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58 The Longer Arm of the Law

THE GROWTH AND LIMITS OF INTERNATIONAL LAW ENFORCEMENT AND CRIMINAL JUSTICE COOPERATION

William F. McDonald

THE NATURE OF THE PROBLEM

Old Roots, New Growth

The problems of criminals fleeing abroad to avoid prosecution or committing crimes that crosspolitical borders have existed since ancient times. Smuggling may be the world's second oldest profession. Agreements among states to return fugitives have been recorded since ancient Egypt. In today's world of porous borders the possibilities for transnational crime and fugitivity have multiplied a thousandfold.

As of the twenty-first century nation states are expanding institutions of international cooperation in law enforcement and criminal justice matters. Compared to the beginning of the nineteenth century when international cooperation was virtually nonexistent and the prevailing assumption was that "the courts of no country enforce the laws of another country,"¹ today's world is strikingly different. A web of bilateral, regional, and international agreements, conventions (treaties) and institutions addressing transnational crime and criminals are proliferating (Andreas & Nadelmann, 2006).

This chapter traces these developments and identifies gaps that remain in the canopy of international law enforcement and criminal justice. These developments began slowly in the nineteenth century, took off after World War II, and accelerated in the 1990s.

Formerly criminologists dealt with crime in other countries under the rubric of "comparative criminology." Interrelatedness as such became a

¹ A principle of international law invoked by Chief Justice Marshall, 23 U.S. (10 Wheat.) 66, 123 (1825).

focus of criminological concern in 1974 with the phrase, "transnational crime," which is not a legally-defined crime but rather refers to criminal activities, transactions, or schemes that violate the laws of more than one country or have a direct impact on a foreign country (Mueller, 1999). In 1996 the National Institute of Justice (NIJ) established its International Center for the study of crime and justice. At the national policy level, transnational crime became a focal concern for the first time when President Clinton targeted it as a threat to national security (U.S. President Clinton, 1995). The State Department had become a player in the formulation of American crime policy (Winer, 1997).

THE EVOLUTION OF INTERNATIONAL AGREEMENTS TO COOPERATE

From Conflict to Cooperation

In the nineteenth century legal theorists began rethinking the relationship between crime, courts, and foreign states. The new thinking reflected political, economic, and technological changes in the world. Domestically, the nation state had established modern police agencies to promote law and order at home. Internationally, states had realized that it was in their self-interest to cooperate in the suppression of transnational crime. This was not always the case.

For example, prior to the seventeenth century, piracy had been officially authorized, albeit with some restrictions by states. Known as "privateering" it was a means of harassing enemies and obtaining resources. The high seas were regarded as a no-man's-land. However, by the eighteenth century the volume of international trade among Western states was increasing. Norms regarding international relations began to change. Doing business with one another came to be regarded as more valuable than stealing from one another.

It was not just economic or state interests that stimulated the development of what Nadelmann (1990) calls "global prohibition regimes." The latter are norms that prohibit, in both international law and domestic criminal laws, certain acts by either state or nonstate actors. The regimes against slavery; against international trafficking of women for prostitution; and against trafficking of controlled psychoactive substances were all driven by moral concerns of particular individuals – who Nadelmann characterizes as "moral entrepreneurs," or in other words, people with the urge to remake the world according to their personal, absolutist ethic.

Extradition and Judicial Cooperation

As governments replaced self-help methods of bringing criminals to justice, they also became interested in extraditing criminals and in having fugitives punished. Formerly, only fugitives who were a threat to the state aroused much governmental effort. Pirates, vagabonds, conspirators, embezzlers, counterfeiters, and assassins had been the focus of most of the minimal efforts by European states prior to the nineteenth century (Joutsen, 2005).

By the twentieth century many states had signed bilateral agreements (treaties) to extradite fugitives for common crimes. Some states even agreed to assist one another with the judicial process related to criminal matters. Known as "mutual legal assistance treaties" (MLATs), these latter agreements broke with the tradition whereby the courts of one state did not help enforce the laws of another state. With MLATs the law enforcement and judicial systems of one state perform certain tasks – such as by taking testimony from witnesses or collecting physical evidence or checking records – needed for the investigation and prosecution of a case in foreign state. MLATs have since become widely accepted and broadened in scope (Joutsen, 2005).

International cooperation in criminal matters increased as the twentieth century closed. In addition to extradition and judicial assistance, there are agreements dealing with related matters: the transfer of proceedings from the state where the offense occurred to another state for trial under the latter's legal system; the recognition of judgments – including imprisonment, fines, and others, and the transfer of prisoners (Joutsen, 2005: 269).

Also noteworthy is the appearance of several multilateral conventions on cooperation with respect to specific forms of crime such as the UN Conventions against Drugs (1961, 1971, 1988); Transnational Organized Crime (2000); Corruption (2003). The Protocol against Human Trafficking (2000) represented the culmination of more than a century of diverse initiatives by reformers to achieve international cooperation against "white slavery," the trafficking of women for sexual exploitation.²

In addition, international and regional institutions of law enforcement and judicial cooperation have proliferated (e.g., Interpol, Europol, Eurojust, the World Customs Organization; the G7's Experts on Transnational Crime; ASEAN Chiefs of Police – ASEANAPOL). Many countries are now

² The phrase "white slavery" originated in the late 1800s to both distinguish the campaign from the one black slavery yet convey the same high moral purpose.

posting police liaison officers at foreign embassies. International joint task forces of police and prosecutors are commonplace. The cumbersome old system of *lettres rogatory* (formal diplomatic letters of request between states) for obtaining legal assistance in criminal matters from another state is being replaced by agreements allowing direct communication among law enforcement agencies.

THE GROWTH OF LAW ENFORCEMENT COOPERATION

Political Versus Common Crime

Today's system of international police cooperation grew out of nineteenth century European initiatives. Two kinds of cooperation occurred: cooperation against common crime ("low policing") and the more notorious cooperation against political crime and threats against the state ("high policing"). After years of political agitations, the Italian government convened the International Anti-Anarchist Conference in Rome in 1898. The fifty-four delegates were unwilling to create an international police agency but did agree to exchange information and improve the Bertillonage system of identification.³ They also agreed to allow officials who were tracking anarchists to bypass diplomatic channels and to communicate directly by telephone or telegraph.

In St. Petersburg in 1904, ten European states signed a secret protocol that regularized the cooperative arrangements agreed to in Rome. Jensen (1981) argues that these two conferences laid the groundwork for future cooperation against nonpolitical crime, or what eventually became Interpol. By the early 1900s the need for multilateral police cooperation against common crime had been widely recognized. International meetings were convened in Europe (in 1909, 1911, 1914, 1923) and the Americas (United States in 1893, 1922, and Latin America in 1901, 1905, 1910, 1920). The American initiatives never produced any viable operational structure (Deflem, 2002).

The International Criminal Police Organization: Interpol

The First International Congress of Judicial Police that met in Monaco in 1914 on the eve of World War I was intended to create structures that would facilitate transnational police efforts against common criminals.

³ This anthropometric system was based on measurements of eleven features of the human body. It was used until 1903 when two inmates in the same prison were found to have identical measurements. Thereafter, it was replaced by fingerprints (McPhee, 2008).

The participants endorsed several proposals that were never implemented because of the war. In 1923 the International Police Congress was convened in Vienna. The 131 attendees, mostly European police officials, created the International Criminal Police Commission (ICPC). After World War II, the ICPC was revived; re-located to France; and in 1956 renamed, International Criminal Police Organization (ICPO) – Interpol. It gradually came to be recognized as an international organization – participating in UN and Council of Europe business, being mentioned in treaties and being acknowledged in legal instruments of various governments (Anderson, 1989).

By the early 1970s, Interpol was regarded as unresponsive to the regional needs of Europe (Fijnaut, 1987: 38). The creation of a European alternative to Interpol was probably an inevitable outcome of European economic integration, but it was hastened by the terrorism of the early 1970s. In 1975 the ministers of internal affairs meeting in Rome established a body called "TREVI" to promote cooperation in the fight against terrorism. In 1986 they expanded its remit to include international crime. A year earlier the Benelux countries signed the Schengen Agreement by which they formalized police cooperation amongst themselves. In 1995 the Council of the European Union drafted a convention for an organization called the European Police Office (Europol) that went into effect in 1998 and was joined by a companion prosecutorial institution (Eurojust) in 2000 (Council of the European Union, 2002).

The United States did not officially participate in the European conferences leading to the establishment of the ICPC; nor did it have much to do with ICPC prior to World War II or afterwards (Deflem, 2002). In 1962 the United States officially established a National Central Bureau of Interpol but until 1990 its function was *de minimus*. FBI Director, J. Edgar Hoover, preferred to rely upon America's well-developed system of legal *attachés* (Legats) and the FBI's extensive contacts with foreign agencies (Andreas & Nadelmann, 2006).

GAPS IN THE CANOPY

While there has been progress in the building of the law enforcement and criminal justice systems for the global society, the job is far from complete. There are gaps (McDonald, 2007). This happens for a variety of reasons: the lack of extradition agreements among certain states; differences in the legal definitions of crimes; asymmetry in the professionalism of the law enforcement agencies; corruption; and international and domestic politics.

Even if states have extradition agreements between them, they sometimes refuse to extradite because of: the nonextradition of nationals; the "political

victims of crime in those societies could expect the assistance of professional police and prosecutors in bringing their victimizers to justice but this was not so if their victimizer fled to another country. Extending the reach of national law enforcement agencies beyond national boundaries, and creating regional and international institutions of law enforcement and criminal justice that span those boundaries is a project that is well underway but far from being perfected.

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offense" exception; the low quality of fairness or humanitarianism of the requesting country's criminal justice system especially its use of capital punishment; and, the potentially destabilizing domestic political ramifications of cooperating with certain foreign powers (such as the United States).

According to a customary rule of international law, states are expected to extradite or prosecute (*aut dedere aut judicare*). Prosecutions by one state on behalf of another state are called "vicarious" or "foreign" prosecutions. They seldom occurred – often because of cost or lack of interest. Since the 1980s, however, they have become important to American local criminal justice systems in dealing with criminals who flee to Mexico.

When extradition treaties did not exist or were inadequate to accomplish the rendition (the forcible transfer of a person from one state to another) of a fugitive, other methods have been used. Fugitives have been legally deported or "pushed over the border" by informal agreements. Fugitives have been lured home or to a third country where extradition can be arranged. Others have been kidnapped and returned by bounty hunters or foreign agents hired by aggrieved victims or by law enforcement officials.

Irregular rendition

In 1985, U.S. Drug Enforcement Administration (DEA) agent, Enrique Camarena was tortured to death by drug lords in Mexico. He was kept alive during the torture by a Mexican doctor, Alvarez-Machain. When Mexican police authorities failed to pursue the case, the DEA paid bounty hunters to have Alvarez-Machain kidnapped and brought to the United States to stand trial. Mexico protested the violation of its sovereignty (Zagaris & Peralta, 1997).

Since 9/11 and even before, the CIA has engaged in "extraordinary renditions" whereby it allegedly snatched suspected terrorists in foreign countries (allegedly with the consent of the host state) and flew them to third countries (often their homelands known for human rights abuses) where they have been turned over to the government for questioning. Critics have dubbed this practice "torture outsourcing." Supporters argue that it is a risky but necessary tool (Byman, 2005).

CONCLUSION

The process of establishing formal social control over geographic territories defined by national political boundaries was largely achieved by Western governments during the eighteenth and nineteenth centuries. By 1900,

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59 International Cooperation to Combat Money Laundering

Adam Graycar

MONEY LAUNDERING

Money laundering is a process that turns "dirty money" into "clean money." The proceeds of crime – dirty money – are disguised to hide their illicit origins, and then the money is integrated into the legitimate economy. The process washes dirty money until it appears to be clean. Often, but not always, the cleaning of dirty money involves moving it across national borders and integrating it into another economy.

Criminals disguise the illegal origins of their wealth, and terrorist organizations try to conceal the destination and the purpose for which the money has been collected. Money laundering plays a part in corruption as corrupt public officials need to hide the kickbacks they receive and the public funds they may have misappropriated. Organized criminal groups have substantial proceeds from drug trafficking and commodity smuggling. Together, these activities have profound social consequences and require cooperative international activity to combat them.

There is a great deal of international and national activity to counter financial crime and money laundering. Legislation exists in most countries to criminalize money laundering and the associated activities such as opening accounts in false names. Law enforcement agencies have investigated and prosecuted those accused of money laundering and prison sentences have been imposed. Money laundering is certainly big business and is significant for many economies. In its *Global Anti-Money Laundering Survey 2007*, KPMG opens with these words: "Estimated money laundered every year by drug dealers, arms traffickers and other criminals" (KPMG, 2007: 4).