

Foreword

It is a pity that there isn't any international law in *The Wire*, the highly popular television series that is built around cops and the local gangsters in the city of Baltimore whom they are trying to put in jail. It is mainly about trafficking in drugs, but one set of shows also looks at human trafficking, prostitution, political corruption and systematic theft by workers in the city's dockyards. Regularly, the overworked Baltimore police try to enlist the interest of their federal counterparts, who have much better resources. Usually, they are told that their focus has switched to counter-terrorism, and away from the drug trade and human trafficking. It is post-11 September, after all.

Lurking in the background is 'the Greek', soft-spoken and avuncular, and his lieutenant, Vondas, who is usually clad in a charming newsboy cap. At one point, when the police make a series of arrests, the two are seen at the airport checking in for an international flight. Three years later, in the final series, they make a perfunctory reappearance. The two seem to be the local emissaries of a criminal multinational, but the show never lets us get behind their mysterious facade. If it did, we might find a new layer of activity, with international lawyers, Interpol and complex issues of mutual legal assistance.

Although the engagement of international law in the suppression of organised crime goes back more than a century, it has been through quite dramatic developments in the last decade or so. These comprise the subject matter of Tom Obokata's book. Now, the centrepiece is the Convention against Transnational Organized Crime, known generally as the 'Organised Crime Convention'. It was adopted in 2000, along with three Protocols which deal with human trafficking, smuggling of people and the international trade in firearms. As a result, the last decade has been particularly fertile, and it is time to take stock of the developments in a major monograph.

There has been much talk about the 'fragmentation' of international law. It is certainly true that many new areas have developed, with much interaction involving related fields. Human rights law is especially important here. Legal mechanisms to address various features of organised crime require close attention to human rights norms and standards. Indeed, human rights law probably owes a debt of gratitude to European mafias. With their wealthy resources for legal battles, they have taken fascinating challenges before the European Court of Human Rights, facilitating the further development of the law and the clarification of matters concerning due process and prison conditions.

The European Court of Human Rights will consider the importance of dealing with organised crime when it considers the acceptable limitations that

may be imposed upon fundamental rights. In one ruling, its Grand Chamber said:

Inherent in the whole of the Convention is the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person, but also tend to undermine the foundations of extradition.¹

International law concerning organized crime also comes into contact with the discipline known widely as 'international criminal law'. The latter's primary concern is with international atrocity crimes, specifically genocide, crimes against humanity and war crimes. In some European languages, a distinction is made by changing the order of the words: *droit international pénal* and *droit pénal international*. The former concerns atrocity crimes such as genocide, while the latter is largely addressed to the suppression of organised crime through mutual legal assistance. In English, we more often make the distinction by speaking of 'transnational organised crime', underscoring the point that this is crime to be dealt with primarily through national prosecutions. International law intervenes to assist in the process because of the trans-border nature of the criminal activity.

This book contemplates the relevance of such a distinction. One explanation is that atrocity crimes are generally perpetrated by governments, whereas transnational crimes are the work of non-state actors. Atrocity crimes require internationalisation of prosecution because the investigating authorities and the courts that would normally be responsible are themselves often accomplices in the criminal acts. Organised crime seems different, because states are generally willing and able to prosecute such acts, but complications are imposed by the mafias themselves, with their skilled exploitation of the international environment.

This analysis works well as a general rule, but it has its limits. At the atrocity crime end of the spectrum, we have the phenomenon of non-state actors, such as rebel or guerrilla groups. They are the enemies of states and are in fact often trying to overthrow them. In some respects they resemble organised crime, and the legal problems have similarities. As for organised crime, sometimes it insinuates itself so deeply into the state that the boundaries become difficult to determine. Certainly, there is no willingness to prosecute because the relevant authorities are so corrupted.

There is a constituency that supports the addition of certain forms of organised crime, notably drug trafficking, to the subject matter of international criminal law, effecting its migration from the related but distinct area of transnational criminal law. When the Rome Statute of the International Criminal

¹ *Öcalan v Turkey* [GC], no 46221/99, Judgment, 12 May 2005, para 88.

Foreword

Court was adopted, at the 1998 Rome Conference, proponents of such a view were unsuccessful in attaining this objective. Only a reference in the Final Act, adopted at the same time as the Statute of the Court, has kept the flame alive. There is a debate not only about the practical issues involved in the addition of such forms of organised crime, but also a more theoretical concern as to whether drug trafficking and similar acts belong to the same genus as genocide and the other international atrocity crimes.

One thing is certain: the international law governing organised crime is a close relative of the body of law applicable to the International Criminal Court and similar institutions. It provides a forum to address issues of more general concern, such as the scope of universal jurisdiction, immunities, statutory limitation and extradition. Tom Obokata's study, with its original and in some ways unique perspective, enriches our knowledge of the field.

Professor William Schabas OC MRIA
Galway, 28 February 2010

Acknowledgements

The completion of this monograph would not have been possible without assistance from a number of individuals and organisations. First, I would like to thank Brice Dickson at the QUB School of Law, who spent long hours reading and commenting on an earlier version of this monograph. I also wish to express my gratitude to Jean Allain (QUB) and Neil Boister (University of Canterbury, New Zealand) for their expert comments, as well as to Professor William Schabas (Irish Centre for Human Rights, Galway) for writing a foreword to this book.

I conducted field research to complete this monograph, and a number of people and organisations kindly offered their assistance. In particular, I would like to thank Professor Nenad Radovic (Academy of Criminalistic and Police Studies, Serbia), Lt Colonel Fatos Haziri (Kosovo Republic Police), Mr Uthai Arthivech (Office of the Attorney-General, Thailand), Major General Krerckphong Pukprayura (Royal Thai Police), Mr Matt Friedman (United Nations Inter-Agency Project on Trafficking), and Ms Anne Gallagher and her staff at the Asia Regional Trafficking in Persons Project.

Finally, I would like to thank the QUB School of Law for giving me some time off to complete this monograph.

Contents

<i>Foreword</i>	v
<i>Acknowledgements</i>	ix
<i>Abbreviations</i>	xvii
<i>Table of Cases</i>	xix
<i>Table of Regional and International Instruments</i>	xxv
1 Introduction	1
1.1 The Rise of Organised Crime	1
1.2 Contemporary Manifestation of Organised Crime	4
1.3 The Scope and Aim of This Book	7
Part I: Concepts, Norms and Principles	11
2 Understanding Organised Crime from a Multi-Disciplinary Perspective	13
2.1 Introduction	13
2.2 Concepts of Organised Crime from a Multi-disciplinary Perspective	14
2.2.1 Organised Crime as a Set of Actors	14
2.2.2 Organised Crime as a Set of Activities	19
2.3 Legal Definitions of Organised Crime in National and International Law	24
2.3.1 Definitions of Organised Crime in International Law	24
2.3.1.1 General Discussion	24
2.3.1.2 The Transnational Nature of Organised Crime	28
2.3.1.3 ‘Transnational’ and ‘International’ Crime	30
2.3.2 Definitions of Organised Crime in National Law	33
2.4 Conclusions	36
3 Obligations of States under International Law	39
3.1 Introduction	39
3.2 The Nature and Extent of Obligations under International Law	40
3.2.1 Prohibition of Organised Crime and Associated Acts	40

Contents

3.2.2 Criminal Jurisdiction over Organised Crime	47
3.2.3 Special Investigative Techniques and Intelligence-Led Law Enforcement	55
3.2.4 Mutual Assistance in Criminal Matters	57
3.2.4.1 Extradition	57
3.2.4.2 Other Mutual Legal Assistance	64
3.2.5 Prevention of Organised Crime	66
3.3 Key Legal Challenges Facing Effective Implementation of Obligations	68
3.3.1 Periods of Limitations for Organised Crime	68
3.3.2 Immunity of Government Officials and Diplomats	69
3.3.3 Protection of Human Rights of Suspects/Defendants	75
3.4 Conclusions	79
4 The Role of Non-state Actors in Suppression and Prevention of Organised Crime	81
4.1 Introduction	81
4.2 The Role of Non-state Actors in Prevention and Suppression of Organised Crime	82
4.2.1 The Concept of Global Governance	82
4.2.2 Global Governance over Transnational Organised Crime	86
4.2.2.1 Decision-Making and Participation	86
4.2.2.2 Accountability	93
4.2.2.2.1 Individual Criminal Responsibility	93
4.2.2.2.2 Criminal Organisations	100
4.2.2.2.3 Legal Persons	104
4.2.2.2.4 International Organisations	106
4.3 Towards an Inclusive Notion of the ‘International Community’	113
4.4 Conclusions	116
Part II: Enforcement of Norms and Principles	119
5 National Case Studies of Thailand, Serbia, Kosovo and the UK	121
5.1 Introduction	121
5.2 Thailand	122
5.2.1 Legal Framework to Address Organised Crime	122
5.2.1.1 Legislation on Substantive Offences	122

Contents

5.2.1.2	Legislation on Criminal Procedure and International Co-operation	124
5.2.1.2.1	Criminal Jurisdiction and Investigative Powers	124
5.2.1.2.2	The Rights of Suspects/Defendants, Victims and Witnesses	126
5.2.1.2.3	Mutual Legal Assistance in Criminal Matters	127
5.2.2	Assessment of Law Enforcement in Thailand	129
5.3	Serbia	133
5.3.1	Legal Framework to Address Organised Crime	133
5.3.1.1	Legislation on Substantive Offences	133
5.3.1.2	Legislation on Criminal Procedure and International Co-operation	135
5.3.1.2.1	Criminal Jurisdiction and Investigative Powers	135
5.3.1.2.2	The Rights of Suspects/Defendants, Victims and Witnesses	138
5.3.1.2.3	Mutual Legal Assistance in Criminal Matters	140
5.3.2	Assessment of Law Enforcement in Serbia	141
5.4	Kosovo	145
5.4.1	Legal Framework to Address Organised Crime	145
5.4.1.1	Legislation on Substantive Offences	145
5.4.1.2	Legislation on Criminal Procedure and International Co-operation	148
5.4.1.2.1	Criminal Jurisdiction and Investigative Powers	148
5.4.1.2.2	The Rights of Suspects/Defendants, Victims and Witnesses	150
5.4.1.2.3	Mutual Legal Assistance in Criminal Matters	151
5.4.2	Assessment of Law Enforcement in Kosovo	152
5.5	The UK	157
5.5.1	Legal Framework to Address Organised Crime	157
5.5.1.1	Legislation on Substantive Offences	157
5.5.1.2	Legislation on Criminal Procedure and International Co-operation	159
5.5.1.2.1	Criminal Jurisdiction and Investigative Powers	159
5.5.1.2.2	The Rights of Suspects/Defendants, Victims and Witnesses	162

Contents

5.5.1.2.3 Mutual Legal Assistance in Criminal Matters	163
5.5.2 Assessment of Law Enforcement in the UK	165
5.6 Comparative Analysis	170
5.7 Conclusions	174
6 The EU and Transnational Organised Crime	175
6.1 Introduction	175
6.2 Law, Policies and Measures under the TEU	176
6.2.1 Overview	176
6.2.2 Analysis of the TEU Measures	179
6.3 Law, Policies and Measures under the TEU as Revised by the Treaty of Amsterdam	182
6.3.1 Overview	182
6.3.2 Approximation of National Laws	183
6.3.3 Mutual Recognition of Judicial Decisions	186
6.3.4 The Principle of Availability—Intelligence Exchange	191
6.3.5 Analysis of Measures under the TEU as Revised by the Treaty of Amsterdam	193
6.3.5.1 Application of Approximation, Mutual Recognition and the Principle of Availability	193
6.3.5.2 Other Issues	199
6.4 The Future of the EU Action against Organised Crime in Light of the Lisbon Treaty	202
6.5 Conclusions	205
7 International Responses to Transnational Organised Crime	207
7.1 Introduction	207
7.2 Monitoring Implementation of the Organised Crime Convention	208
7.3 Provision of Technical Assistance	210
7.4 International Co-operation	216
7.4.1 Inter-state Co-operation	216
7.4.2 Inter-Agency Co-operation: UNIAP	220
7.5 Conclusions	224

Contents

8 Conclusion	227
Selected Bibliography	231
Books and Articles	231
Reports and Working Papers	240
<i>Index</i>	243