am sure, did anyone suspect that by the time of writing this review the pipeline would have been the subject of an attack by persons unknown, rendering it inoperable.

But, of course, the last three years have involved even greater disruption to the fabric of international relations – first with the COVID pandemic and now with the Russian aggression against Ukraine – so it will be interesting to see in future volumes how Germany has responded to these challenges. Indeed, it is good to see that a volume covering 2020 has recently been published. Thus, Talmon and Cambridge University Press are very much to be congratulated on this initiative. It is always a step forward when state practice, particularly of a state like Germany, which is very active in international matters, is made more widely available. One might hope that other states, particularly in the developing world, might be able to follow suit. Of course, one question, on which only time will tell, is whether this publication will encourage authors, especially in the German-speaking world, to reference German practice, in preference to, or at least in addition to, the usual practice in English.

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Fulvia Staiano. ***Transnational Organized Crime: Challenging International Law Principles on State Jurisdiction***. Cheltenham: Edward Elgar, 2022. Pp. x + 182. £75. ISBN: 9781800888357.

The foundational subject of jurisdiction continues to spark debates among public international lawyers, as demonstrated by Fulvia Staiano's *Transnational Organized Crime: Challenging International Law Principles on State Jurisdiction*.[1] This book explores ways in which international law on jurisdiction is evolving to keep up with transnational organized crime, a phenomenon that not only crosses borders but also, in some cases, takes place beyond the jurisdiction of any state (that is, in cyberspace or on the high seas). The contemporary practice of both states and international courts shows that a consensus approach to the jurisdictional problems associated with this phenomenon is yet to emerge. Yet the book's engagement with this diverse practice is one of its great strengths. Staiano's findings are supported by a rich collection of domestic case law and legislation concerning transnational organized crime. Other scholars very much stand to benefit from the research reflected in this book.

The first chapter introduces transnational organized crime, with a particular focus on human trafficking, migrant smuggling, firearms trafficking, drug trafficking,

[1] See, e.g., Krisch, 'Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance', 33 *European Journal of International Law* (*EJIL*) (2022) 481; O'Keefe, 'Cooperative National Regulation to Secure Transnational Public Goods: A Reply to Nico Krisch', 33 *EJIL* (2022) 515.

cross-border poaching and trafficking in wildlife, piracy and what are termed the 'accessory offences' of corruption, money laundering and cybercrime (at 31). The distinction between transnational crimes and international crimes lies at the analytical core of this chapter. Staiano considers and rightly discards 'heinousness' as a possible basis for distinguishing between these two bodies of crimes. The heinousness of a crime cannot demarcate the distinction between transnational and international crimes in part because certain transnational crimes, such as human trafficking, are just as serious or heinous as international crimes – that is, war crimes, crimes against humanity and genocide. This chapter could have also argued the converse – namely, that some international crimes – in particular, certain war crimes – have a less serious or heinous character than some transnational crimes, such as human trafficking. The violence regularly employed by organized criminal groups may attract far less attention from journalists and scholars than armed conflict and mass atrocities, but such violence can of course be even graver or more heinous than war crimes like destruction of property and the denial of the right to a fair trial for a prisoner of war.[2]

Even though Staiano discards 'heinousness' as a factor demarcating transnational and international crimes, she nevertheless concludes that the seriousness of international crimes was 'by far the decisive motivation behind the ultimate exclusion' of transnational crimes from the Rome Statute of the International Criminal Court (ICC) (at 5).[3] She explains that most of the states that opposed the inclusion of transnational crimes in the Rome Statute did so because they considered that 'the repression of transnational crimes could be efficiently carried out within the existing international framework', which provides for prosecution by domestic authorities (at 5, 34). The apparent implication here is that states' evident preference for retaining the existing approach to prosecuting transnational crimes is related to the perception that international crimes are graver than transnational crimes and should therefore be prosecuted by an international judicial body.

The drafting history of the Rome Statute, however, could be read as supporting other interpretations. The existence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, for example, influenced the decision of the drafters of the Rome Statute to focus on 'core' crimes, which had already been the subject of international prosecution by these institutions. On a more mundane level, the drafters of the Rome Statute also faced time constraints during the final stages of their negotiations, which hindered their ability to fully debate the possible inclusion of other crimes, beyond those that had already been the subject of international prosecution. The field of transnational criminal law is replete with examples of treaty drafters who preferred to reuse provisions found in related, existing treaties rather than to engage in creative law-making, unmoored from existing precedents. The exclusion of transnational crimes from the Rome Statute could be seen as another example of this trend, albeit in the parallel field of international criminal law.

[2] Rome Statute of the International Criminal Court 1998, 2187 UNTS 90, Art. 8(2)(iv), (vi).
[3] *Ibid.*

Staiano ultimately seems to leave aside her reading of the drafting history of the Rome Statute, as she concludes that the distinction is based not in inherent differences but, rather, in the fundamental, defining features of these two bodies of law. Whereas international crimes are prohibited by international law and punishable directly under international law, transnational crimes are criminalized in national laws adopted pursuant to treaties and are punishable under domestic law (at 9). The distinction upon which Staiano finally settles is therefore not principled or conceptual but is instead grounded in practical implications: transnational crimes involve individual criminal responsibility under domestic law rather than treaty law or customary international law. Attempts to forge a persuasive conceptual distinction between transnational and international crimes may simply be in vain, as the distinction is arguably a reflection of historical developments – including the ad hoc tribunals and the ICC – rather than any inherent differences between the two types of crimes.

The second chapter examines the diverse and creative ways in which states have extended their territorial jurisdiction in order to prosecute members of transnational criminal organizations. The exercise of prescriptive, enforcement and adjudicatory jurisdiction by a state over conduct that occurs on its territory is uncontested. But this fundamental jurisdictional rule often cannot be applied in a straightforward manner to organized crime, which is, by definition, cross-border and may also involve conduct in areas beyond the jurisdiction of any state. The chapter offers two fascinating examples involving migrant smuggling and cybercrime, both of which give rise to questions about the blurring of the distinction between the objective territorial principle and the effects doctrine. The findings in this chapter suggest that the applicability of the effects doctrine to transnational crimes ought to be the subject of dedicated, further research.

The Italian judiciary has been confronted with the legal challenges posed by migrant smugglers who transfer migrants to unseaworthy vessels just outside of Italy's territorial sea (at 55). This manoeuvre is designed to provoke a situation of distress and to require the intervention of Italian authorities under the law of the sea, while, at the same time, potentially allowing smugglers to remain outside of Italian territorial waters. In 2014, in response to this phenomenon, the Italian Court of Cassation began developing its 'mediated author theory', which involves an extensive interpretation of the principle of objective territoriality. This theory allows the Court to grapple with situations in which Italian rescue vessels enable the actual disembarkation of migrants in Italy and are therefore the 'mediated authors' of the offence of migrant smuggling. According to the Court of Cassation, such mediated authors do not disrupt the 'cause-effect relationship between the extraterritorial conduct of the accused and the result of this conduct on Italian territory' (at 56). While the conduct of the accused takes place extraterritorially, the consequences are felt in Italian territory and therefore come within its jurisdiction.

US courts have similarly confronted the legal challenges posed by transnational crimes on the 'dark web'. The term 'dark web' refers to parts of the World Wide Web that 'cannot be accessed by the general public through ordinary web browsers, but only through software that applies multiple layers of encryption' (at 59–60).

This enables a high level of anonymity for users and thereby facilitates their criminal activity, including drug trafficking, firearms trafficking and money laundering. Challenges to the jurisdiction of the USA have been raised by some foreign defendants in the context of criminal proceedings targeting their extraterritorial conduct. US courts, however, have rejected such jurisdictional objections on the grounds that the accused persons aimed to cause harm to US citizens and US interests (at 66–67). Staiano further notes that the prosecution of criminal activities associated with dark web markets is prone to give rise to conflicts of jurisdiction, as the vast majority of states are destination countries for illicit goods sold on the dark web. Numerous states could, at least in theory, simultaneously pursue the prosecution of cyber criminals whose conduct can produce effects on the territories of multiple states. This chapter discusses one example of an actual conflict of jurisdiction, but the frequency with which this problem occurs in reality remains an open question.

The third chapter explores the exercise of jurisdiction by states over extraterritorial transnational organized crimes carried out by foreigners on the basis of either the protective principle or the principle of universality. This chapter's discussion of universal jurisdiction documents a shift away from what is termed 'absolute' universal jurisdiction and towards 'relative' universal jurisdiction. According to Staiano, the term 'absolute universal jurisdiction' refers to the exercise of jurisdiction without conditions. The exercise of jurisdiction could, for example, be conditioned on the presence of the accused in the state exercising jurisdiction or on the unwillingness or inability of the territorial state to exercise jurisdiction (that is, the state where the conduct took place) (at 93). The term 'relative universal jurisdiction' refers to the exercise of jurisdiction subject to one or more conditions. One condition could be that the accused is present in the territory of that state; another condition could be that the state with closer ties to the conduct is unwilling or unable to exercise jurisdiction (that is, the state with jurisdiction on the basis of the territorial or nationality principles).

While the terms 'absolute' and 'relative universal jurisdiction' have clear meanings, they arguably do not go to the heart of the matter, conceptually speaking. Universal jurisdiction is a matter of prescriptive jurisdiction.[4] This entails a state adopting legislation that criminalizes transnational crimes regardless of the nationality of the author of the crime or the location or effects of the conduct. There can be no 'half-hearted' or 'relative' prescriptive jurisdiction based on the principle of universality; a state either does or does not require some sort of nexus with the conduct at issue. The circumstances in which a state will exercise enforcement and adjudicative jurisdiction is a separate issue. The conditions described in this chapter represent pragmatic limitations on the exercise of enforcement and adjudicative jurisdiction over transnational crimes. One condition allows states to conserve prosecutorial resources by limiting prosecution to situations where the accused person is actually on their soil. The other condition allows states to avoid conflicts of jurisdiction with another state that

[4] O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2 *Journal of International Criminal Justice* (2004) 735.

has closer ties by limiting prosecution to situations where the other state has declined to prosecute.

The terms 'absolute' and 'relative universal jurisdiction' obscure the conceptual distinctions between the three types of jurisdiction (prescriptive, enforcement and adjudicative) as well as the reasons why states might approach these forms of jurisdiction in different ways. For example, a state might adopt legislation that has universal application because it shares a community interest in combating certain criminal conduct. But it might also adopt a more restrictive approach to enforcement and adjudicative jurisdiction in order to avoid overburdening its police, prosecutors and judges.

This chapter goes on to explain the emergence of relative universality in the broader context of the fight against impunity. Staiano argues that the causes of impunity are not the same for international crimes and transnational crimes. Impunity in the context of international crimes stems from 'the unwillingness or inability of the territorial State to prosecute … or from the refusal of a State of refuge to extradite alleged perpetrators' (at 118). By contrast, impunity in the context of transnational organized crime arises out of the fact that the conduct at issue has crossed borders or has taken place partly or entirely outside of the territory of any state (at 118). This assertion draws on claims made in the second chapter about how state involvement in the perpetration of international crimes contributes greatly to impunity. The state where the international crimes have taken place will typically be unable or unwilling to investigate and prosecute conduct in which it has acquiesced, been complicit or been actively involved (at 41). Staiano argues that transnational organized crimes, by contrast, 'are disproportionately committed by non-state actors rather than the state organs. … States have often proven to be not at all reluctant – and in fact quite keen – to prosecute said crimes' (at 41).

Some readers (this reviewer included) may be surprised by the assertion that states are typically not involved in the commission of transnational organized crimes and that they are keen to undertake prosecutions. In many corners of the world, quite the opposite is true.[5] Human trafficking and migrant-smuggling operations, to give just two examples, are very much facilitated by corrupt state officials. In practice, the anti-impunity drive may not be as robust as scholars and activists might wish, such that the distinctions drawn here between international and transnational crimes dissolve upon closer examination.

The fourth and final chapter explores the challenges raised by conflicts of jurisdiction and the possible solutions, including the prosecution of transnational crimes by the ICC. In exploring the problem of conflicts of jurisdiction, this chapter surveys a number of recent judgments rendered by international courts and tribunals – in particular, the International Court of Justice's judgment in *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* and the judgment of the International Tribunal for the Law of the Sea in *M/V 'Norstar' (Panama v. Italy)*.[6] Indeed, both cases

[5] See, e.g., H. Decoeur, *Confronting the Shadow State: An International Law Perspective on State Organized Crime* (2018).

[6] *M/V "Nortstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018-2019, 10.

involved cross-border conduct (money laundering and oil bunkering, respectively) and therefore raised the prospect of multiple jurisdictions undertaking investigations and prosecutions.

The rich analysis contained in this chapter very much succeeds in highlighting how these cases raised the potential problem of conflicts of jurisdiction and the absence of rules to resolve such conflicts in the field of transnational criminal law. The resolution of such conflicts depends instead on ad hoc, inter-state cooperation. The chapter, however, does not grapple with implications of the fact that the conflicts of jurisdiction remained hypothetical in these cases (at 128–129, 131). Neither Equatorial Guinea nor Panama acknowledged that a crime had occurred. In the case of Equatorial Guinea, this stance can be explained by reference to the fact that a very high-level state official (the Equatoguinean vice president) was the perpetrator. The case between Equatoria Guinea and France supports the assertion that state actors can indeed be perpetrators of transnational crimes and are, in fact, quite likely to enjoy impunity in their home jurisdictions, such that no conflicts of jurisdiction arise in practice.

This chapter's brief analysis of the ICC's potential jurisdiction over transnational organized crimes – in particular, human trafficking – highlights the many legal obstacles that a successful prosecution would have to overcome. Given the other legal and practical challenges that the ICC faces, it seems unlikely that the Office of the Prosecutor will be eager to find ways to bring such crimes within the scope of its jurisdiction in the foreseeable future. While certain forms of transnational organized crime could potentially be characterized as crimes against humanity, this remains untested, and it is currently difficult to imagine the Office of the Prosecutor assuming the risk involved in pursuing such a charge. This book therefore rightly focuses not on the ICC as a viable path forward but, rather, on the diverse and creative ways in which states exercise jurisdiction over crimes that cross borders.

While the ICC and the broader field of international criminal law seem to attract a steady flood of scholarly writing, the same cannot be said for transnational criminal law. Every book published in the field of transnational criminal law therefore has the potential to make a significant contribution to the relatively smaller stream of writing in this area. Indeed, this is one such book, as Staiano's findings represent a rich resource for anyone interested in the legal tools that states can use to fight impunity for the extremely widespread problem of transnational organized crime. Although some of the presumptions and conclusions found in this book may strike some readers as questionable, the importance of the topic and the depth of the research remain beyond doubt.

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