Neil Boister

GLOBAL LAW
confronting the transnational criminal

Philosophers of liberalism from Rousseau to Rawls have placed the good citizen at the centre of the liberal political arrangements they advocate. These good citizens bear their obligations and exercise their rights within the law of nation states. They enjoy status in their communities, communities to which they owe allegiance. Conceptions of the nature of this citizenship vary widely. Some have a trace of the totalitarian. Rousseau famously argued that humans living in a society must reconcile their own sense of subjective freedom with the objective need to act correctly (Rousseau, 1762, chs 5-8). In a state of nature they live only for themselves; as citizens they cease to be individual units and become parts of the new unit, the community. Independence is exchanged for dependence. Other philosophers emphasise the capacity of citizens living in a community for rational choice. Rawls argues that citizens have the capacity to pursue their own conception of what is good and share a conception of primary goods such as the basic liberties within a society defined by fairness (Rawls, 2001, part 1). Macedo argues that public justification of the community's action is critical, making all participants 'a community of interpreters, a citizenry of self-critical reason givers' (Macedo, 1991, p.78).

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Global citizenship

Whether notional equivalents to this national citizenship exist at a global level – global citizens, living in a global community, who must reconcile their subjective freedom with the needs of the global community, who may do so because they share a global conception of the good, and to which the community must justify its actions – has been a subject of debate for some time (Archibugi, 2008; Dunoff and Trachtman, 2009). One of the principal motivations for this concern has been the necessity for some form of effective global citizenship to make for continued human viability in the face of environmental catastrophe (Falk, 1993, pp.39, 41). Falk describes the rationalist-elitist embodiment of this notion:

> [T]he global citizen as a type of global reformer: an individual who intellectually perceives a better way of organizing the political life of the planet, and favors a utopian scheme that is presented as a practical mechanism. Typically such a global citizen has been the advocate of world government or of a world state or a stronger United Nations – accepting some kind of political centralization as indispensable to overcome today's political fragmentation and economic disparities. (ibid., p.42)

Embodying commitment to a kind of idealistic imperialism, this approach to global citizenship contrasts with the parochial reality of the transnational global citizen doing business (whether it be commercial, governmental, moral or whatever) in different places, connected, networked. There are other such conceptions, yet all embrace a completely de-territorialised concept of citizenship which presents unique problems of the definition of the criteria for and quality of membership of this global political community. To put it crudely, what status does the global citizen enjoy, how do they qualify to enjoy it, and in what do they enjoy it? The state appears always to be in the way, to obscure the relationship of individuals with a global society of individuals.

Global criminals

This is particularly so in regard to the position of those who do not only not meet their social obligations, who do not share a sense of the good, but who deliberately flout the law, who share a sense of the bad and how they can profit from it. At a national level they are considered criminals, and when convicted they may lose some of their freedoms, such as physical liberty, and rights of citizenship, such as voting.[1] However, when these individuals cross borders, or the effects of their actions cross borders, they become transnational criminals. Pirates, slavers, drug traffickers, bribers, human traffickers, people smugglers, terrorists, organised criminals, money launderers, cybercriminals, environmental criminals, weapons traffickers, illicit traffickers in cultural property, organ traffickers, fraudsters, counterfeiters, identity thieves, damagers of undersea pipelines, or some other type of criminal, all engage the interests of other states, potentially many other states. They engage with and become subject to the substantive criminal jurisdiction of states, a jurisdiction which, relying upon an increasingly tenuous link between the interests of the state and that individual's actions, has steadily enlarged beyond state territory. In many cases states take jurisdiction over individuals who are not their nationals and who do not enjoy any of the rights or privileges of citizenship within those states.

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The 'bad man' view of global citizenship

When criminals network with other criminals across borders, they engage, as Falk terms it, in a kind of globalisation 'from below' (Falk, 1993, p.39). This position also dictates their view of the law. Justice Oliver Wendell Holmes famously said that 'if you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict' (Holmes, 1897). What does the bad man who traffics across borders want to know about what the global community expects of them? They probably think only of the laws in the states in which they operate, from the perspective of how to avoid being caught and punished for breaking those laws (if there is any practical likelihood of that occurring). They consider these laws only to try to avoid them by secrecy, or through corruption or coercion. Should this dictate the global response – should they fall outside the law because they undertake criminal activity and do not enjoy the protection of citizenship?

> According to the ancient English concept of outlawry: 'he who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a "friendless man", he is a wolf.' (Harvard Law Review, 1989, p.1301, n.6)

Are these transnational criminals (or modern global outlaws) rightly considered fair game by all comers? One thinks, for example, of Somali pirates captured and apparently executed by Russian naval forces to global clamour (Hussein, 2010). Or are they just bad global citizens, whose community is, because of their activities, the globe; who can be punished because of the harm

they cause but who should be able to seek some minimum levels of protection from that community? The answer to this question dictates the quality of the global criminal justice response to transnational crime. Will it respect fundamental values of legality and due process, or will it permit states by omission to ignore human rights obligations to foreign criminals?

The response: transnational criminal law

The legal response of the international community has been to adopt 'rules and legal instruments … specifically created to deal with transnational criminal matters' (Gless and Veryaele, 2013, p.3). Bad citizens are subject to globalisation 'from above'. They are the objects of the collaboration of states which use different kinds of international instruments to suppress transnational crime. States rely on crime suppression conventions such as the United Nations Convention against Transnational Organised Crime,[2] adopted with the goal of standardising crimes at the national level and making possible international cooperation in the investigation, extradition and prosecution of criminals who commit serious crimes transnationally. Authoritative decisions of intergovernmental organisations, such as Security Council resolution 2178[3] on foreign fighters, go even further and institute extensive preventive measures against potential transnational criminals prior to any action on their part. Soft law such as the Financial Action Task Force's International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation[4] provide for a much tougher sanctions-backed implementation regime than more formal treaty obligations. States are constantly urged to join new multilateral systems to suppress crimes. In recent years we have seen a proliferation of new regimes to combat activities such as counterfeiting of medicine[5] and the smuggling of tobacco,[6] and moves towards suppression of piracy of intellectual property on the internet (see Urbas, 2012).

These systems foster criminalisation and the processing of alleged criminals. But whatever form this intervention takes, this is not a direct ordering by the international community of the lives of individuals. The state intrudes as the mediator of these rules because of the maintenance of the right to take coercive action against individuals as a prerogative of sovereignty. There is, thus, no single point of origin for these transnational criminal laws; there are rather multiple points of origin. These points of origin may be the unilateral domestic actions of states, or agreements based on treaties or other more informal relations between states, or perhaps even arise out of the actions of transnational actors such as intergovernmental organisations, or even companies, such as the banks engaged in self-regulation for anti-money laundering purposes (which accords more with the private law notion of transnational legal activity). The system is plural – the order dispersed in nature.

The single nexus all of these rules have, however, is a focus on cross-border crime. There are two interesting things about this response. First, if these instruments designed by the international community to suppress transnational crime can be said to express the notion of global citizenship at all, it is from the point of view that they do so only through expressing the belief that only an increase in the exercise of power and authority of states on a global scale can serve the interests of all. To put it another way, the one group of individuals that globalisation really pays attention to is global criminals, if only to suppress their activities. Second, these instruments pay little attention to the rights of these criminals; in their silence they reinforce an implicit conception of transnational criminals as global outlaws.

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Systemic human rights risks for global criminals

The human rights regulation of national criminal justice systems is generally weak (see Currie, 2015). But the systems also entrench systemic abuse because the international agreements to suppress transnational crime call for severe action based on ambiguous principles. One result, for example, is that developing states which struggle to comply engage in symbolic commitments to severe practices through the use of, for example, heavy punishments to make up for their poor enforcement of these treaty-derived laws. There is, in addition, no basic transnational standard for a 'fair trial' beyond a state's domestic criminal jurisdiction, something which effects the investigation and extradition of transnational criminals (Gless and Vervaele, 2013, p.6). Gless makes the point that when international instruments for the suppression of crime are developed, state participants seem primarily concerned with the establishment and enforcement of their own *ius puniendi* and the limitation of the *ius puniendi* of other states, rather than with the plight of the individuals subject to the system (Gless, 2015, p.119ff). She notes that from the defendant's point of view transnational criminal law does not look coherent at all, but rather like a patchwork of laws made of overlapping national criminal jurisdictions (p.127). In a system where states retain their independent authority to enforce their jurisdiction, yet are urged to cooperate, defendants may find themselves subject to multiplications of penal power. Hence she argues for the urgent necessity to adopt an approach that places the individual defendant at the centre of transnational criminal relations, not as

an object but as a rights holder.

Gless supports adoption of a global rule against double jeopardy that does not only prevent double prosecution for the same actions, which is currently not prevented, but also prevents parallel prosecution, and deals with situations where some states criminalise particular activity while other states do not. For example, states that seek cooperation from other states against transnational criminals through extradition must provide a functional equivalent to the constitutional protections they afford their own citizens who are exposed to prosecution (ibid., pp.130-4). Gless's argument echoes Benvenisti's general view that states owe obligations to foreign individuals caught in their web of authority because the state, as a trustee of humanity, must express the basic moral obligation that every individual exercise their own self-determination in a way that takes account of others' interests (Benvenisti, 2013, p.300ff).

Full global citizenship for bad global citizens

The same argument can be made in regard to the global polity. The suppression conventions create a negative global citizenship in the sense that they are bearers of obligations not to commit certain crimes against the interests of large hegemonic states. At a practical level Benvenisti accepts that the state must be, at least for the moment, the instrument of the global polity for the protection of transnational criminals from that global polity. The globalisation of rights and protections more explicitly to bad global citizens from the laws created to suppress their activities is a necessary step to granting these bad citizens the quality of protection any citizen deserves. Transnational criminal law needs principles of criminalisation, as well as principles of establishment and enforcement jurisdiction. Gless makes the point that these global principles cannot be set at a high level of abstraction; they have to be principles that can shape and direct the application of national rules in these situations. These principles can be deduced from the normative aims of transnational criminal law or through empirical analysis of existing rules within the system (Gless, 2015, p.136).

There does appear to be a growing consciousness, if only at a rhetorical level, of the need to protect the rights of transnational criminals. The disasters of the global war on drugs are a case in point. It has been accused of allowing law enforcement to make war on minority communities such as black Americans (Davis, 2003). Severe treatment of alleged offenders and severe punishment of offenders largely acts as a surrogate for effective action to control the global drugs market. Human rights NGOs point out that Iran's interdiction programmes, for example, supported by Western and other donors and through the UN Office of Drugs and Crime, have enabled the execution of significant numbers of convicted drug traffickers in spite of donor state and official UN positions that condemn the use of the death penalty (Reprieve, 2015). Of more immediate relevance to New Zealand, Anthony DeMalmanche, a New Zealand national, was convicted in Indonesia for drug trafficking offences despite raising evidence that he had been duped into trafficking the drugs, and was sentenced to 15 years' imprisonment (Dunleavey and Cowlishaw, 2015). At the 2016 special session of the UN General Assembly on the world drug problem the General Assembly adopted resolution S-30/1, which makes the following operational recommendation on proportionate and effective policies and responses, as well as legal guarantees and safeguards in criminal justice. States agreed to

> (o) Promote and implement effective criminal justice responses to drug-related crimes to bring perpetrators to justice that ensure legal guarantees and due process safeguards pertaining to criminal justice proceedings, including practical measures to uphold the prohibition of arbitrary arrest and detention and of torture and other cruel, inhuman or degrading treatment or punishment and to eliminate impunity, in accordance with relevant and applicable international law and taking into account United Nations standards and norms on crime prevention and criminal justice, and ensure timely access to legal aid and the right to a fair trial.[7]

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However, this is just one area of action in a particular silo in transnational criminal law. Full realisation of human rights protection of global bad citizens requires a conscious rebalancing of the interests of effective crime control.

Conclusion: principles for the suppression of global crime

A rough framework for policymaking in this field should ask the following principle-based questions about any proposed new international instrument for the suppression of crime.

General

- What evidence supports the identification of specific threats as harmful and does it justify either the use of criminal sanction or the use of the specific procedural mechanisms recommended?
- Are the principles in the proposed treaty/international instrument etc. acceptable to all potential parties

and not bound to any single legal tradition? (Bock, 2013, p.184)

- Does the proposed instrument adhere to the principle of legality by vesting the jurisdiction to prescribe certain crimes and to adjudicate and enforce those crimes in a competent lawmaker? (Luchtman, 2013, pp.13, 14)
- Does the proposed instrument adhere to lex certa: i.e. will what is to be criminal be readily known and available, certain and clear? (Ireland-Piper, 2013, p.87)

Principles for substantive criminalisation and punishment

- Does the proposed instrument embrace the principle of personal guilt as a prerequisite to criminal liability by making clear provision for conduct and fault in the definitions of proposed criminal offences? (Bock, 2013, p.184)
- Does the proposed instrument embrace the principle of certainty of punishment by making clear provision for the type and measure of punishment to be meted out?

Principles for the establishment of criminal jurisdiction

- Does the proposed instrument adopt clear and recognised principles of jurisdiction, both territorial and extra-territorial, which establish a sufficiently close connection between the state concerned and the alleged crime in question to justify that state establishing jurisdiction?
- Does the proposed instrument spell out clearly a theory of precedence in cases of concurrent jurisdiction?

Principles for the enforcement of criminal jurisdiction through procedural cooperation

- Does the proposed instrument prohibit double jeopardy (*ne bis in idem*) so as to avoid the prospect of repeat prosecution for essentially the same offending?
- Does the proposed instrument guarantee respect for human rights, such as privacy in exchange and storage of information, whether pre-investigation, for the purposes of investigation or for the purposes of trial?
- Does the proposed instrument guarantee respect for human rights and fair treatment at all stages of proceedings, from investigation through to punishment, including enjoyment of all rights and guarantees provided by the domestic law of the party in the territory in which that person is present?
- Does the proposed instrument provide that all criminal charges be brought before a tribunal established by law, or, in the case of administrative action, include the right of the judiciary to exercise oversight?

Luchtman questions the theoretical basis for holding that these bad citizens are bearers of rights under transnational criminal law (Luchtman, 2013, p.11). Is it because we are all Kantian global cosmopolitans, or just because we are human? However we construe our relationship with the global polity, we can all potentially be bad citizens. Ironically, the need to provide these bad citizens with protection is likely to become more pressing as global problems begin to bite, and individuals take advantage of the commercial opportunities these problems present. The market potential is enormous, for example, for the trafficking in the victims of global warming and the smuggling of people attempting to escape drowning and burning lands. How will we respond as global citizens when we catch these traffickers? Badly?

1 Although to what extent is a matter of debate: see, for example, Schall, 2006.
2 The United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 UNTS 209, in force 29 September 2003.
3 Resolution 2178, 24 September 2014.
4 FATF (2012, updated 2016), International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: recommendations, available at http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html.
5 See the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (or MEDICRIME convention), 28 October 2011, CETS no.211.
6 See Conference of the Parties to the WHO Framework Convention on Tobacco Control, Protocol to Eliminate Illicit Trade in Tobacco Products, 12 November 2012, FCTC COP/5/6, 11 May 2012.
7 General Assembly resolution S-30/1, 4 May 2016.

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