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Transnational Criminal Law: A Tool to Further Western Interests?

Kristin Ebner

Introduction

Transnational criminal law (TCL) is generally viewed as, and applauded for, contributing significantly to the effective cross-border suppression of transnational crimes such as terrorism, money laundering and drug, arms and human trafficking. However, despite the prima facie achievements of TCL, the proliferation of suppression regimes also merits a critical inquiry into its legitimacy. Taking Neil Boister's conceptualisation of TCL as a basis¹ and testing his promise that it enables a deeper understanding of TCL and the 'peculiar social, political and normative contexts in which different transnational crimes emerge and are implemented',² this article aims at contributing to a burgeoning critical analysis of the field. It concludes that TCL, in fact, faces serious legitimacy problems, especially in the eyes of non-Western states, particularly due to the substantial influence Western hegemonic states have on its construction, content and enforcement.

Boister conceptualises TCL³ as a pluralistic legal field consisting of international treaty provisions and corresponding criminal norms in numerous domestic legal codes.⁴ As such, he distinguishes the field from international criminal law (ICL), which deals only with so called 'core crimes', directly imposes criminal responsibility on individuals through international

¹ TCL as a 'key heuristic for describing and critiquing supra-state action'- Radha Ivory, 'Beyond transnational criminal law: anti-corruption as global new governance' (2018) 6:3 *London Review of International Law* 413.

² Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (2015) 6:1 *Transnational Legal Theory* 9.

³ Boister uses the term TCL as a legal counterpart to the criminological phenomenon of 'transnational crimes' by combining the latter with what Philip Jessup implies with the term 'transnational law'; 'Transnational Law' includes 'all law which regulates actions or events that transcend national frontiers', not only public international law, but also private international law and other norms that do not fit squarely into these ordinary categories; Philip C Jessup, *Transnational Law*, Yale University Press (1956) 1-2; Neil Boister, 'Transnational Criminal Law?' (2003) 14:5 *European Journal of International Law* 953.

⁴ This conception is in contrast to eg Luban, O'Sullivan, and Stewart's definition of TCL as 'domestic criminal law that regulates actions or events that transcend national frontiers'; David Luban, Julie R O'Sullivan, David Stewart, *International and Transnational Criminal Law* (Wolters Kluwer, 2nd ed, 2014) 3.

law and is enforced by international institutions.⁵ Grounded on this understanding, the first part of this article will examine the construction of TCL's prohibition regimes. After looking at TCL's telos, the ontological reality of transnational crimes will be questioned. Deviating from the common narrative that TCL's suppression treaties were developed as a response to the rapid spread of actual transnational crimes spurred by globalisation, this article argues that suppression regimes themselves have contributed significantly to the creation and spread of the myth of transnational crimes. Taking a holistic approach will reveal the actual role politics and power play in the transnational criminalisation process.⁶

The second part of this article will look at who has benefitted from the construction of TCL. After concluding that TCL bolsters Western hegemony,⁷ the 'Americanization of international law enforcement'⁸ is examined by way of example.⁹ Finally, this article will turn to the negative implications associated with and flowing from Western hegemony, particularly for developing states, and the questionable effectiveness of the suppression regimes, which hamper with TCL's legitimacy.

1. Constructing TCL's Suppression Regimes

TCL *prima facie* aims at the suppression of transnational crimes. This aim is pursued by suppression treaties, which address specific transnational crimes and oblige signatory states to primarily criminalise activities falling within the scope of the defined crimes in their

⁵ Neil Boister, 'Further Reflections' (n 2) 25; Robert Cryer and others, *An Introduction to International Criminal Law and Procedures*, Cambridge University Press 3 (2014) 5, 3, 329.

⁶ Criticisms of ICL will be taken into account since the legal fields face parallel challenges according to Prabha Kotiswaran and Nicola Palmer, 'Rethinking the 'international law of crime': provocations from transnational legal studies' (2015) 6:1 *Transnational Legal Theory* 55, 57.

⁷ Deconstructing and revealing power imbalances as historically relevant as a first step aiming at facilitating the reconstruction of the field in a manner that better accommodates the voices of the Third World; in line with the Third World Approach to International Law (TWAIL); Among others John Reynolds and Sujith Xavier, 'The Dark Corners of the World: TWAIL and International Criminal Justice' (2016) 14:4 *Journal of International Criminal Justice* 959; James T Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralised Network, and a Tentative Bibliography' (2011) 3 *Trade, Law and Development* 26; Obiora Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 *International Community Law Review* 371.

⁸ 'Americanization' (adopted from literature cited in n 7; Apooa Anubhuti, 'Americanisation of International Law' (2010) SSRN E-Journal, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1712286> (accessed 18 June 2019). Used to refer to US-American influence highlighting US-centricity in this context, despite the fact that it is actually an inadequate term as America not only includes the USA, but also eg South America.

⁹ Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press 2008) 10; Margaret Beare and Michael Woodiwiss, 'U.S. Organized Crime Control Policies Exported Abroad' (2014) *The Oxford Handbook of Organized Crime* 545.

domestic legal systems.¹⁰ Additionally, state parties take on treaty obligations entailing assurances of procedural cooperation among them to suppress the crimes in question beyond their borders.¹¹ TCL in general, or the pluralistic legal order in which domestic norms resulting from the successful ‘nationalisation’ of crimes supplement norms in the suppression treaties, can be divided into numerous global prohibition regimes,¹² which are concerned with the suppression of specific transnational crimes. These regimes provide a basis not only for domestic but also cross-border law enforcement activities against the crime in question. This, according to Boister, is the purpose of TCL: to enable states to engage in procedural cooperation in suppressing certain crimes transnationally by building mutual foundations to do so in their national laws.¹³ States, in other words, construct prohibition regimes against criminal concerns, which are essentially domestic, such as drugs, money laundering or their overall national security, to cooperate transnationally and transgress the territorial limits, which confine their respective coercive power in suppressing the crime in concern.¹⁴ The telos of TCL is markedly one of the features, which, according to Boister, distinguishes TCL from ICL.¹⁵ The very normative aim is not, as it is for ICL, to protect fundamental values and interests shared by the international community as a whole through common institutions, but rather to pursue domestic interests transnationally.¹⁶

If one state or a group of states want to pursue a specific criminal concern, such as drug criminality, on a transnational level, other states have to be persuaded that it is in fact – to a sufficient degree – of mutual concern. For example, that the drug problem of that state is actually a transnational problem of drug trafficking. Only then can they be convinced that it is necessary to sign international suppression treaties, which oblige them to adjust their own domestic laws to assure mutual criminalisation for the purpose of mutual cooperation in suppressing specific crimes, which are perceived as a common threat internally and transnationally.¹⁷ In other words, the crimes in question are framed as ‘transnational crimes’, for example drug trafficking.¹⁸

¹⁰ For example, the International Convention for the Suppression of the Financing of Terrorism (1999) establishes an obligation for state parties to criminalise financing as set forth in its article 2 (article 4); ‘nationalising the crime’.

¹¹ Boister, ‘Further Reflections’ (n 2) 9; Robert Cryer, ‘Drug Crimes and Money Laundering’ (2010) Routledge Handbook of International Criminal Law 181, 181.

¹² In the following the term ‘suppression regime’ is used interchangeably.

¹³ Boister, ‘Further Reflections’ (n 2) 12; Boister, ‘TCL?’ (n 3) 967.

¹⁴ Boister, ‘Further Reflections’ (n 2) 26.

¹⁵ Boister, ‘TCL?’ (n 3) 965.

¹⁶ Cryer, *Introduction ICL* (n 5) 6; See Kotiswaran and Palmer (n 6) 57.

¹⁷ Boister, ‘Further Reflections’ (n 2) 26. Justifying universal jurisdiction against certain crimes through the advancement of collective interests of the community of states and the perceived need for inter-state cooperation: Devika Hovell, ‘The Authority of Universal Jurisdiction’ (2018) 29:2 *The European Journal of International Law* 427, 441.

¹⁸ Another example from the United Nations (UN) Convention against Corruption (UNCAC, 2003) preamble: ‘corruption is no longer a local matter but a transnational phenomenon that affects all

2. Defining Transnational Crimes

Transnational crimes, such as money laundering, drug and human trafficking, or financing terrorism, are ordinarily defined as crimes, whose actual or potential effects or moral impacts transgress national borders.¹⁹ It is commonly explained that globalisation has not only spurred international trade, but also enabled the exponential growth of certain types of cross-border criminal activities.²⁰ As transnational crimes proliferated, states were forced to respond to this new common threat by increasing cooperation and coordination of law enforcement efforts. The spread of suppression regimes is, in this line of reasoning, simply a globalised legal reaction to an ever-growing globalised threat.²¹ This functionalist narrative, resting on the assumption of ontologically real transnational crimes, while accounting for some elements in the development of TCL, fails especially to capture the crucial role politics and power relations have played in the process of creating suppression regimes.²² In the following, this article will take a more holistic approach to examine the construction of the constituents of TCL, taking into account insights from criminology and international relations, to more accurately account for the said influences.²³

The basic assumption of the ontological reality of the phenomenon of transnational crimes has increasingly been questioned.²⁴ Since states decide which activities they choose to criminalise, transnational crimes, just as ordinary crimes, are defined and therefore socially constructed by law.²⁵ The increasing number of suppression regimes are, it is argued, not merely responses to the global proliferation of an existing globally spanning phenomenon, but rather suppression regimes themselves are crucial factors in creating and consolidating the myth of transnational crimes. Defining transnational crime is a political endeavour in which states are not only led by political, but also economic and even moral considerations. If a state seeks transnational cooperation in suppressing an activity which is of particular domestic concern, this activity has to be framed, as stated before, in a way that produces the perception that it is indeed of mutual transnational concern. Only if states are convinced that parallel state interests are affected by

societies and economies, making international cooperation to prevent and control it essential'; Ivory (n 1) 425 correctly points out that corruption not always has a cross-border dimension.

¹⁹ UN Convention against Transnational Organized Crime and the Protocols thereto (2000) article 3(2); Boister, 'TCL?' (n 3) 954.

²⁰ Senator John Kerry, *The New War: The Web of Crime that Threatens America's Security*, (Simon & Schuster New York 1997) 13, 109; Cryer, 'Drug Crimes' (n 11) 182.

²¹ Boister, 'Further Reflections' (n 2) 11; Andreas and Nadelmann (n 9) 18; UN General Assembly Resolution, UN doc. A/50/432, 3.

²² Andreas and Nadelmann (n 9) 7; Boister seems not to refute that some crimes have indeed globalized, but questions the process of criminalization (Boister, 'Further Reflections' (n 2) 11).

²³ *ibid.*

²⁴ This is not to say that the ontological reality of the crimes per se or their devastating effects, but rather their conceptualisation as a transnational as opposed to much more home-grown phenomenon and the specific processes of criminalisation are questioned.

²⁵ Among others Kotiswaran and Palmer (n 6) 71-74 and cited authors; Andreas and Nadelmann (n 9); Jude McCulloch, 'Transnational Crimes as Productive Fiction' (2007) 34:2 Social Justice 19.

certain activities that threaten some sort of shared moral code will they believe that it is necessary to criminalise them domestically and contribute to their suppression beyond their borders. Sovereignty deliberations, which might otherwise present an obstacle for transnational cooperation, are, accordingly, not considered relevant.²⁶ In McCulloch's words, states, by politically defining transnational crimes, create 'productive fictions',²⁷ which serve as a rhetorical basis for them to extend their coercive power across borders.²⁸

Once a particular criminal concern is framed as a transnational crime, the extension of coercive powers to combat the crime transnationally has to be sought after through the adoption of suppression treaties, which form the basis for a suppression regime. According to the general tenor in international law that states are part of a non-hierarchical international order in which they enjoy sovereignty and formal equality,²⁹ signing and ratifying suppression treaties signifies that states voluntarily give consent to be bound by them.³⁰ They deliberately take on obligations to criminalise specific activities as set out as transnational crimes in the treaties and – based on the principle of reciprocity – agree to cooperate with one another on procedural matters.³¹ In reality, however, powerful states have the superior capacity to protect and promote their self-interests. This power is applied during the (political) treaty negotiation process, and powerful states can easily influence which crimes are addressed and how the 'transnational' crimes are formulated. For this reason, what becomes an international norm is often modelled on the ideas powerful states have about the nature of the crime, criminal law and punishment. Through the process of subsequent national criminalisation, the way provisions are formulated in the treaties also influences signatory states' domestic criminal laws. Consequently, major powers do not only have the capacity to influence the creation of suppression regimes to accommodate their interest to suppress certain activities transnationally. Rather, they also cement and perpetuate their influence on TCL, by dominating the formulation of new norms that become part of TCL's pluralistic legal field, and due to the fact that new suppression treaties are generally modelled on already existing ones. Major power's interests and global power politics, therefore, decisively determine TCL's norms.³²

3. Using TCL to Pursue Domestic Interests

If TCL's purpose is to transnationally suppress activities of essentially domestic concern, the question arises who benefits from this, i.e. which powerful states have the capacity to

²⁶ Cryer, 'Drug Crimes' (n 11) 181; Andreas and Nadelmann (n 9) 19-21.

²⁷ McCulloch (n 25) 19.

²⁸ Nadelmann (n 9) 11-13; Boister, 'Further Reflections' (n 2) 26.

²⁹ See eg Charter of the United Nations (1945) article 2(1).

³⁰ Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organizations' (1944) 53:2 Yale Law Journal 207, 209; Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2:1 Ghana Institute of Management and Public Administration Law Review 14.

³¹ Boister, 'Further Reflections' (n 2) 16; Andreas and Nadelmann (n 9) 10.

³² Boister, 'TCL?' (n 3) 958; Boister, 'Further Reflections' (n 2) 12, 26.

accommodate their domestic concerns and shape TCL's norms. The following segment will examine this question before turning to an analysis of the implications this has for TCL's legitimacy.

TCL – A Tool for Western Hegemony?

The power imbalances, which enable certain states to exert their power and to influence the creation of treaties are deeply rooted in colonialism, and taint international law in general.³³ In the context of TCL, Western developed states have pushed for the development of suppression regimes to extend their coercive capacities and accommodate their own economic and political interests within the system of TCL.³⁴ Especially the USA, as will be shown in the next section, has influenced prohibition regimes by pursuing explicit foreign policies to make its domestic laws apply extraterritorially.³⁵

Transnational crimes and the 'appropriate' responses to them are, in general, modelled on the ideas of developed states, while developing states are convinced, induced and even coerced to join this dictate, and to sign suppression treaties and become part of suppression regimes.³⁶ Even though suppression treaties frequently promise mutual law enforcement assistance, it is, in practice, often given one-sidedly – from Western developed states to developing states –, which further creates and maintains existing unbalanced dependencies among states.³⁷ Despite formal equality, TCL has been decisively influenced by Western states and, thus, has become a part for Western hegemony.³⁸ Western dominance is preserved and even reinforced as TCL maintains the hierarchies between states, which allowed Western states to assume dominance in the first place.³⁹

³³ Andreas and Nadelmann (n 9) 17; Makau Mutua, 'What is TWAIL?' and 'Comment by Antony Anghie' (2000) 94 *American Society of International Law* 31; Martti Kosenniemi, 'International law and hegemony: a reconfiguration' (2004) 17:2 *Cambridge Review of International Affairs* 197; Antony Anghie, 'The Evolution of International Law' (2006) 27:5 *Third World Quarterly* 739; Kotiswaran and Palmer (n 6) 85; Boister, 'Further Reflections' (n 2) 26, 28-29; Luis Eslava, 'TWAIL Coordinates' (2 April 2019) *Critical Legal Thinking*, <<http://criticallegalthinking.com/2019/04/02/twail-coordinates/>> accessed 18 June 2019; David Kennedy, *World Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press 2018).

³⁴ Cryer, 'Drug Crimes' (n 11) 182.

³⁵ *ibid.*

³⁶ Kotiswaran and Palmer (n 6) 85; In accordance with the 'imposition by bargaining model' in which patterns of law have, according to Mattei, been historically exported from one state to another "in the sense that acceptance of a legal model is part of a subtle blackmail' ; Ugo Mattei, 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance' (2003) 10 *Indiana Journal of Global Legal Studies* 383, 388.

³⁷ *ibid.*; Boister, 'Further Reflections' (n 2) 26, 28-29.

³⁸ Hegemony understood as 'power reached by a combination of force and consent' as conceptualised by Antonio Gramsci as interpreted and defined by Mattei; Mattei (n 36) 387.

³⁹ Andreas and Nadelmann (n 9) 20; Boister, 'Further Reflections' (n 2) 26-27; James Sheptycki, 'Transnational crime: an interdisciplinary perspective' (2014) *Routledge Handbook of Transnational Criminal Law* 41, 42.

4. Americanisation of International Law Enforcement

The USA's transnational organised crime policies, which had an irrefutable influence on the development of TCL, serve as a striking example of powerful states' influence on TCL and Western hegemony. The USA's specific understanding of organised crimes has coined the term 'transnational crime' and the US model response to those crimes has gradually been accepted as the international standard. By way of presenting its own national legislation as a model for norms in suppression treaties, the standards had a direct influence on the domestic laws of other states.⁴⁰

Early on, the USA set the tone for the common narrative that certain types of crimes had become globalised and that this called for states to enhance effective cooperation, overcome traditional notions of sovereignty and coordinate their law enforcement efforts to combat the 'new globalised threat'.⁴¹ Based on domestic criminal concerns, the USA has painted the picture of a mafia-type, highly organised crime group with origins and close links outside of the USA. These groups, ostensibly exploiting the territorially limited law enforcement capacities of states and being anathema to the prospering legitimate international trade, became depicted as a major threat, not only to the USA, but also to other states and even overall international security.⁴² The media and public fears were significant drivers in the spread of this narrative within and beyond the USA, even if it never actually received any empirical support.⁴³

The USA has exerted great diplomatic pressure in order to pursue its explicit policy to use international forums to define global norms for effective criminal laws and to encourage foreign states to enact and enforce their domestic laws based on these norms.⁴⁴ Among the tools employed to make other states comply with US demands and cooperate within suppression regimes, was to readily offer inducements, mostly in the form of technical assistance and training programs for foreign law enforcement agents to overcome their lacking

⁴⁰ Andreas and Nadelmann (n 9); Beare and Woodiwiss (n 9); Michael Woodiwiss and Dave Bewley-Taylor, 'The Global Fix: The Construction of a Global Enforcement Regime' (2005) Transnational Institute Briefing Series 4.

⁴¹ Kerry (n 20) 169, 173.

⁴² Beare and Woodiwiss (n 9) 558; closely intertwined with neo-liberal ideology; Woodiwiss and Bewley-Taylor (n 42) 7, 20-21.

⁴³ The Mafia for example appears as a much more US home-grown crime problem than stemming from a well-organized internationally acting criminal network; Beare and Woodiwiss (n 9) 557; Woodiwiss and Bewley-Taylor (n 42) 26, 28; Reinforced public panic can lead to policy adaptations in a process of what Kuran and Sunstein call 'availability cascade'; Timur Kuran and Cass R Sunstein, 'Availability Cascade and Risk Regulation' (2007) 51: 683 Stanford Law Review 683.

⁴⁴ US National Security Council, 'Strategy to Combat Transnational Organized Crime' (2018) <<https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/strategy>> (accessed 3 March 2020); Beare and Woodiwiss (n 9) 556; U.S. Department of State, 'International Law Enforcement Academies (ILEA) Statement of Purpose', <<https://2001-2009.state.gov/p/inl/crime/ilea//index.htm>> accessed 3 March 2020.

or insufficient enforcement powers.⁴⁵ Another central tool to convince other states of the necessity of a concerted response was the employment of a proselytising moral rhetoric by the USA. In what it declared as the 'war on drugs', the 'war on terrorism' and the general crusade against organised crime, the USA readily presumed leadership as a 'noble sacrifice in the name of worldwide human liberation'⁴⁶ – a role Senator John Kerry compared to the one the USA had presumed in World War II and in the Cold War's struggles against communism.⁴⁷

A significant step towards the transnationalisation of US criminal justice policies, which was led by the USA's policies on drug trafficking, was achieved with the adoption of the United Nations (UN) Convention against Illicit Traffic in Narcotic and Psychotropic Substances (UNCITNPS) in 1988.⁴⁸ At the following UN World Ministerial Conference on Organized Transnational Crime in 1994, the US concept of transnational organised crimes and the idea and successfulness of US prohibitive responses to it were widely endorsed. The Conference, therefore, in Beare and Woodiwiss's words, served as an 'international forum for a global conspiracy theory of organised crime'.⁴⁹ The US model was subsequently fully assimilated by the international community with the adoption of the UN Convention against Transnational Organised Crime and the Protocols thereto (UNTOC) in 2000. The 188 further state parties to the Convention have obliged themselves to comply with the US model, to adapt their domestic laws to criminalise certain activities and to accommodate US demands for procedural cooperation.⁵⁰ After the September 11 attacks, US policies to create global prohibition regimes to expand coercive capacities internationally gained extraordinary political momentum. The re-declared 'war on terror' used the same rhetoric as the previous 'war on drugs'. An internally prioritised security concern was amplified to become a perceived international threat which, in the USA's view, demanded all 'civilized states' to coordinate their efforts to effectively combat the 'common enemy'.⁵¹

The compliance of other states with US demands can, besides the effects of inducement and moral convincing, be explained by the fact that deviating from what has become the accepted

⁴⁵ International Law Enforcement Academy <www.state.gov/j/inl/focus/combating/ilea/-index.htm> accessed 17 December 2018; Beare and Woodiwiss (n 9) 556; Kotiswaran and Palmer (n 6) 86.

⁴⁶ Reminiscent of the 'white man's burden'; Rudyard Kipling, 'The White Man's Burden' (1899) available online: <www.hermann-mueckler.com/pdf/RKipling-Engl-Deut.pdf> accessed 2 June 2019; Mutua (n 33) 34; Ronald Kramer and Raymond Michalowski, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion of Iraq' (2005) 45:4 The British Journal of Criminology 446, 464.

⁴⁷ Kerry (n 20) 173, 193; Beare and Woodiwiss (n 9) 546, 554; Also, Mattei (n 36) 388, who claims that 'Americanisation' was only possible through the employment of 'ideological apparatuses, producing spectacular propaganda that allows the produced legal consciousness to circulate'.

⁴⁸ Beare and Woodiwiss (n 9) 557; Outcome document UNGA Res UN doc A/50/432.

⁴⁹ While many agree that US interests at the conference matched the EU's security interests as well as internal UN politics; Beare and Woodiwiss (n 9) 558; Woodiwiss and Bewley-Taylor (n 42) 21-22.

⁵⁰ Beare and Woodiwiss (n 9) 547; UN Office on Drugs and Crime <www.unodc.org/unodc/en/-organized-crime/intro/UNTOC.html> accessed 18 December 2018.

⁵¹ This is not to say that the September 11 attacks were not a tragedy, in any way planned or that the perpetrators do not present a real threat; McCulloch (n 25) 22; Kramer and Michalowski (n 45) 459; Woodiwiss and Bewley-Taylor (n 42) 16.

international standard would put any state at risk of reputational damage. Shaming states that do not mutely comply with US demands has, for example, occurred during the Bush administration when the focus was shifted towards so called ‘rogue states’, which were labeled as being associated with terrorism.⁵² Complying with US demands is, in short, often considered less costly for states than non-compliance, especially when US cooperation on other international matters is at stake as well.⁵³

5. Illegitimacy of TCL?

The fact that Western states, especially the USA, have constructed prohibition regimes to accommodate their own domestic interests, and that the very hegemonic power imbalances that made the specific construction of the legal regime possible in the first place are maintained, raises doubts about TCL’s legitimacy.⁵⁴ This section will examine negative implications and consequences, particularly for developing states,⁵⁵ associated with and flowing from Western hegemony, which encroaches on TCL’s legitimacy.

Masking Underlying Interests

In accordance with the very telos of TCL, and as illustrated earlier, the USA has constructed and deliberately used TCL’s prohibition regimes to further its interest of enhancing US law enforcement against specific domestic concerns globally.⁵⁶ This has, however, not only served US criminal justice and national security interests, as other underlying interests have affected the policies to ‘Americanise’ international law enforcement as well. Comparable to the Cold War, during which economic and governmental forces within the USA had used the war polemics to justify and expand military budgets, strengthen the military industry and a perpetuate a constant ‘war economy’, transnational crimes had become the new guise to justify and maintain these budgets and other economic interests.⁵⁷ The US-led ‘war on drugs’ has, furthermore, been criticised for being a mere US instrument to reach geopolitical gains, especially in Latin America and the Caribbean.⁵⁸ Equally, the ‘war on terror’ has been perceived as a justification for the USA to pursue its political, economic and foreign policy interests globally and intervene in the domestic affairs of other – Third World – states.⁵⁹ Kramer and Michalowski pungently conclude, that the USA had a ‘long-standing will to

⁵² Kramer and Michalowski (n 45) 459.

⁵³ Woodiwiss and Bewley-Taylor (n 42) 26.

⁵⁴ Parallel to the argument that international law is illegitimate since it subordinates the Third World to the West; Mutua (n 33) 31.

⁵⁵ Or the ‘Third World’.

⁵⁶ Sheptycki (n 38) 42.

⁵⁷ Kramer and Michalowski (n 45) 456; McCulloch (n 25) 22.

⁵⁸ Evo Morales, ‘opening statement at the 56th Session of the UN Commission on Narcotic Drugs, UN Centre Vienna’ (12 March 2012) <<http://cndblog.org/2012/03/evo-morales-speech-at-the-opening-session-of-the-cnd-in-spanish/>>; <www.telesurenglish.net/news/Bolivias-Evo-Morales-Denounces-War-on-Drugs-at-UN-Summit-20160421-0027.html> (3 March 2020); Cryer, ‘Drug Crimes’ (n 11) 187.

⁵⁹ Especially in the MENA region; McCulloch (n 25) 22.

empire'⁶⁰ and pursued political and economic dominance worldwide.⁶¹ The fact that the USA benefits from the current system of TCL and apparently uses it as a tool to further a multitude of disguised interests, makes it highly unlikely for it to agree to any changes to the status quo. Any suggestion to alleviate TCL's Western hegemony has to take this serious obstacle into consideration.⁶²

Ineffective Suppression

The US model to combat transnational crimes has focused mainly on criminalisation and militarised law enforcement. This approach has evidently failed to address underlying structural socio-economic conditions which promote, or at least facilitate, organised crime in the first place. Not addressing the root causes of what has been framed as transnational crimes enables the fight against it to be perpetuated.⁶³ If the goal of the 'war' against transnational crime were, as is propagated, the full eradication of transnational crimes, due to the failure to address their root causes, the international community's approach has – at least so far – been ineffective. Woodiwiss and Bewley-Taylor argue that this lack of success is precisely due to the flawed underlying US-coined conception about transnational organised crime, which has become mainstreamed, and the subsequent adoption of the US-modelled response of unquestioned criminalisation and strict law enforcement domestically and internationally, as outlined above.⁶⁴ However, as already noted, a perpetuation of the 'war' against transnational crime is in the very interest of the USA and other political entities. While developing states, such as Bolivia, have denounced the US-led global suppression regime on drug trafficking as a failure,⁶⁵ alternatives to strict prohibition and repression are not considered and international agreements, such as the UNCITNPS, still present major obstacles to those states wishing to pursue alternate policies to address transnational crimes and their underlying social problems.⁶⁶

Democratic Deficit

As far as the unidirectional normative transfer from developed Western to developing states is concerned, it can be argued that there is a specific democratic deficit in the development of

⁶⁰ Kramer/Michalowski (n 45) 464.

⁶¹ *ibid.*

⁶² For example, regarding the debate on criminalizing drug trafficking directly in international law (ICL); Cryer, 'Drug Crimes' (n 11) 187.

⁶³ Beare and Woodiwiss (n 9) 546; Boister, 'Further Reflections' (n 2) 26.

⁶⁴ Woodiwiss and Bewley-Taylor (n 42) 26.

⁶⁵ CIA, 'The World Factbook: Bolivia' <www.cia.gov/library/publications/the-world-factbook/geos/bl.html> accessed 3 March 2020.

⁶⁶ Beare and Woodiwiss (n 9) 546; Boister, 'Further Reflections' (n 2) 26; While states not obliging to the standard response, as stated above, are ostracised and risk damaging their international reputation; Woodiwiss and Bewley-Taylor (n 42) 10, 27.

TCL hampering with its legitimacy.⁶⁷ Suppression treaties, like all international treaties, are commonly adopted solely by the executive of states. The lack of democratic participation is exacerbated by the fact that the executive branch is in the context of suppression treaty negotiations directly influenced through inducements offered and other tools employed by certain states to convince them to join suppression regimes. States' leaders are attracted by the promise of greater power through 'better' substantive penal laws and increased procedural cooperation. Even though the nationalisation of the provisions of the treaties after joining them is normally conducted by the legislature and therefore generally through democratic institutions, Boister argues that incentives, such as technical assistance offered by powerful states, often also affect local political elites and thus the whole democratic process. Thus, the inability to withstand diplomatic pressure, ignorance, and the lack of democracy within certain states accompany the process of domestic implementation and further tamper with TCL's legitimacy.⁶⁸

6. Impacts on Developing Countries

If states adhere to TCL's hegemonic demands, the states that make them become centres of authority in the field. While this makes suppression regimes and TCL in general more systematic, it can also result in detrimental consequences for developing states, i.e. the Third World.⁶⁹ A state's potentially already weak criminal justice systems might be overwhelmed or even distorted. An example for this can be seen in Kenya's trials against Somali pirates captured by powerful states on high seas. Kenya's postcolonial jurisdiction is utilised to avoid the capturing states' own undesired obligation to prosecute the pirates, indicating new forms of neo-colonial exploitation of substantial inequalities. Interestingly, these trials were taken as an opportunity for powerful Western donor states, such as the USA,⁷⁰ to scrutinise and criticise Kenya's criminal justice system for being flawed and weak.⁷¹

Complying with suppression regimes can, furthermore, lead to the paradoxical outcome that developing countries are obliged to combat supply-sided activities of illicit products within their territory – in some cases with adverse destructive effects – while the demand in those products in developed states is not addressed.⁷² In Mexico, for example, the measures taken in pursuit of the transnational 'war on drugs', with active participation of the USA, have thrown the country into such turmoil that the situation has even become classified as an internal armed

⁶⁷ Ivory (n 1) 420; Allegra M McLeod, 'Exporting US Criminal Justice' (2010) 29 Yale Law and Policy Review 83.

⁶⁸ Boister, 'Further Reflections' (n 2) 27-28.

⁶⁹ 'The Third World consists of the victims and the powerless in the international economy', Mutua (n 33) 35.

⁷⁰ And member states of the European Union.

⁷¹ Mateo Taussig-Rubbo, 'Pirate Trials, the International Criminal Court, and Mob Justice: Reflections on Postcolonial Sovereignty in Kenya' (2011) 2:1 Humanity: An International Journal of Human Rights, Humanism, and Development 51.

⁷² Boister, 'Further Reflections' (n 2) 28; Andreas and Nadelmann (n 9) 20.

conflict.⁷³ Reducing the demand of drugs, at the same time, particularly within the USA, has received insufficient, if any, attention, despite the fact that there are strong indicators that this would be a crucial step towards resolving, or at least significantly mitigating Mexico's struggle.⁷⁴

Many factors influence the capacity of developing states to resist endowments, such as law enforcement assistance promised within suppression treaties. Lacking domestic legal capacities or the differing margin of appreciation which is permitted by different suppression treaties are just two examples of such factors. Boister suggests that one way to ensure states' cooperation against crimes with truly harmful effects, such as terrorism, without the subordination and instrumentalisation of certain states by others, would be to formulate certain guiding principles to govern TCL and its processes of domestic criminalisation and procedural cooperation, while bestowing states with a genuine margin of appreciation.⁷⁵ However, devising such a set of principles would, in my opinion, face exactly the same problems as formulating suppression treaties, or any other international treaties, namely that states do not have the same political power. Powerful – predominantly Western – states have the ability to influence the creation of international norms. Any guiding principle would be subject to political deliberations and, thus, be at risk of becoming yet another part of Western hegemony.⁷⁶

Conclusion

In line with the very teleologic purpose of TCL – to pursue domestic interests transnationally – powerful states construct suppression regimes against essentially domestic concerns, such as drugs, money laundering or their national security, to transgress the territorial limits which confine their coercive power. Framing domestic concerns as transnational crimes serves as a rhetorical basis to convince other states of the necessity to join prohibition regimes, to criminalise certain activities in their domestic law and to cooperate with each other to ensure their efficient suppression internally as well as transnationally. Deviating from the common narrative, which argues that TCL's suppression treaties were developed as a response to the globalisation of actual transnational crimes, this article argues that suppression regimes themselves have contributed to the creation and spread of the myth of transnational crimes. By highlighting powerful states' capacity to influence what is perceived as transnational crimes and the formulation of those crimes in suppression treaties, the holistic approach taken in this article emphasises the crucial role global power politics play in constructing TCL.

Particularly, Western states have used their power to develop TCL and influenced the norms making up the legal field. A compelling example for this has been the USA with its policies of

⁷³ Craig Bloom, 'Square Pegs and Round Holes: Mexico, Drugs and International Law' (2012) 34 *Houston Journal of International Law* 345.

⁷⁴ Callin Kerr, 'Mexico's Drug War: Is It Really a War' (2012) 54:1 *South Texas Law Review* 193, 197.

⁷⁵ Boister, 'Further Reflections' (n 2) 26, 28-29.

⁷⁶ Critical also Kotiswaran and Palmer (n 6) 69.

pursuing national security interests transnationally. The term 'transnational crimes' was coined by the USA's understanding of organised crimes and the US-model has gradually become the standard international response to transnational threats. Other states have been convinced, induced and even coerced to follow Western, especially US, demands and join suppression regimes. The unidirectional giving of mutually assured assistance is just one aspect that perpetuates the very hierarchies between states that have shaped the construction of TCL. TCL is, therefore, not only a product of Western hegemony. It has become much more inherent to the system and is maintained by its functioning, which necessarily raises questions about TCL's legitimacy. The instrumentalisation of TCL to mask underlying economic or geopolitical interests, the doubtful effectiveness of the standard US-inspired response, a serious democratic deficit and various negative consequences for developing states flowing from TCL's Western domination, further hamper with TCL's legitimacy. However, states' cooperation within TCL to combat activities which have truly harmful effects, such as terrorism, and the fact that TCL offers a more flexible regulatory framework than conventional criminal law approaches to do so,⁷⁷ generally justify TCL's existence. By shedding light on the peculiar social, political and normative contexts which have shaped TCL, this article tries to contribute to the full understanding of TCL; an imperative step towards resolving its legitimacy and ineffectiveness problems.

However, as long as TCL is in the tight grip of political global power struggles, solutions to its hegemonic problems can only be found if states could be convinced to neglect their pure pursuit of self-interests.⁷⁸ This, however, seems illusory, if one does not want to use similar deceptive methods which have been employed to create the myth of mutually threatening transnational crimes in the first place.

⁷⁷ See Kotiswaran and Palmer (n 6) 80.

⁷⁸ Parallel to ICL: 'Unless or until International Criminal Law found a way around natural self-interests, it would remain an expression of global power politics'; George Schwarzenberg, 'The problem of an International Criminal Law' (1950) 3 *Current Legal Problems* 263.