# Confronting the Shadow State

An International Law Perspective on State Organized Crime

HENRI DECŒUR



## OXFORD UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP, United Kingdom

Oxford University Press is a department of the University of Oxford.

It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trade mark of Oxford University Press in the UK and in certain other countries

© H. Decœur 2018

The moral rights of the author have been asserted First Edition published in 2018 Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by licence or under terms agreed with the appropriate reprographics rights organization. Enquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above

You must not circulate this work in any other form and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence Number C01P0000148 with the permission of OPSI and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press 198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2018930539

ISBN 978-0-19-882393-3

Printed and bound by CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and for information only. Oxford disclaims any responsibility for the materials contained in any third party website referenced in this work.

## Table of Contents

Table of Cases Table of Treaties Abbreviations		xv xxiii xxix	
In	troduction	1	
	I. STATE ORGANIZED CRIME		
1.	The Phenomenon of State Organized Crime  A. Conceptualizing State Organized Crime  B. The Context of State Organized Crime  1. Symbiosis between state organs and organized crime  2. State organized crime and kleptocracy  (a) The functioning of kleptocracy and the shadow state  (b) Endogenic and exogenic factors of state criminality  (i) History of state construction  (ii) Influence of social and cultural repertoires  (iii) Integration into global networks  (iv) Privatization and economic liberalization  (c) The institutionalization of state organized crime  3. State organized crime and armed conflict  C. The Motives of State Organized Crime  1. Belly politics: state organized crime for profit  2. Dirty tricks politics: state organized crime for policy purposes  (a) Domestic counter-insurgency  (b) Covert operations in pursuance of foreign policy  3. Terror politics: state organized crime and international terrorism  D. The Actors of State Organized Crime  E. The Means of State Organized Crime  F. Conclusion	15 15 17 17 20 20 25 25 26 27 28 29 30 31 31 32 36 37 38 40	
	II. THE LIMITS OF APPLICABLE INTERNATIONAL LAW		
2.	<ul> <li>State Responsibility for State Organized Crime</li> <li>A. State Responsibility for Criminal Conduct of Individuals Acting as Organs or Agents of the State</li> <li>B. Attribution of Conduct to the State</li> <li>1. Conduct of state officials acting in an official capacity <ul> <li>(a) Ultra vires and criminal conduct</li> <li>(b) Conduct motivated by personal motives</li> </ul> </li> <li>2. Conduct of de facto agents acting under the direction or control of the state</li> </ul>	45 47 47 47 49 51	

### Table of Contents

		5. Conduct of state-owned corporations	24
		4. Conclusion	53
		Difficulties Relating to the Establishment of a Breach of an	
		International Obligation	54
	1	1. Absence of a general prohibition on state participation in organized crime	54
		(a) Impossibility of inferring a general prohibition on state participation	
		in organized crime from existing treaty provisions	55
		(i) Obligations of states parties under crime-suppression	
		conventions pertaining to organized crime and corruption	55
		(ii) Obligation of prevention and inferred obligation not to commit	
		crime in the Bosnian Genocide case	57
		(iii) Discussion	58
		(b) Impossibility of identifying a general prohibition on state	
		participation in organized crime under customary international law	60
	2	2. Obligation to perform treaty obligations in good faith	64
	3	3. Obligation to prevent acts contrary to the rights of other states	65
	4	4. Obligation not to intervene in the affairs of another state	67
	5	5. Obligation not to infringe another state's permanent sovereignty over its	
		natural resources	69
	6	6. Prohibition of pillage under the law of armed conflict	70
	7	7. Prohibition of slavery, servitude, and forced labour in international	
		human rights law	71
	D. I	Invocation of State Responsibility	72
	E. (	Conclusion	73
3.		rnational Criminal Law Instruments for the Suppression of	
	Org	anized Crime and Corruption	76
	Α. (	Criminalization under Domestic Law	76
		. Drug manufacturing and trafficking	77
		2. Human trafficking and smuggling of migrants	79
		3. Trafficking in firearms	82
		i. Corruption and trading in influence	83
		5. Embezzlement of public funds, abuse of functions, and illicit enrichment	87
		5. Laundering of proceeds of crime	89
		7. Participation in an organized criminal group	92
		3. Other relevant offences	95
	B. I	Establishment of Criminal Jurisdiction	96
		. Bases of jurisdiction	96
		(a) Territorial jurisdiction	97
		(b) Active personality	99
		(c) Passive personality	100
		(d) The effects doctrine	101
		(e) The protective principle	103
		(f) Universal jurisdiction	103
		(g) Possible residual bases of jurisdiction	104
	2	2. Concurrent jurisdiction	104
	C. I	International Cooperation in Criminal Matters	105
		. Extradition	105
		(a) Legal basis for extradition	106

		lable of Contents	XI
		(b) Requirement of double criminality	106
		(c) Grounds for refusal	108
		(i) Political offence exception	108
		(ii) Discrimination clause	110
		(iii) Fiscal offence exception	110
		(d) Obligation to extradite or prosecute	110
		2. Mutual legal assistance and other international cooperation mechanisms	112
		(a) Scope	113
		(b) Formal requirements	114
		(c) Grounds for refusal	114
	D	Seizure and Confiscation of Proceeds of Crime and Other Property	115
	υ.	Types of measures required	116
		(a) Confiscation	116
		(b) Freezing and seizure	117
		2. Property liable to confiscation	117
		(a) Proceeds of crime and related property	118
		(b) Instrumentalities	119
		3. Reversal of the burden of proof	119
	E	· · · · · · · · · · · · · · · · · · ·	120
	E.	Conclusion	120
4.	Th	e Limits of Applicable Crime-suppression Conventions	121
	A.	Fragmentation of the Law	121
		1. Normative dispersal	121
		2. Provisions with broad or permissive language	122
		3. Reservations	123
	B.	Procedural Limits Hindering Law Enforcement	125
		1. The limits of territorial jurisdiction	125
		2. Obstacles to international cooperation in criminal matters	126
		(a) Inapplicability of UNCTOC and its Protocols to purely domestic	
		criminality	126
		(b) The 'essential interests' clause	127
		(c) Denial of assistance in cases of concurrent investigations	128
		(d) The requirement of double criminality	128
		(e) The evidentiary threshold	129
		(f) The political offence exception	130
		(g) The discrimination clause	131
		3. The limited scope of the obligation <i>aut dedere aut judicare</i>	133
		4. Obstacles to the exercise of jurisdiction over foreign state officials and	
		their conduct	134
		(a) Jurisdictional immunities of foreign state officials	135
		(i) Immunity ratione materiae	135
		(ii) Immunity ratione personae	140
		(b) The act of state doctrine and other grounds of non-justiciability	142
		5. Immunity from enforcement measures of state property and property	
		belonging to a head of state	145
		(a) Immunity of state property	145
		(b) Immunity of property belonging to a head of state	147

xii Table of Contents	
<ul><li>C. Failure to Take into Account the Involvement of State Organs and Resources in Organized Crime</li><li>D. Conclusion</li></ul>	148 150
III. INTERNATIONAL LEGAL MECHANISMS FOR THE SUPPRESSION OF STATE ORGANIZED CRIME	
<ol><li>A Normative Justification for Establishing State Organized Crime as an International Crime</li></ol>	155
A. Theoretical Aspects of Criminalization	155
General principles of criminalization	155
(a) The deontological approach: legal moralism	156 157
<ul><li>(b) Consequentialist approaches</li><li>2. The expressive function of criminal law</li></ul>	158
(a) Consequentialist expressivist theories	159
(b) Deontological expressivist theories	159
(c) The function of labelling	160
3. Conclusion	160
B. International Criminalization	161
1. The concept of international crime	161
2. Interests protected by international criminalization	164
(a) Protection against the abuse of state authority	164
(i) Public sector corruption	165 165
(ii) Aggression (iii) Crimes against humanity	165
(iv) Torture	166
(v) Enforced disappearance	167
(b) Maintenance of international peace and security	167
(c) Protection of human rights	167

(e) Maintenance of normal international relations necessary for

3. The potential expressive function of international criminalization

2. State organized crime as a threat to international peace and security

5. State organized crime as an abuse of sovereignty undermining interstate

168

169

170

171

171

172 174

175

176

177

178

179

181

(d) Promotion of the rule of law

interstate cooperation

International Crime

good governance

A. The Elements of the Crime

cooperation

D. Conclusion

1. Actus reus

C. Reasons to Establish State Organized Crime as an

1. State organized crime as an abuse of state authority

State organized crime as a cause of human rights abuses
 State organized crime as a subversion of the rule of law and

6. A Convention for the Suppression of State Organized Crime

		Table of Contents	xiii
		(a) 'A public official in a position effectively to shape or influence the	
		actions of a state'	182
		(b) 'Acting in concert with a structured group'	184
		(c) 'Using' or 'agreeing to use'	185
		(d) 'The material, financial, or human resources of the state'	185
		(e) 'To commit or facilitate the commission of'	185
		(f) Predicate offences	186
		2. Mens rea	187
		(a) 'For the purpose of obtaining, directly or indirectly, a financial or	
		other material benefit'	187
		(b) 'Knowing or having reason to know'	188
	B.	Obligations Concerning the Establishment and	
		Exercise of Jurisdiction	190
		1. Obligation to establish jurisdiction	190
		2. Obligation to extradite or prosecute	192
	C.	Regulation of Grounds for Refusal for the Purpose of Mutual Legal	
	٠.	Assistance	194
	D	Obligation Not to Participate in Organized Crime	194
		Reservations	196
		Conclusion	196
		Contraction	-,0
7.	Th	e Potential Role of the UN Security Council in the Suppression of	
	Sta	ate Organized Crime	198
	Α.	Legal Basis of the Security Council's Action under Articles 39 and 41	
	1 1.	of the UN Charter	198
		The discretionary power of the Security Council	199
		2. Situations considered to constitute a threat to the peace	200
		(a) General observations	200
		(b) Organized crime as a threat to the peace	201
		3. Conclusion	203
	R	Criminalizing State Organized Crime by Decision of the Security	203
	υ.	Council	203
			203
		1. The 'legislative' power of the Security Council	204
		(a) Security Council decisions prescribing criminalization under domestic law	204
			204
		(b) Legality of Security Council decisions prescribing legislative action	20)
		2. The potential role of a Security Council decision requiring states to	207
		criminalize state organized crime	207
		(a) An efficient means of establishing a legal framework for the	207
		suppression of state organized crime	208
		(b) Expressive function	208
		(c) Potential legitimacy deficit	208
	$\mathcal{C}$	3. Conclusion	200
	Ċ.	Targeted Financial Sanctions against State Officials Involved in State	200
		Organized Crime	209
		1. Asset freezes and state organized crime in the practice of the Security	210
		Council	210
		(a) Asset freezes in the practice of the Security Council	210
		(b) Analysis of relevant sanctions regimes	211

•	
Χı	v

### Table of Contents

	<ol><li>The potential role of targeted financial sanctions in cases of state organi</li></ol>	zed
	crime	214
	(a) The prescriptive, expressive, and preventive functions of sanctions	214
	(b) The inadequacy of economic sanctions	216
	(c) Practical advantages of targeted financial sanctions	217
	(i) Disruption of crime	217
	(ii) Trumping immunities from measures of constraint	218
	(d) Conclusion	218
	D. Conclusion	219
8.	The Potential Role of International Criminal Tribunals in the	
	Suppression of State Organized Crime	220
	A. Advantages of International Criminal Courts and Tribunals	221
	Trumping jurisdictional immunities	221
	2. Alleviating concurrence of jurisdiction	223
	3. Ensuring genuine investigation	223
	4. Capacity to address system criminality	224
	5. Expressive function	225
	B. Overview of Possible Mechanisms	226
	1. The International Criminal Court	226
	(a) Jurisdiction ratione materiae	227
	(b) Conditions for the exercise of jurisdiction	227
	(c) Cooperation of states	229
	(d) Potential for prosecuting state organized crime	230
	2. Ad hoc tribunals	233
	(a) Jurisdiction ratione materiae	234
	(b) Primacy over domestic courts	234
	(c) Cooperation of states	235
	(d) Potential for prosecuting state organized crime	236
	3 The African Court of Justice and Human Rights	237
	(a) Jurisdiction ratione materiae	237
	(b) Individual criminal responsibility	238
	(c) Conditions for the exercise of jurisdiction and	
	jurisdictional immunities	239
	(d) Potential for prosecuting state organized crime	241
	C. Conclusion	242
9.	Concluding Remarks	243
Αp	pendix	247
	bliography	251
	dex	267
		_ ~ /