

# THE CASE FOR THE CREATION OF A 'GLOBAL FBI'

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*ABSTRACT: Global society is in need of the same law-enforcement development as with the introduction of the FBI in the US in 1908; to introduce another layer of expertise and specialism to deal with transnational criminals and international terrorism and to bring the rule of law to the whole of global society. The ICC suffers from a lack of jurisdiction over serious organised crimes and also from the lack of an agency with the powers to refer cases to it, similar to the link between the FBI and US Federal Courts. The growth of human trafficking is evidence of the current system's impotence in dealing with transnational serious organised crime. What is needed is an integrated international criminal justice system that operates independently to deal with organised criminal threats to global security, thereby reducing the temptation for states to consider unilateral military action, as seen in Afghanistan after 11 September. If there was an integrated criminal justice system with global jurisdiction, NATO may have been compelled to delay military action in Afghanistan whilst investigations and arrests relating to the 9/11 attacks took place. This research examines the case for such a system, and how it could be achieved.*

**KEYWORDS:** global society, FBI, terrorism, human trafficking, international criminal court

## INTRODUCTION

Since the end of the Cold War, the greatest threats to international peace and security have come from transnational actors rather than nation states: organised crime has prospered in the states of the former USSR; the boundaries of the EU have pushed further East and have become more porous; access to international travel has become easier and cheaper, and the human slave trade has returned with a vengeance – in the form of human trafficking – some 200 years since its abolition in the British Empire. Since 11 September 2001 there has been a move to redress this security imbalance

but serious transnational crime, international terrorism, and the nexus that exists between them, remain the most compelling issues currently occupying national security agencies and intergovernmental bodies.

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Today's international law-enforcement *system* is disjointed, fractious, ineffective and, increasingly, is unfit to tackle the serious emerging threats of transnational organised crime and terrorism. Since the UN became a reality at the end of the last World War, the threat of inter-state war has receded. The growing interdependence of states through the forces of globalisation, modernisation, lax international borders and ease of access to international travel, has simultaneously reduced the threat of war instigated by nation states, and exacerbated threats from transnational actors.

As the threat of inter-state war has receded, the major threats to human security have become transnational in nature. However, these transnational threats are addressed by the international system in a haphazard, disjointed and inefficient fashion by a plethora of national and international agencies working largely in isolation. To combat the truly transnational threats of serious organised crime, terrorism and piracy, the international community could use the UN Charter itself to institute a new transnational police agency that would support the rule of law worldwide to a common, agreed set of standards, perhaps by adapting Article 43 of the UN Charter, which would allow the UN to develop to fill the global law-enforcement capability gap. However, this ideal solution is far removed from the international system and arrangements that exist today. Achieving this end will inevitably be a long-term goal.

Why exactly is a *Global FBI* needed? Some transnational organised criminal groups have the financial strength to undermine state authority to varying degrees. Also, the re-emergence of slavery in the form of international and intercontinental human trafficking, and the international drugs trade are compelling reasons for developing international law-enforcement apparatuses. The expansion of terrorism as an international phenomenon should further galvanise the intent of nations to respond. Globalisation, interdependence, international travel and the media are contributory factors to the increasing threat from transnational actors of all types. Perhaps the greatest reason for action is the existence of *ungoverned spaces* throughout the globe, which, if left unchallenged, will allow

transnational groups a *rear area* within which to regroup and recover, perpetuating the transnational problem no matter how effective the policing is in *governed spaces*.

After NATO's action in Kosovo, Russian action in Georgia and widespread criticism of the international community for failing to act to halt genocide in Rwanda, the sovereignty principle has somewhat eroded in recent years and this is an important precedent for ceding sovereignty over serious transnational crime by nations. The founding principles of the modern international system, as articulated by the opening statements of the UN Charter, relate directly to maintaining global peace and security, which is precisely what law and order provides.

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#### WHY IS A *GLOBAL FBI* REQUIRED?

Transnational security has become an area of concern since the end of the Cold War. Until then, and into the 1990s, the major area of concern for states was the threat that other states presented to them. Whilst this threat persists today, albeit on a smaller scale, the globalisation of trade, financial structures, cheap international travel, and technology have made it easier for non-state actors to pose a meaningful threat to nation states. Indeed, the National Security Strategy of the UK suggests that 'no state threatens the UK directly,'<sup>1</sup> and that transnational crime and terrorism have replaced the Cold War, as the primary, prevalent threats to the UK, and have 'the potential to undermine wider international stability.'<sup>2</sup>

The estimated global cost of organised crime stands at approximately one trillion pounds. Within the UK, the Government estimates that over £20 billion of social and economic harm occurs as a result of serious organised crime.<sup>3</sup>

Indeed, to give some perspective to these figures, if the trade value were measured as a national economy is measured then the global criminal economy would be the fourth largest in the world.<sup>4</sup>

Arguably, the most stark example of transnational organised crime having an effect on a state was when the USSR split into its constituent parts at the end of the Cold War; it suffered from falling investor confidence due to the effectiveness of the new subversive element that was borne out of former state economic actors combining with small, organised crime groups and discharged elements

of the Soviet intelligence and security apparatus. These new groups with broad skills and access to intelligence and surveillance files were highly successful and able to operate with impunity, almost delegitimising the new Russian democracy by questioning its ability to enforce the rule of law and provide for public safety.<sup>5</sup>

In the modern world of personal computers, cheap international travel and lax international barriers, organised crime can migrate much more easily across national boundaries than the agencies tasked with their arrest. The ability of the judicial system to chase criminals across those boundaries is further constrained because of the reluctance to share sovereignty over these crimes across state borders, as well as widely differing legal systems between states that use different procedures, and have varying attitudes to criminality.

### *Human Trafficking*

Human Trafficking has been of concern to the international community since the very beginnings of the League of Nations (LoN). The first conference organised to deal with the trafficking of women and children was held in Geneva in June 1921. Yet, 90 years later and 200 years since the abolition of the slave trade by Britain, human trafficking remains a blight on the international collective conscience.

It is estimated that there are 27 million people in modern-day slavery across the world and that 800,000 people are trafficked across international boundaries every year.<sup>6</sup> Some 80% of these victims are women and children earning an average of £8,500 per year for their *owners*, thereby undermining local economies and representing a real threat to the security of individuals susceptible to being caught in the trafficking world.<sup>7</sup>

Human trafficking is not restricted to adjacent countries. Inter-continental trafficking is also evident; in the 2009 UNODC report, victims from East Asia were detected in more than 20 countries, including in Europe, the Americas, the Middle East, Central Asia and Africa.<sup>8</sup> The Convention on Transnational Organised Crime came into force in September 2003 and includes three protocols, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.<sup>9</sup> Also in the 2009 UNODC report, it is noted that traffickers rarely work alone.<sup>10</sup> This organised

criminal cooperation is a compelling reason for a new supranational law-enforcement agency to be created to complement existing international agencies. However, the ability of police forces to operate either side of international borders is extremely limited, with national forces largely restricted to their own territory. Efforts against organised criminal gangs are, therefore, severely constrained.

*Global FBI*

### *The Politics of National Policing of Human Traffickers*

Consider the politics of spending national wealth on pursuing criminals outside the home territory of a state; as the threat has left the home shores, albeit temporarily, the problem becomes another state's responsibility. Hence, there is no pressing public appetite to increase funding to combat transnational crime, particularly during the current global austerity drive. The greatest numbers of trafficked persons are from second world nations that have greater pressures on their limited national resources to combat a problem that is already leaving their territory. States that are dealing with an influx of people who have been trafficked have a greater reason to try to stem the flow from inbound human trafficking as it is their social structures that bear the strain of the misery that this trade causes. However, their efforts are centred on the domestic coordination element rather than the source of the problem, which is on another nation's patch. If the source nation is unconcerned with their citizens being trafficked why should the destination politicians and law enforcers look beyond their own borders?

### *The International Drugs Trade*

Most illicit drugs originate from South and Central Asia and South America.<sup>11</sup> However, the international nature of drug trafficking prevents any single country from effectively combating the trade on its own. The effects are more acutely felt among developed nations where profits from the illicit trade are greater. The scale of the problem is vast; the UN estimates that 8% of total world trade is related to illicit drugs!<sup>12</sup> The UK Home Office published a drug-costs study in 2002 that estimated the cost of drug abuse in the UK alone, in 2000, was £13–24 billion, based on its medium estimate.<sup>13</sup>

International cooperation and assistance is having a positive effect on the fight against transnational threats. However, as an example of the failure of current policing arrangements; where the efforts of drug control authorities in some countries have proved successful, drug trafficking operations have merely been shunted to weaker jurisdictions, and criminal gangs have developed greater organisational sophistication in response.<sup>14</sup> This balloon effect, where squeezing by law-enforcement in one area simply gives rise to that activity elsewhere, will remain while a piecemeal attitude to introducing international policy agreements remains.

### *Terrorism*

A step change in international terrorism began when the terrorist attacks on the twin towers of New York occurred on 11 September 2001. Never before had a group based on the other side of the globe had the audacity to plan and execute multiple attacks against the hegemonic power, the energy of which was equivalent to the use of a tactical nuclear warhead<sup>15</sup>.

The preparations for the September 11 terrorist attacks in 2001 spanned several continents, and so did the effects: the World Bank estimated the reduction of global GDP at almost 1%.<sup>16</sup>

This has escalated the threat from international terrorism from what could arguably have been seen as regional prior to 9/11, to being a truly global transnational issue.

The awareness of the global populace outside of the home-nation state has grown as international travel has become cheaper and more accessible to more and more people. Borders have become a barrier to trade rather than a desired control over the numbers of people entering or leaving any one country. Trade has made the world into an inextricably interconnected place where international travel is considered as almost a right of the many rather than simply a privilege of the elite few. The paradox is that ease of travel is necessary for the global pursuit of prosperity, but brings with it opportunities for international terrorists to transit international borders with relative impunity. This ease of travel enabled the 9/11 attackers to travel between continents to plan and execute their devastating attack. Indeed, it has been established that the 9/11 attacks were

orchestrated by cells working out of Montreal and Hamburg, such was the ease of travel across international frontiers.<sup>17</sup>

The processes involved with globalisation contribute to outbreaks of terrorism. Religious groups of all types have been, and are, opposed to the secularism that accompanies modernity and globalisation.<sup>18</sup> As globalisation continues and access to international travel becomes broader, the threat of a large scale terrorist attack increases as the accelerator factors of terrorism contribute to a more permissive environment for terrorists to work within.<sup>19</sup> Indeed, the rise of religiously motivated terrorism in particular poses a truly transnational threat to the security of individuals and states. It also lies behind much criminality, especially of the financial kind. For example, for some it is acceptable to commit crimes against people who are considered infidels.<sup>20</sup>

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### *Piracy*

The issue of piracy should not be considered in isolation. There is a wide range of types of pirates operating on international waterways. They can be local seamen looking for a quick score, highly trained guerrillas, rogue military units, or former seafarers recruited by sophisticated criminal organisations.<sup>21</sup>

They attack in port, on the open seas, and in international waters. Entire ships, cargo, and crews simply vanish, hijacked by pirates working for international crime syndicates; these modern-day ghost ships often turn up later running drugs or carting illegal immigrants to the US.<sup>22</sup>

Piracy against high-value targets, predominately from the oil industry, is increasing. There were more than 400 pirate attacks worldwide in 2009, up from just 239 in 2006.<sup>23</sup> The violence in the attacks is also increasing with 120 ships being fired upon in 2009 compared to just 46 the year before. Indeed, attacks against fishing vessels are more prevalent but these go largely unreported. Therefore, the true scale of the phenomena is likely to be far greater than the 400 reported attacks. It is also true that Somali pirates account for more than 50 percent of reported piracy. However, this increase is mirrored in South America and in the South China Sea; countries reporting an increase in pirate activity include Brazil, Colombia, Costa Rica, Ecuador, Haiti, Venezuela, Peru, Bangladesh, Nigeria,

Singapore, Malaysia and Indonesia. However, pirates are not entirely unchecked. The presence of navies from various nations in the Gulf of Aden and elsewhere has reduced their success rate:<sup>24</sup>

Whilst the number of 2009 incidents [of Somali piracy] has almost doubled, the number of successful hijackings is proportionately less. This can be directly attributed to the increased presence and coordination of the international navies along with heightened awareness and robust action by the Masters in transiting these waters.<sup>25</sup>

In the last quarter of 2009, pirates started working up to 1000 miles East of Mogadishu. This presents a significant problem for the navies sent to combat the problem: operating in the open ocean rather than in the restricted straits of the Gulf of Aden provides a much larger surface area to be covered by a limited number of vessels. The number of vessels can be increased but this is not a sustainable response by the international community. Additionally, this is simply dealing with the symptom and not the cause.

Why do Somali pirates continue to risk so much against naval opponents packing such superior firepower? The answer may lie in the way pirates are dealt with upon capture allied to the poor conditions experienced by them on their home soil. Yusuf, a defendant in a landmark piracy case held in the Netherlands in June 2010, can expect a marked improvement in his living conditions, despite being sentenced to five years in a Dutch jail:

... [Yusuf] is quite happy being in prison, and is almost looking forward to being found guilty and sentenced. For the first time in his life he has access to a real toilet and is in a safe environment. The 24-year-old Yusuf hasn't seen his family in more than four months but he intends to send for his wife and children as soon as he is released from prison. He knows he cannot easily be sent back to Somalia. He loves it here in the Netherlands.<sup>26</sup>

Hence, whilst the case may be one of the first of many, they are unlikely to prove much of a deterrent for pirates of the future. While piracy is a crime with universal jurisdiction under international law, many countries have not codified this into national law. The UK is a case in point and delivers the pirates it detains to Kenyan authorities to prosecute, paying the Kenyans to do so. So far, 18 have faced trial with over a hundred awaiting



their day in court. Additionally, many pirates have been picked up and brought back to Europe. However, the majority have been released at sea because of the cost and difficulty of bringing them to trial. It is clear that the inability of the current international criminal justice system to act as a deterrent to piracy will continue to encourage pirates into the industry. It will also provide rich recruitment grounds from which corrupt businessmen can source their pirate navies.

The actual pirates are usually controlled by gang leaders with contacts abroad. In exchange for part of the ransom - 1 million dollars per ship on average - corrupt businessmen provide the pirates with navigation equipment and weapons. The UN says local authorities in Somalia are also involved.<sup>27</sup>

### *Ungoverned Space*

In discussions with Counterterrorism (CT) practitioners, it has become clear that one of the chief concerns among them is the ability of the modern terrorist to simply move to an area of the globe that is either poorly governed, ungoverned or where local power is susceptible to bribery and corruption.<sup>28</sup> The areas of concern are Sudan, Somalia, the Maghreb in general, Yemen, the Federally Administered Tribal Areas of Pakistan (FATA), areas of Central America and of course Afghanistan. According to Sir David Veness, the UN's focus is on assisting nation states to improve their own capacity and capability to police their own countries, as a part of the *R2P* programme.<sup>29</sup> However, there are three problems with this approach.

Firstly, spending money on assisting each of the 192 states of the UN to improve is incredibly inefficient. Many of the states in question struggle to maintain the funding required for an effective local police force to maintain the rule of law, without considering a specialist force to combat serious organised crime and terrorism. Also, levels of quality in law-enforcement vary due to inconsistencies in national legislation. Indeed, in many of these areas, a fully functioning police force and judicial system remains an aspiration of the state. It would be much more cost efficient, and more effective, for the international community to combat

transnational crime itself, using a law-enforcement agency specially commissioned to act globally, rather than help each state to do it themselves. Secondly, several CT practitioners have privately acknowledged that the balloon analogy used earlier in the article is apposite here.<sup>30</sup> As the Iraq and Afghanistan terrorist *balloons* were squeezed, terrorist activity relocated to areas where there was the potential for less interference by the international community, countries such as Sudan and Yemen. Bringing *ungoverned spaces* under the jurisdiction of the international community has the potential to deny these and other safe havens from terrorists and organised criminal gangs.

The US FBI came into being in 1908. It started with 34 officers and has grown since to an organisation over 30,000 strong.<sup>31</sup> It was introduced to provide well-disciplined specialist experts and was 'designed to fight corruption and crime.'<sup>32</sup> Its inception was based upon the federal system where the federal government had jurisdiction over matters that crossed boundaries, like interstate commerce and foreign affairs, with all other powers reserved to the individual states.<sup>33</sup> Between the World Wars, the FBI was empowered to deal with most crime where the criminals involved attempted to escape the rule of law by travelling out of the state that they had committed their crime in. This was an attempt by the US government to introduce an organisation with the same geographical horizon or remit as the criminals it was intended to combat, and is a direct parallel to the situation facing the world today. This broadening of horizons in policing has been mirrored in the development of policing in England & Wales in the twentieth century.

The Serious Organised Crime Agency (SOCA) is soon to be replaced by the enlarged National Crime Agency but this new agency will still have no jurisdiction over terrorist acts. In its efforts to deal with non-terrorist threats, SOCA has approximately 20 liaison officers working outside of the UK.<sup>34</sup> Therefore, the geographic remit of UK law-enforcement activity has grown, in terms of liaison, and is continuing to expand. However, the challenge is now upon us: how effective can national law-enforcement be on the soil of another state?

The wheels of progress at the UN are too slow to deal with the dynamic problem that transnational security poses to the

international community. Indeed, the only nations that are pursuing international criminals are those that have the resources to do so. No single nation has the resources necessary to fight transnational crime and terrorism on its own, as was recognised in the UK National Security Strategy, 2009:

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In an increasingly interdependent world, we cannot opt out of overseas engagement. But overseas especially, we need to be realistic, and set realistic expectations, about what we can achieve.<sup>35</sup>

Conversely, those nations that are suspected of hosting transnational criminals and terrorists have little motivation to address the problem because the attacks are generally not committed on their soil. Therefore, a truly transnational global problem demands a truly transnational global solution.<sup>36</sup>

#### STRENGTHS & WEAKNESSES OF THE CURRENT INTERNATIONAL LAW-ENFORCEMENT ENVIRONMENT

##### *The UN*

The UN has its own police force of 12,500 personnel which is likely to reach 16,000 by the end of 2010.<sup>37</sup> However, the remit of the UN Police force is limited. The focus of the UN Police is to help national police forces take control of their own rule of law. UN Police officers have no powers of arrest and detention. The few instances where these responsibilities are given to the UN Police are only as part of UN transitional administrations, as was the case in Kosovo and Timor-Leste.<sup>38</sup> This is despite the recognition from a UN police advisor in 2009 that organised crime hampers the progress of post-conflict societies:

Organised crime should be viewed as a major spoiler to peacekeeping and peace-building. One of the most insidious features of organized crime is the corrosive and toxic effect it has through the corruption of officials. It is a catalyst for instability and if it is left unchecked it can undermine all of our efforts to build long-term security in fragile, post-conflict societies.<sup>39</sup>

## *European Models*

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Europol, Eurojust and the European Police College were constituent parts of the measures included in the Maastricht Treaty of 1992. The intention was for Europol to try to combat the problem of transnational crime and terrorism.<sup>40</sup> Europol began operations in 1999, initially focusing on drug trafficking, but has since expanded to target a broader array of transnational crimes including human trafficking, smuggling, terrorism and financial crimes, including money laundering.<sup>41</sup> This is an example of how the international community is evolving to meet the transnational security threat of international organised crime. However, Europol's main purpose is to help individual states to pursue, rather than being the service with powers to arrest, detain and prosecute in their own right.

Europol, as with other international agencies, is considered good at post-incident analysis due to its broader geographical reach and ability to pool intelligence.<sup>42</sup> In fact, Europol officers have a role in operational policing, if only in a support function. When Joint Investigation Teams (JITs) are used, a Europol officer is put at the disposal of the JIT for investigative assistance and can take part in operational activity alongside national police.

The major problem with the use of Europol, as identified by a written report in the House of Lords in 2008,<sup>43</sup> is a lack of trust in the system.<sup>44</sup> Many liaison officers simply share their information with their opposite numbers in the territory concerned, bypassing the Europol central system.<sup>45</sup> Practitioners prefer bi-lateral arrangements because they are quicker, and personal contacts help to build the trust necessary to feel confident in passing sensitive information that could have a material effect on the success of an investigation if that information was to be leaked. However, this then bypasses the Europol Information System (EIS), which allows all Europol personnel to use that information, a key benefit of having a European investigative service, thereby restricting the effectiveness of the analytical, intelligence-led element of Europol's output.

## *Interpol*

INTERPOL aims to facilitate international police cooperation even where diplomatic relations do not exist between

particular countries. Action is taken within the limits of existing laws in different countries and in the spirit of the Universal Declaration of Human Rights. INTERPOL's constitution<sup>46</sup> prohibits 'any intervention or activities of a political, military, religious or racial character.'<sup>47</sup>

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Therefore, as with Europol, Interpol does not have its own set of laws which it can prosecute with. However, when corruption within a state is endemic, there is limited value to a system that can only assist local criminal investigation rather than act independently. However, one of Interpol's great strengths is its independence. Interpol is not funded directly from national budgets. Rather, national police forces allocate part of their own budgets to Interpol. The seat of Interpol at Lyon, France runs a modest annual budget of under £50 Million. There are 188 states as members of the organisation so the cost per state is a little over £250,000. Interpol provides:

...access to the world's only secure global police communications system; global databases including names of criminals, fingerprints, DNA profiles, stolen passports, and stolen vehicles; and specialized investigative support in key crime areas, including fugitives, drugs, terrorism, trafficking in human beings and corruption.<sup>48</sup>

### *SOCA and the FBI*

Both the UK's SOCA and the US FBI maintain a liaison presence worldwide. The US FBI has dedicated officers in circa 75 US embassies and SOCA has a network of approximately 20 operatives dispersed around the world.<sup>49</sup> However, this is just two nations attempting to act unilaterally. Other nations have a similar approach in attempting to interdict transnational crime and terrorism. However, the problems with unilateral efforts include a lack of sufficient resources, a lack of legitimacy in the eyes of the wider international community and a lack of coordination of effort. It would be sensible to pool resources so that common threats to all states are dealt with in a coordinated manner by an organisation that has legitimacy to act on behalf of humanity, rather than on behalf of individual states. It would provide countries without the resources to tackle transnational crime and terror unilaterally, with a stake, and

therefore an interest, in the performance of the agency, thereby empowering every nation in the fight against transnational actors.

#### THE INTERNATIONAL LEGAL PERSPECTIVE

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The Thirty Years' War, which ended in 1648 with the Treaty of Westphalia, brought about the concept of non-intervention into the affairs of nation states by other states. 300 years later, the UN was founded in an effort to 'save succeeding generations from the scourge of war.' To do this the founding nations resolved 'to unite our strength to maintain international peace and security' and 'to ensure that armed forces shall not be used, save in the common interest and to employ international machinery for the promotion of the economic and social advancement of all peoples.'<sup>50</sup> Therefore, there is a fundamental aversion to the use of military force by the UN that has its roots in the founding declaration. However, there is one intention, and reflective instrument of the UN that has never been fully realised: to allow the UN to have its own standing military, under the command of the UN Military Staff Committee (MSC), with forces donated by member states.

All Members of the UN, in order to contribute to the maintenance of international peace and security, undertake to make available to the [UNSC], on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining peace and security. ... the agreement or agreements shall be negotiated as soon as possible on the initiative of the [UNSC].<sup>51</sup>

The MSC exists but there has never been the political appetite amongst member states to donate military forces to be controlled by the UN. However, the legal instrument to introduce a supranational force exists; Article 43 in Chapter VII of the UN Charter.

Membership of the UN has always been open to 'all other peace-loving states which accept the obligations contained in the present Charter.'<sup>52</sup> This is the fundamental reason why a standing military force under UN command has never been introduced. The establishment of an independent UN military force with the power to act unilaterally is simply incongruous with an international organisation committed to the peaceful resolution of conflict.

## *Article 43*

Article 43 is moribund in the modern system.<sup>53</sup> The likelihood of the UN introducing its own military forces under this instrument, as initially envisaged, is virtually nil. However, the instrument is ratified by all 192 member states as it is a constituent part of the Charter. It would be possible to transform the current moribund nature of Article 43, indeed, the founding declaration of the UN states that the main purpose of the organisation is to promote peace and security, economic and social advancement, and to do so in the common interest.<sup>54</sup> Serious transnational crime and terrorism are blights on the international system and justify action in the common interest. In fact, the UN Office on Drugs and Crime (ODC) already exists. Therefore, there is consensus in international relations that drugs and crime warrant action by the UN.

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It would be more politically acceptable to introduce a supranational law-enforcement agency under the auspices of Article 43 and Chapter VII than a military force. This would be more in keeping with the peaceful principles upon which the UN is built as the rule of law is essential in promoting international peace and security.

The sovereignty principle is a major stumbling block for the creation of any supranational body. Whilst various international policing agencies exist that assist national police forces to deal with transnational criminals, they lack operational or executive powers. Interpol, Europol, Borderpol, EuroJust and the UN Police Force all lack jurisdiction and the ability to arrest, detain or prosecute.

### *Erosion of the Sovereignty Principle*

However, the sovereignty principle has been eroded in recent years. In Kosovo for instance, NATO decided that the hitherto primary principle of international relations had to be considered as secondary to the humanitarian needs of the population. This was the first time that humanitarian intervention had usurped the former primary principle of non-intervention, but it was not universally accepted. Indeed, Russia was understandably anxious to dispute the right of states to intervene in their neighbours' internal strife. However, more recently, Russia pleaded the right to intervene in

Georgia on a humanitarian basis. Hence, both sides of the former East-West divide have set the precedent that humanitarian action can be taken despite the existence of the sovereignty principle. Indeed, this erosion is further supported by the widespread condemnation by the international community of the UNSC for failing to intervene in the Rwanda genocide (1994).<sup>55</sup> Therefore, the principle of non-intervention into the internal affairs of state has had caveats applied where previously there had been none. This blurring of the sovereignty principle is key to both the future of the international system and to the case for the creation of a supranational law-enforcement agency.

### *General Principles of Criminal Law*

There is precedent for the consideration of general principles of domestic national law in the prosecution of international crime. Indeed, behind treaties and customary law, general principles of domestic law are the next recognised source.<sup>56</sup> However, as only treaties and customary law are considered as primary sources of international law, resorting to secondary sources is rare. However Yet, much of the work of the International Criminal Tribunal for the former Yugoslavia (ICTY) relies on general principles of domestic criminal law as justification for its decisions.<sup>57</sup>

### *Drazen Erdemovic*

The Erdemovic case at the ICTY showed that it was possible for an international court to establish common principles of criminal law – accepted by the majority of states – to hold individuals personally responsible. This was a key development in international law relating to individual responsibility rather than law relating to the relations between states. However, the most notorious, and arguably important indictees, were not brought before the Tribunal for many years: Radovan Karadzic, Ratko Mladic, Goran Hadzic and senior generals were not handed over for at least ten years.

Indeed, when NATO went into the countries of the former Yugoslavia, there was much debate as to whether the forces on the ground were charged with apprehending Persons Indicted for War Crimes (PIFWCs), or whether this was a role for local law-enforcement.



The new administrations did not have the resources or the organisational maturity to pursue PIFWCs and left it to NATO. NATO quickly decided that chasing PIFWCs was not a part of its mandate and actively avoided the role. This demonstrates well the capacity, capability and political motivation vacuum that can exist in post-conflict societies that is difficult to address with military forces or current international law-enforcement arrangements.

Radovan Karadzic was apprehended by Bosnian authorities and handed over to the ICTY in 2008, some 13 years after the original indictment.

In Bosnia we used personally targeted sanctions extensively against those who assisted the network protecting Karadzic, Mladic and the other war criminals – freezing bank accounts and placing individuals on the US and EU visa ban list. This was one of the key factors in breaking the nine-year dam of Serb obstructionism in capturing war criminals.<sup>58</sup>

This impotence of the international community, without extensive diplomatic coercion, to pursue, arrest and prosecute those who have been charged with crimes against humanity demonstrates the need for a supranational body with operational powers to search, pursue, arrest and present to local officials for the purposes of extradition. If the pursuit and arrest is conducted by a supranational body, acting independently if necessary, then once the individuals have been delivered to local authorities for extradition, it would be much more politically difficult to prevent handing over the arrested individual to the appropriate international court or tribunal.

### *The International Criminal Court*

One of the criticisms of the ad-hoc tribunals of Nuremberg, ICTY, Special Court for Sierra Leone (SCSL) and the International Criminal Tribunal for Rwanda (ICTR) is that they were not pre-existing bodies with jurisdiction established before the events that they were introduced to rule over. This legitimacy issue was one of the key justifications for the creation of the ICC.

The Rome Statute was signed in 1998 but the ICC did not come into force until 2002 when the required 60 states ratified it in their domestic parliaments.

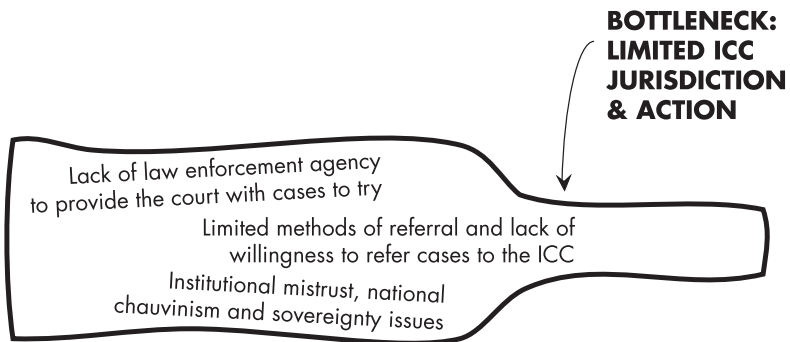
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An important distinction to make however, is that the ICC is not a part of the UN system, whereas the ad-hoc tribunals are. The ICC is seen to have close ties with the UN but is an independent organisation. The Rome Statute details what is included under the heading *Crimes Against Humanity*. It expressly includes enslavement, forcible transfer of population, sexual slavery and enforced prostitution, particularly in respect to the trafficking of people. Hence, human trafficking falls under the current jurisdiction of the ICC. The Statute also stipulates:

‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State **or organisational** [emphasis added] policy to commit such attack.<sup>59</sup>

By this definition, too, transnational organised human trafficking operations fall under the current remit of the ICC. However, human trafficking remains a growing concern, so there must be a problem with getting the jurisdiction to have an effect on the issue. Providing jurisdiction for a problem does not result in perpetrators being pursued and brought before the court. For this, a law-enforcement agency with a similar remit is required.

#### INFO-GRAPH I. Bottleneck: Limited ICC Jurisdiction & Action



SOURCE: Author.

The lack of either element of an integrated criminal justice system leads to impotency. Without police, criminal courts remain empty, no matter what jurisdiction they have. This is the problem with the pursuit of human trafficking internationally, under the auspices of the ICC. The question of referral to the court is a key one; the US FBI refers its cases to federal courts. However, how busy would those federal courts be if there was no agency established to investigate matters under federal jurisdiction? At the moment, the international system lacks an integrated international criminal justice system with law-enforcement, judiciary and detention elements. Take piracy for instance. There is disquiet among lawyers that dealing with pirates with the current system is the wrong tactic:

... the defense [sic] attorney, Ausma, [for Yusuf, see chapter 2] said the idea of bringing Somali pirates to the Netherlands for trial was poorly conceived. 'It's not a solution to bring them here; keep them there and look for a solution there.'<sup>60</sup>

There is no effective court system in Somalia to deal with pirates. This indicates that the current system for dealing with captured pirates, in addition to the complication of refugee regulations post prosecution results in an incentive to commit the crime rather than act as a deterrent. If pirates were to be tried in an international court, refugee status could be removed as a constituent element of the problem.

#### INFO-GRAPH 2. Interrelationship: Global Law Enforcement and Courts



Resolution E of the Final Act of the Rome Statute recommends inclusion of terrorism and drug crimes within the jurisdiction of the ICC, alongside that of human trafficking, and this would represent a comprehensive list of crimes against humanity that the

international community currently faces.<sup>61</sup> However, as Resolution E explicitly recognises, the significant difficulty in achieving this is the lack of consensus on a common definition of the crimes. Indeed, the inclusion of the word "terrorism" itself is pejorative; calling an act of political violence terrorism is not only a description but also a judgement. If this debate is to move forward it should do so by avoiding the pejorative term and restricting the legal definitions to the criminal acts that so-called *terrorists* employ, thereby having a greater chance of achieving consensus among states on the actions required by the international community to combat such crimes.<sup>62</sup> The European Arrest Warrant (EAW) provides a useful mechanism to resolve this definitional problem. All 192 states of the UN have signed the Global CT Strategy resolution. As there is consensus in the international community that terrorism is a scourge that needs to be addressed, work should begin on a treaty that establishes the general legal requirements to prosecute transnational criminals and terrorists for the most serious offences and, most importantly, empower a supranational law-enforcement agency to act independently to investigate, arrest and prosecute individuals. This would remove the unnecessary and critically delaying requirement to give primacy to individual state security forces to act on another state's behalf.

#### PROSPECTS FOR THE DEVELOPMENT OF THE INTERNATIONAL LAW-ENFORCEMENT SYSTEM

The UK's National Security Strategy suggests that support for the rule of law internationally is an integral part of foreign policy to secure the UK for the future:

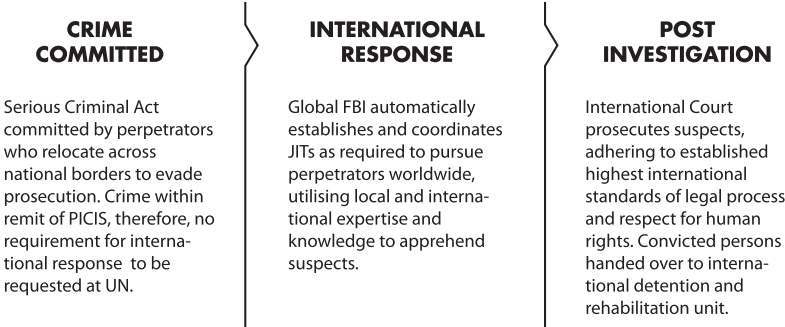
Overseas, our belief in the rule of law means we will support a rules-based approach to international affairs, under which issues are resolved wherever possible through discussion and due process, with the use of force as a last resort.<sup>63</sup>

Hence, with the receding threat of inter-state war since the end of the Cold War, and the growing threat posed by transnational criminals and terrorists, it could be argued that support for the rule of law internationally is at least as important as military options in securing peace and security for the global society.

Just as the UN's inception was not an easy political development, and took a number of years before it was universally accepted, introducing a new global agency is not something that can be achieved overnight. Even simply altering the remit of existing organisations, like Interpol, the UN Police or Europol, to accept responsibility for transnational crime and terrorism, with operational powers to investigate, pursue, arrest, detain and prosecute, may take years or even decades to achieve. However, the fact that the journey ahead may be a difficult one does not mean that it should not be attempted. An ideological motivation is just as valid as a pragmatic one, as an ideal solution is a preferable outcome.<sup>64</sup>

Unfortunately, ideal solutions tend to be more steps removed from the status quo than more limited, pragmatic options. The LoN, and its successor, the UN, were born out of a difficult ideology that took decades to achieve global acceptance. A significant difficulty is that democracies are inherently short or medium term in their outlook due to regular elections of government officials. Therefore, ideological motivations rarely result in projects that could take longer than ten years, or two parliamentary terms, to come to fruition. Modern politics lends itself to a series of short term goals. The solution is to try to coordinate these distinct short-term goals into a long-term strategy that combines the pragmatism of short-termism with a long-term vision.

INFO-GRAPH 3. The Vision



SOURCE: Author.

The ideal vision for the second half of the century is an integrated criminal justice system with its own comprehensive law-enforcement agency that has limited jurisdiction to act independently around the world. Its remit would be restricted to those crimes that are universally accepted by nation states as worthy of attention by the supranational agency, as illustrated in Info-Graph 3, in concert with national and other agencies. This agency would be free to investigate as it saw fit and refer its own cases to its own independent court and legal system, which would be established conforming to the highest standards of legal process and human rights. This would bring the highest standards of the rule of law to the global society at large, regardless of national borders. Convicted criminals of this court would progress to a rehabilitation and detention system that, similarly, uses international best practice in the ongoing treatment of convicts to either protect global society from them and/or rehabilitate them into productive members of the global populace, before returning them to their country of origin.

Therefore, the solution is to combat the issue collectively by taking the best elements of each of the major organisations involved in transnational law-enforcement, and combining those elements into a solitary organisation, thereby utilising economies of scale and pooling the resources of all nations to pay for it.

The Proposed International Criminal Justice System (PICJS) would need to be associated with a court established to prosecute offenders. The ICC already exists but its jurisdiction is limited to certain crimes. Its jurisdiction could be increased to include other common threats to the global society. The ICC is internationally acknowledged as being a useful addition to international law-enforcement relating to war crimes. However, the inclusion of the crime of *Aggression* at the Kampala conference in Uganda in June 2010 catapulted the ICC into the political spotlight. The US, briefly a signatory of the ICC, is now less likely to sign up to the ICC due to the possibility that George W. Bush could be charged with aggression in relation to the invasion of Iraq in 2003. This may also mire the court in political controversy for the foreseeable future, rendering any further extension of its jurisdiction impossible. This may mean that a separate, entirely new court, directly linked to the proposed law-enforcement agency, has a better prospect of gaining widespread support among the international community. This is

the pragmatic option favoured by Sir David Veness, former Under-Secretary-General for safety and security.<sup>65</sup> The major benefit of this approach is that it divorces any new court from the political wrangling of the current ICC and allows the new institution's founding ideals to stand on their own merits.

*Stuart Coffey*

#### *The European Arrest Warrant (EAW)*

A major success of the European model is the introduction of the EAW. This has replaced extradition in the EU area and removes political involvement, as states can no longer refuse to hand over citizens charged with a crime within the EU on the grounds that they are their own citizens.<sup>66</sup> The ingenious element of the wording of the agreement on EAWs is in its acceptance of a difference in definitions: there are 32 offences, including terrorism, organised crime, human trafficking, arms trafficking, financial fraud, counterfeiting and corruption where it is recognised that different definitions exist within the EU. However, alleged crimes on this list have to be executed by the arresting state irrespective of whether or not the definition of the offence is the same, providing that the offence is serious enough to be punished by at least 3 years' imprisonment in the Member State that has issued the warrant.<sup>67</sup> If the EU can agree that a universally accepted definition is unnecessary, instead relying on the sentencing tariff in national laws as the deciding factor, then the definitional difficulty surrounding terrorism and drug crimes' inclusion in the jurisdiction of an international court can be overcome.

There is a radical solution: the UN Charter has always had the establishment of its own forces at the core of its being as recognised by Article 43 of the UN Charter. However, these forces have never been given independent UN control as originally intended. It would be difficult to justify a military force to the majority of nations given the peaceful principle upon which the UN is based. However, it may be politically possible to approve the commissioning of a supranational law-enforcement agency as the independent policing body of the international community, given the importance of the rule of law in promoting international peace and security.

*Could a Global FBI have averted NATO's action in Afghanistan?*

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The events of 9/11 resulted in an invasion of Afghanistan by the end of the month of September 2001. Had there been a supranational law-enforcement agency with international legitimacy at the time of the attacks on the twin towers of New York, that had the operational powers to pursue Osama bin Laden and the other senior leaders of Al Qaeda, would NATO still be involved in a fight against the Taliban today? Would the current terrorist threat from home-grown extremism be as significant if the international response, post 9/11, was one that focussed on preserving the rule of law internationally, and bringing those responsible for the atrocity to justice, rather than a military-led action to punish the offenders? Indeed, it is widely accepted that Al Qaeda has largely moved on from Afghanistan to new pastures in other poorly governed, permissive or *ungoverned* areas of the globe.<sup>68</sup> However, the fact remains that if the international community persists in disproportionate responses then the cycle of reprisals will provide the popular support that terrorist factions thrive on.<sup>69</sup> A new integrated and comprehensive supranational criminal justice system is the only way to give pause to unilateral action by a state before it commits to military action. By having such a system, states will no longer be able to *take the law into their own hands*, as the international community itself will be able to act to enforce the international rule of law, thereby preventing fighting before it starts.

Indeed, it must be remembered that the reluctance to share sovereignty over policing has already resulted in a major war in the twentieth century: the assassination of Archduke Franz Ferdinand in Sarajevo by the Black Hand nationalist movement resulted in the formidable Austro-Hungarian ultimatum to Serbia.<sup>70</sup> Whilst there were many demands made in the document, the only significant demand that Serbia were unwilling to accede to was the insistence that Austrian police be allowed to travel to Sarajevo and actively investigate the assassination, on equal footing with Serbian law-enforcement officials. The Serbian refusal to share sovereignty over the investigation ultimately resulted in war being declared by Austro-Hungary; the web of alliances in Europe further resulted in the commencement of World War One.<sup>71</sup>



A significant, and probably insurmountable, barrier in the short to medium term to supranational bodies exercising operational powers, is simply the chauvinism of nation states. According to Venness:<sup>72</sup>

If national leaders continue to do nothing, we shall have to wait until the criminal gangs over-reach themselves with a 9/11 type of outrageous crime. For example, if several European banks are hacked simultaneously so that thousands of Europeans lose their savings, or if a new artificial drug kills thousands of teenagers across Europe in a single night, then overwhelming public demand for action would follow.<sup>73</sup>

*Global FBI*

## CONCLUSION

The balloon effect, where squeezing by law-enforcement in one area simply gives rise to that activity elsewhere, will remain in relation to organised crime of all types while a piecemeal attitude to introducing international policy agreements remains. Indeed, the ease with which criminal and terrorist groups can relocate across international boundaries and utilise international ungoverned space demands a radical rethink of how nation states collectively deal with transnational crime and terror.

A step change in international terrorism began when the terrorist attacks on the twin towers of New York occurred on 11<sup>th</sup> September 2001.

The preparations for the September 11 terrorist attacks in 2001 spanned several continents, and so did the effects: the World Bank estimated the reduction of global GDP at almost 1%.<sup>74</sup>

This has escalated the threat of international terrorism from what could arguably have been seen as regional prior to 9/11, to being a truly global transnational issue.

Piracy is also on the increase. However, the current international criminal justice system is unable to act as a deterrent to piracy and this impotence will continue to encourage pirates. It also provides rich recruitment grounds from which corrupt businessmen can source their pirate navies.<sup>75</sup>

A chief concern is the ability of modern terrorists to move to an area of the globe that is either poorly governed, ungoverned, or where local power is susceptible to bribery and corruption.<sup>76</sup> The areas of concern are Sudan, Somalia, the Maghreb in general, Yemen, the Federally Administered Tribal Areas of Pakistan (FATA), areas of Central America and Afghanistan. Bringing ungoverned spaces under the jurisdiction of the PICJS has the potential to deny safe havens from terrorists and organised criminal groups. Indeed, the greatest benefit to the international community of such a PICJS would be that it would extend the rule of law to those parts of the world where intentional or situational indifference to the concerns of other states, and impunity for transnational criminals and terrorists, exists.

Transnational crime and terrorism are rarely distinct; terrorism is often funded by transnational illicit activity.<sup>77</sup> Nation states have responded to the growth of transnational crime and terrorism by targeting their national security efforts and including development aid as an integral part of the battle against the phenomena.

There has never been the political appetite amongst member states to donate military forces to be controlled independently of those states by the UN. However, the legal instrument to introduce a supranational force exists in the form of Article 43 of the UN Charter. Article 43 is, however, moribund in the modern system.<sup>78</sup> The likelihood of the UN introducing its own military forces under this instrument, as initially envisaged, is virtually nil. However, the instrument remains and is ratified by all 192 member states as it is a constituent part of the Charter itself. It would be possible to transform the current moribund nature of Article 43: the founding declaration of the UN explicitly states that the purpose of the organisation is to promote peace and security, economic and social advancement, and to do so in the common interest.<sup>79</sup> Serious transnational crime and terrorism are blights on the international system and justify action in the common interest.

The sovereignty principle has begun to be eroded in recent years. In Kosovo, NATO decided that the hitherto primary principle of international relations had to be considered as secondary to the humanitarian needs of the population. This blurring of the sovereignty principle is key to both the future of the international system and to the case for the creation of a supranational law-enforcement agency.

There is precedent for the consideration of general principles of domestic national law in the prosecution of international crime. The Erdemovic case at the ICTY showed that it was possible for an international court to establish common principles of criminal law that would be accepted by the majority of states, to hold individuals personally criminally responsible.

*Stuart Coffey*

Altering the remit of existing organisations, like Interpol, the UN Police or Europol, to accept responsibility for transnational crime and terrorism, may take years or decades to achieve. The desired end-state for the global society is a comprehensive international criminal justice system including law-enforcement, courts and detention, with a level of independence from nation states.

The EAW has replaced extradition in the EU area and removes political involvement, as states can no longer refuse to hand over citizens charged with a crime within the EU on the grounds that they are their own citizens.<sup>80</sup> The ingenious element of the wording of the agreement on EAWs is in its acceptance of a difference in definitions: there are 32 offences, including terrorism, organised crime, human trafficking, arms trafficking, financial fraud, counterfeiting and corruption where it is recognised that different definitions exist within the EU. However, alleged crimes on this list have to be executed by the arresting state irrespective of whether or not the definition of the offence is the same, providing that the offence is serious enough and punished by at least 3 years' imprisonment in the Member State that has issued the warrant.<sup>81</sup> If the EU can agree that a universally accepted definition is unnecessary, instead relying on the sentencing tariff in national laws as the deciding factor, then the definitional difficulty surrounding terrorism and drug crimes' inclusion in the jurisdiction of an international court can be overcome.

The events of 9/11 resulted in the invasion of Afghanistan by the end of September/October 2001. Had there been a supranational law-enforcement agency with international legitimacy at the time of the attacks on the twin towers of New York, that had the operational powers to pursue Osama bin Laden and the other senior leaders of Al Qaeda, would NATO still be involved in a fight against the Taleban today? Would the current terrorist threat from home-grown extremism be as significant if the international response, post 9/11, was one that focussed on preserving the rule of

law internationally, and bringing those responsible for the atrocity to justice, rather than a military-led action to punish the offenders? Indeed, it is widely accepted that Al Qaeda is no longer in Afghanistan but has moved on to new pastures in other poorly governed, permissive or *ungoverned* states. However, the fact remains that if the international community persists in disproportionate responses that ignore the rule of law then the cycle of reprisals will provide the popular support that terrorist factions thrive on.<sup>82</sup> A new integrated and comprehensive supranational criminal justice system is the only way to give pause to states considering unilateral action before they commit to military action. By having such a system, states will no longer be able to *take the law into their own hands*, as the international community itself will be able to act to stop the fighting before it starts.

This author opines that the cost-effective and efficient solution is one that uses the newly accepted precedent of allowing humanitarian issues to displace the national sovereignty principle, whilst maintaining the over-riding peaceful principle upon which the UN is founded. By establishing an international organisation with its own jurisdiction to deal with serious breaches of internationally accepted law across international boundaries, the problems of un-governed space and inconsistent national crime-fighting capacities can be overcome. There is an established international instrument signed by all members of the UN, the Charter itself, that allows for a force to be used under the sole direction of the UN; Articles 43 of Chapter VII.<sup>83</sup> It has been politically unacceptable to establish a purely military force under this article but, perhaps with the threat posed by transnational actors, the political landscape could stretch the extant caveats on sovereignty to allow the establishment of a truly independent and, hence, effective integrated international criminal justice system, if it was restricted to crimes that are universally deployed, as espoused in this article.

Rules and law are the process that society uses to keep anarchy at bay. In established modern society, law is used to protect the weak from the strong so that survival is not based on primal instinct but on universal principles. To do so, maintaining separation of the judiciary from governance is an essential element of policing. Over time, as people have become more mobile with the invention of various methods of transportation, the geographical remit of the

policing structures have had to grow alongside. The UN is the beginning of the evolution of global governance but the independent judiciary is limited and has no police force to pursue transnational criminals. Therefore, the anarchy that has been eradicated from the past in nation states, still exists in international relations, in part due to the absence of an effective set of international laws and a suitably resourced independent judiciary and policing system. This results in the prevalence of the utility of power projection as a means of exerting influence internationally; the bully of the international playground still exists, in the form of both transnational organised groups and western developed nations, and is able to operate with little interference as there are no effective playground monitors to ensure good, principled behaviour based on the rule of law. In this absence of a *playground presence* with the powers to act independently, states have to resort to power projection to achieve their own ends, rather than rely on maintaining the rule of law, because there is no confidence in the ability of the international system to ensure transnational criminals are held to account and justice is done. History has shown that the maturity of a state is directly linked to its ability to maintain law and order with the consent of the people; the immaturity of the international system is precisely because it has not been able to introduce its own police force and associated criminal justice system by agreeing common principles of criminal law. Let's hope that the realisation of the need for a global police force happens sooner rather than later thereby minimising unnecessary loss of life from the extant threats the proposed system would tackle.

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