea that the interdiction and prosecution of chains of supply originating abroad are the only way to dry up local markets by increasing the price of these goods thus reducing

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demand. The human trafficking regime discussed in Chapter 4 is, for example, concerned largely with prosecuting human traffickers and not the individual users of sexual services. Only utter social pariahs, like possessors of child pornography, find that demand receives equally harsh treatment. This fails to take proper account of the responsibility of domestic consumption as a driver of supply.

Transnational criminal law has historically been preoccupied with the suppression of supply from developing states rather than demand in developed states. But this balance of interests is changing as demand for illicit products grows across the world. At the 2015 UN Commission on Crime Prevention and Criminal Justice (UNCCPCJ), for example the Turkish delegate said that '[t]he priority should be to stop terrorist fighters at their point of origin'.[88] The implication was that the duty of suppression was on the Western states which supplied these fighters and not on Turkey, the transit state to Syria and Iraq. Moreover, developed states can also be subject to intense international pressure to suppress transnational activity, as occurred when the United Kingdom (UK) was pressured to adopt the Bribery Act 2010 in response to an increasingly hostile attitude from the OECD's Working Group on Bribery.[89]

2.3.3 Security

Concern with supply interdiction is easily transformed into concern with transnational crime as an issue of general security, and in particular that transnational organized crime can threaten a state's internal sovereignty, both political and economic and by extension threaten international order. There is ample evidence of growth of that concern[90] and of (p. 35) the growth in the security establishment's interest in developing different prohibition regimes in transnational criminal law to combat transnational organized crime.[91] In 2012 the President of the UN Security Council, supported by the Council, articulated a concern not just about terrorism (where it has engaged in regular action) but about all cross-border trafficking as a threat to international peace and security, and implicitly questioned whether the existing approach relying largely on the suppression conventions, was sufficient to provide an adequate response.[92]

2.3.4 Preservation of sovereignty

Ironically, while the sovereign interests of states are the main drivers of transnational criminal law, national sovereignty and non-interference in internal affairs present the most significant barriers to the development of transnational criminal law. States are primarily concerned with the establishment and enforcement of their own criminal jurisdiction and the limitation of the criminal jurisdiction of other states. The suppression conventions express these contradictory concerns. Article 2(2) of the 1988 Drug Trafficking Convention, for example, provides that '[t]he Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States'.

Sovereignty may shield criminal justice incapacity. States with strong external but weak internal sovereignty cannot manage the transnational criminal activity that emanates from within their boundaries. However, their sovereignty forces other states affected by this crime to pressure them for ever greater levels of cooperation and to provide technical assistance to facilitate this cooperation. Although this cooperation is couched in the language of reciprocity, developed states in particular have had, and continue to have, an inordinate amount of influence on transnational criminal law. In contrast, developing states struggle to defend themselves from the overreach of more powerful states keen on exporting their domestic criminal law. Vlassis notes:

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> Dominant amongst the concerns remains safeguarding sovereignty, which is for many smaller developing countries and countries with economies in transition (or emerging democracies) the last bastion of national integrity and identity. Criminal justice matters are at the core of sovereignty concerns, being perceived as essentially domestic in nature, touching as they are on institutions ranging from national constitutions to legal regimes and systems.[93]

Sovereignty may also shield unwillingness. States may have political differences that make it difficult for them to cooperate. The US, for example, regularly refused to extradite Irish Republican Army members to the UK because it considered them political offenders.

(p. 36) Sovereignty, however, always implies difference. Working within civil, common law, mixed, and other legal traditions, states have different constitutional arrangements, unrecognizable administrative arrangements, unfamiliar procedures, distinct grammars of criminal law, all spelled out in their own national languages. Effective international cooperation often requires the surrender of long-held rules or procedures of national criminal law and the introduction of entirely novel ones, and states are deeply resistant to these changes during the negotiation and implementation of the suppression conventions.

2.3.5 Legitimacy

Transnational criminal law can be criticized from the perspective of normative legitimacy,[94] because of limited participation, transparency, and accountability in its development and implementation. Designed by technical legal experts, the public has very little knowledge and little say in the process. It is easy to point fingers at organizations like the FATF but treaty-based bodies such as the UN Convention against Corruption’s Implementation Review Group are notably less transparent than the FATF.[95] Domestic lawmakers who transform these international norms into criminal laws may be as ignorant as the general public. The absence of democratic legitimacy has been specifically criticized because of criminal law’s importance as a tool of social control, an expression of a community’s culture and history, in the hands of elected leaders.[96] However, this criticism only bites in regard to those states that embrace democracy. Many undemocratic states are willing partners in transnational criminal law, which raises the further question of whether and if so to what extent democratic states should cooperate with them.

The conclusion of a treaty injects an element of global legitimacy into the suppression of transnational crime because of the nominal equality of the negotiating parties, opportunities for debate and dissent,[97] and the fact that the parties consent to these international obligations. In consenting, however, states act for their own contingent reasons, which may have little to do with pursuit of normative legitimacy. Moreover, in this process there is a tendency for some states to be active ‘law-givers’ while the majority are passive ‘law-takers’.[98] A number of inducements contribute to this normative transfer: the prestige of the law-givers, shared legal traditions, accessibility of their laws,[99] promises of technical assistance, the potential increase in the penal power (p. 37) of the law-takers, political pressure, perception of domestic threats, and concern for the rule of law.[100] Criminalization in the name of universal values has served as a transparent disguise for instrumentalism based on domestic criminal law models.[101] Britain used the abolition of the slave trade to legitimize policing the high seas.[102] Suppression of drug trafficking has long served the US as a similar normative justification. Referring to the policy of drug prohibition in 1951 US Drug Commissioner and representative on the UN Commission on Narcotic Drugs, Harry Anslinger, said: ‘If the World were at peace the US with its prestige and dollars could whip the rest of the world into line through international agreements.’[103] More recently, the US’s expansion of interest in regard to transnational crime generally has resulted in macro-level transplantation of American models through international law into the national laws of many different states.[104] This transnational interventionism[105] is

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particularly troublesome when the policies in question are being laundered in developing states, a subtle form of neo-colonialism.[106] McCulloch comments:

> Under the pretext of criminal justice agendas, transnational crime has allowed the penetration of concerns and interests of strong states into the sovereign domain of weaker states. These agendas are internationalized in asymmetrical ways that reflect the interests of the stronger states, but are packaged in ways that suggest more neutral and universal concerns over morally repugnant or socially damaging behaviors, such as terrorism, people smuggling, sex trafficking, organized crime, money laundering, and drug trafficking.[107]

Support for intervention usually emanates from groups within a state; the state is simply the vehicle for its expression. For example, pharmaceutical companies played a role in the development of the drug control system,[108] while Western NGOs continue to play a significant role in fostering treaty development in their respective areas of concern. Transnational criminal law thus reflects a multiplicity of domestic concerns; it is their legal expression in relations with other states that gives an illusion of a uniform position on the problem.

(p. 38) Opportunities for debate are also rare during the operationalization of these agreements.[109] Transnational law enforcement networks[110] composed of national officials playing both an international and transnational role, assist both in the design of the international obligation at the macro-level and its fleshing out at the meso and micro levels. It is these lower level contacts where the bulk of the actual 'technology transfer' of policy, model laws, practical know-how, administrative arrangements, and institutions takes place, all part of the Western *mission civilisatrice*.[111] The agents of this transfer are largely unaccountable whether they work for sponsoring states, inter-governmental organizations, NGOs, or receiving states. When implemented these changes may be held up by weak domestic legal capacity, unenthusiastic local political elites, basic incompatibilities of values and criminal laws, and the national margin of appreciation permitted by the suppression conventions which differs from regime to regime. If taken up, they may overburden the creaking criminal justice infrastructure of developing states.

As noted above, more recently powerful Western states have tried to escape the limitations of the multilateral suppression conventions by developing systems of soft law even less respectful of state consent, like the FATF standards. They have been working in the European Union, the Council of Europe, the G8, and other organizations to develop these alternative normative pathways so as to avoid having to reach consensus; other states may join in but only on Western terms and their membership is vetted.[112] These new pathways provide tougher more enforceable standards but their legitimacy is even more questionable.

Legitimacy is, however, a key ingredient in the effective implementation of transnational criminal law. Cotterrell notes that from a Weberian perspective the main problem of transnational criminalization is whether there is adequate political authority to engage in this activity, while from a Durkheimian perspective the issue is whether there is adequate cultural authority to do so.[113] Thus while for Weber the formal authority of states to agree to and enact crimes would be enough, for Durkheim these crimes should be regarded by citizens in different states as constituting a serious threat to the moral security of their societies if they are to be effective. However, the common rationalization of transnational criminal law reform—our purposes are the same so our legal differences are irrelevant—does not create a community. Nor does the rhetorical reference in UN documents to a mythic international community. Nor do rhetorical tropes such as the claim that pirates are enemies of all mankind, when piracy is actually based on the convergent economic interests of states in keeping transnational (p. 39) trade open. Cotterrell concludes: 'Like all transnational law, transnational criminal law has to find secure grounding in populations

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that can culturally ‘own’ this law. To ignore that requirement is to risk stretching the politico-legal authority of regulation beyond the point where its success can be assumed.’[114]

The problem is how to make transnational criminal law more accountable to the communities in which it is applied. It has been suggested that it would be sounder to pursue the harmonization of responses to transnational crime based on a set of principles rather than on more specific provisions, thus leaving intact a mosaic of systems dealing with similar problems.[115] This ‘lighter’ touch requires a more adaptable regulatory concept such as functional equivalence, mutual recognition, or graded compatibility, one that preserves national flexibility sufficient to adjust to international obligations.[116] This regulatory concept could be part of a framework of general concepts or governing principles that guide the development of principles more specific to particular crimes. One such general principle might be an outcomes-based principle which would test each new transnational criminal policy to ensure a measurable equal benefit for all. Another might be a precautionary principle: a willingness to question criminalization and procedural cooperation as a response to certain practices. It also seems essential to make legality and respect for human rights governing principles.

2.3.6 Legality

The principle of legality (*nullum crimen sine lege*—no crime without law),[117] implies that legislation must define clearly offences and the penalties they attract, placing the individual in a position where they know or are reasonably able to discover which acts or omissions will make them criminally liable.[118] There is no clear framework of legality principles applied consistently in transnational criminal law because transnational criminal law entails a multiplicity of domestic legal systems in loose array. This raises questions about the procedural legitimacy of transnational criminal law. The principle of fair warning demands—particularly if the crime is relatively obscure—that the offender should be warned in advance of the transgressive potential of their conduct. Obligations in cooperating states to enact the same offence meet the requirements of legality because this enables fair warning. If a state unilaterally establishes extraterritorial criminal jurisdiction to suppress the activities of individuals located in another state without similar laws being enacted in that state, legality demands that mistake or ignorance of the law should be an excuse.[119] If that state is party to a suppression convention criminalizing the conduct it cannot rely on the existence of the treaty to establish a reasonable basis for fair warning. The principle of certainty requires that a state suppressing a particular transnational crime—say money laundering—proscribe (p. 40) the conduct with precision, in order to give clear warning of this proscription. What is not clear is, if the offender is in State A, but commits a crime in State B, whether both states must proscribe the conduct in the same way or in a similar way in order to meet the dictates of legality. In order to respect legality, states that seek closer cooperation in the suppression of transnational crime must also respect fair labelling, individuality of guilt, and the prohibition on retroactive application of crimes.

2.3.7 Human rights

Certain transnational offences harm individuals directly and put their individual rights in danger while others endanger collectively held rights like public health. The duty on states to protect individual victims from transnational crime is not usually explicitly recognized in the suppression conventions. An exception is article 33 of the Convention on the Rights of the Child,[120] which obliges parties to take all appropriate measures to protect children from illicit use of narcotics and prevent their being used in illicit production and trafficking. Provisions in some suppression conventions also put states under an explicit obligation to help those already victimized by transnational crime.[121]

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The enforcement of transnational criminal law threatens human rights in various ways. Drug laws may threaten the property rights of innocent farmers caught up in drug eradication operations involving the use of herbicides. Innocent bank account holders may find their privacy violated by banks adhering to AML regulations. Trafficked persons may be subject to detention as illegal aliens rather than treated as the victims of crime. Fugitives may be denied the right to be informed of an extradition request, the right to be heard, and the right to legal representation. Unfair trial may follow. Legal assistance in evidence gathering may not be available for exculpatory purposes. Cruel and inhuman punishment may be imposed, including the death penalty. Although the goal must be to balance the suppression of crime and the respect for human rights,[122] that balance is currently heavily skewed in favour of suppression. The 1988 Drug Trafficking Convention, for example 'is deliberately draconian in character'[123] and has, as we shall see in Chapter 6, spawned even more draconian national laws. The suppression conventions themselves pay only scant regard to the protection of the human rights of those affected by their enforcement. Article 11(3) of the UN Convention against Transnational Organized Crime,[124] for example, obliges parties to have 'due regard to the rights of the defence' but only in the context of the obligation 'to seek to ensure that conditions imposed in connection with decisions to release (p. 41) pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings'.

In place of specific protections contained in the conventions, the system relies on the existing human rights obligations of states. The obligation to provide 'fair treatment' in article 17 of the International Convention for the Suppression of the Financing of Terrorism, for example, refers to applicable protections in domestic and international law.[125] In practice, this means that the level of human rights protection available to a perpetrator or victim of transnational crime will be that generally available in the particular state in which they find themselves. This will depend on: whether that state is a party to a relevant human rights treaty (and in particular, to a regional human rights treaty with rights of individual petition); whether that state accepts that older human rights treaty obligations trump its application of a newer obligation under a suppression convention (some states may find it difficult to accept that human rights constitute a superior normative order, particularly if they are heavily engaged in the effective suppression of crime);[126] whether that state has made adequate provision for the protection of human rights in its national law; and whether, if that state is requested by another to cooperate, it is prepared to enquire into potential human rights violations in the requesting state.

The suppression of transnational crime and international human rights protections are out of alignment.[127] To achieve the correct balance, the individual defendant will have to be seen not as an object but as a rights holder. This can be done, it has been argued, by ensuring a global *nemo bis in idem* rule, rules for the coordination of enforcement of jurisdiction, and the provision of a functional equivalent to constitutional protections for citizens to aliens accused of transnational crimes guaranteeing them the rights to a fair trial.[128]

2.4 Conclusion

A range of different approaches have been adopted by states to overcome the difficulties of cooperating in the suppression of transnational crime. In 1990 Heymann argued that states adopted more formal legal relations with less compatible states and more informal relations with more compatible states.[129] He suggested that when states have strong legal and political differences they tend to adopt an 'international law' approach characterized by precise treaty obligations which respect sovereignty but which sacrifice effectiveness. Where states have better relations and trust each other they tend to adopt a 'prosecutorial' approach characterized by more informal (p. 42) reciprocal relations where effectiveness is a priority and sovereignty and formality are less important. This dichotomy reflects the

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classic distinction between restrictive and permissive models in international relations.[130] It echoes Kuhn’s point made in the Introduction to this chapter about whether suppression of transnational crime is best achieved through a standardization of national approaches or a less restrictive more goal-directed procedural (and more recently administrative) cooperation against transnational crime. The indeterminacy in the nature of transnational criminal law arises out of the simultaneous use of a range of these strategies in different prohibition regimes. In the suppression of transnational crime, penal power has been jealously guarded by the state. But the international framing of that power, and the function of suppressing similar activities in different places, has created a perceptible system of transnational criminal law.

Footnotes:

1 F Adler, GOW Mueller, and WS Laufer, *Criminal Justice* (New York: McGraw Hill, 1994), 567.

2 GOW Mueller, ‘Transnational Crime: An Experience in Uncertainties’ in S Einstein and M Amir (eds), *Organized Crime: Uncertainties and Dilemmas* (Chicago: Office of International Criminal Justice, University of Illinois, 1999), 3.

3 Working paper by the Secretariat, ‘Changes in Forms and dimensions of Criminality—Transnational and National’, Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders, Toronto, Canada, 1–12 September 1975, UN Doc A/CONF.56/3, 5–6.

4 P Jessup, *Transnational Law* (New Haven: Yale UP, 1956), 2.

5 See R Cryer, ‘The Doctrinal Foundations of International Criminalization’ in MC Bassiouni (ed), *1 International Criminal Law: Sources, Subjects and Contents*, 3rd edn (Dordrecht: Nijhoff, 2008), 108; R Cryer, H Friman, D Robinson, and E Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd edn (Cambridge: CUP, 2014), 5; RJ Currie, *International and Transnational Criminal Law*, 2nd edn (Toronto: Irwin, 2014) generally; C Kreβ, ‘International Criminal Law’ in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (2009 update), para 6.

6 N Boister, ‘Transnational Criminal Law?’ 14 *European Journal of International Law* (2003) 953.

7 League of Nations, *Gradual Unification of Criminal Laws and Cooperation of States in the Prevention of and Suppression of Crime*, Official Series of the League of Nations Publications, No. 7 (Geneva: League of Nations, 1933).

8 Cited in AK Kuhn, ‘International Cooperation in the Suppression of Crime’ 28(3) *American Journal of International Law* (1934) 541, 542.

9 ibid, 543.

10 ibid.

11 See the US Court for Appeals in *Flores v Southern Peru Copper Corp* 343 F.3d 140 (2nd Cir 2003).

12 Currie calls them ‘transnational crimes of domestic concern’, which he distinguishes from ‘transnational crimes of international concern’ falling under transnational criminal law. Currie, above n 5, 19–20.

13 E Creegan, ‘A Permanent Hybrid Court for Terrorism’ 26 *American University International Law Review* (2011) 237, 246–51.

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[14] [1985] 2 SCR 178, 214.

[15] JS Nye, 'Soft Power' 80 *Foreign Policy* (1990) 153, 158.

[16] See, eg, the bilateral treaties with France of 1831 and 1833.

[17] The International Convention for the Suppression of Counterfeiting of Currency, 20 April 1929, 112 LNTS 371, in force 22 February 1931.

[18] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, 1582 UNTS 95, in force 11 November 1990.

[19] Treaty of Amity, Commerce and Navigation between Great Britain and the United States, signed at London, 19 November 1794, 52 CTS 243. See RS Clark, 'Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and the Lotus' 22 *Criminal Law Forum* (2011) 519, 523.

[20] C Nowak, 'The Internationalization of Polish Criminal Law: How Polish Law Changed Under the Influence of Globalization' 59 *Crime, Law and Social Change* (2013) 139, 144.

[21] Additional Convention between Great Britain and Portugal for the Prevention of the Slave Trade, signed at London, 28 July 1817, 67 CTS 373.

[22] Convention on Combating Bribery of Foreign Public Officials in Transnational Business Transactions, 17 December 1998, 37 ILM 1 (1998), in force 5 March 2002.

[23] 15 US § 78dd-1 et seq; see Chapter 8 below.

[24] Budapest, 23 November 2001, ETS No 185, in force 1 July 2004.

[25] Directive C/DIR. 1/08/11 on Fighting Cyber Crime Within ECOWAS. See N Dalla Guarda, 'Governing the Ungovernable: International Relations, Transnational Cybercrime Law, and the Post-Westphalian Regulatory State' 6(1) *Transnational Legal Theory* (2015) 211, 227, 237.

[26] Pennsylvania State University, Special Collections, Historical Collections and Labor Archive, Harry Anslinger Papers, Box 9, File 59, Opium (1924–1945), in an undated document entitled 'An Appeal to my Colleagues', p 13.

[27] E Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society' 44 *International Organisation* (1990) 479.

[28] *The Tryal of Captain William Kidd for Murder and Piracy, Upon Six Several Indictments* (London, 1701), 322.

[29] Supporting Garland's general observation in this regard—see D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001), 102.

[30] CC Murphy, 'Transnational Counter-terrorism Law: Law, Power and Legitimacy in the "Wars on Terror" ' 6(1) *Transnational Legal Theory* (2015) 31, 33.

[31] See Chapter 7.

[32] The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, 16 February 2012, updated October 2016. See generally KS Blazejewski, 'The FATF and its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks' 22 *Temple International and Comparative Law Journal* (2008) 1.

[33] C Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford: OUP, 2015), 2.

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[34] ibid, at 12.

[35] See, eg, Basel Committee on Banking Supervision (BCBS), International Association of Insurance Supervisors (IAIS), and International Organisation of Securities Commissions (IOSCO).

[36] See, eg, the anti-tobacco smuggling agreements signed between major tobacco products manufacturers and the European Anti-Fraud Office (OLAF), available at <https://ec.europa.eu/anti-fraud/investigations/eu-revenue/cigarette_smuggling_en> last visited 17 July 2017.

[37] See, eg, Transparency International's work as the UNCAC Coalition Secretariat—see <http://www.transparency.org/whatwedo/activity/our_work_on_conventions> last visited 16 June 2016.

[38] The US Drug Enforcement Agency is just one of many significant national agencies operating at a transnational level—see EA Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (University Park, PA: Pennsylvania State University Press, 1993), 189 et seq.

[39] U Sieber, 'Legal Order in a Global World—The Development of a Fragmented System of National, International and Private Norms' in A von Bogdandy and R Wolfrum (eds), 14 *Max Planck Yearbook of United Nations Law* (2010), 1, 17.

[40] See C Scott, ' "Transnational Law" as Proto-Concept: Three Conceptions' 10 *German Law Journal* (2009) 859, 873–75; HH Koh, 'Transnational Legal Process' 75 *Nebraska Law Review* (1996) 181, 199.

[41] P Kotiswaran and N Palmer, 'Rethinking the "International Law of Crime": Provocations from Transnational Legal Studies' 6(1) *Transnational Legal Theory* (2015) 55, 77–80.

[42] Murphy, above n 30, 39–42.

[43] Kotiswaran and Palmer, above n 41, 70 et seq.

[44] See generally D Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton, NJ: Princeton UP, 2007). This is revealed, eg, in the donation by states of funds for earmarked special projects rather than into the general purpose funding of the United Nations Office on Drugs and Crime (UNODC), which allows donor parties to dictate the direction of UNODC activity.

[45] 15 November 2000, 2225 UNTS 209, in force 29 September 2003.

[46] Kotiswaran and Palmer, above n 41, 86.

[47] EM Wise, 'International Crimes and Domestic Criminal Law' 38 *DePaul Law Review* (1989) 923, 938.

[48] See, eg, Niue's Terrorism Suppression and Transnational Crimes Act 2006, which picks up many convention definitions almost verbatim.

[49] See the examples of organized crime legislative provisions surveyed by A Schloenhardt, *Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region* (Leiden: Martinus Nijhoff Publishers, 2009), 354–56.

[50] JD Michels, 'Keeping Dealers off the Docket: The Perils of Prosecuting Serious Drug-Related Offences at the International Criminal Court' 21(3) *Florida Journal of International Law* (2009) 449, 452.

[51] See, eg, article 4(1)(c) of the 1961 Single Convention on Narcotic Drugs, 30 March 1961, 520 UNTS 151, in force 13 December 1964.

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[52] 12 November 2012, not yet in force.

[53] Article 14.

[54] 21 December 2010, not yet in force.

[55] Nadelmann, above n 27, 525.

[56] *De Jure Belli Ac Pacis*, (1758) Chapter 31, Section 76.

[57] MD Dubber, 'Criminal Law in Comparative Context' 56 *Journal of Legal Education* (2006) 433, 434.

[58] *Ze'ev Rosenstein v Israel* Appeal judgment, Crim A 4596/05, para 43; ILDC 159 (IL 2005), 30 November 2005.

[59] See, eg, N Boister, 'Punishing Japan's "Opium War-making" in China: The Relationship between Transnational Crime and Aggression at the Tokyo Tribunal' in Y Tanaka, T McCormack, and G Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden and Boston: Nijhoff, 2011), 323.

[60] J Crawford and S Olleson, 'The Nature and Forms of International Responsibility' in MD Evans (ed), *International Law*, 3rd edn (Oxford: OUP, 2010), 441, 445.

[61] S Gless, 'Bird's-Eye View and Worm's Eye View: Towards a Defendant-Based Approach in Transnational Criminal Law' 6(1) *Transnational Legal Theory* (2015) 117, 119 et seq.

[62] ibid, 127.

[63] Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, in force 1 July 2002.

[64] Article 25(2).

[65] *Maktouf and Damjanovic v Bosnia and Herzegovina*, Application nos 231/08 and 34179/08, Grand Chamber, ECtHR, 18 July 2013, para 46.

[66] See principle 3 of the 'Report of the UNWCC summarising the elements of Crimes Against Humanity in Eight Principles' in UNWCC, *History of the United Nations War Crimes Commission* (London: HMSO, 1948).

[67] AN Trainin, *Hitlerite Responsibility Under Criminal Law* (London: Hutchinson, nd), 28–29.

[68] VV Pella, 'Towards an International Criminal Court' 44 *American Journal of International Law* (1950) 37, 54.

[69] ibid, 56.

[70] G Fletcher, 'Parochial versus Universal Criminal Law' 3 *Journal of International Justice* (2005) 20, 23.

[71] 1 SCR 98, ILDC 182 (CA 1998), paras 64, 69, 72.

[72] Cryer, above n 5, 125–26.

[73] F Mégret, 'The "Elephant in the Room" in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality, and the Constitution of the Political' 6(1) *Transnational Legal Theory* (2015) 89, 91, 116; M Reed-Hurtado, 'International Criminal Law's Incongruity in Colombia: Why Core Crime Prosecution in National Jurisdictions Should be Included in Analyses of Transnational Criminal Law?' 6(1) *Transnational Legal Theory* (2015) 174, 175.

[74] Kotiswaran and Palmer, above n 41, 57–69.

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[75] ibid, 55.

[76] Including Völkerstrafrecht (international criminal law in a strict sense), Europäisches Strafrecht (European Criminal Law), Strafanwendungsrecht (criminal jurisdiction), internationale Zusammenarbeit in Strafsachen (international cooperation in criminal matters), and, increasingly, Transnationales Strafrecht (treaty originating criminal law dealing with crimes of a transnational character). See Kreβ, above n 5, para 6.

[77] See MC Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework' in MC Bassiouni (ed), 1 *International Criminal Law*, 2nd edn (Ardsley on Hudson: Transnational, 1998), 1, 46.

[78] P Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism' 21 *Transnational Law & Contemporary Problems* (2012) 305, 307.

[79] The term used by MC Bassiouni, 'An Appraisal of the Growth and Developing Trends of International Criminal Law' in J Dugard and C Van den Wyngaert (eds), *International Criminal Law and Procedure* (Aldershot: Dartmouth, 1996), 85.

[80] Murphy, above n 30, 41.

[81] S Gless and JAE Vervaele, 'Editorial: Law Should Govern: Aspiring General Principles for Transnational Criminal Justice' 9 *Utrecht Law Review* (2013) 1.

[82] Additional Protocol to the South Asian Association for Regional Co-operation (SAARC) Regional Convention on Suppression of Terrorism, 6 January 2004; in force 12 January 2006.

[83] See Scott, above n 40, 868–72; a similar point is made by Gless and Vervaele, above n 81, 4.

[84] See RA Falk, 'International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order' 32 *Temple Law Quarterly* (1959) 295.

[85] PS Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: CUP, 2012), 25.

[86] ibid, 11.

[87] P Andreas, 'Illicit Globalization: Myths, Misconceptions, and Historical Lessons' 126(3) *Political Science Quarterly* (2011) 403, 414.

[88] UNCCPCJ, Wednesday 20 May 2015 (notes on file with the author).

[89] Rose, above n 33, 29.

[90] A Dupont, 'Transnational Crime, Drugs and Security in Asia' 39(3) *Asian Survey* (1999) 433.

[91] A Edwards and P Gill, 'The Politics of "Transnational Organized Crime": Discourse, Reflexivity and the Narration of "Threat" ' 4(2) *The British Journal of Politics and International Relations* (2002) 245.

[92] PRST/2012/16, Presidential Statement by US Ambassador Susan Rice, 25 April 2012.

[93] D Vlassis, 'The United Nations Convention Against Transnational Organized Crime and Its Protocols: A New Era in International Cooperation' in *The Changing Face of International Criminal Law* (Vancouver, BC: International Centre for Criminal Law Reform and Criminal Justice, 2002) 75, 76.

[94] On normative legitimacy see A Buchanan, 'The Legitimacy of International Law' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford: OUP, 2010), 79.

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[96] T Weigend, 'Strafrecht durch internationale Verinbarungen—Verlust an nationaler Strafrechtskultur?' 105 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1993) 774, 789.

[97] ME Beare, 'Shifting Boundaries—between States, Enforcement Agencies, and Priorities' in HG Albrecht and C Fijnaut (eds), *The Containment of Transnational Organized Crime* (Freiburg: Iuscrim, 2002), 171, 185.

[98] See S Silbey, '1886 Presidential Address: "Let Them Eat Cake": Globalization, Postmodern Colonialism, and the Possibilities of Justice' 31 *Law and Society Review* (1997) 207, 221.

[99] Conditions for transferability isolated by A Watson, 'Legal Change: Sources of Law and Legal Culture' in 131 *University of Pennsylvania Law Review* (1982) 1121, 1147.

[100] See P Lloyd, B Simmons, and B Stewart, 'Combating Transnational Crime: The Role of Learning and Norm Diffusion in the Current Rule of Law Wave' in M Zürn, A Nollkaemper, and R Peerenboom (eds), *Rule of Law Dynamics: In an Era of International and Transnational Governance*, 1st edn (Cambridge: CUP, 2012), 164, 165.

[101] See generally P Andreas and E Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (New York: OUP, 2006), 17, 105.

[102] M Mazower, *Governing the Word: The History of an Idea* (London: Allen Lane, 2012), 395–96.

[103] Pennsylvania State University, Special Collections, Historical Collections and Labor Archive, Harry Anslinger Papers, Box 5, File 11, Scrapbooks, as quoted in the 'New York World Telegraph', 7 August 1951.

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[105] A term used by D Corva, 'Neoliberal Globalization and the War on Drugs: Transnationalizing Illiberal Governance in the Americas' 27 *Political Geography* (2008) 176, 184.

[106] Kotiswaran and Palmer, above n 41, 85.

[107] J McCulloch, 'Transnational Crime as a Productive Fiction' 34(2) *Social Justice* (2007) 19, 27.

[108] J Lilja, S Salek, A Alvarez, and D Hamilton, *Pharmaceutical Systems: Global Perspectives* (Chichester: Wiley and Sons, 2008), 13.

[109] Beare, above n 97, 185.

[110] On transnational networks see A-M Slaughter, *A New World Order* (Princeton, NJ: Princeton UP, 2004), 231.

[111] See D Dolowitz and D Marsh, 'Who Learns From Whom? A Review of the Policy Transfer Literature' 44 *Political Studies* (1996) 343, 344.

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[114] ibid, 22.

[115] Delmas-Marty, above n 104, 14, 17 et seq.

[116] ibid, 159, 161 citing JF Coste and M Delmas-Marty, *Le Genre humain* (Paris: Seuil, 1998), 135.

[117] Article 11(2) of the Universal Declaration of Human Rights, GA Res 2174 (III), UN Doc A/810, 71, 10 December 1948; see K Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: CUP, 2008), 11 et seq.

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[119] S Gless, 'General Principles of Transnational Criminal Law', Paper given at a Joint Conference of the ICCLR and ISRCL, 8 August 2011, Ottawa.

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[123] C*ommentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (New York: UN, 1998) UN Doc. E/CN.7/590; UN Publication Sales No.E.98.XI.5, 144.

[124] United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, 2225 UNTS 209, in force 29 September 2003.

[125] New York, 9 December, 1999, 2178 UNTS 197, in force 10 April 2002.

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