

PART I

INTRODUCTION

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CHAPTER ONE

THE TRANSNATIONAL LEGAL ORDERING OF CRIMINAL JUSTICE

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1.1 INTRODUCTION

Criminal justice, conventionally understood, is a system of legal norms and institutions that govern the exercise of the state's monopoly over the legitimate use of violence (Weber 1948: 78). This claim to monopoly is grounded in an assumption that nation-states are the ultimate providers of the public goods criminal law is to deliver – the maintenance of civic order, the protection of individuals against violence, the reinforcement of society's fundamental values, and the meting out of “just deserts” to culpable offenders (du-Bois, Ulvang, and Asp 2017). It also resonates with the Westphalian principle that restricts other states from intervening in matters that are essentially within a state's domestic jurisdiction.¹ As David Nelken (2011: 194) writes, “criminal law continues to be a powerful icon of sovereign statehood.”

The tendency to view the criminal justice system as a state-based system has long shaped theory and empirical analysis (Zedner 2003: 3). The development and institutionalization of international criminal law since the 1990s has provided an opportunity to transcend the conventional state-centered approach, but the opportunity remained underutilized in light of conventional understandings of the distinction between the domestic and international law planes (Christensen and Levi 2017). Following the conflicts in the Balkans in the 1990s,

¹ In parallel, under private international law, states are not to apply foreign penal law or recognize or enforce foreign penal judgments out of sovereign respect for each other's criminal law systems – known as the “public law taboo” (Dodge 2002).

ELY AARONSON AND GREGORY SHAFFER

scholars in diverse disciplines, including law, political science, international relations, sociology, and history, attended to the distinctive aspects of criminal justice developed by ad hoc international criminal tribunals addressing war crimes in former Yugoslavia, Rwanda, Sierra Leone, Lebanon, and Cambodia, followed by the creation of the International Criminal Court (ICC) and complemented by the United Nations (UN) Commissions of Inquiry (Baas 2000; Hagan 2003; Hagan, Levi, and Ferrales 2006; Meierhenrich 2014; Minow, True-Frost, and Whiting 2014). Yet the development of international criminal tribunals did not meaningfully challenge methodologically nationalist approaches to criminal justice. Although some of the literature addresses the complementary role played by domestic courts under the Rome Statute of the International Criminal Court (Houwen 2013), there remains little socio-legal work on the interaction between domestic and international criminal justice systems, much less regarding broader transnational influences on national and local criminal justice. Indeed, most criminal justice scholarship continues to assume that the forces driving criminalization, policing, prosecution, and punishment are effectively domestic, as if they lie in splendid isolation from foreign and international influences (Aas 2017: 354).

This book, in contrast, examines how processes of transnational legal ordering catalyze the construction and flow of legal norms (Shaffer 2013) that reconfigure the relationship among international, regional, national, and local sites of criminal justice norm making and practice. To start, national criminal justice policy has developed collaborative interstate procedures to address crime. Such procedures hark back at least to the early twentieth century when anxieties about “white slavery,” “anarchist terrorism,” and cross-border liquor smuggling spurred growing concern about illicit actors’ ability to defy national borders (Deflem 2002; Knepper 2010; Limoncelli 2010; Nadelmann 1993). As the world became more economically, technologically, and socially interconnected, international and regional organizations, supranational courts, and transnational nongovernmental organizations (NGOs) addressing criminal justice issues proliferated, and domestic processes of criminal lawmaking and enforcement became increasingly enmeshed within transnational frameworks that elaborate norms and practices. International treaties increasingly define criminal law norms and create duties on states to implement them. In complement, international organizations develop soft law instruments to help enforce these norms (Kotiswaran and Palmer 2015). Judges and prosecutors

within the ICC and regional human rights systems participate in interpretive dialogues with domestic judicial and political actors implementing international norms attributing responsibility to perpetrators of grave human rights violations. The development of these norms and mechanisms calls into question the traditional framing of crime as an inherently territorial phenomenon defined by states (Cotterrell 2015). The accelerated institutionalization of policing and security bodies with a global or regional reach (such as Interpol, Europol, the World Customs Organization, and the Association of Caribbean Police Commissioners) facilitates the transnational diffusion of rationalities of crime governance and technologies of crime control across diverse areas, including organized crime, drug trafficking, terrorism, cyber-crime, and borders (Bigo 2013; Bowling 2010; Bowling and Sheptycki 2012). Distinct criminal justice initiatives now aim to motivate states to tighten the regulation of cross-border financial flows (Sharman 2011), save endangered species from extinction (Felbab-Brown 2017), combat cartel price-fixing (Shaffer, Nesbit, and Waller 2015), stop the plunder of antiquities (Cuno 2010), safeguard intellectual property (Haber 2018), and protect individuals from forced labor and sexual exploitation (Kotiswaran 2017), among other matters.

International institutions and NGOs, in parallel, use international instruments to call into question the legitimacy of state penal practices from a rights perspective (Clark 2001; Van Zyl Smit and Snacken 2009). In Europe, international institutions such as the European Court of Human Rights and the European Committee for the Prevention of Torture influence constitutional and administrative law principles concerning prison governance and prisoners' rights (Easton 2011; Van Zyl Smit 2006; Van Zyl Smit and Weatherby 2014). In Colombia, prosecutors from the International Criminal Court shaped the state's and rebel group's positions in negotiating a peace settlement (Hillebrecht and Huneeus 2018; Iturralde, Chapter 8). There and elsewhere, nongovernmental organizations have pressed the Inter-American Commission to bring claims under the American Convention on Human Rights to ensure accountability of those accused of gross human rights violations, creating a quasi-criminal jurisdiction of a human rights court (Huneeus 2013).

The intensity, complexity, and salience of these efforts call into question conventional theorizing of criminal justice from an analytic perspective that dichotomizes the study of national and international criminal law. Although many criminal justice scholars increasingly

ELY AARONSON AND GREGORY SHAFFER

recognize the need to move beyond state-centric approaches, little progress has been made in developing a systematic analytic framework that addresses the relationship between international and domestic processes of criminal justice policy (Christensen and Levi 2018: 2). This book takes up the challenge by applying the conceptual tools of the theory of transnational legal orders (TLOs) to analyze the dynamic and recursive interactions between the international, regional, national, and local levels in shaping criminal justice law and policy.

Halliday and Shaffer (2015) define a transnational legal order as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions” (Halliday and Shaffer 2015: 3). Drawing on the theoretical tools and empirical insights developed in earlier work on transnational legal ordering (Halliday and Shaffer 2015; Shaffer 2013, 2016; Shaffer, Ginsburg, and Halliday 2019; Shaffer and Halliday, 2020), the studies in this book examine the complex processes through which transnational norms governing criminal justice practices migrate across jurisdictions and shape the norms and practices of national and local actors. They assess the driving forces – bottom-up and top-down – behind the emergence of new mechanisms of transnational legal ordering in criminal law and policy, analyze their limits and their effects, and evaluate their implications for our understanding of the nature of criminal justice as a social and political institution. By linking empirical insights drawn from a wide variety of substantive areas, this volume facilitates theorization of the changing nature of the relationship between domestic and international forms of criminal justice policy making. In particular, we are concerned with the following questions:

- Can we identify distinct transnational legal orders in the field of criminal justice?
- If so, how do these criminal justice transnational legal orders form? Why do certain practices of criminalization, policing, procedure, and penalization exercised by nation-states become subject to transnational regulation?
- How do criminal justice transnational legal orders institutionalize? What processes and mechanisms drive institutionalization?
- How do criminal justice transnational legal orders align and compete with TLOs operating in other fields, such as human rights and constitutional law, administrative law, and business and labor law?

- What explains the variation in how transnational criminal justice norms are implemented in national and local contexts? Under what conditions do criminal justice TLOs facilitate concordance of the settled meanings of criminal justice norms across international, national, and local levels?
- What are the social, political, and cultural impacts of criminal justice TLOs?
- Under what conditions do criminal justice TLOs decline?
- What is distinctive about transnational legal orders in the field of criminal justice compared to other legal fields?

The ten case studies were carefully selected to capture the variability of the phenomenon of transnational legal ordering across different substantive areas of criminal justice policy. In particular, they highlight the commonalities and differences between three types of criminal justice TLOs. The first type consists of transnational legal orders aimed at improving the capacities of states to address crimes that have transboundary impacts. These TLOs define certain categories of conduct as transnational crimes and induce national governments to establish effective domestic mechanisms of policing, prosecuting, and punishing offenders who commit such crimes. The second type consists of transnational legal orders that govern the interactions between international and domestic legal institutions addressing “core” international crimes such as genocide, crimes against humanity, war crimes, and the crime of aggression. The third type consists of transnational legal orders aimed at abolishing or restraining the use of repressive penal and policing practices. With respect to each category of criminal justice TLO, we selected case studies that illustrate broader patterns of transnational legal ordering coupled with variation to apply, assess, and develop different dimensions of TLO theory.

This introductory chapter sets the analytic framework for the ensuing case studies. The chapter presents the key theoretical concepts of TLO theory and frames the book’s inquiry within broader scholarly debates regarding the impact of globalization on criminal justice policies. Drawing on the book’s case studies, it applies the TLO theoretical framework to the criminal justice field, presents the book’s findings, and identifies future avenues of research. It is organized around three aspects of criminal justice transnational legal orders – their formation (Part II), their institutionalization (Part III), and their consequences (Part IV). These sections address competition among and resistance within

ELY AARONSON AND GREGORY SHAFFER

transnational legal ordering processes that shape and constrain a TLO's formation, institutionalization, and consequences. This introduction highlights the book's contributions to the broader project of developing socio-legal theory on transnational legal ordering. Part V concludes by summarizing the case studies and their findings.

1.2 THE FORMATION OF CRIMINAL JUSTICE TLOS

We begin with the question of why certain state practices of criminalization, policing, trial procedure, and penalization become transnationalized. We aim to develop theoretical and empirical understanding of the processes through which social and institutional behaviors become defined as transnational and international crimes, on the one hand, and as illegitimate crime control and penal practices, on the other. Our approach is premised on predominantly constructivist rather than functionalist premises. We posit that the emergence of new transnational criminal justice norms is primarily driven by political and professional actors' success in shaping the dominant frames through which a social problem is defined and acted upon. In this vein, we employ the sociological concept of *framing* (Benford and Snow 2000; Goffman 1974) to investigate how social and institutional behaviors become defined as problems that necessitate legal intervention. We assess the strategies of political mobilization shaping the formation of cultural scripts, hard and soft law norms, and institutional practices in light of facilitating historical circumstances and precipitating conditions that give rise to a TLO (Halliday and Shaffer 2015). In parallel, we emphasize the role of political and social resistance in shaping the normative architecture and institutional design of TLOs. As we will see, the construction of transnational criminal justice norms is fraught with political controversy, reflecting the conflicting interests, values, and experiences of actors that differ in their capacity to influence the norms' content and their implementation.

TLO theory carves a middle ground between theoretical approaches that emphasize macrostructural explanations of legal change and those that focus on bottom-up processes involving agency in the construction of issues as social problems. The chapters in this book examine how a range of structural changes in the last decades, following the end of the Cold War, the impact of a neoliberal American-led world order (Andreas and Nadelmann 2006; Ikenberry 2011), and the growth of global markets, encouraged norm entrepreneurs to develop new crime-

governance frames and how the construction of these frames, in turn, catalyzed changes in legal consciousness and legal practice. The changing nature of illegal markets in a globalizing economy spurred the formation of new mechanisms of national crime governance. In a world characterized by unprecedented levels of cross-border mobility of people, goods, capital, information, and technology, criminal organizations and groups sought to take advantage of new opportunities to establish transnational networks for the production, financing, and trafficking of illicit goods and services (Castells 1998: 172). Technological advances in transportation and communication sharply reduced the cost of smuggling banned commodities, such as drugs, guns, and counterfeit goods (Efrat 2012). Electronic banking and offshore financial centers facilitated the “laundering” of illegally obtained profits and the cross-border financing of terrorist and other criminal activities (Palan 2006). Networks diffusing information on opportunities in the Global North, combined with civil conflict, economic shocks, climate change, and other pressures, intensified the scale of clandestine border crossings of migrants vulnerable to human trafficking. Along with these large-scale social transformations, the formation of new criminal justice TLOs was also precipitated by specific historical events. The Asian Financial Crisis spurred large-scale regulatory reforms that extended the application of criminal law to activities such as tax evasion and money laundering (Sharman 2011). The September 11 attacks triggered the creation of extensive counterterrorism surveillance, policing, and detention (Ali 2018; Murphy 2012).

These broad social transformations and historical events facilitate and precipitate the development of new frames highlighting the transnational dimensions of criminal behaviors and crime governance. The ideational content of these frames and the strategies through which they are disseminated reflect the interests, values, choices, and practices of the actors who produce them (Kotiswaran and Palmer 2015).² The studies in this book identify the range of actors who shape the normative and institutional structures of criminal justice TLOs, analyze their legal mobilization strategies, and assess the factors that explain the success and failure of these endeavors. Collectively, they develop a more nuanced understanding of the relationship between state and

² For a range of other cases involving the construction of transnational legal orders, see Dezalay and Garth 1996; Halliday and Shaffer 2015; Seabrooke and Henriksen 2017.

ELY AARONSON AND GREGORY SHAFFER

non-state actors in constructing criminal justice policy and practice transnationally.

Much of the current scholarship on the formation of international and regional crime-governance frameworks tends to characterize states as unified entities that dominate the policy-making agenda, and it focuses on the role of powerful states such as the United States. TLO theory, in contrast, rejects the conceptualization of the state as a unified actor (Shaffer and Halliday 2020), and it posits that officials operating within the constituent branches and agencies of the state develop their positions and practices through interactions with non-state actors and administrative officials working for international organizations and foreign governments. As an alternative to theoretical approaches that reify the state as autonomous in its ability to set domestic policy agendas, TLO theory emphasizes the interactions that take place between state and non-state actors both within and outside of national boundaries in functionally differentiated domains. These interactions provide platforms for the development of new policy frames, engaging intergovernmental networks and broader knowledge and practice communities (Haas 1992; Keck and Sikkink 1998; Slaughter 2004). In an era in which international organizations and transnational networks acquire more resources, expertise, legitimacy, and policy autonomy, states face increasing pressure to enhance their *de facto* public policy-making authority and to implement the criminal justice norms developed under their auspices (Alvarez 2005; Barnett and Finnemore 2004). By viewing state actors within this wider ecology of national and global lawmaking (Block-Lieb and Halliday 2017), this project moves beyond the state-centric approach that has long dominated criminal justice scholarship and opens new avenues for theoretical development and empirical research.

Existing literature tends to portray the United States as the major driving force behind the formation of new transnational criminal justice frameworks (Andreas and Nadelmann 2006; Chuang 2006; McLeod 2010; Nadelmann 1990). In this book, we seek to develop a more nuanced understanding of the role played by the United States in transnational criminal justice governance. By juxtaposing case studies dealing with three different categories of criminal justice TLOs – respectively focusing on the governance of transnational crimes, the implementation of international norms criminalizing atrocities, and the establishment of human rights safeguards against repressive policing and penal practices – we illuminate the different postures taken by