1. Transnational organized crime as a new phenomenon on the international criminal law scene

1.1 INTRODUCTION

In his Storr Lectures delivered at Yale University in 1956, Philip C Jessup expressed his dissatisfaction over a conception of international law merely focused on inter-State relationships.¹ He observed that the international community is made up of a multitude of subjects, which include nation States but also individuals, corporations and organizations. To effectively capture this complex reality and the entire set of rules that regulates it, he proposed substituting the term ‘international law’ with ‘transnational law’. This terminological shift, in his view, would allow the inclusion of ‘all law which regulates actions or events that transcend national frontiers’.² This all-encompassing definition would include within its scope public international law and private international law as well as rules that could not fit these categories.

Almost seven decades later, Jessup’s analysis is more topical than ever. Classic international law categories and principles have been continuously revised in an effort to keep them updated in the face of an ever-changing world. The phenomenon of transnational organized crime is one of the many factors adding complexity to the reality that international law has to confront. Many of the issues observed by Jessup in 1956 are raised once again by this matter. Transnational organized crime offers a timely illustration of internationally relevant conducts carried out not by States (or State organs) but rather by individuals or groups. The repression of such conducts may require supra-national regulation owing to their cross-border character. It is not by chance, therefore, that transnational organized crime has fostered lively scholarly debates on the existence of transnational criminal law as a separate branch of legal studies, and on the boundaries between the latter and international criminal law.

¹ Philip C Jessup, Transnational Law (Yale University Press 1956).
² Ibid 2.
This chapter explores such debates with the aim of highlighting the peculiarities of transnational crimes in general and transnational organized crime in particular as a category of internationally relevant conducts separate from international crimes *strictu sensu* (or ‘core crimes’). This differentiation is not an easy task, first and foremost because international legal doctrine does not unanimously agree on what is the constitutive element of core crimes that sets them aside from transnational crimes. Nevertheless, it will be argued that a conceptual distinction between transnational criminal law and international criminal law is indeed possible and appropriate. Paragraph 1.5 of the chapter, then, will critically review the international legal framework applicable to transnational organized crime. This analysis will include international treaties concerning transnational organized crime in general or specific forms of transnational organized crime (e.g. human trafficking, migrant smuggling, drug trafficking, trafficking in firearms and so forth). Both global and regional treaties will be examined in this context.

1.2 THE CONCEPTUAL DISTINCTION BETWEEN TRANSNATIONAL AND INTERNATIONAL CRIMES

The definition of transnational crimes is not an easy task. In addition to the fact that there is no universally accepted definition of transnational crimes, the lack of consensus on the distinction between transnational crimes and international crimes adds a further obstacle to the identification of the defining features of the former. Scholarly debates concerning the definitional components of international crimes have proposed different distinctive elements for this category. Such academic efforts to provide a clear definition of international crimes also convey the difficulty of drawing clear boundaries between this category and other types of conducts that are – to various degrees – relevant for international criminal law, including transnational crimes. Nonetheless, a critical review of such debates offers interesting insights for a construction of the concept of transnational crimes. Indeed, establishing what is the essence of international crimes *strictu sensu* – or ‘core crimes’ – can also foster a better understanding of what distinguishes them from transnational crimes, and in turn help to determine what are the essential components of transnational crimes as a separate category.

1.2.1 The Unsuitability of Heinousness as a Definitional Component of International Crimes

In the Preamble of the Statute of the International Criminal Court (ICC), States Parties referred to ‘unimaginable atrocities that deeply shock the conscience of
Transnational organized crime as a new phenomenon

humanity’ and to the need to punish ‘the most serious crimes of concern to the international community as a whole’. Such statements prompt the question of whether international crimes may be distinguished from transnational crimes because of the particular gravity of the former. A first theoretical construction of international crimes includes among their constitutive features the fact that such conduct undermines universal values. According to this view, international crimes constitute breaches of international norms – established under customary law or treaties – that protect values shared by the international community as a whole, and that therefore the entire international community has an interest in repressing. This definition of international crimes would encompass not only ‘core’ crimes (namely, genocide, crimes against humanity, war crimes and aggression), but also international terrorism and torture. On the other hand, conduct such as drug trafficking, piracy, human trafficking and money laundering could not be qualified as international crimes because their repression does not correspond to a universal interest, but rather to ‘selfish’ – albeit shared – interests of States. In relation to such crimes, international law could be considered as a mere tool used by States to enhance their cooperation and ensure an effective repression of transnational criminal conduct. This notion of international crimes recalls other theoretical constructions, whereby their essence lies in their particular seriousness, gravity or heinousness. The inclusion of a certain gravity threshold within the definition of international crimes would conversely imply that transnational crimes consist in offences that are comparatively less harmful or serious than core crimes such as genocide, crimes against humanity or war crimes.

This distinction, however, is questionable for several reasons. First, at least certain offences that are currently not qualified as international crimes can be considered as equally serious and heinous. This is the case, for instance, for trafficking in human beings – to the point that some scholars have advocated for its inclusion within the subject-matter jurisdiction of the ICC on the grounds of extensive interpretations of Article 7 of its Statute, or even for its

---

Transnational organized crime

requalification as a self-standing international crime. Second, references by international courts and tribunals to the special seriousness of international crimes can hardly be considered as confirmation that the latter is indeed a constitutive element of their definition. In 2011, for instance, the Special Tribunal for Lebanon observed that the principle nullum crimen sine lege did not prohibit the retroactive application of domestic legislation adopted to comply with international customary law criminalizing certain conduct. The Tribunal justified this conclusion by noting that punishment for such offences was foreseeable because ‘international crimes are those offences that are considered so heinous and contrary to universal values that the whole community condemns them through customary rules’. In this context, however, heinousness was not considered as a necessary component of international crimes. In fact, because this case concerned – among other charges – terrorist acts rather than core international crimes, the Tribunal stated that the same reasoning applied to ‘crimes punished at the international level by way of bilateral or multilateral treaties’. Similarly, the observation of Trial Chamber III of the International Criminal Tribunal for Rwanda in the Semanza case, whereby all crimes in its Statute are ‘crimes of an extremely serious nature’, was merely functional to the assertion that the actual – rather than abstract – gravity of a conduct was to be taken into consideration for the purpose of establishing a penalty. More broadly, even the widely cited joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the Arrest Warrant judgment referred to heinousness not as a discerning criterion of international crimes, but rather as grounds for their proposal to limit the exercise of universal jurisdiction in


8 Ibid.

absentia to conducts considered to be damaging to the interests of the international community.\textsuperscript{10}

Third, the very criterion of heinousness is inherently flawed because of its inevitably subjective and relative character. The preparatory works to the ICC Statute reveal for instance that the inclusion of drug trafficking and other so-called ‘treaty crimes’ (namely, conducts criminalized by international treaties rather than under customary international law) was seriously considered.\textsuperscript{11} In fact, the proposal submitted by Trinidad and Tobago to criminalize drug trafficking under international law significantly contributed to reviving negotiations aimed at the creation of an international criminal court.\textsuperscript{12} The degree of seriousness of such conducts, however, was by far the decisive motivation behind the ultimate exclusion of treaty crimes from the scope of the subject-matter jurisdiction of the ICC. The majority of States that opposed the inclusion of such crimes within the conducts criminalized by the ICC Statute expressed the view that their repression could be efficiently carried out within the existing international legal framework regulating inter-State cooperation and through prosecution at the domestic level.\textsuperscript{13} More broadly, the lack of clear and objective indicators of the gravity of relevant conducts has fostered critiques concerning the biased nature of heinousness as a discerning criterion between international and transnational crimes, or between core crimes and treaty crimes.\textsuperscript{14} These observations suggest that heinousness is an unsuitable


\textsuperscript{12} UNGA ‘Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the United Nations addressed to the Secretary-General’ UN Doc A/44/195 (21 August 1989). In the letter, the Permanent Representative observed that ‘one of the more urgent contemporary bases for reconsidering the question of international criminal jurisdiction is the illicit traffic in narcotic drugs’ (ibid 2). On this point, see Mahnoush H Arsanjani, ‘The Rome Statute of the International Criminal Court’ (1999) 93 AJIL 22, 29.

\textsuperscript{13} ‘Summary records of the plenary meetings and of the meetings of the Committee of the Whole’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June to 17 July 1998) UN Doc A/CONF.183/13 (Vol II) 171–179. For a critical take on the process that led to the ultimate delimitation of the ratione materiae jurisdiction of the ICC in its Statute, see Saira Mohamed, ‘Contestation and inevitability in the crimes of the International Criminal Court’, in Margaret M deGuzman and Valerie Oosterveld (eds.), The Elgar Companion to the International Criminal Court (Edward Elgar 2020).

\textsuperscript{14} Roger O’Keefe, International Criminal Law (OUP 2015) 57–60; Christine Schwöbel-Patel, ‘The core crimes of international criminal law’, in Kevin Jon Heller and others (eds), The Oxford Handbook of International Criminal Law (OUP 2020). Similar critiques have concerned the distinction between international crimes and
criterion to discern between core international crimes and transnational crimes, and that such a distinction should rest on more objective grounds.

1.2.2 The Blurred Boundaries between International and Transnational Crimes in the Context of International Criminal Jurisdiction

An alternative definition of international crimes identifies the distinctive trait of such conducts in their inclusion within the scope of the subject-matter jurisdiction of international criminal courts. More specifically, this approach identifies as international crimes only those conducts that are currently assigned to the jurisdiction of international courts and tribunals under general international law – namely, genocide, crimes against humanity, war crimes and aggression. Other offences – such as torture, terrorism and transnational crimes in general – may not be qualified as international crimes according to this definition, since they are merely the subject of international treaties that require States Parties to criminalize and prosecute them in their respective domestic orders. This definition does not aim to trace a definitive distinction between international and transnational crimes, and admits the future possibility that other conduct might be included within international courts’ jurisdiction – and thus be qualified as international crimes.

Despite the merits of a pragmatic but flexible approach focused on objective indicators, the scope of international courts’ jurisdiction is a questionable definitional component of international crimes. The principle of complementarity under which the ICC operates recognizes the primary jurisdiction of domestic courts over core crimes. At the same time, treaties that encompass state obligations to criminalize certain transnational conducts in their respective domestic order entrust the exercise of adjudicative jurisdiction to domestic courts. Therefore, domestic courts enjoy a priority in the exercise of their crim-
inal jurisdiction with respect to both international and transnational crimes.\(^\text{17}\) In this light, the distinction between these two categories of conducts on the grounds of their inclusion or exclusion within the subject-matter jurisdiction of international courts becomes quite blurred. A further source of conceptual confusion might stem from the inclusion of conducts criminalized at domestic level within the jurisdiction of special criminal tribunals, such as the Special Court for Sierra Leone or the Special Court for Lebanon.\(^\text{18}\) The unsuitability of international courts’ jurisdiction as a criterion to define international crimes is also suggested by the adoption of the so-called Malabo Protocol\(^\text{19}\) for the purpose of amending the Statute of the not yet established African Court of Justice and Human Rights (ACJHR). The Malabo Protocol has not entered into force yet. Because none of the signing States have ratified it, the threshold of 15 ratifications required by its Article 11 for its entry into force has not been reached. Nonetheless, the Malabo Protocol has attracted significant interest because of its innovative character.\(^\text{20}\) Its Article 14, in particular, aims to grant the ACJHR with criminal jurisdiction not only over international crimes – namely, genocide, crimes against humanity, war crimes and aggression – but also in relation to a number of conducts that include piracy, money laundering, trafficking in persons, in drugs or hazardous wastes as well as the illicit exploitation of natural resources. All of such conducts are included within the jurisdiction of the ACJHR without any distinction between international and transnational crimes.\(^\text{21}\) Regardless of its concrete perspectives of entry into


\(^{18}\) O’Keefe (n 14) 60.


Transnational organized crime

force in the near future, the Malabo Protocol provides a further illustration that a definition of international crimes based on their inclusion within the jurisdiction of international criminal courts inevitably rests on weak grounds. International criminal jurisdiction, indeed, is potentially open to encompassing different types of conducts and it is not reserved in principle to core crimes.

1.3 TRANSNATIONAL CRIMINAL LAW AND INTERNATIONAL CRIMINAL LAW AS SEPARATE BRANCHES OF PUBLIC INTERNATIONAL LAW

The discussed academic efforts to qualify international crimes as a distinct category of offences suggest that any definition of these conducts is inevitably controversial. There is no consensus in international legal scholarship on this matter, and international criminal jurisprudence does not point to a definite direction. If the issue of the definition of international crimes is contentious, determining what are the defining features of transnational crimes is perhaps even more arduous. It is not surprising, therefore, that such offences are the subject of great terminological confusion, and that efforts to define the contours of transnational criminal law as a specific and separate sector of public international law have produced diverging results.

A recurring observation in such definitional efforts concerns the hybrid character of transnational crimes, and consequently of transnational criminal law. Transnational crimes are often described as neither purely national crimes nor core international crimes, or as an in-between category of crimes that is not entirely ascribable either to international criminal law or to domestic criminal law.22 The feature that is consistently identified as a constitutive element of the definition of transnational crimes, however, refers to the fact that they are not directly criminalized by international treaties or by customary law.23 Rather, the prohibition of relevant conducts – and their qualification as crimes – is carried out by States in their respective domestic order with the aim to implement so-called ‘suppression treaties’. The latter provide a definition of certain conduct, envisage an obligation for States Parties to criminalize them in their municipal criminal law and establish a legal framework to ensure their mutual assistance and cooperation in the prevention and repression of such

---

crimes. This aspect is identified as a fundamental component of the definition of transnational crimes even when such conducts are labelled as ‘treaty-based crimes’ \(^{24}\) or ‘treaty crimes’, \(^{25}\) ‘crimes of international concern’ \(^{26}\) or ‘transnational crimes of international concern’. \(^{27}\)

In this light, the most convincing definitions of international crimes appear to be those that qualify them as conducts prohibited by international law and punishable directly on the grounds of international law. \(^{28}\) Conversely, transnational crimes can be defined as conducts criminalized by national laws adopted by States to comply with international treaties that require them to prohibit and prosecute such offences in their respective domestic orders. This conceptual distinction allows us to define the contours of transnational criminal law as the legal framework applicable to transnational organized crime.

In addition, transnational crimes can be distinguished from other crimes envisaged by domestic law because of their cross-border character. Suppression conventions, indeed, respond to the need of States Parties to establish a common legal framework regulating the exercise of prescriptive, executive and adjudicative jurisdiction over offences that they are unable to repress independently because of their transboundary features. These observations suggest that transnational criminal law is a complex body of law made up of international treaties, criminal legislation adopted by States Parties to implement those treaties, international and state practice on the subject as well as a number of soft-law sources. \(^{29}\) This plurality of sources has led Boister to

---

28 Werle and Jessberger (n 16) 36 appear to share this view when they argue that a conduct can be qualified as an offence under international criminal law if it entails individual responsibility, if an international law norm envisages it and if the offence is punishable regardless of its criminalization under domestic law. The element of criminalization under international law is also present – together with other defining features – in the definition of international crimes proposed by other scholars. On this matter, see for instance C Jalloh, ‘A classification of the crimes’ (n 17) and Boister, ‘Transnational crimes jurisdiction’ (n 21) 338.
describe transnational criminal law as a ‘non-hierarchical order of formally equal national centres of legal authority based on reciprocity, equality, and sovereign consent which are interlinked, coexist, and overlap’. Nonetheless, transnational criminal law may not be reduced to the mere sum of national criminal law provisions on cross-border criminal activities. Transnational criminal law should be considered instead as a sector of international law, encompassing both mutual obligations that States undertake by acceding specific international treaties and domestic norms adopted to comply with a duty of criminalization equally enshrined in such treaties.

1.4 THE DEFINITION OF TRANSNATIONAL ORGANIZED CRIME

Within the broader category of transnational crimes, the expression ‘transnational organized crime’ denotes a specific phenomenon. International treaty law does not establish an exhaustive list of offences qualified as such. However, the United Nations Convention against Transnational Organized Crime (UNTOC) constitutes a key reference to define the contours of transnational organized crime. The wide scope of application of the UNTOC was further broadened by the adoption of three Protocols, respectively on trafficking in persons, the smuggling of migrants and trafficking in firearms. One

---

30 Boister, An Introduction to Transnational Criminal Law (n 23) 34. On the same note, see also Héctor Olásolo, International Criminal Law, Transnational Criminal Organizations and Transitional Justice (Brill 2018) 94.
31 Boister, An Introduction to Transnational Criminal Law (n 23) 18–19. Boister identifies horizontal and vertical obligations in the context of transnational criminal law. The former refer to international obligations to criminalize certain conducts and cooperate in their repression, while the latter concern the application of criminal law and procedure to individuals in order to comply with vertical obligations under international law.
of the most frequent criticisms directed towards the definitions established by the UNTOC points to their excessively broad character, which might deprive them of any meaning and significance or raise serious interpretative issues. Differently than other conventions that will be examined over the course of this chapter, the UNTOC does not include any definition of the specific conducts that States Parties must criminalize at a domestic level. Because of the difficulties experienced during negotiations in reaching a consensus over an exhaustive list of crimes to include within the scope of the UNTOC, this convention essentially leaves States Parties free to determine which offences should be defined as transnational organized crimes. Nevertheless, the UNTOC provides definitions of key concepts that constitute a crucial starting point for our analysis and that therefore deserve specific attention, also in the light of the quasi-universal ratification of this convention.

First and foremost, Article 3 includes within the scope of application of the UNTOC two groups of offences – namely, specific offences envisaged by the UNTOC itself and ‘serious crimes’ as defined by its Article 2. The first group of conducts includes participation in an organized criminal group (Article 5), the laundering of the proceeds of crime (Article 6), corruption (Article 8) and obstruction of justice (Article 23). These offences, therefore, are the subject of specific UNTOC provisions that define their constitutive elements and establish an obligation for States Parties to adopt legislative and other measures to qualify them as criminal offences in their domestic orders. States Parties enjoy a much wider margin of discretion in relation to the second groups of offences. Article 2(b) UNTOC indeed defines serious crimes as offences punishable by a maximum deprivation of liberty of at least four years or by a more serious penalty. States Parties are therefore free to determine which offences to include within the scope of application of the UNTOC by adjusting


38 As of November 2021, UNTOC counts 147 signatories and 190 States Parties.
their domestic criminal legislation accordingly. The penalties established by each State for a certain offence will determine its inclusion or exclusion within the definition of serious crime under the UNTOC. Indeed, States Parties have often exercised this discretion to include within the scope of application of the UNTOC a wide range of offences.39

In any case, both groups of offences – namely, those directly defined by UNTOC provisions and those qualified as serious crimes – will be included within the scope of application of the UNTOC only in the presence of two additional features. First, the offence must be transnational in nature. Second, the offence must involve an organized criminal group. Article 3(2) envisages a number of situations where an offence is qualified as transnational. Broadly speaking, the transnational element will be identified when the offence in question affects more than one State. Thus, this provision refers to the cases where an offence is either committed in more than one State, or is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State, or is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State, and finally when the offence is committed in one State but has substantial effects in another State.

Moving on to what might be identified as the subjective element of transnational organized crime, Article 2(a) clarifies the meaning of ‘organized criminal group’. The latter is defined on the grounds of four main features. First, an organized criminal group is a structured group of at least three persons. Article 2(c) specifies that a group is structured when it is not formed randomly for the immediate commission of an offence. Such a negative and minimal definition is deemed sufficient by this provision, which specifically excludes requirements such as the existence of formally defined roles, membership continuity or a developed structure. The second main feature required by Article 2(a) is the existence of the group ‘for a period of time’, confirming that impromptu criminal formations are excluded from the scope of application of the UNTOC. The third and fourth definitional elements relate respectively to the group’s modus operandi – since it must act in concert – and the aim of its criminal activity. Article 2(a) defines organized criminal groups as those committing one or more serious crimes or offences established directly under the UNTOC.

Transnational organized crime as a new phenomenon

[364x611]13

with the aim of obtaining ‘directly or indirectly, a financial or other material benefit’.

The latter component of the definition of organized criminal groups under the UNTOC is particularly relevant for the purpose of delimiting the scope of the present analysis. This book will indeed focus on transnational organized crimes committed with the ultimate aim of gaining a material or financial benefit. For this reason, it will not discuss international terrorism. Drawing clear boundaries between transnational organized crime and terrorism has become increasingly difficult, in part because terrorist groups worldwide carry out transnational criminal activities such as trafficking in arms or in illicit drugs as a source of financial support.\(^4\) Despite the possible overlap – at least in some instances – between transnational organized crime and terrorism, the international legal regimes applicable to such offences are radically different. This book, therefore, will focus on transnational organized crimes committed mainly or exclusively for the purpose of financial gain, rather than for ultimately ideological or political aims. Moreover, the transnational element included in the UNTOC definition is an essential component of the offences that constitute the object of this study. Therefore, this book will not include reflections on the exercise of jurisdiction over torture, either as defined by the ICC Statute in the context of its provisions on crimes against humanity or as criminalized by the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.\(^4\)

The following section of this chapter deals with specific conducts that will be the subject of this book’s analysis. The aim of this enquiry is not to provide a comprehensive overview of all transnational crimes committed by criminal organizations worldwide. Rather, the purpose of this book is to explore how States have dealt with the problem of adapting international law principles concerning the exercise of criminal jurisdiction over internationally relevant conducts to the specific need to prosecute transnational organized crime. For this reason, some conducts that can be carried out by transnational criminal organizations but that are not the subject of specific suppression treaties and

---


\(^4\) Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
over which no extensive state practice has developed (e.g. trafficking in human organs, illicit trade in cultural property) will not be included in this book’s analysis.

The following review of the applicable suppression treaties at global and regional level will provide a legal background for the next chapters, where specific issues concerning the exercise of territorial and extraterritorial jurisdiction over transnational organized crime will be examined. Therefore, at this stage of enquiry special attention will be paid to the definition of specific transnational organized crimes but also to States Parties’ duties of criminalization of such conducts within and beyond their borders, as established by relevant treaties.

1.5 THE INTERNATIONAL LEGAL FRAMEWORK ON TRANSNATIONAL ORGANIZED CRIME

The need to strengthen their cooperation in the prevention and repression of transnational organized crime has led States to conclude a significant number of international treaties to establish common rules in this realm. The resulting international legal framework on transnational organized crime encompasses both treaties that are potentially applicable to a wide range of conducts – first and foremost, the UNTOC – and subject-specific agreements, such as for instance the three UNTOC Protocols or the UN treaties that make up the global drug control regime. International suppression treaties include universal conventions such as those mentioned so far, but also regional treaties concluded in the American, African and European contexts.

1.5.1 Trafficking in Human Beings

The United Nations Office on Drugs and Crime (UNODC) recently estimated that in 2018 around 50,000 persons in 148 countries had been victims of trafficking.42 While striking, this data does not convey the magnitude of the phenomenon, owing to the probably high incidence of unreported cases and the often invisible character of this crime. Trafficking in human beings (or human trafficking) can occur within the borders of an individual State or assume a transnational character. Different actors can commit this crime, ranging from individual perpetrators to more or less structured criminal syndicates.

However, the largest share of perpetrators of human trafficking is represented by organized criminal groups that meet the definition of Article 2 UNTOC. The Human Trafficking Protocol to the UNTOC defines trafficking in persons as encompassing a series of conducts – namely, recruitment, transportation, transfer, harbouring or receipt of persons – aimed at the exploitation of the latter. According to the definition provided by Article 3(a), exploitation includes at least sexual exploitation (including the exploitation of prostitution), forced labour, slavery or slavery-like practices, servitude and the removal of organs. The same provision also clarifies the means through which human trafficking as defined by the Protocol takes place. In particular, it refers to the threat or use of force or other forms of coercion, fraud, abduction, deception, abuse of power or of a situation of vulnerability, and the giving or receiving of payments or benefits as means to achieve ‘the consent of a person having control over another person’. Importantly, Article 3(b) establishes that when such means are used, the victim’s consent to the exploitation is irrelevant. Moreover, if the victim of trafficking is a minor, Article 3(c) provides that the conducts listed in Article 3(a) will be qualified as human trafficking even in the absence of the means described in the latter provision. The definition of human trafficking adopted in the Protocol, while not uncontested, allows the inclusion within its scope of the application of a significant range of conducts carried out at different stages of the trafficking process in countries of origin, transit and destination. Consistently with UNTOC provisions, the Human Trafficking Protocol applies to the conducts defined as human trafficking only when the relevant offence is transnational in nature and involves an organized criminal group.

At regional level, an identical definition of human trafficking is adopted by the Council of Europe Convention on Action against Trafficking in Human Beings (CoE Convention against Trafficking). The latter, however, does not require the presence of a transnational element nor a connection with organ-

---

43 UNODC (n 42) 42.
45 Human Trafficking Protocol (n 33) Article 4.
ized crime for its application. This choice, and particularly the inclusion of intra-State forms of human trafficking within the scope of application of the CoE Convention against Trafficking, might pose problems of implementation within domestic criminal law – especially in relation to the distinction between forms of ‘internal’ human trafficking and other criminal conducts, such as for instance sexual exploitation or abduction. Another peculiarity of the CoE Convention against Trafficking concerns its human rights-based approach. This character differentiates it from the Human Trafficking Protocol, whose main focus is on the prevention and repression of criminal conducts through inter-State cooperation. The focus of the CoE Convention against Trafficking on the human rights of victims has influenced the conceptualization of human trafficking in the European context. The European Court of Human Rights (ECtHR), in particular, has interpreted the prohibition of slavery, servitude and forced labour under Article 4 of the European Convention on Human Rights (ECHR) as encompassing a prohibition of human trafficking. In doing so, however, it has blurred the boundaries between slavery, forced labour, labour exploitation and human trafficking, prompting a conceptual confusion between action, means and purpose. Beyond the European context, the definition of human trafficking adopted by the Human Trafficking Protocol was reproduced in identical terms in the Convention Against Trafficking in Persons, Especially Women and Children, concluded between Member States of the Association of Southeast Asian Nations (ASEAN Human Trafficking Convention).

Adopting an approach typical of suppression treaties, the analysed sources do not directly criminalize or prohibit relevant conducts. Rather, they envisage specific obligations of criminalization for States Parties. Article 5 of the Human Trafficking Protocol provides for States Parties’ duty to establish as criminal offences such acts (as well as attempts to commit them, participation

47 In fact, Article 2 of the CoE Convention against Trafficking establishes that it shall apply ‘to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime’.  
as an accomplice and the organization or direction of others to commit such offences). Identical obligations are established under Article 5 of the ASEAN Human Trafficking Convention. The CoE Convention against Trafficking includes a wider range of obligations of criminalization. Its Chapter IV envisages the duty of States Parties to establish as criminal offences not only human trafficking (Article 18) but also acts relating to travel or identity documents and aimed at enabling trafficking (Article 20) as well as attempting, aiding or abetting trafficking (Article 21). States Parties are also encouraged – but not obliged – to criminalize the use of services of a victim (Article 19).

1.5.2 The Smuggling of Migrants

According to UNODC, migrant smuggling is not only a global phenomenon but also a profitable activity for transnational criminal organizations. Its first Global Study on Smuggling of Migrants reported the existence of around 30 smuggling routes, as well as of evidence of 2.5 million migrants smuggled in 2016 for a profit of around 5 billion US dollars. The need for a shared definition of the smuggling of migrants as well as for the creation of international obligations to criminalize this conduct under domestic law became especially evident during the 1990s, when the advocacy of the most affected receiving countries in support of stronger international cooperation in this field gained particular momentum. In 1993, the UN General Assembly adopted a Resolution on the prevention of the smuggling of aliens where it urged States ‘to take appropriate steps to frustrate the objectives and activities of smugglers of aliens and thus to protect would-be migrants from exploitation and loss of life’. The link between exploitation and migrant smuggling was subsequently set aside, owing to the conceptual separation between human trafficking and the smuggling of migrants. Nowadays, Article 3(a) of the Migrant Smuggling Protocol to the UNTOC defines the smuggling of migrants as the procurement of the illegal entry of a person into a State Party to which the person is neither a national nor a permanent resident, with the aim of obtaining a direct or indirect financial benefit or another material benefit. For the purpose of this definition, an illegal entry is identified with the crossing

---

56 Ibid 3
57 Gallagher and David (n 54) 30. Luban, O’Sullivan and Stewart (n 24) 533.
of borders in breach of the necessary requirements for legal entry into the receiving State. As the Human Trafficking Protocol, the Migrant Smuggling Protocol only applies to the described conduct when the latter is transnational in nature and it involves an organized criminal group. In fact, the inclusion of the aim of gaining a financial or material benefit within the definition of migrant smuggling responded to the willingness to focus on the activities of transnational organized crime, excluding from the scope of application of the Migrant Smuggling Protocol similar conducts motivated by humanitarian reasons or family ties.58

As for States Parties’ duties of criminalization, Article 6 of the Migrant Smuggling Protocol establishes an obligation to define migrant smuggling as a criminal offence in their respective domestic orders. The same obligation applies to the production of fraudulent travel or identity documents and to the procurement, provision or possession of such documents (when committed to enable migrant smuggling), to the enabling of a person who is neither a national nor a permanent resident to illegally remain in the concerned State through illegal means, and to attempts, participation as an accomplice or organization or direction of another person to commit migrant smuggling. The provision under Article 6(4) of the Migrant Smuggling Protocol – whereby the Protocol should not be interpreted as preventing the adoption of national measures ‘against a person whose conduct constitutes an offence under its domestic law’ – has raised the question of whether the latter leaves States Parties free to criminalize the illegal entry and residence of migrants on their respective territories. While Article 5 explicitly prohibits the criminal prosecution of persons subjected to smuggling, this question is debated in relation to irregular migration not facilitated by conducts within the scope of the Migrant Smuggling Protocol. It has been argued that a teleological reading of this source should lead to the conclusion that criminalization of irregular entry is excluded from its scope of application, because the Migrant Smuggling Protocol pursues the twofold aim of protecting the rights of smuggled migrants and to combat smuggling carried out by transnational criminal organizations.59 This argument, however, seems unconvincing. A literal and contextual interpretation of the Migrant Smuggling Protocol, indeed, suggests that States Parties retain a margin of discretion in relation to the criminalization of instances of irregular immigration beyond the scope of the Protocol, albeit within the

limits allowed by other international obligations (such as for instance those stemming from Article 31 of the 1951 Convention Relating to the Status of Refugees).60 This interpretation is also suggested by the Legislative Guide for the Implementation of the Migrant Smuggling Protocol, which states that ‘the Protocol itself takes a neutral position on whether those who migrate illegally should be the subject of any offences’.61

1.5.3 Trafficking in Firearms

Trafficking in firearms can take many forms. Worldwide, seizures of illicitly traded arms have included small arms and light weapons (SALWs), firearms, gas weapons, and so forth.62 Trafficking in firearms often facilitates the commission of other transnational crimes, because it provides financial support to criminal organizations as well as the concrete means to carry them out through threats of violence or the use of lethal force.63 The first binding international treaty aimed at the repression of trafficking in firearms was the 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms (Inter-American Firearms Convention).64 The declared aim of this convention as well as its definition of illicit trafficking in firearms were then reproduced in almost identical terms by the Firearms Protocol to the UNTOC in 2001. The Firearms Protocol to the UNTOC aims to ‘prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms’, as well as their parts, components and ammunition (Article 2). The illicit trafficking in firearms is defined under its Article 3(e) as encompassing a series of conducts, ranging from the import or export of firearms to their acquisition, sale and delivery as well as their movement or transfer from or across the terri-


tory of a State Party to that of another State Party. Such conducts will constitute illicit trafficking whenever they are not authorized by one of the State Parties concerned, or if the firearms are not marked, in accordance with the provisions of the Protocol itself. Reproducing the approach of the Human Trafficking Protocol and of the Migrant Smuggling Protocol, Article 4(1) of the Firearms Protocol restricts its scope of application to offences that are transnational in nature and involve an organized criminal group. This restriction also applies to the illicit manufacture of firearms as defined by Article 3(d).

Against this background, Article 5 provides for an obligation of States Parties to criminalize the intentional commission of illicit firearms manufacturing or trafficking, as well as to the falsification of markings on firearms. A similar obligation is also established by Article 4 of the Inter-American Firearms Convention, which however focuses on illicit manufacturing and trafficking as well as accessory conducts such as aiding and abetting, facilitation, attempts to commit such offences and so forth.

After the adoption of the Firearms Protocol, significant regional efforts were observable in the context of the global fight against arms trafficking. Setting aside political documents and soft-law sources, the most notable developments occurred in the African region. First, in 2001 the Member States of the South African Development Community (SADC) adopted the Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community (the SADC Protocol). Further regional treaties on the matter include the 2004 Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region, the Horn of Africa and Bordering States (the Nairobi Protocol), the Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons, their Ammunition and Other Related

---

66 Ibid. See also Damien Rogers, Postinternationalism and Small Arms Control: Theory, Politics, Security (Routledge 2016) 105–106.
Transnational organized crime as a new phenomenon

Materials of 2006 (the ECOWAS Firearms Convention)\(^69\) and the 2010 Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition, Parts and Components that can be used for their Manufacture, Repair and Assembly (the Kinshasa Convention).\(^70\) With the exception of the ECOWAS Convention, all of these regional treaties adopted the definition of trafficking in firearms of the Firearms Protocol. On the other hand, the obligations of criminalization weighing on States Parties were more extensive than those established by the Firearms Protocol. For instance, in addition to the qualification of trafficking in firearms as a criminal offence in their respective domestic orders, States Parties of such treaties were also bound to criminalize the illicit possession of SALWs.\(^71\)

1.5.4 Trafficking in Narcotic Drugs and Psychotropic Substances

Drug trafficking is an extremely diverse and complex phenomenon. A great variety of substances – ranging from plant-based drugs such as heroin, cannabis and cocaine to synthetic drugs such as methamphetamines – is illicitly traded in ever-changing markets worldwide.\(^72\) Although it is virtually impossible to estimate the profit generated by drug trafficking at the global level, it is suggested that the annual value of this illicit activity is around 500 billion US dollars.\(^73\)

\(^69\) ECOWAS Convention on Small Arms and Light Weapons, their ammunition and other related materials (adopted 14 June 2006, entered into force 29 September 2009).

\(^70\) Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and all Parts and Components that can be used for their Manufacture, Repair and Assembly (adopted 30 April 2010, entered into force 8 March 2017) Depositary notification C.N.700.2010.TREATIES-2 of 12 November 2010.

\(^71\) SADC Protocol (n 67) Article 5(1); Nairobi Protocol (n 68) Article 3(iii); Kinshasa Convention (n 70) Article 25(2)(c)


At present, the global drug control regime is grounded on three UN conventions: the 1961 Single Convention on Narcotic Drugs (Single Convention),\textsuperscript{74} the 1971 Convention on Psychotropic Substances (1971 Convention)\textsuperscript{75} and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Drug Trafficking Convention).\textsuperscript{76} Within this international legal framework, only the Drug Trafficking Convention aims to tackle drug trafficking and establishes specific obligations of criminalization for States Parties in this area. Its adoption marked a shift in the focus of the international community from a bureaucratic approach aimed at the regulation of the supply and use of drugs to a framing of drug control as a transnational security issue.\textsuperscript{77}

Article 3 of the Drug Trafficking Convention provides for an obligation of States Parties to criminalize a wide range of conducts defined as ‘illicit traffic’ of drugs and psychotropic substances. It should be noted from the outset that neither the transnational character of such conducts nor the involvement of transnational criminal organizations is a constitutive element of this definition. Rather, Article 3(5)(a) and (b) establishes a mere possibility for the domestic court of States Parties to take into account the involvement of an organized criminal group or the involvement of the offender in ‘other international organized criminal activities’ as aggravating circumstances. The criminal offences that States Parties must envisage in their domestic legislation according to Article 3(1) and (2) can be divided into four main groups. First, Article 3(1)(a) contains a comprehensive list of conducts that can be linked to the various phases of the drug trafficking process. These conducts include the cultivation of the opium poppy, coca bush or cannabis plant, the production of drugs, their sale and transportation, but also the possession of drugs for such purposes as well as the manufacture, transport and distribution of equipment used in such contexts. This group of offences also includes the organization, management and finances of such activities. Second, Article 3(1)(b) enumerates offences essentially consisting of money laundering and more broadly the laundering of the proceeds of drug trafficking (such as for instance the conversion or transfer of property to conceal their illicit origin). Third, Article 3(1)(c) refers to what

\textsuperscript{74} Single Convention on Narcotic Drugs (adopted 30 March 1961, entered into force 13 December 1964) 520 UNTS 151.
\textsuperscript{75} Convention on Psychotropic Substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175.
\textsuperscript{76} United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95.
could be defined as accessory or related offences. The latter include aiding and abetting conducts, but also the acquisition of property derived from drug trafficking, the possession of equipment or substances used for the illicit cultivation or production of illicit drugs as well as incitement to commit drug trafficking or the illicit use of narcotic drugs. Lastly, Article 3(2) requires States Parties to criminalize the possession, purchase and cultivation of narcotic drugs or psychotropic substances for personal consumption in breach of the Single Convention or the 1971 Convention. The Drug Trafficking Convention, therefore, is the only global treaty to establish an obligation for States Parties to qualify as criminal offences not only drug trafficking but also the personal use of drugs.

Despite its almost universal ratification, the effectiveness of the Drug Trafficking Convention in relation to the prevention and repression of drug trafficking has been questioned. Part of this criticism highlights that the described international legal framework has been in fact counterproductive, because its prohibitionist approach has fostered illegal markets and favoured organized crime. In 2020, a Report by the Global Commission on Drug Policy (an organization created by political, economic and cultural personalities) noted that ‘the global “war on drugs” has, counter to its ostensible aims, fed and empowered transnational organized crime’. Among other recommendations, the Report proposed the creation of a more coherent international legal framework and the adoption of a comprehensive approach by States based on the acknowledgement of the ‘transnational and trans-sectorial nature of criminal organizations’. So far, however, such shortcomings have not been analysed in the context of efforts to reform the international legal regime applicable to the global drug market. Rather, several States Parties have chosen to adopt more permissive policies – especially in relation to personal consumption or to specific drugs – by introducing reservations to the 1988 Convention and through unilateral interpretations of its Article 3.

---

78 As of 29 November 2021, 191 States are parties to the 1981 Convention.
79 Vogler and Fouladvand (n 73) 122–124.
81 Ibid 7.
1.5.5 Cross-border Poaching and Trafficking in Wildlife

Wildlife trafficking is a less researched and discussed transnational organized crime in comparison with the other offences examined so far. However, its financial import and its impact on the security and well-being of States and communities should not be overlooked. Transnational criminal organizations represent a significant portion of perpetrators of wildlife trafficking, in some cases in conjunction with other transnational crimes such as drug trafficking or accessory offences such as corruption and money laundering. The high demand for certain animal species or animal parts (e.g. elephant tusks, rhino horns or pangolin scales) allows the illegal trade in wildlife to flourish both physically and online, generating significant financial flows.

There is no universally agreed definition of wildlife trafficking or cross-border poaching. Wildlife trafficking may be broadly defined as the illicit trade in animal species or animal parts. This book will focus in particular on instances where this offence has a transnational character and is carried out by criminal organizations. Moreover, for the purpose of this analysis cross-border poaching should be understood as the illegal hunting of animal species.

The international trade in wild animals and plants is regulated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This treaty does not aim to prevent and repress wildlife trafficking. Rather, it establishes a licensing system to regulate the international trade of endangered species based on their classification in three groups, depending on the level of threat of extinction faced by each group. While CITES does not establish an absolute prohibition to trade in endangered species, those classified as threatened with extinction may be traded only in exceptional circumstances. The only obligation of criminalization established by CITES is contained in its Article 8(1)(a), whereby States Parties must adopt measures to penalize the trade or possession of specimens in breach of CITES itself.

---


Differently than other transnational crimes examined so far, wildlife trafficking and cross-border poaching are not the subject of specific suppression treaties. Nonetheless, States Parties to the UNTOC may choose to include such conducts within the meaning of ‘serious crimes’ as defined by its Article 2. Indeed, whenever a State Party envisages these conducts as offences punishable with at least four years of imprisonment in its domestic law, they will be included within the scope of application of the UNTOC if they are transnational in nature and carried out by an organized criminal group, pursuant to Article 3(1)(a). The possibility of including wildlife trafficking within the definition of transnational organized crime was envisaged by the Preamble of the UNTOC itself, where the UN General Assembly (UNGA) expressed its conviction that this convention would ‘constitute an effective tool and the necessary framework for international cooperation in combating, inter alia (…) illicit trafficking in endangered species of wild flora and fauna’.

However, at present it is not possible to observe a global tendency by States Parties to criminalize wildlife trafficking and cross-border poaching and to establish penalties that reach the threshold required by Article 2 UNTOC for their qualification as ‘serious crimes’ within the scope of application of this convention. In fact, the implementation of the UNTOC in relation to such conducts (as well as of CITES) is very uneven in different regions of the world. While ASEAN Member States often establish strict penalties for wildlife trafficking, the same cannot be said for the European and African context. Despite the fact that one of the actions recommended by the 2016 EU Action Plan against Wildlife Trafficking was precisely the qualification of wildlife trafficking as a serious crime within the meaning of the UNTOC throughout the EU by the end of 2017, few EU Member States have currently established sufficient penalties to allow for the application of the UNTOC in this area. African States, for their part, show significantly different levels of criminali-

87 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘EU Action Plan against Wildlife Trafficking’ COM/2016/087 (26 February 2016) COM/2016/087, 15. For an overview of EU Member States’ legislation.
zation of wildlife trafficking. The majority of sub-Saharan States are parties to both CITES and UNTOC. However, as of October 2020 only 16 African countries are classified by the CITES Secretariat as Parties having adopted legislation that meets the requirements for its implementation. Moreover, many Sub-Saharan States have yet to establish penalties for wildlife trafficking or cross-border poaching above the threshold required for the application of the UNTOC to such offences. On a more general level, the UNODC reported in 2016 that most of UNTOC States Parties envisage CITES violations as offences punishable with less than four years of imprisonment or even with fines, thus excluding them from the definition of ‘serious crimes’ under Article 2 UNTOC.

1.5.6 Maritime Piracy

Piracy is a sui generis crime. Well before the development of contemporary international criminal law, this conduct was qualified as an offence against the law of nations, justifying the exercise of universal jurisdiction by any State on the high seas. In his Dissenting Opinion in the Lotus case, Judge Moore observed that because pirates were considered as ‘enemies of all mankind’ (or hostes humani generis), their capture and prosecution was in the interest of the international community as a whole. This view was recalled in Judge Guillame’s Separate Opinion to the Arrest Warrant judgment by the International Court of Justice (ICJ), where he noted that the exercise of universal jurisdiction over piracy on the high seas was rooted in customary international law. From the outset, therefore, the consideration of maritime piracy under international law was strictly functional to the creation of

---

90 CITES Secretariat ‘Status of legislative progress for implementing CITES (updated October 2020)’ 1.
93 Case of the S.S. ‘Lotus’ (France v Turkey) (Dissenting Opinion Judge Moore) PCIJ Rep Series A No. 10 (1927) 70.
a procedural rule that would allow States to repress this phenomenon when it occurred beyond their territory – and thus outside their jurisdiction. The links between maritime piracy and universal jurisdiction were so consolidated that when contemporary international criminal law started to develop – from the end of World War II onwards – domestic and international courts alike justified the exercise of universal jurisdiction over core crimes by referring to what has been called the ‘piracy analogy’. Landmark domestic judgments such as those stemming from the Eichmann trial in Israel and the Filartiga case in the United States – but also the judgments of Furundzija and Tadic issued by the International Tribunal for the Former Yugoslavia – made use of this analogy by asserting that universal jurisdiction could be exercised not only over piracy but also over other conducts of comparable heinousness. With the progressive development and institutionalization of international criminal law, the focus of international and domestic courts shifted onto core crimes such as genocide, crimes against humanity and war crimes. Maritime piracy almost disappeared from the radar of international criminal law, also because it was no longer so widespread.

In the first decade of the 21st century, this situation radically changed. First, the proliferation of piratical attacks off the coast of Somalia and the Gulf of Aden became a security issue of international concern, prompting the UNSC to authorize Member States to enter the territorial waters of Somalia to repress

94 For an historic overview, see Michael Mulligan, ‘Piracy and Empire: The campaign against piracy, the development of international law and the British imperial mission’ (2017) 19 JHIL 70.
96 CrimC (D Jer) 40/61 Attorney General v Adolf Eichmann (12 December 1961) and Supreme Court of Israel 336/61 Attorney General v Adolf Eichmann (29 May 1962). The English translations of these judgments were acquired from the International Crimes Database, and are available at https://www.internationalcrimesdatabase.org/Home accessed 20 December 2021.
97 Filártiga v Peña-Irala 630 F.2d 876 (2d Cir. 1980).
98 Furundžija Case (Judgment) ICTY-95-17/1 (10 December 1998).
99 Tadic Case (Judgment) ICTY-94-1 (7 May 1997).
100 Kontorovic (n 95) 197–203.
101 Luca Marini, Pirateria Marittima e Diritto Internazionale (Giappichelli 2016) 55–61.
acts of piracy and armed robbery at sea. In 2011, the UNODC noted that ‘piracy in the region has increased so much that it is now considered a form of transnational organized crime’. More recently, the UNSC has expressed concern over the threat to international navigation and security posed by piracy and armed robbery in the Gulf of Guinea. According to the International Maritime Organization (IMO), in 2019 acts of piracy and armed robbery at sea were reported – among other areas – in West Africa, the Straits of Malacca and Singapore, the South China Sea and South America.

These observations pose the problem of understanding whether maritime piracy in its contemporary form can be qualified as a form of transnational organized crime, or whether on the other hand it may more appropriately be classified as an international crime *strictu sensu*. Maritime piracy is not the subject of a suppression treaty, nor of a treaty-based duty to criminalize this offence at domestic level. The United Nations Convention on the Law of the Sea (UNCLOS) merely establishes a duty of cooperation for States Parties in the repression of piracy at Article 100, but it does not envisage any specific obligation for them to qualify this conduct as a criminal offence. Article 101 defines piracy as consisting in (among other conducts) illegal acts of violence, detention or depredation committed for private ends by the crew or passengers of a private ships, either against other ships on the high seas or against a ship outside the jurisdiction on any State. On the other hand, the UNCLOS does not directly prohibit maritime piracy either, nor does it ground individual criminal responsibility for perpetrators. Article 105 merely grants any State executive and adjudicative jurisdiction over pirate ships, authorizing the seizure of such ships and of the property on board, the arrest of persons on board as well as the seizing State’s power to decide upon penalties to be imposed and actions to be taken with regard to such ships. The exercise of said jurisdiction is entirely discretionary, as evidenced by the literal text of Article 105.

The UNCLOS framework, therefore, does not allow any definite conclusions as to the qualification of maritime piracy as an international crime (as

---

103 UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816. Subsequently, UNSC Res 1838 (7 October 2008) UN Doc S/RES/1838 called upon States to deploy vessels and aircraft on the high seas off the Somali coast and adopt ‘the necessary means’ for the repression of piracy.


105 IMO ‘Reports on acts of piracy and armed robbery against ships: Annual report 2019’ (27 April 2020).

Transnational organized crime as a new phenomenon

directly prohibited under it and punishable on the grounds of its provisions) or, vice versa, as a transnational crime (by virtue of an explicit treaty-based duty for States Parties to criminalize this conduct in their respective criminal legislation). Some international legal scholars interpret the lack of an express prohibition of piracy under UNCLOS as indicative of the existence of a mere procedural rule under this treaty, whereby States may exercise extraterritorial executive jurisdiction over relevant conducts on the high seas. The prohibition of piracy in substantive norms, on the other hand, is left to the domestic legislation of each State Party. According to such an interpretation, it is not possible to define maritime piracy as a crime under international law. An opposite opinion has been expressed by those who argue that maritime piracy is in fact directly prohibited by customary international law, or even that it is contrary to a *jus cogens* norm. Proponents of this view qualify piracy as the quintessential international crime. These theories, however, appear unconvincing for two main reasons. First, admitting the criminalization of certain conducts exclusively under customary international law – absent any explicit prohibition under international treaty law – raises questions of compatibility with the principle of *nullum crimen sine lege*. Such problems do not affect core international crimes such as genocide, crimes against humanity and war crimes. The latter, indeed, are explicitly prohibited by the statutes of international criminal courts and tribunals that clarify the scope of individual criminal responsibility for said offences. Second, contemporary international law and practice do not seem to provide solid grounds for a qualification of maritime piracy as prohibited by customary law, let alone by a *jus cogens*

---


norm. As already stressed, the UNCLOS did not codify any customary rule directly criminalizing piracy. Moreover, several UNSC Resolutions on the repression of piracy (including those adopted under Chapter VII of the UN Charter) have merely ‘called upon’, rather than openly demanding, States to criminalize this conduct in their respective legal orders.110 Therefore, they may hardly be considered as an indication of the existence of an actual duty of criminalization under customary international law. Lastly, it is unclear whether the International Law Commission (ILC) considers piracy as directly prohibited by customary international law. In 1996, its Commentary to the Draft Articles on the Law of Treaties111 mentioned treaties ‘contemplating or conniving at the commission of acts (…) such as piracy (…) in the suppression of which every State is called upon to cooperate’ as an example of conventions that would be void because of a conflict with a jus cogens rule. However, this observation might be interpreted in the sense that such a treaty would infringe not a customary rule prohibiting piracy but rather the duty of cooperation in its repression – as codified, incidentally, by Article 105 UNCLOS. It has also been aptly observed that in its 2019 Annual Report112 the ILC has recalled this past qualification, but it has not provided any clear indication that maritime piracy in its modern iteration can be considered as prohibited by a peremptory norm of customary international law.113

These observations lead to the conclusion that at present maritime piracy can be more appropriately classified as a transnational crime than an international crime strictu sensu. For the purpose of this book, maritime piracy will

---


112 International Law Commission, ‘Report of the International Law Commission’ (29 April to 7 June and 8 July to 9 August 2019) UN Doc A/74/10, 207.

113 Sean D Murphy, ‘Peremptory norms of general international law (Jus Cogens) and other topics: The seventy-first session of the International Law Commission’ (2020) 114 AJIL 68.
be considered as a form of transnational organized crime. This qualification is consistent not only with UNODC’s assessment of Somali piracy,114 but also with the features of contemporary piracy in the currently most affected areas of the world, where transnational criminal organizations are very much involved.115

1.5.7 Accessory Offences: Corruption, Money Laundering and Cybercrime

Transnational organized crime is a complex phenomenon. Transnational criminal organizations often do not confine themselves to one offence, but carry out multiple conduct as part of broader criminal enterprises. Setting aside the links between transnational organized crime and terrorism, which are beyond the scope of this book, different transnational organized crimes are also frequently connected. In its Resolution 2136(2014),116 for instance, the UNSC recognized the links between wildlife trafficking and trafficking in firearms in the DRC. More recently, the UNGA has called upon States to adopt a multidisciplinary approach in facing ‘the serious challenges posed by the increasing links between drug trafficking, corruption and other forms of organized crime, including trafficking in persons, trafficking in firearms, cybercrime and money-laundering’.117 With reference to the European context, it has been recognized that – while clearly distinct phenomena – migrant smuggling and trafficking in human beings are often interlinked.118

114 UNODC (n 102).
118 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘New pact on migration and asylum’ COM/2020/609, 15–17; Communication from the Commission to the European Parliament, the Council, the European Economic and
A further source of complexity relates to a series of conducts that might be defined as accessory to transnational organized crime. Offences such as corruption and money laundering are often carried out by criminal organizations to facilitate the transnational crimes examined so far, or to benefit from the proceeds of such crimes. Both corruption and money laundering are indeed specifically targeted by the UNTOC when transnational in nature and involving an organized criminal group. Article 6 UNTOC requires States Parties to criminalize conducts defined as laundering the proceeds of crime, including (but not limited to) the conversion or transfer of such proceeds for the purpose of concealing their illicit origin and the concealment of the true nature, source, location, movement or ownership of proceeds of crime. The same definition is also established by Article 3(b) of the Drug Trafficking Convention (albeit with specific reference to drug trafficking) and at regional level by Article 9(1) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. Moreover, Article 8 UNTOC envisages a duty for States Parties to establish as criminal offences the intentional promise, offering or giving of an undue advantage to public officials – as well as the solicitation or acceptance of such an advantage by public officials – in order that they act or refrain from acting in the exercise of their official duties. An identical obligation is established under Article 15 of the UN Convention against Corruption. The criminalization of corruption by States Parties is also demanded by Article VII of the Inter-American Convention against Corruption and Article 5 of the African Union Convention on Preventing and Combating Corruption (AU Convention on Corruption).


122 African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 5 August 2008) 2860 UNTS 113. It should be noted that both the Inter-American and the African Union conventions adopt a definition of corruption that is different from the one established by the UNTOC and the UN Convention against corruption.
This brief overview of the international legal framework applicable to money laundering and corruption reveals that such offences can be carried out entirely within the borders of one State – and therefore be purely internal to that domestic order – or they can assume a transnational character, prompting the application of UNTOC provisions. At the same time, these conducts can be carried out by individuals and criminal organizations alike. In the light of these clarifications, this book will take into consideration money laundering and corruption only in so far as they are carried out by criminal organizations, not as self-standing offences but rather as a tool to facilitate (or benefit from) other transnational crimes. The same rationale will be applied to cybercrime. The term ‘cybercrime’ is used in international legal doctrine to refer to a plethora of conducts, ranging from crimes that can only be perpetrated on the web (such as phishing, hacking or cyber-attacks) to those that might also be carried out in the physical world (for instance, identity theft). Just like money laundering and corruption, cybercrime can be committed both by individuals and by criminal organizations. For the purpose of this monograph, the most relevant aspects of this phenomenon concern conducts carried out by criminal organizations that exploit the cyberspace as a facilitator of transnational crimes such as drug trafficking, human trafficking, the illicit trade in firearms, and so forth. Therefore, its analysis of States’ responses to the challenge of establishing their jurisdiction over components of transnational organized crime that take place beyond their territory will also encompass, when relevant, a reflection on the exercise of adjudicative jurisdiction over conducts carried out in the cyberspace.

1.6 CONCLUDING REMARKS

Transnational crimes pose a significant challenge to international criminal law. This chapter has shown that their very existence undermines the notion that the defining feature of core crimes lies in their heinousness, and reveals the weakness of a rigid theoretical separation between crimes subjected to international


Transnational organized crime

courts’ jurisdiction and those prosecutable exclusively by domestic courts. As noted, debates between States at the inception of contemporary international criminal law did not neatly distinguish between transnational and core crimes. The ultimate choice of which conducts to include within the subject-matter jurisdiction of the ICC – and thus to criminalize under international law – ultimately responded to a pragmatic assessment of the most suitable realm for their effective prosecution (domestic or international). Currently, the case of the Malabo Protocol shows how fragile the conceptual separation between transnational and international crimes really is, and how value judgments concerning the particular seriousness of certain conduct are not decisive for their inclusion in one or the other category.

These reflections suggest that core crimes may be more appropriately defined as conducts that are directly prohibited by international law, while transnational crimes are criminalized by domestic law in compliance with corresponding obligations established by international treaties. These definitions, in turn, prompt two main conclusions. First, transnational criminal law is much more than the mere sum of domestic criminal legislations concerning the repression of cross-border conducts. Rather, it is a complex system of international and national legal sources, which encompasses international legal obligations that States choose to undertake in an effort to respond to phenomena that they are unable to tackle alone. Second, transnational crimes in general and transnational organized crime in particular are internationally relevant conduct, to the extent that they are defined by international treaties which regulate the exercise of prescriptive and adjudicative jurisdiction by States Parties as well as inter-State cooperation.

Moreover, as this book will show, the exercise of state jurisdiction over such crimes relies on the same legal principles established under international criminal law for the prosecution of core crimes. In fact, transnational crimes represent a challenge for international criminal law especially in this respect. In addition to putting to the test the definitional categories on which international criminal law relies, transnational criminal law is also leading to a re-thinking of international legal principles concerning the exercise of criminal jurisdiction by States over internationally relevant conduct. The model of complementarity adopted by the ICC Statute has fostered a rich state practice concerning the exercise of territorial and extraterritorial jurisdiction over international crimes. At the same time, States are increasingly facing the problem of how to adapt such principles to the need to ensure an effective prosecution of transnational crimes in general and transnational organized crime in particular. As shown in this chapter, such crimes generate significant interest and alarm in the international community. The resulting proliferation of suppression treaties has led States to confront the problem of how to exercise adjudicative jurisdiction over conduct that – by their very definition – are carried out partly or even entirely
outside their territory. This book explores how legal principles that emerged and were consolidated in the context of international criminal law with respect to the exercise of state jurisdiction over core crimes have been adapted by States with the aim of repressing transnational organized crime.