

Anja P. Jakobi

Governing global illegal markets: from prohibition to regulation

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Abstract

How to deal with illicit markets and transactions? Prohibitions used to be the core of global norms that tackled illicit flows, from the slave trade to drug trafficking. Civil society has pressured for them, governments have negotiated them, and most analysts focus on them when assessing global crime governance. However, as this paper argues, prohibitions have become less significant for the governance of illegal markets, both on the national as well as on the global level. Instead, a breadth of regulatory approaches is applied to govern crime and illegal markets. To show this shift from prohibition to regulation and its consequences, the paper first disentangles the relation of prohibition and regulation. Second, based on a transactional approach, different types of illegal markets are presented. Third, the analysis of state and non-state actors' engagement in governance shows that incentives vary across countries, types of actors and illegal markets. Fourth, the paper shows how the drawing of boundaries between legal and illegal spheres has become the central governance task, resulting in separation, not prohibition, of market transactions. Fifth, analyzing illegal market governance over time shows that it is increasingly based on a regulatory approach and less on prohibitions.

Comments welcome, please email to author.

Author contact details:

Professor Anja P. Jakobi
Email: a.jakobi@tu-braunschweig.de
TU Braunschweig
Institute for the Social Sciences
Chair of International Relations
Bienroder Weg 97
D-38106 Braunschweig

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Governing global illegal markets: from prohibition to regulation

How can states suppress illegal markets and ‘evil trade’ on a global scale? Illegal markets and criminal networks have long been identified as a major challenge to a globalizing economy, and they are an important aspect of shadow economies (Schneider and Enste, 2000:79). They can include illegal or illicit transactions, but they also partly overlap with legal markets and show similar exchange processes like competition, monopolies and price-fixing in cartels (Beckert and Wehinger, 2012). Yet, there is surprisingly little conceptual work on how they differ from legal markets and how states and other actors govern them. Recent research is usually focused on one or two specific market sectors (Andreas, 2015), not providing a generalizable insight into the governance of illegal markets.

Adding to the complexity is the double meaning of ‘governing illegal markets.’ One meaning refers to the internal dimension – how criminals establish and control a market. The other refers to the external dimension – how states and other actors want to limit illegal market activities. The internal dimension implies that the state is largely absent and criminal groups establish rules, provide security and cause insecurity (e.g. Idler and Forest, 2015; Risse, 2011; Andreas, 2009b). The external dimension of governing crime is of interest to scholars of global governance, where research has often shown the limits of governing global crime ranging from illicit finance (Sharman, 2011) to the trafficking of drugs, weapons or conflict diamonds (Friesendorf, 2009; Jojarth, 2009; Efrat, 2012). The existence of illegal markets is a necessary byproduct of these crimes, yet comparative knowledge about different illegal markets is rare and the causes of most governance efforts remain unknown.

This paper focuses on the external dimension of governing illegal markets by drawing on different cases of global illegal markets and their governance. The paper introduces a transactional perspective on illegal markets and examines the reasons why we actually face a huge variety of public-private governance activities. Specifically, the paper argues that the main empirical trend in the governance of illegal markets is an ongoing, yet significant shift from prohibition to regulation. Prohibition is intended to delegitimize and extinguish a specific market activity mainly through criminal law and related policing. Regulation aims to incentivize, decrease or otherwise structure a market activity mainly through implementing laws, standards or other behavioral guidelines by state and non-state actors.

Each of the following sections tackles a different aspect related to this shift: The first section presents the relationship between prohibition and regulation. Different types of illegal markets are then presented to show the intersections of illegal and legal markets as well as ‘product categories’ traded in illegal markets. The overview shows that the complexity of governance depends on the type of illegal market and that prohibition is inadequate for governing most types of illegal markets. The third section outlines the reasons why state and non-state actors engage in the governance of illegal markets, and why incentives vary across countries, type of actors or type of illegal market. The main aim of current activities against illegal markets is not prohibition, but the drawing of effective boundaries between legal and illegal markets. As the fourth section shows, instruments to achieve this aim vary, but criminalization and policing are only two of many possibilities. Finally, comparing different governance schemes shows that the global governance of illegal markets is increasingly based on a regulatory approach. The paper is based on the analysis and comparison of a different cases of illegal markets and their governance.

Prohibition, regulation and illegal markets

Regulation and prohibition are distinct instruments by which global illegal markets are targeted, but they do not preclude each other. Both include the setting of standards that constrain or enable a specific behavior of collective entities or individuals. One could conceive of prohibition as a special form of regulation, aimed to criminalize a specific behavior, yet this would ignore the crucial difference that the state is the sole authoritative actor when it comes to creating prohibitions - prohibition and the related criminalization activities are privileges of the law-making ability of states. Regulation, in contrast, can be established by both state and non-state actors.

Current efforts against illegal markets rely on state and non-state actors, and this complexity ultimately strengthens regulation and weakens prohibition-based governance. The shift is visible in national contexts such as national drug policies relating to Cannabis, but it also represents a global trend that covers different fields of global crime governance. Reasons for this shift cannot be broken down to one single IR theory, but – like in other areas of global crime governance (e.g. Andreas and Nadelmann, 2006:8-13) – the development is caused by interrelated variables, ranging from changed moral ideas to concerns of effectiveness, governmental resource scarcity, and the growing importance of private actors like business and global civil society. At the same time, prohibitions and regulations are also measures that can contribute to the creation of illegal markets when market participants ignore, circumvent or exploit laws for illicit business. Prohibition and regulations are, technically, contributing variables to the emergence of global illegal markets.

This paper applies the terms criminalized, illegal and illicit in an interchangeable way, though each refers to a market's distinctive legal status. 'Illicit' is a market activity that is considered by society to be undesirable, amoral or close to criminal. 'Illegal' is a market transaction that violates laws as in instances of civil law related to property. 'Criminal' acts are codified in criminal law. Criminal law enables the state to become active even against the will of concerned non-state parties, while civil law leaves it open whether or not the state is obligated to act. While criminalization is always a governmental policy, it can involve state and non-state actors for enforcement and be supplemented by additional regulation. In addition, societal norms can be used to label a market transaction as 'illicit' even in the absence of legal standards. Criminalization, regulations and norms therefore define and create illegal markets each in a specific way. The overlap of illicit, illegal and criminal markets usually exists within democratic legal systems that reflect society's morals. However, the congruence of illicit, illegal or criminal does not necessarily exist on a global scale given the varying ideas about justice across societies and the existence of non-democratic states.

Compared to other governance instruments, the investment costs of prohibitions and regulations are comparably low. They are usually limited to the negotiation costs for establishing a regulatory frame. The subsequent implementation and enforcement costs are high, either for the state, for private actors, or both. This includes surveillance, monitoring, prosecution and other tasks. A model that is based on prohibition usually disentangles norm-setting from implementation; criminal activity is defined by the state, while prosecution and international exchange is carried out by police, customs and other law enforcement bodies (Andreas and Nadelmann 2006).

Global prohibition regimes have been a central organizing concept behind international activity against crime (Nadelmann 1990). Criminalization, and thus the distinction of what is legal and illegal, can only be established by governments. Governments set criminal laws at the national level, yet even global criminal law is typically constructed as a criminalization requirement that needs to be ratified and incorporated into national law. The shift away from prohibitions is rarely analyzed, yet this change enables new actor configurations, new instances of norm emergence, and the shaping of norms themselves. For the past few centuries, as civil society pushed for prohibition regimes on slavery or piracy, these movements usually aimed to achieve a governmental prohibition (Nadelmann 1990). They later focused on international organizations and their rule-making authority. Today, some illegal markets are primarily governed by private actors as a result of the rise of private authority or “soft law” in global affairs (e.g. Abbott and Snidal, 2010; Avant et al., 2010; Cutler et al., 1999). As a consequence, contemporary debates on global crime and illicit markets do not necessarily refer to global and national laws, but can be based on a social understanding of licit and illicit – not legal and illegal.

A shift from prohibition to regulation can signify an ontological change or an epistemological one: Is this really a new development or just a new discovery of changes that are well established? Due to the closeness of legal and illegal markets, governance arrangements have always aimed at drawing boundaries between them. Up through the mid-to late 20th century, global prohibition was a standard instrument in dealing with illegal markets related to drugs, prostitution or other crimes (Nadelmann, 1990). In this paper, comparing different cases across sectors and time shows that regulation has become the central instrument for governing illegal markets today – representing an ontological change. The growing significance of regulation is due to intersecting legal and illegal markets, the importance of non-state actor

involvement and the diversity of instruments by which both states and non-state actors tackle different markets. Meanwhile, the rise of global governance and global regulation continues to have an impact on world politics itself (Dingwerth and Pattberg, 2006). Therefore, researchers are now more likely to ‘discover’ other forms of global regulation – representing an epistemological change.

Different types of global illegal markets

From a functionalist perspective, the governance of illegal markets depends on the kind of market and how close it resembles a legal market, as all illegal markets expose mechanisms of supply and demand. Like other markets, they provide an opportunity for exchange, they need participants willing to engage in exchange, and they are surrounded by other neighboring – legal and illegal – markets with influence on market innovations and prices. A notable difference between a legal and illegal market is restricted competition; illegal markets are usually non-transparent and preference formation is difficult. Cooperation in these markets can suffer from a lack of information about business partners, guaranteed property rights or any formal enforcement structure for agreements (Beckert and Wehinger, 2012). Research on global illegal markets shows two different challenges related to classification and, ultimately, governance: On the one hand, the spatial dimension of global illegal markets makes it hard to determine their size. On the other, different kinds of market exchange make it difficult to categorize global illegal markets.

The spatial dimension of global illegal markets

The borders of global, national and regional markets are hard to determine both for legal and illegal markets. National illegal markets can be part of a chain of global illegal exchange. Global trafficking is typically organized from home states to market states (Williams, 2002:68-69). Home states provide opportunities for the origin of crime such as drug production. Trafficking states are those countries where illicit goods are brokered or smuggled onward to market states. Market states are those areas where the demand is highest, and the goods are ultimately sold. The gains of these transactions are then transferred through service states, making use of illicit financial sectors to launder money. Transportation costs in the global illegal market are high and include corruption of officers, violence to ensure compliance or costs incurred for hiding and transporting goods on inaccessible routes that are less likely to be monitored by law-enforcement. During the global trafficking process, the price for a trafficked good (or person) rises and is most valuable when it arrives at the main market.

The distinction between home, transshipment and market state is analytical and it depends on the market. Human trafficking for the purpose of prostitution often means that the trafficked persons are already exploited while they are moved across countries. The market in the ultimate destination country might provide the highest price for trafficked people, but individuals can be sold and resold frequently before and after reaching this market (Shelley, 2010). The smuggling of heroin through Central Asia has also led to a major addiction problem in these countries. Transshipment countries are themselves markets for trafficked drugs, but with lower demand and lower prices than the ultimate destination countries (Paoli et al., 2009). A significant negative externality for countries along the trafficking chain is a

growth in crime and violence, like in Mexico, where drug trafficking led to gang wars and high levels of corruption.

The spatial aspects of illegal markets have an impact on their participants, modes of exchange and governance. Local illegal markets are often spaces of competition in which criminal groups fight for territory and a share of the profit. Market dominance or monopolies can be arranged by agreement or by one group driving the others out of the market, which often requires the use of violence. Transnational markets can also be based on informal exchange and trust (von Lampe and Johansen, 2004). In highly contested and violent markets, non-state actors have some degree of effective control over property rights and the enforcement of behavioral rules. The result is fragmented state spaces (Davis, 2010). At the same time, illegal markets can flourish in these contexts, which explains why research on illegal markets and security converges and why development policies targeted at strengthening the rule of law is an important means to counter crime.

Global instruments against illegal markets emerged against the background of a spatial understanding of the world: Traditionally, governmental agencies have reacted to the different scales of global crime by setting global prohibitions that have been translated into national law and enforced (e.g. Nadelmann 1990). The global prohibition was thus ‘translated’ to a specific territory. With the growth of the global economy and the facilitation of cross-border trade and movement, the spatial dimension also includes exit options; criminal actors and markets can shift sensitive parts of their operation to those spaces where law enforcement is weakest, which can be a specific state or just a part of a state territory. The ‘squeezing the balloon effect’ has frequently been assessed (Friesendorf 2007:20), showing that illegal markets react to law enforcement not by breaking down, but by flexibly moving market

operations elsewhere. This ability of criminal actors to move across territories signals the limitations of a spatial understanding when analyzing the characteristics and dynamics of illegal markets.

Towards a non-spatial, transactional understanding of illegal markets

Classifying illegal markets is difficult due to the variety of products and activities that are exchanged in these markets. The global governance of legal markets includes categories like trade in goods, trade in services or financial markets. Illegal markets often intersect these boundaries and many linkages exist among these markets. Some of the goods in legal markets might end up in illegal markets, and legal financial markets can be used to finance illegal trade in goods. Moreover, some markets might be illegal in one country, illicit in another and legal in a third. Whether related trading activities should be conceived as part of one illegal market or conceptualized as ‘semi-legal’ is unclear from an academic perspective and highly interest-driven from a policy perspective.

A further challenge of categorizing illegal markets stems from the fact that market exchanges can range from trade in informal economies to the trade in globally prohibited goods. To generate workable categories, typologies often classify illegal markets with a view to the product that is being exchanged: According to Beckert and Wehinger (2012:5-6), illegal markets consist of goods that are stolen; or whose provision or production is illicit (e.g. illegal drugs); whose production is licit, but market exchange is illicit (e.g. human organs); of products whose production is illicit, but the underlying category of product is licit (e.g. counterfeit medicine); of licit products that are produced by violating existing regulations (e.g. illegal logging).

This classification, however, is restricted to goods only, and does not necessarily take into account the large cross-national variance in product regulations. Moreover, the grey market, and the linkages between legal and illegal markets are hard to be modeled along this typology. Categorizing illegal markets based in product characteristics – products that are either prohibited, regulated, stolen or counterfeit (Andreas 2015: 782) – omits the fact that a trafficking chain can shift a product from one category to another (e.g. when a counterfeits is legal in one country but illegal after crossing the border). It also limits the analysis of markets in which different types of products are exchanged.

This paper proposes a transactional perspective, focusing on transaction patterns and the overlap of legal and illegal markets, and it distinguishes four types of illegal market exchanges. The first type shows a pattern where goods are traded from a legal to an illegal market, often involving a grey zone, which is neither clearly legal nor illegal. A prime example of this kind of market is the trafficking of small arms and light weapons, which most actually originate in the legal sphere, but can ultimately reach markets where their sale is prohibited. The second type shows an exchange pattern of goods being traded from the illegal to the legal sphere. This means illicit goods end up competing in the market with legally produced goods. An important example here is illegally logged timber that is harvested by circumventing existing environmental regulations. A third type of illegal markets consists of cases where market exchange is prohibited, but not necessarily other forms of exchange. An important example here are human organs; organ donation is an accepted exchange, while organ trade is not. Finally, the fourth category of illegal market exchange is a strictly illegal market, where all aspects of production or trade – sometimes with the exception of extremely small niches – are prohibited, suppressed and prosecuted such as slave markets.

Mixed forms of some of these types exist when the exchange of goods is restricted to a specific group of clients, only a restricted amount of goods can be purchased, or only a specific use of a product is allowed. For instance, cannabis purchase has been increasingly legalized, but purchase is often legal for some groups. Despite the global prohibition regime, a small fraction of the global opium production is legal, given that opium is the base of morphine for medical purposes. The international exchange of nuclear, dual-use goods can be legal when this technology is used for energy production, but not when it is used for military purposes.

This classification of illegal markets does not only apply to goods, but also includes financial markets and services. For example, terrorism financing often involves transactions that shift legal funds to the illegal sphere, while money laundering of crime-related gains aim to integrate illegal funds to legal financial markets (Sharman, 2011). Tax evasion is a third type, given that the transfer of legally earned money across jurisdictions and accounts itself is legal, but not in an undeclared manner. Prohibited financial markets exist where both the gain, transfer and purpose are illegal as in using money from drug-related crimes to bribe officers or to finance terrorism. With regard to services, the market for the use of armed force frequently exhibits nuances between a legal, private security, and the illegal use of private force. The legal status of private combatants has not been clarified in all aspects and a blurry division of public and private security exists in Western democracies (Krahmann, 2010).

The governance of global illegal markets faces spatial challenges – prohibiting, controlling or regulating governance across borders – and challenges related to the selection of adequate instruments to counter global transactions. At the same time, these challenges interact with

each other; some countries may opt to regulate a market to counter criminal activities, while others simultaneously prohibit any market activity. Differing approaches in closely adjacent territories suggests an even greater need to separate illegal from legal market transactions.

Table 1: Governance and Illegal Market Transactions

Type of Market Transaction	Type of Governance
Type A From Legal to Illegal Market	Prohibition and Regulation
Type B From Illegal to Legal Market	Prohibition and Regulation
Type C In Partly Criminalized Market	Prohibition and Regulation
Type D In Completely Illegal Market	Prohibition

Source: own account

One consequence of this complexity is the functional need for regulation. As long as a significant legal market for a product or service exists, illegal transactions from or into this market can be attractive. Regulation usually establishes markers of legal and illegal transactions, aimed at separating the legal from the illegal market. While prohibition is a normative aim, it is not necessarily the most functional approach in most types of illegal markets. Prohibition is most suitable for market exchange linked to completely illegal markets, while other types of market exchange require at least supplementary regulation.

Actors governing illegal markets

Along with the shift from prohibition to regulation, the governance of global illegal markets now involves states, various non-state actors and international organizations. States still have the defining power over crime as they pursue and prosecute criminals (Friman and Andreas, 1999). International agreements on criminalization and other forms of cooperation against

crime need approval from sovereign states; border controls and police cooperation remain core instruments when trying to govern crime (Andreas and Nadelmann, 2006; Andreas, 2009a). Yet, non-state actors are also involved in the governance of crime on the national and international level, and a growing number of crime-related monitoring and prosecution has been delegated to private actors (Grabosky, 1995; Liss and Sharman, 2015). With the shift from prohibition to regulation, these actors and their instruments have become more important.

Governance actors select prohibition or regulation from one of three underlying policy choices – suppression, separation or legalization of an illegal market. Suppression implies that production or market exchange in a given area is criminalized. As a consequence, the market is based only on informal internal governance that can result in informal enforcement of property rights, informal exchange rules or price negotiations. In terms of external governance, the state usually polices a suppressed illegal market and prosecutes market participants like producers, broker or consumers. Suppressed markets are mainly those related to narcotic drugs like cocaine or heroin. The transition from a formalized, non-suppressed market to a suppressed, informal market was particularly visible in the American Prohibition era, where alcohol production and consumption took place in new, informal arrangements instead of the formerly regulated and legal environment (Andreas, 2013:227-248). In contrast, separation of an illegal market means that a legal market exists for a specific product, but other categories of the same product are criminalized. One example is the market in ivory, some of which can be sold legally, but only if specific conditions are met. In the case of separation, a legal market is formalized and monitored, while the illegal market is based on informal practices. The coexistence of these legal and illegal markets makes effective separation the central governance task. Finally, legalization is a strategy to shift informal,

illegal market exchange to formalized monitoring by governmental or non-governmental agencies. The most recent example is the wide-spread legalization of cannabis markets in many places, which is intended to deprive criminal businesses of their income and at the same time guarantee basic quality controls and oversight. While legalization means decreasing costs of prosecution, other regulatory tasks emerge that range from product safety to accounting and taxation.

Governance related to illegal markets is about more than states and their law enforcement bodies. On a global scale, international organizations play an important role in advancing standards against crime, in providing forums for discussion and managing oversight. The UNODC, the secretariat of global anti-crime conventions, hosts global policy-making bodies related to the world drug regime and is one of the few agencies publishing comparable statistics on global crime. Other organizations like the OECD or the Council of Europe develop and monitor standards against crime, ranging from corruption to cybercrime. These efforts are usually supplemented by private actors including non-governmental activists and businesses, which have become increasingly important for the governance of illegal markets. Often acting as ‘orchestrators’ (Abbott et al., 2015), international organizations create networks, initiate cooperation among public and private actors, disseminate information, and monitor compliance to standards. The mandates of international organizations to counter crime have expanded in recent years, most visibly in the growing role of Europol, the United Nations and Interpol (Jakobi, 2013). Coordination is carried out with for-profit actors, for example, when businesses cooperate with international organizations or with customs authorities to fight counterfeited goods (Paun, 2013).

It is important to understand the different functions and motivations of other actors as they grow in importance in the governance of illegal markets. Non-governmental activists have pushed for a large numbers of international norms against crime, from drug trafficking to trade in endangered species (Bertram et al., 1996; Epstein, 2008; Nadelmann 1990; Andreas and Nadelmann 2006). A recent example is non-state activity against the trade in conflict diamonds, which ultimately led to the Kimberley Process (Bieri and Boli, 2011). Activists not only raise awareness regarding problems related to illegal markets, but they also monitor compliance. Transparency International regularly publishes assessments of corruption in business and governments worldwide (Transparency International, 2016). Other NGOs aim to change market mechanisms and transactions in many fields, from environmentally damaging textiles to unfair cocoa production (GOTS, 2016; Make Chocolate Fair, 2016).

Companies and for-profit actors, in contrast, have rarely demanded new international standards, but are frequently involved in developing the details of regulations or implementing them. The governance activities of non-state actors therefore vary significantly depending on their specific resources, expertise or mobilization potential. Issue areas like money laundering or cybercrime are hard to govern without the resources of private actors – be it banks and their financial data or internet providers and their traffic data (Bergström et al. 2011, Jakobi 2016). The recent case of Apple resisting an implementation order of the FBI shows that the implementation is not necessarily welcomed by companies (Cook, 2016). In other areas, however, companies have a strong interest in effective implementation. The profits of criminal businesses from illegal markets threaten legal businesses through unfair competition and low-quality suppliers or faked goods can destroy markets or brand reputation. There also exists a considerable grey area, in which some businesses would profit from conditions that other actors would consider to be illicit – for example, when child labor is

used to produce goods or when illegal logging leads to a low-priced supply of lumber for furniture construction.

The reasons for state and non-state actors' involvement in the governance of illegal markets varies. They may want to eliminate a specific illegal market, restrict illegal market share in a generally accepted market, profit from illegal market activities or use the governance scheme instrumentally to serve other goals.

Extinguishing an illegal market due to legal or moral reasons seems to be the immediate goal of most governance efforts related to illegal markets, ranging from narcotic drugs to endangered species. In some areas, incentives do not fully extinguish the illegal market, but restrict the share of criminal transactions. Legal actors then profit from a market that is not entirely illegal. One example is the illegal firearms market. States often have an interest in 'trickling' arms deliveries down to befriended violent actors, and businesses resist restrictions to the trade in firearms (Lumpe, 2000; Efrat, 2012). The aim to profit from illegal markets can result in participating in governance mechanisms to 'water them down', or to otherwise render them less effective. This is usually the case when state and criminal elites are closely intertwined, but it can also mean that business actors would not like to see a specific market fully criminalized because of economic interests. One recent example has been discussions in the Kimberley Process where non-governmental organizations have criticized businesses that aim to 'white-wash' the diamond market by not fully addressing major problems (Diamonds and Human Security Project, 2006). One important use of governance schemes that can be observed is when actors use a specific scheme to control illegal markets in order to achieve other goals. This can be related to higher-valued goals – bringing peace to a civil war by eliminating 'conflict diamonds' in the market – but it can also mean that actors use schemes

for other purposes, including normative ones. For example, some non-governmental organizations used the fight against human trafficking to push an anti-prostitution agenda (Chuang, 2010). Also, states may participate in governance schemes not because they have a substantial interest in governing an issue area, but because they fear the negative consequences if they do not. The rise of ‘naming and shaming’ (Frimann, 2015) in world politics thus leads to states adopting strategies to avoid material or reputational losses.

Taken together, the variety of activities shows normative as well as rationalist principles (table 2). From a normative perspective, governance aims to standardize behavior of market participants according to an ideal (e.g. not to consume drugs). This idea has been central to prohibition regimes and is often at the expense of effective implementation. For example, the UN Convention against trafficking and prostitution remains widely unknown even though it has been in force since 1951 (United Nations Treaty Collection, 1951). It did not have an impact on prostitution in most countries, and debates on human trafficking in the 1990s aimed to revitalize this prohibition (McClean, 2007:15-20; Chuang, 2010).

In contrast to the normative logic, rationalist principles are central when states and non-state actors have functionalist reasons to participate in governance. This is because they either have a self-interest in the process or because they possess resources that are important for governing this field. Sometimes specific states and their resources are needed for the success of a governance scheme as information or legitimacy might otherwise be lacking or to prevent the rise of safe havens. Businesses often provide expertise on business processes or provide data. The Kimberley Process builds on the self-regulation of the formerly informal diamond industry and requires an intimate knowledge of transactions (Haufler, 2009). Resources can be used at the expense of the providing entity. For example, banks are obliged to enact

paperwork and other administrative burdens related to anti-money laundering, but this monitoring is a legal obligation (Bergström et al., 2011).

Table 2: Incentives and Aims in the Governance of Illegal Markets

Logic of Action	Aim	Primary Reason for Participation of Actors
<i>Normative</i>	Standardizing behavior	Inclusion of like-minded actors
<i>Rationalist</i>	Functionalist orientation	Inclusion of actors concerned by regulation
	Resource-based	Actors as providers of regulatory capabilities
	Interest-based	Actors as stakeholders in the regulation

Source: own account

The multitude of actors, their different rationales and roles show that the global governance of illegal markets is ill-described by prohibition alone. Because legal and illegal markets co-exist, the definition, regulation and separation of legal and illegal markets is the central task. This requires a shift from a prohibition-related understanding where one norm applies equally across all markets, to a more contested form of governance where conflicting interests are at the heart of regulatory activities. The shift from prohibition to regulation also enables a more nuanced picture of norm-emergence and implementation. As a form of hard law (Abbott and Snidal, 2000), prohibitions are discussed and contested mainly before being decided and implemented. Regulation, however, requires the interpretation of regulatory aims by different actors, making contestation more likely to occur by stakeholders after a market has been identified as being illegal and while regulations are being implemented. This is most visible in prominent markets related to narcotic drugs, where prohibition is under pressure. However,

the standard model of global prohibition regimes has not yet taking this dynamic into account (Nadelmann, 1990).

Instruments to govern global illegal markets

The suppression of illegal global markets is usually conducted through state-based governance, like criminalization and border controls, and is only supplemented by other actors. Legalizing an illegal market (or parts of it) implies a decriminalization of a specific product or service and would mean that some governance instruments are replaced by others. Separating illegal markets from legal markets, however, is a comprehensive governance task that requires regulation of the legal and the illegal side of markets. This also depends on the specific type of illegal market exchange: the regulation of type A illegal markets aims to prevent them from leaving the legal market, while regulation of type B illegal markets aims to prevent them from entering a legal market.

Border and customs controls are instruments that prevent territorial market entry or exit, ideally sealing off national markets against unwanted transactions. Border controls enforce state sovereignty and control access to state territory, but have limited capability to deter or detect illegal goods, or to prevent the cross-border provision of services and illicit financial transactions. As a consequence, border controls today are often supplemented with data acquired beforehand about the persons travelling through the border or about the shipment in containers. The work at the border controls can then be reduced to enforce access or exit decisions that were taken elsewhere even before the individual or product physically appears at the border. The prime example is regular migration, where personal information and visa

decisions are stored in databases and border controls are often a final check of documentation (Mau et al., 2012:88-120). But also in cases of product counterfeiting, border controls and customs often rely on information given by companies when they detect illegal shipments of counterfeit products (Paun, 2013:91). Border and customs controls correlate with a spatial understanding of illegal markets. Amidst the decreasing relevance of space, other instruments have become more important for tracking market exchanges irrespective of the territory.

Certification and licensing allow the global exchange of predefined product categories or the exchange along predefined criteria. For instance, whaling or hunting endangered species is allowed when specific conditions of licensing agreements are met. Certification and licensing is central when governments or private actors try to prevent exchanges across legal and illegal markets. For example, certification of logged wood can help preventing the logging of protected trees even if it can be undermined (Forest Stewardship Council, 2014). The costs of establishing a certification and licensing scheme are typically higher than establishing a regulation related to suppression, while enforcement costs depend on the specific certification model. Unlike customs and border controls, certification and licensing can be established nationally and internationally – with a flexible number of territories or market sectors.

Marking and tracking implies that a producer provides information about the origin of a product or payment, and subsequent market transactions as in trade in weapons or diamonds (Haufler, 2009). Ideally, tracking is a formalized documentation, resulting in a comprehensive knowledge about the brokerage and final destination of a marked product. Comparable to certification and licensing, a flexible number of territories or market sectors can be included in these schemes.

The *monitoring* of existing agreements and sanctioning non-compliant behavior are at the core of many governance activities. Non-state actors frequently take up this task; bank transfers are monitored to detect money laundering schemes related to organized crime (Helgesson, 2011). The trade of precursor chemicals is monitored to prevent the production of drugs, and patterns of the global diamond trade are monitored to detect non-certified diamond production and trade. State compliance is also analyzed in peer reviews, or naming and shaming strategies are applied (Friman, 2015).

Transparency and information exchange allows for the assessment of illegal market activity, including market trends and the evaluation of counter-measures. Transparency is particularly important with a view to separate legal and illegal markets. The informal diamond trade is now based on transaction records and informal hawala banking is now being made more formal. Information exchange is crucial for transparency, especially if it reveals all levels of a global illegal market from local production to smuggling routes. Information is sensitive, but is needed to close loopholes or safe havens. Therefore, information exchange is regulated in the details of many international treaties on crime (e.g. United Nations, 2000). Besides these formal agreements, the informal personal contacts between agencies also facilitate the sharing of information and intelligence.

Linking illegal markets to governance instruments and actors shows that criminalization, prohibition and policing is only a fraction of the overall ‘tool box’ (table 3). The legal and illegal markets spheres (Types A-C) can be separated by combining marking, tracking, certification or licensing. Only the governance of completely prohibited markets (Type D) is based primarily on criminalization, prohibition and policing by customs and border controls. Transparency and information exchange is part of all governance initiatives.

Table 3: Different Dimensions related to the Governance of Illegal Markets

Type of Market Transaction	Governance Instruments	Governance Actors
From legal to illegal market (Type A)	Prohibition and criminalization, border and customs controls, marking and tracking, transparency, information collection and exchange, monitoring and sanctioning	States, IOs, non-state actors (for profit, non-profit)
From illegal to legal market (Type B)	Prohibition and criminalization, Licensing and certification, border and customs control, transparency, information collection and exchange, monitoring and sanctioning	States, IOs, non-state actors (for profit, non-profit)
In partly criminalized market (Type C)	Prohibition and criminalization, licensing and certification, border and customs control, marking and tracking, monitoring and sanctioning, transparency, information collection and exchange	States, IOs, non-state actors (for profit, non-profit)
In completely illegal market (Type D)	Prohibition and criminalization, border and customs controls, monitoring and sanctioning, information collection and exchange	States, IOs (some non-state actors [for profit, non-profit])

Source: own account

Prohibition and regulation over time

The linkage of legal and illegal markets, the actors involved in the governance of illegal markets, and the instruments applied signify a growing importance of regulation. However, regulation can take three different forms, as the following case studies show: First, regulation aims at the legalization of illegal markets, converging their regulation with the regulation of legal markets. Second, regulation aims at separation where legal and illegal markets can intersect. Third, regulation is stepped up in the context of traditional prohibition regimes.

The legalization of illegal markets involves the decriminalization of a specific product or service, but it still requires regulation. In the case of cannabis, many states opted to regulate the amount of consumption or the minimum age of consumers. Monitoring, licensing of points of sale and information exchange are governance instruments that are now applied to this market and bring more oversight and transparency. While the advantages of legalization from a rationalist perspective seem convincing, the moral dimension of crimes and prohibition can impact heavily on the decision-making process to legalize a market. Defining crime, after all, is not only a rational act, but involves subjective and cultural perceptions of justice.

The normative underpinnings of prohibition are particularly visible in debates about the legalization of the illegal organ market. International regulations on organ trafficking are mainly related to health regulations, and its prohibition is stated in the UN Trafficking Protocol (UNODC, 2004). In recent years, the Council of Europe has embarked on efforts to develop a regulatory framework for the prohibition of this illegal market. The illegal exchange of organs became a regulatory problem along with the ongoing medical progress that enables transplants (Council of Europe and United Nations, 2009:17-18). There are different categories of human body parts used for transplantation: tissues, bones and organs. Tissues and bones are often traded legally and are used in different medical products and operations (Thompson and Bradley 2009). Organs are transplanted to replace existing body parts. Kidneys are nowadays often transplanted from a living donor, though this is more dangerous and impossible for other organs. Transplantations are usually administered completely by health professionals (Efrat, 2015). People suffering from illnesses are put on the national (or European-wide) waiting list for a specific organ. As soon as a matching organ comes available, potential recipients are contacted and tested for a match.

Several regulatory problems arise in the context of market suppression (Council of Europe and United Nations, 2009). First, the existing system is weak with regard to saving life. Transplantation lists worldwide are usually longer than the list of organs that are available, so usually a large percentage of patients die while waiting for an organ. The number of available organs differs slightly depending on the system of organ donation. In systems with presumed consent, all deceased people are considered organ donors if they have not documented an opt-out. This typically leads to a higher availability than the other system in which donors need to declare their intention to donate. With regard to living donations, kidneys are usually donated among relatives. The selling of organs is illegal in most countries with the exception of Iran. However, medical tourism has led many kidney disease patients to travel to poorer countries with good health systems. While there is no legal market for human organs, there is a global illegal market where patients can pay donors and have a transplant abroad (e.g. Budiani-Saberi and Delmonico, 2008:926). Given that organ donations concern severely ill persons, the moral stakes in criminalizing the behavior are high and the introduction of a legal market is contested. Introducing a market model may seem legitimate due to the fact that current regulations of legal transplantation have weaknesses. Some people may be high on the transplant list but might be less likely to survive an operation, while those who are healthier are less likely to get a transplant, but might profit most in the long term. Also, the overall costs and impact of dialysis or other necessary treatments are high, so that there is controversy within the existing system whether scarce resources are used efficiently. Some economists and social scientists have started debating about whether legalization would be a useful strategy (e.g. Cherry, 2005; Becker and Elías, 2007).

Organ trafficking and cannabis are important cases to show legalization as trend in regulating global illegal markets, but they represent exceptions rather than the rule. Like prohibition,

legalization is poor policy choice in most cases, because legal markets can be saturated with illegal products and illegal markets can be fed from legal sources.

A more common trend is regulation aimed at separating global legal and illegal markets. The distinction between what is legal and illegal or licit and illicit becomes important in this context because separating markets is not always based on criminalization. Resources like fish or wood are examples where certification is intended to allow licit products to be made that fulfill specific conditions of production and processing. Given resource scarcity, a trading pattern from illegal to legal markets is prevalent, including wildlife crime or illegal logging of wood and protected rainforests. While a global prohibition regime related to illegal logging does not exist, global governance initiatives in this field are based on the public private interplay of businesses, non-governmental organizations and governmental support. The Forest Stewardship Council (2014), for example, is a voluntary certification scheme that covers different parts of the value chain related to wood and logging. Forest owners and profiteers can become certified when they fulfill specific guidelines intended to guarantee sustainability in foresting. A central aim is thus the separation of different resource flows: those that are sustainably managed and those that are not. For this purpose, certification covers the entire process from logging to selling final products. While many national governmental and non-governmental bodies publish figures on trade in wood, there is no comprehensive monitoring in place. Also the participation in these schemes is completely voluntary. Drawing on this example shows that regulation of illicit markets expands even irrespective of prohibitions. This phenomenon is similar to observations in the field of corporate social responsibility (Tsutsui and Lim, 2015), in which the number of schemes aimed at separating ‘good’ from ‘bad’ market exchange has grown.

Separation is also increasingly common in financial transactions, especially in anti-money laundering and counter-terrorism efforts that distinguish legal from illegal financial flows. Typically, money laundering takes place in the stages of placement, layering and integration: In the placement stage, illegally obtained money is deposited in the banking system in a way that avoids the reporting requirement. In the layering phase, a multitude of transactions takes place often across multiple jurisdictions to hide the origin of the money. Finally, in its integration stage, all payments appear to be from legal sources and can be used for further investments. When laundering money, payments cross from the illegal to the legal sphere. The financing of terrorism or proliferation financing typically is the reverse: In these cases, legal money is used to finance illegal activity. In the case of terrorism financing, this can range from small payments to different individuals in the banking system to larger cash-exchange between individuals. The governance of illegal financial flows aims to suppress these transactions by criminalizing them and to delegate monitoring to non-state actors, in particular banks and financial professions. A mix of formal and informal governance is widespread in this area: Major regulations and regulatory bodies in this area are actually of an informal nature, like the Financial Action Taskforce, while terrorism financing is also dealt with in separate international conventions or by highly formalized international bodies like the UN Security Council (Biersteker et al., 2008; Helgesson and Mörth, 2012). While money laundering and the financing of terrorism are prohibited, regulation is needed to actually define what makes these different from other financial flows and how they can be tracked and found.

Another example of the separation of legal and illegal markets through regulation is firearms trafficking. The legal business of trading small arms and light weapons (SALW) usually feeds the illegal part of the trade. Different international regulations exist to prevent firearms

trafficking, often by registering the trade of arms across countries (Garcia, 2009; Laurance et al., 2005). Targeted at the trafficking of weapons, the UN firearms protocol attempted to establish instruments related to crime control. The protocol's regulations are rather weak, however, so a UN Program of Action was introduced to support the monitoring of arms flows (Jojarth, 2009:230). While these activities usually target international illegal markets of firearms, they are supplemented by national regulations of licensing, marking and other tools aimed to prevent the crossing from legal to illegal markets. While there exists no global criminal law provision, export regulations may nonetheless prohibit sales to specific regions or countries. Manufacturers of firearms and dealers, though to a lesser degree, need to be licensed and certified. The monitoring of sales is done in registers like those related to the UN Program of Action against SALW. These and other agreements also contain provisions on information collection and exchange. Finally, firearms are often registered and marked to enable a tracking of the history of a given firearm. The regulation of firearms also shows the utility-maximizing logic of states and non-state actors in defining and governing crime. By explicitly avoiding prohibition, the weak regulation enables a grey area that is sometimes used by states and others (Efrat, 2012, Jojarth 2009).

Even the prime example of a prohibited illegal market – narcotic drugs – is increasingly governed by a multitude of formal instruments: Several UN conventions tackle different types of narcotic drugs and the list of narcotic substances is regularly updated following intergovernmental deliberations by the Commission on Narcotic Drugs. International anti-drug policies are determined by the Narcotic Drugs Control Boards, a UN committee. But non-state actors are also subject to detailed regulations: The monitoring of precursor chemicals means that producers and traders of these substances need to check the identities of customers and report suspicious patterns of acquisition to the authorities. The breadth of the

current anti-drug regime also results from its increasingly procedural and regulatory character. While the origins of the global anti-drug norms were linked to religious and moral concerns and the banning of drug consumption (Bertram et al., 1996), UN conventions increased the number of governance actors over time, culminating in the 1988 anti-drug convention that aims to regulate the obligation of actors even in areas like money laundering. Regulation has become a more important element within the prohibition regime itself. Further limits to prohibition emerge for functional reasons: States and international organizations have difficulty in dealing with the newly emerging ‘legal highs’, a category of drugs that includes potent narcotics (some toxins), but consist of non-criminalized substances. These substances are usually added to the list of illegal narcotics, but, given the formal procedure, it can take as much time as drug developers need to create the next ‘legal high’. While prohibition requires definitions of drugs, new measures are needed to tackle ‘legal highs’ – including a separation from similar substances that have a legal purpose (Guardian, 2015).

The tendency for regulation to substitute or supplement prohibitions becomes further visible when we compare drug trafficking with the few global norms that do not have a strong regulatory component such as human trafficking or maritime piracy. While there is a lot of activism on anti-human trafficking, regulations do not go much beyond the prohibition and policing of this crime (Jakobi, 2016). Activities are based on the global prohibition of slavery in all its forms, which is also enacted in national laws. Moreover, the UN Anti-Trafficking Protocol requires states to prosecute human trafficking, to protect victims, and to cooperate on the international level (UNODC, 2004). The principal instruments for detecting human trafficking remain border controls or national laws. Information exchange is used to detect trafficking victims and trafficking routes, which is most often based on information provided by non-governmental organizations active in this field (Shelley, 2010). This also holds true

for maritime piracy – a global prohibition, but not a global illegal market – where the international community relied on the law enforcement, border and judicial capacity of states to counter this crime. Only recent as there been a shift towards a more regulatory approach that involves private actors as governance actors (Liss and Sharman, 2015). Neither having a strong regulatory component, nor a truly global scope. The way how human trafficking or piracy have traditionally been governed is the exception today, which supports the argument of a shift from prohibition to regulation.

Table 4: Selected Illegal Markets and Governance Instruments

Criminal Market	Governance Instruments
Slavery	Prohibition, Policing
Drug Trafficking	Prohibition and Policing, customs and border controls, later supplemented with regulations related to drug manufacturing processes and trade of precursor chemicals, asset recovery, money laundering etc., information collection and exchange
Human Trafficking	Mainly prohibition and policing, customs and border controls, monitoring and sanctioning (of countries, by US anti-trafficking policies), information collection and exchange
Arms trafficking	Prohibition, customs and border controls, policing, marking, tracing, licensing (with restrictions)
Conflict diamonds	Regulation and self-regulation of industry, customs and border controls, monitoring and sanctioning, certification, marking and tracking, information collection and exchange
Illegally logged wood	Certification and licensing, licensing, certification, customs and border controls, information collection and exchange
Wildlife crime	Prohibition (partly), licensing, certification, customs and border controls, information collection and exchange
IP crimes	Prohibition (partly), licensing, certification, customs and border controls, information collection and exchange, monitoring and sanctioning (partly)
Source: own account	

Bringing together these and other cases (table 4) shows the variety of instruments applied to the current governance of illegal markets, and the growth of regulation over time and across

almost all sectors. Illegal markets today do not only include strictly criminalized market activities, but also a growing number that are formally legal but with blurring boundaries to the illicit. At the same time, debates about criminalized markets have also included the possibility of legalization with the intent of making the market fully transparent.

Conclusions

Assessing the governance of global illegal markets across sectors and over time shows that governance arrangements shift away from prohibitions to a more regulatory approach. Prohibitions are a state-based form of governance, supplemented by instruments like policing or custom controls. Unlike early prohibitions like those relating to slave markets, most types of contemporary illegal markets require a regulatory approach that separates legal from illegal transactions and involve state and non-state actors. The instruments used to govern range from policing and customs control, marking and tracking, to licensing and certification. The aim to separate illegal from legal markets also becomes obvious in comparing different cases of illegal markets; only a few illegal markets are completely prohibited or legalized. Separation, which requires regulation, has become common in all areas of illegal markets such as illegal financial transactions and illegal resources.

These findings have different implications. On the one hand, the rise of regulation is likely the result of growing attention to global illegal markets from different actors, especially because states and their ability to criminalize has become less important for the definition of global illegal markets. On the other hand, non-state activism incorporates conflicting interests, promotes selective normative convictions and strives for maximizing public attention. It needs

to be examined whether the definition and regulation of global illegal markets under these conditions shows larger benefits or a higher effectiveness compared to prohibition regimes.

A focus on prohibitions often suggests that markets are static and that there is a strict separation between legal and illegal activities. However, the empirical trend actually suggests there is a convergence of different aspects. First, the set of actors that are involved in the governance of illegal market looks increasingly the same. They cannot be reduced to state actors like policing or customs authorities, but – comparable to any other liberalized legal markets – include non-state actors like non-governmental organizations and businesses. Second, the instruments applied to govern illegal markets often resemble the ones we know from legal markets such as tracking, marking, certification or licensing. Research on the governance of illegal markets thus contributes to a broader comparison of legal and illegal markets as well.

Regulation has been a supplement to prohibitions, yet it has also increasingly become a replacement. This shift could be interpreted as a rational selection of governance tools that target an issue area that is hard to govern. Arguments about legalization (from organ trafficking to drugs) often rely on the idea that regulation is more cost-effective. Whether this is actually true, or whether regulation is not an exit option to prohibition – due to normative or rational reasons – remains to be seen. The speed by which legal and illegal markets develop and change make regulatory approaches attractive to policy-makers. Besides the classic prohibition regime, regulation intensifies cooperation between state and non-state actors and draws on the resources of the latter. Regulation can also be based on softer standards or cover only some market segments, therefore reducing negotiation costs.

Some crimes and illegal markets such as money laundering have become a global concern because states put them on the agenda. However, many regulatory frameworks linked to crime are initiated by non-state actors and this closely resembles the theoretical models on global prohibitions and the emergence of norms (Nadelmann 1990, Finnemore and Sikkink 1998). One needs to be aware of the selectivity in this field: Many illegal markets exist in more technical areas or those linked to consumer products that have rarely triggered the attention of global activists or scholars. Given the importance of global production chains and the expected financial gains from circumventing regulation, illegal activity in these sectors is likely to affect the global public at large – from food scandals to fake medical products. We do not know much about the size of the problem nor the activities to address it. Research on crime and illegal markets could profit from analyzing the variance in non-state activism and the resulting problems of selectivity in the practice of governance.

Moreover, state and non-state activity against illegal market exchanges increasingly tend to blur the boundaries between ‘illicit’ and ‘illegal’. This is usually done with the aim to problematize activities in the absence of an applicable law, and it can be a functional necessity for actors facing various perspectives on what is ‘licit’ and ‘illicit.’ Normative concerns that range from environmental to social aspects are used to change market conditions by delegitimizing a specific market activity. Certification and licensing schemes are introduced to show licit production, at the same time separating a market that might be completely legal into a ‘better’ and ‘worse’ part. These regulations help spread norms that are unlikely to have been set up in global prohibition regimes. Regulation has thus become a policy-choice for state and non-state actors alike – something that prohibition as a state-based activity precludes. Blurring the boundaries of criminal activity is commonplace, but deserves

more attention from scholars as it makes the definition of global crime increasingly open to relativism – something that criminalization usually aims to avoid.

The shift from prohibition to regulation has thus led to various understandings of what is licit and illicit. Choosing regulation over prohibition can thus result in increased effectiveness, but it also means that criminal activity can be defined by various actors in the public discourse instead of by legal frameworks. Ultimately, the change from prohibition to regulation therefore has implications for research on global norms and legalization. Scholars typically analyze the variety of norms and standards (e.g. Finnemore and Sikkink 1998, Abbott et al., 2000; Finnemore and Toope, 2001) or the fact that norms are contested and can disappear (Wiener and Puetter, 2009; Panke and Petersohn, 2016). The change from prohibition to regulation, however, implies that it is the essence of global norms that changes, suggesting a new approach to global normativity.

While this paper provides a framework for analyzing the governance of global illegal markets based on a range of cases observed, further research could compare cases in more detail, and a systematic diachronic and synchronic way. This would shed light on the conflicting interests involved, the moral foundations of governance, questions of effectiveness, and also on the blurring boundaries of criminal, illegal and illicit activity. Research in this field would ultimately enrich the study of governing legal markets as well, and it can give rise to a broader understanding of what constitutes – and who creates – a contemporary global norm.

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