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Legality, criminality and agency beyond the state: forest governance, illegal logging and associated trade

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Comparative Research in
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Legality, criminality and agency beyond the state: forest governance, illegal logging and
associated trade

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Abstract

This paper examines the disconnect between the literature on and practice of legality verification (LV) in the forest sector and what would seem to be a logical extension into the literature on and responses to forest crime and, more specifically, transnational criminality associated with the trade in illegally logged timber. The apparently logical overlap between these two areas of endeavour arises because both are dealing with aspects of supply chains or chains of custody involving raw timber, forest products or timber products more generally. The disconnect, I suggest here, arises because of a lack of ‘joined up thinking’ between the two themes that are central to forest law enforcement and governance (FLEG) - that is, enforcement on the one hand and governance on the other. The former is frequently perceived to be relevant mainly to issues of criminality and the development of coercive responses by the state, the latter to normative standards and rules for defining legality and implementing verification in which actors other than the state have assumed a substantial role. The second purpose of this paper, then, is to explore the role of ‘agents beyond the state’ in the spaces of transnational legality verification and forest law enforcement. It does so as an initial response to the call from Biermann et al ‘to document these various forms of governance through which actors exercise agency [beyond the state] and ... to better understand the conditions for the emergence of agency at different levels and within different architectures.’

Keywords: Forest management, legality verification, criminality, non-governmental organizations
JEL classification: D18; F02; K32; K33; M14; L31

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Legality, criminality and agency beyond the state: forest governance, illegal logging and associated trade²

Lorraine Elliott

Introduction

The University of Oxford's Environmental Change Institute defines forest governance as the way that 'state and non-state institutions and actors shape decisions about the conservation and use of forest resources'.³ This paper does two things – admittedly both in a preliminary, 'work in progress' fashion – in an exploration of the way that legality, illegality and criminality feature in those decisions and practices of forest governance. First, it examines the apparent disconnect between the literature on legality verification (LV) in the forest sector and what would seem to be a logical extension into the literature on forest crime and, more specifically, criminality. It is notable that issues of criminality and law enforcement are rarely mentioned in the growing body of work on legality verification, most of which emanates from scholars and practitioners working in an environmental or forest management context. In a similar fashion, the literature on the criminal aspects of trade associated with illegal logging – what Interpol and UNEP call 'black trade' and which is mainly the purview of the law enforcement and border protection community of practice – rarely discusses legality verification standards and practices.

The apparently logical overlap between these two areas of endeavour arises because both are dealing with aspects of supply chains or chains of custody involving raw timber, forest products or timber products more generally. While approaches to verification have focused on setting standards that can help to define legality and illegality, they have paid little attention to countervailing criminal efforts that seek to circumvent and violate domestic and international norms and challenge the authority of states and other private actors. The disconnect, I suggest here, may well arise because of a lack of 'joined up thinking' between the two themes that are central to forest law enforcement and governance (FLEG) - that is, enforcement on the one

² This paper draws on research being undertaken for a three year project funded by the Australian Research Council under its Linkage Grant program in partnership with the Australian federal Department of Sustainability, Water, Environment, Population and Communities (DSEWPaC). For more on this project, see Lorraine Elliott 'Fighting transnational environmental crime', *Journal of International Affairs*, 66(1) (2012): 87-104; Lorraine Elliott (2011) *Transnational Environmental Crime: Applying Network Theory to an Investigation of Illegal Trade, Criminal Activity and Law Enforcement Responses*, Australian National University 2011 (Canberra: Department of International Relations, 2011); and Lorraine Elliott (forthcoming) 'Governing the international political economy of transnational environmental crime' in Anthony J. Payne and Nicola Phillips (eds) *The Handbook of the International Political Economy of Governance* (Cheltenham: Edward Elgar Publishing; in preparation). An earlier version of this paper was presented as part of a panel on Legality Verification in Transnational Environmental Governance at the International Studies Association Annual Meeting, San Francisco, April 2013

³ <http://www.eci.ox.ac.uk/research/ecodynamics/forestgovernance.php> (accessed 22 March 2013).

hand and governance on the other. The former is frequently perceived to be relevant mainly to issues of criminality and the development of coercive responses by the state, the latter to normative standards and rules for defining legality and implementing verification.

This paper also accepts Cashore and Stone's proposition that single instrument approaches such as LV are necessary but not sufficient to 'ameliorate the multi-faceted nature of forest degradation'.⁴ From a policy and regulatory perspective, these challenges require more than just disrupting illegal supply through strengthening domestic legislation – normative change – and ensuring that forestry agencies have appropriate skills and technical capacity to enforce that legislation – material change. This paper argues that the focus on (il)legality and governance in the global forest sector must be supplemented and complemented with a focus on criminality and enforcement.

The second purpose of this paper is to explore the role of 'agents beyond the state' in the spaces of transnational legality verification and forest law enforcement. It does so as an initial response to the call from Biermann et al 'to document these various forms of governance through which actors exercise agency [beyond the state] and ... to better understand the conditions for the emergence of agency at different levels and within different architectures'.⁵ This paper focuses not on all non-state actors but specifically on non-governmental organisations (NGOs) that work independently (*beyond* the state) as well as with agents *of* the state to address governance and enforcement challenges associated with the transnational timber trade and trafficking. While a role for NGOs has been widely accepted in LV procedures and standard-setting it has been more controversial in enforcement. This move from verification to enforcement raises more complex questions about the role of NGOs and 'agents beyond the state'.

The lack of a clear international normative framework creates ambiguity about what constitutes legality and illegality in the global forest sector. This is not helped by the complexity of forest laws – often numbering in the hundreds – within individual timber producing countries. It is beyond the scope of this paper to attempt to resolve those ambiguities. In the face of confusion about the *substance* of what is legal or not, the *character* of legality is understood here to apply to behaviour as well as to commodities or goods.⁶ Criminal behaviour is often defined in terms of the active evasion and violation of standards established by domestic and international

⁴ Benjamin Cashore and Michael Stone (n.d.) *Can legality verification rescue global forest governance? Assessing the interacting effects of economic mechanisms on forest policy and governance: lessons learned from Southeast Asia*, unpublished paper, p. 1

⁵ Frank Biermann et al (2010) 'Earth system governance: a research framework', *International Environmental Agreements*, 10 (4) 277-98 at pp. 283-4.

⁶ Penny Green, Tony Ward and Kirsten McConnachie (2007) 'Logging and legality: environmental crime, civil society and the state', *Social Justice*, 34 (2): 94 – 110.

laws and regulations. This encompasses more than those actions that specifically attract criminal as opposed to civil or administrative penalties in law. Criminality can also be understood in sociological terms as deviancy, ‘subject to ... social processes of censure and sanction’.⁷ In our transnational environmental crime project, the way we define criminal activities (again, the character rather than the specific content) is also informed by the UN Convention Against Transnational Organised Crime.⁸ The Convention refers to intentional offences against domestic (and by extension international) laws that are undertaken with the aim of obtaining financial or other material benefit. This includes organising, direction, aiding and abetting such offences; or dealing with the proceeds through money-laundering, or through converting, transferring or disguising the illicit origins of property that constitutes the proceeds of crime. These kinds of activities take on a transnational form when, in effect, the planners, the perpetrators, the products or the profits (I refer to these as the 4 Ps of transnational crime) cross borders.⁹

Illicit international trafficking in forest products¹⁰

The transnational trade in illegally logged timber – described by one observer as being of ‘industrial scale’¹¹ – is a significant component of what is an otherwise legal, although often unsustainable global industry. Illegal logging, which takes place in some of the world’s most vulnerable forests, is an umbrella term for a range of activities: extraction crimes such as logging without a licence or logging inside protected areas or national parks; transportation crimes involving the smuggling across borders of illegally logged (or stolen) timber and timber products, or timber species that are protected from trade under the Convention on International Trade in Endangered Species (CITES); and processing crimes such as the fraudulent labeling of timber destined for export (timber laundering). It is a major driver of deforestation, habitat destruction, and species endangerment and is often accompanied by abuse of human rights, violence, and social and cultural dislocation for forest dwelling and forest-reliant communities.

While not all illegally logged timber is destined for transnational trade, there is almost certainly a close relationship between the extent of illegal logging and the extent of timber trafficking. Illegal logging is reported to account for 50 to 90 percent (by volume) of forest

⁷ Green et al, ‘Logging and legality’, p. 94.

⁸ The Convention’s focus on organized crime (groups that are structured rather than randomly formed) and on serious crime attracting four years or more deprivation of liberty in domestic law can, however, narrow the scope and range of what is understood as a crime or as criminality in the global forest sector.

⁹ Under the UN TOC Convention, the activity must be recognized as a criminal offense in at least two countries as a result of international or national law

¹⁰ This is the phrase used by ECOSOC and the UN Commission on Crime Prevention and Criminal Justice (under the auspices of the UN Office of Drugs and Crime); see, for example, ECOSOC Resolution 2008/25.

¹¹ Sam Lawson, (2004) *Profiting from plunder: how Malaysia smuggles endangered wood* (London/Bogor: Environmental Investigation Agency/Telapak), p. 1.

output in tropical producer countries, and between 15 and 30 percent of global output.¹² In Indonesia, for example, where at its height something between 51 percent and 80 percent of timber cut was thought to be illegally logged,¹³ estimates suggest that the equivalent of 300,000 million cubic metres of illegally harvested timber is smuggled out of the country each month.¹⁴

The illegal timber trade is also sustained by the ease of commodity displacement with loggers and traffickers turning to new and more profitable timber species – or to manufactured products – as other species attract (unevenly implemented) protection status under international or domestic law. This form of TEC is driven in part by a market for cheap timber and timber products. But the trade also reflects demand for high value species. 500 rosewood logs seized by Thai Customs in August 2010 were estimated to be worth \$US 1.5 million had they reached their intended Chinese market.¹⁵ Illegally sourced mahogany can fetch more than US\$1,700 a cubic metre.¹⁶ The market might generate profit for timber traffickers but it is costly for governments and for legitimate industry. The World Bank conservatively estimates the cost to timber-producing countries in lost government revenue at about \$US5 billion a year.¹⁷ The trade in illegally logged timber depresses world timber prices by something between 7 and 16 percent because the companies and agents involved pay no taxes, fees or other forms of licence and use cheap and often vulnerable sources of labour.¹⁸

Forest governance and legality verification

The 2008 report of the G8 forest experts agreed that tackling illegal logging and its associated trade requires combating corruption, strengthening enforcement capacity, re-establishing law enforcement and administrative systems in post-conflict situations, helping countries to meet CITES obligations, and enhancing cooperation between customs and law enforcement authorities in producer and consumer countries.¹⁹ The Salvador Declaration on Comprehensive Strategies for Global Challenges, adopted at the 12th UN Congress on Crime Prevention and Criminal Justice in 2010, recognized emerging forms of crime such as illegal logging that have a

¹² C. Nellemann, I. Redmond and J. Refisch (2010) *The last stand of the gorilla: environmental crime and conflict in the Congo basin* (Norway: UNEP GRID:Arendal), p. 6.

¹³ United Nations Office of Drugs and Crime (2010) *The globalization of crime: a transnational organized crime threat assessment* (Vienna: UNODC), p. 167.

¹⁴ WWF (n.d.) Country Profile: Indonesia, http://gftn.panda.org/gftn_worldwide/asia/indonesia_ftn/indonesia_profile/; accessed 17 July 2012

¹⁵ Environmental Investigation Agency (2012) *Rosewood robbery* (London: EIA), p. 3.

¹⁶ Julia M. Urrunaga, Andrea Johnson, Inés Dhaynee Orbeagozo and Fiona Mulligan (2012) *The laundering machine: how fraud and corruption in Peru's concession system are destroying the future of its forests* (Washington DC: Environmental Investigation Agency), p. 3.

¹⁷ World Bank (2006) 'Weak forest governance costs \$US 15 billion a year', Press Release No. 2007/86/SDN. 16 September

¹⁸ See Anon (2006) 'Down in the woods', *The Economist* 25 March: 73-5 at p. 74.

¹⁹ *The G8 Forest Experts' Report on Illegal Logging*, May 2008, pp. 9-11.

significant impact on the environment and called on member states to ‘strengthen their national crime prevention and criminal justice legislation’ in response.

One of the challenges for governments in meeting these expectations and dealing with timber trafficking is finding the right regulatory mix across prevention, detection, apprehension, and prosecution. This is likely to involve the use of economic incentives, command-and-control strategies and law enforcement practices to contain relationships of exchange along illegal chains of custody and restrict both supply-side and demand-side activity. The challenges of illegal logging and associated trade are complex. They flourish in situations of weak governance and regulation, imperfect or poorly protected property rights, and inadequate legal frameworks for defining the boundaries of legality and illegality.²⁰ Put broadly, illegal logging and associated trade reflect failures in forest governance. Weak forest governance is characterized by corruption, inadequate or ineffective legal frameworks, and narrow and exclusive decision-making procedures with little or no transparency or accountability. FAO and the World Bank’s Program on Forests (PROFOR) define the major elements of ‘good’ forest governance to include accountability, effectiveness, efficiency, fairness/equity, participation and transparency across three pillars: policy, legal, institutional and regulatory frameworks; planning and decision-making processes; and implementation, enforcement and compliance.²¹

Measures are required at both the producer and consumer level – to protect forests from illegal logging and to ensure that timber products that reach the market are or can be certified as legal (and, often, as from sustainably managed forests). Legality verification has been one strategy by which governments have sought to meet forest governance challenges. The heart of LV lies in the elaboration of due diligence processes by which suppliers can ensure the legal status of raw materials used in the timber and forest products industries. This demands verification of both legal origin and legal compliance to provide markets with ‘independent information about the origin of timber’.²² Suppliers are expected to maintain documented chain of custody systems and to adopt strategies to enable them to evaluate the risk that illegally logged or sourced timber has been included in the supply chain. Forest managers, suppliers, and other entities involved in all stages of a supply chain need to participate if legality verification is to work effectively. According to NEPCon’s standard legality verification scheme, for material to be determined *not* to be associated with illegal activities, it must:

²⁰ See, for example, Ludgarde Coppens (2013) *Transnational environmental crime: a common crime in need of better enforcement*, UNEP Global Environmental Alert Service (GEAS), January.

²¹ See FAO (2011) *Framework for assessing and monitoring forest governance* (Rome: FAO/PROFOR).

²² Verifor (2009) *Meeting the challenges of timber legality verification* (London: Verifor/FAO), p. 3.

- originate from a forest that has been harvested according to applicable [national] legislation
- be transported, traded, and handled legally in the supply chain; and
- not be mixed with other material of illegal [or uncertain] origin.²³

As well as avoiding timber that is illegally harvested, legal supply chains must also exclude conflict timber (timber extraction that funds groups involved in conflict situations associated with human rights abuses or crimes that violate international law including international humanitarian law). They must also exclude timber from countries that are the subject of international sanctions, and timber that is logged in ways that violate third party rights including those of forest-dwellers and local communities. Procedures that must be verified legal along the supply chain include declaration of species and quantity of timber products for customs, classification and reporting for appropriate fees and taxes, and the separation of certified timber from products of unknown or suspicious origin at all stages of transport and trade.

Tracking systems for tracing chains of custody are crucial to legality verification.²⁴ But they are auditing not enforcement strategies. They are necessary but not sufficient in the fight against illegal logging and timber trafficking. While they can play a ‘significant role’ in addressing the ‘deep-seated problems of forest governance’, relying on LV alone will fail ‘because it does not address the underlying weaknesses that lead to illegality’.²⁵ Nor, in many cases, do domestic legality definitions and practices address fundamental problems associated with illegal chains of custody and cross-border trade. Investigations into the illegal log trade between Laos and Vietnam, for example, have revealed that the Certificate of Origin documents identifying Laos as the country of origin and China as the country of import – documents that would be a required component of an effective LV scheme – were issued not by Laotian authorities but by the Vietnamese Chamber of Commerce and Industry on the basis of unilateral validation.²⁶

In contrast to the single-instrument approach, the so-called portfolio approach to forest governance and the elimination of or reduction in illegal logging and illegal supply anticipates a combination of instruments that (among other things) involve certification, verification, capacity building, and voluntary partnership agreements. However this regulatory mix – which captures policy instruments at a *domestic* level – is only one component of the ‘systems of [authoritative]

²³ NEPCon Legal Source Standard, Version 1, 8 February 2013, p. 13

²⁴ Donovan identifies this as only one component of legality verification, and one that is not necessarily included in all verification initiatives (see Donovan, *Private sector forest legality initiatives*, p. 14).

²⁵ Verifor, *Meeting the challenge*, p. 10.

²⁶ Environmental Investigation Agency, Comments on *Draft 6* of the “Timber and Timber Product Legality Definition for the Voluntary Partnership Agreement”, issued in December 2012 by the Ministry of Agriculture and Rural Development of the Socialist Republic of Vietnam; available at <http://www.eia-international.org/eia-comments-on-the-6th-draft-of-the-vietnamese-timber-and-timber-product-legality-definition>

rule-making, political coordination and problem-solving²⁷ that constitute and define the reach of transnational environmental governance. For the most part, these function as the first of the three FAO pillars referred to above, collectively the policy, legal, institutional and regulatory frameworks. The focus on governance, legality and verification pays little attention to criminal practices and behavior, to the illicit forest economy and illegal transnational chains of custody, or to the role of law enforcement agencies in suppressing, detecting and preventing forest-related crimes and illegal activities. LV standards and practices are unlikely to be able to address indiscriminate markets and criminal activity in the forest sector. The Indonesian environmental NGO WALHI claims that the ‘technical focus on “illegal logging” of the kind that characterizes LV fails to target the real criminals, those behind the operations’.²⁸ They argue that it does little more than ‘legitimise the current system’ which perpetuates deals, perks and the exchange of large payments to officials and political figures.²⁹ More attention is therefore demanded of the areas where ‘criminal law can intervene to protect the environment’.³⁰

Black trade, criminality and forest law enforcement

The trade in illegally sourced raw timber and forest products has been clearly identified in law enforcement circles as a form of transnational crime. The chains of custody through which illegally-sourced or produced commodities are physically sourced and then moved to their destination can be understood as a form of network. The nodes in the network are designed to manage illicit trade flows. The links between the nodes consist of relationships of (illegal) commercial exchange. Some timber trafficking chains are simple, even amateur or opportunistic attempts that involve a small number of people, uncomplicated smuggling routes, and unsophisticated forms of concealment. The market networks that underpin or manage the movement of large quantities of illegally sourced timber are likely to involve multiple sources of goods, multiple participants in the chain of custody, and the use of sophisticated methods to conceal either the goods or their true nature or origin. To make detection more difficult, stolen timber is often moved along complex routes through more than one trans-shipment point where enforcement is lax and where goods can easily be mixed with legal sources, relabeled or acquire fraudulent documentation before being moved on.

²⁷ James N. Rosenau (2002) ‘Governance in a new global order’ in David Held and Anthony McGrew (eds) *Governing globalization: power, authority and global governance* (Cambridge: Polity Press), p. 8

²⁸ Cited in Chantal Marijnissen, Saskia Ozinga, Beatrix Richards and Sebastien Risso (2004) *Facing reality: how to halt the import of illegal timber in the EU* (Brussels: FERN/Greenpeace/WWF), p. 8.

²⁹ See Marcus Colchester (2005) ‘Illegal timber in Indonesia: experiments with legal verification’, WRM Bulletin, no. 98, September; <http://www.wrm.org.ut/bulletin/98/Indonesia.html>

³⁰ Coppens, Transnational environmental crime, p. 5.

Local communities who provide labour for illegal logging and timber processing are often integrated into criminal networks through patron-client relationships. This may involve semi-feudal connections to local timber barons or local officials who control aspects of criminal activity. These relationships can also arise through social coercion that takes advantage of people's economic vulnerability in situations where alternative livelihoods are not available. Local communities are sometimes also 'bought off' to minimize protests in areas where resource extraction is known to be illegal.³¹ Transnational environmental crime also creates opportunity structures for legal companies to engage in shadow enterprise and for front or shell companies to be used to hide illegal connections and practices. This arises because, in contrast to drugs for example, illegal timber trade sits alongside a legal one. Black markets, according to Naylor, have become 'institutionally embedded in the legal economy'³² and, in some sectors at least, legal businesses use 'ever shadier methods'.³³ Timber, timber commodities and profits are laundered with the assistance of delinquent professionals and 'shadow facilitators'.³⁴ Environmental goods and resources are moved in and out of the licit economy through the use of counterfeit or falsified documentation. Legitimate companies process fraudulent permits and lend their infrastructure to facilitate transportation in illegal timber.

Intelligence on merbau smuggling syndicates in Southeast Asia shows that they involve timber brokers in Jakarta, companies and individuals in Malaysia who oversee the actual logging, companies in Singapore who charter cargo vessels and who arrange false documentation, brokers in Singapore and Hong Kong who connect sellers in places such as Papua with buyers in India and China.³⁵ Timber logged illegally in the Congo Basin, most often under the control of militia groups, is moved through local front companies to companies in and through Burundi, Rwanda and Uganda, exported globally to the EU, the Middle East, China and other Asian countries, with support from financiers in the US.³⁶

Those engaged in illicit TEC market activity have also moved to take advantage of the 'upperworld' of corrupt officials and politicians, enabling them to evade control mechanisms and protect illegal chains of custody. The correlation between high levels of corruption and illegal

³¹ See, for example, the case studies of Cameroon in Danielle Van Oijen and Sylvain Angerand (2007) *Illegally logged wood from Cameroon on the Dutch market* (Amsterdam/Paris: Milieudefensie/Les Amis de la Terre).

³² R. T. Naylor (2002) *Wages of crime: black markets, illegal finance and the underworld economy* (Ithaca: Cornell University Press), p. 3.

³³ Naylor, *Wages of crime*, p. 4.

³⁴ Douglas Farah (2010) *Transnational crime, social networks and forests: using natural resources to finance conflicts and post-conflict violence* (Washington DC: Program on Forests [PROFOR])

³⁵ Julian Newman and Sam Lawson (2005) *The last frontier: illegal logging in Papua and China's massive timber theft* (London/Bogor: Telapak/Environmental Investigation Agency), p. 9.

³⁶ Nellemann et al, *The last stand*, p. 6.

logging is well documented.³⁷ Indeed, some commentators suggest that corruption should best be understood not as a pathology of the state but simply as an instrument of risk management – a strategy for doing business – for criminal groups.³⁸ Local officials, customs officers, police and the judiciary are bribed to overlook illegal shipments, to assist with false paper trails and forged documentation, to help evidence disappear during prosecutions, to delay or drop prosecutions, and even to return no convictions when cases are brought to trial. Syndicates running timber smuggling enterprises in Indonesia, for example, have “bought off local Indonesian customs officials and harbour masters” and used their influence to “have any attempted shipments by competitors stopped”.³⁹

In their most extensive form, timber trafficking networks integrate criminal actors fully into the economic and political institutions of the state, often delivering them significant power and even, Serrano suggests, consolidating “exclusive governing authority”.⁴⁰ Rather than being just the recipients of bribes, government officials, protection and enforcement officers, and politicians can take key roles as the organizers, facilitators and beneficiaries of illicit market networks. Police and military officers are known to be heavily involved in organizing and coordinating illegal logging in a number of countries in Southeast Asia or providing security for logging operations.⁴¹ As with other forms of systematic criminal activity, this bribery and corruption undermines attempts to instill good governance. They corrode the institutions of the state and compromise core values such as the rule of law. In the most extreme cases of high-level corruption and personal patronage, the state itself no longer functions in the Weberian sense as a provider and guarantor of public goods but as a ‘protection racket’ or kleptocracy that sustains private appropriation, resource ‘asset stripping’ and rent-seeking.

Disrupting the criminal networks that sustain the illegal timber trade, even those that are informal and opportunistic, is difficult. The most sophisticated smuggling networks in the illegal timber trade are often better resourced than law enforcement and border control agencies. While laws are expected to function on the basis of deterrence – ‘the inhibition of criminal behavior by

³⁷ See, for example, NEPCon Legal Source Standard, version 1, 8 February 2013; Christian Nellerman/Interpol Environmental Crime Program (eds) 2012, *Green carbon, black trade: illegal logging, tax fraud and laundering in the world's tropical forests*, A rapid response assessment (Norway: UNEP, GRID-Arendal).

³⁸ Phil Williams (2002) ‘Transnational organized crime and the state’ in Rodney Bruce Hall and Thomas J Biersteker (eds) *The emergence of private authority in global governance* (Cambridge: Cambridge University Press), pp. 174-5.

³⁹ Lawson, *Profiting from plunder*, p. 13.

⁴⁰ Monicá Serrano (2002) ‘Transnational organised crime and international security: business as usual?’ in Mats Berdal and Monicá Serrano (eds) *Transnational organised crime and international security* (Boulder: Lynne Rienner), p. 18.

⁴¹ Rivani Noor and Rully Syumanda (2006) *Social conflict and environmental disaster: a report on Asia Pulp and Paper's operations in Sumatra, Indonesia* (Moreton-in-Marsh, UK: World Rainforest Movement); Marilyne Pereira Goncalves, Melissa Panjer, Theodore S. Greenberg and William B. Magrath (2012) *Justice for forests: improving criminal justice efforts to combat illegal logging* (Washington DC: The World Bank).

fear of the consequences (sanctions or penalties)⁴² – penalties are often minimal. Intelligence on activities that sustain the black timber trade is often limited compared with what is known about other illicit markets such as drugs or arms. Inter-agency arrangements for exchange of information, for managing joint operations or providing mutual legal and enforcement assistance are often uneven within countries let alone between them. Enforcement and border protection agencies require operational support to interdict illegal trade, seize goods, pursue and punish perpetrators, and use surveillance of corruption, fraud and money-laundering to gather and act on financial intelligence.

Third parties and agency beyond the state⁴³

Legality verification and enforcement are assumed to be the responsibility of the state (or states acting intergovernmentally). Judgements about what is ‘legal’ – for both commodities and actions – are caught up in definitions and decisions about what is not legal and what is criminal. Sovereign states claim and seek to retain individual and collective authority over the making and implementation of rules on trade, crime prevention, enforcement and border protection. States – or governments, in practice – are central to the form and function of relevant treaty law as negotiators and as allegedly responsible implementers of that law through domestic legislation and regulation. Yet the involvement of organized criminal groups brings the monopoly claims of the sovereign state into conflict with the shadow area of illegality that functions beyond or as a challenge to sovereign space and authority. Weak states, and those characterized by ‘socio-economic destitution’, are more likely to offer the kinds of ‘commercial opportunities’ that attract criminal groups.⁴⁴ At the same time, efforts to control borders and to reassert the role of the state in the face of both licit and illicit market liberalization can have the unintended consequence of encouraging criminal groups to develop more innovative concealment and avoidance strategies.

In the terrain of transnational environmental governance, agency for legality verification and for enforcement has become more complex. NGOs and various forms of enforcement and intelligence networks have an increasingly important role in verifying not just what is legal in accordance with regulatory standards but also in exposing what is ‘illegal’ and ‘criminal’ or what

⁴² Verifor, *Meeting the challenge*, p. 6.

⁴³ The concept of agency beyond the state, in the context of transnational environmental crime including illegal logging and timber trafficking, also includes the ‘dark side’ of such agency embedded in criminal actors and illicit market networks. Actors involved in the commission of transnational environmental crime are also in the business of purposefully violating or subverting the rule systems of global environmental governance and avoiding or neutralizing regulatory or surveillance schemes by which they are implemented.

⁴⁴ Achim Wennmann (2004) ‘The political economy of transnational crime and its implications for armed violence in Georgia’, *CP 6: The Illusions of Transition: which perspectives for Central Asia and the Caucasus* (Geneva: Graduate Institute of International Studies/CIMERA), p. 105.

should be defined as such. The concept of agency beyond the state captures the proposition that non-state actors such as NGOs and civil society organisations do more than protest, advocate, lobby and advise.⁴⁵ Rather in some circumstances – and forest illegality and crime is one such area – they have become rule-makers, establishing what Bull et al refer to as non-coercive mechanisms of influence.⁴⁶ These can take the form of constitutive rules that define a regime, regulative rules that focus on procedures, voluntary rules and standards, and codes of conduct articulated through private regulation, certification and accreditation.

The background of NGO involvement in forest governance – that is the regulatory side of the equation – is well known. As Donovan notes, organisations in the private (non-public) sector have taken various leadership roles as independent auditors, sometimes providing ‘direct fee-for-service to forest product manufacturers, traders or forest managers’ and sometimes ‘contracted by governments or foreign aid organisations in implementing government legality registration or monitoring systems’.⁴⁷ Many of the leading efforts to improve sustainable forest management through monitoring, certification and the implementation of market-based mechanisms have been the result of NGO initiatives, sometimes acting alone and sometimes in partnership with industry groups and sometimes with governments. Private sector/NGO initiatives in the forest governance arena include the Forest Stewardship Council, the Global Forest and Trade Network, and the Tropical Forest Trust.

In response to the black trade in timber and forest products (as in other areas of transnational environmental crime), non-state actors have also become active in rule implementation and compliance – or what Biersteker and Hall call the ‘enforcement of contracts’.⁴⁸ This might take the form of an inspectorate role and the assessment of compliance, delivering capacity-building and training, or publicising examples of non-compliance. But it can also take the form of intelligence, surveillance, and even operational activities.

In the transnational space, nongovernmental organizations and scientific bodies have become an increasingly important component of the networked and multi-level architecture that characterizes transnational environmental governance, often as key partners in formal arrangements and active participants in informal arrangements. The wildlife monitoring NGO TRAFFIC is a formal partner with CITES under a MoU adopted in 1999 to strengthen capacity

⁴⁵ See Frank Biermann et al (2010) ‘Earth system governance: a research framework’, *International Environmental Agreements*, 10 (4) 277-98 at pp. 282-4.

⁴⁶ Benedicte Bull, Morten Bøås and Desmond McNeill (2004) Private sector influence in the multilateral system: a changing structure of world governance?, *Global Governance*, 10 (xx): 481-98 at p. 493

⁴⁷ Richard Z. Donovan (2010) *Private sector forest legality initiatives as a complement to public action*, (Richmond: Rainforest Alliance), p. 3.

⁴⁸ Thomas J. Biersteker and Rodney Bruce Hall (2002) ‘Private authority as global governance’ in Thomas J. Biersteker and Rodney Bruce Hall (eds) *The emergence of private authority in global governance* (Cambridge: Cambridge University Press), p. 203.

building, communication and liaison among member states. This relationship now includes TRAFFIC acting as a mandated collection point for data from Parties (on the killing of elephants for example) and a formal requirement for TRAFFIC to report its analysis to each CITES Conference of Parties. NGOs are partners with governments and international organizations in so-called 'Track II' arrangements that address various aspects of forest crime and illegal trade, such as the Asia Regional Partners' Forum on Combating Environmental Crime (ARPEC) and the International Network on Environmental Compliance and Enforcement (INECE).

The dependence on private as well as public spheres of action, and the frequent blurring of the two, is also reflected in the extent of undercover and intelligence gathering operations undertaken equally by key NGOs as by national and international enforcement and policing agencies such as Interpol and the World Customs Organisation. NGOs such as the Environmental Investigation Agency (EIA), TRAFFIC and the Wildlife Conservation Society (WCS) have developed extensive capacity and expertise in undercover investigation and intelligence gathering. The EIA describes its own work as involving '[d]iligent, carefully planned undercover investigations' that generate 'credible intelligence and persuasive imagery'.⁴⁹ This includes 'setting up false front companies and well-researched fake identities ... to infiltrate potentially criminal organisations'.

The challenges of agency beyond the state

Agency for transnational forest governance and transnational forest law enforcement spans the boundary between environmental protection, in which non-state agency is increasingly accepted, and the making and implementation of rules on crime prevention, enforcement and border protection over which sovereign states claim and seek to retain individual and collective authority. The involvement of NGOs in regulatory and governance arrangements such as legality verification raises questions about independence, autonomy and state sovereignty. Those questions become even more important when agency beyond the state is extended into the realm of compliance and enforcement. As Green et al note, the use of surveillance and undercover techniques – more often associated with national and transnational crime enforcement agencies – raises questions about the legitimacy and authority of non-state actors whose actions are not specifically sanctioned by law or regulation.⁵⁰ Those issues are explored briefly in this final section.

⁴⁹ See <http://www.eia-international.org/about-eia>; accessed 25 March 2013; see also <http://science.time.com/2012/04/09/indonesia-punishes-wildlife-traffickers/>;

⁵⁰ Green et al, 'Logging and legality', p. 100.

In simple terms, transnational environmental crime in general and timber trafficking in particular could be understood as a problem of the kind of regulatory failure that occurs when there is insufficient regulation, or when regulatory systems are based on outdated or insufficient knowledge, or when domestic agencies ‘inadequately fulfill their oversight, supervisory and enforcement functions’.⁵¹ Yet there is little agreement on whether LV is best undertaken by independent agencies or whether the involvement of non-state actors is a stepping stone to greater involvement of the public sector as procedures improve and as capacity and expertise grows. NGOs may function independently of the state in their monitoring and verification role. They may also act on behalf of the state. Private or non-state actors can help to give credibility to standards. Given that timber trafficking and other forms of environmental crime are serious crimes that are often not taken seriously by governments, with enforcement in particular usually vastly underfunded, there is a danger though that NGO capacity and expertise becomes a substitute for state action rather than a driver of it. Government actors themselves may come to rely on intelligence gathered through NGO undercover actions. EIA investigators report being asked by Indonesian forest officials to conduct further investigations because they (the officials) needed more information that they were apparently unable or unwilling to pursue themselves.⁵²

Non-state actors can also face challenges in balancing externally-mandated inspectorate or monitoring responsibilities and their own missions that focus on exposure and enforcement. This is particularly so in situations where the former relies on improving compliance with existing rules and regulatory structures and the latter involves challenging and exposing the limitations of the same rules and regulations. Global Witness, for example, has worked to expose corruption in the forestry sectors in countries such as Cambodia (from which it was subsequently banned) and Malaysia at the same time as it has been funded by the UK government agency DFID (Department for International Development) to work with local NGOs in a number of forest-producing countries to improve transparency and monitoring with the explicit goal of driving national and international advocacy to ‘demand accountability and improve policy and practice across the forestry sector’.⁵³

The state’s sovereign claims to ‘exclusive competence’ over forest governance, as over environmental governance more generally, are being re-envisioned by transnational challenges

⁵¹ Daniel Kaufmann and Veronika Penciakova (2011) *Preventing nuclear meltdown: assessing regulatory failure in Japan and the United States*, Opinion (1 April), Brookings Institution; <http://www.brookings.edu/research/opinions/2011/04/01-nuclear-meltdown-kaufmann>

⁵² See http://www.eia-international.org/wb_15_forests; in other areas of transnational environmental crime – such as wildlife crime – NGO representatives report being present at official interviews of crime suspects (see http://www.nytimes.com/2013/03/04/world/asia/notorious-figure-in-animal-smuggling-beyond-reach-in-laos.html?pagewanted=all&_r=0)

⁵³ See <http://www.dfid.gov.uk/Work-with-us/Funding-opportunities/Not-for-profit-organisations/Governance-and-Transparency-Fund/GTF-programmes/Global-Witness-led-GTF-programme/>

and by the nature of agency beyond the state. For Karkkainen, this constitutes more than a constraint on the exercise of state sovereignty. Rather it implies the ‘partial disaggregation or unbundling and reassignment of powers traditionally thought to be among sovereignty’s most essential attributes’.⁵⁴ There is, as a result, no clarity on whether the involvement of NGOs in forest regulation, governance and enforcement is a challenge to sovereignty, a function of weak sovereignty, or whether it can actually serve to strengthen state capacity. To some extent, the involvement of NGOs can be seen as a response to the inadequacies and incapacities of the state, with NGOs filling the gaps in environmental/forest sector governance where states have been unwilling or unable to do so. However, agents beyond the state do more than ‘assist’ the state, or attempt to influence state policy, or step in when state capacity is found wanting. Rather this agency also exists as a sphere of politics and authority independent of the sovereign state¹ or what Rosenau refers to as ‘sovereignty-free’ zone.⁵⁵ The involvement of NGOs in both regulation and enforcement in the global forest sector can also be understood as a countervailing force, a ‘disciplining of state agencies’⁵⁶ or what Tinker refers to as a ‘check and balance on unbridled state sovereignty’⁵⁷ of the kind that arises when agents of the state are complicit in the very issues and challenges – such as illegal logging and associated trade – that they purport to be attempting to solve.

⁵⁴ Bradley C. Karkkainen (2004) “Post-sovereign environmental governance”, *Global Environmental Politics* 4 (1): 72-96 at p. 77

⁵⁵ James Rosenau (1990) *Turbulence in world politics: a theory of change and continuity*, Princeton: Princeton University Press.

⁵⁶ Green et al, ‘Logging and legality’, p. 100.

⁵⁷ Catherine J. Tinker (1993) ‘NGOs and environmental policy: who represents global civil society?’, paper presented to the Annual Meeting of the International Studies Association, Acapulco, Mexico, p.14.