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COPLA: A Transnational Criminal Court for Latin America and the Caribbean

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Abstract

States in the Latin American and Caribbean regions have long called for the creation of an independent, international court to prosecute members of transnational organised crime gangs. These organisations not only profit from the illicit traffic in drugs, people and cultural property, but are able to corrupt and undermine the domestic legal systems and judiciaries of the affected states. This article examines the current proposal for the creation of the "Latin American and Caribbean Criminal Court against Transnational Organized Crime" (COPLA). It reviews the rationale for creating such a court, examines the main pillars of the current proposal, and suggests the potential for it to play a normative and regulatory role in the transnational criminal law ecosystem.

Keywords

transnational – criminal law – organised crime – international courts – Latin America – South America – Caribbean

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1 Introduction

Founded by treaty[1] in the late 20th century and operational by early in the 21st,[2] the International Criminal Court (ICC) is undoubtedly one of the most prominent and important international legal institutions in the world. During the drafting process and negotiations that led to the founding of the ICC, consensus emerged that its subject matter jurisdiction should be over the "core crimes" of genocide, crimes against humanity, war crimes and aggression[3] – all more or less fair candidates for customary international law status and agreed to be the most serious crimes facing the world. One of the great modern ironies of international criminal justice, however, is that the original proposal that gave rise to the ICC was for a court of a very different nature.

In 1989 a coalition of Caribbean states led by Trinidad and Tobago proposed to the General Assembly that it revive the idea of an international criminal court,[4] which was first contemplated in the immediate post-WWII period but which became a casualty of the Cold War.[5] The idea was motivated by these states' general inability to cope with transnational criminal gangs which were profiting mightily from the narcotics trade, and who facilitated their activities by violence and corruption that undermined policing, prosecution and the courts. There was also a need for a pressure valve to relieve some of the burden of being on the front lines of the US-sponsored "war on drugs"; as Professor Boister notes:

> The sponsoring states appear to have believed that a territorially remote ICC able to deal with serious treaty crimes and to send convicts to prison in states remote from the locus delicti would help make for more effective domestic suppression of crime as well as halt the erosion of their sovereignty and national pride by powerful states that either obliged them to extradite offenders and provide legal assistance or effectively took control of domestic suppression of these crimes.[6]

1 Rome Statute of the International Criminal Court, 2187 UNTS 3 (17 July 1998) [Rome Statute].

2 The Rome Statute came into force on 1 July 2002.

3 Rome Statute, *supra* note 1, Article 5.

4 U.N. GAOR, 44th Sess., 38th mtg., U.N. Doc. A/C.6/44/SR.38 (17 November 1989).

5 R.J. Currie and J. Rikhof, *International & Transnational Criminal Law*, 2d ed. (Irwin, Toronto, 2013) at 7–9.

6 N. Boister, 'Treaty Crimes, International Criminal Court?,' 12 *New Criminal Law Review* (2009) p. 341 [Boister, Treaty Crimes] at 343.

The General Assembly was open to the idea and directed the International Law Commission (ILC) to examine the possibility of examining the prospects for such a court.[7] However, enthusiasm for establishing the ICC as a prosecutorial venue for the core crimes quickly gained momentum, and though proposals to include narcotics trafficking and other transnational crimes (particularly terrorism) featured in the Rome debates, in the end opposition by the US and other powerful states dissipated the idea.[8] The Final Act of the Rome Diplomatic Conference did recommend that a Review Conference consider the inclusion of terrorist crimes and transnational narcotics trafficking into the subject matter of the ICC,[9] but the idea garnered no attention in the 2010 Kampala Review Conference and has not been on the radar in any of the Assembly of States Parties meetings since. There is an immense literature on the possibility and propriety of inserting various treaty crimes into the ICC's activities,[10] but the prospect has not yet attracted any political will. Despite their proposal having sparked the creation of the ICC, the situation of the coalition of states led by Trinidad and Tobago was swept aside and left unaddressed.

Recently, however, a new proposal which revives the prospect of establishing a standing international criminal court to prosecute serious treaty crime violations has been gaining traction with NGOs and governments in the Americas. A campaign to establish COPLA (Corte Penal Latinoamericana y del Caribe contra el Crimen Transnacional Organizado)[11] is conceived as a court created by treaty between all Caribbean and Latin American signatories of the

7 UN Doc A/RES/44/39 (4 December 1989)

8 For details *see* D. Robinson, 'The Missing Crimes', in Antonio Cassese et al (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) at 497; N. Boister, 'The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics', 3 *Journal of Armed Conflict Law* (1998) p. 27.

9 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June – 17 July 1998, U.N. Doc. A/CONF.183/10 (17 July 1998), Resolution E.

10 A fairly extensive list of articles on the topic of provided in N. Boister, 'International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?', 23 *Criminal Law Forum* (2012) p. 295 [Boister, Int'l Tribunals], 296 at fn 3.

11 The English translation is 'Latin American and Caribbean Criminal Court against Transnational Organized Crime' 'What is the COPLA", <https://www.coalicioncopla.org/copia-de-que-es-la-copla>, visited 19 June 2019.

2000 United Nations Convention on Transnational Organized Crime[12] and its protocols.[13] The Court is intended to be based, in structure, on the ICC. Its subject matter jurisdiction, however, would include the crimes in the UNTOC and its Protocols, as well as the crimes of drug trafficking, money laundering, transnational bribery and the illicit trade in cultural artefacts committed on the territories of states parties.

The campaign to establish COPLA was launched by Democracia Global, an Argentinian NGO, in 2013, and is currently being promoted by Coalicion COPLA,[14] a group of NGOs predominantly based in Latin America but which also includes the Canadian branch of the World Federalist Movement,[15] the US-based Coalition for the International Criminal Court[16] and European group No Peace Without Justice.[17] It has recently begun to attract interest from Latin American governments[18] and on 20 September 2017 the Vice President of Argentina, Gabriela Michetti, made a presentation to the UN General Assembly in which she noted that state's support for the COPLA proposal, stating that it would help to address the "essential" need to combat the narcotics trade.[19] On 13 December 2017, a side event promoting COPLA was held as part of the ICC ASP meetings in New York, which featured the Argentinian ambassador to the UN, among others, as a speaker.[20] Most recently, in November 2018 a group of

12 2225 UNTS 209 (2000) [UNTOC].

13 That is, the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, UN Doc A/RES/55/255, Annex (8 June 2001); the Protocol against the Smuggling of Migrants by Land, Sea and Air, UN Doc A/RES/55/255, Annex 3 (15 November 2000); and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, UN Doc A/55/383 (2 November 2000).

14 Online at: www.coalicioncopla.org.

15 *See* <www.worldfederalistscanada.org>, visited 6 June 2019.

16 *See* <www.coalitionfortheicc.org>, visited 6 June 2019.

17 See <www.npwj.org>, visited 6 June 2019.

18 *See* 'Parlamentarios', <www.coalicioncopla.org/parlamentarios>, visited 19 June 2019.

19 *See* Government of Argentina, Misión Permanente de la Republica ante las Naciónes Unidas, 'Discurso de la vicepresidente de la Nación, Sra. Gabriella Michetti, en la 72A. Asamblea General de la Naciones Unidas' (20 September 2017), <enaun.mrecic.gov.ar/es/discurso-de-la-vicepresidente-de-la-naci%C3%B3n-sra-gabriela-michetti-en-la-72a-asamblea-general-de-las>, visited 6 June 2019.

20 A report about the side event (in Spanish) can be found on the COPLA Coalition website:, <www.coalicioncopla.org/single-post/2018/01/02/COPLA-una-respuesta-regional-al-crimen-organizado-transnacional>, visited 19 June 2019.

parliamentarians and representatives from Argentina, Bolivia, Ecuador, Honduras, Nicaragua, Paraguay, the Dominican Republic and Venezuela issued the "Declaration of Buenos Aires" in support of COPLA, at a side event during the 2018 G20 Leaders' Conference.[21]

It is early days for the effort to establish COPLA, and as of the time of writing the "hard" documentation relating to it consists primarily of promotional materials, background information and a preliminary draft of a potential statute that was formulated by the "COPLA Legal Experts Group", a group of Latin American legal scholars. However, the momentum towards COPLA follows reasonably quickly on the conclusion of the Malabo Protocol,[22] which creates jurisdiction over transnational crimes within the framework of the African Court of Justice and Human and Peoples' Rights. Accordingly, it is worth evaluating the prospects of COPLA as a new institution within the transnational criminal law ecosystem.

The goal of this article, then, is to serve as an introduction to COPLA as an international law institution, and primarily at the conceptual level. It will first examine the very idea of the utility of a transnational criminal court, as well as the motivation for its founding in the Latin America/Caribbean region. Then, relying on the current Draft Statute, some of the major features of the COPLA proposal will be reviewed, including the novel suggestion of the institute functioning as a regional facilitator of police investigation. Finally, relying on a doctrinal framework for the ordering of transnational law formulated by Ulrich Sieber,[23] a view will be taken of how such a court might function as a regulator of transnational criminal law.

21 *See* M. Florencia Gor, 'COPLA Update: COPLA arrives on the global stage', World Federalist Movement Canada (14 January 2019):, <www.wfmcanada.org/2019/01/copla-update-copla-arrives-on-the-global-stage/>, visited 19 June 2019. A copy of the Declaration can be found via the website of Coalicion COPLA, <docs.wixstatic.com/ugd/4da135_83dda105c83f427e9b1ee6de8896a080.pdf>, visited 19 June 2019.

22 African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (adopted at the Twenty-Third Ordinary Session of the Assembly of Heads of State and Government Held in Malabo, Equatorial Guinea, 27 June 2014) ('Malabo Protocol').

23 U. Sieber, 'Legal Order in a Global World: The Development of a Fragmented System of National, International and Private Norms', 14 *Max Planck Yearbook of United Nations Law* (2010) p. 1 [Sieber].

2 Transnational Criminal Court: An Idea Whose Time Has Come?[24]

2.1 *Whither a Transnational Criminal Court?*

Given that the international criminal justice scene has been dominated by international and "internationalised" courts[25] that are nearly exclusively dedicated to adjudication of the core crimes, it is important to locate and distinguish the idea of what a "transnational criminal court" is and how it can and should be distinguished. The normative and jurisprudential space being referred to is best captured in the concept of "transnational criminal law" (TCL), which of late is being taken seriously as a sub-field of public international law.[26] At its broadest this field covers any crime which has cross-border aspects, and thus raises international law issues,[27] but most usually refers to a network of anti-crime treaties known as "suppression conventions". These treaties are struck primarily in order to deal with criminal conduct that is of interest to and impacts upon a number of states, and specifically to resolve issues of jurisdiction relating to the investigation and prosecution of these crimes – particularly that criminals, evidence and increasingly the physical elements of crimes themselves cross borders and end up beyond the lawful reach of domestic law enforcement.

The treaties co-ordinate inter-state cooperation in suppression of these crimes, typically requiring that each party state 1) criminalise the conduct in question, 2) agree to broader extensions of extraterritorial jurisdiction over the conduct, 3) agree to either prosecute or extradite alleged offenders who are apprehended, and 4) provide various forms of assistance to treaty partner states,

24 It is too difficult to resist using the hackneyed phrase "an idea whose time has come" in this paper, as it is one that pervades the literature on international criminal justice generally, perhaps because it speaks effectively to the long germination of the notions which are now seeing practical development. *See* most recently F. Kebede Tiba, 'Regional International Criminal Courts: An Idea Whose Time Has Come', 17 *Cardozo Journal of Conflict Resolution* (2016) p. 521.

25 This refers to the mostly *ad hoc* criminal tribunals that have been created by treaty to deal with particular (usually post-conflict) situations. Examples would include the Special Court for Sierra Leone, the Cambodia Extraordinary Chambers, etc. *See* Currie and Rikhof, *supra* note 5, chapter 4.

26 *See generally* N. Boister, *An Introduction to Transnational Criminal Law*, 2d ed. (Oxford University Press, Oxford, 2018); N. Boister and R.J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law* (Routledge, Abingdon, 2014); Currie and Rikhof, *supra* note 5, chapter 7.

27 Currie and Rikhof, *ibid.,* at 20–22.

including extradition, mutual legal assistance and policing cooperation.[28] There is a fairly large number of these conventions and many are widely subscribed to, such as the UNTOC, the Vienna Narcotics Convention,[29] the UN Terrorist Bombing Convention,[30] and so on. These regimes, then, target crimes based in the international flow of goods or capital (e.g. money laundering, drug trafficking), or those which take place in territory not easily policed or controlled by a single state (crimes committed on commercial aircraft for instance).[31]

Central to understanding the usual reach of TCL is that the overall goal is not the prosecution of international crimes *stricto sensu*, like genocide, to which individual liability attaches under international law itself and which are amenable to being prosecuted before international courts. Rather, the goal is co-operation in suppressing conduct which is agreed to amount to criminal behaviour under a plurality of domestic criminal law systems, but where the conduct is legislatively criminalised only under domestic laws, and prosecutions will proceed before domestic courts. This is seen not only as a necessary part of the functionality of the regime but as a selling point – in that criminal law is highly domesticised and states often prefer to apply their own substantive criminal law and procedure and maintain their prosecutorial goals and strategies as much as possible.[32] Accordingly, prosecution of transnational crimes before an international court would represent something of a departure from the overall system.

That is not, however, to say that the idea has not been considered – it has[33] – or that it is entirely without precedent. As usual with matters in the TCL field, Professor Neil Boister has done some of the pioneer thinking, and in his leading

28 *Ibid.,* at 327–334.

29 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1582 UNTS 95 (20 December 1988).

30 International Convention for the Suppression of Terrorist Bombings, UN Doc A/RES/52/164 (17 December 1997).

31 N. Boister, 'Further reflections on the concept of transnational criminal law', 6 *Transnational Legal Theory* (2015) p. 9 at 30.

32 The US government opposed the inclusion of treaty crimes in the jurisdiction of the ICC for essentially this reason; *see* J.D. van der Vyver, 'Prosecuting Terrorism in International Tribunals', 24 *Emory Int'l Law Rev* (2010) pp. 527 at 535–36.

33 *See, e.g.*, F. Patel, 'Crime Without Frontiers: A Proposal for an International Narcotics Court', 22 *New York Univ J Intl Law & Politics* (1990) p. 709; C. Thedwall, 'Choosing the Right Yardarm: Establishing an International Court of Piracy', 41 *Georgia Journal of International Law* (2010) p. 501; E. Creegan, 'A Permanent Hybrid Court for Terrorism', 26 *American University International Law Review* (2011) p. 237.

article on the subject[34] he points out that there is no lack of sound policy reasons or precedents for a TCL court. Chief among the former is the simple fact that the TCL system itself can break down, particularly due to fractious interstate relations and sovereignty concerns. As Boister has it:

> States … may be unwilling to cooperate because they are broadly sympathetic for some reason with the alleged criminals, or because they are politically antagonistic towards the requesting state, or because they are implicated in the offences themselves … [S]tates may not be inclined to help with what they consider to be some other state's problem. They may have strong moral objections to extradition. They may be apprehensive about facilitating the imposition of foreign law and foreign punishment (often-times more severe) on their fellow countrymen, which they might regard with suspicion. They may find themselves between rich and violent criminals and a very profitable criminal market.[35]

Moreover, these problems are particularly profound for smaller states "with weak internal sovereignty",[36] since they may both need to resist political pressure more powerful states, on the one hand, and be compromised in terms of their ability to conduct complex investigations and run numerous, large-scale trials, on the other. It was no accident that the initial Trinidad and Tobago proposal for reviving the idea of an ICC, noted above, was made by a group of predominantly small island states caught in the competing pressures generated by the US campaign against narcotics trafficking.

In terms of precedent, there is certainly a record of past interest and activity around the idea of transnationalised adjudication of crimes of international concern. Boister points to the League of Nations' original effort to establish an "international criminal court" in the form of the 1937 Convention for the Creation of an International Criminal Court, which was aimed at the crime of terrorism as it was (and to the extent it was) then understood.[37] This treaty, part of an effort to head off the political conflicts that eventually erupted in WWII, was accompanied by a suppression convention seeking to define the crime of terrorism.[38] Neither ever came into force, but represented an early way of

34 Boister, Int'l Tribunals*, supra* note 10.

35 *Ibid.,* at 301.

36 *Ibid.,* at 300.

37 Convention for the Creation of an International Criminal Court, 16 November 1937, 7 Hudson 878.

38 The 1937 Convention of the Punishment and Prevention of Terrorism, League of Nations O.J. 19 (1938), 7 Hudson 862.

allowing states to lift domestic pressures around certain crimes by essentially exporting the prosecution to a standing international body.[39] Interestingly, as Boister notes, later commentary on the effort lamented that a good idea had failed to come to fruition and proposed that a similar court based on a regional model might have great potential.[40]

There are other precedents: regional slavery courts set up by Great Britain in the 18th and 19th centuries;[41] the *Lockerbie* trial, which involved Scottish criminal proceedings being held in the Netherlands against Libyan nationals, by reason of an international dispute over the obligations contained in the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;[42] various efforts at the UN level to create a regional piracy court to deal with Somali piracy, as well as transfers of piracy cases to Kenya and Mauritius;[43] and the Special Tribunal for Lebanon, set up to prosecute transnational terrorism crimes.[44] Most recent and interesting is the conclusion of the Malabo Protocol to the Statute of the African Court of Justice and Human and Peoples' Rights,[45] which added a group of what are generally considered transnational crimes to the subject matter jurisdiction of that Court: piracy, terrorism, mercenaryism, corruption, money laundering, human trafficking, narcotics trafficking, trafficking in hazardous wastes and illicit exploitation of natural resources.[46]

It is too early in the history of this latter development to assess whether it will function, but without a doubt it indicates that a regional court mechanism for TCL crimes is an idea that is gaining momentum. Moreover, the energy behind the idea of adding treaty crimes to the jurisdiction of the ICC – or any future

39 Boister, Int'l Tribunals*, supra* note 10 at 308–312.

40 *Ibid.,* citing J.W.F. Sundberg, 'Piracy and Terrorism,' in M. Cherif Bassiouni and V.P. Nanda (eds.), *A Treatise on International Criminal Law* (Thomas, Springfield, IL, 1973), 455 at 484.

41 *See* Boister, *ibid.,* at 305–306.

42 24 UST 565 (23 September 1971). *See* David Andrews, 'A Thorn on the Tulip – A Scottish Trial in the Netherlands: The Story behind the Lockerbie Trial', 36 *Case Western Reserve Journal of International Law* (2004) p. 307; John Grant, 'Beyond the Montreal Convention', 36 *Case Western Reserve Journal of International Law* (2004) p. 453.

43 D. Akande, 'UN Secretary General sets out options for dealing with Piracy off Somalia', *EJIL Talk!* (3 September 2010), <www.ejiltalk.org/un-secretary-general-sets-out-options-for-dealing-with-piracy-off-somalia/>, visited 6 June 2019.

44 Statute of the Special Tribunal for Lebanon, Attachment to SC Resolution 1757, 30 May 2007, UN Doc S/RES/1757.

45 *Supra* note 22; *see* G. Worle and M. Vorumbaum (eds.), *The African Criminal Court: A Commentary on the Malabo Protocol* (T.M.C. Asser Press, Alphen aan den Rijn, 2017); C. Chernor Jalloh, 'The Nature of Crimes in the African Criminal Court', 15 *Journal of International Criminal Justice* (2017) p. 799.

46 *Ibid.,* Art. 28A.

institution like it – seems to be spent, despite the mountains of ink spilled in support of the idea. This is quite sensible, given how expensive and top-heavy the ICC has shown itself to be, not to mention its inability to prosecute cases with anything like alacrity. A regional approach, focused on crimes of specific interest to the party states, may be easier to co-ordinate.[47] The subject matter jurisdiction may also allow it to avoid resistance from those concerned about fragmentation of the substantive law. A regional court focused on international crimes *stricto sensu* might attract fears that it would diverge from or dilute the universal norms. However, transnational crimes are, in their nature, loose frameworks at the international level and some level of local adaptation is not only necessary, but anticipated, which should obviate any fragmentation fears.

Additionally, a regional court is more likely to address pressing problems being faced on a geographical basis, an issue to which we now turn.

2.2 *The Needs of the Region*

As noted above, the ICC itself came about because a coalition of Latin American states were convinced – as long ago as 1989 – of the need for an independent, external and internationally-founded court in their region. Unsurprisingly, this need has not abated in the years since. Latin America arguably has become, in recent years, the most violent region in the world.[48] The UNHCR notes that gang conflicts in the so-called Northern Triangle of El Salvador, Guatemala and Honduras have escalated the number of violent deaths in the region beyond what they were in the 1980s, when civil wars wracked these countries. Gangs like the Mara Salvatrucha (MS-13 in particular) and their rivals, Barrio 18, have used tactics of targeted killings and political corruption to gain *de facto* control of large sections of the region and have provoked a refugee crisis.[49]

At the same time, a less violent, but equally insidious, brand of organised crime imported from Europe and China continues to subvert the governments of a number of Caribbean nations.[50] The initial movers for the ICC, Trinidad

47 *See Report of the International Narcotics Control Board for 1996*, UN Doc E/INCB/1996/1 at para. 14.

48 Fernando Iglesias, 'Latinoamerica, un barrio en llamas' (28 September 2018), <www.coalicioncopla.org/single-post/2018/10/22/Latinoam%C3%A9rica-un-barrio-en-llamas>, visited 19 June 2019.

49 T. MacGabahan, 'Gangs Menace Central Americans Seeking Refuge in Guatemala', *UNHCR* (1 July 2016), <www.unhcr.org/news/stories/2016/7/577395af4/gangs-menace-central-americans-seeking-refuge-guatemala.html>, visited on 6 June 2019.

50 M. Goede, 'Transnational Organized Crime (TOC) and the Relationship to Good Governance in the Caribbean,' 12:3 *International Journal of Development Issues* (2013) pp. 253–270.

and Tobago, have seen transnational crime-related violence skyrocket since the early 90s, and a recent government inquiry concluded that "international organised crime is firmly entrenched" in that state.[51]

The severity of the violence committed by transnational criminal organisations in the region, paired with government complicity and inactivity in the area, has led critics to argue that many perpetrators could be prosecuted at the ICC for crimes against humanity, even under the current fairly restrictive definition of the offence.[52] Regardless of how these acts should be classified from a legal standpoint, given the severity of the situation it is easy to see the impetus behind the suggestion that some form of supranational solution to prosecuting these crimes is warranted – and indeed the idea has continued to come up in the years since the initial Trinidad and Tobago proposal.[53]

This may, in fact, be one of the strengths of a regionalised model of transnational criminal prosecution. At the ICC negotiations it became difficult to convince states not faced with the danger of transnational crime overwhelming their polities to accede to surrendering their sovereignty in the way required by the ICC prosecution model.[54] Given the realities faced by the Latin America-Caribbean region, however, COPLA is premised on the idea that the political will might be easier to muster. Even the proposed states parties whose governments have not yet been destabilised by the effects of TOC and narcotics trafficking cite these crimes as the most serious challenges faced by their law enforcement agencies.[55] Equally, the majority of proposed states parties are small states with limited international influence. Many have experienced the effects of invasive exercise of American hegemonic powers, incentivising the creation of this type of alternative to the influence of larger states. These motivations had already brought many of the proposed states parties to become involved in the original coalition of states pushing for the of treaty crimes at

51 Report of the Commission of Inquiry Appointed to Enquire Into the Events Surrounding the Attempted Coup d'Etat of 27 July 1990 (13 March 2014), para. 1.497, <www.ttparliament.org/documents/rptcoe1990.pdf>, visited 6 June 2019.

52 S. Cuenca, 'Narcotráfico: ¿Un crimen de lesa humanidad en el estatuto de Roma de la Corte Penal Internacional?,' 1 *Anuario Ibero-Americano de Derecho Internacional Penal,* ANIDIP (2013) p. 105, online, <revistas.urosario.edu.co/index.php/anidip/article/view/286>, visited 6 June 2019; Heather L Kiefer 'Just Say No: The Case Against Expanding the International Criminal Court's Jurisdiction to Include Drug Trafficking', 31 *Loyola of Los Angeles International & Comparative Law Review* (2009) p. 157 at 167.

53 Boister, Treaty Crimes*, supra* note 6 at 359, fn 76.

54 *Ibid.,* at 351.

55 P. Brieger, 'La Propuesta inédita de la Corte Penal para UNASUR se consilidó en cinco años' (9 november 2016), NODAL (blog), <www.nodal.am/2016/11/la-propuesta-inedita-de-la-corte-penal-para-unasur-se-consolido-en-cinco-anos/>, visited 6 June 2019.

the ICC,[56] and explains why members of Democracia Global describe the reactions of support of officials from the proposed states parties to COPLA as enthusiastic and universal.[57]

That said, while the United States is not a proposed member of the COPLA regime, its presence looms over the entire project. As indicated by the opposition of the US delegation to the Rome Statute negotiations to including narcotics and terrorist crimes in the ICC's jurisdiction, American investment in the existing transnational suppression treaty regime is substantial.[58] The idea of shifting the locus of enforcement from the state to the supranational level, despite the perceived advantages among the other regional actors, might not play well in Washington, DC. The potential destabilising effect of American opposition is not to be ignored.

3 Examining COPLA

As noted above, COPLA was originally the initiative of the Argentinian NGO Democracia Global, driven by a perception of transnational organised crime as the most pressing legal and social problem in the Latin American and Caribbean region, and by a sense of futility in continuing with un-coordinated and inefficient domestic law enforcement efforts.[59] The project is currently very much in the planning stages, and to the extent it is a formalised proposal it would be premature to try to assess it in any detail. However, using the English translation of the current Draft Statute,[60] this section will review the major pillars of the current proposal and offer some specific and more general remarks.

3.1 *"Leadership" Crimes and Substantive Jurisdiction*

It is clear right away, in Article 1 of the Draft Statute, that COPLA is not intended to be a forum for the prosecution of garden-variety or street-level crime – rather, "[i]ts purpose shall be to investigate and prosecute the leaders and heads of criminal organisations responsible" for the crime within its

56 Kiefer, *supra* note 52 at 163.

57 M. Florencia Gor, 'How to Build a World Community: A World Federalist Movement-Canada Podcast: COPLA 1', lecture, Faculty of Law, McGill University, September 2016, <https://soundcloud.com/monique-cuillerier>, visited 6 June 2019.

58 Boister, *supra* note 8.

59 Iglesias, *supra* note 48.

60 'Draft Statute of the Criminal Court for Latin America and the Caribbean against transnational organized crime' available online as supplementary material, Appendix A [COPLA Draft Statute] at: 10.6084/m9.figshare.9772448.

jurisdiction, and in particular *vis-à-vis* "organised criminal groups".[61] This is a concept immediately familiar within the ICL field, often referred to as "leadership crimes" or the prosecution of "those most responsible".[62] The latter phrase reflects a policy imperative that developed through prosecutorial strategising at the ICC, the idea being that the resources of a large and expensive standing court should be utilised to prosecute those whose liability attaches most broadly to large-scale crimes, rather than lower-level perpetrators.[63]

In the context of COPLA this takes on a different meaning, where the intention is to attempt to facilitate the breaking up of the leadership of the organised criminal gangs which bedevil the region – specifically, "those who direct, administer, organize or promote a transnational organized criminal group"[.][64] This reflects the different needs sought to be served. Whereas one of the major goals of the ICC and other core crimes tribunals is to ensure accountability for mass crimes committed in the past, the prosecutorial direction of COPLA is at least equally intended to impair or even help to destroy the operation of existing organised crime groups, a point underscored by the intention of ordering confiscation of proceeds of crime.[65] This is, unsurprisingly, commensurate with the goals of the UNTOC and its Protocols as well.

Article 5 sets out the substantive jurisdiction covered by COPLA: illicit trafficking of narcotics or psychotropic substances; manufacturing and/or illicit trafficking of firearms, their components, parts and ammunition; trafficking of persons; smuggling of migrants; trafficking of cultural property; money laundering; and transnational bribery. Each of these offences (with the exception, at the moment, of transnational bribery) is defined in Article 6, most with definitions that either are redolent of the relevant suppression conventions or invoke them via reference. For example, the definition of "trafficking of narcotics" uses some language from Article 3 of the Vienna Narcotics Convention,[66] while the definitions of "firearm", "trafficking of persons" and "smuggling of migrants" each refers to the relevant UNTOC Protocol.[67] The definition of "illicit trafficking of cultural property" is essentially referred away to two relevant

61 COPLA Draft Statute, Article 1(2).

62 *See* C. Steer, *Translating Guilt: Identifying Leadership Liability for Mass Atrocity Crimes* (T.M.C. Asser Press, Alphen aan den Rijn, 2017), esp. c. 1, 'The Problem of Liability in International Criminal Law'.

63 *See* International Criminal Court, 'Office of the Prosecutor', <www.icc-cpi.int/about/otp>, visited 6 June 2019.

64 COPLA Draft Statute, Article 5(1).

65 COPLA Draft Statute, Article 30(3).

66 COPLA Draft Statute, Article 6(3)(a).

67 COPLA Draft Statute, Articles 6(b)-(d).

instruments,[68] while money laundering is fairly generically defined as the conversion, transfer, selling, etc. of "assets of illicit origin from any of the crimes specified here in or the legislation of the States parties".[69]

Article 6 also contains definitions of "organised criminal group", which draws on the language of the UNTOC, and criteria for a crime being "transnational" which uses three of the four criteria from Article 3(2) of UNTOC.[70] The criterion left out is that in Article 3(2)(c) of UNTOC, which includes as "transnational" a crime committed in one state but involves an organised criminal group that "engages in criminal activities in more than one state". The overall suggestion, then, is that COPLA will only deal with crimes that occur in or affect more than one state.[71] Why this is so remains unclear.

Two points offer themselves for further development of these Articles. First, read literally, Article 5 would suggest that the only substantive crime over which COPLA will have jurisdiction is the direction, administering, organising or promotion of "a transnational organized criminal group intended to commit" one of the defined crimes. Yet this is substantially narrower in scope than even the specific offence of "participation in an organized criminal group" required under Article 5 of UNTOC, and would miss the opportunity to also try any of the gang leaders for the predicate crimes themselves. This will likely be fleshed out in subsequent drafts of the Statute.

Second, all of the listed crimes will require further development in terms of the elements required to be proven by the prosecution. The relevant suppression conventions are a starting point, but the definitions in those treaties are intended simply as a vehicle for agreement between the states parties on the overall attributes of the offences in question;[72] definition at the more granular level required for actual prosecution is accomplished via the domestic criminal laws of the parties. Each of the potential states parties to COPLA will have

68 The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 UNTS 231 (14 November 1970) (usually referred to as the 'UNECSO Convention'), the UNIDROIT Convention for Stolen or Illicitly Exported Cultural Objects, 2421 UNTS 457 (24 June 1995).

69 COPLA Draft Statute, Article 6(f).

70 Article 3(2) of UNTOC provides: "an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State".

71 Personal communication from M. Florencia Gor, 18 January 2018.

72 Currie and Rikhof, *supra* note 5 at 329–330.

ratified the relevant conventions (or such ratifications will likely be a requirement for signing), but each will also have its own, local version of the offence. The solution may be to adopt a model similar to that in the Rome Statute, which was to set out for each crime an agreed-upon definition of the crime under international law, and leave the elements to be formulated in subsequent negotiations. Even this, however, will require further definitional development than is found in the current draft.

This latter point is worth attention. Criminal law at any level must operate on the principle of *nullem crimen sine lege*, i.e. a crime must be sufficiently defined in order to be the basis of legitimate criminal sanction. One of the main criticisms of including treaty crimes in the Rome Statute has been the fact that unlike the core crimes, which (with the exception of aggression) had well-developed definitions in customary international law, there is no such consensus regarding the treaty crimes. Suppression conventions require states to criminalise certain acts, but allow states parties to define the limits of this criminalisation; meaning that, even for states which have signed the same suppression treaty, the definitions of the treaty crimes in national legislation may be diverse. In turn, while a crime may exist in many or most of the states over which the Court has jurisdiction, there is not necessarily a consensus on the elements of the crime, their seriousness or their breadth. While, as noted, this will need to be massaged in formulating the elements of the crimes, an apparent strength of the COPLA proposal is that the Court is meant to create a notion of regional criminal responsibility over a set of crimes, and to assert jurisdiction over these crimes based on a restricted and principled delegation of authority to do so by the states party to the Court.

The other element of the principle of legality, certainty of punishment, similarly requires further development. Part XII of the Draft Statute is entitled "Penalties" and speaks to certain modalities regarding sentencing, particularly sentencing reductions, but at the moment without anything like actual sentencing principles or ranges. Given the "leadership crimes" objective, it can be expected that a fairly robust level of sentence would be anticipated, but this too will be subject to how the negotiations among the potential state parties proceed.

3.2 *Referrals and Complementarity*

The intention of the Draft Statute is clearly to establish a standing, permanent court to adjudicate crimes arising in, and referred from, the party states. In terms of cases coming before the Court, Article 9 says quite simply that "[t]he States Parties hereto accept the jurisdiction of the Court for the crimes specified herein", which suggests a fairly broad independence on the Court's part

in terms of cases over which it exercises jurisdiction. Article 20, setting out the powers of the prosecutor, states that the prosecutor will receive referrals regarding crimes which could become cases before the Court, but with no indication as to an actual referral process or whether the prosecutor is to have any *proprio motu* power to select cases. Article 20(1) does seem clear, however, that the prosecutor is meant to "act independently" and has the power to decide whether to "move forward with an investigation and prosecution". It states explicitly that the prosecutor "will neither request nor comply with instructions from outside the Court". There is as yet no system of close supervision of the prosecutor's activities by the Court itself, a feature of the Rome Statute.[73]

COPLA does not appear to be intended as a court which has primacy of jurisdiction, as did the ICTY and ICTR due to their status as arms of the UN Security Council. Rather, Article 1(2) provides that COPLA will be "complementary to the national systems of criminal justice" which will be "authorized to exercise its jurisdiction over … cases that the national systems of justice are unwilling or unable to try". All of this language recalls the complementarity scheme under Article 17 of the Rome Statute, and indeed Article 10 (entitled "Questions of Admissibility") is quite similar in scope. It suggests that "the Court" will determine the admissibility of individual cases, considering whether a case has not been investigated or tried by a state with jurisdiction but which is "unwilling or unable to do so".[74] Also relevant to the Court's determination of admissibility are whether the accused is the subject of an international arrest order (presumably an INTERPOL Red Notice) which has gone six months without an arrest,[75] and whether a state party with jurisdiction over "the case" has issued an acquittal that the Court holds to be *res judicata irrata* – i.e. the Court determines that the acquittal in a particular case was invalid.[76]

All of this remains to be substantiated in future drafting, but the policy suggestion is one of complementarity as a starting point but with a fairly robust ability of COPLA to assume jurisdiction in appropriate cases, as well as competence to determine when it is legally appropriate to do so. This makes sense in the context of a region where the problems of organised crime gangs compromising the functioning of domestic criminal law systems is well-known, which is in fact a motivator for the creation of the Court itself. Indeed, this is analogous to the rationale behind the ICC's scheme, which explicitly anticipated that a mechanism would be needed to deal with states which were somehow

73 Rome Statute, *supra* note 1, Article 15.

74 COPLA Draft Statute, Article 10(1)(a).

75 *Ibid.*, Article 10(1)(b).

76 *Ibid.*, Article 10(1)(c).

shielding perpetrators.[77] Nonetheless, it seems logical that this may very well put the Court on a collision course with some state governments, particularly those which are subject to the influence of criminal organisations in some way, whether via collusion or intimidation. As the ICC's forays into complementarity tangles with states has shown,[78] this might be tricky ground to navigate, but is essential if the Court to fulfil the mandate currently proposed for it.

3.3 *Cooperation and Investigation*

The machinery for Court-state cooperation is in fairly skeletal form in Part XIII of the current draft. Article 35 provides that state parties "will cooperate fully with the Court in relation to the investigation and prosecution of crimes in the jurisdiction of the Court, in accordance with the Inter-American Convention on Mutual Assistance in Criminal Matters". This appears to incorporate by reference the modalities of cooperation contained within the Inter-American Convention,[79] a measure no doubt made necessary by the fact that a number of states anticipated as possible members of the Court (e.g. Belize, St. Kitts and Nevis) are not parties to the Convention. This will doubtless receive some amplification since the Convention itself is designed for government-to-government cooperation and not all of its machinery will necessarily translate to the state-Court axis. Article 36 contains definitions of "surrender" and "extradition" which appear to anticipate future articles concerning the transfer of accused or convicted persons from states to the Court, or between states, though nothing further on the subject appears.

The language in Part XIII appears to anticipate that as well as prosecuting cases, the Court will have some kind of active role in investigating them, and as noted above Article 35 binds states to cooperate in whatever form these investigations take. There is no indication as yet that the Court will be given independent jurisdiction to investigate cases on the territories of state parties, an exceptional power which is provided under the Rome Statute.[80] The Coalicion COPLA's promotional material indicates that a possible role of the Court could be to help with judicial and police cooperation among member countries,[81] which does not suggest independent investigation. Article 37 provides that states will create "special group[s]" within their domestic security forces to

77 Currie and Rikhof, *supra* note 5 at 207–210.

78 For example, the Kenya situation; *see* C. Cherner Jalloh, 'Kenya vs the ICC Prosecutor', 53 *Harvard International Law Journal* (2012) p. 269.

79 OAS Treaty Series No. 75 (23 May 1992).

80 Rome Statute, *supra* note 1, Article 57(3)(d).

81 *See* 'What is the COPLA?', *supra* note 11.

enforce decisions and orders of the Court, and Article 30(3)(b) anticipates the Court submitting requests for confiscation of proceeds of crime to state courts. All of this suggests a protective attitude towards state sovereignty over criminal law matters, even in cases where the Court is active.

That said, Article 37 *bis* presents the possibility of an intriguing further development in Court-state cooperation, as it anticipates the creation (by way of an Additional Protocol) of a Regional Intelligence Agency which will coordinate the sharing of information and intelligence between and among states parties. More is said on this below.

4 COPLA: A Transnational Regulator in a 'Sieberian' Global Order?

In a far-reaching 2010 paper,[82] Ulrich Sieber distinguishes a number of models for approaching the creation and enforcement of transnational law (i.e. the law which attempts to regulate transnational actors and activities), and decision-making. He sets out the advantages and disadvantages of each model and evaluates their comparative effectiveness and democratic legitimacy. He further outlines how to optimise each approach in order to mitigate these weaknesses. Because of both its breadth and its focus on highlighting solutions which prioritise the needs of affected parties, this paper provides a useful framework for reviewing the quality of the COPLA proposal as a supranational regulator in a highly globalised order. In particular, Sieber's analysis of the national cooperation and supranational models are useful when discussing COPLA from this perspective.

4.1 *National Cooperation Model*

It is perhaps tempting to overlook the importance of the national cooperation aspect of transnational law when reflecting on COPLA. The project is billed, after all, as a regional criminal court designed to take the stress off overwhelmed national legal systems. However, because COPLA incorporates the requirement of complementarity, the majority of cases will continue to be heard at the national level where the *de facto* regime of interstate cooperation in enforcing suppression treaties continues. That said, it is in the transnational domain where COPLA proposes some of its most nebulous and wide raging changes to the existing system.

Sieber defines his view of effective cooperation solutions as those which streamline the ability of states to have their decisions recognised by other

82 Sieber, *supra* note 23.

courts.[83] The COPLA proposal, on the other hand, does nothing in the way of explicitly adding to the obligations of states to recognise each other's decisions. For the most part, the conventions on which the court bases its jurisdiction already provide for broad and obligatory mutual legal assistance, as well as requirements to honour requests for the seizure or confiscation of assets. Instead, COPLA makes a daring proposal aimed at facilitating these underlying obligations to cooperate and recognise the judgments of other states. As noted above, it proposes the creation of a centralised Regional Intelligence Agency, which has the potential to significantly streamline the process of mutual assistance.

The intended scope of this proposed agency is unclear, as the draft treaty itself leaves the exact parameters of the agency's powers to the imagination of future negotiators. One might sensationally imagine that the agency will take the form of a "Latino FBI", but as thrilling as the prospect of teams of *Hombres G* kicking down doors throughout the region might sound, this is an overstatement of what is actually intended. Instead, the agency appears to be more of a clearing house for intelligence, requests for mutual legal assistance and the enforcement of confiscation orders.

While such a body might not seem revolutionary (it is not unlike EUROPOL, for example), it has great potential to strengthen the effectiveness of enforcement as a whole. By centralising the proliferation of requests for assistance/enforcement and removing them from the more general mutual legal assistance process, this could increase both the breadth and speed of mutual assistance generally. This is particularly promising when considering the emphasis COPLA puts on the confiscation of TOC assets for the purpose of dismantling and weakening criminal organisations.[84]

The Regional Intelligence Agency, then, has the potential to allow a single state to issue a request for confiscation analogous to those under Article 13 of the UNTOC, or Article 5(4)(a) of the Vienna Narcotics Convention which could be quickly and widely enforced, leaving no time for targeted organisations to effectively protect their assets. Just as multinational businesses follow the incentives of tax breaks and cheap labour, TOC organisations, facing hostile conditions in one region, decamp for more hospitable climes. By facilitating quick and coordinated action across the region, COPLA's Regional Intelligence Agency may help in ensuring that when a state strikes against a criminal organisation it will not be able to gain a foothold to re-establish elsewhere easily.

83 *Ibid.,* at 34–36.

84 'What is the COPLA?', *supra* note 11.

This being said, an increase in effectiveness of interstate enforceability of judgements could have dangerous consequences in the context of a region where many countries suffer from a deficit in the rule of law. The UNODC's 2012 threat assessment of transnational organised crime in Central America and the Caribbean notes that much of the recent increase in violence in the northern triangle region of Central America can be traced to greater enforcement in Mexico which forced TOC out of that country and further into states with weaker rule of law. There, the incoming organisations clashed with local groups for control of territory leading to more violence and greater destabilisation within the state.[85] If the efficiency of widespread cross border investigation and asset seizure were to be increased without planning, a similar phenomenon could occur. By increasing the ability for co-ordinated enforcement of seizures and arrests, pressure will increase on TOC throughout the region. The only states which will remain safe for TOC groups will be those unable to enforce these coordinated requests for aid. This has the potential to further incentivise TOC groups to move into these states and exacerbate the violence and confrontation there.

COPLA's proposal for cooperation run through a centralised body leaves the potential not only for more efficient but also more strategically effective cooperation. A centralised body would potentially have the ability to monitor investigations across the regions and make recommendations about how best to coordinate enforcement to emphasise restraint and burden sharing, so that disparate enforcement does not lead to more violence in affected regions. Such a project would require significant centralisation of information, and compliance by states parties which is far beyond the scope of the tentative proposal in Article 37 of the current Draft Statute.

4.2 *The Supranational Model*

Despite the possible implications for interstate cooperation, the COPLA proposal is undeniably a document focussed primarily on exploring the potential of a supranational approach to the enforcement of TCL. The challenges for supranational approaches to transnational law-making are the perfect inverse of those which plague the cooperation model.

While the cooperation approach struggles to develop methods for ensuring that the legitimately-made decisions of sovereign states are accepted and facilitated by their peers,[86] the supranational model circumvents this issue

85 UNODC, *Transnational Organized Crime in Central America and the Caribbean: A Threat Assessment* (United Nations, Vienna, 2012) at 5

86 Sieber, *supra* note 23 at 34–35.

through top down decision making that effects the legal obligations of a group of states. In Sieber's view, however, what this model gains in efficiency and unity of action, it gives up in effectiveness and legitimacy.[87] Because supranational institutions are a step removed from both the enforcement powers of their constituent states and the governing institutions which legitimise the use of these powers, they must work to ensure firstly that their decisions will be enforceable and secondly that their decisions are sufficiently reflective of the will of these states to encourage them to continue to comply with this enforcement regime.

To ensure enforcement, COPLA employs two distinctly effective methods which correspond with those identified by Sieber, to approximate the coercive power of a state and to ensure compliance. Firstly, it relies on the security and law enforcement bodies of the individual states to enforce their decisions. COPLA proposes a particularly robust version of this approach of enforcement, mandating in Article 37 the creation of divisions within the security forces of each state to carry out orders of the Court. From the text of Article 37, these enforcement divisions would seem to remain under the direct control of the individual states, but would be devoted primarily to the quick and effective execution of Court decisions. It is easy to be sceptical about the viability of this clause, in that it appears to envision a significant surrender of state enforcement power directly to the Court, and because it envisions a court whose activities are so numerous as to require the maintenance of its own security division on standby in each state. Ultimately, though, it is an ambitious position from which to start the discussion around meaningful enforcement, and it demonstrates a concern for making the Court an effective supranational institution.

Second, in addition to any hard power it might exercise through the proxy of state law enforcement, the COPLA proposal would provide the Court's institutions with a certain amount of soft power. As described in Article 20 of the Draft Statute, the prosecutor of the Court would, like the prosecutor of the ICC, act independently to carry out investigations and bring charges against individuals. This power to initiate investigations, which inevitably brings scrutiny on states for their inaction or complicity, operates somewhat like the "naming and shaming" procedures employed by certain supranational organisations.[88] Depending on how the prosecutor's powers take shape in future drafts, this power could allow the prosecutor to quickly and flexibly call states to task for their failure to enforce norms, without requiring the engagement of a slow or

87 *Ibid.,* at 36–39.

88 *Ibid.,* at 38.

involved decision-making process towards more formal binding legal orders or conventional coercive power.

These combined measures would entrust the Court with fairly significant normative power. But in order to ensure continued cooperation of local enforcement agencies to carry out these orders, and for these agencies to feel compelled to react to the soft power of the prosecutor's office, the Court requires legitimacy.[89] Sieber links legitimacy to two types of institutional feature – democratic control and respect for state sovereignty.[90] COPLA incorporates elements of both of these approaches in its proposal at every decision-making step.

Sieber gives the Treaty of Lisbon as an example of a high standard for legitimising super national legal decision making, which sets out the constitutional structure of decision making at the EU,[91] and requires several phases of parliamentary approval to legitimise decision making. As a court, which, by its nature is not a legislative body and is independent from parliamentary approval, COPLA has limited recourse to the parliamentary model of legitimation. This being said, the COPLA proposal suggests employing a broad array of procedures to ensure both democratic oversight and diverse geographic representation in decision-making. The Court would be overseen, for instance, by an assembly of representatives from the each of the state's parties, who elect a board of 21 members (18 members at large, two vice presidents and a president).[92] The assembly would oversee the Court, set the budget, establish subsidiary bodies, determine the composition of the Court, and would be ultimately responsible for administration.

Judges would be elected by the assembly, with each state party nominating a candidate. The prosecutor would be elected by the assembly, though the prosecutor's office would be composed of representatives from each state. A secretary would also be chosen by the president of the board based on the recommendation of the assembly. Unlike the ICC, the COPLA proposal also mandates the creation of a Defense Branch, whose composition would be decided by election.[93] Moreover, COPLA supplements these governance mechanisms with principles drawn from principles on which most national courts

89 *Ibid.,* at 32.

90 *Ibid.,* at 36–39.

91 *Ibid.*

92 COPLA Draft Statute, Article 24.

93 COPLA Draft Statute, Article 21.

base their legitimacy, such as the open court (Article 20(10)), and rights of appeal (Article 15) *inter alia*.[94]

Where parliamentary decision-making is impossible, Sieber notes that a viable alternative is to ensure that the supranational bodies' decision-making powers are as limited and un-invasive as possible.[95] COPLA achieves this goal through the strict requirement of complementarity, its limited jurisdiction to make decisions, and its reliance on state aid to carry out its decisions. These restrictions would allow COPLA to minimise criticism when it is forced to make decisions which are not subject to direct democratic approval.

4.3 *Using the Regional Model as a Catalyst for Ordered Pluralism*

Beyond the question of whether COPLA builds an institution whose decisions can be effectively enforced with a semblance of legitimacy lies the more fundamental consideration of whose interests will be served by this institution. A persistent problem in the development of TCL has been a democratic deficit which lies at the heart of the process by which suppression treaties are created.[96] While, on its face, the process of treaty formation is seen as an agreement between nominally equal states, reflecting the interests of all parties, in reality the power and influence of individual states varies wildly. As a result, when treaties are negotiated, it is often entirely on the initiative and terms of the most powerful states, who create treaties that serve their interests at the expense of others.[97]

In some iterations the TCL treaty making process, rather than representing a good faith democratic effort to combat the struggles of all affected states, is instead an exercise in expanding the hegemony of powerful states. In the trafficking context, for instance, this hegemonic influence has often manifested itself as a programme which serves the interests of enforcement in richer consumer state, with tragic consequences for poorer producer states. Powerful states demand strict suppression on the supply side with little effective action in moderating demand, forcing poorer, weaker states into violent confrontations

94 Though at the moment, Article 15 simply provides that there will be an Appeals Division of the Court; the draft does not speak to a substantive right of appeal or any procedural mechanisms.

95 Sieber, *supra* note 23 at 38.

96 *See generally* S. Wheatley, 'A Democratic Rule of International Law', 22 *European Journal of International Law* (2011) p. 525.

97 For example, the US has been a particularly powerful driver of the transnational anti-narcotics regime, which has had deleterious effects on supplier states; *see* P. Andreas and E. Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press, Oxford, 2006), chapter 3.

with producers inside within their borders, overburdening their enforcement powers and leading to situations like that in Latin America today.[98] The truly innovative feature of COPLA as an instrument of TCL is how it disrupts the destructive status quo of the suppression treaties on which it is based, by allowing states to more easily live up to their obligations under these treaties while prioritising the interests of states parties, rather than those of a distant hegemon.

The French legal scholar Mireille Delmas-Marty suggests that in order to correct the destructive tendencies of the current suppression treaty model, while ensuring the development of law which addresses transnational criminal concerns, we must aim to create a system of "ordered pluralism"[99] which balances the inevitable influence of powerful states and international obligation with "an authentic margin of national appreciation".[100] To achieve this, she suggests that the norms underlying the suppression treaty process must be rewritten. Rather than allowing powerful states to calque their law into transnational obligations, Delmas-Marty suggest to undertake a Chomskian project to uncover a universal grammar of international principles to govern suppression treaties.[101]

This new grammar would set broad obligations of enforcement and cooperation but allow states to implement them on their own terms. Such an approach would need to be outcomes based, and open to re-evaluating existing strategies. It would also need to be freed from the tacit imposition of (mainly) common law principles of law and culpability, so as to be adaptable to local regimes. The system should also provide for a more flexible system of interstate cooperation, allowing for state adjustment and, finally, a stronger appreciation of human rights.[102]

As a body which is predicated entirely on pre-existing suppression treaties, COPLA is evidently incapable of achieving all of these objectives. On the other hand, the project's structure and stated goals provide an example of how regional organisations might function as an intermediary solution to gain a measure of national appreciation under treaties by which they are already bound.

98 Boister, 'Further reflections', *supra* note 31 at 27–28; and *see* C.C. Leacock, QC, 'Internationalization of Crime' 34 *New York University Journal of International Law and Politics* (2001–2002) p. 263.

99 M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, trans N. Norberg (Hart, Oxford, 2009) at 107, as cited in Boister, *ibid.*, at 29.

100 Boister, *ibid.,* at 28.

101 Delmas-Marty, *supra* note 100 at 75, as cited in Boister, *ibid.,* at 29.

102 *Ibid.*

Through political unity, and the creation of a bulwark against tools of compulsory enforcement such as forced extradition, the COPLA proposal is able to add texture to the TOC suppression regime, refocussing the effort on an outcomes-based approach, allowing for a re-evaluation of previous approaches, nuancing the cooperation regime.

A notable feature of the COPLA campaign, in all of its preliminary statements, has been the deemphasising of the importance of actually supressing the commission of treaty crimes.[103] Instead, COPLA's preparatory materials focus on achieving the goal of dismantling organisations which, through the profits of transnational criminal activity, have become powerful enough to threaten the rule of law. The UN General Assembly Resolution[104] that adopted the UNTOC makes no mention of the role of TOC in corroding rule of law and promoting violence. While the Vienna Convention does mention the potential for trade in illicit substances to "generat(e) large financial profits and wealth enabling transnational criminal organisations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society", this is clearly subordinate to the desire to suppress consumption in consumer states on the grounds that these constitute a moral and health concern.[105] As noted above, simple enforcement against street level criminals has only resulted in increased conflict and violence, which has forced groups to relocate but has done nothing to alleviate the problem.

COPLA could provide for a re-evaluation of the existing model. In perfect contrast to the suppression treaties it enforces, the project's preparatory documents have little to say about the motivations for criminalising the trafficking and production of illicit goods; instead they speak at length about the need to respond to the violent and destabilising effects of the groups who engage in them.[106] Rather than valorising street level confrontations, which do little to weaken the drug trade, they outline a new strategy for enforcement which focuses on a top down deconstruction of criminal organisations. This strategy aims to deprive TOC groups of the organisational structures and resources which allow them to function.[107] This philosophy is instantiated in the Draft Statute, which gives jurisdiction only over those who organise or incite the trade for their profit, thus removing street level producers and traffickers from

103 'What is COPLA?', *supra* note 11.

104 UNGA Res 55/25 (15 November 2000).

105 Vienna Convention, *supra* note 29, Preamble.

106 'What is the COPLA?', *supra* note 11.

107 *Ibid.*

the ambit of the Court.[108] Though the Statute does nothing to relieve states of their duties to enforce under the old treaty, it challenges the status quo of enforcement against low level criminals, instead significantly increasing capacity to effectively investigate and prosecute perpetrators from higher echelons of TOC groups, facilitating changes of strategy at the national level as well.

By taking these steps, COPLA has effectively jury-rigged a method for allowing states to re-evaluate their approach to treaty crime enforcement to better serve regional needs. In this way, COPLA injects a measure of regional, if not national, appreciation into the existing system and moves the regime somewhat closer to the ideal of ordered pluralism. In particular, the project makes inroads toward the goals of ordered pluralism in the domain of enforcement. While the Draft Statute does not entirely abandon the model of coordination and cooperation as a primary method of enforcement, as I have noted above the proposed Regional Intelligence Agency presents a potential forum to formulate ongoing recommendations for how to meet these obligations and at the same time providing leeway for a bespoke approach to implementation.

Finally, it is worth noting that any fulsome notion of ordered pluralism should include within its ambit protection of the human rights of the accused person. The TCL regime, focused as it is on prosecution and enforcement, contains significant gaps in terms of the application and implementation of human rights protection within the cooperation process, in particular.[109] There are many cracks for people being investigated and prosecuted to fall through. The Rome Statute contains substantial human rights protections for accused persons, though mostly at the trial level. There is significant potential for COPLA to plug some of the gaps and provide an ordered model of transnational criminal process that upholds human rights protections and thus strengthens, however indirectly, the legitimacy of the TCL system. In our view, this possibility is worth exploring as the drafting moves forward.

5 Conclusion

As noted at the outset, the objective of this article was to introduce and evaluate the proposal for the creation of COPLA at a primarily conceptual level. Given the preliminary nature of the current draft we are still, as the saying goes, taking a view from 30,000 feet. There is little doubt that as currently envisioned

108 COPLA Draft Statute, Articles 1, 5.

109 On this *see* R.J. Currie, 'The Protection of Human Rights in the Suppression of Transnational Crime', in Boister and Currie, *supra* note 26 at 27.

COPLA would play a unique role within the overall system of suppression of transnational crime, and in particular that like the Malabo Protocol it might introduce institutional and normative support for this mission on a geographic basis. As political momentum appears to be gathering, this development is worth watching.[110]

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