

COPLA: A Transnational Criminal Court for Latin America & the Caribbean

by

Robert J. Currie^f & Jacob Leon*

Abstract: States in the Latin American and Caribbean regions have long called for the creation of an independent, international court to prosecute members of transnational organized crime gangs. These organizations not only profit from the illicit traffic in drugs, people and cultural property, but are able to corrupt and undermine the domestic legal systems and judiciaries of the affected states. This paper examines the current proposal for the creation of the "Latin American and Caribbean Criminal Court Against Transnational Organized Crime" (COPLA). It reviews the rationale for creating such a court, examines the main pillars of the current proposal, and suggests the potential for it to play a normative and regulatory role in the transnational criminal law ecosystem.

Introduction

Founded by treaty¹ in the late 20th century and operational by early in the 21st,² the International Criminal Court (ICC) is undoubtedly one of the most prominent and important international legal institutions in the world. During the drafting process and negotiations that led to the founding of the ICC, consensus emerged that its subject matter jurisdiction should be over the “core crimes” of genocide, crimes against humanity, war crimes and aggression³—all more or less fair candidates for customary international law status and agreed to be the most serious crimes facing the world. One of the great modern ironies of international criminal justice, however, is that the original proposal that gave rise to the ICC was for a court of a very different nature.

In 1989 a coalition of Caribbean states led by Trinidad and Tobago proposed to the General Assembly that it revive the idea of an international criminal court,⁴ which was first contemplated in the immediate post-WWII period but which became a casualty of the Cold War.⁵ The idea was motivated by these states’ general inability to cope with transnational

^f Professor of Law, Schulich School of Law, Dalhousie University.

* J.D. 2017, Schulich School of Law and articulated clerk at Newfoundland & Labrador Legal Aid Commission, 2017-2018. This paper is a revised and expanded version of one presented by Jacob Leon at the conference “Transnational Criminal Law in the Americas,” held by the Transnational Law & Justice Network, University of Windsor, Windsor ON, 4 May 2017. The authors wish to thank Professor Sara Wharton, Maria Florencia Gor, Fergus Watt and Chris Ram for their kind assistance. © 2018 Robert J. Currie & Jacob Leon

¹ Rome Statute of the International Criminal Court, 2187 UNTS 3 (17 July 1998) [Rome Statute].

² The Rome Statute came into force on 1 July 2002.

³ Rome Statute, supra note 1, Article 5.

⁴ U.N. GAOR, 44th Sess., 38th mtg., U.N. Doc. A/C.6/44/SR.38 (17 November 1989).

⁵ Robert J. Currie & Joseph Rikhof, *International & Transnational Criminal Law*, 2d ed (Toronto: Irwin, 2013) at 7-9.

criminal gangs which were profiting mightily from the narcotics trade, and who facilitated their activities by violence and corruption that undermined policing, prosecution and the courts. There was also a need for a pressure valve to relieve some of the burden of being on the front lines of the U.S.-sponsored “war on drugs”; as Professor Boister notes:

The sponsoring states appear to have believed that a territorially remote ICC able to deal with serious treaty crimes and to send convicts to prison in states remote from the locus delicti would help make for more effective domestic suppression of crime as well as halt the erosion of their sovereignty and national pride by powerful states that either obliged them to extradite offenders and provide legal assistance or effective took control of domestic suppression of these crimes.⁶

The General Assembly was open to the idea and directed the International Law Commission (ILC) to examine the possibility of examining the prospects for such a court.⁷ However, enthusiasm for establishing the ICC as a prosecutorial venue for the core crimes quickly gained momentum, and though proposals to include narcotics trafficking and other transnational crimes (particularly terrorism) featured in the Rome debates, in the end opposition by the U.S. and other powerful states dissipated the idea.⁸ The Final Act of the Rome Diplomatic Conference did recommend that a Review Conference consider the inclusion of terrorist crimes and transnational narcotics trafficking into the subject matter of the ICC,⁹ but the idea garnered no attention in the 2010 Kampala Review Conference and has not been on the radar in any of the Assembly of States Parties meetings since. There is an immense literature on the possibility and propriety of inserting various treaty crimes into the ICC’s activities,¹⁰ but the prospect has not yet attracted any political will. Despite their proposal having sparked the creation of the ICC, the situation of the coalition of states led by Trinidad & Tobago was swept aside and left unaddressed.

Recently, however, a new proposal which revives the prospect of establishing a standing international criminal court to prosecute serious treaty crime violations has been gaining traction with NGOs and governments in the Americas. A campaign to establish COPLA (Corte Penal Latinoamericana y del Caribe contra el Crimen Transnacional Organizado)¹¹ is conceived as a court created by treaty between all Caribbean and Latin American signatories of the *2000 United*

⁶ Neil Boister, “Treaty Crimes, International Criminal Court?” (2009) 12 *New Crim. L. Rev.* 341 [Boister, Treaty Crimes] at 343.

⁷ UN Doc A/RES/44/39 (4 December 1989)

⁸ For details see Darryl Robinson, “The Missing Crimes,” in Antonio Cassese et al, eds, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP 2002) at 497; Neil Boister, “The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics” (1998) 3 *J. Armed Conflict L.* 27.

⁹ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, U.N. Doc. A/CONF.183/10 (17 July 1998), Resolution E.

¹⁰ A fairly extensive list of articles on the topic of provided in Neil Boister, “International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?” (2012) 23 *Crim L Forum* 295 [Boister, Int’l Tribunals], 296 at fn 3.

¹¹ The English translation is “Latin American and Caribbean Criminal Court Against Transnational Organized Crime” (<http://www.coalicioncopla.org/en/what-is-copla/>)

*Nations Convention on Transnational Organized Crime*¹² and its protocols.¹³ The court is intended to be based, in structure, on the ICC. Its subject matter jurisdiction, however, would include the crimes in the UNTOC and its Protocols, as well as the crimes of drug trafficking, money laundering, transnational bribery and the illicit trade in cultural artifacts committed on the territories of States Parties.

The campaign to establish COPLA was launched by Democracia Global, an Argentinian NGO, in 2013, and is currently being promoted by Coalicion COPLA,¹⁴ a group of NGOs predominantly based in Latin America but which also includes the Canadian branch of the World Federalist Movement,¹⁵ the US-based Coalition for the International Criminal Court¹⁶ and European group No Peace Without Justice.¹⁷ It has recently begun to attract interest from Latin American governments¹⁸ and on 20 September 2017 the Vice President of Argentina, Gabriela Michetti, made a presentation to the UN General Assembly in which she noted that state's support for the COPLA proposal, stating that it would help to address the "essential" need to combat the narcotics trade.¹⁹ On 13 December 2017, a side event promoting COPLA was held as part of the ICC ASP meetings in New York, which featured the Argentinian ambassador to the UN, among others, as a speaker.²⁰

It is early days for the effort to establish COPLA, and as of the time of writing the "hard" documentation relating to it consists primarily of promotional materials, background information and a preliminary draft of a potential statute that was formulated by the "COPLA Legal Experts Group," a group of Latin American legal scholars (a copy of which, in English translation, is attached as Appendix A to this paper). However, the momentum towards COPLA follows reasonably quickly on the conclusion of the Malabo Protocol,²¹ which creates jurisdiction over transnational crimes within the framework of the African Court of Justice and Human and Peoples' Rights. Accordingly, it is worth evaluating the prospects of COPLA as a new institution within the transnational criminal law ecosystem.

¹² 2225 UNTS 209 (2000) [UNTOC]

¹³ That is, the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, UN Doc A/RES/55/255, Annex (8 June 2001); the Protocol Against the Smuggling of Migrants By Land, Sea and Air, UN Doc A/RES/55/255, Annex 3 (15 November 2000); and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, UN Doc A/55/383 (2 November 2000).

¹⁴ Online: www.coalicioncopla.org

¹⁵ Online: www.worldfederalistscanada.org

¹⁶ Online: www.coalitionfortheicc.org

¹⁷ Online: www.npwj.org

¹⁸ See "Parliamentarians for COPLA" at <http://www.coalicioncopla.org/en/parlamentarians-for-copla/>

¹⁹ See Government of Argentina, Mision Permanente de la Republica Ante Las Naciones Unidas, "Discurso de la Vicepresidente de la Nacion, Sra. Gabriella Michetti, en la 72A. Asamblea General de la Naciones Unidas" (20 September 2017), online: <http://enaun.mrecic.gov.ar/es/discurso-de-la-vicepresidente-de-la-naci%C3%B3n-sra-gabriela-michetti-en-la-72a-asamblea-general-de-las>

²⁰ A report about the side event (in Spanish) can be found on the COPLA Coalition website:

<http://www.coalicioncopla.org/articulos/copla-una-respuesta-regional-al-crimen-organizado-transnacional/>

²¹ African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (adopted at the Twenty-Third Ordinary Session of the Assembly of Heads of State and Government Held in Malabo, Equatorial Guinea, 27 June 2014) ('Malabo Protocol').

The goal of this paper, then, is to serve as an introduction to COPLA as an international law institution, and primarily at the conceptual level. It will first examine the very idea of the utility of a transnational criminal court, as well as the motivation for its founding in the Latin America/Caribbean region. Then, relying on the current draft statute, some of the major features of the COPLA proposal will be reviewed, including the novel suggestion of the institute functioning as a regional facilitator of police investigation, and a view taken of how such a court might function as a regulator of transnational criminal law.

Transnational Criminal Court: An Idea Whose Time Has Come?²²

Whither a Transnational Criminal Court?

Given that the international criminal justice scene has been dominated by international and “internationalized” courts²³ that are nearly exclusively dedicated to adjudication of the core crimes, it is important to locate and distinguish the idea of what a “transnational criminal court” is and how it can and should be distinguished. The normative and jurisprudential space being referred to is best captured in the concept of “transnational criminal law” (TCL), which of late is being taken seriously as a sub-field of public international law.²⁴ At its broadest this field covers any crime which has cross-border aspects, and thus raises international law issues,²⁵ but most usually refers to a network of anti-crime treaties known as “suppression conventions.” These treaties are struck primarily in order to deal with criminal conduct that is of interest to and impacts upon a number of states, and specifically to resolve issues of jurisdiction relating to the investigation and prosecution of these crimes—specifically that criminals, evidence and increasingly the physical elements of crimes themselves cross borders and end up beyond the lawful reach of domestic law enforcement.

The treaties co-ordinate inter-state cooperation in suppression of these crimes, typically requiring that each party state 1) criminalize the conduct in question, 2) agree to broader extensions of extraterritorial jurisdiction over the conduct, 3) agree to either prosecute or extradite alleged offenders who are apprehended, and 4) provide various forms of assistance to treaty partner states, including extradition, mutual legal assistance and policing cooperation.²⁶ There is a fairly large number of these conventions and many are widely subscribed to, such as

²² It is too difficult to resist using the hackneyed phrase “an idea whose time has come” in this paper, as it is one that pervades the literature on international criminal justice generally, perhaps because it speaks effectively to the long germination of the notions which are now seeing practical development. See most recently Firew Kebede Tiba, “Regional International Criminal Courts: An Idea Whose Time Has Come” (2016) 17 *Cardozo J. Conflict Resol.* 521.

²³ This refers to the mostly ad hoc criminal tribunals that have been created by treaty to deal with particular (usually post-conflict) situations. Examples would include the Special Court for Sierra Leone, the Cambodia Extraordinary Chambers, etc. See Currie & Rikhof, *supra* note 5, chapter 4.

²⁴ See generally Neil Boister, *An Introduction to Transnational Criminal Law*, 2d ed (Oxford: OUP, 2018); Neil Boister & Robert J. Currie, eds, *Routledge Handbook of Transnational Criminal Law* (Routledge, 2014); Currie & Rikhof, *supra* note 5, chapter 7.

²⁵ Currie & Rikhof, *ibid*, at 20-22.

²⁶ *Ibid* at 327-334.

the UNTOC, the Vienna Narcotics Convention,²⁷ the UN Terrorist Bombing Convention,²⁸ and so on. These regimes, then, target crimes based in the international flow of goods or capital (e.g. money laundering, drug trafficking), or those which take place in territory not easily policed or controlled by a single state (crimes committed on commercial aircraft for instance).²⁹

Central to understanding the usual reach of TCL is that the overall goal is not the prosecution of international crimes *stricto sensu*, like genocide, to which individual liability attaches under international law itself and which are amenable to being prosecuted before international courts. Rather, the goal is co-operation in suppressing conduct which is agreed to amount to criminal behaviour under a plurality of domestic criminal law systems, but where the conduct is legislatively criminalized only under domestic laws, and prosecutions will proceed before domestic courts. This is seen not only as a necessary part of the functionality of the regime but as a selling point—in that criminal law is highly domesticized and states often prefer to apply their own substantive criminal law and procedure and maintain their prosecutorial goals and strategies as much as possible.³⁰ Accordingly, prosecution of transnational crimes before an international court would represent something of a departure from the overall system.

That is not, however, to say that the idea has not been considered—it has³¹—or that it is entirely without precedent. As usual with matters in the TCL field, Professor Neil Boister has done some of the pioneer thinking, and in his leading article on the subject³² he points out that there is no lack of sound policy reasons or precedents for a TCL court. Chief among the former is the simple fact that the TCL system itself can break down, particularly due to fractious inter-state relations and sovereignty concerns. As Boister has it:

States...may be unwilling to cooperate because they are broadly sympathetic for some reason with the alleged criminals, or because they are politically antagonistic towards the requesting state, or because they are implicated in the offences themselves...[S]tates may not be inclined to help with what they consider to be some other state's problem. They may have strong moral objections to extradition. They may be apprehensive about facilitating the imposition of foreign law and foreign punishment (often-times more severe) on their fellow countrymen, which

²⁷ United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1582 UNTS 95 (20 December 1988).

²⁸ International Convention for the Suppression of Terrorist Bombings, UN Doc A/RES/52/164 (17 December 1997).

²⁹ Neil Boister, "Further reflections on the concept of transnational criminal law" (2015) 6:1 *Transnational Legal Theory* 9 at 30.

³⁰ The U.S. government opposed the inclusion of treaty crimes in the jurisdiction of the ICC for essentially this reason; see J.D. van der Vyver, "Prosecuting Terrorism in International Tribunals" (2010) 24 *Emory Int'l Law Rev* 527 at 535-36.

³¹ See, e.g., F. Patel, "Crime Without Frontiers: A Proposal for an International Narcotics Court" (1990) 22 *New York Univ J Intl Law & Politics* 709; C. Thedwall, "Choosing the Right Yardarm: Establishing an International Court of Piracy" (2010) 41 *Georgia J of Int'l L* 501; E. Creegan, "A Permanent Hybrid Court for Terrorism" (2011) 26 *American Univ Int'l Law Rev* 237.

³² Boister, *Int'l Tribunals*, supra note 10.

they might regard with suspicion. They may find themselves between rich and violent criminals and a very profitable criminal market.³³

Moreover, these problems are particularly profound for smaller states “with weak internal sovereignty,”³⁴ since they may both need to resist political pressure more powerful states, on the one hand, and be compromised in terms of their ability to conduct complex investigations and run numerous, large-scale trials, on the other. It was no accident that the initial Trinidad & Tobago proposal for reviving the idea of an ICC, noted above, was made by a group of predominantly small island states caught in the competing pressures generated by the US campaign against narcotics trafficking.

In terms of precedent, there is certainly a record of past interest and activity around the idea of transnationalized adjudication of crimes of international concern. Boister points to the League of Nations’ original effort to establish an “international criminal court” in the form of the 1937 Convention for the Creation of an International Criminal Court, which was aimed at the crime of terrorism as it was (and to the extent it was) then understood.³⁵ This treaty, part of an effort to head off the political conflicts that eventually erupted in WWII, was accompanied by a suppression convention seeking to define the crime of terrorism.³⁶ Neither ever came into force, but represented an early way of allowing states to lift domestic pressures around certain crimes by essentially exporting the prosecution to a standing international body.³⁷ Interestingly, as Boister notes, later commentary on the effort lamented that a good idea had failed to come to fruition and proposed that a similar court based on a regional model might have great potential.³⁸

There are other precedents: regional slavery courts set up by Great Britain in the 18th and 19th centuries;³⁹ the Lockerbie trial, which involved Scottish criminal proceedings being held in the Netherlands against Libyan nationals, by reason of an international dispute over the obligations contained in the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;⁴⁰ various efforts at the UN level to create a regional piracy court to deal with Somali piracy, as well as transfers of piracy cases to Kenya and Mauritius;⁴¹ and the Special Tribunal for Lebanon, set up to prosecute transnational terrorism crimes.⁴² Most recent and

³³ Ibid at 301.

³⁴ Ibid at 300.

³⁵ Convention for the Creation of an International Criminal Court, 16 November 1937, 7 Hudson 878.

³⁶ The 1937 Convention of the Punishment and Prevention of Terrorism, League of Nations O.J. 19 (1938), 7 Hudson 862.

³⁷ Boister, Int’l Tribunals, supra note 10 at 308-312.

³⁸ Ibid, citing J.W.F. Sundberg, “Piracy and Terrorism” in M. Cherif Bassiouni & V.P. Nanda, eds, *A Treatise on International Criminal Law* (Springfield, Ill: Thomas, 1973), 455 at 484.

³⁹ See Boister, *ibid*, at 305-306.

⁴⁰ 24 UST 565 (23 September 1971). See David Andrews, “A Thorn on the Tulip - A Scottish Trial in the Netherlands: The Story behind the Lockerbie Trial” (2005) 36 Case W Res J Intl L 307 (2005); John Grant, “Beyond the Montreal Convention” (2005) 36 Case W Res J Intl L 453.

⁴¹ Dapo Akande, “UN Secretary General sets out options for dealing with Piracy off Somalia,” *EJIL Talk!* (3 September 2010), online: <https://www.ejiltalk.org/un-secretary-general-sets-out-options-for-dealing-with-piracy-off-somalia/>

⁴² Statute of the Special Tribunal for Lebanon, Attachment to SC Resolution 1757, 30 May 2007, UN Doc S/RES/1757.

interesting is the conclusion of the Malabo Protocol to the Statute of the African Court of Justice and Human and Peoples' Rights,⁴³ which added a group of what are generally considered transnational crimes to the subject matter jurisdiction of that court: piracy, terrorism, mercenarism, corruption, money laundering, human trafficking, narcotics trafficking, trafficking in hazardous wastes and illicit exploitation of natural resources.⁴⁴

It is too early in the history of this latter development to assess whether it will function, but without a doubt it indicates that a regional court mechanism for TCL crimes is an idea that is gaining momentum. Moreover, the energy behind the idea of adding treaty crimes to the jurisdiction of the ICC—or any future institution like it—seems to be spent, despite the mountains of ink spilled in support of the idea. This is quite sensible, given how expensive and top-heavy the ICC has shown itself to be, not to mention its inability to prosecute cases with anything like alacrity. A regional approach, focused on crimes of specific interest to the party states, may be easier to co-ordinate,⁴⁵ and moreover is more likely to address pressing problems being faced on a geographical basis, an issue to which we now turn.

The Needs of the Region

As noted above, the ICC itself came about because a coalition of Latin American states were convinced—as long ago as 1989—of the need for an independent, external and internationally-founded court in their region. Unsurprisingly, this need has not abated in the years since. Latin America arguably has become, in recent years, the most violent region in the world.⁴⁶ The UNHCR notes that gang conflicts in the “so-called” Northern Triangle of El Salvador, Guatemala, and Honduras have escalated the number of violent deaths in the region beyond what they were in the 1980s, when civil wars wracked these countries. Gangs like the Mara Salvatrucha (MS-13 in particular) and their rivals, Barrio 18, have used tactics of targeted killings and political corruption to gain de facto control of large sections of the region and have provoked a refugee crisis.⁴⁷

At the same time, a less violent, but equally insidious, brand of organized crime imported from Europe and China continues to subvert the governments of a number of Caribbean nations.⁴⁸ The initial movers for the ICC, Trinidad and Tobago, have seen transnational crime-

⁴³ Supra note 21. See Gerhard Worle & Moritz Vorumbaum, eds, *The African Criminal Court: A Commentary on the Malabo Protocol* (T.M.C. Asser Press, 2017); Charles Cherner Jalloh, “The Nature of Crimes in the African Criminal Court” (2017) 15 JICJ 799.

⁴⁴ Ibid, art. 28A.

⁴⁵ See *Report of the International Narcotics Control Board for 1996*, UN Doc E/INCB/1996/1 at para. 14.

⁴⁶ COPLA, “Latin American Court Against Organized Transnational Crime”, online: <http://www.coalicioncopla.org/wp-content/uploads/2017/03/ING-COPLA-difusi%C3%B3n-30-octubre-2.pdf>

⁴⁷ Tim MacGabhán “Gangs Menace Central Americans Seeking Refuge in Guatemala” *UNHCR* (1 July 2016) online: <http://www.unhcr.org/news/stories/2016/7/577395af4/gangs-menace-central-americans-seeking-refuge-guatemala.html>

⁴⁸ Miguel Goede, “Transnational Organized Crime (TOC) and the Relationship to Good Governance in the Caribbean” (2013) 12:3 *International Journal of Development Issues* 253-270

related violence skyrocket since the early '90s and a recent government inquiry concluded that “international organised crime is firmly entrenched” in that state.⁴⁹

The severity of the violence committed by Transnational Criminal Organizations in the region, paired with government complicity and inactivity in the area, has led critics to argue that many perpetrators could be prosecuted at the ICC for crimes against humanity, even under the current fairly restrictive definition of the offence.⁵⁰ Regardless of how these acts should be classified from a legal standpoint, given the severity of the situation it is easy to see the impetus behind the suggestion that some form of supranational solution to prosecuting these crimes is warranted—and indeed, the idea has continued to come up in the years since the initial Trinidad & Tobago proposal.⁵¹

This may, in fact, be one of the strengths of a regionalized model of transnational criminal prosecution. At the ICC negotiations it became difficult to convince states not faced with the danger of transnational crime overwhelming their polities to accede to surrendering their sovereignty in the way required by the ICC prosecution model.⁵² Given the realities faced by the Latin America-Caribbean region, however, COPLA is premised on the idea that the political will might be easier to muster. Even the proposed States Parties whose governments have not yet been destabilized by the effects of TOC and narcotics trafficking cite these crimes as the most serious challenges faced by their law enforcement agencies.⁵³ Equally, the majority of proposed States Parties are small states with limited international influence. Many have experienced the effects of invasive exercise of American hegemonic powers, incentivizing the creation of this type of alternative to the influence of larger states. These motivations had already brought many of the proposed States Parties to become involved in the original coalition of states pushing for the of treaty crimes at the ICC,⁵⁴ and explains why members of Democracia Global describe the reactions of support of officials from the proposed States Parties to COPLA as enthusiastic and universal.⁵⁵

Examining COPLA

⁴⁹ Report of the Commission of Inquiry Appointed to Enquire Into the Events Surrounding the Attempted Coup d'Etat of 27th July 1990 (13 March 2014), para 1.497, online: <http://www.ttparliament.org/documents/rptcoe1990.pdf>

⁵⁰ Salvador Cuenca, “Narcotráfico: ¿Un crimen de lesa humanidad en el estatuto de Roma de la Corte Penal Internacional?” (2013) 1 Anuario Ibero-Americano de Derecho Internacional Penal, ANIDIP 105, online <https://revistas.urosario.edu.co/index.php/anidip/article/view/286>; Heather L Kiefer “Just Say No: The Case Against Expanding the International Criminal Court’s Jurisdiction to Include Drug Trafficking” (2009) 31 Loy. L.A. Int’l & Comp. L. Rev. 157 at 167.

⁵¹ Boister, Treaty Crimes, supra note 6 at 359, fn 76.

⁵² Ibid at 351.

⁵³ Pedro Brieger, “La Propuesta inédita de la Corte Penal para UNASUR se consolidó en cinco años” (9 november 2016) NODAL (blog) online: <http://www.nodal.am/2016/11/la-propuesta-inedita-de-la-corte-penal-para-unasur-se-consolido-en-cinco-anos/>

⁵⁴ Kiefer, supra note 50 at 163.

⁵⁵ Maria Florencia Gor, “How to Build a World Community: A World Federalist Movement- Canada Podcast: COPLA 1” (Lecture delivered at the Faculty of Law McGill University September 2016) Online: < <https://soundcloud.com/monique-cuillerier>>

As noted above, COPLA is currently very much in the planning stages, and to the extent it is a formalized proposal it would be premature to try to assess it in any detail. However, using the English translation of the current draft Statute,⁵⁶ this section will review the major pillars of the current proposal and offer some specific and more general remarks.

“Leadership” Crimes and Substantive Jurisdiction

It is clear right away, in article 1 of the Draft Statute, that COPLA is not intended to be a forum for the prosecution of garden-variety or street-level crime—rather, “Its purpose shall be to investigate and prosecute the leaders and heads of criminal organizations responsible” for the crime within its jurisdiction, and in particular vis-à-vis, “organized criminal groups.”⁵⁷ This is a concept immediately familiar within the ICL field, often referred to as “leadership crimes” or the prosecution of “those most responsible.”⁵⁸ The latter phrase reflects a policy imperative that developed through prosecutorial strategizing at the ICC, the idea being that the resources of a large and expensive standing court should be utilized to prosecute those whose liability attaches most broadly to large-scale crimes, rather than lower-level perpetrators.⁵⁹

In the context of COPLA this takes on a different meaning, where the intention is to attempt to facilitate the breaking up of the leadership of the organized criminal gangs which bedevil the region—specifically, “those who direct, administer, organize or promote a transnational organized criminal group[.]”⁶⁰ This reflects the different needs sought to be served. Whereas one of the major goals of the ICC and other core crimes tribunals is to ensure accountability for mass crimes committed in the past, the prosecutorial direction of COPLA is at least equally intended to impair or even help to destroy the operation of existing organized crime groups, a point underscored by the intention of ordering confiscation of proceeds of crime.⁶¹ This is, unsurprisingly, commensurate with the goals of the UNTOC and its Protocols as well.

Article 5 sets out the substantive jurisdiction covered by COPLA: illicit trafficking of narcotics or psychotropic substances; manufacturing and/or illicit trafficking of firearms, their components, parts and ammunition; trafficking of persons; smuggling of migrants; trafficking of cultural property; money laundering; and transnational bribery. Each of these offences (with the exception, at the moment, of transnational bribery) is defined in Article 6, most with definitions that either are redolent of the relevant suppression conventions or invoke them via reference. For example, the definition of “trafficking of narcotics” uses some language from Article 3 of the Vienna Narcotics Convention,⁶² while the definitions of “firearm”, “trafficking of persons” and “smuggling of migrants” each refers to the relevant UNTOC Protocol.⁶³ The definition of “Illicit

⁵⁶ “Draft Statute of the Criminal Court for Latin America and the Caribbean against transnational organized crime,” attached as Appendix A [COPLA Draft Statute].

⁵⁷ COPLA Draft Statute, Article 1(2).

⁵⁸ See Cassandra Steer, *Translating Guilt: Identifying Leadership Liability for Mass Atrocity Crimes* (T.M.C. Asser Press, 2017), esp. c. 1, “The Problem of Liability in International Criminal Law”

⁵⁹ See International Criminal Court, “Office of the Prosecutor,” online: <https://www.icc-cpi.int/about/otp>

⁶⁰ COPLA Draft Statute, Article 5(1).

⁶¹ COPLA Draft Statute, Article 30(3).

⁶² COPLA Draft Statute, Article 6(3)(a).

⁶³ COPLA Draft Statute, Articles 6(b)-(d).

trafficking of cultural property” is essentially referred away to two relevant instruments,⁶⁴ while money laundering is fairly generically defined as the conversion, transfer, selling etc. of “assets of illicit origin from any of the crimes specified here in or the legislation of the States parties.”⁶⁵

Article 6 also contains definitions of “organized criminal group,” which draws on the language of the UNTOC, and criteria for a crime being “transnational” which uses three of the four criteria from Article 3 of UNTOC. The criterion left out is that in article 3(2)(c) of UNTOC, which includes as “transnational” a crime committed in one state but involves an organized criminal group that “engages in criminal activities in more than one state.” The overall suggestion, then, is that COPLA will only deal with crimes that occur in or affect more than one state.⁶⁶

Two points offer themselves for further development of these articles. First, read literally, article 5 would suggest that the only substantive crime over which COPLA will have jurisdiction is the direction, administering, organizing or promotion of “a transnational organized criminal group intended to commit” one of the defined crimes. Yet this is substantially narrower in scope than even the specific offence of “participation in an organized criminal group” required under Article 5 of UNTOC, and would miss the opportunity to also try any of the gang leaders for the predicate crimes themselves. This will likely be fleshed out in subsequent drafts of the statute.

Second, all of the listed crimes will require further development in terms of the elements required to be proven by the prosecution. The relevant suppression conventions are a starting point, but the definitions in those treaties are intended simply as a vehicle for agreement between the states parties on the overall attributes of the offences in question;⁶⁷ definition at the more granular level required for actual prosecution is accomplished via the domestic criminal laws of the parties. Each of the potential states parties to COPLA will have ratified the relevant conventions (or such ratifications will likely be a requirement for signing), but each will also have its own, local version of the offence. The solution may be to adopt a model similar to that in the Rome Statute, which was to set out for each crime an agreed-upon definition of the crime under international law, and leave the elements to be formulated in subsequent negotiations. Even this, however, will require further definitional development than is found in the current draft.

This latter point is worth attention. Criminal law at any level must operate on the principle of *nullem crimen sine lege*, i.e. a crime must be sufficiently defined in order to be the basis of legitimate criminal sanction. One of the main criticisms of including treaty crimes in the Rome Statute has been the fact that unlike the core crimes, which (with the exception of aggression) had well-developed definitions in customary international law, there is no such consensus regarding the treaty crimes. Suppression conventions require states to criminalize certain acts, but allow States Parties to define the limits of this criminalization; meaning that,

⁶⁴ The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 UNTS 231 (14 November 1970) (usually referred to as the “UNESCO Convention”), the UNIDROIT Convention for Stolen or Illicitly Exported Cultural Objects, 2421 UNTS 457 (24 June 1995).

⁶⁵ COPLA Draft Statute, Article 6(f).

⁶⁶ Personal communication from Maria Florencia Gor, 18 January 2018.

⁶⁷ Currie & Rikhof, *supra* note 5 at 329-330.

even for states which have signed the same suppression treaty, the definitions of the treaty crimes in national legislation may be diverse. In turn, while a crime may exist in many or most of the states over which the court has jurisdiction, there is not necessarily a consensus on the elements of the crime, their seriousness, or their breadth. While, as noted, this will need to be massaged in formulating the elements of the crimes, an apparent strength of the COPLA proposal is that the Court is meant to create a notion of regional criminal responsibility over a set of crimes, and to assert jurisdiction over these crimes based on a restricted and principled delegation of authority to do so by the states party to the court.

Referrals and Complementarity

The intention of the draft statute is clearly to establish a standing, permanent court to adjudicate crimes arising in, and referred from, the party states. In terms of cases coming before the court, Article 9 says quite simply that “The States Parties hereto accept the jurisdiction of the Court for the crimes specified herein,” which suggests a fairly broad independence on the Court’s part in terms of cases over which it exercises jurisdiction. Article 20, setting out the powers of the Prosecutor, states that the Prosecutor will receive referrals regarding crimes which could become cases before the court, but with no indication as to an actual referral process or whether the Prosecutor is to have any *proprio motu* power to select cases. Article 20(1) does seem clear, however, that the Prosecutor is meant to “act independently” and has the power to decide whether to “move forward with an investigation and prosecution.” It states explicitly that the Prosecutor “will neither request nor comply with instructions from outside the Court.” There is as yet no system of close supervision of the Prosecutor’s activities by the Court itself, a feature of the Rome Statute.⁶⁸

COPLA does not appear to be intended as a court which has primacy of jurisdiction, as did the ICTY and ICTR due to their status as arms of the UN Security Council. Rather, Article 1(2) provides that COPLA will be “complementary to the national systems of criminal justice” which will be “authorized to exercise its jurisdiction over ... cases that the national systems of justice are unwilling or unable to try.” All of this language recalls the complementarity scheme under Article 17 of the Rome Statute, and indeed Article 10 (entitled “Questions of Admissibility”) is quite similar in scope. It suggests that “the Court” will determine the admissibility of individual cases, considering whether a case has not been investigated or tried by a state with jurisdiction but which is “unwilling or unable to do so.”⁶⁹ Also relevant to the Court’s determination of admissibility are whether the accused is the subject of an international arrest order (presumably an INTERPOL Red Notice) which has gone six months without an arrest,⁷⁰ and whether a state party with jurisdiction over “the case” has issued an acquittal that the Court holds to be *res judicata irritata*—i.e. the Court determines that the acquittal in a particular case was invalid.⁷¹

⁶⁸ Rome Statute, *supra* note 1, Article 15.

⁶⁹ COPLA Draft Statute, Article 10(1)(a).

⁷⁰ COPLA Draft Statute, Article 10(1)(b).

⁷¹ COPLA Draft Statute, Article 10(1)(c).

All of this remains to be substantiated in future drafting, but the policy suggestion is one of complementarity as a starting point but with a fairly robust ability of COPLA to assume jurisdiction in appropriate cases, as well as competence to determine when it is legally appropriate to do so. This makes sense in the context of a region where the problems of organized crime gangs compromising the functioning of domestic criminal law systems is well-known, which is in fact a motivator for the creation of the court itself. Indeed, this is analogous to the rationale behind the ICC's scheme, which explicitly anticipated that a mechanism would be needed to deal with states which were somehow shielding perpetrators.⁷² Nonetheless, it seems logical that this may very well put the court on a collision course with some state governments, particularly those which are subject to the influence of criminal organizations in some way, whether via collusion or intimidation. As the ICC's forays into complementarity tangles with states has shown,⁷³ this might be tricky ground to navigate, but is essential if the court to fulfil the mandate currently proposed for it.

Cooperation and Investigation

The machinery for Court-state cooperation is in fairly skeletal form in Part XIII of the current draft. Article 35 provides that state parties "will cooperate fully with the Court in relation to the investigation and prosecution of crimes in the jurisdiction of the Court, in accordance with the Inter-American Convention on Mutual Assistance in Criminal Matters." This appears to incorporate by reference the modalities of cooperation contained within the Inter-American Convention,⁷⁴ a measure no doubt made necessary by the fact that a number of states anticipated as possible members of the Court (e.g. Belize, St. Kitts & Nevis) are not parties to the Convention. This will doubtless receive some amplification since the Convention itself is designed for government-to-government cooperation and not all of its machinery will necessarily translate to the state-Court axis. Article 36 contains definitions of "surrender" and "extradition" which appear to anticipate future articles concerning the transfer of accused or convicted persons from states to the Court, or between states, though nothing further on the subject appears.

The language in Part XIII appears to anticipate that as well as prosecuting cases, the Court will have some kind of active role in investigating them, and as noted above Article 35 binds states to cooperate in whatever form these investigations take. There is no indication as yet that the Court will be given independent jurisdiction to investigate cases on the territories of state parties, an exceptional power which is provided under the Rome Statute.⁷⁵ The Coalicion COPLA's promotional material indicates that a possible role of the Court could be to "help with judicial and police cooperation among member countries,"⁷⁶ which does not suggest independent investigation. Article 37 provides that states will create "special group[s]" within their domestic security forces to enforce decisions and orders of the Court, and Article 30(3)(b) anticipates the Court submitting requests for confiscation of proceeds of crime to state courts. All of this

⁷² Currie & Rikhof, *supra* note 5 at 207-210.

⁷³ For example, the Kenya situation; see Charles Cherner Jalloh, "Kenya vs the ICC Prosecutor" (2012) 53 *Harv Int'l Law J* 269.

⁷⁴ OAS Treaty Series No. 75 (23 May 1992).

⁷⁵ Rome Statute, *supra* note 1, Article 57(3)(d).

⁷⁶ <http://www.coalicioncopla.org/en/what-is-copla/>

suggests a protective attitude towards state sovereignty over criminal law matters, even in cases where the Court is active.

That said, Article 37 *bis* presents the possibility of an intriguing further development in Court-state cooperation, as it anticipates the creation (by way of an Additional Protocol) of a Regional Intelligence Agency which will coordinate the sharing of information and intelligence between and among states parties. More is said on this below.

COPLA: A Transnational Regulator in a ‘Sieberian’ Global Order?

In a far-reaching 2010 paper,⁷⁷ Ulrich Sieber distinguishes a number of models for approaching the creation and enforcement of transnational law (i.e. the law which attempts to regulate transnational actors and activities), and decision-making. He sets out the advantages and disadvantages of each model and evaluates their comparative effectiveness and democratic legitimacy. He further outlines how to optimize each approach in order to mitigate these weaknesses. Because of both its breadth and its focus on highlighting solutions which prioritize the needs of affected parties, this paper provides a useful framework for reviewing the quality of the COPLA proposal as a supranational regulator in a highly globalized order. In particular, Sieber’s analysis of the national cooperation and supranational models are useful when discussing COPLA from this perspective.

National Cooperation Model

It is perhaps tempting to overlook the importance of the national cooperation aspect of transnational law when reflecting on COPLA. The project is billed, after all, as a regional criminal court designed to take the stress off overwhelmed national legal systems. However, because COPLA incorporates the requirement of complementarity, the majority of cases will continue to be heard at the national level where the *de facto* regime of interstate cooperation in enforcing suppression treaties continues. That said, it in the transnational domain where COPLA proposes some of its most nebulous and wide ranging changes to the existing system.

Sieber defines his view of effective cooperation solutions as those which streamline the ability of states to have their decisions recognized by other courts.⁷⁸ The COPLA proposal, on the other hand, does nothing in the way of explicitly adding to the obligations of states to recognize each other’s decisions. For the most part, the conventions on which the court bases its jurisdiction already provide for broad and obligatory mutual legal assistance, as well as requirements to honour requests for the seizure or confiscation of assets. Instead, COPLA makes a daring proposal aimed at facilitating these underlying obligations to cooperate and recognize the judgments of other states. As noted above, it proposes the creation of a centralized *Regional Intelligence Agency*, which has the potential to significantly streamline the process of mutual assistance.

⁷⁷ Ulrich Sieber, “Legal Order in a Global World: The Development of a Fragmented System of National, International and Private Norms” (2010) 14 Max Planck Yearbook of United Nations Law 1 [Sieber].

⁷⁸ *Ibid* at 34-36.

The intended scope of this proposed agency is unclear, as the draft treaty itself leaves the exact parameters of the agency's powers to the imagination of future negotiators. This has led some more sensationalist interpreters to suggest that the agency will take the form of a "Latino FBI."⁷⁹ As thrilling as the prospect of teams of *Hombres G* kicking down doors throughout the region might sound, this is an overstatement of what is actually intended. Instead, the agency appears to be more of a clearing house for intelligence, requests for mutual legal assistance, and the enforcement of confiscation orders.

While such a body might not seem revolutionary (it is not unlike EUROPOL, for example), it has great potential to strengthen the effectiveness of enforcement as a whole. By centralizing the proliferation of requests for assistance/enforcement and removing them from the more general Mutual Legal Assistance process, this could increase both the breadth and speed of mutual assistance generally. This is particularly promising when considering the emphasis COPLA puts on the confiscation of TOC assets for the purpose of dismantling and weakening criminal organizations.⁸⁰

The *Regional Intelligence Agency*, then, has the potential to allow a single state to issue a request for confiscation analogous to those under article 13 of the UNTOC, or article 5 (4)(a) of the Vienna Narcotics Convention which could be quickly and widely enforced, leaving no time for targeted organizations to effectively protect their assets. Just as multinational businesses follow the incentives of tax breaks and cheap labour, TOC organizations, facing hostile conditions in one region, decamp for more hospitable climes. By facilitating quick and coordinated action across the region, COPLA's *Regional Intelligence Agency* may help in ensuring that when a state strikes against a criminal organization it will not be able to gain a foothold to re-establish elsewhere easily.

This being said, an increase in effectiveness of interstate enforceability of judgements could have dangerous consequences in the context of a region where many countries suffer from a deficit in the rule of law. The UNODC's 2012 threat assessment of transnational organized crime in Central America and the Caribbean notes that much of the recent increase in violence in the northern triangle region of Central America can be traced to greater enforcement in Mexico which forced TOC out of that country and further into states with weaker rule of law. There, the incoming organizations clashed with local groups for control of territory leading to more violence and greater destabilization within the state.⁸¹ If the efficiency of widespread cross border investigation and asset seizure were to be increased without planning, a similar phenomenon could occur. By increasing the ability for co-ordinated enforcement of seizures and arrests, pressure will increase on TOC throughout the region. The only states which will remain safe for TOC groups will be those unable to enforce these coordinated requests for aid. This has the potential to further incentivize TOC groups to move into these states and exacerbate the violence and confrontation there.

⁷⁹ "En camino hacia una novedosa Corte Penal Latinoamericana" (25 november 2016) *Voces por la Justicia* (blog) online: <http://www.vocesporlajusticia.gob.ar/hacia-una-corte-penal-latinoamericana/>

⁸⁰ "What is COPLA?", supra note 11.

⁸¹ UNODC, *Transnational Organized Crime in Central America and The Caribbean: A Threat Assessment* (Vienna: UN, 2012) at 5

COPLA's proposal for cooperation run through a centralized body leaves the potential not only for more efficient, but also more strategically effective cooperation. A centralized body would potentially have the ability to monitor investigations across the regions and make recommendations about how best to coordinate enforcement to emphasize restraint and burden sharing, so that disparate enforcement does not lead to more violence in affected regions. Such a project would require significant centralization of information, and compliance by States Parties which is far beyond the scope of tentative proposal in article 37 of the current draft statute.

The Supranational Model

Despite the possible implications for interstate cooperation, the COPLA proposal is undeniably a document focussed primarily on exploring the potential of a supranational approach to the enforcement of TCL. The challenges for supranational approaches to transnational law-making are the perfect inverse of those which plague the cooperation model.

While the cooperation approach struggles to develop methods for ensuring that the legitimately-made decisions of sovereign states are accepted and facilitated by their peers,⁸² the supranational model circumvents this issue through top down decision making that effects the legal obligations of a group of states. In Sieber's view, however, what this model gains in efficiency and unity of action, it gives up in effectiveness and legitimacy.⁸³ Because supranational institutions are a step removed from both the enforcement powers of their constituent states and the governing institutions which legitimize the use of these powers, they must work to ensure firstly, that their decisions will be enforceable and secondly, that their decisions are sufficiently reflective of the will of these states to encourage them to continue to comply with this enforcement regime.

To ensure enforcement, COPLA employs two distinctly effective methods which correspond with those identified by Sieber, to approximate the coercive power of a state and to ensure compliance. Firstly, it relies on the security and law enforcement bodies of the individual states to enforce their decisions. COPLA proposes a particularly robust version of this approach of enforcement, mandating in Article 37 the creation of divisions within the security forces of each state to carry out orders of the court. From the text of Article 37, these enforcement divisions would seem to remain under the direct control of the individual states, but would be devoted primarily to the quick and effective execution of court decisions. It is easy to be skeptical about the viability of this clause, in that it appears to envision a significant surrender of state enforcement power directly to the Court, and because it envisions a court whose activities are so numerous as to require the maintenance of its own security division on standby in each state. Ultimately, though, it is an ambitious position from which to start the discussion around meaningful enforcement and it demonstrates a concern for making the court an effective supranational institution.

Second, in addition to any hard power it might exercise through the proxy of state law

⁸² Sieber, supra note 77 at 34-35.

⁸³ Ibid at 36-39.

enforcement, the COPLA proposal would provide the Court's institutions with a certain amount of soft power. As described in Article 20 of the draft statute, the Prosecutor of the court would, like the Prosecutor of the ICC, act independently to carry out investigations and bring charges against individuals. This power to initiate investigations, which inevitably brings scrutiny on states for their inaction or complicity, operates somewhat like the "naming and shaming" procedures employed by certain supranational organizations.⁸⁴ Depending on how the Prosecutor's powers take shape in future drafts, this power could allow the Prosecutor to quickly and flexibly call states to task for their failure to enforce norms, without requiring the engagement of a slow or involved decision-making process towards more formal binding legal orders or conventional coercive power.

These combined measures would entrust the court with fairly significant normative power. But in order to ensure continued cooperation of local enforcement agencies to carry out these orders, and for these agencies to feel compelled to react to the soft power of the prosecutor's office, the court requires legitimacy.⁸⁵ Sieber links legitimacy to two types of institutional feature - democratic control and respect for state sovereignty.⁸⁶ COPLA incorporates elements of both of these approaches in its proposal at every decision making step.

Sieber gives, as an example of a high standard for legitimizing super national legal decision making, the treaty of Lisbon, which sets out the constitutional structure of decision making at the EU,⁸⁷ and which requires several phases of parliamentary approval to legitimize decision making. As a court, which, by its nature is not a legislative body and is independent from parliamentary approval, COPLA has limited recourse to the parliamentary model of legitimation. This being said, the COPLA proposal suggests employing a broad array of procedures to ensure both democratic oversight and diverse geographic representation in decision-making. The court would be overseen, for instance, by an assembly of representatives from the each of the States Parties, who elect a board of 21 members (18 members at large, two vice presidents and a president).⁸⁸ The assembly would oversee the court, set the budget, establish subsidiary bodies, determine the composition of the court, and would be ultimately responsible for administration.

Judges would be elected by the assembly, with each state party nominating a candidate. The Prosecutor would be elected by the assembly, though the prosecutor's office would be composed of representatives from each state. A secretary would also be chosen by the president of the board based on the recommendation of the assembly. Unlike the ICC, the COPLA proposal also mandates the creation of a Defense Branch, whose composition would be decided by election.⁸⁹ Moreover, COPLA supplements these governance mechanisms with principles

⁸⁴ Ibid at 38

⁸⁵ Ibid at 32

⁸⁶ Ibid at 36-39

⁸⁷ Ibid

⁸⁸ COPLA Draft Statute, Article 24.

⁸⁹ COPLA Draft Statute, Article 21.

drawn from principles on which most national courts base their legitimacy, such as the open court (article 20(10)), and rights of appeal (article 15) inter alia.⁹⁰

Where parliamentary decision-making is impossible, Sieber notes that a viable alternative is to ensure that the supranational bodies' decision making powers are as limited and un-invasive as possible.⁹¹ COPLA achieves this goal through the strict requirement of complementarity, its limited jurisdiction to make decisions, and its reliance on state aid to carry out its decisions. These restrictions would allow COPLA to minimize criticism when it is forced to make decisions which are not subject to direct democratic approval.

Using the Regional Model as a Catalyst for Ordered Pluralism

Beyond the question of whether COPLA builds an institution whose decisions can be effectively enforced with a semblance of legitimacy lies the more fundamental consideration of whose interests will be served by this institution. A persistent problem in the development of TCL has been a democratic deficit which lies at the heart of the process by which suppression treaties are created.⁹² While, on its face the, the process of treaty formation is seen as an agreement between nominally equal states, reflecting the interests of all parties, in reality the power and influence of individual states varies wildly. As a result, when treaties are negotiated, it is often entirely on the initiative and terms of the most powerful states, who create treaties that serve their interests at the expense of others.⁹³

In some iterations the TCL treaty making process, rather than representing a good faith democratic effort to combat the struggles of all affected states, is instead an exercise in expanding the hegemony of powerful states. In the trafficking context, for instance, this hegemonic influence has often manifested itself as a program which serves the interests of enforcement in richer consumer state, with tragic consequences for poorer producer states. Powerful states demand strict suppression on the supply side with little effective action in moderating demand, forcing poorer, weaker states into violent confrontations with producers inside within their borders, overburdening their enforcement powers and leading to situations like that in Latin America today.⁹⁴ The truly innovative feature of COPLA as an instrument of TCL is how it disrupts the destructive status quo of the suppression treaties on which it is based, by allowing states to more easily live up to their obligations under these treaties while prioritizing the interests of States Parties, rather than those of a distant hegemon.

The French legal scholar Mireille Delmas-Marty suggests that, in order to correct the

⁹⁰ Though at the moment, Article 15 simply provides that there will be an Appeals Division of the Court; the draft does not speak to a substantive right of appeal or any procedural mechanisms.

⁹¹ Sieber supra note 77 at 38.

⁹² See generally Steven Wheatley, "A Democratic Rule of International Law" (2011) 22 EJIL 525.

⁹³ For example, the U.S. has been a particularly powerful driver of the transnational anti-narcotics regime, which has had deleterious effects on supplier states; see Peter Andreas & Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford: OUP, 2006), chapter 3.

⁹⁴ Boister, "Further reflections," supra note 29 at 27-28. And see C. Clifton Leacock, QC, "Internationalization of Crime" (2001-2002) 34 New York Univ J Int'l Law & Politics 263.

destructive tendencies of the current suppression treaty model, while ensuring the development of law which addresses transnational criminal concerns, we must aim to create a system of “ordered pluralism”⁹⁵ which balances the inevitable influence of powerful states and international obligation with “an authentic margin of national appreciation”.⁹⁶ To achieve this, she suggests that the norms underlying the suppression treaty process must be rewritten. Rather than allowing powerful states to calque their law into transnational obligations, Delmas-Marty suggest to undertake a Chomskian project to uncover a universal grammar of international principles to govern suppression treaties.⁹⁷

This new grammar would set broad obligations of enforcement and cooperation but allow states to implement them on their own terms. Such an approach would need to be outcomes based, and open to re-evaluating existing strategies. It would also need to be freed from the tacit imposition of (mainly) common law principles of law and culpability, so as to be adaptable to local regimes. The system should also provide for a more flexible system of interstate cooperation, allowing for state adjustment and, finally, a stronger appreciation of human rights.⁹⁸

As a body which is predicated entirely on pre-existing suppression treaties, COPLA is evidently incapable of achieving all of these objectives. On the other hand, the project’s structure and stated goals provide an example of how regional organizations might function as an intermediary solution to gain a measure of national appreciation under treaties by which they are already bound. Through political unity, and the creation of a bulwark against tools of compulsory enforcement such as forced extradition, the COPLA proposal is able to add texture to the TOC suppression regime, refocussing the effort on an outcomes-based approach, allowing for a re-evaluation of previous approaches, nuancing the cooperation regime.

A notable feature of the COPLA campaign, in all of its preliminary statements, has been the de-emphasizing of the importance of actually suppressing the commission of Treaty Crimes.⁹⁹ Instead, COPLA’s preparatory materials focus on achieving the goal of dismantling organizations which, through the profits of transnational criminal activity, have become powerful enough to threaten the rule of law. The UN General Assembly Resolution¹⁰⁰ that adopted the UNTOC makes no mention of the role of TOC in corroding rule of law and promoting violence. While the Vienna Convention does mention the potential for trade in illicit substances to “generat(e) large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society”, this is clearly subordinate to the desire to suppress consumption in consumer states on the grounds that these constitute a moral and health concern.¹⁰¹ As noted above, simple enforcement against street level criminals has only resulted in increased conflict and violence, which has forced groups to relocate but has done nothing to alleviate the problem.

⁹⁵ Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, trans Naomi Norberg (Hart, 2009) at 107, as cited in Boister, *ibid.* at 29.

⁹⁶ Boister, *ibid.* at 28.

⁹⁷ Delmas-Marty, *supra* note 95 at 75, as cited in Boister, *ibid.* at 29.

⁹⁸ *Ibid.*

⁹⁹ “What is COPLA?”, *supra* note 11.

¹⁰⁰ UNGA Res 55/25 (15 November 2000).

¹⁰¹ Vienna Convention, *above* note 27, Preamble.

COPLA could provide for a re-evaluation of the existing model. In perfect contrast to the suppression treaties it enforces, the project's preparatory documents have little to say about the motivations for criminalizing the trafficking and production of illicit goods; instead they speak at length about the need to respond to the violent and destabilizing effects of the groups who engage in them.¹⁰² Rather than valorizing street level confrontations, which do little to weaken the drug trade, they outline a new strategy for enforcement which focuses on a top down deconstruction of criminal organizations. This strategy aims to deprive TOC groups of the organizational structures and resources which allow them to function.¹⁰³ This philosophy is instantiated in the draft statute, which gives jurisdiction only over those who organize or incite the trade for their profit, thus removing street level producers and traffickers from the ambit of the court.¹⁰⁴ Though the statute does nothing to relieve states of their duties to enforce under the old treaty, it challenges the status quo of enforcement against low level criminals, instead significantly increasing capacity to effectively investigate and prosecute perpetrators from higher echelons of TOC groups, facilitating changes of strategy at the national level as well.

By taking these steps, COPLA has effectively jury-rigged a method for allowing states to re-evaluate their approach to treaty crime enforcement to better serve regional needs. In this way, COPLA injects a measure of regional, if not national, appreciation into the existing system and moves the regime somewhat closer to the ideal of ordered pluralism. In particular, the project makes inroads toward the goals of ordered pluralism in the domain of enforcement. While the draft statute does not entirely abandon the model of coordination and cooperation as a primary method of enforcement, as I have noted above the proposed Regional Intelligence Agency presents a potential forum to formulate ongoing recommendations for how to meet these obligations and at the same time providing leeway for a bespoke approach to implementation.

Finally, it is worth noting that any fulsome notion of ordered pluralism should include within its ambit protection of the human rights of the accused person. The TCL regime, focused as it is on prosecution and enforcement, contains significant gaps in terms of the application and implementation of human rights protection within the cooperation process, in particular.¹⁰⁵ There are many cracks for people being investigated and prosecuted to fall through. The Rome Statute contains substantial human rights protections for accused persons, though mostly at the trial level. There is significant potential for COPLA to plug some of the gaps and provide an ordered model of transnational criminal process that upholds human rights protections and thus strengthens, however indirectly, the legitimacy of the TCL system. In our view, this possibility is worth exploring as the drafting moves forward.

Conclusion

¹⁰² "What is COPLA?", supra note 11.

¹⁰³ Ibid.

¹⁰⁴ COPLA Draft Statute, Articles 1, 5.

¹⁰⁵ On this see Robert J. Currie, "The Protection of Human Rights in the Suppression of Transnational Crime" in Boister & Currie, supra note 24 at 27.

As noted at the outset, the objective of this article was to introduce and evaluate the proposal for the creation of COPLA at a primarily conceptual level. Given the preliminary nature of the current draft we are still, as the saying goes, taking a view from 30,000 feet. There is little doubt that as currently envisioned, COPLA would play a unique role within the overall system of suppression of transnational crime, and in particular that like the Malabo Protocol it might introduce institutional and normative support for this mission on a geographic basis. As political momentum appears to be gathering, this development is worth watching.

**APPENDIX A: Draft Statute of the Criminal Court for Latin America and the Caribbean
against transnational organized crime**

December 2017

*Possible member countries: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

Table of Contents

PART I. ESTABLISHING THE COURT	3
PART II. COMPETENCE, ADMISSIBILITY AND APPLICABLE LAW	5
PART III. COMPOSITION AND ADMINISTRATION OF THE COURT	10
PART IV. VICTIMS AND THEIR RIGHTS	12
PART V. COMPOSITION AND ADMINISTRATION OF THE PROSECUTION	13
PART VI. COMPOSITION AND ADMINISTRATION OF THE DEFENCE	15
PART VII. COMPOSITION AND ADMINISTRATION OF THE SECRETARIAT	16
PART VIII. COMPOSITION AND ADMINISTRATION OF THE STAFF	17
PART IX. ASSEMBLY OF STATES PARTIES	18
PART X. COMMON PROVISIONS FOR ALL ORGANS, PARTIES, WITNESSES, VICTIMS AND COMPLAINANT ORGANIZATIONS	20
PART XI. RIGHTS OF THE ACCUSED	22
PART XII. PENALTIES	24
PART XIII. INTERNATIONAL COOPERATION, JUDICIAL ASSISTANCE AND SECURITY FORCES	26
PART XIV. EXECUTION OF THE PENALTIES	27
PART XV. AMENDMENTS AND TRANSITIONAL PROVISIONS	29
PART XVI. FINAL PROVISIONS	31
PART XVII. AUTHENTIC TEXTS	32

PART I. ESTABLISHING THE COURT

Article 1 – Principles, Definitions and Purposes

1. This international treaty establishes the Criminal Court for Latin America and the Caribbean against transnational organized crime, hereinafter “the Court.”
2. The Court shall be a permanent institution, complementary to the national systems of criminal justice. Its purpose shall be to investigate and prosecute the leaders and heads of criminal organizations responsible for committing the crimes indicated herein and in the United Nations Convention Against Transnational Organized Crime and their attached protocols (Palermo Convention, 2000), in accordance with the mechanisms established herein.

For these purposes, the Court will be authorized to exercise its jurisdiction over persons for acts that constitute a transnational crime committed by organized criminal groups in cases that the national systems of justice are unwilling or unable to try.

Article 2 – Independence of the Court and Relationship with Other International and Regional Organizations

1. The Court will be independent of any pre-existing international or regional organization and of any that may be created in the future. It may cooperate with them through an agreement that must be approved by the Assembly of States Parties (ASP) using the mechanisms established herein.
2. Nothing herein shall be interpreted in a way that in any manner limits or diminishes existing or developing standards of international law for purposes other than this Statute.

Article 3 - Seat of the Court

1. The Court will sit in the territory of one of the States Parties, the location to be determined during the first session of the Assembly of States Parties.
2. The Court will conclude with the host State an agreement regarding both the establishment and proper functioning of the headquarters, as well as diplomatic immunities indicated herein. The host State will be responsible for ensuring the security of the members, officials and others involved in the cases under the Court's jurisdiction, as well as the security of the diplomatic seat of the Court, as established in this statute.
3. The Court may sit elsewhere if it sees fit, in accordance with the terms hereof.

Article 4 – Legal Status and Powers of the Court

1. The Court will have international legal status and the necessary legal capacity for the fulfilment of its purposes and the performance of its duties.
2. The Court may exercise its duties and powers in accordance with the terms hereof in the territory of any State Party and, by special agreement, in the territory of any other State that so requests.

PART II. COMPETENCE, ADMISSIBILITY AND APPLICABLE LAW

Article 5 - Crimes within the jurisdiction of the Court

1. The Court will be competent to judge those who direct, administer, organize or promote a transnational organized criminal group intended to commit any of the following crimes:

- a) Illicit trafficking of narcotics or psychotropic substances
- b) Manufacture and/or illicit trafficking of firearms, their components, parts and ammunition
- c) Trafficking of persons
- d) Smuggling of migrants
- e) Trafficking of cultural property
- f) Money laundering
- g) Transnational bribery

2. The Assembly of States Parties, by a majority of two thirds of its members, may extend the jurisdiction of the Court to additional crimes, and must consider any further crime added to the Palermo Convention at the first session of the ASP following the adoption of said new crime.

3. For the crimes included in paragraph 1 of this article, the Court may impose a penalty of 4 to 30 years of imprisonment, plus the accessory penalties stipulated herein.

Article 6 – Definitions

1. “Organized criminal group” means a structured group of three or more persons, existing for a period of time, and acting in concert with the aim of committing one or more crimes specified herein, in order to obtain, directly or indirectly, a financial or other material benefit.

2. The crime will be considered transnational if:

- a) It is committed in more than one State;
- b) It is committed within one State but a substantial part of its execution, direction or control is carried out in another State or States;
- c) It is committed in one State but has substantial effects in another State or States, or the proceeds of the crime are used in another State or States.

3. a) “Trafficking of narcotics” means the production, manufacture, extraction, preparation, supply, distribution, sale, delivery in any condition, brokerage, shipment, shipment in transit, transport, importation, exportation or financing of operations concerning any of the above for any narcotic or psychotropic substance, contrary to current international law.
- b) “Firearm” means any weapon covered in the Protocol against the illicit manufacture and trafficking of firearms, their parts and components and ammunition, as a supplement to the United Nations Convention against transnational organized crime.
- c) “Trafficking of persons” means the capture, transport, transfer, taking or receiving of persons by means of the threat or use of force or other forms of coercion, abduction, fraud, deceit, abuse of power or of a situation of vulnerability, the granting or receiving of payments or benefits to obtain the consent of a person who has authority over another for the purposes of exploitation, or the financing of operations concerning the above. It will at least include the exploitation of the prostitution of others and any other form of sexual exploitation, forced labor or services, slavery and similar practices, servitude and the extraction of organs, under the Protocol to Prevent, Suppress and Punish the Trafficking of Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.
- d) “Smuggling of migrants” means facilitating the illegal entry of a person to a State Party of which he or she is not a national or resident, for the purpose of obtaining, directly or indirectly, a financial or other material benefit, as established in the Protocol against the Illicit Trafficking of Migrants by Land, Sea and Air, which is a supplement to the United Nations Convention against Transnational Organized Crime.
- e) “Illicit trafficking of cultural property” means the importation, exportation or transfer of ownership of cultural property, in violation of the provisions adopted by the States Parties under the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the UNIDROIT Convention for Stolen or Illicitly Exported Cultural Objects, and the Convention on Measures to Prohibit and Impede the Illicit Importation, Exportation and Transfer of Ownership of Cultural Property.
- f) ‘Money laundering’ means the process by which the assets of illicit origin from any of the crimes specified herein or in the legislation of the States Parties, understood as the previous crime, enter the legal economic system as having been obtained lawfully, whether by converting, transferring, administering, selling, taxing, simulating or in any other way putting the goods on the market, provided that they are worth more than ten million U.S. dollars (US\$10,000,000) or the equivalent, whether in a single or successive acts.

If the above-mentioned crime is subject to a final sentence in one of the States Parties, it will be considered to have been committed in both States when the one in which the money laundering operation as defined in the United Nations Convention against Corruption took place is a State other than the one in which the crime was first committed.

Article 7- Temporal Jurisdiction

1. The Court will only have jurisdiction over crimes committed after the entry into force of this Statute.
2. For States that join subsequently, the Court will exercise its jurisdiction only for crimes committed after this Statute comes into force for that State.

Article 8 - Personal Jurisdiction

The Court will have jurisdiction only over persons who were at least eighteen (18) years old at the time of the alleged commission of a crime.

Article 9 – Prerequisites for the Exercise of Jurisdiction

1. The States Parties hereto accept the jurisdiction of the Court for the crimes specified herein.
2. States that are not parties hereto and request the Court to intervene must deposit their request with the Secretary of the Court, and consent to having the Court exercise its jurisdiction for the crime in question. The accepting State will cooperate with the Court without delay or exception, as provided herein.

Article 10 - Questions of Admissibility

1. Keeping in mind article 1, the Court will determine the admissibility of a case on the basis of the following:
 - a. The case has not been investigated or tried by a State that has jurisdiction over it, because it was unwilling or unable to do so.
 - b. The accused was subject to an international arrest order and at least six months passed without the execution of his arrest.
 - c. The State party with jurisdiction over the case issued a final acquittal that is interpreted by the Court as an invalid *res judicata*.
 - d. The case has not previously been nor is currently subject to an investigation or trial by an international or regional tribunal.
2. In the cases mentioned above, in order to determine the inability or failure to decide to investigate or try a particular case, the Court will consider whether the State in question, owing

to a total or substantial collapse of its national judicial system or to a lack thereof, is unable or unwilling to try the accused, but has the necessary evidence and testimony and/or to conduct the trial for any other reason of fact or law.

Article 11 – Statutory Limitations

1. The States Parties commit to amend their national constitutions so that the crimes under the jurisdiction of the Court are not subject to any statute of limitations.
2. Once all the States Parties have made these amendments, the crimes under the jurisdiction of the Court will not be subject to any statute of limitations.

Article 12 – Intent

1. Unless provided otherwise, a person will be criminally responsible and may be punished for a crime in the jurisdiction of the Court only if the material elements of the crime were committed intentionally and with knowledge of the material elements of the crime.
2. For the purposes of this article, an act is deemed intentional if:
 - a. The person in question meant to do it;
 - b. The consequence was intended, or the person in question was aware of what would happen in the normal course of events.
3. For the purposes of this article, “knowledge” means awareness of a particular circumstance or that a consequence would occur in the normal course of events. The terms “knowingly” and “with knowledge” have the same meaning.

Article 13 - Circumstances Exempting Persons from Criminal Liability

1. Without prejudice to the other exculpatory circumstances established herein, no person will be criminally responsible who, at the time of the action in question:
 - a. Had a mental illness or deficiency that made him or her unable to appreciate the illegality or nature of his or her conduct, or limited his or her ability to control his or her conduct so as not to break the law;

- b. Was in a state of intoxication that deprived him of the ability to appreciate the illegality or nature of his conduct, or limited his ability to control his conduct so as not to break the law, unless he was intoxicated voluntarily, knowing that, as a result of being intoxicated, he would probably engage in conduct deemed to be a crime in the jurisdiction of the Court, or overlook the risk of that occurring;
- c. Was acting reasonably in his own or another person's defence or to protect property that was essential for his own or another person's survival from the imminent use of illicit force, such actions being in proportion to the degree of danger for him, the other person or the property being protected. Using force in an act of defence is not sufficient to exempt an individual from criminal liability under this paragraph;
- d. Engaged in conduct that would presumably be a crime under the jurisdiction of the Court as a consequence of coercion arising from a threat of imminent death or continued or imminent serious bodily harm for him or another person, and was compelled to act in a necessary and reasonable way to avoid that threat, provided that he did not intend to cause greater harm than the harm he was trying to avoid. That threat may:
 - d.i. Have been made by other persons, or
 - d.ii. Have arisen from circumstances beyond his control.

- 2. The Court will determine if the exculpatory circumstances admitted hereunder apply in the particular case.

Article 14 - Error in Fact or Error in Law

- 1. Errors of fact are exculpatory only if they remove the intent required for the crime.
- 2. Errors of law concerning whether a particular type of conduct constitutes a crime in the jurisdiction of the Court are not considered exculpatory. However, an error of law may be considered exculpatory if it was inevitable.

PART III. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 15 - Organs of the Court

The Court will consist of the following organs: the Presidency; an Appeals Division, a Trial Division, and a Pre- Trial Division;; the Prosecution; the Defence; the Secretariat. Equitable representation of both genders will apply for all positions not subject to election by the States Parties.

Article 16 - Performance of the Duties of Magistrates

1. The magistrates on the Court will be chosen to work exclusively in this position and will be available to perform their duties as soon as their term begins.
2. The magistrates who constitute the Presidency will perform their duties exclusively as soon as they are elected.
3. Depending on the volume of work of the Court, and in consultation with its members, the Presidency may decide how much time will be necessary for the other magistrates and officials to perform their duties exclusively.

Article 17 - Selection of Magistrates

1. Each State Party must nominate a judge as a member of the Court. In appointing judges, it must follow the procedure provided for appointing members of its supreme court.
2. The judge proposed will join the Court upon approval by a simple majority of the Assembly of States Parties.
3. Judges will hold their position for seven years, and may not be re-elected.

Article 18 - Independence of Magistrates

1. Magistrates will be independent in performing their duties.
2. Magistrates will not carry on any activity that may be incompatible with the exercise of their judicial duties or undermine confidence in their independence.

3. Magistrates who are required to perform their duties exclusively at the Court cannot hold any other professional position except teaching and research, provided that the volume or nature thereof does not interfere with the performance of their duties as magistrates of the Court.

4. Questions concerning the application of paragraphs 2 and 3 will be resolved by an absolute majority of the magistrates. The magistrate in question will not participate in the decision.

PART IV. VICTIMS AND THEIR RIGHTS

Article 19 - Complainants

1. The Court may admit as complainants the victims of the acts specified herein.
2. The Court may admit as complainants civil society organizations whose purpose is related to fighting organized crime.
3. The Court may admit as *amicus curiae* civil society organizations that, while not acting as witnesses, may provide information on the *modus operandi* of the persons and organizations under investigation, or any other information deemed relevant.

PART V. COMPOSITION AND ADMINISTRATION OF THE PROSECUTION

Article 20 - The Prosecution

1. The Prosecution will act independently as a separate organ of the Court. It will be tasked with receiving referrals and corroborated information on crimes under the jurisdiction of the Court, in order to proceed with an analysis and, if applicable, move forward with an investigation and prosecution before the Court. The members of the Prosecution will neither request nor comply with instructions from outside the Court.
2. The Prosecution will consist of a representative of each State Party hereto.
3. The Prosecution will be headed by the Prosecutor. The Prosecutor will have full authority to direct and administer the Prosecution, including the staff, facilities and other resources. The Prosecutor may be assisted by one or more deputy prosecutors, specially appointed for particular cases that so require, who may perform any of the appropriate duties hereunder. The prosecutors must be of different nationalities, and will perform their duties exclusively; they may have no other professional or commercial occupation, except for academia.
4. The Prosecutors will be of high moral character, with a high level of competence and extensive practical experience in prosecuting or substantiating criminal cases. They must have an excellent knowledge and mastery of at least one of the working languages of the Court.
5. The Prosecutor will be elected in a secret ballot by an absolute majority of the members of the Assembly of States Parties. He will hold his position for nine years and cannot be re-elected.
6. The Prosecutor will not carry on any activity that may interfere with the performance of his duties or reduce confidence in his independence.
7. The Presidency may, at the request of the Prosecutor, relieve him or her of acting in a particular case.

8. The Prosecutor will not participate in any case that, on any ground, may reasonably cast doubt on his or her impartiality.
9. The Prosecutor will name expert legal advisers on specific issues, such as sexual violence, gender-based violence and violence against children, drug trafficking, money laundering or any other subject that may require specialized knowledge or expertise.
10. As an exception to the principle of the public nature of hearings, the chambers of the Court may, in order to protect victims and witnesses, or an accused, order part of a trial to be held *in camera* or authorize the presentation of evidence by electronic or other special means. In particular, these measures will apply in the case of victims of sexual violence or minors who are victims or witnesses, unless otherwise decided by the Court considering all the circumstances, especially the opinion of the victim or witness concerned.
11. Throughout any phase of the trial, as deemed appropriated by the Court, the Court will allow for victims to bring forward opinions and observations if their personal interests are affected, but must do so in a manner that is not detrimental to the rights of the accused, or to a fair and impartial trial, or incompatible therewith. The legal representatives of the victims may present these opinions and observations when the Court sees fit, in accordance with the Rules of Procedure and Evidence.
12. When the disclosure of evidence or information hereunder would seriously endanger the security of a witness or his family, the Prosecutor may, for the purposes of any proceeding prior to the trial, not present this evidence or information, and instead present a summary thereof. Such measures cannot prejudice the rights of the accused, or the right to a fair and impartial trial, or be incompatible therewith.
13. Any State may request any measures as may be necessary to protect its officials or agents, as well as the confidentiality or secrecy of information.

PART VI. COMPOSITION AND ADMINISTRATION OF THE DEFENCE

Article 21 - The Defence

1. The Defence is an organ that ensures access to justice and comprehensive legal assistance, in individual and collective cases, in accordance with the principles, duties and provisions established herein. It takes any action to protect and defend the fundamental rights of individuals, especially those who are vulnerable and do not have their own legal defence.
2. The Defence will consist of 10 defence attorneys, eligible for the case of an accused who does not have his own defence attorney. The said defence attorney will not act permanently, but only when called upon.
3. The Defence will consist of persons of high moral character, with a high level of competence and extensive practical experience in criminal trials or the substantiation of criminal cases. They must have an excellent knowledge and mastery of at least one of the working languages of the Court.
4. The Defence Attorney will be elected in a secret ballot by an absolute majority of members of the Assembly of States Parties. He will hold his position for nine years and cannot be re-elected.
5. The Defence will have access to expert legal advisers appointed by the prosecution as specified herein.

PART VII. COMPOSITION AND ADMINISTRATION OF THE SECRETARIAT

Article 22 - The Secretariat

1. The Secretariat will be responsible for the non-judicial aspects of the administration of the Court and for providing it with services.
2. The Secretariat will be directed by the Secretary, who will be the chief administrative officer of the Court. The Secretary will exercise his duties under the authority of the President of the Court.
3. The Secretary must be a person of good moral character, highly competent and have an excellent knowledge and mastery of at least one of the working languages of the Court.
4. The Assembly of States Parties will recommend candidates for the position of secretary, who will be selected by the President.
5. The Secretary will serve for four years; he will hold this position exclusively and his term is renewable once.

PART VIII. COMPOSITION AND ADMINISTRATION OF THE STAFF

Article 23 - The Staff

1. The Prosecutor and the Defence Attorneys will appoint the qualified officials needed in their respective offices. In the case of the Prosecutor, this will include the appointment of investigators.
2. In appointing the officials, the Prosecutor and the Defence Attorneys will ensure the highest level of efficiency, competence and integrity.
3. The Secretary, with the consent of the Presidency, will propose regulations for staff, setting forth the conditions for appointing, compensating and dismissing the staff of the Court. The Staff Regulations will be subject to approval by the Assembly of States Parties.
4. The Court may, in exceptional circumstances, call on the expertise of staff provided free of charge by States Parties or intergovernmental or non-governmental organizations to collaborate in the work of any organ of the Court. The Prosecutor and the Defence may accept such offers in their respective fields. The staff provided free of charge will be employed in accordance with rules established by the Assembly of States Parties.

PART IX. THE ASSEMBLY OF STATES PARTIES

Article 24 - Assembly of States Parties

1. An Assembly of the States Parties hereto is established. Each State Party will have a representative in the Assembly, who may be accompanied by alternates and advisers. Other States signatories of this Statute or of the Final Act may participate in the Assembly as observers.

2. The Assembly will:

- a. Consider and approve, as appropriate, the recommendations of the Preparatory Committee;
- b. Supervise the Presidency, the Prosecutor and the Secretariat on matters related to the administration of the Court;
- c. Consider the reports and activities of the Board pursuant to paragraph 3 and take the appropriate action with respect thereto;
- d. Consider and decide on the budget of the Court;
- e. If appropriate, in accordance with article 36, change the number of magistrates;
- f. Perform the other duties under this Statute and the Rules of Procedure and Evidence.

3. The Assembly will have a Board, consisting of a President, two Vice Presidents and 18 members elected by the Assembly for a period of three years;

- a. The Board will be representative, taking into account, in particular, the principle of equitable geographic distribution and proper representation of the principal legal systems of the world;
- b. The Board will meet as often as necessary, but at least once a year, and will assist the Assembly in the performance of its duties.

4. The Assembly may establish the subsidiary organs that it deems necessary, including an independent supervision mechanism responsible for inspecting, evaluating and investigating the Court in order to make it more effective and efficient.

5. The President of the Court, the Prosecutor and the Secretary or their representatives may, as appropriate, participate in sessions of the Assembly and of the Board.
6. The Assembly will meet at the seat of the Court or at United Nations Headquarters once a year and, when required, hold extraordinary sessions. Unless indicated otherwise herein, the extraordinary sessions will be convened by the Board on its own initiative or on request by a third of the States Parties.
7. Each State Party will have one vote. The Assembly and the Board will do everything possible to reach decisions by consensus. If they cannot reach consensus, and unless this Statute provides otherwise:
 - a. Decisions on fundamental questions will be by a two-thirds majority of those present and voting, and an absolute majority of the States Parties will constitute a quorum for voting;
 - b. Decisions on questions of procedure will be made by a simple majority of the States Parties present and voting.
8. States Parties that are in arrears in paying their financial contributions to the expenses of the Court will not have a vote in the Assembly and on the Board, if the amount owed is equal to or greater than the total of the contributions owed for the previous two full years. Nevertheless, the Assembly may permit such States to vote in the Assembly and on the Board if the Assembly concludes that the delay is due to circumstances beyond the control of the State Party concerned.
9. The Assembly will approve its own standing orders.
10. The official and working languages of the Assembly will be Spanish, Portuguese and English.

PART X. COMMON PROVISIONS FOR ALL THE ORGANS, PARTIES, WITNESSES, VICTIMS AND COMPLAINANT ORGANIZATIONS

Article 25 - Privileges and Immunities

1. The Court shall enjoy, in the territory of each State Party, such privileges and immunities as are necessary for the fulfilment of its purposes.
2. The magistrates, the prosecutor and deputy prosecutors, the defence attorney, the complainants and the Secretary, when performing their duties or in relation thereto, will have the same privileges and immunities granted to the heads of diplomatic missions. Once their term of office has ended, they will continue to be accorded immunity from legal process of every kind in respect of words which had been spoken or written and acts which had been performed by them in their official capacity.
3. The private defence attorneys, experts, witnesses or other persons whose presence is required in the Court will be treated as required for the proper operation of the Court, in accordance with the agreement on the privileges and immunities of the Court.

Article 26 – Protection of Witnesses, Victims, Experts and Complainants

1. Using the security forces placed at its disposal by the States Parties, the Court will provide the protection that it considers necessary for all the witnesses, victims, experts, complainants, members of organizations presenting *amicus curiae* briefs and officials of all organs of the Court.
2. The Court will create a system to protect witnesses, victims, experts and complainants and make it available to all who request it, in cases where their physical safety is in danger.
3. The Court may also offer this protection to witnesses, victims, experts and complainants participating in proceedings related to organized crime, if the judges of the State concerned so request.

4. The system mentioned above will be the one already offered by the States Parties in their domestic legislation. This protection will be in effect from the start of the trial until 10 years after the sentence.

Article 27 - Salaries, Stipends and Living Allowances

The Magistrates, the Prosecutor, the Defence Attorney and the Secretary will receive the salaries, stipends and living allowances decided by the Assembly of States Parties. These salaries and stipends will not be reduced during their term of office.

Article 28 - Official and Working Languages

1. The official languages of the Court will be Spanish, Portuguese and English. The sentences of the Court, as well as other decisions on fundamental questions before the Court, will be published in the official languages. The Presidency, in accordance with the criteria established in the Rules of Procedure and Evidence, will determine what decisions concern fundamental questions for the purposes of this paragraph.
2. The working languages of the Court will be Spanish, Portuguese and English. The Rules of Procedure and Evidence will determine in what cases other official languages may be used as a working language.
3. The Court will authorize any of the parties or any of the States that are permitted to intervene in a proceeding, at their request, to use a language other than Spanish, Portuguese and English, when it sees fit to do so.

PART XI. RIGHTS OF THE ACCUSED

Article 29 - Rights of the Accused

1. Presumption of innocence:
 - a. Everyone will be presumed innocent until proven guilty before the Court in accordance with applicable law.
 - b. It will fall to the Prosecutor to prove the guilt of the accused.
 - c. In issuing a guilty verdict, the Court must be convinced that the accused is guilty beyond any reasonable doubt.

2. In responding to any charge, the accused will have a right to be heard publicly, taking into account the provisions of this Statute, and to a fair and impartial trial, as well as the following minimum guarantees:
 - a. To be informed without delay and in detail, in a language that he understands and speaks perfectly, of the nature, the cause and the content of the charges against him;
 - b. To have sufficient time and resources to prepare his defence and to communicate freely and confidentially with a defence attorney of his choice;
 - c. To be judged without undue delay;

3. The accused will have a right to be present during the trial and to defend himself personally or be assisted by a defence attorney of his choice; to be informed, if he does not have a defence attorney, of his right to one and, if it is in the interest of justice, a defence attorney will be appointed for him, at no cost to him if he cannot pay;
 - a. To question witnesses for the prosecution or have them questioned and to have witnesses for the defence appear and be questioned under the same conditions as witnesses for the prosecution. The accused will also have a right to object and to present any other admissible evidence in accordance herewith;

- b. To be assisted free of charge by a competent interpreter and to obtain the translations required for the sake of equity, if the proceedings in Court or the documents presented to the Court are in a language that he neither understands nor speaks;
 - c. To not be obliged to testify against himself or to admit guilt and to remain silent, without this being held against him in determining his guilt or innocence;
 - d. To testify orally or in writing in his defence without swearing an oath; and
 - e. To not bear the burden of proof or be required to present evidence in reply.
4. In addition to any other disclosure of information stipulated herein, the Prosecutor will disclose to the defence, as soon as possible, the evidence in his possession or under his control and that, at trial, would indicate or tend to indicate the innocence of the accused or to reduce his guilt or that may affect the credibility of the evidence presented by the prosecution.

PART XII. PENALTIES

Article 30 - Applicable Penalties

1. The Court will apply the penalties provided herein, taking into account the aggravating and extenuating factors of the particular case, and considering as aggravating the hierarchical position of the accused within the structure of the criminal organization, whether he was a public official under the domestic law of the States Parties, and also the number of States in which the crime was committed. The Court will also consider as an aggravating factor the use of protected legal goods, whether for transnational organized crimes or for related offences specified by the States Parties, in accordance with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and their additional protocols.

2. The Judge may reduce the penalty if the accused:
 - a) Reveals the identity of accomplices, participants or accessories after the fact of the acts under investigation or of related acts, providing sufficient information to bring them to trial or to significantly advance the investigation.
 - b) Provides information for seizing instruments, objects or effects related to the crimes described here as well as valuables, goods, money or any other important asset used in committing the crime.
 - c) Provides information that will lead to the dismantling of organizations intending to commit the crimes described here.

3. Furthermore, the Court may:
 - a. Impose a fine under the terms of the Rules of Procedure and Evidence.
 - b. Order seizure of the proceeds, goods and assets arising directly or indirectly from this crime, without prejudice to the rights of third parties in good faith.
 - c. Submit to the pertinent judicial bodies of the States Parties a request for confiscation to be considered and applied for the above purposes under current national law.

Article 31 – Precautionary Measures

1. The Court may embargo and seize goods and apply any type of precautionary measure for the persons and objects involved in the trial.

Article 32 - Imposition of the Penalty

1. The Court, in imposing a prison sentence, will consider the time already served in detention.
2. When a person is found guilty of more than one crime, the Court will impose a penalty for each one of them, and a common penalty specifying the total length of the prison sentence.

Article 33 - Trust Fund

1. The Assembly of States Parties will establish a trust fund to benefit victims of crimes, and their families, in the jurisdiction of the Court.
2. The Court may order that money and goods received as fines or seized be transferred to the Trust Fund.
3. The Trust Fund will be administered according to criteria set by the Assembly of States Parties.

Article 34- Application of Penalties by Countries and National Legislation

1. Nothing in this paragraph will interfere with the enforcement of pre-existing penalties at the national level. The penalties established by this Court will not be combined with them but will be enforced after.

PART XIII. INTERNATIONAL COOPERATION, JUDICIAL ASSISTANCE AND THE SECURITY FORCES

Article 35 - General Obligation to Cooperate

The States Parties, in accordance with the terms hereof, will cooperate fully with the Court in relation to the investigation and prosecution of crimes in the jurisdiction of the Court, in accordance with the Inter-American Convention on Mutual Assistance in Criminal Matters.

Article 36 - Terms Used

For the purposes hereof:

1. “Surrender” means the surrender of a person by a State to the Court in accordance with the terms hereof;
2. “Extradition” means the delivery of a person by a State to another State in accordance with the terms of a treaty or convention, or its domestic law.

Article 37 –Security Forces

Each State will appoint a special group within its established security forces to enforce the decisions and orders of the Court, and will report on them to the State to which said forces will subsequently belong.

Article 37 bis – Regional Intelligence Agency

The States Parties will share information and intelligence, and cooperate in the investigation of crimes subject to the jurisdiction of the Court. The means for creating the Regional Intelligence Agency will be covered in the Additional Protocol.

PART XIV. EXECUTION OF THE PENALTY

Article 38 – Duty of States in Executing Prison Sentences

1. A prison sentence will be executed in a State designated by the Court, other than the State of which the accused is a citizen and the States in which he was convicted of the crime. The State in which the sentence will be served will be chosen from a list of States that have indicated their willingness to receive such convicts.
2. Each State will designate a maximum security penitentiary for the purposes of housing the detainees and convicts for the crimes within the jurisdiction of this Court.
3. In stating its willingness to receive a convict, the State may set conditions, subject to acceptance by the Court and conformity with this Part.
4. The State designated in a particular case will indicate to the Court without delay if it accepts the designation.
 - a. The State executing the penalty will notify the Court of any circumstances, including the conditions under paragraph 1, that could materially affect the conditions or duration of the prison sentence. The Court must be informed of known or foreseeable circumstances at least 45 days in advance.
5. The Court, on exercising its discretionary authority to designate a State under paragraph 1, will take into account:
 - a. The principle that the States Parties must share the responsibility for executing prison sentences in accordance with the principles of equitable distribution stated in the Rules of Procedure and Evidence;
 - b. The application of standards concerning the treatment of prisoners set forth in generally accepted international treaties;
 - c. The nationality of the convict and the States in which the crime was committed;

- d. Other factors relating to the circumstances of the crime or the convict, or the effective execution of the penalty, as may be appropriate in the designating of the executing State.

Article 39 - Limitations on Trial or Punishment for Other Crimes

1. Convicts who are in the custody of the executing State will not be tried or punished or extradited to another State for conduct that preceded their transfer to the executing State, unless at the request of said State, the Court has approved such trial, punishment or extradition.
2. The Court will resolve the question after hearing the convict.
3. Paragraph 1 of this article will not apply if the convict remains voluntarily for more than 30 days in the territory of the executing State after completing the full sentence imposed by the Court or if he returns to the territory of that State after leaving it.

Article 40 - Execution of Fines and Seizure Orders

1. The States Parties will enforce the fines or seizure orders imposed by the Court under Part VII, without prejudice to the rights of third parties and in accordance with the procedure established in their domestic law.
2. A State Party that cannot enforce the seizure order will take measures to collect the value of the proceeds, the goods or the assets that the Court ordered seized, without prejudice to the rights of third parties.
3. The goods, or the proceeds of the sale of immovable property or, if applicable, the sale of other goods that the State Party may obtain in executing a decision of the Court shall be transferred to the Court.

Part XV. AMENDMENTS AND TRANSITIONAL PROVISIONS

Article 41 - Amendments

1. Seven years after the coming into force of this Statute, any State Party may propose amendments to it by informing the Secretariat.
2. Three months after the date of notification, the Assembly of States Parties will decide, by simple majority, whether to consider the proposal, which must be done as part of a Review Conference.
3. The approval of any amendment will require a special majority of two thirds of the States Parties, except in the case of limitation of the jurisdiction or powers of the Court and/or crimes that it is competent to judge, in which case a special majority of three quarters of the States Parties will be required.
4. Any amendment will come into force for the States Parties 12 months after the same proportion of States has given the Secretary their instruments of ratification or accession.
5. If an amendment was accepted by three quarters of the States Parties under paragraph 4, State Parties that do not accept it may withdraw from this Statute immediately, by giving notice no later than one year after the amendment took effect.
6. The Secretary will distribute to the States Parties the amendments approved at a meeting of the Assembly of States Parties or a Review Conference.

Article 42 - Amendments to Institutional Provisions

1. Notwithstanding article 41(1), any State Party may at any time propose exclusively institutional amendments to the provisions of this Statute, that is, amendments concerning the organization of the Court and its organs and related administrative questions. The text of the proposed amendment will be presented to the Secretary or to the person designated by the

Assembly of States Parties, who will distribute it without delay to the States Parties and the other participants in the Assembly.

2. The amendments presented under this article on which it is not possible to reach consensus will be approved by the Assembly of States Parties or by a Review Conference with a majority of two thirds of the States Parties. These amendments will take effect for the States Parties six months after their approval by the Assembly or the Conference, as the case may be.

Article 43 - Revision of the Statute

1. Seven years after this Statute comes into force, the Secretary will convene a Review Conference of the States Parties to consider amendments to the Statute. The review may include the list of crimes indicated in article 5 but will not be limited to them. The Conference will be open to participants in the Assembly of States Parties and under the same conditions as apply there.
2. Subsequently, at any time, at the request of a State Party and for the purposes of paragraph 1, the Secretary General, with the approval of a majority of the States Parties, will convene a Review Conference of the States Parties.
3. The provisions of paragraphs 3 to 6 of article 41 will apply to the approval and entry into force of any amendment of the Statute considered at a Review Conference.

Article 44 – Transitional Provision

1. Notwithstanding the terms of paragraphs 1 and 2 of article 11, a State, on becoming a party hereto, may declare that, for a period of seven years from the date on which the Statute came into force for it, it will not accept the jurisdiction of the Court for the category of crimes in article 8 when the commission of one of these crimes by its national or in its territory has been reported. The declaration under this article may be withdrawn at any time. The terms of this article will be reconsidered at the Review Conference convened under article 43(1).

PART XVI. FINAL PROVISIONS

Article 45 - Signature, Ratification, Acceptance, Approval or Accession

1. This Statute will be open to the signature of all States in Latin America and the Caribbean.
2. This Statute will be subject to the ratification, acceptance or approval of the signatory States. The instruments of ratification, acceptance or approval will be deposited with the Secretary.
3. This Statute will be open to subsequent accession by any State in Latin America or the Caribbean. The instruments of accession will be deposited with the Secretary General.

Article 46 - Entry into Force

1. This Statute will enter into force on the first day of the month following the date on which the tenth instrument of ratification, acceptance, approval or accession was deposited with the Secretary.
2. For every State that ratifies, accepts, approves or accedes to the current Statute, it will come into force on the first day of the month following the date on which it deposited its instrument of ratification, acceptance, approval or accession.

Article 47 – Withdrawal

1. Any State Party may withdraw from this Statute by giving the Secretary General written notice. The withdrawal will take effect one year after the date on which notification was received, unless a later date is indicated in the notice.
2. Withdrawal will not exempt the State from its obligations under this Statute while it is a party to it, in particular the financial obligations that it has contracted, as well as the obligation not to frustrate the object and purpose of the treaty with respect to fighting organized crime. Withdrawal will not prevent cooperation with the Court on criminal investigations and trials, with which the withdrawing State is obliged to cooperate and that began before the effective

date of withdrawal; neither will the withdrawal in any way prevent continued consideration of questions before the Court before the date on which the withdrawal takes effect.

PART XVII. AUTHENTIC TEXTS

Article 48 - Authentic Texts

1. The original of this Statute is equally authentic in Spanish, Portuguese and English and will be deposited with the Secretary General, who will send a certified copy to all States Parties.

IN WITNESS WHEREOF, the undersigned, duly authorized by their respective Governments, have signed this Statute.