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# The Containment of Transnational Organized Crime

Comments on the UN Convention of December 2000

edited by

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# Preface

Crime, in particular organized crime, or at least some of the most serious manifestations of organized crime, like the traffic in (wo)men, the illegal trade in small arms and the illegal drugs trade, is being more and more defined as a problem that can only be solved within the framework or/and with the support of international organizations. The overarching structures and means which are needed to achieve this aim. The most remarkable initiative in this field is, without a doubt, the United Nations Convention against Transnational Organized Crime. This convention – which was signed in Palermo,12th - 15th December 2000 by the majority of the member states – makes up comprehensive armoury of legal and institutional means that the Parties can use, in order to increase their national efforts for the containment of organized crime and to improve their mutual cooperation in individual cases.

In view of the potential impact of this convention on the policies of states and regions against organized crime, it is obvious that such a major development deserves the world-wide attention of both policy makers and researchers in the field. This was the conclusion we drew in the wake of the Palermo signing conference. With the support of our own institutions - the Max Planck Institute for Foreign and International Criminal Law and the School of Law of Tilburg University - we took the initiative for an international conference on this convention on the 13th - 15th December 2001 at the Max Planck Institute in Freiburg. The programme that was outlined covers many of the important aspects of this convention: the background of this major initiative, the nature of the crime problems which are at stake, the means this convention itself contains in order to get implemented, the prominent substantive and procedural issues this convention raises and the shifting boundaries between domestic safety and external security. But, this was not the only reason for the success of the conference. The fact that it was not too difficult to convince a range of prominent speakers to join our

initiative was an equally important critical success factor. Furthermore, we are indebted to the Dutch Ministry of Justice for its financial support.

It is also remarkable that the proceedings of such a big international conference are already published, within a short period of eight months. This small miracle is the result of the efforts made by Beate Lickert and Hanny Pentinga who manned the conference secretariat and by Michael Knecht who took care of the editorial troubles.

Freiburg im Breisgau and Tilburg

Prof. Dr. Hans-Jörg Albrecht
Prof. D. Cyrille Fijnaut

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### An Introduction

HANS-JÖRG ALBRECHT

## 1. Setting the Agenda

On the 12th of December, the UN Convention Against Transnational Organized Crime, was opened for signature in Palermo. An Annex contains the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

With the Convention against transnational organized crime, an attempt has been made to lay the normative groundwork for improvements in the control of what has become known as transnational crime but which is also known under various other labels, among them cross border crime, international crime or, simply, organized crime. Organized transnational crime phenomenon which was focussed at the convention, has been for several decades now a major issue of criminal law and criminal justice. Criminal law reforms throughout the nineties, have been justified and explained by the need to control organized crime. Much of the European Union efforts to coordinate and harmonize, in particular in procedural law and crime investigation, but also the establishment of Europol is first of all a response to transnational or cross border crime.

With the terrorist acts in New York and Washington of September 11 2001, there has been further evidence that the threat of transnational crime is not confined to the conventional areas of mere profit generating markets of human and drug trafficking, serious fraud and other economic crime but that transnational crime is including large scale violence and organized at-

tempts to destabilize whole regions, in efforts to establish political and social order, contrary to the basic values as laid down in the international and regional treaties on human rights. The threats posed by transnational terrorism points to the importance to elaborate a legal basis for responding to phenomenon, which on the one hand make the once significant separation of concepts of internal and external security meaningless and on the other hand, stresses the need to re-arrange models of sovereignty and autonomy of the nation state, as well as their function in responding to global risks. The threats which come up with terrorism and organized crime, at large, concern the capacity of individuals or networks of individuals to wage war (or at least efficient violence) against states (and their citizens) and herewith (re-) individualization of war and individualization of stranger and stranger violence (conventional hate violence certainly represents a precursor of transnational terrorist violence). The emergence of a world risk society which produces these threats poses then a new dilemma, that is the need of responding outside the borders of the nation state in order to provide for safety of citizens on the territory of the nation state. However, as Beck has pointed out[1], the necessities of denationalizing policies of security will lead into a process of diminishing the nation states autonomy in providing for internal security (and reducing thus the role of the nation state itself which is forced to pursue policies of internal security through measures implemented beyond the borders of the nation state). On the other hand, the very same process will produce a potential of strengthening sovereignty (not of the nation state but of societies organized in states insofar as states (and civil societies) succeed in setting a relevant agenda on the international level of cooperation, policing and justice. The agenda – if properly set up in terms of aiming for an international legal basis along basic human rights and standards of democracy and rule of law – will then possibly result in an expansion of the individual states competence in establishing security and safety of their citizens. The political and legal discourse on this agenda is important, as globalized responses to global threats carry also the risk of triggering the strong state and safety and security models, which put the focus on efficiency in crime and violence control to the disadvantage of human rights and the rule of law.

After the 2000 transnational crime convention was elaborated and signed it was certainly worthwhile – both from a policy as well as from a scientific

[1] Beck, U.: Das Schweigen der Wörter. Über Terror und Krieg. Edition Suhrkamp: Frankfurt 2002, p. 26.

point of view – to have a closer look on what is called implementation of the convention. Creating and framing the convention certainly was a major task which was accomplished rather rapidly and which shows that cooperation in the field of investigation and procedure as well as harmonization of substantial criminal law still are the most important fields in developing international criminal law and international criminal justice.

The discussion on the European arrest warrant demonstrates the problems that can come up with close cooperation. One of these problems certainly concerns cooperation between sovereign states in an area which represents, still, the core of the sovereign state, that is the definition of crime and the control and punishment of crime.

However, as students of criminal law and criminal justice, we know that law creation is sometimes much less important than the implementation of law, because with implementation of law it is demonstrated what kind of law has actually been created and whether the goals pursued will be achieved, as had been foreseen by the lawmakers.

The Transnational Organized Crime Convention explicitly mentions implementation of the convention not only in the sense of adopting its content within the system of national law making; but the conference elaborates on major points which are evidently seen as becoming crucial in applying the convention.

These points concern

- Exchange of information,
- Cooperation and assistance in investigation,
- Training and technical assistance,
- Economic development and technical assistance (in order to overcome problems caused by the differences we observe in the equipment and in the resources available for crime control and crime prevention,
- Prevention and prevention programmes including the civil society.

All of that amounts to a very ambitious programme, tying together the control of root causes, with coordination of criminal law and criminal procedures, as well as attempts to facilitate criminal law based control of transnational crime.

It is, in particular, from the view of implementation of the 2000 Transnational Crime Convention, that the Tilburg University and the Max-Planck-Institute jointly agreed to organize a conference on issues of how to make the convention operational.

## 2. Transnational Crime: Understanding the concept

Transnational crime must be linked with basic changes in modern societies, changes which affect labour markets, the economy, mechanisms of social integration and point to a globalization of risks. Transnational crime therefore, is also linked to migration and immigration and those processes which have led to multicultural or multi-ethnic societies, in both Europe and North-America. Changes concern not only the emergence of transnational enterprises and a globalized economy but also the emergence of transnational ethnic communities which bridge borders and possibly also cultures. Transnational crimes, i.e., crimes affecting more than one country or nation at a time, as well as crimes characterized by their cross border nature certainly are not new. Transnational crimes have always been part of the crime phenomenon. However, what has changed is the quantity and quality as well as the structures of transnational crime which today are determined by the market economy, organization and networks, rational choice and migration.

But, there exists a different angle from which a type of transnational crime comes into view which is not characterized by borders anymore because it falls into a space where borders, nations, as well as the nation state have become almost meaningless: That is cyber space and with the cyber space globalization of risk becomes as evident as it becomes visible in modern phenomenon of terrorism. With the cyber space a completely new environment emerged where crime is bred in forms we now call cyber crime but which could easily be conceptualized as a very prominent form of transnational crime. Cyber terrorism, cyber stalking, cyber vandalism, all sorts of property crime facilitated through the internet and money laundering, to name but a few offence types, create a sort of "globalized threat" which fuels sentiments of insecurity that again fuel demands (and offers) to establish security and safety through expanding social control, in particular, electronically based systems of control[2]. A recent survey of businesses and commerce in Europe (N=3403) showed that almost half of the enterprises said that cyber crime will be the most pronounced risk in the future in the field of economic crime. Some 13% of enterprises report victimization through cyber crime events, a fourth of them reporting 10 and more cyber attacks[3].

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[2] Fox, R.: Someone To Watch Over Us: Back to the Panopticon? Criminal Justice 1(2001), p. 251-276, p. 253.

[3] Pricewaterhouse/Coopers: Europäische Umfrage zur Wirtschaftskriminalität 2001. Frankfurt: Moderne Wirtschaft 2001, p. 24.

It does not come as a surprise that international and national criminal law reforms as well as police strategies are geared towards better control of transnational crimes. Besides trafficking and smuggling of illegal immigrants as well as cyber crimes, we find among transnational crimes, that attract policy attention, a variety of economic crimes, environmental crime (and cross border pollution), drug trafficking, trafficking in women and children, money laundering, international corruption and, finally, also transnational terrorism (emerging since the seventies).

When putting forward the question of what are the significant characteristics of transnational crime, the first characteristic that comes in view concerns the cross border nature of transnational crime. Transnational crime is either characterized by a cross border criminal, who perceives opportunities to commit crimes beyond national borders, or by the cross border transfer of illegal commodities as well as the cross border transfer of risks and dangers. Motivations to cross borders and to become transnational are twofold.

First, cross border crimes sometimes allow exploitation of opportunity structures as established through legal and administrative frameworks which differ along countries.

Second, some cross border crimes, eg. drug trafficking, simply is not possible without crossing borders because supply and demand are located in different regions.

Finally, transnational crime refers to networks of criminals or organized crime groups. Moreover, and from a methodological perspective, with transnational crime we address a topic which is not accessible through the conventional instruments of criminological research such as surveys, interviews or participant observation which are routinely deployed in order to study conventional subjects such as youth crime and the like[4]. That is why the United Nations is currently looking into possibilities of incorporating variables into the World Crime Survey which should produce information on transnational organized crime.

However, the phenomenon of transnational organized crime itself is part of a trend towards the integration and convergence of social, cultural and economic systems, it is, in particular, the subcultural systems which display

[4] See eg. Shapland, J.: Crime: A Social Indicator or Social Normality? In: Robert, Ph., Sack, F. (Eds.): Normes et Deviances en Europe. Un Debat Est-Ouest. Paris 1994, pp. 101-126; see also De Nike, H.J., Ewald, U., Nowlin, Ch.J. (Eds.): Victimization Perception after the Breakdown of State Socialism. First Findings of a Multi-City Pilot Study 1993. Berlin 1995.

symptoms of globalization and integration with transnational terrorism being insofar an exception as it aims at disintegration. The process of integration is based upon well known general trends such as the mobility and globalization of the economy.

The phenomenon of transnational crime can be conceptualized, also in order to facilitate its control by a system of coordinates which are derived from four concepts. These four concepts enable us to understand fully what transnational crime means, what forms it takes, what kinds of control and investigation problems it poses and how societies can or should respond to such phenomenon. It shows also, what problems in principle, will be faced when implementing the Palermo convention.

These four concepts consist of:

- The concept of the Market Economy,
- The concept of Organized Crime,
- The concept of Immigration and Migration,
- and the concept of Ethnic Minorities and with that particulars of social (and ethnic) segmentation in modern societies.

Finally, the nation states' capacity to provide for safety on its territory (through criminal law and policing) evidently is fading away with transnational crime. De-territorialized crime demands for transnational and de-nationalized responses as well as for procedures and instruments which are adjusted to the structure of transnational organized crime.

## 3. Organized Crime and the Market Economy

Transnational crime is related to the market economy. All transnational crime phenomenon are part of an economy which is regulated by demand and supply. Besides markets for illicit commodities, we find markets for licit goods which stem from aquisitive crime in terms of property crime or subsidy/tax fraud; thus, we observe markets for illegal risks (eg. illegal waste disposal or various types of investment fraud) and markets for illicit services such as gambling, prostitution and money laundering, illegal immigration, transfer of restricted or controlled technology as well as software piracy. Modern societies in Europe and in North-America then, have produced an enormous demand an for undocumented labour force outside the first and partially over-regulated labour market, which continues to attract illegal immigration. Illegal immigration thus has become a major

market where transnational crime groups are operative. It is estimated that a share of 60-90% of illegal immigrants today have been supported by organized groups in travelling to Europe and crossing European borders[5]. At large there exist estimates that put the number of immigrants illegally smuggled and trafficked at some 4 million per year[6]. Brokerage of illegal immigrants into labour markets is concentrating on the construction business, house servants, sweatshops and agriculture as well as various types of shadow economies. Conventional organized crime is involved in trafficking immigrants, in particular the Chinese triads[7]. In Germany, estimates put the number of illegal immigrants in the construction business at approximately 500,000 illegals. According to recent estimates some 4.5 million illegal Mexicans alone live and work in the US (most of them in the areas of the southern belt where agriculture plays a major role)[8].

International adoption practices, finally, point to a market for children. The emergence of shadow economies leads to the phenomenon of accumulation of capital which in turn demands for re-allocation of such illicit capital into legal markets [9].

The answers to shadow economies and black markets during the last decades have been manyfold. However, the most important certainly seem to be

- disruption of local retail markets, also called zero-tolerance and proactive policing and
- disruption of the global economy of illicit goods and services through strategies of going after the proceeds of crime.

Anti-money-laudering and confiscation measures rank high in the policy agendas of European countries. Pressures arising out of widely voiced demands to prevent organized crime from profiting from various types of crimes, especially drug trafficking, have led into legislation facilitating seizure, freezing and forfeiture of crime proceeds. Besides the Council of Europe's Convention on Money Laundering, the guidelines issued by the

[5] Aronowitz, A.A.: Smuggling and Trafficking Human Beings: The Phenomenon, the Markets That Drive It And the Organizations That Promote It. European Journal on Criminal Policy and Research 9(2001), pp. 163-195, p. 169.
[6] Aronowitz, A.A.: opus cited 2001, p. 164.
[7] Yiu Kong Chu: The Triads as Business. Routledge: London, New York 2000, pp. 115.
[8] "Out of the Shadows", Time, July 30, 2001, pp. 26-29.
[9] Sinuraja, T.: Internationalization of Organized Economic Crime. The Russian Federation Case. European Journal of Crime Policy and Research 1995, pp. 34-53, pp. 46.

European Commission oblige member states to enact a legislation forbidding money laundering and to establish systems of control in order to enhance the potential of identifying, freezing and confiscating crime money. Moreover, the 1988 UN-Convention against trafficking in illicit drugs, emphasizes the need to crack down on illegal profits. Art. K of the European Union Treaty makes international crime, and with that, drug trafficking and money laundering, an important point in police and justice cooperation. The 2000 UN Convention of Control of Transnational Organized Crime pays also special attention to money laundering (and forfeiture policies). Anti-money-laundering measures and confiscation techniques today seem to represent the most powerful weapons available in the fight against drug trafficking and other types of organized crime[10]. It is even argued that the traditional response to crimes such as imprisonment and fines alone are ineffective, the better alternative being to follow the money trail[11]. In just one decade most of the European countries have amended both, basic criminal codes and procedural laws with the intent to facilitate seizure and forfeiture of ill-gotten gains[12].

Both, confiscation and anti-money-laundering-policies have contributed to changes in the criminal law and the criminal procedure significantly. Criminal law policies in this field have developed into international policies. Policies designed to combat organized crime are backed up by commitments to uniform legislation and joint efforts in law enforcement as expressed in international treaties and supra-national directives[13].

The scientific analysis of confiscation policies and anti-money-laundering measures has to focus first of all, on the process of implementation of these policies and problems which are encountered when enforcing criminal law in this field. As regards implementation of money laundering statutes and confiscation rules, it can be assumed that similar problems, as those known from research on the implementation of other parts of modern

[10] Tullis, L.: Handbook of research on the illicit drug trade. Socioeconomic and political consequences. New York et al. 1991, p.133.

[11] Savona, E.U.: The organized crime/drug connection: National and international perspectives. In: Travor, H.H., Gaylord, M.S. (Eds.): Drugs, law and the state. New Brunswick, London 1992, pp.119-133, p.131; Pieth, M.: Gewinnabschöpfung bei Betäubungsmitteldelikten. Strafverteidiger 1990, pp.558.

[12] Meyer, J. et al. (Eds.): Gewinnabschöpfung bei Betäubungsmitteldelikten. Eine rechtsvergleichende und kriminologische Untersuchung. Wiesbaden 1989.

[13] Levi, M.: Incriminating disclosures: An evaluation of money laundering regulation in England and Wales. European Journal of Crime, Criminal Law and Criminal Justice 3 (1995), pp.202-217; Pieth, M.: Opus cited 1990, p.559.

criminal law (such as eg. environmental criminal law) will show up, although the type of actors and type of activities involved will differ. This assumption is based upon the central role of information and information exchange for enforcing criminal laws. Crime profits and money laundering are part of systems (black markets on the one hand, as well as financial institutions, banks, building societies and commerce on the other hand) which are not easily penetrated by law enforcement although having access to these systems is a crucial point for implementation. In the case of traditional street crime and personal crime, initiation of criminal investigations are widely dependent on victims reporting the crime. Moreover, successful investigation is primarily dependent on the victim's capability to give a clear account of what has happened and, more important still, some information on the suspect which then can be used in tracing down the offender. Therefore, the victim's role in social control has been compared to that of a gate-keeper of the criminal justice system. However, crimes generating huge profits (drug trafficking) as well as money laundering are essentially victimless crimes. It follows that someone else has to take care of collecting and passing on intelligence. The functions normally fulfilled by the victim in the case of ordinary crimes have to be taken up either by the private sector which is engaged in financial transactions or by administrative authorities which have access to such information. Success or failure of confiscation and anti-money-laundering policies, then, is essentially dependent on whether relevant information can be provided for law enforcement purposes.

Two options are available for criminal justice agencies in attempts to cope with the deficit of information caused by the lack of a reporting victim. The first option consists of criminal justice agencies becoming proactive and acquiring the particular knowledge and the access necessary to produce and to use meaningful information with the ultimate goal to initiate criminal investigations, prepare solid charges and finally reach a verdict. This option has been used extensively in the field of drug offences where proactive policing has become a major mechanism in controlling drug markets and drug scenes. The second option would consist of criminal justice agencies creating "artificial victims"[14] or creating private law enforcement staff, thus making use of the knowledge and intelligence on money laundering available in other systems which usually would not be ready to invoke criminal law and do not stick to the goal of law enforcement. This

[14] Levi, M.: opus cited 1995, pp.202.

option is eg. in use in the field of environmental offences where particular administrative agencies are responsible for implementing administrative environmental law. The creation of artificial victims supposes that persons or institutions can be made interested in reporting suspicious cases or suspects as personal victims. This in turn means that persons or institutions relevant for money laundering can somehow be pursuaded that they are victimized by money laundering. Although, it might be that the cultural or financial system includes also an image of honesty and trust, confidentiality and the respect for customers' privacy have always been central values in the financial system, too. A second way, therefore, seems preferable to law enforcement systems, i.e. assigning banks and their employees the functions of deputies of police. This again points also to the question of private policing.

## 4. Concepts

### *4.1 Organized Crime*

The concept of organized crime is based on two theoretical approaches. The first views organized crime as linked with the traditional subcultures of the modern metropolis. These subcultures are also dependent on shadow economies which, on the one hand, provide for the economic basis for what once was called the professional criminal (in particular the professional thief) and on the other hand, provide for an environment for a network of professional criminals on the basis of deviant norms and values[15]. In fact, what is described in much of the contemporary literature on these subcultures of organized crime is the underworld which sometimes, is even conceived as a competitor to conventional society. However, as we observe in many societies there exists a multitude of arrangements between these underworlds and the conventional society which are functional, insofar as the underworld and the shadow economies operating within provide, for the supply which is demanded in the conventional society. The demand for drugs, prostitution or gambling emerges outside shadow economies and

[15] See Fijnaut, C.: Organized Crime: The Forms it Takes, Background and Methods Used to Control It in Western Europe and the United States. In: Kaiser, G., Albrecht, H.-J. (Eds.): Crime and Criminal Policy in Europe. Proceedigs of the II. European Colloquium. Freiburg 1990, pp. 53-97, pp. 54.

keeps these economies alive. The arrangements vary and include also various types of corruptive relationships [16].

The second theoretical approach necessary to understand organized crime refers to crime as a rational and well organized enterprise. It is obvious that the enterprise related characteristics of organized crime prevail today and that the subculture based characteristics are on the retreat. Organized crime thus comes in the forms and with the structures of ordinary and conventional economic behaviour. The differences which once were visible now have faded away and organized crime becomes indistinguishable from other types of economic behaviour. This can be demonstrated eg. by money laundering where nothing in the offender or in the act itself lends itself to a clear identification of the act as criminal or deviant. The offender and the acts do not carry any signs of crime or deviance we are used to rely on with respect to conventional crime or conventional criminals. The significant difference between organized and conventional crime, therefore, essentially concerns the emergence of new problems in investigation which are the consequence of adjustments and changes in rational and organized enterprises, like crime. Adjustments consist of getting closer to conventional society and abolishing subculture related and therefore visible differences. Organized crime creates problems of law enforcement because forms and procedures of conventional society are used (which make identification of criminal acts and suspects a difficult task). What contributes to these law enforcement problems certainly are new types of criminal legislation which – like eg. money laundering statutes – as a point of departure take a perfectly legitimate behaviour (handling assets or money) with illegality invoked only by the criminal origins of assets.

## *4.2 Immigration*

Immigration and migration represent the third "pillar" in understanding transnational crimes. Immigration has always be associated with "safety feelings" and crime. Immigration in Europe, since the early sixties, has been associated with crime and other social problems and therefore immigration has also become a central topic in the debates on safety in European Union countries. As is demonstrated through the creation and implementa-

[16] Williams, Ph.: The Geopolitics of Transnational Organized Crime. Paper Presented for the Conference on Global Security. University of Pittsburgh, November 2-3, 1995, pp. 5.

tion of the Schengen treaties, the immigration topic has grown into a most significant concept as regards the European Union policies with respect to crime and crime control[17]. Control of immigration is even equated with control of crime and the creation of stable social conditions. The particular relevance of the topic of the relationship between safety and immigration results from the process of globalization in the economy, the shrinking of the first labour market, and the rapid expansion of shadow economies as well as mass unemployment, the consequences of which become visible in feelings of unsafety, segregation and the emergence of inner city ghettos[18], in the loss of social solidarity and massive signs of bias hate and bias violence. With such processes the view of immigration and attitudes towards immigrants (and ethnic minorities) changes and moves immigrants into the role of individuals and groups carrying an extreme risk of

- contributing to unstability and violence either actively as offenders or passively as violence provoking victims

or

- exploiting host countries and host societies either through marketing illicit goods and services or through living on social security and property crime.

This view is reinforced through other signs of disintegration and conflict displayed by immigrant groups. It is, in particular, their high share of unemployment and low achievements in training and education which make immigrants (in particular immigrants from non-EU countries) a social group evidently living at the margins of societies. Unemployment rates among non-EU immigrants is at least the twofold of what can be observed among the majority group[19].

Immigration is, then, closely related to the fourth concept to be considered here in the context of transnational crime, that is ethnic minorities and ethnic segmentation of modern societies. This, too, contributes to the distinct features of transnational crime. With changes in immigration patterns

[17] Kühne, H.-H.: Kriminalitätsbekämpfung durch innereuropäische Grenzkontrollen? Auswirkungen der Schengener Abkommen auf die innere Sicherheit, Berlin: Duncker & Humblot 1991; Bundeskriminalamt (ed.): Moderne Sicherheitsstrategien gegen das Verbrechen, Wiesbaden: Bundeskriminalamt 1999.

[18] Wiles, P.: Ghettoization in Europe? European Journal of Crime Policy and Research, 1(1993), pp. 52-69.

[19] Muus, P.: International Migration: Trends and Consequences, European Journal of Crime Policy and Research, 9(2001), pp. 31-49, p. 45.

on the one hand and changes in the economic and social structures of modern societies on the other hand, we find that immigrants move into a precarious position which creates marginality and exclusion and contributes thus to ethnic segmentation and partiality as well as loyalty, that backs up shadow economies on the one hand and creates new types of law enforcement problems.

- social and economic changes in the last 20 years in general, have worked to the disadvantage of immigrants. The success stories of immigration which are known from the 19th and still 20th century Europe and North-America, concern immigrant groups which managed to work their way up and to integrate (economically and culturally) into mainstream society. So, eg., several waves of Polish labour immigrants settled at the end of the 19th and the beginning of the 20th century in the West of Germany (particularly in coal mining areas); they melted rapidly into main stream society and became invisible as a distinct group within half of a century;
- the traditional concept of immigration and cultural conflicts which was developed to explain social problems attributed to immigration in North-America obviously is not a concept that fits to the European situation as most immigration in Europe starts in European countries (including Turkey) themselves or in areas neighbouring Europe (as eg. Maghrebian countries); this, in turn creates new networks of migration and a pluralism of "transnational" communities";
- it is essentially the disappearance of low skilled work and the transformation of industrial societies into service and information societies dependent on high skilled staff, which have contributed to the change in labour markets drastically and with that the basic framework of traditional mechanisms of social integration (which was always based upon labour and employment). Shadow economies and black markets particularly in metropolitan areas, now offer precarious employment opportunities for newly arriving immigrants;
- political changes in Europe have contributed in affecting the legal status of immigrants considerably through changing the statutory framework of immigration as well as enforcement policies. While in the sixties and seventies most immigrants entered European countries legally (as labour immigrants or on the basis of family re-unification), today, the legal status of new arrivals points to illegality or to a precari-

ous status of asylum seekers, refugees and merely tolerated immigrants, who are subject to strict administrative controls and threatened by serious risks of criminalization (as a consequence of not complying with administrative controls);

- with the transformation of labour markets into places where highly skilled staff are needed immigrants also adopted an image of being unemployed and being dependent on social security. As agendas of crime policies are certainly not only preoccupied by crime and victimization but in particular, by assumed precursors of crime and deviance family problems, unemployment, lack of education and professional training become of great importance in descriptions of risks and dangers flowing from immigrants;
- then, immigrants tend, of course, to concentrate in inner city ghettos. Migration and immigration in Europe are headed towards metropolitan areas and with that, towards areas that are increasingly plagued by all sorts of social problems, including the emergence of inner city ghettos, youth gangs, drug use and shadow economies;
- there are important changes in the structure of immigrants. Labour migrants of the fifties and sixties are predominantly from rural areas while immigrants from the eighties and nineties are from metropolitan areas (where resources for migration are more readily available than in the disadvantaged areas of developing countries);
- Migration and immigration of the second half of the 20th century then, has led to the fastly developing phenomenon of ethnic and migration networks and with that, into the establishment of transnational communities providing for ample opportunities to move and representing an alternative to the European Union master plan of free movement of goods and people.

## 5. New Challenges for Law Enforcement and Answers Provided by the Transnational CrimeConvention

New challenges for police and policing in the area of transnational crime have several sources.

A first challenge follows from the attempt to balance efficiency in crime control with the need to protect privacy and human rights. Demands for more and more sophisticated electronic control of communication as well

as demands for compensation for growing mobility, globalized threats and weakening border controls certainly reflect the decline in informal controls of crime. In face of transnational crime, informal control anyway is rather limited. There is certainly a growing tension resulting from conflicting perspectives between the right of privacy on the one hand and law enforcement objectives on the other hand.

A second challenge concerns cooperation between police forces and an increasing demand for intelligence about the police itself and international variation in police organization, police laws, criminal procedural laws as well as policing models as adopted by various countries. Such intelligence is needed in order to understand the problems which can come up in police cooperation and to develop remedies in international treaties on transnational crime control.

Finally, challenges refer to changes that have been embedded in police work itself, in particular the emergence of zero tolerance style policing and related strategies that focus on the disruption of local expressions of transnational crime, for example, local shadow economies and black markets (and related order problems). These strategies have given rise to a general question of how crime can be controlled without increasing the police abuse of power and illegitimate violence,[20] a question which can be boiled down to the question of how to organize the relationship between police on the one hand and ethnic minorities on the other hand. Research on zero tolerance policing has revealed that such strategies are associated with a parallel increase in abuse of power, illegal behaviour and sometimes also illegitimate violence and has, in particular, led to the question of how such irregular conduct can be reduced without giving up the advantages of strict policing[21]. The problem is well known to all agencies that pursue several objectives at the same time. Policing regularly is not only guided by the goal of reducing crime but also by the goal to respect the value of human life and human dignity as well as to guarantee the basis of a civil and civilized society, moreover, to enforce the law impartially[22]. What is aimed at here, is to strike a balance between the two models of crime control which

[20] Eterno, J.A.: Zero Tolerance Policing In Democracies: The Dilemma of Controlling Crime without Increasing Police Abuse of Power. Police Practice & Research. An International Journal 2(2001), pp. 189-217.

[21] Kelling, G.L.: Crime Control, the Police, and Culture Wars: Broken Windows and Cultural Pluralism. In: Perspectives on Crime and Justice: 1997-1998 Public Lecture Series. NIJ, Washington 1998, pp. 1-29.

[22] Eterno, J.A.: opus cited 2001, p. 191.

have been outlined by Packer as crime control model and due process model[23].

Most important in the attempt to make the police an organization which adopts a balanced approach to crime control and in particular, a fair and impartial approach to ethnic minorities has been the representation of minorities themselves in police forces. However, European police forces have only recently adopted policies of active recruitment of ethnic minorities. Research on the recruitment of ethnic minority members into the police forces in England/Wales shows that despite an active commitment towards an ethnicization of the police, the proportion of ethnic minorities in the police is still rather low. While the proportion of ethnic minorities of the population at large is estimated at 7%, the proportion of ethnic police in general police services is 3%, as police officers 2%, as special constables 2,9%, as civil police staff only 5%. The details demonstrate that there is obviously an inverse relationship between the size of the ethnic general population on the one hand and the proportion of ethnic police. The higher the ethnicities proportion of the general population the bigger the gap between that rate and the rate of ethnic minorities in the police forces[24].

On the international level, the political will to focus on transnational organized crime as well as work on instruments to combat these types of crimes, were first expressed in the 1988 Vienna Convention.

The Vienna Convention focussed on the three areas perceived to be of paramount importance for the control of transnational drug trafficking. First, harmonization of substantial criminal law in the field of drug trafficking, then harmonization of money laundering legislation. Finally, international judicial cooperation were streamlined. Of marginal importance were attempts to harmonize investigative techniques. The 1988 Vienna Convention addressed controlled deliveries as a means to investigate major cases of transnational drug trafficking. The 1988 Vienna Convention in 2000 was followed by the UN Convention Against Transnational and Organized Crime with an additional protocol, dealing with trafficking in humans[25]. The Transnational Crime Convention 2000 goes into defining transnational and

[23] Packer, H.L.: The Courts, the Police, and the Rest of Us. Journal of Criminal Law and Criminology 57(1966), pp. 238-240.

[24] Duprez, D., Pinet, M.: Policiers et mediateurs. Sur le Recrutement et les Appartenances. Ifresi, Lille 2001, p. 116-119.

[25] Joutsen, M.: Elaboration of a United Nations Convention Against Transnational Organized Crime. ISPAC Newsletter 7(1999), No. 28; United Nations, General Assembly A 55/383.

organized crime beyond drug trafficking and attempts to establish a framework within which all types of transnational crimes can be dealt with effectively. According to Art. 2 of the Convention "Organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit. The definition certainly remains vague in order to cover the various phenomenon which internationally are regarded as transnational crime. The convention then covers various offences which are regarded as core transnational crimes such as money laundering, corruption, trafficking in humans as well as all serious offences committed by organized crime groups (whereby serious crime is defined as criminal offences carrying a threat of punishment of at least four years imprisonment). Then, membership in a criminal enterprise (or organized criminal group as defined in Art. 2 of the convention) is made a point in the convention urging members of the convention to introduce criminal legislation which makes such membership a criminal offence.

The convention also suggests to introduce various types of control of communication, and under cover operations as well as the crown witness, moreover witness protection programmes and corporate liability. What is interesting to note is the coverage of not only judicial cooperation in combating transnational crime but international police cooperation which stands now independently besides conventional forms of judicial cooperation. With that, a trend is reinforced which is visible very clearly in Europe where cross border cooperation is dominated by police, a trend which has provoked critics of "policization" of the criminal procedure and marginalization of the judiciary in international law enforcement[26]. In fact, the system of liaison officers which has been strengthened considerably over the last two decades has created a dynamic in the field of international police cooperation which does not have a parallel in judicial cooperation. What has furthermore pushed international police cooperation is certainly the elitist forms it takes. First, police cooperation is entrusted to a small group of police officers which is, second, far away from everyday police work[27].

Summarizing the trends as visible in the Transnational Crime Convention, we may conclude that a process has been initiated which aims at har-

[26] See also Aden, H.: Convergence of Policing Policies and Transnational Policing in Europe. European Journal of Crime, Criminal Law and Criminal Justice 9(2001), pp. 99-112.

[27] Aden, H.: opus cited, 2001, p. 103.

monizing special investigative techniques on the one hand and special sanctioning strategies on the other hand, while expanding their application beyond drug trafficking to serious types of crimes at large. The focus, evidently, is on efficiency in crime control and law enforcement; policing and law enforcement go international while the judiciary and judicial procedures remain national.

# The Origin of the Convention

PETER GASTROW

## A. Introduction

Much has been written during the past decade about the growth and increasing threat of transnational organised crime. I do not intend to reflect on those developments, as my task is to focus on the global response to that threat, namely the UN Convention against Transnational Organised Crime (the Convention). This Convention constitutes the culmination of a long process of endeavours, first by national governments, and then by the United Nations, to catch up with transnational organised crime and to curb it. The international community is still trying to catch up, but at least the Convention now provides a potential platform from which an international phenomenon can be more effectively addressed through international co-operation. With the wisdom of hindsight, we may well ask ourselves why it took so long for the international community to galvanise itself into action. I suppose that in this regard, we as individuals, national governments, and the United Nations, all display a similar approach of belated action against new threats that present themselves. We all tend to respond to new threats at a stage when the factors that appear to constitute such threats have already become a reality. We discover how entrenched and sophisticated the threat is once we have become the victims of such threats.

The responses against organised crime by governments and the international community since the 1960s, have followed a such a pattern: when the threats became obvious and blatant, reactive steps were taken to try and catch up. In mitigation it must be said that some of the underlying societal and political factors that facilitated the growth of organised crime are highly complex, not easily predictable, and have been very difficult to

identify. Politically it is also very difficult for governments to marshal the necessary public support for interventionist steps unless the threat to their self-interest is patently clear. The problem is that by the time that the average member of the public has gained some understanding of the nature and threat posed by organised crime, the sophisticated transnational organised groups will already have moved into a new phase of operating, resulting in new threats and challenges. There seems to be a recurring time gap between the stage when organised criminal groups diversify or intensify their activities, and the time when experts and governments develop the understanding, the rhetoric, and the explanations so as to subsequently mobilise support to combat the new forms of transnational organised crime.

## B. Early Initiatives

The origins of the Convention need to be sought not in one initiative or event but in the multitude of initiatives that were taken over the past three decades. The net needs to be cast very wide. If we were to look solely at the initiatives of the United Nations, one could try and trace the origins of the Convention by analysing the information supplied in the lengthy preambles of the many UN resolutions that preceded the adoption of the Convention. Only seasoned UN bureaucrats will be able muster the enthusiasm to do that with ease. I am referring to those resolutions that relate to organized crime that were passed by the Economic and Social Council, the General Assembly, and the various UN sponsored conferences over the past ten years. If one follows this trail into the past, one ends up with probably the most important stimulus for the Convention, namely the "World Ministerial Conference on Organized Transnational Crime" which took place in Naples from 21 to 23 November 1994 and which issued the "Naples Political Declaration and Global Action Plan against Organized Transnational Crime".

However, some of the earlier national and international initiatives to address organised crime that were devised in different parts of the world, indicate that a long learning curve had to be mastered before the Naples Conference could take place. In addition, during the two decades preceding the adoption of the Convention, the scale and diversity of transnational organised continuously expanded, providing analysts, policy makers and legislators with constantly shifting goal posts. The very concept of "transnational crime" was new. It had emerged for the first time in 1975, during a meeting of the then UN Crime Prevention and Criminal Justice Branch.

The term was coined in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country.[1]

A brief excursion into some of the earlier national initiatives might illustrate that the Naples World Ministerial Conference was in fact a culmination of numerous smaller steps that were taken domestically, and the result of a process in which governments and their criminal justice systems learnt many lessons and adjusted their approaches, thereby clearing the way for global action.

## C. Pre 1990: Ad hoc domestic responses to organised crime

The stereotype notion of 'organised crime' was largely shaped by the movie industry. For many it continues to connote a type of criminal activity similar to the racketeering and smuggling exploits that occurred during the prohibition era in the US or similar to the stereotype role of Mafia 'mobsters' in New York during the 1950s. But it was also in the US that the first serious attempts were made during the 1960s to understand and address 'crime syndicates' or organised criminal groups. The testimony of former US Attorney General, Robert Kennedy in 1963 before the Senate Committee hearings contributed significantly towards a heightened awareness in the US of the growing influence of organised criminal groups. Kennedy warned that sophisticated criminals were moving into legitimate business enterprises through violence and intimidation.[2] The threat was perceived to be a domestic and not an international one, even though the police were aware of the fact that Mafia leaders had contacts and collaborators in other countries such as Italy and Canada.

During the 1960s, the focus in the US to devise new measures to contain the growth of organised crime and to complicate their entry into legitimate businesses, culminated in October 1970 with the passing by the US Congress of "The Racketeer Influenced and Corrupt Organizations Statute" – the RICO statute. The new law was controversial and it constituted a quantum leap away from the conventional approach of individual prosecutions and provided for the prosecution of a "pattern of criminal acts", whether com-

[1] Gerhard O W Mueller, Transnational Crime: Definitions and Concepts, Transnational Organized Crime, Volume 4, Autumn/Winter 1998, Numbers 3 and 4, Frank Cass & Co Ltd, London, 1998, p. 13.

[2] M E Beare, Criminal Conspiracies: Organized Crime in Canada. Nelson Canada, Ontario, Canada, 1996, p. 140.

mitted by direct or indirect participants in the criminal group. In addition it provided for both criminal and civil forfeiture of the proceeds of crime. Federal States in the US were cautious about introducing RICO-type legislation and most of them waited for more than a decade before they did so.

In Canada, the new RICO legislation was regarded with a degree of scepticism. After a number of reports, commissions, and extensive debates, and after some of the RICO provisions were found to be too potentially abusive or inappropriate to Canada's criminal justice system, new Proceeds of Crime legislation eventually came into force in 1989, as a step towards addressing organised crime.[3] Australia and the United Kingdom also studied the RICO statutes but found aspects of it too far-reaching and incompatible with their legal systems. Instead, they both opted for legislative change that was aimed at forfeiting the proceeds of crime. However, the RICO statutes had a major influence on legislative changes beyond the borders of the US, even though most countries used it merely as a model from which to extract concepts around which domestic legislation could then be shaped. In South Africa, for example, this happened as recently as 1998 with the adoption of the Prevention of Organised Crime Act.

In Italy, the government moved to combat the growth of the Mafia by criminalizing the membership of such an organisations. In 1982 it promulgated Penal Code, article 416 bis, which criminalized the "act of being part of an associazione di tipo mafioso" made up of three or more persons.

The legislative changes in various countries during the 1970s and 1980s were still mainly geared towards addressing the domestic threat of organised crime. This changed slightly during the 1980s, in two respects. *Firstly*, governments had realised that in order to effectively prosecute domestic organised crime, they increasingly required evidence and legal assistance from other states in which organised criminal groups had links or were involved. A growing list of countries therefore entered into mutual legal assistance treaties during the 1980s. *Secondly*, governments had come to realise that international steps against the illicit narcotics trade and its associated money laundering activities had become necessary. This was the one transnational organised criminal activity that was outstripping national governments' ability to contain it. However, the international response was a sectoral one that did not address the phenomenon of transnational organised crime in all its manifestations. It focused on the two sectors that were of immediate concern. This resulted in the 1988 UN Convention against

[3] M E Beare, supra, p. 157.

Illicit Traffic in Narcotic Drugs and Psychotic Substances and the 1989 Financial Action Task Force. These were the first two sectors or categories of transnational criminal activities whose increasing global impact had led to an international response.

Prior to 1990 the various piecemeal initiatives that were undertaken were therefore initially aimed at either addressing domestic organised crime rather than the international dimension of transnational organised crime, or they focused on specific sectors of transnational organised crime. The international impact, sophistication, and threat of other sectors of transnational organised crime only became apparent as law enforcement agencies developed a better understanding of domestic organised crime. The result of this learning curve was that increasingly the international implications of some of the other transnational criminal activities came under international scrutiny. This started to happen in earnest from 1990 onwards.

To summarise, prior to 1990 there appear to have been four overlapping phases through which responses against organised crime progressed:

- New domestic legislation against organised crime: These first steps involved the recognition by governments that organised crime was a distinct phenomenon that could no longer be countered effectively through conventional investigative approaches or by pursuing individual prosecutions. The RICO statues and the Italian Penal Law, illustrate this adjustment in approach.
- Mutual Legal Assistance Agreements: The growing realisation that organised criminal groups had international links and that mutual legal assistance treaties were necessary to effectively prosecute them, led to a proliferation of mutual legal assistance agreements during the 1980s and the adoption in 1990 by the UN General Assembly of Model Treaties on Extradition and on Mutual Assistance in Criminal Matters.
- The UN Convention on drug trafficking: Governments had come to perceive one aspect of transnational organised crime, namely the growing international narcotics trade, as constituting an international threat to be countered through a global response. The 1988 UN Convention on drug trafficking was the result.
- Money Laundering: Associated with the narcotics trade, the enormous profits that were being made and laundered by transnational organised criminal groups led to initiatives that focused on countering domestic and international money laundering. This galvanised the G7 nations to

set up the Financial Action Task Force (FATF) which subsequently promulgated the 40 guidelines for the prevention and control of money laundering.

## D. Post 1990: Moves towards a comprehensive global response

By the beginning of the 1990s, it had become increasingly clear that not only had transnational organised crime expanded significantly during the 1980s, but also that the range of activities pursued by them had broadened. Globalisation and increasing economic interdependence had become a reality. Tortuous transformation processes towards democracy were underway in the Russian Federation, several central European states and in South Africa. New low-risk criminal markets had emerged. The weakening of state authority in many parts of the world had reduced the risk for transnational organised networks that were able to swiftly exploit the new opportunities to expand their markets. To an increasing extent transnational organised crime was driven not only by international criminal organisations that had rigid hierarchical and corporate structures, but also by expanding networks that were flexible, innovative, and that cooperated internationally where it served their interest but also competed with others when it was to their benefit to do so.

Also from 1990, the United Nation played a more prominent role in addressing transnational organised crime. In December 1990, the UN General Assembly decided to appoint an inter-governmental working group to come forward with proposals for an effective crime prevention and criminal justice programme.[4] The report from the working group, which was tabled a year later in December 1991, caused the General Assembly to express its alarm at the rising incidence of crime generally and at the "many forms of criminal activity that have international dimensions". The report expressed its concern about international crime as follows:

"We believe that the growing internationalisation of crime must generate new and commensurate responses. Organized crime is exploiting the relaxation of border controls designed to foster legitimate trade and, hence, development. The incidence and scope of such crimes may increase further in the coming years unless sound preventive measures are taken. It is thus

[4] UN General Assembly resolution 45/108 of 14 December 1990 (A/RES/46/152), http://www.un.org/documents/ga/res/46/a46r152.htm

particularly important to anticipate events and to assist Member States in mounting suitable preventive and control strategies."[5]

If the above statement reflects the collective wisdom of the international community on how to address the so-called "internationalisation" of crime, then it is clear that the notion of a coordinated global response to the phenomenon of transnational organised crime was not yet an option that had been seriously considered. All the UN resolution was aiming at was to ".. assist Member States in mounting suitable preventive and control strategies." The focus was still on enhanced national responses to counter growing internationalisation of crime more effectively.

However, within a year the emphasis had changed significantly. No longer did the General Assembly merely express its alarm at the 'internationalisation of crime'. In a December 1992 resolution it went further and expressed its alarm at the "rapid growth and geographic extension of organized crime in its various forms, both nationally and internationally" and it acknowledged "the need for global efforts commensurate with the magnitude of national and transnational crime".[6] In addition, the General Assembly stressed that priority had to be given "to the struggle against all activities of organized crime, including the illicit arms trade and traffic in narcotic drugs, cultural property theft, money laundering, the infiltration of legitimate business and the corruption of public officials".

The heightened profile accorded to transnational organised crime by the UN was influenced amongst others, by a number of conferences and meetings during 1991 and 1992,, that had focused on the phenomenon with a growing sense of urgency. Meetings at which recommendations were formulated were, amongst others:

- The Ad Hoc Expert Group Meeting on Strategies to deal with Transnational Crime, held at Smolenice, Czechoslovakia in May 1991,
- A International Seminar on Organized Crime, held at Suzdal, Russian Federation, in October 1991,
- A March 1992 meeting in Courmayeur, Italy, convened by a committee of the UN crime prevention and criminal justice programme, which came forwards with a proposed outline for an international conference on money laundering,[7]

[5] UN resolution 45/108 supra.

[6] UN General Assembly resolution A/RES/47/87 of 16 December 1992, http://www.un.org/documents/ga/res/47/a47r087.htm

[7] See UN General Assembly resolution A/RES/47/87 of 16 December 1992.

- The first session of the UN Commission on Crime Prevention and Criminal Justice, held in April 1992,
- The Economic and Social Council meeting which decided in July 1992, that the topic "Action against national and transnational economic, organized and environmental crime: national experiences and international cooperation" should form part of the agenda of the forthcoming Ninth UN Congress on the Prevention of Crime and the Treatment of offenders.[8]

Despite a realisation of the growing complexity and threat posed by transnational organised crime, progress towards developing a global response against the phenomenon remained cautious and slow. This was not only due to the fact that there were still widely different understandings of what organised crime was, but also because some states did not perceive it as a threat grave enough to warrant an international response. In some developed countries the view was held that stepped up national efforts to contain transnational organised crime would suffice in containing organised crime. Some European analysts did not regard transnational organised crime as posing a real threat to the democratic constitutional state and the free market economy in most of the European member states.[9] Their view was that:

"Organized crime, as most member states know it, is, for the most part, not international in nature but a local problem. ... Following from all this, it can be argued that the significance of international cooperation in criminal law, and in particular judicial cooperation, in the control of organized crime is overestimated both in official publications and in much scientific literature. Because organized crime is to a significant extent a local issue, the control of this crime is first and foremost a responsibility of local and national authorities..."[10]

Although this view was expressed in the context of whether or not the EU should adopt a communitarian approach towards addressing organised crime, it reflects a cautious approach, which was later also displayed by some European governments during the preliminary phases of negotiating the Convention.

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[8] Economic and Social Council resolution 1992/24 of 30 July 1992.

[9] Cyrille Fijnaut, "Transnational Organized Crime and Institutional Reform in the European Union: the Case of Judicial Cooperation", Transnational Organized Crime, Volume 4, Autumn/Winter 1998, Numbers 3 and 4, Frank Cass & Co Ltd, London, 1998, p. 278.

[10] Fijnaut, Supra, p. 279, 280.

However, the UN Commission on Crime Prevention and Criminal Justice provided an important coordinating forum from which the international community could respond more comprehensively and more energetically to transnational crime. The supra-national positioning of the UN enabled it to serve as a clearing house and coordinator of new ideas that went beyond addressing domestic interests. In December 1992, the General Assembly passed a resolution in which it reaffirmed that "priority must be given to the struggle against all activities of organised crime, including the illicit arms trade and traffic in narcotic drugs, cultural property theft, money laundering, the infiltration of legitimate business and the corruption of public officials."[11]

## E. The World Ministerial Conference on Organized Transnational Crime

The second session of the UN Commission on Crime Prevention and Criminal Justice in Vienna in April 1993, recommended that a World Ministerial Conference on Organized Transnational Crime be convened. This was endorsed by the Economic and Social Council of the UN in July 1993, when it pointed out that one of the objectives of the planned Ministerial Conference would be "to consider the feasibility of elaborating international instruments, including conventions, against organized transnational crime".[12] The UN General Assembly supported this in December 1993 and urged member states to be represented at the highest possible levels.[13]

The government of Italy established a Coordinating Committee in preparation for the World Ministerial Conference planned for Naples in November 1994. This Coordinating Committee prepared a comprehensive discussion document, which set the tone and parameters for the forthcoming Naples meeting. It reflected a sense of urgency for increased international cooperation and proposed international agreements to address the problems. Interestingly, the discussion document did not contain a suggestion for a comprehensive UN convention against transnational organised crime.

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[11] UN General Assembly resolution A/RES/47/87 of 16 December 1992, http://www.un.org/documents/ga/res/47/a47r087.htm

[12] Economic and Social Council resolution 1994/12 of 25 July 1994, http://www.un.org/documents/ecosoc/res/1994/eres1994-12.htm

[13] UN General Assembly resolution A/RES/48/103 of 20 December 1993, http://www.un.org/gopher-data/ga/recs/48/103

It recommended that action steps should be taken along four fronts, one of them, referred to as "perhaps the most difficult one" was

> "devising adequate ad hoc measures of international cooperation that are aimed specifically at fighting organized crime and are more specific than those generally applicable to other crimes. Such measures should take into account the above-mentioned structural characteristics of organized crime and could benefit from a comparative study between what is described in the 'model treaties', and frequently contained in existing agreements, and the provision of more specialized and advanced conventions concerning serious criminal offences such as those in United Nations conventions on drug trafficking."[14]

Representatives from 142 states attended the World Ministerial Conference which took place in Naples in November 1994 – more than were present at any stage during the subsequent Vienna negotiations of the Convention. They issued the "Naples Political Declaration and Global Action Plan against Organized Transnational Crime" which amounted to a wake-up call, urging immediate steps to be taken by the United Nations and national governments against the growing threat of transnational organised crime. But the Declaration contained no clear and crisp call for a global convention. The idea of developing such a global legal instrument was raised at the conference, but the lingering scepticism of some of the developed countries about the feasibility of negotiating such an instrument was responsible for the rather conditional language that found its way into the Naples Political Declaration.[15] The resistance to the preparation of a convention came particularly from among the "Western European and others" group of countries.[16]

The result was that there was no direct statement in the Declaration to the effect that a convention would be drafted. Instead, the Secretary General was asked to consult with Governments on the "opportunity of elabo-

[14] Annexure to Economic and Social Council resolution 1994/12 supra.

[15] Dimitri Vlassis, Drafting the United Nations Convention against Transnational Organized Crime, Transnational Organized Crime, Volume 4, Autumn/Winter 1998, Numbers 3 and 4, Frank Cass & Co Ltd, London, 1998, p. 356.

[16] An unpublished paper by Matti Joutsen, Drafting the United Nations Convention against Transnational Organized Crime, Director, International Affairs, Ministry of Justice, Finland, matti.joutsen@om.fi, p.2.

rating new international instruments such as a convention or conventions and on the issues and elements that could be covered therein".

This hesitancy was due to a variety of reasons. Those who were sceptical of the need for a new convention argued that the concept of organised transnational crime was too vague, that it appeared in too many forms to be dealt with except on a high level of generality, and that existing instruments on extradition and mutual assistance – if promoted and properly implemented – could already provide an adequate basis for international cooperation. In their view, the focus had to be placed on the development and strengthening of practical measures. The sceptics also noted that negotiating a convention was an expensive process, for both the countries involved and for the United Nations, and that the resources needed for this would inevitably be taken away from other projects that were perhaps just as deserving.[17]

The UN General Assembly approved the Naples Political Declaration and action plan in December 1994 and urged states to implement the recommendations as a matter of urgency.[18]

## E. The Final Stretch

Despite the circumscribed language of the Political Declaration, broad support had emerged amongst most delegates at the Naples meeting for a new convention against transnational organised crime. Two follow-up regional ministerial conferences, one in Buenos Aires in 1995 and one in Dakar in 1997, resulted in a large number of countries calling for a new convention and urging the expedient commencement of negotiations. The Naples Ministerial Conference had created a momentum, which resulted in an exceptionally rapid process thereafter leading to the negotiation of the UN Convention against Transnational Organized Crime and its adoption by the UN General Assembly by November 2000. The details of this rapid process are still fresh in the minds of those with an interest in transnational organised crime and, except for a few factors that accelerated the process, will not be elaborated upon here.

During the mid-1990s, the US began to take on a leading role in support of global action. In his UN 50th anniversary speech in October 1995, President Clinton gave the organised crime threat unprecedented prominence

[17] Matti Joutsen, supra, p. 2.
[18] General Assembly resolution 49/159 of 23 December 1994.

and followed it up with a Presidential Directive 42, declaring organized crime to be a threat to global security and mobilising the entire US government in the fight to counter it.

In December 1996, Poland submitted the first draft of a possible convention to the General Assembly, thereby boosting the process. The Polish draft was loosely based on the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Once the Polish government had introduced its draft, the political pressure 'to get the job done' became overwhelming. The idea for a convention took on a life of its own. For example the Finish government – which was one of those countries that initially strongly opposed the idea of a convention – concluded that if energy and resources were going to be expended on the process, it would be better to join in and seek to ensure that the end result was as useful as possible.[19]

In 1997 the UN Commission on Crime Prevention recommended to the General Assembly the adoption of a resolution, which set up a group of governmental experts with the task of exploring the contours of an international convention.[20] The group of governmental experts met in Warsaw in February 1998 and produced a list of options, which was in essence the first rough draft of a new convention. Informal meetings of experts followed to refine the draft. During 1999 and 2000, ten sessions of a UN Ad Hoc Committee were held in Vienna at which the negotiations were conducted to produce a Convention that received unanimous approval from the about 120 delegations that participated.

## F. Conclusion

The Convention is now a reality, even though it has not yet entered into force. The jury is still out on the issue of the workability and effectiveness of the Convention. If the enthusiasm that was displayed by most governments in concluding the Convention is matched with the same enthusiasm to ratify and implement it, then the Convention is likely to make the impact that its drafters hoped for. It is perhaps too early to even venture a prediction, but the turmoil of the post September 11, 2001 period suggests that other priorities may cause the Convention to drop on the list of priorities and therefore take longer to become an effective global weapon against transnational organised crime than anticipated.

[19] Matti Joutsen, supra, p. 2.
[20] Dimitri Vlassis, supra, at p. 357.

# The TOC Convention and the Need for Comparative Research: Some Illustrations from the Work of the UN Centre for International Crime Prevention*

JAN VAN DIJK, MARK SHAW & EDGARDO BUSCAGLIA

## 1. Introduction

While the decisions on the implementation and monitoring of the United Nations Convention against Transnational Organized Crime are still forthcoming, the ability to access information on international organized crime trends will undoubtedly be an important requirement. Reliable information on ongoing developments from a global perspective may provide a useful marker against which progress can be measured and changes in the nature of organized crime assessed. At the same time, an international effort to collect information on developments in organized crime around the globe would provide a useful platform for the work of a wide ranging number of individuals and governments who are increasingly adopting more systematic ways of acquiring information on organized criminal groups.

Such requirements are explicitly recognized in the Convention. This stipulates that states should "consider analyzing, in consultation with the scientific and academic communities, trends in organized crime in [their] territory, the circumstances in which organized crime operates, as well as the professional groups and technologies involved".[1] The Convention also urges states to share information on organized crime and specifically recognizes that "common definitions, standards and methodologies should be

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[1] Article 28 (1)

developed and applied as appropriate."[2] It is envisaged that a key outcome of such information sharing exercises would be the forging of a common understanding and approach to the problem and, over time, the development of a set of best practices in the fight against organized crime.

Nonetheless, these factors, and their inclusion in the Convention, constitute a significant challenge for international bodies, specifically the UN's Centre for International Crime Prevention (CICP) and the United Nations Interregional Crime and Justice Research Institute (UNICRI) who are likely to be tasked with it, in providing the framework for such analysis and information sharing to occur. Data on organized crime groups across the world is uneven, and often dominated by information from the developed world. There is, in contrast, a general lack of knowledge on the nature and extent of organized crime groups in the developing world. The focus is also generally on organized crime groups which have a high public profile – such as the Italian Cosa Nostra or the Russian Mafia[3] – to the exclusion of a wide range of smaller criminal enterprises which often resemble more complex and fluid networks.[4]

The challenge at the international level is to collect information on a phenomenon that has both local (at the level of states) and international dimensions (organized criminal groups by their nature engage in illicit trade across borders). Such interconnectivity between the local and the global has been neatly termed 'glocal' by one analyst.[5] At the same time, it must be recognized that the nature of organized crime in a range of societies does not resemble the structured hierarchies of the popular imagination. In contrast, criminal enterprises are dynamic and relatively loose structures, making the task of both law enforcement and research and information collection activities more difficult.[6]

This paper explores the challenge of research and information collection as an aid to the future implementation of the TOC Convention by examin-

[2] Article 28 (2)

[3] See for example, Patricia Rawlinson, 'Mafia, Media and Myth: Representations of Russian Organised Crime', *The Howard Journal*, Vol 37, No 4, November 1998.

[4] Nigel Coles, 'It's Not What You Know – It's Who You Know That Counts: Analysing Serious Crime Groups as Social Networks', *British Journal of Criminology*, Vol 41, 2001.

[5] Dick Hobbs, 'Going Down the Glocal: The Local Context of Organised Crime', *The Howard Journal*, Vol 37, No 4, November 1998.

[6] Phil Williams, 'Organising Transnational Crime: Networks, Markets and Hierarchies', in Williams and Dimitri Vlassis (eds), *Combating Transnational Crime: Concepts, Activities and Responses*, London: Frank Cass, 2001.

ing three inter-related research efforts underway at the CICP. These are as follows:

- An attempt to collect information on organized crime groups themselves, and by so doing measure overall trends in the phenomenon of transnational organized crime.
- The development of a set of indices to measure organized crime across countries and their correlation with both indices of conventional crime, levels of development as well as with levels of homicide and corruption.
- The development of a systemic method of identifying and assessing the institutional control variables affecting the level and scope of public sector corruption and organized crime.

An overview of some of the challenges and findings in these three areas is dealt with below. It should be noted that work in each of the three areas is ongoing and that in some cases conclusions are still at a tentative stage. Nevertheless, these projects serve as useful examples to explore the degree to which focussed research projects at the international level may be important in both monitoring and assisting the implementation of the TOC Convention.

## 2. Researching Organized Crime Groups

Collecting information and data on organized crime in a variety of jurisdictions presents a series of difficulties. The process entails a combination of two features which, it has been noted elsewhere, present significant methodological problems. The first is the conducting of cross-jurisdictional or comparative criminology, with all the issues of legal definition and varying interpretation that this presents.[7] The second is conducting research on organized crime, acknowledged to contain challenges that are not present in other areas of criminological study.[8] To combine these two features therefore in a comparative study of trends in organized crime constitutes a challenge for research and analysis.

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[7] For both the advantages and disadvantages of comparative criminology, in this case specifically research on policing, see R. I. Mawby (ed), *Policing across the World: Issues for the Twenty-first Century*, London: UCL Press, 1999.

[8] See for example the introduction to James O. Finckenauer and Elin J. Waring, *Russian Mafia in America: Immigration, Culture and Crime*, Boston: Northeastern University Press, 1998. Also, Dick Hobbs, *Bad Business: Professional Crime in Modern Britain*, Oxford: Oxford University Press, 1995.

A related obstacle is the fact that any study of international organized crime (particularly one conducted at the level of the UN which relies on contributions from member countries) has to rely on information generated in individual states, the building blocks of the international system. Yet transnational organized crime, by definition, operates across national boundaries. Information obtained from any one state therefore may only provide a partial reflection of the reality.

For these and other reasons the comparative study of organized criminal groups is not well developed. Literature on the subject is either very general, providing an overview of the key principles or defining features of organized crime and drawing on various examples. Or, it refers to the activities, history and trends of a specific criminal group. Comparative studies that examine the characteristics of organized crime groups in a variety of societies, *having collected primary data on these*, are few and far between. The two reviews of global organized crime completed to date provide only high level overviews of transnational organized crime trends, and while useful, lack the detail of a closer analysis of individual criminal groups.[9] There is thus a significant gap in the literature, which when filled, would greatly benefit the process of information sharing outlined by the Convention. This was the reason that the CICP project on global organized crime trends was initiated.

## *Gathering data*

The initial challenge faced by the CICP study was how to gather the data required – and more specifically *which* data. The approach adopted was to send out detailed questionnaires to a selected number of member states of the UN where it was believed capacity existed and information would be available which would be useful to the study. The issue of what information to collect generated more debate however than the method (the questionnaire) in which it would be acquired. The choice, broadly speaking, was whether to collect information about the general situation of organized crime in any country, or whether to collect data on specific criminal groups. The outcome is effectively a compromise, although leaning more

[9] These are: Sabrina Adamoli, Andrea Di Nicola, Ernesto Savona and Paola Zoffi, *Organised Crime Around the World*, HEUNI, 1998; and the *International Crime Threat Assessment* produced by the Clinton Administration (http://www.state.gov/www/global/narcotics_law/crimecontrol.html).

heavily towards the accumulation of data on specific criminal groups. Thus national correspondents in each of the 18 states[10] which have served as partners in the study, were asked to fill in a detailed questionnaire and provide a narrative account of the three most prominent organized criminal groups in their country.

The level of prominence of the organized crime groups in question was to be determined by, among other factors, the level of media coverage of that group and the attention it had received by the police or prosecution services. Admittedly this was an imperfect method, relying on the subjective judgement of those completing the survey. One result might be that criminal groups which were more effective in their methods of operation and thus would not have received attention in the media or a visit from the police would not be covered. In any event however, there would also only presumably be sketchy information about the activities of such groups in the public realm, making them less useful for the purposes of the survey. In the end information on 43 specific criminal groups or clusters of criminal groups were submitted.[11]

The questionnaire itself consisted of approximately 50 variables, under the general themes: name, structure and activities of the group in question; law enforcement responses; ethnic and gender dimensions; the community and social context of the group's activities; the use of violence by the group; its level of professionalism based on information about its *modus operandi* and activities; the use of corruption to facilitate illegal activities; the ability to influence the political process; the group's transnational links, including with other organized crime groups; and finally the role of the group in the legitimate economy.

In addition to identifying and providing information on specific criminal groups, details in respect of a prominent criminal market (such as the trade in illegal narcotics, stolen motor vehicles or the trafficking in human beings) in each country was also requested, so as to provide greater insight into the overall nature of criminal activity. Again admittedly, this method was not perfect but at least gave some more detailed information than a

[10] In fact 17 countries and one region, the Caribbean. The countries to which questionnaires were sent are: Australia, Canada, Colombia, Czech Republic, Germany, Italy, Japan, Netherlands, United Kingdom, United States, South Africa and the Russian Federation. Data from a similar UNICRI study of countries in Eastern Europe were also added. These are: Lithuania; Ukraine; Bulgaria; Albania and Byelorussia.

[11] This is less than three per country, as in a number of cases fewer responses were received. Some countries however submitted four responses.

simple overview of organized criminal activity in the country, which could in any event be gathered by using secondary sources.

The final obstacle was to select who would be the respondents in each country. A particular problem in comparative research conducted at an international level is that governments are understandably sensitive to how they are portrayed in respect of domestic crime problems and their success in fighting them. In respect of organized crime then, government inputs and documentation should thus be supplemented with information from a variety of other sources. As Hobbs points out "the intransigence [of some analytical accounts] that collude so closely with administrative analysis ignores narrative accounts at the considerable loss of detail, tone and depth".[12] For this reason, the various surveys have been filled out by a variety of respondents, including academic research institutes, law enforcement and intelligence bodies and state research agencies, where it was felt (or where particular 'experts' were known to be located) the best results could be achieved. Respondents were also urged to draw on a number of sources.

### *Preliminary interpretations*

The various questionnaire responses give a rich insight into the characteristics of organized crime groups in a number of societies. Each response is interesting in its own right, but the real value of the information is the ability to make comparisons across countries and groups.

An initial analysis of the data suggests that some distinction must be made between the various groups analyzed. The majority of the groups (32 of the 43) that have been submitted constitute single criminal entities. These are, in effect, relatively self-contained groups with a clearly identifiable number of members.[13] Thus, for example, a small group engaged in the trade in illegal narcotics from Turkey to the Netherlands whose members have multiple nationalities and who coordinate their activities with other criminal groups. The remainder (11) do not represent individual groups, but rather categories, or perhaps more accurately clusters, of or-

[12] Quoted in Patricia Rawlinson, 'Mafia, Methodology and "Alien" Culture', R. D. King and E. Wincup (eds), *Doing Research on Crime and Justice*, Oxford: Oxford University Press, p. 357.

[13] 'Self-contained' should not however imply that there is not significant cross-over and cooperation with other groups, but that they constitute a relatively self-contained unit for study. The difficulties inherent in such distinctions however illustrate the extent to which trying to analyze the various component parts of transnational organized crime represents a definitional mine field.

ganized crime groups. These would include responses covering, for example, the Russian Mafia in the United States or Nigerian criminal groups in South Africa. In both cases it would be inaccurate to describe these as homogenous criminal groups, they are instead made up of a large number of smaller and often overlapping groups which generally operate independently of each other. Given that these are not the same phenomenon, the one being a cluster of criminal groups, the other the group itself (potentially the building block of a criminal cluster), the two categories have been separated out from each other. This distinction, as will be suggested below, is of some importance in terms of an overall project on examining global organized crime trends.

A matrix of the groups under examination is presented (see Figure 1a) to illustrate in simplified form the progress to date in respect of information gathering on the various criminal groups. While this article examines the process around which the research is being conducted, it is worth diverting briefly to examine two tentative conclusions emerging from the data which will shape how the work proceeds.

First, what is clear from an early review of the data is the diversity of groups that respondents have analyzed. The key to the matrix (Figure 1b) indicates the various classifications than can apply to each criminal group in respect of structure, size, violence, etc., on the matrix. Some groups for example, make use of high levels of violence (indeed, violence is a defining feature of their activities), while other make use of little or none. Thus while in two thirds of the groups, violence was regarded as being essential to their activities (marked as C in the 'violence' column of the matrix), in the remainder of cases violence was used only occasionally or not at all (marked as A or B). Some groups have more clearly structured hierarchies (identified as A, B or C in the 'structure' column of the matrix), while others seem to be nothing more than a loose and often motley collection of individuals (marked as D or E). The majority engage in multiple and interconnected criminal activities (designated by an A in the 'activities' column of the matrix), while a significant proportion engage in very few, and in some cases only one (marked as B and C). The diversity of the groups is perhaps the most startling feature of the data, suggesting that when we talk of transnational organized crime in a variety of localities, we are often in fact referring to very different phenomenon.

Second, a review of the data suggests the remarkable degree of what perhaps can be referred to as the 'fragmentation' of the groups involved. In many cases, the entities in question are not clearly structured hierarchies,

with clear lines of command. Instead, in about one third of the cases (marked D and E in the 'structure' column of the matrix) they are relatively loosely structured and dynamic. In almost all cases they rely on the personality of a specific individual or individuals for their formation, direction and the activities they are involved in. Indeed, the role of individuals is a feature sorely missing in much of the academic literature around organized crime. The various case studies around which data has been collected show it however to be an issue of critical importance. In turn, if (and it has already been conceded that this is a subjective judgement) the groups in question are the most important in the various countries, some are remarkably small – the core group often only consisting of 3 or 4 people. The majority of the groups have between 20 and 50 members (marked as B in the 'size' column of the matrix). Of course, there are also larger groups (who measure their number in hundreds and are marked as D in the matrix) but the extent to which many of the groups identified are modest in size is a surprising outcome of the research process.

These two features suggest that critical to understanding the data that has been collected is, in the longer term, to develop a more rigorous system to classify various organized crime groups, both in terms of their structure, activities and the degree of harm which they cause. A short example may be useful here in illustrating the degree to which it is possible to extract important conclusions from the data. When the structure of the various groups is compared to the degree of violence which they are engaged in, the clear conclusion reached is that highly structured and arranged criminal groups also have the greatest propensity for both internal and externally focussed violence. This is illustrated by Figure 2 which shows that groups classified in the matrix as structured hierarchies (A) also engage in the highest level of violence (C).

Beyond the establishment of an overall measure to assess trends in organized crime, the development of a more comprehensive system of classification and the ongoing collection of data on criminal groups provides a useful tool for both law enforcement officials and prosecutors. Information on various criminal groups serves not only to inform counterparts in other countries what kind of criminal groups are being investigated in specific states, but also allows information on the activities of similar groups to be compared. If combined with data about institutional arrangements and strategies of states in addressing organised crime, it provides insights into the viability of various measures and strategies adopted in tackling types of groups.

## 3. Transnational Organized Crime Trends

The exercise of collecting information on individual criminal groups, while important, does not provide a comprehensive enough approach. Two other requirements are necessary. The first is to provide regional assessments of criminal markets around the globe. The second is to trace and monitor trends within the various clusters of organized criminal groups such as for example Russian, West Africa or Turkish criminal groups. While it is recognized that the latter are often shifting and ill-defined categories, they constitute an important building block in providing a comprehensive understanding of the development of organized criminal activity across the globe. Trends and changes in each of these clusters, and the underlying causes as to why individuals from specific geographic locations become involved in organized criminal activity may alter, shaping in turn the nature and formation of individual criminal groups and the markets in which they operate.

It is hoped that a standardized system for examining trends in transnational organized crime should consist of three components – that of 'groups', 'clusters' and 'markets'.

- *Groups*: At the lowest level the collection of data on individual criminal groups, using the survey methodology already developed. Over time it is hoped that this will provide enough data to develop a more comprehensive system of classification for transnational organized criminal groups, and the level of harm they cause. National correspondents in each state under examination will be responsible for collecting data in this regard. States are in any event obliged under the TOC Convention to share information in respect of criminal groups active in their jurisdiction.
- *Clusters*: The next level is the collection of information around the various clusters of criminal groups, often originating from specific geographic localities. While there is some cross-over between the first category above, in that groups which fall into these broad clusters may also be analyzed there, this approach would seek to focus on broad trends within each of these clusters rather than the specific details of any group. This analytical exercise could be performed by CICP and UNICRI.
- *Markets*: As already suggested, information on regional criminal markets is essential to any understanding of the development of transna-

tional organized crime groups, and trends associated with this. Such an analysis would examine the commodities, be they people, protection, illicit narcotics or others, which characterize various regions. Again, national correspondents in various states will act as key sources of information. Such information will be complemented by specific studies of particular geographic areas. Current regional research projects being conducted by CICP and UNICRI in Central Asia and West Africa constitute important regional pilot studies. Ongoing work at CICP on specific markets, most notably the trafficking of human beings, also constitute critical components of the overall study.

This layered approach to the study of the problems of organized criminality, with each stage reinforcing the other, provides a comprehensive framework in which to collect information and assess trends. A word of caution however is necessary. Building a comprehensive global system to monitor developments in the field of transnational organized crime cannot be achieved overnight. At an international level what is required is the ability to collect and analyze data on organized criminal groups in a sustained manner. Once-off surveys are of little use. Like the sweeps of the International Crime Victim Survey (ICVS), they are most valuable when they have been completed on a number of occasions, thus allowing not only comparisons across jurisdictions but also across time.[14] Only in this way can a comprehensive system of trend analysis of transnational organized crime be developed.

## 4. Towards an Index of Organized Crime

A study of organized crime groups, clusters and markets as illustrated above, while essential in providing an overall picture of the development of the phenomenon, does not on its own provide sufficient information on the context in which the phenomenon flourishes. Most notably it does not establish the size of the threat of organized crime in any country as compared to another. Thus, while providing an ability to compare *organized criminal groups* themselves, it does not provide the ability to compare the broader circumstances in countries where the problem exists. This requires both an

[14] For a review of the findings of the ICVS and the necessity for the repetition of any such international measurement tool, see Jan van Dijk, 'The experience of crime and justice', in Graeme Newman (ed), *Global Report on Crime and Justice*, Oxford: Oxford University Press, 1999, pp. 25-41.

attempt to estimate the extent of organized crime in a range of countries, but also the ability to correlate this data with a variety of social indicators, such as the level of conventional crimes, the scale of development, serious crimes such as homicide and the degree of corruption that may be present.

In Kangaspunta, Joutsen and Ollus work is presented on multi-source indices of non-conventional crimes such as homicides and corruption.[15] Indicators taken from four different sources were used for the construction of a composite index of homicide. An index of corruption was based on data from the ICVS, Transparency International and the World Economic Forum.[16] As reported elsewhere, these indicators of corruption from various sources show remarkably high inter-correlation.[17] Following the same methodology, a third index was constructed using data on the perceived impact of organised crime upon business, collected through the World Economic Forum studies of 1997, 1998 and 1999.[18] Data have been included from more than eighty countries from all world regions. The three composite indices just mentioned were strongly intercorrelated (Figure 3). This result underlines the interconnectedness of organized crime activity, grand corruption and homicide.

It should be noted however that the data on homicide requires some explanation. The homicide rates from Interpol and the World Health Organization that is used do include various categories of homicides, such as family-related homicides as well as organized crime related homicides. Ideally these data should be desegregated, but in reality this is seldom possible given the difficulty of knowing whether or not any murder is organized crime related, and the fact that few, if any, national recording systems make this distinction. Nevertheless the strong correlation between the homicide index and costs of organized crime index suggest that both types of crime

[15] K Kangaspunta, M Joutsen and N Ollus, *Crime and Criminal Justice in Europe and North America, 1990-1994*, Helsinki: HEUNI, 32, 1998.

[16] The corruption index used here is composed of data from ICVS 1991,1995, 1999 and data from World Economic Forum 1999. The homicide index is composed of data from the UN Crime Survey 1995, 1997, Interpol 1998 and the World Health Organization (WHO) 1995 and 1997.

[17] See A Alvazzi del Frate, *Victims of Crime in the Developing World*, Rome: UNICRI, 57, 1998; and, J J M Van Dijk, 'Does Crime Pay?' in *FORUM on Crime and Society*, Vol 1, No 1, February 2001.

[18] In constructing this comparative index, the countries are ranked on each of the above mentioned variables. The rankings, turned into percentiles to overcome the effect of unequal numbers of responses, are averaged to make the three component measures.

share common causes such as the availability of firearms or strongly established cultures of violence.

For the purpose of the present analysis, the composite indices for homicides and corruption were combined with the index for organized crime. The new composite index was labelled the non-conventional crime index. The correlation between the composite index for non-conventional crime with a composite index for conventional property crime, predominantly based on ICVS data, is presented in Figure 4.[19] To explore the link between human development issues and both levels of conventional and non-conventional crime, the Human Development Index of the United Nations Development Programme has been included in the analysis.

The key finding is that conventional and non-conventional crimes as defined here are unrelated to each other at the macro level.[20] The hypothesis that these two categories of crime are somehow interconnected is clearly refuted. If a country experiences high levels of conventional crimes such as household burglaries and car thefts, it is not more likely to be exposed to high levels of organized crime and corruption as well. The first type of crime is not a predictor of the other.

Conventional and non-conventional crimes seem to be determined by different social factors. The results of our subsequent analyses of the correlates of crime shed some light on this finding. Conventional crime is positively linked to human development (composed of indicators of affluence, educational attainment and health), whilst non-conventional crime is strongly inversely correlated with human development.

Conventional property crime affects developed countries as much or even stronger than developing countries. Non-conventional crime, on the contrary, is much more prevalent in the developing world and in countries with economies in transition. The organized crime-corruption complex is clearly linked to underdevelopment.

Non-conventional crime then, appears to be determined by other sets of social factors than conventional crime. Indeed, the extent of non-conven-

[19] The index of conventional crime is a composite index of the indices for petty crime (six of the least serious ICVS offences), burglary ( ICVS rates and rates of recorded burglaries) and for the motor vehicle crime ( ICVS rates and data on recorded car thefts). For a detailed description of these indices refer to Kangaspunta, Joutsen and Ollus, *op. cit.*

[20] Earlier research has shown that the ICVS overall victimisation rates are unrelated to homicide rates. Rates of victimisation by assaults, sexual assaults and robberies – so called contact crimes – are weakly related to homicide rates.

tional crime may be more determined by the strength of formal institutional controls than by the strength of informal social control. This may be one of the reasons why rates of conventional crimes do not coincide with rates of non-conventional crime. This issue is explored in greater detail in the section that follows.

The application of the non-conventional crime index to a comparative study of a large number of countries yields important findings. This is illustrated in Figure 5. In this table, countries are arranged according to the value assigned them by the non-conventional crime index. Higher values (greater than 75) suggest more non-conventional crime, such as in the case of Brazil, Indonesia, the Russian Federation and South Africa. Lower values (less than 50), as in the case of Australia, Chile, Jordan and Singapore, suggest low levels of non-conventional crime.

Eventually information at country level on organized crime groups and markets can be used to provide detail to the country scores on the index outlined above. Such a cross-country comparative index is significant for a number of reasons. Primarily it will allow, over time, a mechanism to measure the comparative development of organized criminal activity in a variety of settings. At the international level it also provides a means through which developments in a list of priority countries can be monitored to determine progress both in implementing the TOC Convention, but also the resulting impact on the development of organized criminal groups. Finally, by measuring the links between organized crime and other types of criminal activity, such as levels of homicide and corruption, the importance of links between these features and their presence in societies where organized crime is prevalent provide important tools for policy makers.

A brief review of country rankings in Figure 5 reinforces the assertion that non-conventional crime is strongly linked to underdevelopment, with developing and transitional societies scoring poorly (that is above 75) in the non-conventional crime index. It should be noted that the strong link between the organized crime-corruption complex and underdevelopment does not necessarily imply that these types of crime are poverty-driven. The causal effects may be circular or go largely in the other direction, in the sense that poverty is governance–driven. Several studies have highlighted the negative impact of corruption on investment and economic growth.[21] It is now generally assumed that 'good governance', including

[21] D. Kaufmann, P. Kraai and P. Zoida-Lobaton, *Governance Matters*, Washington D.C.: The World Bank, 2000.

effective anti-corruption policies, is the key to economic development and poverty reduction. Underdevelopment, poor governance and the organized crime-corruption complex are mutually reinforcing evils. Many developing countries are caught in a double bind. They remain poor because inadequate state institutions cannot cope with organized crime-corruption. To the extent that the organized crime-corruption complex manages to capture more state functions, the prospects for economic growth are further reduced.

Non-conventional crime, then, does not show the same tendency to spontaneous stabilization as conventional crime. Unlike conventional crime, organized crime and corruption do not mobilize but undermine effective counter forces in society. Countries with severe problems of organized crime and corruption are caught in a vicious circle of stagnant development and 'bad governance'.[22] The organized crime-corruption complex is like a disease that effectively weakens the host state's own anti-bodies. However, we can not elaborate here on the various possible interpretations of the correlations found.

The explanation given above serves to illustrate the analytical potential of the indicators approach. Yet it also points to an important guiding principle – that is, that the nature and extent of organized crime is closely linked to issues of governance. Among other issues, this relates closely to the degree to which the strength of institutions within each country impact upon the nature and extent of organized crime. The correlation between the effectiveness of criminal justice systems and the extent of organized crime is examined within the context of a CICP research project on organized crime in its institutional setting.

## 5. Organized Crime and its Institutional Setting

Having examined both the nature of organized criminal groups, as well as identifying important correlations of organized criminal activity in a variety of countries, there is a growing need to develop a systematic international policy-oriented tool designed to identify and address a country's institutional propensity towards organized criminal behavior and corrupt practices. As stated above, the need to increase the exchange of information on trends and best practices is also expressed in the TOC Convention. Yet, there is still a deficit in the empirical analysis of 'best fit' policy options to address specific types of non-conventional crime.

[22] Van Dijk, *op. cit.*

The current research effort undertaken at CICP is founded on the premise that organized crime and public corruption are largely shaped by formal, but also semi-formal and informal social control structures of which criminal justice and other related institutional arrangements constitute the main infrastructure. Factors such as legal and administrative infrastructures, determining the 'criminal vulnerabilities' of countries play an important role in uncovering the best practices used to counteract unconventional crime. Within this conceptual framework, CICP's research adopts the following methodological steps:

- To propose a systematic method of identifying and assessing the institutional control variables affecting the levels and scope of public sector corruption and organized crime. In the future this may potentially allow the reporting by state parties to the TOC Convention on their institutional arrangements.
- To collect qualitative and quantitative information about those institutional factors and institutional control variables affecting the levels and scope of public sector corruption and organized crime. Examples of these factors include criminal justice effectiveness, independence of the judiciary, abuse of judicial discretion, and measures of the nature and scope of how the rule of law is administered (i.e. consistency, coherence, and predictability in the delineation, interpretation, and enforcement of laws).
- To detect the main institutional failures and comparative advantages (formal and informal) affecting a country's judicial system; and
- To identify and formulate best practice public policies aimed at counteracting specific types of non-conventional crimes.

Within this step-by-step context, this research provides a clear indication of how specific institutional indicators can serve the purpose of identifying areas to be addressed by policies designed to counteract organized crime and public sector corruption activities. Given this, CICP has collected a significant quantity of data in order to begin to explore how varying levels of institutional effectiveness coincide with levels of organized crime. It should be emphasized here again that there is very much work in progress, designed to illicit a broader debate as to how analytical tools at the international level can be used to provide overall measures of progress in the fight against organized crime. Much work remains to be done. Nevertheless, the research presented here provides some guiding principles to how such work

can be conducted in future. Two examples are useful in illustrating what can be achieved with the data. Both of these also point to possible future areas of analysis.

The first attempts to verify the correlation between a measure of judicial independence[23] and the non-conventional crime index. The result (illustrated in Figure 7) suggests that countries with significantly lower levels of judicial independence also reflect higher levels of non-conventional crime. Of course, such an illustration does not take into account the various contexts of each of the societies considered – for example, the particular problems of drug cartels in Columbia or that of the transition from the Soviet Union in the case of Russia – but it does raise interesting questions as to why, at a macro level, these two factors correlate so closely. An early hypothesis would suggest that more open societies, with greater transparency, more effective judiciaries and a dispersal of administrative power, may be less conducive to the growth of organized crime. Such conditions do not however exist in isolation and so the effect of a range of other variables on this relationship, such as levels of economic or financial development as well other measures of governance, is currently being explored. Indeed, it is likely that a range of measures of economic development, stability and governance will produce a similar result – countries where indicators suggest lower levels of economic, political and social development also show higher levels of non-conventional crime.

The second example, and building on that already outlined above, attempts to test the assertion that the combination of systemic abuse of judicial discretion in final rulings for drug trafficking case types causes high levels of organized crime and high levels of judicial corruption. This hypothesis is verified below through the use of non -parametric and parametric techniques. The organized crime index used in the graph below (Figure 7) is the same one already explained above in this chapter. It is noteworthy that the indicator to be shown in the graph below is based on objective examination of case rulings handled by the criminal justice systems in each of the countries included. The data is based on samples of the abuse of judi-

[23] The measure of judicial independence is drawn from the World Economic Forum, *Global Competitiveness Report 2000.* The individual country ratings are determined through a survey of several thousand business leaders, and as thus, do not provide an absolutely objective measure of judicial independence. Nevertheless, given that such a measure is not available, or at least subject to interpretation, such a perceptual survey provides a useful guide to the independence of the judiciary across a large number of countries.

cial discretion in court rulings in each of the 29 countries included, as dots in the graph with the final rulings corresponding to drug trafficking case types.[24]

Figure 7 therefore, measures the proportion of final rulings sampled where basic procedural and substantive criteria are being violated in an explicit manner. Certainly these abuses of discretion foster the environmental preconditions for the spread of organized crime and corruption. For example, the utilization of one specific criteria to assess complex criminal evidence in organized crime in one final ruling by one judge that contrasts with the use of a different and contradictory criteria used by the same judge to assess evidence in a similar case type, clearly represents a lack of consistency, predictability, and coherence in judicial rulings measured in the graph. Countries on the top right-hand side are the ones affected by higher levels of organized crime and where a higher proportion of the cases sampled are affected by abuse of substantive and/or procedural discretion.

Overall, the research evidence emerging suggests that institutional failures are key determinants of levels of organized crime. And, while criminal justice systems and the courts may have little impact on reducing levels of conventional crime, this may not apply to non-conventional crime where the strength of institutional arrangements, including those in the criminal justice system, are key criteria in both preventing and reducing levels of organized criminal activity.

## 6. Conclusion

The paper has sought to illustrate both the difficulties and challenges faced by researchers at the international level, in providing information and analysis that is supportive of efforts at implementing the TOC Convention. However, the potential of this kind of data collection and analysis is illustrated by the research projects described here. Nevertheless, at an international level, it should be emphasized, real difficulties remain in terms of data gathering. Yet without research tools which provide some insight into the overall development of international organized criminal activity, it will be difficult to measure in the long term the degree to which the implementation of the TOC Convention is a success. The three organized crime proj-

[24] For a fuller discussion, see Edgardo Buscaglia, 'Subjective versus objective indicators of judicial corruption: A governance based approach', *International Review of Law and Economics*, June 2001.

ects carried out by CICP and outlined above are aimed at providing some insight in this regard. They, thus, include both a focus on the organized crime groups themselves, as well as on systems to create various indices to provide comparative measures of the development of organized crime, its correlation with other forms of criminal activity, and the impact of institutional arrangements on preventing and/or countering its growth.

*Figure 1a: Matrix of organized crime groups*

| Name | Struc-ture | Size | Activity | Trans-border Activity | Identity | Violence | Corruption | Political influence | Penetration in legitimate economy | ooperation wit other OCG |
|---|---|---|---|---|---|---|---|---|---|---|
| Italian group – Germany | C | B | B | B | A | B | C | A | C | D |
| Group with no name – Germany | E | C | C* | A | A | B | A | A | A | A |
| Group with no name – Germany | D | B | B* | A | A | A | A | A | A | A |
| Group with no name – Germany | B | B | A | A | A | A | A | A | A | A |
| Verhagen Group – Netherlands | E | B | A* | C | A | B | B | A | A | ? |
| Group with no name – Netherlands | E | B | A | C | C | A | B | A | A | B |
| Group with no name – Netherlands | D | B | A | B | A | C | A | A | A | A |
| Group with no name – Netherlands | D | C | B | C | A | C | B | A | B | D |
| Group with no name – Netherlands | A | C | A* | B | B | B | C | A | C | C |
| Outlaw Motorcycle Gangs - Australia | B | D | B* | B | B | C | B | A | C | C |
| The McLean Syndicate – Australia | D | B | A* | C | B | B | B | A | B | D |
| Japanese Yakuza – Australia | B | B | A | A | C | B | A | D | C | C |
| The Orange Case - Caribbean | E | A | A* | C | B | A | C | A | B | C |
| The Dream House Case – Caribbean | D | C | A* | B | A | C | C | A | B | C |
| The Meji Case – Caribbean | E | ? | A | A | A | B | C | C / D | C | A |
| Fuk Ching Gang – US | B | C | C | B | C | C | B | D | B | C |
| La Cosa Nostra – US | A | D | C | C | C | C | B | C / D | B | ? |
| Clan Paviglianiti – Italy | A | D | C* | C | C | C | B | B | C | C |
| Sizranskaya Groopirovka - Russia | A | A | A* | B | C | B | B | A | B | ? |
| Group with no name – Russia | A | B | A* | A | C | B | A | A | A | A |
| Ziberman Group – Russia | C | C | B | B | A | C | B | B | C | ? |
| Group with no name – Russia | A | A | B* | C | A | C | A | A | C | C |
| VIS-2 – Bulgaria | A | ? | C | C | A | C | C | B | C | C |
| Cock Group – Lithuania | A | B | C* | B | B | C | C | B | C | C |
| Savlokhov group – Ukraine | A | B | B | B | C | C | C | B | C | C |
| Juvenal group – Colombia | D | D | A* | C | A | A | C | B | B | C |
| Hells Angels – Canada | B | D | C* | C | B | C | A | B | B | C |
| The 28s Prison Gang – South Africa | C | D | C* | A | B | C | C | A | C | D |
| La Cosa Nostra – Italy | A | D | C | C | C | C | C | C / D | C | D |
| Licciardi Clan – Italy | A | C | C* | C | C | C | C | C- | B | A |
| Group with no name – Italy | A | ? | C* | C | A | C | C | A | A | D |
| Yamaguchi-Gumi – Japan | B | D | C* | B | A | C | A | C- | B | C |

* in activity column denotes that trafficking in illegal narcotics is a primary or core activity.

## *Figure 1b: Key to matrix of organized crime groups*

A note on methodology: Information from all the 32 groups has been entered into a database with approximately 50 variables. The most important variables have been isolated for the purpose of the matrix. The categories and various ratings that have been applied are by no means perfect. They were determined from an overall review of the data on all criminal groups. In some cases a judgement has had to be made about which category any particular groups fits into.

Structure
**A** - *Rigid hierarchy*: Single boss. Organisation or division into several cells reporting to the centre. Strong internal systems of discipline.
**B** - *Devolved hierarchy*: Hierarchical structure and line of command. However regional structures, with their own leadership hierarchy, have a degree of autonomy over day to day functioning.
**C** - *Hierarchical conglomerate*: An association of organised crime crimes with single governing body. The latter can range from an organised umbrella type body to more flexible and loose oversight arrangements.
**D** - *Core criminal group*: Ranging from relatively loose to cohesive group of core individuals who generally regard themselves as working for the same organisation. Horizontal rather than vertical structure.
**E** - *Organised criminal network*: Defined by the activities of key individuals who engage in illicit activity together in often shifting alliances. They do not necessary regard themselves as an organised criminal entity. Individuals are active in the network through the skills and capital that they may bring.

Size (This includes not only the groups core membership, but all associated and related individuals)
**A** - From 1 to 20 members **B** - From 20 to 50 members **C** - From 50 to 100 members **D** - More than 100

Activities (An * has been added when drug trafficking is the primary activity of the group)
**A** - One primary activity, other illegal activities supportive of this
**B** - Two to three major activities
**C** - Multiple activities

Level of transborder activity
**A** - limited (1 to 2 countries) **B** - medium (3 to 4 countries) **C** - extensive (five and more)

Identity
**A** - Organisation with no strong social or ethnic identity
**B** - Social-based organisation with members drawn from the same social background or with common social interests
**C** - Ethnic-based organisation with members strictly from the same ethnic group / region / country

Level of violence (both internally and externally focussed)
**A** - Little or no use of violence
**B** - Occasional use of violence
**C** - Violence is essential to the criminal activities (accumulation of profit) of the organisation

Use of corruption
**A** - Little or no use of corruption
**B** - Occasional use of corruption
**C** - Corruption is essential to the primary activity (accumulation of profit) of the organisation

Political influence
Data in this category is not always reliable. If corruption is suspected, although there is no evidence that it has occurred, category **B-D** has been denoted.
**A** - None **B** - At a local / regional level **C** - At a national level in the country of intervention **D** - Abroad

Penetration into the legitimate economy
**A** - None or limited
**B** - Some investment of profits of crime in legitimate activities
**C** - Extensive cross-over between legitimate and illegitimate activities of the group

Level of cooperation with other organized criminal groups
**A** - None
**B** - Cooperation in the base-country
**C** - External cooperation abroad
**D** - Cooperation in the base-country and abroad

*Figure 2: Structure of organized crime groups versus their propensity for violence*

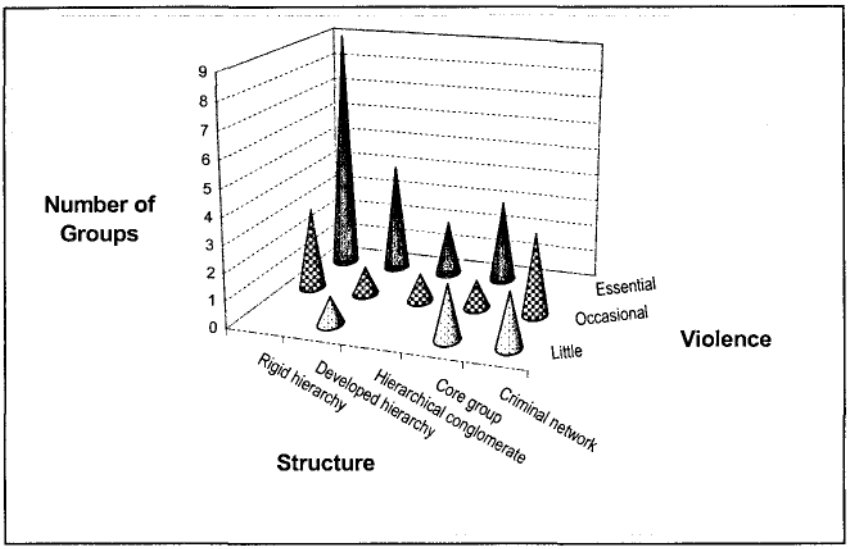



*Figure 3: Correlation between the homicide index, corruption index and organized crime*

| | | Homicide index | Corruption index | World Economic Forum organized crime, 1999-99 average |
|---|---|---|---|---|
| Homicide index | Pearson Correlation | 1 | | |
| | Sig. (2-tailed) | | | |
| | N | 124 | | |
| Corruption index | Pearson Correlation | 0.581* | 1 | |
| | Sig. (2-tailed) | 0.000 | | |
| | N | 67 | 77 | |
| World Economic Forum organized crime, 1999-99 average | Pearson Correlation | 0.638* | 0.743* | 1 |
| | Sig. (2-tailed) | 0.000 | 0.000 | |
| | N | 52 | 57 | 58 |

Correlation is significant at the 0.01 level (2-tailed).

*Figure 4: Correlation between indices of non-conventional crime (corruption, homicide and organized crime), conventional property crime and human development.*

| | | Non-conventional crime index | Conventional property crime index | Human development index, 1998 |
|---|---|---|---|---|
| Non-conventional crime index | Pearson Correlation<br>Sig. (2-tailed)<br>N | 1<br><br>74 | | |
| Conventional property crime index | Pearson Correlation<br>Sig. (2-tailed)<br>N | -0.117<br>0.356<br>64 | 1<br><br>85 | |
| Human development index, 1998 | Pearson Correlation<br>Sig. (2-tailed)<br>N | -0.668*<br>0.000<br>72 | 0.317*<br>0.005<br>77 | 1<br><br>173 |

Correlation is significant at the 0.01 level (2-tailed).

*Figure 5: Non-conventional crime index*

Countries within the groups are in alphabetical order.

| > 75 | 50-75 | < 50 |
|---|---|---|
| Albania | Belarus | Australia |
| Argentina | China | Austria |
| Bolivia | Costa Rica | Belgium |
| Brazil | Croatia | Canada |
| Bulgaria | Czech Rep | Chile |
| Colombia | Estonia | Denmark |
| Ecuador | Hungary | Egypt |
| El Salvador | India | Finland |
| Georgia | Italy | France |
| Indonesia | Macedonia, FYR | Germany |
| Kyrgyzstan | Malaysia | Greece |
| Latvia | Mauritius | Hong Kong |
| Lithuania | Mexico | Iceland |
| Paraguay | Mongolia | Ireland |
| Russian Federatio | Peru | Israel |
| South Africa | Philippines | Japan |
| Uganda | Poland | Jordan |
| Ukraine | Romania | Korea, Rep Of |
| Venezuela | Slovakia | Luxembourg |
| | Thailand | Malta |
| | Turkey | Netherlands |
| | USA | New Zealand |
| | Viet Nam | Norway |
| | Zimbabwe | Portugal |
| | | Singapore |
| | | Slovenia |
| | | Spain |
| | | Sweden |
| | | Switzerland |
| | | United Kingdom |

*Figure 6: The degree of independence of the judiciary as measured against the non conventional crime index*

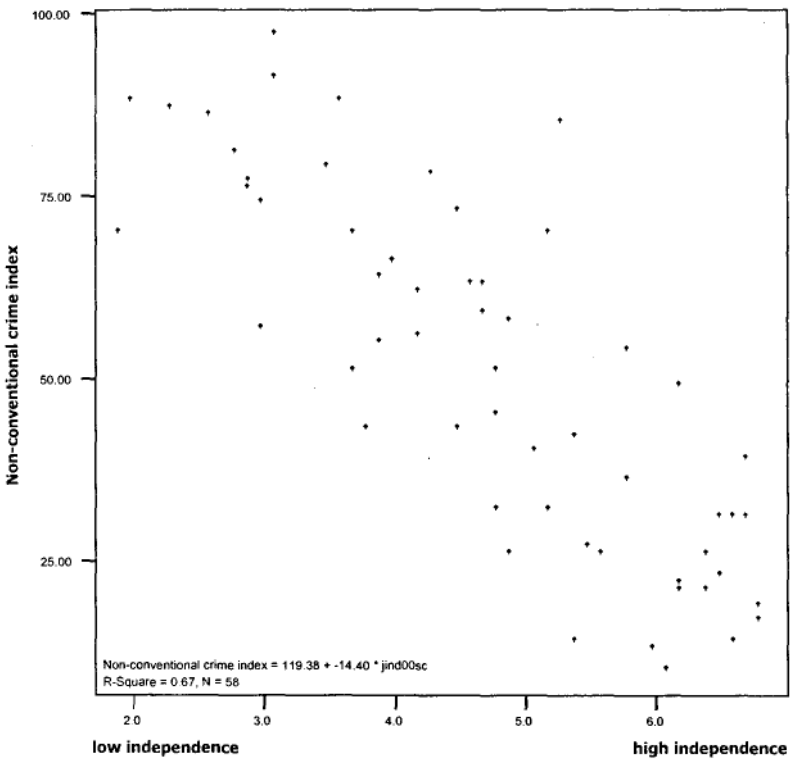
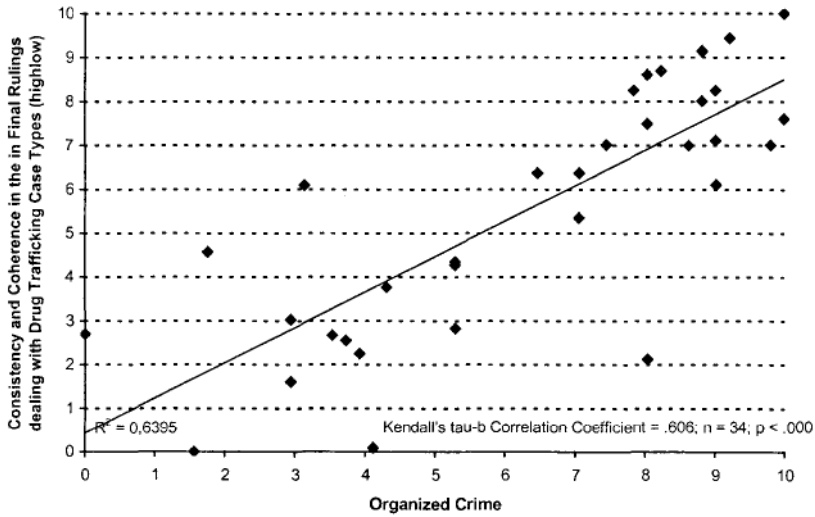


*Figure 7: The link between organized crime and the abuse of judicial discretion in criminal rulings (drug trafficking case types)*




Source: Data drawn from the data base of the Law and Economic of Development Project, Centre for International Law and International Development, School of Law, University of Virginia and CICP.

# The UN Convention and the Global Problem of Organized Crime

CYRILLE FIJNAUT

## I. Introduction

It is quite self-evident that there is a great deal to be said about the problem of organized crime in our modern-day society. In this paper, however, I shall not be seeking to offer a concise summary of the sum total of that knowledge (Corsun, 1998; Cretin, 1998; Einstein and Amir, 1999; Friman and Andreas, 1999; Kelly, 1986; Martin and Romano, 1992; Ryan and Rush, 1997; Williams and Vlassis, 2001). The aim here is to look at the problem in the light of the content and the aims of the UN Convention against Transnational Organized Crime. In view of the short time-frame within which this has to be done, this paper will focus on three aspects:

- the content of the Convention with regard to the definition of organized crime and the policies to combat it;
- the limits of our existing knowledge about organized crime in the world;
- the part that the Convention can play in improving our knowledge of this phenomenon.

A number of important topics will therefore be intentionally excluded. These include the transnational efforts that are being made by international organizations (apart from the United Nations), inter-State collaborative partnerships and individual governments to keep organized crime under control. The limitations of the policies that are being pursued – at whatever level – to combat this type of crime are another important subject that will not be touched upon here. These limitations include the existence of all kinds of black markets in the world as a result of large-scale poverty,

problems of dictatorships and civil wars that make proper domestic administration and international cooperation impossible, major economic and financial interests of States or national power groupings in criminal activities and, to some extent, the constitutional relationships in democracies.

## II. Three comments on the Convention

This Convention is a comprehensive attempt to make coherent arrangements to deal with a large number of issues that are directly and indirectly linked to inter-State cooperation aimed at combating organized crime. In that sense the authors of this Convention deserve a great deal of praise for their ambitious initiative. But the fact that this Convention is open for discussion on a number of points is not surprising either. The many complications and dilemmas, and hence the numerous compromises that are usually made when seeking to fight organized crime, are of course part and parcel of this Convention, and automatically provoke a certain amount of controversy. The comments that follow refer to just three aspects: the definition of organized crime, the emphasis on the transnational character of this type of crime and the origins of the policies to combat it.

On the first point it should be mentioned that the Convention adopts a very broad definition of organized crime[1], in fact so broad that all types of more or less serious crime fall within the scope of the Convention. Although this may have benefits from the political and practical point of view, it does mean that the concept of organized crime actually no longer has any specific meaning. This, in turn, makes it very difficult to gather information on a global scale about the nature, scale and development of organized crime. And ultimately it makes it virtually impossible to realistically appraise the situation in these areas throughout the world. That is because this all-embracing definition gives both individual States and individual researchers scope to use their own definitions in gathering and interpreting data on the nature, scale and development of organized crime, with the result that the findings of official reports or the results of academic research will be difficult to compare.[2] The fact that using a broad (even excessively broad) definition in this way has an impact on interna-

[1] See Article 2, paragraphs (a), (b) and (c) of the Convention concerning this definition.

[2] It is therefore worth mentioning that in Article 28, paragraph 2, the parties are even encouraged to develop their own definitions of criminal activities etc. at international and regional level.

tional comparative reports and studies has been clearly shown in the European Union. In this context a very broad official definition of organized crime is also used. In practice, however, the various Member States interpret this definition in their own way. The result is that the description of the problems with organized crime in the European Union, as formulated by Europol, is so different for the various Member States that not only is comparison between countries virtually impossible, but building a cumulative picture is also a perilous undertaking.[3]

With regard to the second point – the emphasis on the transnational character of organized crime in the Convention[4] – it can be stated that transnational organized crime is presented in the Convention as a separate category of organized crime, as an offence that is transnational "in nature". This characterization of organized crime is very much open to discussion. On the one hand it can be observed that a lot of organized crime does not have a transnational character at all, but is primarily a local phenomenon, for example in New York City or in Southern Italy.[5] Consider, for example, all the forms of organized crime that consist in illegal control of legitimate economic sectors such as the construction industry (or at least parts of it) and the transport sector in certain industries. On the other hand those types of organized crime that may at first sight seem to be primarily transnational in nature – because they involve the supply of illegal goods and services on the black market – are to a large extent a local problem too. Take the example of synthetic drugs or "blood diamonds". Their production does not take place in some "transnational" location, but – in the

[3] In this context, cf. the full version of, for example, the "2000 European Union Organised Crime Situation Report", which was compiled by Europol. In the abridged public version of this report, which was published in 2001 by the European Communities, this problem is of course not so conspicuous.

[4] In Article 3, paragraph 2, of the Convention, which defines what is meant by an offence that is "transnational in nature", it is implicitly recognized that such an offence always affects more than one State and therefore in this sense always has a national/local character as well, but there is no explicit recognition of the local roots of transnational organized crime. The "Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime" and the "Interpretative Notes for the Official Records (travaux préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto" also fail to demonstrate this insight (United Nations, General Assembly, A/55/383 and A/55/383/Add. 1).

[5] On the situation in New York City, see inter alia J. Jacobs, Ch. Panarella and J. Worthington, (1994), and J. Jacobs, C. Friel and R. Radick (1999). On the situation in Southern Italy, compare P. Arlacchi (1996), D. Gambetta (1993) and L. Paoli (1997).

case of the drugs – simply in the southern part of the Netherlands and the north of Belgium or – in the case of the diamonds – in Sierra Leone or Zaire. The same is also true of their distribution. This does not happen "somewhere in the world", but – in order to stay close to the drugs – in the local consumption centres in western countries, and increasingly also in southern and oriental countries.[6] The diamonds mentioned find their way to jewellers in major cities – or at least they used to do so – through the markets in Belgium, the United Kingdom and the United States.[7] The transnational character of these forms of organized crime is usually therefore limited to the cross-border transportation of the relevant goods and/or raw materials that are needed to make them, or of the money that is earned through the sale of these goods. It is also important to establish this, since it means that combating organized crime should not be presented as something that can only be done effectively by international organizations. On the contrary, efforts to combat this form of crime will stand or fall by the deployment of (or failure to deploy) adequate resources by national governments, both to deal with problems within their own territory and with a view to mutual cooperation. It is therefore very important for the countries that are party to the Convention to introduce a number of domestic measures. Clearly the authors of this Convention have also perceived that the effectiveness of efforts to combat so-called transnational organized crime actually depends to a large extent on the ability and willingness of individual countries to curb this form of serious crime.

On the third point it should be emphasized here that the Convention very much reflects the criminal and other policies that have been developed in recent decades in the United States and in the Member States of the European Union to combat organized crime.[8] This influence may have been unavoidable, to some extent, precisely because in these countries – by and

[6] See the 2000 annual report of the Synthetic Drugs Unit in Eindhoven, the Netherlands. See also the hearing held on 15 June 2000 before the Subcommittee on Crime of the American House of Representatives on the "Threat Posed by the Illegal Importation, Trafficking, and Use of Ecstasy and Other 'Club' Drugs" (http://commdocs.house.gov/committees/judiciary).

[7] Cf. the paper by M. Kaplan entitled "Carats and Sticks; Controlling Civil Wars through the Economic Transactions that Nurture Them", whose central focus is the illegal diamond trade. This paper was written in 2001 - 2002 as part of her fellowship at the Center for International Studies of the New York University School of Law.

[8] For the policy of the United States, refer to D. Kenney and J. Finckenauer (1995), 313 - 371. With regard to the policy in the European Union, see inter alia G. Wittkaemper, P. Krevert and A. Kohl (1996), 20 - 158, and V. Militello (2000), 3 - 32.

large – a lot of work has been done to combat this phenomenon. Against the background of specific policy reports, this factor does, however, easily create the impression that organized crime is mainly perceived in this Convention as a threat to the West, to the so-called developed world, and that it is therefore primarily intended to avert this danger more effectively, above all in the interests of the West itself.[9] Those who are responsible for the implementation of this Convention should be aware of this silent message, since it may have a disastrous impact on the way in which it is implemented. This is because, firstly, this signal may seriously and adversely affect the legitimacy and hence also the effectiveness of this Convention in the so-called developing countries. Secondly it also makes it easy to overlook the fact that the West is in many ways itself part of the global problem of organized crime. It is incontrovertible that the black market in the West, for example in the areas of drug abuse or prostitution, is partly the cause of the problems of organized crime in these areas in other parts of the world.[10] It also should not be forgotten that in several areas Western countries are also the source countries behind organized crime. The transnational trade in synthetic drugs still largely originates from Western Europe.[11] Trafficking in illegal firearms in large parts of the world cannot, of course, be seen in isolation from arms manufacturing in Europe and North America. And the illegal trade in hazardous waste is almost, by definition, linked to industrial activities in the West.[12]

## III. The limits of our knowledge about organized crime in the world

A great deal tends to be written about how globalization influences the problems of organized crime, for example about the impact of the globalization of means of transport, communication channels and financial services on the internationalization of organized crime. Attention is often also drawn to the factors that make it attractive for criminal groups to promote this process: large markets, high profits and low risks. In this context we

[9] See, for example, the "International Crime Threat Assessment" which was published in Washington in December 2000 by a US Administration working group.

[10] With regard to trafficking in human beings and in women in particular, reference can be made inter alia to D. Kyle and R. Koslowski (2001), Department of State (2001), International Organisation for Migration (2001).

[11] See H. Moerland and F. Boerman (1998).

[12] Cf. J. Clapp (1999). Specifically concerning nuclear waste, see R. Lee III (1998).

can also point to the fact that global links are sometimes established between terrorism on the one hand and organized crime on the other, particularly trafficking in drugs and firearms.[13]

The voluminous literature on the subject of globalization of organized crime should not, however, allow us to forget that most academic research on organized crime is not only conducted in North America and Western Europe but is also confined to problems of organized crime in these parts of the world. To a certain extent these problems are therefore dealt with as domestic problems here. In any case, most research stops at national borders (as do a lot of criminal investigations). As a result of this, our knowledge of organized crime in large parts of the world is extraordinarily limited.[14]

There are, of course, certain exceptions to this rule. Some research has, of course, been carried out into problems of organized crime in Russia and Japan by researchers from these countries. On occasion you will also find studies by "native" researchers, which examine these problems in Asia and Africa.[15] There are also a few researchers who have studied aspects of organized crime in a truly transnational way. One prime example is the study by Chin on the smuggling of and trafficking in human beings into North America. This study begins in Southern China where a large proportion of the people being smuggled come from. It then analyzes the routes by which they are smuggled into the West. Finally it considers the outcome of their adventures in the United States and Canada. This type of study is, however, very exceptional.[16]

In large parts of the world, for various reasons, there is therefore a huge shortage of research and hence also of researchers. Possible reasons for this include the lack of university infrastructure or research funds in many developing countries. Not to mention the situation in countries that are torn by civil war or governed by dictatorship regimes. Another point that should not be overlooked in this context is that in some parts of the world

[13] See the literature in the notes above. See also, for example, Ph. Williams and E. Savona (1996) and Ph. Williams (1999).

[14] At the moment there is not a single good international bibliography on research into organized crime.

[15] With regard to China, reference can be made to A. Lodl and Z. Longguan (1992). One of the few "domestic" studies on a country like Thailand is the one by P. Phongpaichit, S. Piriyarangsan and N. Treerat (1998). On Southern Africa, see inter alia P. Gastrow (2001).

[16] See K-L. Chin (1999).

– for example Australia – organized crime has only recently come to be seen as a significant problem.[17] All this means that the picture we have of organized crime in the world contains a lot of black spots, not to say black holes, and that for this reason alone it is not easy to conduct a responsible debate at international level on the development of organized crime, on the part that specific countries or continents play in this development and on the inhibitory effect that the Convention may have on this development under certain circumstances.

What is more, it is not appropriate to be fixated with the academic research. Many aspects of organized crime are also explored by non-governmental organizations (NGOs), which publish extremely valuable reports from time to time on specific developments or problems. One example are the NGOs that are active in the field of the trade in "blood diamonds", the arms trade or, to give a different example, the illegal trade in cigarettes.[18] It may also be possible to mobilize these NGOs to gather information in a targeted way on the implementation and enforcement of the Convention that is the central theme of this conference.

## IV. The significance of the Convention for research into organized crime

There are not many conventions that stipulate mechanisms to promote the implementation and enforcement of the agreements that have been made. Fortunately this has been done in this Convention.

Article 28 of the Convention obliges the parties, in consultation with the academic community, both to analyze the trends in organized crime in their own territory and to identify the groups that commit these crimes. They are also obliged, pursuant to this article, to develop the expertise that is needed to do this and, for that purpose, common definitions and methodologies should be developed. Finally, they must consider evaluating their policies to combat organized crime on a regular basis and, particularly, the effectiveness and efficiency of these policies.

[17] See A. McCoy (1986). The same can, however, be said of the Netherlands to a certain extent. See C. Fijnaut, F. Bovenkerk, G. Bruinsma and H. van de Bunt (1998).

[18] With regard to the trade in "blood diamonds", see, for example, Fatal Transactions (2001). On the trade in illegal firearms, see inter alia B. Wood and J. Peleman (1999), P. Gasparini Alves and D. Cipollone (1998) and the international action network on small arms (www.iansa.org). On the illegal trade in cigarettes, reference can be made to L. Joossens (1999).

The obligations in this article must certainly be read in conjunction with the provisions of Article 29. These include a stipulation that States must not only set up their own training programmes for their law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, but that they must assist one another in taking initiatives of this kind. Article 30 adds to this that the implementation of the Convention must also be promoted by States that, through international and regional organizations, provide economic and technical assistance to developing countries with a view to strengthening their capacity to combat organized crime.

It probably goes without saying that the majority of these provisions are intended to enhance the ability of developing countries to cope with the problems of organized crime, and quite rightly so. It must not be forgotten here, however, that in order to achieve this aim it is very important to have a good overview of the nature, scale and development of organized crime in these countries and of the effects of the efforts that they are able to make to tackle this problem. It would therefore be helpful if a proportion of the resources generated through the aforementioned articles could be spent on promoting academic research into organized crime in these countries and on developing a global network of researchers in this field. Through this network the United Nations could not only significantly improve the global perspective on organized crime but it could also keep an eye on the implementation of the Convention.

Policymakers – even in this field – are unfortunately not always convinced about the importance of academic research. Here, however, its relevance to policy is so obvious that it may be hoped that they will take up this suggestion.

## V. Conclusion

The Convention against Transnational Organized Crime is not an isolated bureaucratic invention. In more than one respect it offers an appropriate response to a number of problems relating to organized crime that currently exist on a global level. This does not, however, alter the fact that implementation and enforcement of this Convention represents a huge challenge for a variety of reasons. A number of these reasons have been touched upon above. There are undoubtedly more, for example the United Nations manpower available to promote and monitor this important proc-

ess. The parties to this Convention should be willing to devote a proportion of their resources to this. In this way they could at least eventually put themselves in a position to assess whether their other efforts aimed at combating organized crime throughout the world are having any positive result, and, if so, what those results are.

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# The fight against organised crime: possibilities, problems and opportunities, with a special focus on the EU

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## 1. Introduction

This speech seeks to provide an overview of recent trends in organised crime and the countermeasures taken against it, especially within the European Union framework.

In the context, several initiatives merit special attention. The political declaration and global action plan against organised transnational crime adopted at the World Ministerial Conference on Organised Transnational Crime held in Naples, Italy, on 21-23 November 1994, has to be taken as the basic framework.

Also, recent international initiatives taken against organised transnational crime by both governmental and non-governmental organisations [the United Nations, the Council of Europe, the G7/P8, the European Union (including Europol), the organisation for Economic Cooperation and Development, the organisation of American States, Interpol], as well as other forms of action such as bilateral agreements, also form the basis of this study, although a special focus is given to European developments.

Fortunately more and more European member states, have initiated studies on transnational crime. Based on these studies, as well as intelligence analysed by Interpol and especially by Europol, I will try to provide an accurate assessment of the current registered and perceived situation.

## 2. Towards a common definition of organised crime

Defining the concept of organised crime has long been a source of controversy and contention, probably because of differences in the way different

persons and countries approach various aspects of the problems[1]. Nevertheless, there has often been a need for an unequivocal, common definition of organised crime that, due to the cross border character this form of crime has assumed, could make cooperation amongst different countries easier. It is vital for the understanding of the organised crime issue to decide whether or not a certain category of crime should be determined as "organised crime" and then to decide how to delineate that category[2], and finally to decide how resources should be allocated and assess how effectively they have been used in preceding and controlling it[3].

The essential characteristic of the term "organised crime" is that it denotes a process or method of committing crimes, not a destined type of crime itself, nor even a destined type of criminal. The "process" is what adds the additional levels of danger and social threat.

Several countries, such as United States, Canada and Germany have adopted their own definitions. With the EU framework preference was given to a selection of criteria.

In fact, since 1994, the European Council has required annual reports on the scope of and trends in international organised crime. The mechanism introduced to this end focuses on collecting and analysing information on the international criminal organisations known to the competent authorities in the Member States. This focus was prompted by the difficulty of establishing agreement on a common definition of the phenomenon and by the need for reliable data on trends in international organised crime.

Selection of criminal organisations for analysis purposes is based on a set of (11) criteria. To be selected, an organisation must meet at least six of these criteria, four of which (nos. 1, 3, 5 and 11) are mandatory. These criteria include the following:

1. The organisation consists of more than 2 members.
2. Each member is entrusted with a specific task.
3. The members have worked together for a considerable or undetermined period of time.

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[1] Adanoli, S., Dr. Hiola, A., Savona, E., Zofi, P., Organised Crime around the World, Trento/HEUNI, Tammer-Paino, Tampere, 1998, 117 (p4).

[2] Beare, M.C., Criminal Conspiracies, Organised crime in Canada, Nelson Canada, 1996, p. 219.

[3] Maltz, M.D., Measuring the effectiveness of organised crime control effort, Monograph 9, University of Illinois and Chicago, The office of International Criminal Justice, 1990.

4. The organisation's activities are performed according to an established set of rules.
5. The organisation is suspected of serious offences.
6. The organisation's operations span more than one country.
7. The use of violence or intimidation comprises part of the organisation's regular working methods.
8. The organisation employs commercial or commercial-like structures to control its profits.
9. The organisation engages in money laundering activities.
10. The organisation works to influence politicians, the media, public administrations, and the legal community of the country's economy.
11. The organisation's activities focus on gaining profit or power.

The revised draft United Nations Convention against transnational organised crime (May 1999) states (art. 2 bis) that for the purpose of this Convention:

- organised crime group means a structured group of three or more persons, existing for a period of time and having the aim of committing a serious transnational crime through concerted actions by using intimidation, violence, corruption or other means, in order to obtain directly or indirectly, a financial or other material benefit;
- "serious crime" means conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least (...) years or a more serious penalty;
- "structured group" means a group that is not randomly formed for the immediate commission of a crime and that needs not have formally defined roles for its participants, the continuity of its membership or a developed structure;
- "existing for a period of time", means being of sufficient duration for the formation of an agreement or plan to commit a criminal act.

Also within the EU framework a definition was adopted, by deciding upon making it a criminal offence to participate in a criminal organisation in the Member States of the EU. Within the meaning of this joint action, a criminal organisation shall mean a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious pen-

alty, whether such offences are an end in themselves or a means of obtaining material benefits, and, where appropriate of improperly influencing the operation of public authorities.

All legal and international definitions of organised crime tend (internationally or not) to converge, so that the term denotes a method of conducting criminal operations which is distinct from other forms of criminal behaviour. Its features are violence, corruption, ongoing criminal activity and the precedence of the group over any single member.

## 3. Trends in organised crime

Globalisation or internationalisation, the over-arching trend in global affairs, is both promoting and benefiting from economic and trade liberalisation. The possibilities to communicate across the globe in seconds rather than in days or weeks has transformed the view of the world. The 'global village' has brought people closer together than ever before and created interdependent relationships where events in one part of the world have direct effects on others.

This international trend is paralleled in the EU with increasing mobility of both people, goods, money and services over open borders within the Community area. Open borders, a most revered value, has obvious side-effects. This transnationalisation provides criminals with access to new markets, suppliers, partners and routes at the same time as it decreases possibilities of control over cross-border transactions.

Organised crime groups have shown their readiness to take on these opportunities. Organised crime is growing more transnational; cooperation between organised groups is increasing; large, international organised crime groups extend their operations worldwide, and even formerly nationally bound organised crime groups are increasingly becoming involved in international crime, at least at a regional level. An ever larger number of non-indigenous organised crime groups not only commit crimes in the EU, but also indirectly have an effect on the crime situation in the EU from outside its borders. Following this trend, the threat from non-indigenous organised crime groups to the EU will increase. However, indigenous groups will continue to be the largest threat to the Member States in the foreseeable future.

From an EU perspective, serious, transnational and organised crime is the focus of attention. The one factor which most clearly distinguishes or-

ganised crime from crime in general, is that it is organised. This may sound like a truism, but without this, the organisations' dimension of organised crime would be indistinguishable from other forms of profit-driven criminal activity, and therefore the organisational and group perspective is the key to the study of this phenomenon.

## *Organised crime groups*

Organised crime groups pose a significant threat to the EU, as witnessed in their composition, nature, geographical spread and criminal activities.

Indigenous organised crime groups still play the most important role concerning organised crime in the Member States and thus constitute the largest threat to the EU, in particular concerning drug trafficking, illegal immigration, trafficking in human beings and various forms of commodity smuggling, such as alcohol and tobacco.

Outlaw motorcycle groups are intrinsically linked to extortion in their criminal activities. They are also engaged in drug trafficking, various forms of commodity smuggling and prostitution.

Indigenous groups aside, many non-indigenous organised crime groups also have a large negative impact on the crime scene of the EU.

- Albanian groups are mainly homogeneous and strictly hierarchical based on family links. Their propensity for violence is high. In addition to drug trafficking, where they have acquired a dominant position in many Member States, Albanian groups are extensively involved in illegal immigration, trafficking in human beings, violent crimes, thefts and burglaries.
- Chinese organised crime groups are mainly involved in illegal immigration. They also feature in, for instance, intellectual property theft (IPT) and heroin smuggling. Generally, they are fairly insular. There are several examples where Chinese organised crime groups are cooperating with other ethnic groups, and there are also examples of Chinese criminals directing their activities against people outside the Chinese community.
- Colombian organised crime groups are no longer organised in large, monolithic cartels but rather in smaller, more adaptable cells. Whilst keeping strong links with groups in Colombia, Colombian groups in the EU are ready to cooperate with others. They are chiefly involved in cocaine trafficking from Colombia into the EU.

- Nigerian organised crime groups, professionally sophisticated yet primarily based on tribal patterns, are mainly engaged in fraud, prostitution and drug trafficking. In general, the threat posed by West African groups is characterised by their readiness to combine the best of both modern and older world by allying sophisticated forms of modern technology to tribal customs.
- North African organised crime groups are mainly involved in drug trafficking (primarily cannabis), property crime (including trafficking in stolen vehicles), trafficking in human beings and illegal immigration. Many of these groups are well organised.
- Russian organised crime groups in the EU are predominantly involved in drug trafficking, violent crime, illegal immigration, trafficking in human beings, cigarette smuggling and money laundering. Russian organised crime from Russia itself targets the EU mainly for financial reasons (investment, money laundering) and refuge.
- Turkish organised crime groups are hierarchical and mainly homogeneous. The main criminal activities of Turkish organised crime groups are drug-related crime, financial crime, illegal immigration, trafficking in human beings and prostitution.

Although great differences exist between the Member States, some generalisations about organised crime groups are nonetheless possible to make. The majority of the organised crime groups within the EU consist of some 10 to 15 members. Most of the groups have a fixed delegation of tasks; with a few exceptions a fixed composition of members – particularly concerning core members – and they have also often been in operation for several years. The groups are often heterogeneous, involving members from several Member States or ethnic groups; internationally active; mainly hierarchical and using some form of internal discipline for group cohesion. In short, the groups reported by the Member States well fulfil most of the 11 organised crime criteria established by the EU, including the mandatory ones.

At least half of the organised crime groups in the EU are indigenous groups or dominated by nationals from the Member States.

The groups are mainly involved in drug trafficking, fraud and money laundering, but other forms of trafficking are also well represented in their activities, including illegal immigration, trafficking in human beings, alcohol and tobacco smuggling, trafficking in cars, weapons and other commodities.

Criminal groups seldom concentrate on a single criminal activity. They often engage in various activities. For example, drug trafficking is often combined with other activities such as fraud, money laundering and illegal immigration. The same is true within the drug field itself: groups often engage in combined activities in different types of drugs.

Criminal groups do not, on the whole, confine their operations within national borders. At the same time, the members of the criminal groups are themselves often likely to be of different nationalities. Heterogeneous groups consisting of suspects from different countries have become the rule rather than the exception.

There is a high degree of international cooperation between the groups; even between organised crime groups earlier considered insular and self-sufficient (for instance Albanian, Chinese and Turkish groups).

Criminal groups often employ business-like principles to their operations which are regularly based on conscious calculations of risks and opportunities. Specialists are frequently hired for specific tasks, and groups use high technological means for their work, inter alia, for safer communication.

### *Types of crime*

- **Drug trafficking remains the core activity of most organised crime groups in the EU.**

Drug trafficking involves both indigenous and non-indigenous groups, mainly Turkish, Albanian and Colombian. A large number of groups are heterogeneous in their composition and they frequently cooperate with others.

There have been some changes in the drug markets within the Member States. However, on a general level it seems that synthetic drugs trafficking is attracting the attention of a larger number of organised crime groups than before.

Heroin mainly arrives from Afghanistan, cocaine from Colombia and cannabis from Morocco (although other countries, for instance Albania, are also important source countries). Synthetic drugs are predominantly produced within the EU, chiefly in The Netherlands but also in Belgium, Germany, Spain and the UK. Some countries in Central and Eastern Europe (Poland, Lithuania) are also important source countries.

The Balkan route remains one of the most important transit routes, primarily for heroin into the EU, but drugs also enter the EU via, mainly, The Netherlands, Belgium, Spain and Portugal.

- **Illegal immigration is affecting all Member States.**

Illegal immigration has increased in parts of the EU, for instance in Spain and Italy. Favourite destination countries in the EU include Austria, Belgium, France, Germany, Greece, The Netherlands, Sweden and the UK.

The majority of the organised crime groups which are involved in illegal immigration are non-indigenous groups, mainly Afghan, Albanian, Chinese, Iranian, Iraqi, Nigerian, Pakistani, Russian, Turkish and Yugoslavian groups.

The major source countries of illegal immigrants are countries in Africa (Nigeria, but also Angola, Guinea, Malawi, Sierra Leone and Somalia), Asia (Afghanistan, China, India, Iran, Iraq, Sri Lanka and Turkey), central and Eastern Europe (the Czech Republic, Former Yugoslavia, the Ukraine) and South-Eastern Europe (Albania).

Favoured trafficking routes include the Balkan route (from Turkey into Italy, Greece, Austria and Germany); Mediterranean routes (from North Africa into Spain, Italy but also Greece), and routes from Russia via central Europe into Austria and Germany.

- **Trafficking in human beings is a major problem for most Member States.**

Not only is trafficking in human beings a major problem in the EU; it has also grown significantly in, for instance, Italy. Since victims are regularly moved between Member States it is difficult to identify favourite destination countries. However, Germany, The Netherlands, Belgium and France are especially vulnerable.

Albanian organised crime groups are particularly active in trafficking in human beings, together with groups from other parts of Central and Eastern Europe (for instance Romanians, Hungarians, Lithuanians and Poles). Turkish, Chinese and Nigerian organised crime groups are also very much active in this criminal field. And Lebanon, Iran and Azerbaijan are regularly mentioned in this context.

The victims are generally brought in by offenders of the same nationality. However, Albanian organised crime groups vary victims, in particular from countries in Central and Eastern Europe. Victims usually come from Central and Eastern Europe (Albania, the Baltic States and Russia); Africa (Nigeria), Latin America (Brazil), and Asia (Thailand).

The victims often know that they are going to work within the sex industry, but they are not aware of the very harsh conditions under which

they are to be employed. Violence is often used against the women (and in some cases children), in some cases also at the recruitment stage.

- **Child pornography is a latent organised crime problem.**

Child pornography is still a domain dominated by individuals or networks which cannot be defined as organised crime groups. However, some organised crime groups are reportedly being attacked by the field, not because they are themselves paedophiles but because of the profits which can be made through the distribution of child pornographic material.

- **Trafficking in stolen vehicles attracts large organised crime attention.**

Some 1.2 million cars were reported stolen in the EU in 2000; 470,000 of which were not recovered. Many of the stolen cars are trafficked within the EU. However, a large proportion also goes abroad, primarily to Central and Eastern Europe, Africa and the Middle East.

Indigenous groups are mainly responsible for trafficking in stolen vehicles, although they have established contacts with organised crime groups outside the EU.

Car-jacking or home-jacking are used for stealing cars in a number of cases, no doubt in response to new security features in the cars, for instance immobilisers. Some groups seem to have the technical expertise to reprogramme immobilisers.

- **Financial crime is a key area of organised crime involvement.**

After drug trafficking, financial crime is the most important type of crime engaging organised crime, in particular money laundering and fraud.

Money laundering is an integral part of organised crime and the number of reports of suspicious transactions have increased in most Member States. Drug trafficking is the most important predicate crime. However, in Sweden it is fraud. Money laundering usually takes place in bureaux de change and money transmission agencies. However, any cash-based business is favoured for money laundering, including pubs, restaurants and discotheques. In some cases, money is moved through underground banking systems such as the hawala or hundi.

Currency counterfeiting has increased in many Member States. There has been a shift away from lithographic plate printing to the use of inkjet printers and colour copiers. The quality of the counterfeited notes has in-

creased following developments in both computer and printing techniques. Counterfeit money can be sold as any other commodity rather than being put into circulation by the counterfeiters themselves.

Most indigenous organised crime groups are involved in a wide variety of fraud. After drug trafficking, this is the most important area of criminal engagement of organised crime groups. VAT, excise and customs fraud particularly attract organised crime, particularly in so-called carousel fraud, but so is Community budget fraud, payment card fraud, investment and advance payment fraud and other forms of serious fraud, including benefit fraud and Inland Revenue fraud. Nigerian and other West African organised crime groups are traditionally involved in investment and advance free fraud, but they also engage in, for instance, identity fraud.

- **Commodity smuggling is a major problem in the EU.**

Commodity smuggling has grown exponentially throughout the EU since the abolition of intra-Community borders in 1993. Almost everything can and is being smuggled, including alcohol, tobacco, works of art and antiques, fuel and guns. Weapons mainly come from Central and Eastern Europe, including the Balkans. Bulgaria, Croatia and Slovenia have been observed as source countries of disguised firearms in the shape of, for instance, mobile phones and pens.

Smuggling is largely the domain of indigenous organised crime groups, however many groups from other countries are also involved, in particular groups from source or transit countries such a Lithuania, Montenegro and China.

- **Document forgery is a matter of concern.**

Document forgery is commonly connected with other types of crime such as illegal immigration, trafficking in human beings, fraud and commodity smuggling. The facilitation of these crimes has become easier following developments in computer and printing techniques.

- **Intellectual property theft attracts considerable organised crime attention.**

Intellectual property theft (IPT) involves virtually everything which can be plagiarised for profit. Audio and software CDs, and other digital media are particularly vulnerable to IPT due to the simplicity in manufacturing and distribution. Asia, in particular China, South Korea, Hong Kong, Taiwan

and Thailand, is the cradle of IPT, but it certainly takes place elsewhere as well, involving a large number of different organised crime groups.

- **Cultural property theft invites a steady organised crime involvement.**

Cultural property theft is a great problem, in particular in countries which possess a large number of valuable works of art and antiques such as Italy and France. It has also increased in Portugal. The main source of articles seems to be private houses and churches.

International trafficking in such goods has grown in part because of expanding global trade and travel and the EU single market. Trade between the EU, the US and Japan is of particular concern.

- **Other forms of thefts hold the attention of many organised crime groups in the EU.**

Various forms of thefts, including armed robberies, seem to have increased in several Member States. The number of burglaries increased sharply in France in 2000, and ram-raids have become more common. The number of lorry load thefts has also risen, and Belgium notes the importance of container thefts.

The majority of thefts and armed robberies are committed by indigenous organised crime groups although the involvement of non-indigenous groups is also a matter for concern.

- **Environmental crime is a dormant problem in terms of organised crime involvement.**

Environmental crime seldom attracts the attention of organised crime groups. In some cases, organised crime groups are known to be involved in trafficking in endangered species and the dumping of hazardous waste. In the latter case, it seems more appropriate to talk about 'organisation crime' where businesses are cutting corners to reduce costs.

Some trafficking in hazardous waste takes place between Eastern Europe and the EU, Italy in particular, and from the EU to Africa (Somalia, Malawi, Zaire, Sudan, Eritrea and Algeria).

- **High technology crime does not generally draw much organised crime attention.**

In the main, high technology crime (specifically attacks on computer networks) does not appear to be the work of organised crime groups. Partly,

this is because their potential for causing harm or mischief is easier to see than their potential use for profit. There is little or no involvement of organised crime in such types of computer crime as the spreading of viruses, denial of service attacks or hacking, unless they can be used for extortion purposes or, if data can be extracted, such as payment card details, which can then be used fraudulently.

High technology crime includes new types of crime ('cyber crime', for instance, data streaming of payment card details), traditional types of crime (for instance, fraud and prostitution) using new tools, for instance, for targeting customers or victims, and safe(r) communications for organised crime groups, for instance, internet communication and encryption.

### *Other key organised crime features*

- **Violence is a persistent problem in organised crime.**

The threat or use of violence is a prerequisite for some crimes (extortion, armed robberies) and a supporting activity for others (inter alia, trafficking in human beings). Violence is used in the preparation of crime, the commission of crime and the 'post-commission phase' (for instance to conceal the primary offence).

Most organised crime groups have some form of internal discipline based on violence. However, violence is also directed at other criminal groups or individuals outside the criminal sphere, for instance, to silence witnesses. Albanians (Kosovo), Russians, Poles, Turks, Vietnamese and outlaw motorcycle groups are especially prone to violence. The threat or use of violence seems to have increased in some Member States.

- **Corruption is a key part of many organised crime groups' modus operandi.**

Corruption is an efficient way of acquiring, hindering access to or preventing the use of information, either to conceal or facilitate crime. A number of cases of corruption/undue influence were revealed in 2000. Focus was mostly on the business community, although several times public officials, including law-enforcement officials and police officers, were targeted.

- **Organised crime groups accumulate large resources through their criminal activities.**

Resources amassed by organised crime cannot be reliably estimated. However, the losses to society should be counted in billions of euro annually, and the same is true for the profits made by organised crime groups.

A large part of the criminal proceeds is reinvested in both legal and illegal businesses. The use of companies fulfils many purposes apart from the obvious one of being profit generating in itself. For instance, companies are used for drug trafficking, prostitution, money laundering, fraud and the handling of stolen cars.

A great variety of firms are used for criminal purposed, but some of the more prominent include import/export firms; the catering business and hotels; transport firms and travel agencies, and an assortment of clubs such as discotheques and night clubs.

## 4. Threat/Risk Assessments

The proposed changes of the EU OCSR, which will move it further towards a threat/trend assessment, require additional developments of the report's basis of information and methodology.

A regular and focused analysis on the nature and scope of organised crime in the Member States is recommended. Such an analysis – a product of a multi-disciplinary approach involving public authorities, academics, and other relevant social and economic sectors – should provide decisive insights into crime opportunities. This will facilitate the definition of further short, medium and long-term counter-measures, and such an analysis is expected to contribute to the quality enhancement of the EU OCSR and, as a result, to the action oriented capacity of competent authorities at all levels.

Existing experiences, such as the Organised Crime Monitor which has been developed and practised in The Netherlands, could serve as a good practice for reproduction elsewhere. Crime foresight mechanisms (e.g. such as developed in the UK) and risk-based methodologies as developed in Belgium (Federal Police/University of Gent) could contribute to further developments of the EU OC threat assessment methodology.

Threat/risk assessments should, as the name implies, provide a measure of the threat from, or risk posed by, OC. It is worth noting that such an assessment needs a broad information base involving different sorts of data. The data should not only measure police activity (which, at times, is the case with police data) but rather the actual situation as depicted in a variety of sources of information. It goes without saying that a threat/risk assessment by necessity is future oriented; providing support for planning and decision-making at all levels.

Therefore a wide array of information should be employed, arranged and processed with the help of a common risk assessment methodology (RAM),

in support of a strategy addressing – and answering – the basis questions 'who', 'how', 'when', 'where' and 'why' in relation to OC. This way, a developed threat/risk assessment will provide support to policymakers and law enforcement decision-makers at all levels, giving them the tools to enhance their action oriented capacities and therefore more efficiently fight OC in the Member States.

## 5. Conclusions

*5.1.*

The globalisation ("global village") of many sectors of social life is one of the characteristics of our modern world. Considering that this globalisation concerns many sectors of our economic and social life, it is evident that it also affects the world of crime. In the European and Mediterranean areas (but this phenomenon concerns the whole world), criminal organisations are joining to do businesses in the field of drugs, arms, prostitution, trafficking in stolen cars, and trafficking in human beings and to invest the proceeds of crime where it is more convenient. Hence, the extreme danger of a global criminal system for the economic systems, the financial markets, our public institutions and the people.

*5.2.*

If this is true, then no one can say that organised crime does not exist in one's country. Modern organised crime is present everywhere, although under different forms, according to traditions, social, economic and political circles and types of business handled. One must not confuse the presence of criminal organisations, which the manifestation of serious crimes, against assets (burglaries and extortion) or against individuals (murders, kidnappings); consequently, it is wrong to say that organised crime does not exist in a country where no Mafia-style murders are committed. Many crimes committed by organised crime are, in fact, committed for the survival of criminal organisations (intimidation, corruption, money laundering, and investment of criminal profits), and many of these crimes are not "visible". I would like to make it clear, that this is not solely an Italian point of view but it is shared by many States who are in the forefront in the fight against organised crime or in the development of appropriate instruments to combat it (as is the case of the United States, Germany, the Netherlands, Belgium and Spain). We should also be reminded that in 1993, the

French National Assembly approved a report stating that: "Three levels of activities in the Mafia industry have been established by the experts: the first concerns violent exactions and traffics that ensure the Mafia's control over a territory and the production of proceeds; the second is constituted by money laundering; the third is the investment of laundered capitals in legal activities".

*5.3.*

The main instrument through which organised crime associations and Mafia-type organisations operate is not violence but corruption and intimidation. Corruption and intimidation are directed towards individuals and both private and public institutions. Criminal organisations resort to violence only as a last resort, because through violence they make themselves visible, they show their danger, they generate concern within the public opinion, and oblige to accomplish the same results with less risk, and it threatens the public institutions from within.

*5.4.*

Today, organised crime tends to expand at an international level and engages in any traffic or business that can boost its profits. The main objective of organised crime is to make Profits and to acquire as much power as possible.

*5.5.*

It should be underscored that the internationalisation of the major criminal organisations has come about regardless of the treaties on the free movement of goods and persons. They have been helped in this internationalisation process by the gaps in, and inadequacy of, international treaty rules and by the difference in national legislation and by the gaps in, and incompleteness of, the criminal laws of many countries. Europe is fighting against a unified organised crime in its objectives and modus operandi with forty different criminal codes and as many police and judicial authorities as there are countries. And it is this difference which nurtures organised crime. Experience, in fact, has shown that organised crime is attracted by countries where investments are convenient, those that lack or do not have strong rules regarding the financial world, and by countries lacking strict laws against organised crime.

# 2. The Contents of the Convention

## Substantive Aspects of the U.N. Convention Against Transnational Organized Crime: A Step Towards an *'Organized Crime Code'*?

MICHAEL KILCHLING

### 1. Introduction

The Convention is the first legally binding instrument in the field of crime control. In order to improve the prevention of, investigation into and prosecution of (transnational) Organized Crime on an international level, the implementation of comparable legal instruments shall provide a minimum standard of compatibility for two purposes: (1.) to enable effective national intervention as well as (2.) to improve the legal framework for mutual legal assistance. In the past, such mutual assistance was often blocked by differences among the national legal systems.

As regards the substantive regulations of the Convention, the signing States are, in particular, required to establish four statutory offences in their national legislation; these are:

- participation in an organized criminal group (Article 5),
- money laundering (Article 6),
- corruption (Article 8), and
- obstruction of justice (Article 23).

Whereas the Articles 5, 6 and 8 deal with offences that are the well known components of most strategies and concepts underlying any national and international efforts to combat Organized Crime[1], the latter one is a rela-

[1] For an overview, see, e.g., ADAMOLI, S. et al., Organised Crime around the World, Helsinki 1998, pp. 92 et seq.; SAVONA, E., Assessment of the Various National and

tively new term, at least in the European framework; such an offence has not appeared yet in any of the comparable treaties of the Council of Europe or the legislative acts of the E.U. Obviously, this issue has not been considered as relevant in the (western) European hemisphere yet.

## 2. The Convention's General Approach to (Transnational) Organized Crime

In the Palermo material[2], the main Convention has been described as a "parent convention" which is accompanied by three additional Protocols. This specific 'technical' structure brings me to a few theoretical remarks on the general approach of the Convention to Organized Crime – be it of transnational character or not[3] – as seen from the criminological perspective.

At first glance one might think that the afore-mentioned four *Convention crimes* are the material focal points of the Convention are for more or less procedural, or technical reasons, i.e., in order to provide the substantive anchoring points to meet the principle of double criminality which is one of the general principles in the area of mutual assistance. However, with regard to the overall rationale of the Convention, such a mere procedural interpretation of their function does not reflect the functional significance of these Convention crimes in the context of O.C.

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International Strategies Aimed at Combating Organized Crime, in: U. SIEBER (ed.), Internationale Organisierte Kriminalität, Köln etc. 1997, pp. 221 et seq.; for a compilation of relevant U.N. documents, see also BASSIOUNI, M. & VETERE, E. (eds.), Organized Crime, Ardsley/New York 1998.

[2] ODCCP, Summary of the United Nations Convention Against Transnational Organized Crime and the Protocols Hereto, as provided at: www.odccp.org/palermo/convensumm.htm, supra A (4).

[3] Transnational Organized Crime is characterized by its borderlessness; the basic problem, however, is that in this context there are crimes which are transnational but not organized and likewise crimes which are organized but not transnational; cf. CASTLE, A., Transnational Organized Crime and International Security, Institute of International Relations at the University of British Columbia, Working Paper No. 19, November, 1997 (pdf.file available at: www.iir.ubc.ca/pdffiles/webwp19.pdf); not all of these possibilities are covered by the definition as provided in Article 3 Paragraph 2 of the Convention. For further sceptical considerations towards a definitorial separation of Organized Crime and transnational Organized Crime, see also FIJNAUT, C., 'Transnational Crime and the Role of the United Nations in Its Containment through International Cooperation: A Challenge for the 21st Century', European Journal of Crime, Criminal law and Criminal Justice 8 (2000), pp. 119 et seq.; M. BASSIOUNI & E. VETERE (op. cit.), pp. xxxi et seq.

Let us imagine the Convention as a whole, i.e., together with the three Protocols, as a model for a – fictitious, of course (!) – *Organized Crime Code*. Then the Convention itself could, notwithstanding the fact that it provides substantive rules about concrete statutory offences as well as a variety of procedural issues, be read as a kind of *'Principal Part'* (to avoid the technical term 'General Part') of such a code. This interpretation is based on the fact that by focusing on the four Convention crimes the most relevant *organizational aspects*[4] are considered, i.e., those elements that make up the specific dimension and the specific danger of O.C. These types of crime are *not just* offences because they have a special function – as opposed to the basic, or initial crime, of which the Palermo materials[5] speak as the "basic subject-matter" of (transnational) O.C. In the particular framework of money laundering, the technical term predicate crime is common. This means all those – 'conventional' – offences that are committed in the front line in order to generate profits by means of O.C.

With regard to money laundering which is one of the most important components of (and indicators[6] for) organized offending, the term predicate offence might be used also in a more general sense, as all those predicate offences from which the laundered moneys derive, are at the same time also the 'predicate' crimes of O.C. in general. Therefore a wider, non-technical use of the term may appear appropriate. Some authors, however, make use of an alternative terminology: they speak of the organizational offences as a "secondary crime"[7]. In such a functional understanding, the basic crime is the primary crime. To avoid misunderstanding it must be mentioned that secondary crime has of course not a minor impact or significance; but it is – as are logistic matters[8] in general – not the final aim. All the activities on the secondary level of criminal activity allow the first level to continue[9]. In light

[4] See also POTTER, G., Criminal Organizations, Prospect Heights 1994, where the related chapter is perfectly entitled "the Organization of [Organized] Crime"; cf. pp. 101 et seq.

[5] ODCCP Summary, as provided at: www.odccp.org/palermo/convensumm.htm, supra A (5b).

[6] ZACHERT, H.-L., Erfahrungen mit der Bekämpfung der Geldwäsche in Deutschland, in: U. SIEBER (ed.) (op. cit.), pp. 187 et seq. (p. 194).

[7] CASTLE, A. (op. cit.), p. 9.

[8] For a fundamental theoretical and empirical approach to the logistic dimension of OC, see SIEBER, U. & BÖGEL, M., Logistik der Organisierten Kriminalität, Wiesbaden 1993.

[9] CASTLE, A. (op. cit.), p. 9.

of this fact one might even argue that the secondary crime is the key crime of *organized* crime.

In the FBI's[10] as well as in Interpol's[11] definition of Organized Crime the prime crimes are referred to as the *primary objective*. It is the interplay between organizational (secondary) and basic (primary or prime) crime(s) that makes Organized Crime the most excessive variant of greed for profit[12]. Reflecting on most of the various definitions of Organized Crime[13], at least one of such secondary aspects must be met to make crime *Organized Crime*. Furthermore, the differences between prime and secondary criminal conduct of O.C. provides also implications for an adjusted two-track strategy of prevention[14].

Apparently, by taking over this typology, the *criminological substance of Organized Crime* is reflected by the Convention in a consequent manner.

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[10] KENNEY, D. & FINCKENAUER, J., Organized Crime in America, Belmont etc. 1995, p. 18.

[11] "Any group [...] whose primary objective is to obtain money through illegal activities [...]"; see, e.g., BRESLER, F., Interpol, London 1993, p. 373, also quoted at www.alleged-mafia-site.com/definitions.htm.

[12] It is with explicit regard to the profit orientation as its most decisive denominator that alternative terms such as, e.g., "crime industry" (KERNER, H.-J., Organisierte Kriminalität: Realität und Konstruktionen, Neue Kriminalpolitik 7 (1995) issue 3, pp. 40-42) or "rational crime" (ALBRECHT, H.-J., Organisierte Kriminalität – Theoretische Erklärungen und empirische Befunde, in: H.-J. ALBRECHT et al. (eds.), Organisierte Kriminalität und Verfassungsstaat, Heidelberg 1998, pp. 1-40) appear more appropriate than the common term "Organized Crime ".

[13] In Germany, no legal definition of Organized Crime is available; however, in 1986, prosecution authorities and the Federal and State Ministries of Justice and Home Affairs agreed on an internal uniform working definition, reproduced in: KLEINKNECHT, T. & MEYER-GOSSNER, L., Strafprozeßordnung, München 20014, pp. 1940 et seq. (p. 1941) [RiStBV, Anlage E, Nr. 2.1]; for further details see KINZIG, J., Die justitielle Bewältigung von Organisierter Kriminalität, in: H.-J. ALBRECHT (ed.), Forschungen zu Kriminalität und Kriminalitätskontrolle am Max-Planck-Institut für ausländisches und internationales Strafecht, Freiburg 1999, pp. 111 et seq. (pp. 113 et seq.); an English translation of the working definition is provided in KINZIG, J., Organised Crime in Germany: Areas of Activity and Influence on Politics, the Economic Sector, and the Judicial System, in: V. MILITELLO & B. HUBER (eds.), Towards a European Criminal Law Against Organised Crime, Freiburg 2001, pp. 61-66, and in ADAMOLI, S. et al. (op. cit.), p. 6.

[14] See, for such a two-track approach to O.C. prevention, SIEBER, Logistikstrukturen und neue Bekämpfungsansätze im Bereich der OK, in: C. MAYERHOFER & J.-M. JEHLE (eds.), Organisierte Kriminalität, Heidelberg 1996, pp. 191 et seq. (pp. 212 et seq.); SIEBER, Internationale Organisierte Kriminalität, Köln etc. 1997, pp. 275 et seq.

Unlike most other international instruments in this field, all material provisions dealing with the primary criminal offences are provided in the subordinate Protocols. Therefore, the Convention as a whole, is designed as an open system which can easily be supplemented by additional protocols in the future which then may focus on other specific, maybe new, upcoming areas of transnational Organized Crime[15]. And it is exactly this separate regulation of all prime crime aspects that makes the Convention itself, with its exclusive focus on the secondary crime and all related issues, appear like the Principal Part of an Organized Crime codification.

It should be added, by the way, that the complete spectrum of Organized Crime is not covered, neither by the Convention nor by the Protocols. From the point of view of the criminological typology of O.C. offence categories, the third group of offences, *violent crime*, is not dealt with explicitly. Violence often has its own function and impact within the organized structures that, like secondary crime, can also be differentiated from prime crime. As any conduct in the context of O.C., violence primarily, has also an instrumental, or goal directed character, employed in order to reach some organizational end[16]. Such *instrumental violence* which mainly appears (1.) as a phenomenon related to internal goals, i.e., as a form of punishment in order to establish and maintain 'discipline', or (2.) in the pursuit of external power, in particular to safeguard the organization's own position against other competitors and the State[17]. Non-instrumental, or *expressive violence*, is a further category with its own, different character. However, any kind of violence is, from the oganization's point of view, to some extent risk-increasing and counter-productive[18] as it is prone to interrupt secrecy and undisturbed business going on and to trigger unwanted attendance by the

[15] See also: ODCCP, After Palermo: An Overview of what the Convention and Protocols Hope to Accomplish, as provided at www.odccp.org/palermo/sum1.html.

[16] MAHAN, S. & O'NEIL, K., Beyond the Mafia, Thousand Oaks etc. 1998, pp. 107 et seq.

[17] Cf. BASSIOUNI, M. & VETERE, E., Organized Crime (op. cit.), pp. xxvii et seq.

[18] It is this particular aspect that makes MAHAN/O'NEIL's description of internal violence as a "costly punishment" (loc. cit.) appear so ambiguous in its true sense. And it seems more plausible that this counterproductive danger of detection has made such violent excesses more rare, rather than the assumption of a kind of 'civilization process' within such groups that might allow physical 'punishment' get outdated (and replaced by economic 'penalties'). Nevertheless, not only in the more violent culture of groups such as, e.g., the Triads, the Yakuza and the various Italian Mafia associations but within O.C. in general, the use of violence as the prime sanction remains a basic feature, at least as a potential threat.

public[19] and the police, probably providing a factual starting-point for further criminal investigations[20]. Therefore Allan Castle is right in pointing out that

"in general, violence [...] appears more as a sporadic transaction cost"[21].

The reason for the exclusion of this category might be that these offences in their appearance and outcome are – even if a O.C. background or context is recognized – mostly perceived as *'conventional' violent crimes* which are traditionally (and sufficiently) covered by the national penal codes. Moreover, unlike other offences with a real transnational character, this particular manifestation of Organized Crime primarily appears as domestic events and a national problem. In light of these considerations, additional regulations in the Convention has in deed been widely superfluous.

## 3. Selected Substantive Issues of the Convention

Let us refer to the idea of a Principal Part once again – an interpretation which, by the way, finds also evidence by the technical requirement that states can be parties of either the Convention alone or together with any of the protocols, but not of one or more protocols alone, i.e., without adopting the main Convention[22]. As is explained in the Palermo material, the protocols have to be read and applied in conjunction with the Convention, for the latter contains the general provisions[23]. It is self-evident that the Convention can provide only framework rules in this field. According to different legal traditions there are, of course, different possibilities to transfer such general principles into national law/laws. The same is true with regard

[19] This phenomenon could be observed in Italy in an exemplary manner in the early 1990s when the mafia assassinations of the popular magistrates Borselino and Falcone resulted not only in rather tough (and, relatively, successful) countermafia action by the criminal justice organs but in unexpected public protests as well; see PAOLI, L., Crime, Italian Style, Daedalus 130 (2001), No. 3, pp. 157 et seq. who even speaks of a social revolt against the mafia (pp. 177 et seq.).

[20] Cf. H.-J. KERNER (loc.cit.), p.41.

[21] CASTLE, A. (op. cit.), p. 11; earlier on p. 2 he also refers to violence against the State power, pointing out that organized criminals "operate a profitable fashion [...], it is logical to assume rather than acting as a destabilizing force, they will behave like any profitable business and seek to support the administrative status quo under which they have prospered".

[22] See Article 37 of the Convention.

[23] See the ODCCP Summary, as provided at: www.odccp.org/palermo/convensumm.htm, supra A (6).

to the implementation of the four Convention crimes. The requirement for a criminalization does not necessarily restrict the national legislatures just to introduce them as any other conventional statutory offence. It is also possible to establish, according to the special, 'principal' impact of these offences as discussed earlier, further legal consequences in cases of organized offending when indicated by a conviction for having committed (at least) one of the Convention crimes. Such *additional consequences* might, e.g., be provided as aggravated or even qualified circumstances within the sentencing of the primary offences, as it is the case in many systems, for example for crime commission through gangs or terrorist groups[24], or for offences committed with a particular motivation such as, e.g., hate crime. With special regard to the Convention crimes, the RICO Statute[25] of the U.S. is the most prominent example. And also in Germany, the money laundering provision in the Penal Code[26] provides for a statutory penalty that is more severe than that of several of its predicate offences[27].

Apart from the articles dealing with the four Convention crimes, the Convention contains a variety of additional substantive regulations which are typical for a *General Part in the technical sense.* Just a few of them can be discussed here in more detail. Generally speaking, the material content of some of the provisions exposes a certain lack of concrete substance whereas others appear remarkably detailed.

### *3.1. Legal Entities*

One of these articles deal with the responsibility of legal entities. First of all, it should be mentioned that Paragraph 2 of Article 10 has no exclusive focus on criminal responsibility; it allows civil or administrative law meas-

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[24] Austria, as the most recent example, is going to establish a *mandatory aggravation rule* for sentencing in cases dealing with enumerated offences committed in a terrorist context; see § 278c of the Austrian Penal Code [StGB] to be amended according to the draft for a Penal Law Amendment Act 2002 [StRÄG 2002], provided at: www.justiz.gv.at/gesetzes.

[25] Racketeer Influenced and Corrupt Organizations Statute, 18 U.S.C. 1961-68.

[26] § 261 of the German Penal Code [StGB].

[27] Moreover, money laundering is one of very few statutory offences in the German Penal Code which provide for a mandatory prison sentence; in general, the possibility to impose a fine instead, is generally excluded for the most severe capital crimes only; for more details, see KILCHLING, M., Money Laundering and Deprivation of Proceeds in Germany, in: V. MILITELLO & B. HUBER (eds.), Towards a European Criminal Law against Organised Crime, Freiburg 2001, pp. 99 et seq.

ures as well. In this respect, the Convention remains behind the Council of Europe Recommendation from 1988[28] which explicitly promotes *criminal* liability of corporate bodies. Moreover, unlike the 1988 Recommendation, the U.N. Convention does not provide for any substantive criteria of responsibility[29].

In accordance with other instruments, however, Article 10 does not affect the criminal liability of the individual offenders.

### *3.2. Organizational Offence, and Penalties*

Interestingly the Convention, unlike other national and international instruments, does not provide a definition of Organized Crime. Instead, its applicability is restricted to cases dealing with either the Convention offences or other serious crimes if an organized criminal group is involved in the commission[30]. And the Convention itself only provides definitions of an organized criminal group[31] and serious crimes[32].

Rather vague is the further substance of Article 5[33], in particular with regard to the *lack of any provision on penalties*. Therefore it remains unclear whether or not the Article 5 offence (paticipation in an organized criminal group) itself shall fall under the definition of *serious crime* as provided in Article 2 of the Convention. The same gap regarding the legal consequences can be found with regard to the other offences. Art. 11 provides only a general rule according to which the sanctions shall take into account the gravity of the offence. The interpretative notes do not help further insofar, either.

However, one has to admit that one of the principal difficulties for the implementation of international texts in the field of criminal law is to meet the different principles of sentencing that are applied in different legal systems. A problem can arise from the afore-mentioned definition of serious crime according to Article 2 which is based upon the system of *maximum*

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[28] Recommendation (88) 18 of 20/10/1988.

[29] For more detailed considerations on this topic, see LÖSCHNIG-GSPANDL, M., Zur Bestrafung juristischer Personen, ÖJZ 57 (2002), pp. 241 et seq.

[30] Article 3 Paragraphs 1 (a) and (b) of the Convention.

[31] Article 2 (a) of the Convention.

[32] Article 2 (b) of the Convention.

[33] For further details on this issue, see MILITELLO, V. (in this volume); MILITELLO, V., Participation in a Criminal Organisation as a Model of European Criminal Offence, in: MILITELLO, V. & HUBER, B. (eds.), (op. cit.), pp. 154 et seq.

*penalties*. This principle is applicable, e.g., in Austria, whereas in German law, serious crime has been defined on the basis of a *minimum penalty* of one year[34].

As regards the legal and factual situation in Germany one has to realize that the legal regulation[35] is not sufficient[36]. This can be shown by the statistics on sentencing (see below, *table 1*). Throughout the last decades, no more than just a handful of offenders were convicted per year for participation in a criminal organization; only in the recent years, a moderate increase can be recognized. However, most of these cases deal with offences in the context of the so-called *Kurdish Workers' Party (PKK)* which is more a terrorist than a criminal organization[37]. It is quite obvious that the German provisions do not satisfy the standards required by European Law[38], and it seems at least questionable whether it would be sufficient to meet the Convention.

### *3.3. Confiscation*

Unlike the afore-mentioned substantive provisions, Article 12 on confiscation and seizure is significantly more concrete. Paragraph 1 (a) even differentiates concrete types, or techniques, of confiscation. In particular, *confiscation of equivalent values* is explicitly enumerated. Insofar, the Convention is in accordance with the E.U. joint action and the framework decision "on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime"[39]. As deprivation of illegal proceeds is deemed to be the most effective strategy to counter Organized Crime[40], I would like to focus on this particular point in more detail here.

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[34] So-called *"Verbrechen"*, as provided by § 12 of the Penal Code [StGB].

[35] § 129 of the Criminal Code [StGB].

[36] For a short introduction into the German regulation, see ARNOLD, J., in: MILITELLO, V. & HUBER, B. (eds.), (op. cit.), pp. 47 et seq.

[37] By Council Decision of 02/05/2002 (2002/334/EC), O.J. L 116/33, the E.U. included the PKK in the list of terrorist organizations.

[38] See the joint action of 21/12/1998 (98/733/JHA), O.J. L 351/1, requiring an effective statutory basis for the prosecution of organizational offending.

[39] Joint action of 03/06/1998 (98/699/JHA), O.J. L 333/1, as amended by the framework decision of 16/06/2001 (2001/500/JHA), O.J. L 182/1.

[40] See, e.g., BASSIOUNI, M. & VETERE, E, (op. cit.), p. xlviii.; LEVI, M., Taking the Profif Out of Crime: The UK Experience, European Journal of Crime, Criminal Law and Criminal Justice 5 (1997), pp. 228 et seq.; KILCHLING, M., Die vermögensbe-

Either as an option or as a general rule, confiscation of equivalent values already applies in many European countries, including Germany[41]. In some systems the confiscation orders are aligned to the payment of a specific, judicially determined sum of money; it then appears as a kind of monetary penalty, which has not the *symbolic*, typical character of the confiscation of specific, namely illegally obtained, assets (the original *"dirty" money*). This option is by far more than a just question of technicality. Extension of confiscation to equivalent values has two significant advantages:

- concealment, displacement or destruction of assets is irrelevant, *and*
- the grasp to *legal property* is made possible – without the necessity to rely on instruments which, from a human rights perspective, appear more problematic such as the relaxation or even the reversal in the burden of proof concerning the legal resp. illegal origin[42].

From the point of view of these consequences, confiscation of equivalent values appears, in a certain way, as a *consequent implementation of the so-called gross principle*, since the risk is generally transferred upon the offender to remain liable for confiscatory intervention, even in case of a loss of the original illegal assets. With this particular focus on the values the historic, *naturalistic concept*, or understanding, of confiscation appears more and more outdated. Both, the E.U. regulation as well as the Convention can therefore be deemed to provide the most advanced rules for confiscation currently available in the field of international treaties.

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zogene Bekämpfung der Organisierten Kriminalität – Recht und Praxis der Geldwäschebekämpfung und Gewinnabschöpfung zwischen Anspruch und Wirklichkeit, wistra 19 (2000), pp. 241 et seq.

[41] For an overview on the German asset confiscation legislation, see KILCHLING, M., Tracing, Seizing and Confiscating Proceeds from Corruption (and Other Illegal Conduct) Within or Outside the Criminal Justice System, European Journal of Crime, Criminal Law and Criminal Justice 9 (2001), pp. 264 et seq. (pp. 274 et seq.); KILCHLING, M., in V. MILITELLO & B. HUBER (eds.), (loc. cit.). For a summarizing comparison of confiscation legislations and practices in selected European countries, see also KILCHLING, M., Die Praxis der Gewinnabschöpfung in Europa, *forschung aktuell/reserach in brief no. 9*, Freiburg i.Br. 2001, also available as pdf.file at: www.iuscrim.mpg.de/verlag/Forschaktuell/Forschakt.html (English version forthcoming).

[42] For more detailed considerations on this issue, see KILCHLING, M., Comparative Perspectives on Forfeiture Legislation in Europe and the United States, European Journal of Crime, Criminal Law and Criminal Justice 5 (1997), pp. 314 et seq. (pp. 357 et seq.).

*Table 1: Total of Convictions and Total of Confiscation/Forfeiture Orders Imposed by the Criminal Courts in Germany*

| Year | Convictions | | | | with confiscation/forfeiture | | | |
|---|---|---|---|---|---|---|---|---|
| | total | drug offences | criminal organisation | money laundering | total | drug offences | criminal org. | money laundering |
| 1986 | 705,348 | 17,145 | 1 | - | 11,455 | 4,199 | 1 | - |
| 1987 | 691,394 | 19,796 | 4 | - | 11,381 | 4,749 | 2 | - |
| 1988 | 702,794 | 21,629 | 4 | - | 13,821 | 6,050 | 0 | - |
| 1989 | 693,499 | 23,170 | 0 | - | 13,599 | 6,172 | 0 | - |
| 1990 | 692,363 | 24,295 | 3 | - | 13,570 | 6,697 | 0 | - |
| 1991 | 695,118 | 27,781 | 8 | - | 16,847 | 8,899 | 0 | - |
| 1992 | 712,613 | 28,516 | 2 | - | 18,327 | 9,087 | 0 | - |
| 1993 | 760,792 | 29,086 | 3 | 3 | 18,215 | 7,784 | 0 | - |
| 1994 | 765,397 | 29,494 | 0 | 16 | 19,757 | 7,923 | 0 | 2 |
| 1995 | 759,989 | 31,393 | 10 | 15 | 20,768 | 8,664 | 0 | 2 |
| 1996 | 763,690 | 37,024 | 8 | 20 | 20,632 | 10,169 | 1 | 2 |
| 1997 | 780,530 | 41,332 | 9 | 21 | 20,818 | 10,272 | 2 | 1 |
| 1998 | 791,549 | 42,377 | 15 | 25 | 20,658 | 10,228 | 3 | 6 |
| 1999 | 759,661 | 45,033 | 5 | 43 | 19,871 | 10,841 | 0 | 13 |
| 2000 | 732,733 | 45,090 | 6 | 65 | 18,899 | 10,538 | 0 | 10 |

*Source:* Federal Office for Statistics, Strafverfolgung [sentencing statistics] 1986-2000 (tab. 2.4 and 5).

The *practical impact* of seizure and confiscation of values equivalent to the illegal original assets is also mirrored by statistical data. *Table 1* gives a rough overview on the frequency of confiscatory measures on the court level as compared to the total number of convictions. It indicates that the overall rate of forfeiture and confiscation ordered by the courts is quite low. In 1999, confiscation or forfeiture was ordered in no more than 2.6 percent of all criminal convictions[43]. This is a remarkably low rate, in particular in

[43] For more deatiled figures, see also KILCHLING, M., European Journal of Crime,

light of the fact that forfeiture should be a compulsory part of any court verdict. Even in cases involving laundered moneys (where convictions are very rare), confiscation is the exception rather than the rule.

*Table 2: Provisional Seizures in Organized Crime Cases According to the Type of Confiscatory Measure (Police Data)*

| Year | Provisional Seizures | | | | Type of Measure** (§ 111b StPO) | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | investigaton cases with seizure(s) | (%) | seized values in total (DM) | estimated assets (%) | *§ 43a** | § 73 | § 73a | § 73d | § 74, § 74a |
| 1992 | 32 | 5.0 | ca. 5,000,000 | - | - | - | - | - | - |
| 1993 | 51 | 6.6 | *893.5 mill.* | - | - | - | - | - | - |
| 1994 | 54 | 6.8 | 17,512,080 | 1.4 | *3* | 33 | 0 | 9 | 18 |
| 1995 | 65 | 8.3 | 38,592,750 | 5.4 | *13* | 49 | 5 | 37 | 15 |
| 1996 | 89 | 10.5 | 36,843,794 | 2.9 | *3* | 99 | 9 | 50 | 38 |
| 1997 | 102 | 12.1 | 62,922,364 | 8.6 | *5* | 99 | 30 | 56 | 57 |
| 1998 | 179 | 21.5 | 95,152,126 | 9.0 | *8* | 195 | 125 | 102 | 82 |
| 1999 | 181 | 22.2 | 118,593,239 | 6.0 | *7* | 180 | 254 | 42 | 117 |
| 2000 | 258 | 30.2 | 582,527,117 | 38.0 | *2* | 289 | 477 | 77 | 170 |

*Source:* Federal Bureau of Investigations [Bundeskriminalamt], 'Lagebild Organisierte Kriminalität' 1992, p. 41; 1993, p. 50; 1994, p. 55; 1995, p. 58; 1996, p. 55; 1997, p. 42; 1998/1999/2000 taken from internet summaries [www.bka.de/lageberichte/ok/]. Missing values not provided in the official documents.

*) Asset penalty (§ 43a) was declared unconstitutional by the Federal Constitutional Court on 20 March, 2002 and can no longer be applied.

**) Instruments applicable are: § 73: forfeiture; § 73a: forfeiture of equivalent values; § 73d: extended forfeiture; § 74: confiscation; § 74a: extended confiscation.

However, on the police level, there is currently more attention towards asset related measures. *Table 2* provides a specific overview on the Organized Crime cases recorded by the Federal Bureau of Investigations. Al-

Criminal Law and Criminal Justice 9 (2001), (loc. cit.), pp. 276 et seq.

though these figures are subject to some methodological shortcomings, it gives at least some impressions on the meaning of provisional seizures in the context of such cases, in particular in light of the fact that this is the only available source in Germany which provides data on the type of measures imposed as well as on the value of the assets involved. In 2000, a total of some 582.5 million DM[44] were seized in Germany in the registered Organized Crime cases alone. The police data also give some information on the frequency and efficiency of the different instruments available. In recent years, forfeiture of equivalent values have become the most frequently used instrument[45]. Moreover, additional analyses based on data of the police authorities of the Federal States indicate that – be it either with regard to the number of applications or with regard to the relation of the number of measures versus the values obtained per type of confiscation measure – forfeiture of equivalent values is by far the most effective measure in Germany as well[46].

### *3.4. Smuggling of Migrants*

Instead or even *as* a concluding remark, I would like to refer very briefly to one final point representing the *'Special Part'* of our topic. In the Protocol against the Smuggling of Migrants by Land, Air and Sea which deals, by the way, with one of the most profitable areas of present O.C.[47] we can find a provision which might someday present a challenge to the restrictive immigration policy of the E.U. Member States. It provides that migrants shall not be liable to prosecution "for the fact of having been the object of conduct" (i.e., for having been smuggled)[48]. Notwithstanding the fact that the applicability of this article is restricted to prosecution for protocol offences only – which cover a broad range of offences, including the typical document offences[49] – it might be interpreted not just as a victim-friendly provi-

[44] This corresponds to approx. € 297.8 million.

[45] See the column for § 73a StGB of *table 2*: of explicit interest is the significant increase from year to year.

[46] In some Federal States, 90 percent or even more of all seizures were executed according to the provision on forfeiture of equivalent values; see KILCHLING, M., Deutschland, in: M. KILCHLING (ed.), Die Praxis der Gewinnabschöpfung in Europa, Freiburg i.Br. 2002, pp. 49 et seq.

[47] See the considerations by ALBRECHT, H.-J. (in this volume).

[48] Article 5 of the Protocol.

[49] See Article 6 of the Protocol.

sion[50] but also as a criminal policy statement pleading if, not for an explicitly immigrant-friendly, than at least for a *less repressive approach* to immigration policy than is currently being pursued by many European countries, including Germany.

This leads me to my final conclusion: the Protocol is an important part of the measures propagated by the Convention as a whole. It incorporates into the efforts to counter transnational Organized Crime a humane, or *social component* that goes beyond mere repressive measures. However, this reflects not only an issue of humanity. This component must be part of an all-encompassing approach to anti-O.C. policies. Not only that prosecution today is often hindered due to the fact that many of the victims are extradited and removed before a trial takes place, with the result that they are not available as witnesses; a more social immigration policy would, of course, contribute to a reduction of the immigration pressure and, in so doing, reduce, at least to some extent, the demand for (transnational) organized criminals in this particular area of delinquency.

[50] For more considerations on the victimological impacts of the Convention, see VAN DIJK, J., Empowering Victims of Organized Crime; on the Compliance of the Palermo Convention with the UN Declaration on Basic Principles of Justice for Victims, ERA-Forum 1-2001, pp. 33 et seq.

# Participation in an Organized Criminal Group as International Offence

VINCENZO MILITELLO

## 1. A worldwide legal instrument against transnational organised crime

In inaugurating the Palermo conference for the signature of the U.N. Convention on organised transnational crime, the President of the Italian Republic, Ciampi, had no hesitation in defining the document and its protocols as "the first worldwide legal instrument" against organised transnational crime and some of its most serious forms.

Certainly, former examples are not lacking potentially global cooperation to counter forms of criminality that cross national boundaries: the most significant example is the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.[1] However, the Palermo Convention marks a turning point in the commitment of the community of states to cooperate against transnational crime. The objective of increasing the effectiveness of international cooperation on this matter represents a constitutive and founding value for the entire Convention as indicated in the statement of purpose of the entire text (Article 1). The practical imple-

[1] The text of the Convention is to find e.g. in International Legal Materials 1989, 493 s.; see also on the matter KAUFMAN: United Nations: International Conference on Drug Abuse and Illicit Trafficking, Harvard International Law Journal 1988, 581 s. Other examples of recent global initiatives in GODSON/WILLIAMS: Strengthening Cooperation against Transnational Crime: A new security Imperative. In: Combating Transnational Crime. Concepts, Activities and Responses, ed. by Williams/Vlassis, London 2001, 332. For the action taken by United Nations organs on the specific, but of great importance, field of the terrorism see CORELL: Possibilities and Limitation of International Sanctions Against Terrorism. In: Countering Terrorism through International Cooperation, ed. by Schmid et al., Milano 2001, 245 s.

mentation of this declaration of principle has been entrusted to a set of provisions jointly designed to provide greater standardisation or coordination of national policy in legislative, administrative and enforcement approach to the problem to counter organised crime. The Convention foresees common definitions, substantive and formal penal provisions and other measures designed to facilitate investigations and enhance preventive actions to counter transnational organised crime.

It should be emphasised, first of all, that the text offers common definitions in a field (the notion of organised crime) that has always been plagued with uncertainties (Article 2). The Convention provides for a wide range of substantive and procedural measures such as the obligation to incriminate certain conducts (Article 6: Criminalization of the laundering of proceeds of crime; Article 8: Criminalization of corruption; Article 23: Criminalization of obstruction of justice), criteria of sentencing, and measures to enhance cooperation with law enforcement authorities such as the protection of witnesses and victims. Moreover, it stresses the importance of both law enforcement cooperation and the recourse to enhanced investigative techniques, such as undercover operations, forms of electronic surveillance and controlled delivery, and also the analysis and exchange of information on organised crime. Furthermore, it does not neglect the importance of streamlining international judicial assistance between member states (Article 18), the transfer of judicial proceedings (Article 21), extradition (Article 16), seizure and confiscation of the proceeds of crime (Articles 12 and 13). Nor, in conclusion, has the importance of preventive action been overlooked (Article 31) or the guarantee of technical assistance to countries in the implementation phase of the Convention (Articles 30, 32).

In this general framework that heightens the overall level of cooperation, substantive measures acquire particular importance, especially common definitions of crime and the related obligation of incrimination which are incumbent upon all states if a homogeneous standard of penal protection is to be achieved. This contribution will be focalized on the incrimination of the participation in a criminal group, with the related problems of implementation of this new international offence in the various legal systems.

## 2. The role of legislative harmonisation in modern international cooperation on penal matters.

In order to understand the importance of this innovation it should be remembered that the principle of national sovereignty on criminal matters has

traditionally excluded the choice of crimes and relative sanctions from international operations in the fight against crime.[2] The classical form of legal assistance at the request of another state according to the limits laid down by such assistance is circumscribed by the basic rules of international law: on the one hand, non-interference in the internal affairs of other states and, on the other, the non-recognition, in principle, of foreign penal systems. This means limiting legal assistance mainly to bilateral relations between states and, then, limiting it to individual and highly circumscribed procedural matters.

The shift from judicial assistance to international cooperation in criminal matters illustrates that states now share a common interest in this field. The relationships brought into being are no longer limited to bilateral relations but involve a growing number of member states.[3] In this more-modern cooperative context, the harmonisation of the penal laws of individual states has become a major priority, at least as regards those laws directly addressed to forms of crime that are not confined to a single legal system.

The resistance represented by the principle of state sovereignty in laying down penal laws can only be overcome by international agreement on penal provisions provided very rigorous conditions also apply. Such conditions refer to activities that can be performed within an institutional framework embracing all parties to such an agreement and to the extent to which the states agree upon specific objectives in terms of criminal policy.

There is no difficulty in recognising such conditions in some international agencies of regional type. For example, in the context of the Euro-

[2] For this reason, the more developed domain of international cooperation against crime has been, for long time, limited at the level of the police: in the European contest see among others FINJAUT, The Schengen Treaties and European Police Cooperation, Eur.J.Crime Cr.L.Cr. J. 1993, 37; SOULIER, Le traité d'Amsterdam et la coopération policiére et judiciaire en matière pénale, Rev. Sc. Crim. Dr. Pén. Com. 1998, 237 s.; PASTORE: La cooperazione fra autorità di polizia: Schengen ed Unione Europea a confronto. In: Giustizia ed affari interni nell'Unione Europea, ed. by Parisi/Rinoldi, Torino 1996-1998, 179 s. More in general HEBENTON/THOMAS: Transnational Policing Networks, Int. J. Risk Sec.Cr.Prev. 1998, 99 s. For the role of the sovereignty issue and of the differences between the legal systems see e.g. ZAGARIS: US International Cooperation against Transnational Organized Crime, International Review of Penal Law 1999, 497 s., 506.

[3] For examples of more advanced juridical cooperation agreements see e.g. SCHOMBURG, Are we on the Road to a European Law-Enforcement Area? International Cooperation in Criminal Matters. What Place for Justice?, Eur.J.Crime Cr.L.Cr. J. 2000, p. 51 s.

pean Union, which in the Amsterdam Treaty has accepted that harmonisation in criminal matters is a necessary instrument to guarantee European citizens an "area of freedom, security and justice". And in relation to crucial sectors such as "organised crime, terrorism and unlawful drug trafficking" the Union, "within a period of five years after the entry into force of the Treaty of Amsterdam" (Article 61(a) TEC), must progressively adopt measures establishing "minimum rules relating to the constituent elements of criminal acts and to penalties" (Article 31(e) TEU).[4]

On the other hand, the structure of global-type international organisations such as the United Nations, which comprises states with highly different political, legal and religious systems, makes it very difficult to reach the agreement on a common purpose that is necessary if harmonisation on penal measures is to be achieved. Moreover, the contents required for such harmonisation entail, in their turn, very difficult choices in terms of the legal model to be chosen and adopted, given the many existing models among the legal systems concerned.[5]

Yet for over 25 years, the United Nations has been trying to forge a common position on the question of organised crime and in doing so, it has produced a large number of documents prior to arriving at the formulation of the Palermo Convention in 2000.[6] In this Convention the obligation incumbent upon member states to incriminate participation in a transnational criminal organisation has more than a simple exemplary value as regards the various obligations set forth in the text. Above all, it is important in terms of the definition of a legal basis if this common objective is not to be watered down by uncertainties on how to represent the criminal phenomenon to be controlled. We should bear in mind the well-known accusations

[4] For some normative proposals to counter organised crime in this framework see Towards a European Criminal Law Against Organised Crime, ed. by Militello/Huber, Freiburg 2000,7 s.

[5] The role of the different factors (economic, political, but also moral and emotional) in the creation and evolution of international prohibition regimes is considered in NADELMANN: Global prohibition regimes: the evolution of norm in international society (1990). In : Transnational crime, ed. by Passas, Aldershot 1999, 480 s.

[6] A complete collection up to 1998 can be found in Organized Crime: a compilation of U.N. Documents 1975-1998, ed. by Bassiouni/Vetere, New York 1998. See also, The United Nations and Transnational Organized Crime, ed. by Williams/Savona, London 1996. The part of the United Nations which counters transnational crime is emphasized in FIJNAUT: Transnational Crime and the Role of the United Nations in Its Containment through International Cooperation: A Challenge for the 21st Century, Eur.J.Crime Cr.L.Cr. J. 2000, 119 s.

levelled at the notion of organised crime as being too imprecise to be taken as the foundation for any kind of legislative activity.[7]

Thus, the question becomes that of ascertaining whether or not the innovation contained in the Palermo Convention is suitable for contributing to the general objective of improving international cooperation in penal questions. To do this we have to consider if it satisfies the canons of correct normative harmonisation on penal matters, particularly in the light of the legislative variety that may be found in the different penal systems.

A verification that, first of all, has a theoretical value: understanding and comparing the various solutions adopted in the various legal systems brings to light not only reciprocal differences but also fundamental features common to them all. At the same time, an analysis conducted in this manner has important practical consequences with respect to the possibility of implementing the Convention in question – the greater the distances between the legal systems of the state parties, the harder it will be to implement the new judicial standards fixed by the Convention in each state. The ascertainment of the situation in question will provide valuable indications on how to perform technical assistance, as provided for by the Convention (articles 30 and 32) to those systems that are the most furthest removed from common solutions.

## 3. The structural elements of the organised criminal group in the Convention

The long preparatory work for defining participation in a criminal organisation has produced a solution that distinguishes two aspects of the problem. In the first, the salient terms of the notion of criminal organisation are fixed. In the second, the conduct to be incriminated by the states is specified.

[7] On the difficulty to establish a common definition of organized crime see e.g. DEN BOER, The European Union and Organized Crime: Fighting a new Enemy with Many Tentacles. In: Global Organized Crime and International Security, ed. by Viano, Aldershot 1999, 14 s.; FIANDACA, Criminalità organizzata e controllo penale. In: Studi in onore di G. Vassalli, ed. by Bassiouni et al., Milano 1991, 33 s.; INSOLERA: Diritto penale e criminalità organizzata, Bologna 1996, 11, 36 s.; H.-J. ALBRECHT: Organisierte Kriminalität- Theoretischen Erklärungen und empirische Befunde. In Organisierte Kriminalität und Verfassungsstaat, ed. by Id. et al., Heidelberg 1998, 3 s.; SCHAEFER: Organisierte Kriminalität aus der Sicht der Justiz, Regensberg 1998, 12 s.; AURTE BORRALLO, Conjeturas sobre la criminalidad organizada. In: Delinquencia Organizada. Aspectos penales, procesuales y criminologicos, ed. by Ferré Olivé/Aurte Borallo, Huelva 1999, 20 s.

*3.1.*

As regards the first aspect, Article 2 lays down that for the purposes of the Convention, an organised criminal group shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

The definition brings together naturalistic and normative elements, both of which, in their turn, requiring further definition. The naturalistic elements include, first, the participation of at least three persons and, second, activities concerted among the subjects comprising the group that last over a certain period of time. The normative elements include the references to the structured group and serious crime. For greater certainty, the text makes a further definition of these two concepts even if the references adopted are, in the one case, too rigid and, in the other, insufficiently precise.

*3.1.1.*

As regards to the notion of **serious crime** considered as the subject matter of the operations of group, a fixed parameter has been adopted (all offences punishable by a maximum deprivation of liberty of at least four years or a more serious penalty). In so doing, however, the law ends up by embracing groups of subjects involved in highly differentiated criminal activities that vary according to the countries in which they operate. Thus a fixed level of sanctions as reference for "serious crime" disregards the considerable differences that exist among the criminal law systems of the more than 190 UN Member States in the matter of establishing sanctions for crimes. This consideration can be borne out by a comparison between very similar penal systems. For example, the maximum levels of custodial sentences in Germany is fifteen years, half of that in Italy, which may be as high as thirty years, but Germany's is also lower than Portugal's, which is limited to twenty-five. On the contrary, life sentences are provided for in Germany as well as in Italy, but not in Portugal. Probably, it would be better to leave the specification of the notion of serious crime to the single states, when the Convention has to be ratified, and only indicate a catalogue of offences to be regarded as serious for purposes of the Convention.

*3.1.2.*

As concerns the other element, the definition of the **structured group**, the formula adopted is not as rigorously defined as that of serious crime in that it only requires that the group should not be randomly formed for the immediate commission of an offence. Consequently, it may be held that the notion of the structured group should be limited to situations in which the group presents some kind of stability in the components and in their respective criminal roles. But this is expressly excluded: the norm states "the group does not need to have formally defined roles for its members, continuity of its membership or a developed structure". However, this solution is not in line with other recent international documents on this matter. For example, the first resolution of the XVIth Congress of the International Association of Penal Law, dedicated to the notion of organised crime, contains the requirement of a "highly structured organisation".[8] But such reference could, without good grounds, restrict the phenomenology of organised crime. A rigid organisational model is only one of the forms adopted by modern day criminality, which can also take the form of a temporary alliance among groups in the pursuit of criminal interests.[9]

Although the formula adopted in the convention has quite rightly not neglected these forms of criminality, it has ended up by proposing a solution that is so wide as to eclipse the necessary distinction between the simple complicity of two persons in a single crime and the specific danger represented by an organisation whose programme covers an indeterminate number of crimes. As concerns the former, reference can be made to the notion of the group as randomly formed for the immediate commission of an offence, which has been excluded from the definition of a "structured group" in the text of the Convention. However, in order to produce a better definition of this difficult concept it would be advisable to view the organisational condition as a division of labour among at least three persons. Such operational structures are the sign of the rationalisation of criminal work that increases the range of the activities performed by the group, and can thus justify the punishability of the specific crime of participation in an organised group.

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[8] See Congress Proceedings of the XVIth Congress of the International Association of Penal Law, (Budapest, September 5-11, 1999), Budapest 2000, 242.

[9] For the various forms see e.g., DEN BOER: The European Union and Organized Crime, quoted note 7, 14 s.

In this respect, the Convention's decision to opt for a less-precise choice, is probably due to the influence exercised by common law penal systems.[10] Here the category of conspiracy covers not only the forms of simple consent to commit crimes but also the actual performance of one or more crimes by an organised group. This ambiguity is perfectly represented by the double definition of conduct to be criminalized as participation in an organised criminal group.

*3.2.*

The first form of conduct is related to the agreement with only one other person who commits a serious crime for the purpose relating directly or indirectly to obtaining a financial or other material benefit. This definition is clearly linked to the Anglo-Saxon category of conspiracy, which includes an agreement between two or more persons aimed at the perpetration of an unlawful act or the performance of a lawful fact by unlawful means.[11] In this manner, however, the Convention does not correctly focus upon the specific danger of a criminal organisation, understood as a "quid pluris" with respect to the mere participation in the single crime. Nor is it sufficient to overcome this obstacle by including the reference that a financial or other material benefit must be the necessary purpose of the agreed action because the intent to acquire unlawful material advantages is present in a very large number of crimes. This is a necessary but not sufficient condition to legitimise the worldwide criminalization of participation in an organised group.

Nor should we overlook the fact that the punishment of the mere agreement to commit a crime has a critical legitimation within the liberal penal tradition. From the latter standpoint unlawful agreements are not, as such, liable to punishment but only the actual attempts that put such harmful or dangerous conduct into practice. To avoid this confusion the Convention states that parties can request the punishment of a material act actually committed pursuant to an unlawful agreement. This is a solution that, on the one hand, respects the national specificity of penal systems as concerns

[10] The tendency of the international regimes to reflect the interest of the dominant members of the international society is considered e.g., in NADELMANN: Global prohibition regimes, quoted note 5, 480.

[11] See e.g., LA FAVE/SCOTT: Criminal Law, St. Paul 1986, 525 s.; Fletcher, Rethinking Criminal Law (1978), New York 2000, 218 s.

the critical point involving the ascertainment of the grounds and limits of criminal law but, on the other, runs the risk of once again compromising the unitary approach to conduct punished in the various legal systems.

Moreover, for those states that require the unlawful agreement to be translated into a material act in order to obtain the domestic ratification of the Convention, the boundaries between participation in a criminal organisation and the mere consent of persons to the unlawful act will once again be blurred. Furthermore, this unwanted effect might be replicated in a much wider context. Behaviour such as organising, directing, abetting, facilitating or counselling are not directly referenced to the criminal organisation per se but to the perpetration of serious crimes included among the activities of such organisations (Article 5 1b). It is easy to see that on many occasions the responsibility for sustaining such conduct is based on the general rules on complicity rather than upon a special incrimination concerning the participation in a criminal organisation.

Nevertheless, the conduct is well described in the U.N. Convention, expressing, as it does, the subjective and objective characteristics that justify the autonomous incrimination of a criminal organisation. In subjective terms, it is requested that the subject be aware of the unlawful activities of the criminal group or at least those concerning unlawful aims. In objective terms it is necessary that the subject participates either directly in the group's criminal activity or only in such other activities that are, however, designed to achieve the unlawful aims of the criminal group. But the formulation of the provision is not actually free from technical imperfections. For example, participatory conduct in not directly unlawful activities replicates what was originally stated as regards the subjective element, that is the subject's necessary knowledge of the criminal purposes of the organisation.

## 4. Comparative models of incrimination at an international level

We should not be surprised at the technical difficulties encountered in formulating the norm. The definition of a model of incrimination that could be potentially valid for every penal system is certainly not an easy task. Thus delicate problems are raised concerning what standard should be taken between the various solutions available in the sector, in order also to be able to accommodate the possible diversities in the way in which crimes can manifest themselves in different social and geographical contexts.

Nevertheless, the solutions adopted by the Convention have benefited not only from a long period of preliminary debate but also from the existence of other international documents on the matter covered by the Convention.

Of such international documents there is, for example, the Joint Action adopted at the end of 1998, in the ambit of the third pillar of the European Union,[12] which is closest in terms of time and content to the Convention. In binding Member States to make it a criminal offence to participate in a criminal organisation, the European text make reference to a structured association, established over a period of time and composed of more than two persons acting in concert – thus, according to a division of tasks – with a view to realising a qualified criminal plan. The crimes in question must be of a predetermined seriousness in general (which must not in any case be less than a four-year deprivation of liberty). Moreover, the relative conduct can be underpinned by a desire to obtain material benefits or improperly influence the operation of public authorities.

Rather than making a detailed comparison between the two documents it is important to emphasize a fundamental feature: the chances of success in the field of international cooperation in the fight against crime of both the European Joint Action and the Palermo Convention depend upon their capacity to contribute not only towards the goal of achieving further legislative harmonisation but also towards greater effectiveness in the fight against the phenomenon, while remaining in a framework that continues to respect the safeguards of the rights of the individual.

It is worthwhile recalling that with respect to the relevance of the activities of organised crime three principal models can be identified, ranked according to an increasing higher level of legal formalisation of the requisites characterising the phenomenon. They can be labelled as "no crime solution", "generic crime solution" and "specific crime solution".

I. *No crime solution*: it denies the necessity to criminalise in an independent and separate way collective structures in connection with criminal organisations. The criminal relevance of the conduct of the various individuals involved depends upon the commission of a different crime or at least an attempt to commit such a crime, with the possibility then of applying the general rules governing participation. With respect to the individual position, participation in a criminal or-

[12] Joint Action, referring to the incrimination of participation in a criminal organisation in the Member States of the European Union, published in: Official Journal of the European Communities (OJEC) L 351 of 29.12.1998.

ganisation can be relevant at most as an aggravating circumstance to be taken into account at sentencing, but it makes no differences in the constituent elements of crime.

II. *Generic crime solution*: the independent and separate criminal relevance of an association, owing to the unlawful nature of its aims or the means employed to achieve its aims, is the most widespread solution currently adopted by many criminal law systems, even apart from the legal tradition such systems belong to. In the majority of the cases, the association is punished for pursuing a plan prohibited by law in general terms. No particular elements are required in relation to the method of implementing the plan or the collective structures that must support the unlawful implementation. Only in some cases is criminal relevance also attributed to the unlawful methods employed for illegal purposes, but the methods characterising the actions of organised crime are never specified.

III. *Specific crime solution:* the express consideration of organised crime as a specific type of criminal enterprise to be outlawed separately represents the most recent solution adopted in this field, but so far only by a limited number of States. The relative provisions are regarded as being special rules with respect to unlawful associations in general.

It is interesting to see how the foregoing models have been implemented in the penal codes of different nations. Here we provide some indications on this phenomenon that take account of the results of two preceding researches. The first, undertaken in Europe, made use of the traditional technique based on a comparative-statistical survey involving the direct collection of pertinent data.[13] The second, instead, was made by compiling a questionnaire for the representatives of twenty countries belonging to different parts of the world (Latin America, Africa, Asia, East Europe, as well as the G-8 countries) in preparation for an international meeting to ascer-

[13] For the result of the "Joint European Project to Counter Organised Crime" – a comparative investigation conducted between 1998 and 2001 by the city of Palermo, and the Max Planck Institute for Foreign and International Criminal Law (Freiburg) in collaboration with judicial, academic and administrative institutions from Italy, Germany and Spain – see, Il crimine organizzato come fenomeno transnazionale, ed. by Militello/Paoli/Arnold, Freiburg 2000; Organisierte Kriminalität als transnationales Phänomen, ed. by Militello/Arnold/Paoli, Freiburg 2000; and Towards a European Criminal Law Against Organised Crime, quoted note 4.

tain the chances and the difficulties for the implementation of the Palermo Convention.[14]

a) The first model (A) characterises the Penal Codes of Northern Europe: Finland (chapter 6, section 2; in particular, chapter 50 on drug related crimes); Denmark (par. 80(2) for the possible relevance in sentencing); Sweden (where separate criminalisation exists but only in cases in which the group of individuals takes the form of an armed gang or is of a paramilitary nature: chapter 18, section 4). There are also examples in Latin America (Bolivia, Ecuador); Asia (Cambodia Article 69 Penal Code); Central America (Bahamas, Trinidad and Tobago, although they criminalize conspiracy to commit a particular offence as an agreement between two or more persons to commit an offence).

b) The second model (B) boasts a long tradition: in the Latin countries the criminal organisation took the form of the *association de malfaiteurs*, long present in French criminal law (art. 450-1 of the French Penal Code, mirroring art. 256 of the former French Penal Code of 1810) and exported to other legal systems under various names but with similar contents (art. 416 of the Italian Penal Code; art. 515 of the Spanish Penal Code; art. 299 of the Portuguese Penal Code; art. 322 of the Belgian Penal Code; art. 322 of the Luxembourg Penal Code; art. 140 of the Dutch Penal Code; art. 187 of the Greek Penal Code). This model is followed in East Europe (Romania: Article 323 Penal Code) as well as in Africa (e.g., in Algeria: Article 176 Penal Code) and in Latin America (Colombia: Article 340 Penal Code). In the German area, there is a similarity with the structure of "Kriminelle Vereinigung" (par. 129, 129a terrorist organisation of the German Penal Code). Even in the different common law tradition, the concept of conspiracy is deeply rooted, even if this offence is comprehensive of the agreement between two or more persons to commit an offence (also like "no crime solution"), as well as of a structured group (as in Great Britain and in the USA).

c) Regarding the third model (C), the adoption of a specific crime has notably increased in recent years. For example, criminal organisations are now punishable in Italy (par. 416 bis of the Penal Code), Austria

[14] Towards the Entry into Force of the UN Convention against Transnational Organised Crime, ed. by Militello/Vlassis (proceedings of the International Conference ISPAC - Courmayer, Italy - September, 13-16 2001), in print.

(par. 278a of the Penal Code), Belgium (art. 324 bis and 324 ter of the Penal Code) and Luxembourg (art. 324 bis and 324 ter of the Penal Code). In East Europe e.g. in Poland (art. 258 of the Penal Code); in Latin America e.g., in Mexico (art. 2 Federal Statute against organised crime).

## 5. The "hybridization" of the participation in an organized criminal group

In this international context, the provisions contained in the Palermo Convention for the incrimination of participation in a criminal organisation, reveals itself to be the outcome of a kind of "hybridization" of the above outlined models.

The definition of an organized criminal group is influenced by the experience of penal systems that have recently introduced specific offences against organized crime. But the two types of participatory conduct juxtapose the simple unlawful agreement model even if only between two persons[15] alongside the model that, as with the association des malfaiteurs, necessitates a more ample grouping (at least three persons).[16] And in its turn, not only is criminal activity in the performance of the group's programme subsumed under this second category but also those activities which, albeit lawful, are carried out in the knowledge that they contribute towards the fulfilment of the criminal aim of the group. This has been made possible by construing responsibility not as internal participation in the group but as a kind of complicity by a subject who is formally external to it.

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[15] Article 5 Palermo Convention (*Criminalization of participation in an organized criminal group*): 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity: (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group. (...).

[16] Article 5 Palermo Convention (*Criminalization of participation in an organized criminal group*): (...)(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in: a. Criminal activities of the organized criminal group; b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.

This external situation has a bearing upon the experience comprising the case law of the Italian penal system. In almost 20 years of the application of the specific provision on Mafia-type organised crime, this supplement to the general provisions on complicity has led to attempts to repress links between organised crime and the economy, which were hidden in the more elevated social classes (professional people, politicians, judges).[17] However, rather than the difficulties associated with probative evidence, here we are interested in stressing that the choice made by the Convention's provision ends up by putting very different situations on the same plane. Such different situations in the penal systems of individual states derive from models of incrimination that are neither historically nor functionally homogeneous.

The choice of creating a hybrid model is an attempt to maximize the supranational coverage of activities related to organised crime. We are in total agreement with the objective of sidetracking the shortcoming and delays of the different penal systems in repressing the extremely variegated manifestations of organised crime, by means of an instrument that surmounts the great differences in the world legal systems. However, in my opinion this hybrid model cannot prevent us from overlooking the fundamental need to make the punishment adequate to the crime. The forms of conducts that are treated as equal as regards the obligation of incrimination, must re-acquire their differences when the supranational obligation is ratified by the national states.

Once the Convention takes legal force it will be important to have it implemented as part of national penal systems. It will be especially important to ascertain that the single penal systems ensure a different kind of sanction as between mere illicit agreements involving only two persons and agreements formed in the context of structured groups and followed by the performance of unlawful activities. In order to repress organised crime the proportion of the penal sanction to the substantial seriousness of the fact, as determined by national codes, is no less important in producing a common platform for fighting such crimes at a world-level. However, in re-establishing the diversity in the punishment imposed for the multiple ac-

[17] For such experience see FIANDACA: Organised Crime and its Infiltration into Politics, Economics, and Justice in Italy. In: Towards a European Criminal Law Agains Organised Crime, quoted note 4, 57. See also the full version in Id.: La criminalità organizzata e le sue infiltrazioni nella politica, nell'economia e nella giustizia in Italia. In: Il crimine organizzato come fenomeno transnazionale, quoted note 13, 249 s.

tivities of organised crime, this will not constitute an impediment to the activities of international cooperation in the subject matter by virtue of the homogeneous framework outlined in the comprehensive terms of the Palermo Convention.

## 6. The crucial implementation phase of the palermo convention in internal penal systems

The variety of situations covered by the penal systems in relation to the various incriminations provided for by the Convention (organized group, laundering of proceeds of crime, corruption, obstruction of justice) will, certainly, affect the present phase of ratification by the signatory states and the adjustments to be made to internal penal systems. In the light of the foregoing considerations, the choices that the Convention opted for, with respect to obligation of incrimination mirror, in a contradictory manner, the need to find solutions able to command the widest possible consensus on international actions to combat organised crime.

The implementation phase in internal legal systems will call for very careful work of inserting and tailoring the elements of the crime into the regulatory archipelago of each penal system. The profiles onto which our attention should be focused are various: we must rationalize - also in terms of sanctions- the corresponding incriminations; avoid superfluous redundancies as between various internal laws; and seize the occasion for codifying the statutory regulations on illegal activities at present regulated in a too fragmentary manner. This determines the importance of ensuring adequate technical assistance for countries involved in such a difficult passage, especially those nations whose judicial culture is not familiar with the solutions contained in the Convention and lacks the technical skills necessitated by international penal law.

It should, for that matter, also be noted that the Convention has not made use of the more incisive instruments mentioned in international debates and/or in the experience of some penal systems. Consider, for example, the responsibility of the leaders of criminal organisations for crimes committed by its members, [18] or even simpler forms of the burden of proof in cases of

[18] For proposals on this matter see Congress Proceedings of the XVIth International Congress of Penal Law, quoted note 8, 243.

confiscation of unlawful proceeds. [19] However, here a secondary problem is presented by the compatibility of solutions of this kind with the guarantees to safeguard the individual against the state enshrined in the rule of law, despite the fact that this has still not been firmly codified at an international level.

We shall conclude with a last consideration: The sense of the Palermo Convention should not be sought in having introduced this or that single and more or less innovative and effective measure to combat crime. Instead, it largely seems to consist in having developed a common language in the fight against organised crime. And this objective is all the more important if we consider the confusion that used to reign in the debates on the question. Nevertheless, the signature of the Convention by a truly large number of states only represents a partial success, because the task has still to be completed. The contest will only be won if after the implementation and execution of the convention, the attention of the international community that brought the nations together to stipulate a new chapter in the fight against organised transnational crime does not wane.

[19] In the European context see the proposals of a extended confiscation drafted by FIANDACA and VISCONTI in: Towards a European Criminal Law Against Organised Crime, quoted note 4, 8-9 and the comment 73 s.

# On Containing Organised Crime Using "Container Offences"

## Some Reflections on Substantive Criminal Law Issues

FRANK VERBRUGGEN

## A. Introduction

Is it a crime to be a criminal? Should it be? It can be interesting to keep questions like these in the back of one's head while studying the substantive criminal law provisions in the United Nations Convention on Transnational Organised Crime (UNCTOC or Palermo Convention).

The Palermo Convention addresses two types of offences. On the one hand there are the crimes which constitute the core activity of the group, its core business: drug trafficking, kidnapping, extortion, robbery, fraud... Those are the offences that make their perpetrators "criminals". On the other hand, specific offences target the tactical and strategic behaviour of the group's members and allies which makes those criminals "organised" criminals. They envisage the actions aimed at protecting or supporting the core activities. The punishment or elimination of a suspected informer, for instance, is not the core activity of the drug ring. It is imposed in order to protect the drug trafficking operation itself, the people running it or the ones profiting from it. In the eternal discussion as to what exactly the notion "organised crime should encompass, some prominent criminologists claim that a distinctive feature is indeed the counterattack. Organised criminals would be the ones using aggressive counter-strategies against anyone liable to threaten the interests of the group, and in particular against the authorities or people assisting the authorities. Such behaviour can be criminal in itself, but that is not always the case. Whereas explicit violence or corruption will constitute offences in their own right, that will not neces-

sarily be the case for more subtle or sophisticated forms of protection or intimidation. For legal and evidentiary reasons, it is by no means self-evident that the systematic gathering of information on the movements or hobbies of witnesses, investigating officers or their families will also be punishable. Under the Palermo Convention, some behaviour is therefore being "criminalised" because it is "functional" for the core criminal activities.

Not surprisingly, the Convention's drafters did not linger long on the issue of which core criminal activities a group has to be engaged in to make it an organised criminal group: it can be any kind of serious crime. More "modern" offences, like the Trafficking of Persons, the Smuggling of Migrants, which only emerged or re-emerged as important offences in recent times (and mainly in the richer countries of destination) were enclosed in separate protocols. The same has happened to the "explosive" issue of the "Illicit Manufacture of and Trade in Firearms".

The specific offences aimed at the tactical and strategic behaviour of the criminal groups are therefore the keys to the Convention as far as substantive criminal law is concerned. They are: Participation in an Organised Criminal Group (art.5), Laundering the Proceeds of Crime (art.6), Corruption (art.8) and Obstruction of Justice (art.23). In this contribution we will call them "Palermo offences".

A number of "classical" substantive criminal law issues, like complicity[1], aiding and abetting other people's offences, attempt, conspiracy[2], aggravating and mitigating circumstances are included in the Convention. This contribution will not analyse them, as the Convention does not seem to break any new ground.

For two controversial issues, the Convention's drafters limited themselves to mentioning them, without really including binding obligations for the Parties: turncoats and legal persons (art.10). Probably these issues were, from a political or legal point of view, not yet "mature" enough to reach a worldwide agreement.

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[1] E.g. art. 8,3: "*Each State Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this article.*"

[2] E.g. art. 6, (b) (ii) on money laundering obliges State Parties to criminalise "*subject to the basic concepts of their legal systems, (...) participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.*"

As for the sanctions, nobody doubted that the Convention would duck matters like the death penalty or life imprisonment. Still, it is striking that it should focus almost exclusively on confiscation, the drafters' favourite sanction by far.

## B. The Core Crimes

In the United States, where the notion "organised crime" was coined, traditionally the "typical" core activities were smuggling offences (liquor, drugs, women,...), extortion and gambling. It did not take the Americans long to realise that plenty of different types of crime could become the core business of an organised crime group. The famous RICO-statutes, both the federal one[3] and the state laws modelled on it, only contain a tremendously long list of offences (murder, gambling, arson, ...) which are the *means* to extort, infiltrate or control enterprises. What the core activity of the enterprise is, does not matter: it can be any legitimate business activity as well as lucrative criminal business. Maintaining the control over a "car theft enterprise" by a pattern of murders therefore falls within the scope of the RICO-offence.

When defining the mandate of Europol, the EU's police unit especially dedicated to the fight against organised crime, the Member States opted for a list that has already been extended on regular occasions. The almost-approved European Union framework decision on a European Arrest and Surrender Warrant, which is not directly aimed at organised crime but against all serious cross-border crime, contains a list of more than thirty offences for which the double criminality requirement is being dropped. It is obvious: if lists of offences become too long, they lose their threshold function and become useless.

The drafters of the Palermo Convention decided wisely not to limit organised crime to specific, "traditional" core crimes. Art. 2 (b) of the UNCTOC states that it has to be "serious crime", defined as "*conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty*".

This guarantees that most of the core crimes will be covered. Still, one can imagine that in some countries the infringement of copyright, for instance, does not constitute "serious crime". The same goes for a series of activities which observers describe as one of the main emerging markets

[3] Title 18, Part I, Chapter 96, section 1961 U.S. Code.

for organised crime groups: the trafficking of humans beings or at least the smuggling of migrants. Apparently, some states were reluctant to include these offences in the Convention itself. The choice was made to draft a separate additional protocol to the Convention. Trafficking[4] is conceived as a crime against the liberty of persons. It implies exploitation: sexual or other slavery, forced labour or the removal of organs. It is to be distinguished from the smuggling of immigrants by land, sea and air as well as related document fraud and the enabling of illegal residence to smuggled immigrants. They might – and often do – include abuse of the would-be immigrants' vulnerable situation, but that is not necessary. In essence they are crimes not against people, but against the claim of sovereign states to let their authorities decide which persons have the right to enter their territory or to stay there and under which conditions. Document fraud related to these offences is also included. The fight against terrorism has made clear that forged documents, inevitable as they are in many serious crimes, have to be an important axe of investigative activity.

The last of these "opt-in offences" concerns the illicit manufacturing and trafficking of firearms, their parts and components and ammunition.

## C. Participation in an Organised Criminal Group (art. 5 UNCTOC)

Counting with the support of an association brings added value to the criminal intentions and actions of people. Classical concepts aimed at a group of people beyond the author of the core crime like aiding or abetting, complicity or incitement, fail in the case of organisations which are conceived specifically to shield people from or immunise them against classical law enforcement reaction. The existence of different layers of middle management within the more hierarchical groups guarantees that the leaders cannot be linked to the actual core crime. "Expendable" soldiers will commit the "core offences" and run the risk of getting caught. The pool of have-nots to recruit from and to replace the people who get caught, ensures

[4] Trafficking is (art. 3 (a) of the Protocol) the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability or of the giving or receiving of payments or benefits, to achieve the consent of a person, for the purpose of exploitation. For children, these means do not even have to be used to be considered "trafficking" (art.3 (c ) and 3 (d) of the Protocol).

that as long as the "command structure" remains intact, the criminal activities will continue.

There is strong evidence however that most international smuggling operations are not directed by different members of the same hierarchical enterprise. Rather it is a long chain of small and medium sized criminal enterprises, often working on the basis of an ad hoc partnership. The fact that every link in the chain only knows the next one often thwarts efforts to obtain a conviction for the core crimes detected further up or down the chain. In smuggling operations from Asia to Europe, these chains pass through dozens of transit countries, each one with its own legal regime.

The strength of the group rather than its individual components and the way in which it is organised also play a decisive part in conquering market share and protecting it. Intimidation of (potential) competitors by threat or use of serious violence can be used both in an underground market like that of heroin sales, a grey market like illegal workers in legitimate enterprises or a legal market like the bidding procedure in public procurement of construction works.

The way criminal law should come to grasps with that, has been a thorny issue, always and everywhere. Incriminating the mere belonging to a certain group and attributing criminal intentions to the group as such, is often seen to be at odds with dogmatic principles (like the establishment of individual guilt and punishment, the necessity of a clear line as to which behaviour falls within the scope of criminal law,...) and fundamental rights (freedom of association, freedom of expression for those who justify a group's actions,...). Whereas Anglo-Saxon countries have preferred the extensive use of "conspiracy" and related concepts, countries with a continental European tradition will rely more on "associative offences", which come in all shapes and sizes however[5]. Especially in young democracies, the members of the incoming elite remember that it was particularly with this kind of "crimes of association" like "belonging to a subversive or counterrevolutionary organisation" that the oppressive regimes had targeted them. In established democracies, people with historic perspective remind us of comparable abuses during political or other witch-hunts in the past. In an international context, these kind of offences have therefore, always been treated with diffidence. The fact that this resistance has crumbled in recent years, mainly under the pressure of law enforcement asking for "tools" to

[5] Cfr. GRANDE, E., *Accordo criminoso e conspiracy. Tipicità e stretta legalità nell'analisi comparata*, Milan, Cedam, 332 p.

fight organised crime and terrorism, is in itself one of the most remarkable trends now definitively sealed by the Palermo Convention. The Convention leaves it to State Parties to choose between the "conspiracy-model" (art. 5,1 (a)(i)) and the "associative offence" (art. 5,1 (a)(ii)), they can even opt for both[6].

A lot can be said about this trend and indeed a lot is being said. Since professor Militello's contribution is dedicated to this topic, we will not dwell upon it.

## D. Laundering of the Proceeds of Crime (art. 6 UN CTOC)

People who obtain financial profit from their own or other people's crimes, have of course always tried to make good use of it. In societies without tight control on individual finances, they could do so without too many problems. In countries with a more developed tax system, they would have to "mask" the illicit origin. Such so-called "money laundering" is a typical example of the tactical and strategic activities in support of the core criminal activities. From a tactical point of view, it serves to prevent the detection of the core activities and the use of the "money trail" as evidence of the core offence. From a strategic perspective it renders the "ill-gotten gains" usable for investment in new criminal activity or to protect the ongoing activity by bribing controlling authorities, investigators or witnesses. It will also serve to reward "loyalty" and hence strengthen the bond between members. The fact that organised crime groups almost inevitably have to work in a clandestine way of course comes at an extra price.

The idea is that while financial power is the strength of organised crime, it is also its vulnerability. The perception – or perhaps even conception – of organised crime groups as criminal "enterprises" lead law enforcement to point out that the most efficient way to suffocate organised crime groups is by cutting off their financial "bloodstream". Financial troubles would dissolve the glue which keeps the groups together and renders them strong and dangerous to societies.

Consequently, it is hardly surprising that the laundering of proceeds from crime should be included in the Palermo Convention. The drafters could count on a number of existing international instruments for inspiration. In

[6] The E.U. did the same in its common position on the participation in a criminal organisation of December 21, 1998, *O.J.*1998/351.

the first place there was the UN Convention of 1988 against the illicit trade in drugs (Vienna Convention). In the 1980s, the illegal drugs trade was universally seen as the most profitable form of organised crime and corruption by drugs money as the biggest threat to the legitimate economy and the integrity of institutions. Following an American lead, the parties to that Convention agreed to make the financial front one of primary theatres of operations in the war on drugs. This included a definition of "laundering the proceeds of drug offences" and the engagement of all parties to make this an offence (art.3 of the Vienna Convention). The work of the Financial Action Task Force clearly began to bear fruits. This multinational group of experts acts (under the aegis of the OESO) as a lobby against money laundering, as a consultant to governments and institutions joining this fight and as an controller of compliance. The definitions in the Vienna Convention strongly inspired the Council of Europe's Strasbourg Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)[7]. Not surprisingly, the enormous breakthrough was that the Europeans decided that not only drugs crime was "dirty" and that the money proceeding from other offences should also be labelled "dirty". The Convention allowed its members to expand the predicate offences producing the proceeds to all kinds of serious crime. Although the Convention did not compel them to do so, many parties availed this possibility. Typically, Europeans would think it is not logical, not even morally justifiable to treat the proceeds of murder, extortion or serious fraud in a more favourable way than those of drugs trafficking. Limiting the laundering offences to drug proceeds also implied that the launderer could defend himself by claiming that he was told that the money proceeded from theft or extortion and go free.

The Palermo Convention reflects the efforts of some countries, especially some European ones, to expand the choices of the Vienna Convention from drug-related to all kinds of serious crime.

As for the laundering, this entails the increase in the number of predicate offences, i.e. the offences as a result of which proceeds have been generated that may become the subject of a laundering offence. The Convention defines "proceeds" as "*any property derived from or obtained, directly or indirectly, through the commission of an offence*" (art. 2 (e)). Property refers to "*assets of every kind, whether corporal or incorporeal, movable or*

[7] *E.T.S.* nr.141.

*immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in it"* (art. 2 (d)).

The drafters are clearly trying to close any potential loophole which would allow the "bad guys" to get away with any proceeds.

In Palermo, the Parties agreed that they would "*seek to criminalise laundering of proceeds from the widest range of predicate offences*" (art. 6,2 (a)). In any event, the laundering of the proceeds of serious crimes in art.2 (b), i.e. which could result in a deprivation of liberty of more than four years and the "Palermo-offences" (participation in an organised criminal group, corruption, obstruction of justice and (?) money laundering) will become "predicate offences".

Globalisation of the financial system is a fact and money laundering is one of the most "transnational" crimes on the books. Very often the laundering, or at least a part of it will occur in states other than the one where the predicate offences took place. That is why the Convention explicitly states that laundering of proceeds will be an offence, regardless of whether the predicate offences were committed within the jurisdiction or outside the jurisdiction of the state of laundering (art. 6, 2 (c)). In case of extraterritorial predicate offences, there is a double criminality requirement. One can only speak of "proceeds" if they spring from behaviour which is a crime both in the state where it occurs and in the state where those proceeds are laundered. It does not seem to be required that it be "serious" in both states, i.e. that it should carry a prison sentence of more than four years in both countries. One cannot underestimate how big an expansion of the fight against "proceeds laundering" amounts to.

Like its predecessors, the Convention distinguishes different phases or different players in the laundering which is inevitably a process. The states which have taken the lead in the fight against proceeds laundering can look back on one or two decades of experience. They know where the existing instruments are hamstrung, in their scope or because of evidentiary problems. They know which are the battlegrounds of their further – according to some excessive – expansion. The "intent" requirement seems to have been a kind of watershed. The Convention reflects this in a distinguishing between "compulsory" and "conditional" laundering offences. The former two must be accepted by all Parties, the latter are "*subject to the basic concepts of Parties' legal systems.*"

In the first compulsory offence (art. 6,1 (a) (i)), the objective elements (the *actus reus*) are defined in a very broad way: "*any conversion or trans-*

*fer of property*". This is however compensated to a certain extent by a higher threshold in the subjective requirements (the *mens rea*). First of all, that conversion or transfer has to happen "*intentionally*". That is the subjective attitude towards the action, the "*conversion*" or the "*transfer*". Far more important is of course the subjective relation between the "converting" or "transferring" person and the proceeds and their origin. On the one hand there is the cognitive component: "*knowing that such property is the proceeds of crime*". This excludes persons (or institutions) which lack such knowledge, even in cases where this is due to their own neglect and where a normal person would have known. On the other hand there is the additional voluntary component, requiring that the conversion or transfer is precisely done "*for the purpose of disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action.*" It seems that this provision is directed at the financial institutions and intermediaries which might get involved in the so-called "layering" phase of the laundering process. It consists of spinning the proceeds around, if possible while mixing them with "clean" money.

In the second compulsory offence (art. 6,1 (a) (ii)), the point of gravity shifts from the subjective to the objective requirements. The objective element is the "*concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property*". It suffices that such behaviour is intentional and that the person which conceals or disguises the true nature etc. does so "*knowing that such property is the proceeds of crime*". On its face, this provision seems to do away with the purpose, the specific laundering intent: the action can be motivated by pure (financial) self-interest, without any consideration for the intentions of the "owner of the proceeds". Still, the use of verbs like "*to conceal*" or "*to disguise*" seems to point at an implicit "laundering intent"[8].

If it is compatible with the basic concepts of their legal system, State Parties should also criminalise the plain acquisition, possession or use of property "*knowing, at the time of receipt, that such a property is the proceeds of crime*" (art. 6,1 (b) (i)). No *dolus specialis*, no laundering intent, no special purpose would be required : the proceeds of crime should become "untouchable", subject to a universal boycott. When the "purpose"

[8] According to the travaux préparatoires "*the terms 'concealing or disguising' and 'concealment or disguise' should be understood to include preventing the discovery of the illicit origins of the property*".

exists, it is often hard to establish its existence beyond reasonable doubt, particularly in complicated entities like internationally operating banks or funds. Yet often the purpose is simply not there: the motive is purely commercial in an amoral way.

The same "condition" of compatibility with the basic concepts of their legal system accompanies the criminalisation of "*participation in, association with, conspiracy, attempt, aiding, abetting, facilitating and counselling the commission of laundering offences*" (art. 6,1 (b) (ii)). One could of course wonder what one should make of this "condition". Europeans are already familiar with this "*reservation in disguise*". It has turned up in European instruments to harmonise certain aspects of criminal law. A *reasoning a contrario* would imply that the two "compulsory" offences have to be introduced even if they would be incompatible with the basic concepts of a State's criminal law system.

Another example of a controversial issue which surged in most countries with experience in the fight against laundering is whether the author of the predicate offence can be punished for laundering. Under the Palermo Convention the answer is affirmative, but States are allowed to exclude him or her if this is required by fundamental principles of their domestic law (art. 6, 2 (e)). Again, one can wonder to what extent such Convention articles generate obligations under international law. One could read this as a kind of standstill clause: if you already have this exception, you can maintain it if you really, really want to. But you can drop it any time and if you do not have it, you cannot claim it is required by the fundamental principles of your domestic law and you should by no means introduce it now. This might be important for countries, like the members of the EU, which are trying increasingly to harmonise their criminal laws in this field. Even if most member states would exclude the author of the predicate offence from the scope of laundering offence, it would then suffice that one member state does not to impede that a "harmonised" EU-offence should do so. It is quite unlikely that many EU states would support such a reading of the Palermo-convention. They would probably claim that the new "European" fundamental principles would replace the "domestic" ones[9]. Still, under the current state of the Treaty on European Union, all member states, or rather,

[9] The European Convention on Human Rights and especially its interpretation by the European Court of Human Rights have already had the effect of introducing or (re)discovering "new" fundamental principles in the domestic law of the States which are Party to it.

ministers from the governments of all member states, have to consent to the harmonising measure (called framework decision). All EU Member States are parties to the Palermo Convention. One could say that their obligations under that Convention prevent the EU Member States without "fundamental principles of domestic law" limiting the most far-reaching provisions of the UNCTOC from consenting to any EU instrument which would. Since Belgium for instance has a law which allows the perpetrator of the predicate offence to be prosecuted for laundering the proceeds of his own offence[10], it could – under the Palermo Convention – not consent to a harmonised European offence which would exclude the perpetrator from being punished as a launderer. One could say that the fundamental principles are not sacrificed, but sterilised: they will no longer be able to procreate and in the long run they will probably become extinct[11].

The money laundering offences are well known by now, the crucial issue is the enormous extension of the predicate offences. It is remarkable that the intent requirement is upheld. Some countries argue that also negligent or reckless laundering should constitute an offence, especially if when one is confronted with legal persons. The individual teller of the bank may have acted intentionally, the bank itself and its management might have been negligent in controlling their personnel or they might have condoned the illicit activities.

Probably the crucial problem will be whether the laundering offence is derivative or independent in nature. How strong a link will be required by judges between the predicate and the laundering offence? To what extent will the predicate offence itself have to be established? What kind of evidence will be required for the link between the predicate offence and the laundering offence (criminal origin of the proceeds)? How much knowledge regarding the predicate offence will be required, especially in the case of extraterritorial predicate offences? If, for example, an Argentinian citizen says he wants to deposit his savings on a French bank account because he is afraid of the devaluation in his country, should the French banker accept this explanation? Could he do the same with a Colombian, Russian or Congolese customer?

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[10] Art. 505 of the Belgian Penal Code.

[11] According to the *travaux préparatoires* the States which did not allow the conviction of the same person for both the predicate offence and the laundering offence, confirmed that they "*did not refuse extradition, mutual assistance or cooperation for the purpose of confiscation solely because the request was based on a money laundering offence the predicate offence of which was committed by the same person.*"

The drafters know full well that it often will be difficult to prove the subjective elements of the laundering offences. Hence the provision in art. 6, 2 (f) which states that "*knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances*". That is of course a statement of the obvious: you cannot read people's minds, less even their minds, at the moment they allegedly committed the offence. Judges always infer the subjective elements like intent, knowledge or purpose from objective factual circumstances. We believe that what the drafters actually want to point at, is a kind of constructive knowledge. Sometimes people and institutions who claim that they did not know that property proceeded from crime, because they did not really want to know, they completely ignored all the indications that there was something wrong. If there were suspicious circumstances surrounding the transaction, they "must have known" that they were involved in laundering. The numerous obligations which the next article of the Convention (art. 7) wants to impose on financial intermediaries and other professionals who run into "suspicious transactions" are therefore more than just a mechanism to detect and (theoretically) prevent money laundering. The failure to meet those obligations will probably be used as evidence that one knew one was dealing with proceeds and knowingly and willingly laundered them.

## E. Corruption (art. 8 UNCTOC)

It is a classical comment about Colombian organised crime that those who have to deal with it, have only two options : "plata o plomo" (silver or lead), accept the bribe money or get shot. The willingness and capability to use exemplary violence to protect the group's interest if other tactics fail, is probably what distinguishes organised from other serious forms of crime. In Al Capone's words: you can get very far with a smile, but you get a lot further with a smile and a gun. The provisions on obstruction of justice (infra) are the Convention's answer to that. Very often it will not be necessary to resort to violence, because corruption neutralises any attempt to cut the group's wings. In sensitive matters, corruption tends to be a process, rather than an event. "Translating" that into specific offences which can pass the tests imposed by the "legality principle" has been a difficult job to lawmakers. An international push to get tougher on corruption has already resulted in numerous international anti-corruption-

initiatives (European Union, Council of Europe, OESO). Art. 8 of the UNCTOC relies heavily on the definitions in those instruments. It follows the classical distinction between active and passive corruption. The objective elements of active corruption (art. 8, 1 (a)) are "*the promise, offering or giving to a public official, directly or indirectly, of an undue advantage for the official or another person or entity*". Such promise, offering or giving should happen "*in order that the official would act or refrain from acting in the exercise of his or her official duties*". All this should also happen "*intentionally*". Unintentional active corruption is indeed hard to imagine, but it might be important in groups or organisations where the intentional actions of some might be the consequence of the negligent or reckless attitude of others.

The flipside of the coin is the offence committed by the official "on the take": passive corruption. Art. 8,1 (b) defines the *actus reus* as the "*solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for an official or another person or entity*" with the same purpose, "*in order that the official would act or refrain from acting in the exercise of his or her official duties*". Once more, the Convention sticks to an intent requirement.

The corruption offences in the UNCTOC are "modern" in that they abandon the classical idea that it takes (at least) two to have a corrupt relationship and that the offence is not complete unless there is agreement between the two of them. Such a "pact" is no longer necessary, let alone that it would have to be executed. What the Convention does, is "criminalising unilateral behaviour on both sides". It suffices that undue advantages are "*offered or promised*", it is no longer necessary that they would actually be given. The same goes for solicitation, which is treated on the same footing as the actual acceptance of a bribe.

Apart from the classical, yet extensively defined, offences of active and passive corruption, the Convention also mentions some optional issues. On the one hand, it offers State Parties the option to consider extending the offence of corruption to cases in which the official is a foreign or international public official (art. 8,2), something which many countries have already done to stay in tune with the world-wide surge in anti-corruption-initiatives. On the other hand, they should give consideration to criminalising "other forms of corruption", probably private corruption and the "*greasing*" of officials with "presents" not linked to a specific favour, to be granted or a specific transaction.

## F. Obstruction of Justice (art.23 UNCTOC)

The last of the substantive crimes in the Convention is so closely linked to criminal procedure that it is actually to be found among the procedural issues. It is the offence of "obstruction of justice" in art.23. It is a broad notion, because it actually only deals with specific forms of obstruction of justice, i.e., intimidation of or violence against witnesses and investigators on the one hand and the bribing of witnesses on the other[12]. It does not seem to cover the intentional destruction of physical or documentary evidence or the tampering with evidence. The shredding of documents by an accountancy firm in a fraudulent-bankruptcy-case, would not amount to obstruction of justice in the sense of art.23.

The objective element of the first offence is either *"the use of physical force, threats or intimidation*" or *"the promise, offering or giving an undue advantage*"[13]. This should be done intentionally. Intent will often be evident, but it will not necessarily be present in the minds of intermediaries which pass on the message or the advantage. On top of that, to make it an obstruction of justice offence, a special purpose is required, *"to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings related to offences covered by this Convention."* "Fear" is, of course, a crucial "ally" of organised crime and protecting witnesses is not just an important part of tactics, it is often argued that it is the state's obligation. One can wonder, if interfering with witnesses, a crime in its own right will be likely to impress members of serious criminal organisations. Most witnesses will not be satisfied by the "deterrence" of the criminal law either. They will claim physical protection for themselves and their neighbours. Not surprisingly, the Convention's next article (24) obliges States to provide effective protection from potential retaliation.

Probably few people realise that the offence in art.23 actually cuts both ways. In organised crime cases witnesses rarely abound and they do not tend to jump for joy at the prospect of testifying. Officials trying to build a case almost inevitably tread a thin line between legitimate and undue pressure. Witnesses for the defence who feel intimidated, prosecution witnesses

[12] Compare the numerous other forms of "obstruction of justice" in the American federal criminal code: Title 18, Part I, Chapter 73.

[13] "Seducing" a witness or investigator in its most classical sense would not be covered, at least as long as the blackmail or the threats which usually follow later on, have not started.

which were put under pressure by investigators or received promises that were not met: they will all be eager to accuse officials with obstruction of justice.

In practice, the problem will more likely to be one of evidence. It will seldom be easy to establish the link between a violent action, an "accident" happening to a (potential) witness or a benefit received and the victim's role in the trial.

Once more, we see that the defining moment of organised crime is not the core crime itself, but rather the way it tries to neutralise the normal law enforcement reaction: by neutralising or bluntly eliminating the (potential) threat. When confronted with this kind of organisation, law enforcement attention shifts from the core crime itself to the crimes which make it difficult to obtain a conviction for the core crime.

## G. Sanctions

The impact of sanctions on (potential) organised criminals, has rarely been the subject of serious debate. The sanctions are usually harsh enough. For the big fish, the justification tends to be that society should be protected against "incorrigible" offenders. This logic of "social defence" is sometimes used to justify "preventive measures" next to the classical criminal "penalties". For the small fry, the harsh sanctions can be a means to pressure them into accepting a deal, i.e. testifying or otherwise providing information on the group in exchange for reduced punishment.

The first problem with the sanctions was that not everyone who was involved, could be convicted. To make things worse, the existing sanctions do not seem to have a lot of effect on the target group. The Convention was not likely to be a platform of subtle innovation. Article 11, 1 states that each State Party shall make the commission of an offence established in accordance with the articles 5, 6, 8 and 23 liable to sanctions that take into account the gravity of that offence. The drafters' main concern seems to be that States might be too lenient. Article 11, 4 warns about being too generous with parole or early release; Article 11, 5 suggests "*a long statute of limitations*".

Indeed, the Convention merely confirms the general trend of recent decades to put an enormous faith in confiscation as the most effective sanction against organised crime (art.12). The limited evidence available, has shown that the expectations were definitely exaggerated. Of course, if you can

catch someone and get his assets, you punish him even more. The problem is that often the "hunt" for proceeds comes at a price, both to the rights and interest of third persons and to human rights in general. It remains to be seen how the rights of bona fide parties (art.12, 8) shall be protected. As Dr. Kilchling will analyse the use of confiscation as a sanction against organised crime, we will refer to his contribution on the issue.

## H. Remarkable Features

The Palermo Convention was conceived as an instrument to fight organised crime. The protection of individual human rights may have been a concern, but it was not a priority. That gives particular weight to article 11, 6, the switch between the provisions on substantive criminal law in the Convention and the domestic legal order. It states that "*nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law*". Individuals cannot be held liable under the Convention if the offence received a more restrictive wording in the domestic criminal law. The failure of the State to implement the Convention correctly, makes that State liable under international public law. Individuals however would benefit and escape (criminal) liability. To put it differently: the substantive provisions of the Palermo Convention are not self-executing, they do not have "direct effect" which would automatically set aside conflicting national laws.

It remains to be seen to what extent the Palermo Convention, after being implemented by the States, will be "hampered" or "enhanced" by the idiosyncrasies of domestic criminal law. An example can illustrate this. We have said that the willingness and capacity to use violence are crucial to organised crime. But the fear should also be considered from the perspective of the victim of intimidation. In organised crime cases, many people rightfully fear for their lives. The Colombian "balloon swallower" who smuggles drugs inside his own body, will claim that he could not act otherwise, because refusal would mean retaliation against his family in the mountain village back home. The businessman pays extortion money rather than risking his health or his business. The frightened witness commits perjury or the intimidated inspector turns a blind eye to illegal practices.

Most of the time, they are right to be frightened. A broad definition of duress, but even more the willingness of courts to accept duress as a defence, would render most of the Palermo offences harmless[14].

Numerous other features of domestic criminal law, like release on parole or the granting of pardon, can be (ab)used to "neutralise" the "punitive" ambitions of the Palermo-Convention, without violating it[15].

For academics, the Palermo-offences is food for thought. They possess some common features, each of them creating tension with the basics of what is now called classical criminal law[16]. These "reflections" merely point at two of them, as an invitation to a more profound discussion: the increasing use of container-offences and the intervention of criminal law being pushed forward.

We like to compare offences like "belonging to a criminal organisation" or "proceeds laundering" to the containers which have revolutionised international transport after the Second World War. One can put the most varied issues in those standardised metal boxes: easy transport is guaranteed all over the globe. It can happen by sea, air, road or railroad: the boxes will match, however heterogeneous their content. In a similar way "container

[14] The *travaux préparatoires* indicate that the obligation under art.8,1 (corruption) "*was not intended to include the actions of a person who acted under such a degree of duress or undue influence as to constitute a complete defence of the crime.*"

[15] Obviously, the drafters were aware of this, but they had to settle for the promise: "*Each State Party shall ensure that its courts or other compentent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of persons convicted of such offences.*"(art.11, 4)

[16] When dozens of governments sit down to negotiate a Convention, they do not tend to get bothered too much by the dogmatic intricacies of penal law. It will be up to practitioners and academics to develop general rules and priniples. The body of practice which is growing in the sphere of war crimes, crimes against humanity and genocide will be a prominent source of inspiration. Courts and tribunals have answered questions on command responsibility for crimes perpetrated, not by the lower ranks within a strict hierarchy, but by «maverick militia». They took a stand on the liability of legitimate enterprises providing logistical support to criminals. The basic issue is the same : the relation between individual and collective (criminal organisations or legal persons) and the liability of both individuals and collectives for « collective » action or collective failure to act. Cfr. the excellent analysis of AMBOS, K., "Individual Criminal Responsibility in International Criminal Law: a Jurisprudential Analysis-From Nuremberg to The Hague" in: KIRK McDONALD, G. and SWAAK-GOLDMAN, O. (eds.), *Substantive and Procedural Aspects of International Criminal Law, the Experience of International and National Courts, Vol.I*, The Hague-London-Boston, Kluwer Law International, 2000, 3-31.

offences" derive their criminality from a link with other offences, which can be quite heterogeneous.

The advantage is clear: double criminality, a classical requirement and often a complication in international cooperation against transnational crime, is no longer an issue. In stead of harmonising all the different predicate offences, it is enough to standardise the "boxes".

The drawbacks are equally obvious however. Since the boxes are closed, it becomes harder to control whether they really contain what they should contain. Many people will claim that they did not know, what was in the box. Furthermore, form prevails over content. That means that laundering money from theft will often carry the same sentence as laundering money from aggravated theft. The inherent proportionality between seriousness of the offence and penalty of the predicate offence, is lost at the level of the "derivative offence".

The Palermo offences break with the classical theory that states should not intervene in human relations with a blunt instrument like criminal law unless damage has been done to a specific "legally protected interest", "a common good" like property, sexual integrity or life and limb. Only for the most serious offences (like murder or attacks against the head of state) the intervention was pushed forward, through the use of concepts like attempt or conspiracy.

The Convention confirms unambiguously that those classical theories no longer apply. Technology allows individuals and small groups to cause such enormous damage that states cannot afford to wait for the damage actually to happen. Instead, criminal law becomes a tool to prevent the damage from ever happening, by making endangerment the threshold for intervention and sanctioning[17]. Often very strict and detailed rules will be drafted (traffic law, environmental law, economic and financial law) and their violation will be punished. Typical for offences like the ones in the Palermo Convention is however that neither the legal interest which is being protected is concrete, neither are there any detailed rules.

"Abstract endangerment offences" have often been criticised as a blank cheque for prosecutors and judges, a violation of the legality principle under which potential offenders should be able to know whether their actions would fall under the scope of the criminal law or not.

Often it is indeed less the fear of irreparable damage, but rather the ea-

[17] We refrain from mentioning the enormous amount of sophisticated dogmatic literature on "endangerment" as a concept.

gerness to avoid evidentiary problems which inspires lawmakers to make abstract endangerment already an offence. The provisions on corruption in article 8 of the Convention illustrate this.

The overall result is that the objective, the material elements of the offence have lost almost any limiting function. Consequently, the subjective elements carry more and more weight. What knowledge does an individual have about the goals and actions of an organised crime group and what is his attitude towards them? Did he have the laundering intent when he handled the assets? Did he commit the destruction "in order to interfere in the giving of testimony or the production of evidence"? The drafters were aware of these difficulties in establishing the subjective elements. Whether the provisions that "*knowledge, intent, aim, purpose or agreement*" regarding the organised criminal group (art. 5, 2) or "*knowledge, intent or purpose*" as elements of the laundering offence "*may be inferred from objective factual circumstances*" (art. 6, 2 (f) UNCTNOC) will be of much help, remains to be seen.

Anyone can see the potential for abuse of a system of criminal law where the subjective aspects carry so much weight: the classical system was to a large extent a reaction to such abuses.

The establishment of these subjective elements, will not be easy with traditional investigative methods and procedures. Different, modern, proactive and sensitive methods will be necessary and the Convention dedicates a lot of attention to them. The consequence might be that in organised crime cases the existence of the offence itself will be a minor matter, it will almost inevitably be established since the substantive law is hardly a threshold at all. The focus and the legal arguments will shift to the procedure, to the methods that were used by the investigators, their legality or legitimacy.

## I. Conclusion

The substantive criminal law provisions of the Palermo Convention will not be a primary source of criminal law for practitioners. Still, they will be implemented and their influence on the wording of resulting criminal laws is likely to be very strong. Rather than the core crimes, four offences focusing on tactical and strategic behaviour of organised criminals constitute the substantive backbone of the Convention: participation in an organised crime group, money laundering, corruption and obstruction of justice. The derivative nature of these offences, i.e. the fact that the actions are punish-

able because of their link with another offence, raises plenty of questions. Especially if that link becomes tenuous, and that seems to be the general trend, it could be dangerous. Even people who are still far from actually damaging anyone or anything are brought within the scope of criminal laws. The result is that the subjective elements and personal motives become extremely important. To establish those subjective elements, sensitive investigative methods will have to be used. The debate on whether the defendant's actions were illegal and constituted an offence, might become overshadowed completely by the debate on whether the investigators acted properly. However important it might be from a tactical point of view to pay attention to the way how organised crime groups try to protect themselves, one should never ever forget the core crimes. They make the organised criminals "criminal". Without core crimes inside, the container-offences remain empty and shipping empty containers around does not make sense.

# The Prominent Procedural Issues: Obtaining Evidence Abroad – a European Approach

SABINE GLESS

## A. Introduction

The objective of the UN Convention against Transnational Organized Crime (following: UN-Conv.) is to promote cooperation on combat and prevent organized crime more effectively.[1] It thus gives special emphasis to the framework for mutual legal assistance, which is – among other things – a basis for the obtainment of evidence abroad.[2] The so-called "*kleine Rechthilfe*" (or: "little legal assistance") is regulated in Art. 18 UN-Conv. Art. 18 stretches over 6 pages: a record length. (The only article, which strives to measure up to Art. 18 is Art. 16 UN-Conv., which rules on extradition and covers 2 pages.) From the length of the Article alone – without even taking its complicated content into account – it is clear: something must be difficult in the field of mutual legal assistance if such a voluminous rule is necessary. What is the problem?

## B. Traditional Way of Obtaining Evidence Abroad

### *1. Longwinded Process*

Traditionally the international exchange of evidence relies on the exchange of letters rogatory, sent through ministries or diplomatic channels. According to those rules, a request for evidence – for example, the interview of a person as a witness – must be authenticated by a supervising national

[1] Art. 1 and 18 (1) UN-Conv.
[2] Art. 18 (3) UN-Conv.

court in the requesting state. As a result, this request should be submitted to the foreign office, which forwards the request to the embassy of the requested state. This embassy passes the request to its own foreign office, which dispatches it to the proper court for approval and order for execution.[3]

In the requested state, the appropriate authority forwards the request to those authorities who finally execute the request – that is, interview a witness according to the country's national law, and forwards the deposition to the superior authority, which will send it to the competent authority of the requesting state.[4]

The traditional procedure of mutual assistance is, thus, too longwinded.

In Europe, however, the procedure was made easier by the European Convention on Mutual Assistance in Criminal Matters, adopted in the Council of Europe in 1959[5], which provides (in its Art. 15) that letters rogatory shall be exchanged between the Ministries of Justice and, in cases of urgency, may be addressed directly by the judicial authorities of the requesting party to those of the requested party.[6] The Schengen-countries even allow the authorities of all contracting parties to address procedural documents directly by post to persons who are in the territory of another Contracting Party[7], thus providing a possibility to summon a witness directly. (Whether the witness shows up, however, is another matter.[8])

This brief glimpse of the European framework already shows that cooperation between the European countries is quite developed, while the UN convention strives to build a network within a larger framework, namely between countries which have not entered contracts of mutual legal assistance in this field yet: As a rule, Art. 18 (13) UN-Conv. places the Contracting States under the obligation to designate a Central Authority, that has the power and repsonsibility to receive requests for mutual legal assistance and either execute them or transmit them to the competent authority

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[3] *Jones* on Extradition and Mutual Assistance (London 2001), 18-002.

[4] See *e.g.*: *McLean*, International Judicial Assistance (Oxford 1992), 242ff.

[5] ETS/STE no. 30 (at www.coe.fr).

[6] See *Pradel/Corstens*, Droit Pénal Européen (Paris 1999), nos. 156ff.

[7] Art. 52 Schengen Implementing Convention (Official Journal [EC] No. L 239 of 22.9.2000, 19). For further information see *Schomburg*, European Journal of Crime, Criminal Law and Criminal Justice (2000), 52ff.

[8] According to Art. 52 (3) Schengen Implementing Convention a witness, who has failed to answer a summons shall generally not be subjected to any punishment or measure of restraint.

for execution. Such a set-up is quite an improvement compared to the "prehistoric" traditional procedural rules.

## 2. *Traditional Provisos*

Apart from being longwinded, mutual assistance may face various material objections. Here are a few examples:

According to the *principle of double criminality*, no evidence should be procured for the prosecution or investigation of an offence which is not criminal in both the country making the request and in the requested country.[9]

The *political offence exception* means that assistance may not be given nor extradition ordered in relation to an offence that is considered to be political in nature.[10]

According to the *speciality principle*, evidence may only be used according to the consent of the requested state.[11]

The *double jeopardy* or *ne bis in idem* principle ensures that a person is not tried twice for the same offence.[12]

The UN Convention leaves these provisos mainly[13] untouched.[14] This decision is certainly right when regarding *double jeopardy*, but it is a rather questionable way of regarding the other material objections.

Only the proviso in fiscal matters[15] (and bank secrecy[16]) is explicitly restricted by the UN Convention.

## 3. *Administration and Asssesment of Evidence Obtained Abroad*

The third and rather weighty problem of the collection of evidence abroad by means of international cooperation, is that this cooperation often leads

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[9] *Lagodny/Schomburg*, European Journal of Crime, Criminal Law and Criminal Justice (1994), 387.

[10] *Pradel/Corstens*, Droit Pénal Européen (Paris 1999), nos. 100ff.

[11] *Lagodny/Schomburg*, European Journal of Crime, Criminal Law and Criminal Justice (1994), 389f.

[12] *Pradel/Corstens*, Droit Pénal Européen (Paris 1999), nos. 50ff.

[13] *E.g.* regarding *dual criminality* Art. 18 (9) UN-Conv. provides that the requested state may provide assistance "to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested State Party".

[14] See Art. 8 (9), (19) and (21) UN-Conv.

[15] Art. 18 (22) UN-Conv.

[16] Art. 18 (8) UN-Conv.

to results that comply with the national rules on admissibility or evaluation of such evidence at a subsequent trial. Such difficulties already emerge in regard to very basic means of evidence, like the testimony of witnesses or statements of the accused.

### *a) Hearsay Rule*

A major principle causing such problems in common law jurisdictions is the "hearsay rule."[17] With focus on evidence obtained abroad, the main problem arises from the principle that, in a contested case, the only form in which evidence of a witness is admissible is the oral testimony delivered live at trial.[18] A deposition a witness has made to the authorities beforehand in the course of the investigation – abroad or at home – is thus considered hearsay evidence and must – in general – be excluded for this reason.[19] This is the case regardless of the formalities followed during interrogation; this would also be the case even if the deposition had been the answer to a letter rogatory. The only way to introduce depositions of witnesses interviewed abroad is a statutory exception, which exists in all European Common Law States.[20]

### *b) forum regit actum*

On the other hand, in Continental jurisdictions, problems regarding the admissibility and evaluation of evidence obtained abroad arise from the principle of *locus regit actum*:[21] According to this principle – on which the UN Convention is also based as a rule – each state will execute a request for evidence following its own procedural rules. Only if expressively provided for (in international treaties or by approval on a case to case basis)[22], the re-

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[17] For further information on the hearsay-rule see: *Walker/Ward*, English Legal System, 7ed. (London a.o. 1994), 617f.

[18] For further information see *Andrews & Hirst*, On Criminal Evidence, 3ed. (London 1997), nos. 17-001ff.

[19] See *Zuckerman*, Principles of Criminal Evidence (Oxford 1989), 179f.

[20] See *e.g.* for England: Art. 23 of the Criminal Justice Act 1988. For further information on "reliable documentary evidence": *Choo*, Hearsay and Confrontation in Criminal Trials (Oxford 1996), 144ff.

[21] *McLean*, International Judicial Assistance (Oxford 1992), 131; Regarding the position of the individual: *Gane/Mackarel*, European Journal of Crime, Criminal Law and Criminal Justice 1996, 105ff.

[22] Several agreements on mutual assistance do make provisions for the requesting state to outline any procedure they require to be followed., *e.g.*: Netherlands – United States Treaty on Mutual Legal Assistance in Criminal Matters, 21 I.L.M. (1982) 48, Art. 12 (2).

quested state will follow the law of the requesting state (subject to his *ordre public*).[23] The gathering of evidence abroad thus generally follows the procedure of the requested state. These rules usually do not comply with the procedural rules and requirements of the court, which wants to use the evidence to decide on a criminal charge – as is the case in the following example:

> German law enforcement agencies are investigating the alleged racketeering of S, a resident in Passau, Germany. They need testimony from D, a shop owner and alleged victim of the racketeering, who resides in Linz, Austria. The German prosecutor thus sends a letter rogatory to the Austrian authorities requesting an interview with D. The examining judge executes the interview according to Austrian law.[24] He neither informs the defendant nor his lawyer of the interview, during which D identifies S as the racketeer.

If the interview had taken place in Passau, the German judge would have had to inform B or his lawyer by law.[25] Without notification of the defence, the deposition may, in principle, not be presented in court later on.[26]

Should the Austrian protocol nevertheless be used as evidence in the German Court as if nothing had happened? This seems hardly fair to the accused, who has ultimately lost his right to confront the witness and ask him questions. Or should it be excluded, because it violates German procedural rules? This is hardly practical, given that the *locus regit actum* rule is accepted by the participating states.

*aa) The German Approach*

Generally speaking, the German approach (which is similar to many other Continental approaches) to this problem is as follows:

Although the collection of evidence and the forms of evidence are strictly regulated in the German criminal procedure, the assessment of evidence is free from regulations.[27]

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[23] Art. 18 (17) UN-Conv., however, allows for an execution of a letter rogatory following the law of the requesting state in cases, where auch a procedure is specified in the request and is not contrary to the law of the requested state.

[24] See § 162 (1) Austrian Criminal Procedure Code (Strafprozeßordnung)

[25] § 168 c (5) German Criminal Procedure Code (Strafprozeßordnung).

[26] *Kleinknecht/Meyer-Goßner*, Strafprozeßordnung, 45ed. (München 2001) § 168 c no. 6.

[27] § 261 German Criminal Procedure Code (Strafprozeßordnung). For France see Art. 353 French Criminal Procedure Code (Code de Procédure Pénal); *Rassat*, Traité de procédure pénale (Paris 2001), no. 221.

A German judge receiving a piece of evidence obtained abroad that violates the strict German rules governing the search and/or administration of evidence, is allowed to "correct" the damage done when evaluating the evidence: generally he is supposed to assign "a lower value" to such evidence.[28] Nevertheless, he may base his conviction of guilt on this evidence. This rule, however, is subject to certain exceptions. These exceptions (a) include an *ordre public* proviso: that is, basic requirements of due process have to be met;[29] and (b) discipline aspects have been taken into consideration: for example, if a court arbitrarily uses international cooperation to circumvent defence rights, the evidence is to be excluded.[30]

In our example, the German judge will rely on the deposition of the witness, although it was obtained without the defence being informed of the interview. The judge however, will not regard the protocol as a proper deposition, that is, one taken by a judge, but rather as a deposition given to the police or prosecution during the course of investigation.

*bb) Validity of the German Approach*

This approach will probably not satisfy the accused, who has lost the only opportunity to confront the witness.[31] It might also not satisfy anyone else, for two reasons:

Firstly: Since there are no strict rules on the assessment of evidence, an approach which relies on the fact that a judge will assign a "lower value" to a piece of evidence should not be accepted because one cannot reliably examine the judge's decision. His conviction of someone's guilt may be solely based on a piece of evidence of low value.

Secondly: The approach appears to be based on the assumption, that a violation of procedural rules (for example, the violation of defence rights) may be outweighed by law enforcement interests if – because of the setting of international cooperation – this is the only way to obtain evidence from

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[28] Entscheidungssammlung des Bundesgerichtshofes in Strafsachen Bd. 2, 300, 304; Bundesgerichtshof in Goltdammer's Archiv 1976, 218 (219); *Wohlers*, Anmerkung zu BGH NStZ 1994, 595, in [1995] Neue Zeitschrift für Strafrecht, 46.

[29] Bundesgerichtshof in: [1982] Strafverteidiger, 153 (154); Bundesgerichtshof in: [1983] Neue Zeitschrift für Strafrecht, 181.

[30] Bundesgerichtshof in [1988] Neue Zeitschrift für Strafrecht, 563; *Alsberg/Nüse/Meyer*, Der Beweisantrag im Strafprozeß, 4ed. (Köln 1978), 268 ; *Rose*, Anmerkung zu BGH NStZ 1996, 609f, [1998] Neue Zeitschrift für Strafrecht, 156.

[31] For further information on the right to confront a witness see *Choo*, Hearsay and Confrontation in Criminal Trials (Oxford 1996), 186f.

abroad. The approach thus relies on an objective balance of law enforcement interests versus procedural requirements. This appears to be a balancing on an "objective level." The inconsistency of this approach reveals itself when one examines another, quite similar example:

> German law enforcement agencies are still investigating the alleged racketeering of S. Now they need testimony from M, another shop owner and alleged victim of the racketeering, who lives in both Linz and Passau. On the first meeting of M with German law enforcement authorities, he made it clear that he would not testify if B or his lawyer were present. To make such an interview with M possible, the German prosecutor sends a letter rogatory to the Austrian authorities requesting an interview with M in Linz. Again, the examining judge executes the interview according to Austrian law. He thus informs neither the defendant nor his lawyer of the interview, during which M identifies S as the racketeer.

How should a German judge handle this deposition?

Here, the prevailing question is:

May a state also request assistance from another state for the purpose of carrying out an investigation or, rather, certain measures that its own law would not permit it to carry out[32] and thus arbitrarily circumvent the requirements of its own national law?

If the defendant objects to the curtailment of his rights, is the court allowed to reject the objection, arguing that in mutual assistance the law of the requested state governs the gathering of the evidence? Or is it undue to mix a special cocktail of procedure – having the best of both procedures, and if so when?

As already indicated before, the evidence would – contrary to the general doctrine – be rejected in our example in accordance with German case law because the court *arbitrarily* used international cooperation to circumvent defence rights .

If the *locus regit actum* logic is so strong as to nullify certain defence rights (by outweighing them on the objective side), however, why should the law enforcement agency's *motivation* upset this balance?

Hence, the German approach (which is similar to many Continental approaches) is neither consistent in itself nor a fair solution regarding the different interests in criminal procedure. But it appears to be the only feasible

[32] For further discussion see: *Wyngaert*, Belgium, in: 65 (1992) RIDP, 187 (197).

way out of the *locus regit actum* principle, which is – in general – still the principle of the UN Convention, according to which, the law of the requesting state may be applied only in reply to a special request.

There are, however, other ways: According to the new EU Convention of 29.5.2001,[33] requests for mutual assistance shall be carried out in accordance with formalities and procedures expressly indicated by the requesting EU State to the maximum extent possible:[34] A witness interrogation in Austria – executing a German letter rogatory – shall be conducted according to the rules of German criminal procedure. The requested state may refuse to carry out the formalities and procedures of the requesting state only where they are contrary to its fundamental principles of law.

## C. Hearing by Video Conference

The UN Convention (and the EU-Convention[35]) look for more efficient ways of evidence gathering abroad. Both provide for a witness hearing by video conference.[36]

### *1. "Hearing by Video Conference"*

If a person living on the territory of one Party State, is to be heard as a witness in proceedings conducted in another Party State and can not appear in person – a hearing by video conference will take place. The requested state may refuse the setup of a live video link to a witness, if such a procedure violates its fundamental principles or if it lacks technical means.

The *judicial authority of the requested state* will thus summon the person concerned for the hearing and be present during the interview to ensure the identity of the witness and the obedience to the fundamental principles of law of the requested state. If the states agree, the *competent authority of the requesting state* – that is, the deciding judge or court – will conduct the interview directly according to its own laws.

Different from the EU-Convention, the UN-Convention does not lay down further rules about the procedure. It thus leaves crucial questions open: May the person to be heard claim the right not to testify, which

[33] Official Journal (EC) No. C 197 of 12.7.2000, 1.
[34] See Art. 4 of the EU-Convention of 29.5.2000.
[35] See above footnote 33.
[36] Art. 18 (18) UN-Conv.; Art. 10 EU-Convention.

would be due to him or her under the law of either the requested or the requesting state or both? Or, what are the rules for a "suspect witness"?

Nevertheless, at first glance, the possibility of a video hearing seems to be a positive step forward for mutual assistance: It (a) avoids the trouble evidence obtained abroad by traditional mutual cooperation faces, for example, by getting rid of the *locus regit actum* principle and (b) strengthens the validity of the witness deposition, for example, by allowing (albeit a somewhat limited) cross-examination.

## 2. *Fundamental Principles of Law*

Apart from the basic problems of a video-conference, however, numerous new questions arise:

According to the UN Convention, a request for a video hearing shall be carried out only if it is consistent with the fundamental principles of domestic law of the requested state.

The difficulty to pin down "fundamental principles of law" in the different legal jurisdictions becomes clear in the following example:

> B and C are suspected of having smuggled weapons into the EU.
>
> Charges have been brought against B in Leicester and against C in Freiburg. In court, B is asked whether he wants to give testimony, thus waiving the shield of the privilege against self-incrimination provided by English law and be a witness in his own trial.[37] In doing so in England, he faces charges for obstruction of justice if he lies.[38] B chooses not to speak. C, in Freiburg, also is asked whether he wants to give his account of the incidents. According to the German understanding of the privilege against self incrimination, C is even allowed to lie in court.[39] According to C, B is the mastermind behind everything; while C himself is a mere helper.
>
> While both proceedings are still pending, the two respective defendants shall be interviewed by video link to gain information for the respective other trial.

Would the procedure of such a hearing already violate the fundamental principles of the respective criminal justice systems?

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[37] *Andrews & Hirst*, On Criminal Evidence, 3ed. (London 1997), no. 8-020.

[38] *Blackstone's* Criminal Practice 2000 (10ed. London 2000), B.14.1/14.9/14.17.

[39] Entscheidungen des Bundesgerichtshofes in Strafsachen vol. 3, 152 and vol. 27, 379; *Kleinknecht/Meyer-Goßner*, Strafprozeßordnung, 45ed. (München 2001), § 136 no. 18.

Or, rather, how is the situation to be handled so that the fundamental principles of the respective criminal justice systems are not violated?

The first question to be decided upon is: are the two defendants to be interrogated as witnesses or co-accused? The answer will determine the duties and privileges, especially the privilege against self-incrimination, in each jurisdiction:

Formally, B and C are not accused in the same trial – thus, they are not co-accused, but witnesses in each other's trials.

In England, however, the rule is that accomplices cannot be forced to testify against each other for the prosecution as long as proceedings are still pending.[40] Would it violate the fundamental principles of English law, if B and C were compelled to testify against each other?

In Germany, case law generally allows the deposition of a "co-suspect" speaking as witness, as long as it is in a separate trial.[41] Scholars, however, regard such an approach as unworthy for a fair criminal justice system, since it robs the co-defendant of the privilege against self-incrimination.[42]

More questions arise when one goes into the details of such a video conference: How should the "witnesses" be treated? Different from English law, German procedure takes the special situation of a "suspect witness" into account in regard to the oath: A "suspect witness" may not testify under oath.[43] Would it violate a fundamental principle of German law if C were forced to testify under oath and face charges of perjury?

The UN-Convention does not answer these question.

## D. Conclusion

Does the UN-Convention, nevertheless, reach its objective to promote cooperation to combat and prevent organized crime more effectively through its Art. 18?

It does so by providing minimal standards for mutual assistance between those countries that did not practice cooperation in this field up to now. In doing so, the UN Convention mostly relies on the traditional ways of mutual assistance. In general, it does not eliminate the material and procedural obstacles for mutual assistance inherent to classic mutual assistance. From

[40] *Andrews & Hirst*, On Criminal Evidence, 3ed. (London 1997), no.12-014.
[41] Entscheidungen des Bundesgerichtshofes in Strafsachen, vol. 34, 44.
[42] *Roxin*, Strafverfahrensrecht, 24ed. (München 1995) § 26 Rn. 5-7 m.w.N.
[43] See § 60 no. 2 German Criminal Procedure Code (Strafprozeßordnung).

a European perspective, it is thus no real step forward. Between the countries of the European Union, the Acquis on mutual assistance will prevail, since the UN-Convention does not affect closer ties in the area of mutual legal assistance.[44]

With the possibility of a video hearing for witnesses abroad, however, it opens a door to a short procedure and a better quality of testimony evidence obtained abroad. It would probably be asking too much, to demand a solution for the various problems arising from such a setup, from the drafters of the UN Convention – these problems in the assessment of evidence are better solved individually within the respective legal system.

[44] See Art. 18 (6) and (7) UN-Conv.

# Procedural Aspects of the Convention against Transnational Organised Crime

MARK MACKAREL

The procedural mechanisms for international cooperation are fundamental to the Convention against Transnational Organised Crime. Indeed, it is an explicit aim of the Convention 'to promote cooperation and prevent and combat transnational organised crime more effectively'.[1] In broad terms, the Convention adopts two strategies to achieve this aim. Firstly, the Treaty seeks to expand the application of established means of international cooperation in criminal matters to a greater number of state parties. Secondly, where possible, the Convention has sought to update, improve and broaden the means of cooperation.

The ambit of international cooperation in criminal matters has expanded dramatically over recent years. Agreements facilitating the different forms of cooperation have proliferated. Cooperation agreements have progressed by function – for example in relation to mutual legal assistance, extradition and police cooperation; by reference to specific criminal problems – for example drug trafficking and acts associated with terrorism; and even by regional developments, thus means for cooperation between states have been advanced by, amongst others, the European Union, the Council of Europe and the Organisation of American States. Elsewhere, work under the auspices of the United Nations Office for Drug Control and Crime Prevention has improved cooperation in Africa and Asia. Such has been the increase of agreements for cooperation, the feeling began to emerge that an international instrument was required to unify and harmonise these measures in their application to organised crime.

[1] Article 1.

In its Resolution 49/159 of 23 December 1994, the General Assembly approved the Naples Political Declaration and Global Action Plan against Organised Transnational Crime.[2] The Naples Plan noted initiatives against organised crime in the European Union and the Americas[3] and the contained declaration to urge states to seek a closer legislative harmonisation, agreement on the means of cooperation at both regional and global levels, further development of strategies to fight money laundering and the elaboration of an international instrument on organised crime. The Global Action Plan specifically recommended an agreement on the definition of organised crime, the adoption of harmonised domestic legislation, the development of agreements on extradition and mutual assistance, the consideration of an international instrument against transnational organised crime and anti-money laundering measures. The World Ministerial Conference on transnational organised crime which was held in Naples and which gave rise to the Naples Action Plan was, the best-attended meeting concerning crime prevention and criminal justice in the United Nation's history. Representatives of 142 nations attended the Conference, reinforcing the view as to how seriously solve the problem of organised crime. On approving the Naples document, the UN General Assembly urged states to implement its principles as a matter of priority. In 1998, The General Assembly established an *Ad Hoc* Committee for the purpose of negotiating an international convention and related protocols against transnational organised crime.[4] Even prior to this, the Polish Government had drafted a framework convention against organised crime and the Convention then evolved through revisions made at subsequent meetings of the *Ad Hoc* Committee.

From 1998, the work of the *Ad Hoc* Committee made excellent progress and the timetable for completing the Convention was achieved in two years. From an early juncture in the work on the Convention priority was given to the concept that the Convention would be a 'self-sufficient and free-standing instrument'.[5] The hope was that this would promote the signing and early entry into force of the treaty. Plans were also made at an

[2] Report of the World Ministerial Conference on Organised Crime: Report of the Secretary General, UN GAOR, 49th Sess., Agenda Item 96, UN Doc A/49/748 (1994).

[3] Ibid, at p.9.

[4] GA Res. 53/111 (Dec 9 1998).

[5] Report of the *Ad Hoc* Committee on the Elaboration of a Convention against Transnational Organized crime on the work of its first to eleventh sessions. GA A/55/383. (2 November 2000) Para. 28. Reprinted at 40 ILM 335 (2001).

early stage of negotiation for additional protocols to the Convention to address offences that required specific action. The *Ad Hoc* Committee felt that these optional protocols would be consistent with the main Convention 'to maximise the relevance and applicability of general provisions, such as those pertaining to international cooperation, which would be covered under the Convention'.[6] Overall the approach was to create a framework to address the legal response to organized crime by taking existing concepts and recent developments and creating a new framework. It is clear that even from the earliest discussions surrounding the enunciation of an international instrument against organised crime, that measures for cooperation would be of central importance to the agreement.

## The Procedural Measures.

The Convention seeks to build on the established means of international legal cooperation to improve international investigation and prosecution of offences connected to organised crime. It is not surprising therefore, that the Convention includes measures facilitating extradition and mutual legal assistance, although in both cases the Convention updates these practices to ensure more efficient cooperation. Provisions for more progressive cooperation are also set out in relation to the confiscation of assets, the use of 'special investigative techniques' and communication between law enforcement agencies. These provisions take aspects of practice from other regional or bi-lateral agreements and place them into a truly global context. The Convention adopts three main approaches to unifying the international legal response to transnational organised crime. Firstly, it provides for the criminalisation of particular offences associated with organised crime under the domestic law of member states. Secondly, it sets out a range of measures and procedures that should be implemented by state parties to improve the 'fight against organised crime'. Thirdly, it sets out a range of procedures relating to international legal cooperation to be utilised by state parties.

In setting down measures for international cooperation in relation to organised crime, the Convention seeks a standardisation of the *minimum* standards of cooperation and allows state parties to develop these means of cooperation further by concluding more advanced agreements on a bilat-

[6] Ibid.

eral or regional basis such as those steps taken by the member states of the European Union.

### *Extradition*

Extradition practice has been undergoing a modernisation over the past decade. Writing in 1991, Gilbert observed that 'present extradition laws belong to the world of the horse and buggy and the steamship, not in the world of commercial jet air transportation and high speed telecommunications.'[7] The 'older generation' of extradition treaties such as the European Convention on Extradition 1957, contained extensive barriers that could delay or obstruct effective rendition of fugitives. Worse still, the international framework of extradition contained numerous holes where states simply had no legal mechanism for extradition. The United Nations produced a Model Treaty on Extradition[8] in 1990, that sought to encourage states to enter into treaties so as to improve international cooperation against organised crime and to promote a standardisation of extradition practice.[9] The progress in the extradition procedure can be seen by the recent negotiations for a 'European Arrest Warrant' within the European Union, which will take the rationalising of the extradition process to the extent that extradition for a core of offences amongst the Member States will be simply replaced by a process of transfer.[10]

Under Article 16 of the Organised Crime Convention, extradition is provided for in respect of the offences related to organised crime under the Convention and on the condition that the requirement of double criminality is satisfied.[11] Where an extradition request concerns both offences under the Convention and other 'serious crimes' not covered under the Convention, the Convention can apply in respect of all the offences.[12] Whilst states are encouraged to conclude extradition arrangements with other states, the Convention can serve as the basis for extradition between parties where no

[7] GILBERT, G.: Aspects of Extradition, The Hague, 1991. p.1.
[8] United Nations Model Treaty on Extradition. UN Gen Ass Res. 45/116 (1990).
[9] See; UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan 1985. Report prepared by the Secretariat, Chap. I, Sect. E.
[10] See; Proposal for a Council Framework Decision on the European arrest warrant and surrender procedures between the Member States. OJ C332 E, 27/11/2001 p.0305-0319.
[11] Article 16(1).
[12] Article 16(2).

other agreement applies.[13] The Convention also provides for a strict 'try or extradite' approach in circumstances where a states national is alleged to have committed offences.[14] Whilst this is a prudent step designed to prevent the traditional problems caused by states choosing not to extradite their own nationals, the Convention merely provides that the party 'be obliged to submit the case without undue delay ... for the purpose of prosecution'. No prosecution *must* ensue.

### *Mutual Legal Assistance*

The Convention also provides the basis for the provision of mutual legal assistance in relation to the investigation and prosecution of organised crime. Under the Convention, established aspects of mutual legal assistance are provided for including; taking statements, service of judicial documents, search and seizure, providing information and evidence, tracing the proceeds of crime and facilitating the appearance of witnesses.[15] Whilst states may refuse to provide assistance on the grounds of a lack of double criminality, discretion can be exercised in raising such an objection to assistance.[16]

As a response to the regular criticism of the slowness and inefficiency of mutual assistance arrangements in the past, the Convention provides that not only should each state party designate a central authority for dealing with requests, but that the authority 'shall ensure the speedy and proper execution or transmission of the requests received.'[17] The Convention also contains guidelines as to the format of the request.[18]

Provision for mutual assistance under the Convention contains a number of interesting features beyond those routinely included in previous agreements. The Convention explicitly allows for the unsolicited transmission of material between states, where the competent authorities in a state party 'believe that such information could assist the authority in undertaking or successful inquiries and criminal proceedings'.[19] Whilst encouraging states to 'look out for each other' should enhance effective investigation and

[13] Article 16 (5).
[14] Article 16(10).
[15] Article 18(3).
[16] Article 18(9).
[17] Article 18(13).
[18] Article 18(15).
[19] Article 18(4).

prosecution, the unsolicited transmission of assistance could be made without following any of the procedures or invoking safeguards set out for standard requests. The situation is further muddied by the requirements of Article 18(17) that provides:

'A request shall be executed in accordance with the domestic laws of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request'.

Whilst the obvious aim of the wording of this provision is to provide evidence in an admissible form for the requesting state, the wording also suggests that the requested state has some 'leeway' in domestic procedures when taking evidence for transmission abroad.

As with extradition, the Convention allows for complementary agreements agreed by states to operate alongside or further the provisions of the Convention.[20] Again, as with extradition, a considerable infrastructure for mutual legal assistance has developed over the past decade on both a bilateral and multi-lateral basis. In Europe, there are a number of treaties that overlap in their competence and a rationalisation of the procedures for the sake of transparency is overdue.[21]

## *Police Cooperation.*

The Convention provides for expansive grounds of police cooperation. Formal arrangements for police cooperation have been developing rapidly under a modernised and rejuvenated Interpol, the creation of Europol under the auspices of the European Union and arrangements for practical police cooperation such as those included in the Schengen Convention. On a less official basis, police forces generally have recognised the need to build up links and working arrangements with law enforcement bodies around the world to assist in international investigation. The importance of police cooperation in relation to tackling drug trafficking was recognised

[20] Article 18(6).

[21] For example, a number European countries are party to the European Convention on Mutual Assistance in Criminal Matters 1959, the Benelux Convention on Extradition and Judicial assistance in penal matters 1962, the EU Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union 2000 and relevant measures of the Schengen Convention 1990.

in the Vienna Convention 1988[22] and is reiterated here in respect of organised crime.

Thus, the Convention provides for the creation of joint investigation teams (either by state parties concluding specific agreements or on a case by case basis),[23] and for measures furthering the use of 'special investigative techniques' such as electronic surveillance and controlled deliveries.[24] Article 27 of the Convention sets out the obligations on the parties 'to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention'. To this end, states are required to adopt effective measures improving channels of communication and cooperation between law enforcement agencies. The ambit of such cooperation includes the tracing and tracking of suspects, tracing and tracking the proceeds of crime and property used in the commission of offences and the exchange of information and intelligence on the *modus operandi* of organised crime groups. As with the other forms of cooperation set out in the Convention, parties are urged to consider developing police cooperation through further bilateral and multi-lateral agreements.[25]

### *Other Measures for Cooperation.*

In addition to establishing measures for substantial cooperation with regards to extradition, mutual legal assistance and police cooperation, the Convention contains measures seeking to facilitate the cross border confiscation of the proceeds and instrumentalities of crime,[26] encouraging the use of informers in the investigation and prosecution of organised crime (cross border informers!)[27] and providing that states 'consider' entering into agreements for the rather underused processes of transferring sentenced prisoners[28] and transferring proceedings.[29]

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[22] United Nations Convention against the Illicit in Narcotic Drugs and Psychotropic Substances 1988.
[23] Article 19.
[24] Article 20.
[25] Article 27 (2).
[26] Article 13.
[27] Article 26.
[28] Article 17.
[29] Article 21.

## *Practical Implementation of the Convention*

The Convention sets down a framework for cooperation procedures applicable to organised crime. Whilst the measures in the Convention will without a doubt, be a valuable addition to the fight against organised crime, many of the provisions are widely drafted and leave the practical issues of detail and implementation to the state parties. This approach to drafting the Convention helped gain a consensus of agreement to it and this is reflected in the large number of signatories. However, the actual success of the Convention will hinge heavily on states overcoming barriers to the practical application of the measures and meeting the pragmatic requirements of cooperation.

These problems can be well illustrated in discussing the problems to engendering improved police cooperation. On a national and international basis, there has been a tradition of mistrust and even competition between police forces. For example, in the past there have been reports of rivalries between the domestic police forces in the United Kingdom and France. Following the September 11 attacks in New York, the media carried stories of complaints by the local United States police forces that the FBI was withholding information from other parties involved in the investigation. Such problems can be compounded by law enforcement agencies operating under a different legal system and culture. Even on a regional basis, there have been reports of a conflict of interests between Interpol and Europol, hopefully now allayed following a recent Memorandum of Understanding[30].

Similarly, the resources and wealth of state parties can impact on their ability to effectively cooperate. At a time when the use of information networks and databases by law enforcement agencies have become de rigeur, this is especially apparent in relation to the so-called digital divide. The Secretary General of Interpol, Ronald Noble, has spoken of his shock at discovering in 1999 that only five of the organisation's 30 National Central Bureaux in Africa had Internet access.[31] These problems are acknowledged in the Convention against Transnational Organised Crime. Article 14 of the Convention makes provision for the investment of confiscated proceeds of crime into projects connected to fighting organised crime. Even more specifically, Article 30(2)(b) provides the basis for state parties to

[30] Cooperation Agreement between Interpol and Europol, concluded 5 November 2001.
[31] NOBLE, Ronald K.: Lecture given at Edinburgh University, 7 November 2001.

'enhance financial and material assistance, to support the efforts of developing countries to fight organised crime effectively and to help implement this Convention successfully.'

International cooperation has been modernising and there are indications that domestic laws and practice lag behind the changes implemented at an international level. Thus, changes to standard practice for extradition set out in the European Union's Convention on Extradition have, at the time of writing, not been implemented in domestic UK law. Indeed, this treaty is still not in force and joins numerous, substantially older treaties on international legal cooperation as existing on paper, but not yet in force because the countries which agreed and signed the treaty have subsequently failed to ratify them. Practices which have become a feature of police cooperation have not yet gained any standard procedure. For example, controlled delivery is now an important tool in the array of law enforcement tactics against organised criminals and recent international agreements include provision for their use. However, there is as yet, no standard international practice for agencies operating controlled deliveries.

The dangers of controlled delivery have been amply demonstrated by the events surrounding the Van Traa inquiry in the Netherlands, where controlled deliveries spun 'out of control' due a number of factors including criminal informers double-crossing the police and informing the criminal groups targeted, police forces within the Netherlands not cooperating with each other and the unregulated use of covert operations turning a regional criminal intelligence branch into an uncontrolled 'state within a state'. As a consequence, the drugs at the centre of the deliveries joined the flood of drugs sold on the open market, criminal informers kept vast sums of drug profits, government money used to purchase the drugs was lost and little success was achieved against the criminal organisations involved. Indeed, it is suggested that the Dutch Government was essentially the chief importer of cannabis into the Netherlands during the early 1990s. These problems were subsequently compounded by Dutch police officers lying about events to the consequent inquiry and police forces from the Unites States and Germany refusing to cooperate with the inquiry.[32]

Controlled delivery is an example of an aspect of international legal cooperation still in its formative period of operation and yet detailed regulation on any international basis is minimal. Controlled deliveries 'involve'

[32] Parliamentary Investigations Commission into Police Methods, Chaired by Mr Martin Van Traa. 1 February 1997.

the state in criminal activities and a number of controversial issues of legal ethics need to be addressed. For example, should state money be invested into illegal drugs purchases (or other fields such as cars, art or even human beings) to operate controlled deliveries? Should law enforcement agencies allow these operations to produce a profit to reinvest into further investigations? At what point should operations be interrupted? Prior to drugs being sold on the open market (leaving the state with an expensive and 'useless' commodity) or after the drugs have been sold thereby allowing the proceeds of crime to be confiscated? Whilst domestic agencies do have codes of practice and regulation, discussions with police officers around Europe reveal great disparities in national practice which can have consequences both for the country heading the investigation and for transit countries through which the deliveries must travel. It is issues such as these, and those related to the other fields of cooperation set down by the Convention that must be properly addressed by state parties to effectively implement the provisions of the Convention on a fully international basis.

Finally, for the Convention's aim of a global framework for cooperation against organised crime to be realised, the signatures to the Convention must be turned into ratifications, not only to the extent that the Convention comes into force, but with enough participating states committed to its implementation that territorial loopholes for organised criminals are effectively closed.

# Preventing Organized Crime

JAMES B. JACOBS

## I

"Organized crime prevention" has several possible meanings. Therefore, people who use the same phrase may actually be referring to different things. Prevention might refer to limiting (or eliminating) the possibility that a sophisticated criminal group could form in the first place. With that goal in mind, we will concentrate on policy interventions that would discourage young people from forming or joining criminal gangs and cliques. The most obvious strategies would be by strengthening young people's, especially those in vulnerable groups, pro-social values and providing educational, vocational, and employment opportunities. It would also be important to focus on the swift apprehension, punishment and rehabilitation of gang members and other juvenile offenders who commit crimes in groups.

Prevention might refer to stopping already-existing organized crime groups, like gangs, from becoming bigger, better organized, more sophisticated and more influential. This kind of prevention might focus on anti-social gangs, perhaps by infiltrating and disrupting such organizations. Targeting their leaders for special enforcement efforts, and persuading fringe members to defect. It is imperative to prevent weak organizations, which are relatively easy to defeat, from developing into powerful entrenched syndicates like the Italian-American Cosa Nostra or the Chinese triads.

"Organized crime prevention" might also refer to preventing formidable organized crime groups from carrying on a particular racket (e.g. drugs, commercial sex, gambling) or infiltrating a particular economic sector. Organized crime thrives on black markets. Thus, the best preventive strategy would be legalization, thereby denying organized groups their monopoly. If

some sort of legalization is not an option, some clever enforcement strategies would seem the only possibility, but such strategies have been notoriously ineffective.

Some analysts are searching for a strategy of organized crime prevention that would identify economic sectors vulnerable to organized crime infiltration before such infiltration actually occurs. Then they would apply remedial measures that would strengthen that sector's resistance to organized crime. It remains to be seen whether such strategies can be developed, but just the process of thinking in these terms is likely to be helpful in combating organized crime.

Once a formidable organized crime group has been identified as having a presence in a particular economic sector, it is possible to utilize administrative mechanisms to purge the organized crime element and to prevent its recurrence. The Las Vegas Gaming Board has used an administrative licensing system to keep companies with organized crime ties from becoming owners of gambling casinos. New York City has used an administrative licensing strategy to keep organized crime groups from reinfiltrating the commercial waste hauling sector, which for decades had been dominated by Cosa Nostra. Companies wishing to work as commercial waste haulers ("carters") must apply to a Trade Waste Commission for a license. The license application demands full disclosure of the criminal records of all owners and managerial employees as well as disclosure of the company's business history. Lying on these forms is punishable by license denial or forfeiture.

Obviously, for administrative licensing to be effective, the licensing agency has to be well funded and staffed with highly competent investigators and managers knowledgeable about organized crime and committed to the highest standards of government integrity. There is always a risk that agencies set up to regulate an industry end up becoming subordinate to and corrupted by the dominant interests in that industry. Therefore, it is critical that such administrative agencies be independent and shielded from political intervention.

The first director of New York City's Trade Waste Commission (TWC) was a former federal prosecutor with considerable experience investigating organized crime. His successor is a former state prosecutor with substantial experience as investigator with NYC's Department of Investigation. The TWC employs criminal investigators to thoroughly examine the backgrounds of applicant companies. New York City's School Construction

Authority (SCA) has a similar policy; it requires contractors wishing to bid on Authority construction projects to seek pre-qualification approval by submitting a lengthy application form that probes for background information. The SCA also employs criminal investigators. Both the TWC and the SCA have utilized Independent Private Sector Inspectors General (IPSIGs) to assist in the task of crime prevention. Companies with questionable backgrounds are required to hire IPSIGs (usually a team from a private investigative firm comprised of former prosecutors, law enforcement investigators, forensic accountants and research/analysts to monitor the companies and provide assurance to the government agencies that the companies are operating lawfully in all respects and that they have implemented appropriate corruption-prevention mechanisms.

Finally, "organized crime prevention" might refer to non-law enforcement strategies for purging organized crime groups from an economic sector where they are deeply entrenched and then to preventing them or new crime groups from re-infiltrating that sector in the future. This is a challenge that New York City has faced with respect to its garment industry, construction industry, cargo operations in its seaport and airports, its trade exhibition center and its wholesale fish market. It has achieved considerable success by utilizing civil litigation that has resulted in court-appointed trustees being authorized to work on the court's behalf to remove organized crime figures from the industry and to reform companies and unions so that they will be less susceptible to future organized crime influence. Often, the court-appointed trustees have been individuals rather than firms. But some of the court-appointed trustees are also IPSIGs; in other words private investigations firms can play a number of different roles in assisting private sector companies to comply with criminal and regulatory law and to assure regulators and courts that the private companies are complying with administrative and judicial orders.

In summary, "organized crime prevention" is a multi-faceted concept. Prevention is relevant at every step on the continuum, from the formation of unsophisticated youth gangs (that might evolve into mature crime syndicates), to the exploitation of legitimate sectors by mature crime syndicates. How, at each step along the continuum, organized crime could be prevented from advancing further, deserves extensive policy analysis. However, in this article, I will deal only with the challenge of purging mature organized crime groups from the legitimate economy and preventing them from reinfiltrating that sector.

## II

IPSIGS. The IPSIG represents an entirely new development in U.S. criminal justice, and one with great potential to prevent organized crime infiltration of the legitimate economy. Ronald Goldstock, then Director of the New York State Organized Crime Task Force (and previously head of the rackets bureau of the Manhattan District Attorney's office and Inspector General of the U.S. Department of Labor) came up with the idea in the mid-1980s. He insisted that the inspector general concept, adopted by the federal government in the late 1970s, could be expanded and adapted to private companies doing business with government agencies

In the wake of the Nixon Administration's Watergate scandal, Congress passed the Inspector General Act of 1978. Every major department in the federal executive branch would have an inspector general (IG), appointed by the President and confirmed by Congress. The inspector general's mission was to combat fraud, waste and abuse. The IG would have access to all agency books, records, minutes of meetings, and employees. In order to protect the IG's independence, the law provided that the IG would report directly to one of Congress' oversight committees. In the following decades, several state and local governments (including NYC) passed similar laws.

Goldstock argued that a local, state or federal agency that lacked complete confidence in the integrity of a company with which it was contracting for goods or services ought to require that company to hire an IPSIG, which would monitor the company's operations and report wrongdoing or improper practices to the government agency. Of course, adapting the public sector IG to the private sector required that there be a corps of incorruptible specialists who could monitor diligently and competently while maintaining independence and integrity. Fortunately, just such a corps was developing in a number of prestigious private investigation firms, like Kroll Associates (headquartered in New York City with branch offices around the world), accounting firms and certain law firms (especially those formed by former prosecutors).

Kroll Associates and a growing number of similar firms flourished because of the demand of private corporations, especially banks, for sensitive investigations of internal corruption as well as investigations of crimes, like frauds and thefts, against the firms. The 1986 Federal Sentencing Guidelines contributed to the demand for the services provided by private inves-

tigations firms. The Guidelines provided that private firms could mitigate their liability for violating various federal criminal and regulatory statutes by demonstrating that they had taken bona fides measures - rules, procedures, and structures - to prevent wrongdoing by their employees. The organizational guidelines provided private firms a financial incentive to hire specialists to help them design standards of integrity and strategies for assuring compliance. If they hired a reputable firm, comprised of former investigators, prosecutors, and accountants with spotless credentials, they could insulate the company, at least to some extent, from future criminal liability in the advent that rogue employees committed crimes on behalf of the company or in their capacity as a company employee. In addition, a growing number of companies recognized that good compliance and integrity systems would reduce their vulnerability to being victimized by insiders and outsiders. Thus, Kroll and the other private investigations firms provided employment and a career path for FBI agents, investigative accountants and prosecutors who wished to utilize the skills acquired in law enforcement in the more lucrative private sector.

The IPSIGs have a strong financial incentive to hire competent and honest investigators and staff. The success of these firms depends upon their maintaining the confidence of the government agencies, which have to approve their selection. An IPSIG whose performance on a previous assignment had been incompetent would probably not be approved for future assignments. Of course, it might be said that an IPSIG that carried out its monitoring duties too aggressively might not appeal to a private company that, in effect, has been ordered by a regulator to hire an IPSIG. But that is not necessarily true. Some companies want to be sure that they will be insulated from any charges of tolerating corruption. And some companies have concluded that they have much to gain from building a reputation for integrity. Furthermore, the government regulatory agent might not approve the choice of a mediocre IPSIG.

One of the first people to implement the IPSIG idea was a former Goldstock deputy who was appointed as the first inspector general of a new NYC School Construction Authority. School construction in New York City had long been mired in corruption scandals, not surprising given that New York City's construction industry had been thoroughly infiltrated by Cosa Nostra since the early decades of the twentieth century. Thus, the legislation establishing a School Construction Authority (with a multi-billion dollar budget) called for the SCA to have an inspector general (with

a staff of 60 people), like the federal IGs. The inspector general devised the contractor pre-qualification system discussed above. The SCA would not pre-qualify a company controlled by an organized crime figure or a company with a thoroughly corrupt business history. But other companies, with some questionable history, were permitted to work for the SCA if they hired an IPSIG (from a list of approved firms). Such companies would have to give the IPSIG complete access to books, records and employees. The IPSIG would monitor the company's operations and report directly to the SCA. Likewise, the SCA could ask the IPSIG to look into any questionable matters that might have come to its attention.

The NYC Trade Waste Commission adopted the same model. It too had to operate in an industry with a long history of organized crime domination. In New York City, commercial garbage (i.e. from restaurants, offices, and factories) had been picked up and hauled away by a city agency until the late 1950s when that service was privatized; henceforth commercial establishments would have to hire a private "carting" company to carry away their garbage. At that point, the Cosa Nostra organized crime families set up or took over many small "carting" companies. They established a cartel, which divided up routes and allocated customers to carters who comprised the cartel. No competing companies could do business in NYC; a few tried, but gave up when their trucks were sabotaged. Needless to say, the carting cartel set very high non-negotiable prices for carting services. A business, which was dissatisfied with its carter, could not choose a different company to pick up its trash. Customers who complained were punished. For example, their property was damaged or they were threatened or garbage was dumped at their front door.

Mayor Rudolph Giuliani, a former federal prosecutor, established the NYC Trade Waste Commission to purge organized crime from the commercial waste hauling industry. The first head of the agency was a lawyer who had formerly served as a prosecutor in Giuliani's office. He hired other ex-prosecutors and ex-police officers to staff the agency. Under the law establishing the TWC, carting companies wishing to do business in New York City had to obtain a carting license from the TWC. The first step toward obtaining a license was to fill out a ream of papers listing employees and answering all sorts of questions about whether the company, its owners and officers had ever been convicted of a crime or been the subject of an administrative or criminal investigation. The owners and officers had to attest that they did not and would not have any knowing association with

organized crime members or associates. The TWC granted some firms a license only if they hired an IPSIG from an approved list.

IPSIGS have also played a vital role in the clean-up that followed the terrorist attack on the World Trade Center on September 11th 2000. The agency directing the-clean up divided the site into four quadrants and hired a different contractor to haul away the debris in each quadrant. Because the contractors were hired on an emergency basis (i.e. without competitive bids) under a cost plus overhead and profit contract, a separate IPSIG (chosen by the agency) was assigned to each contractor. These IPSIGS maintained a 24 hours a day presence at ground zero throughout the clean-up and exposed a number of fraudulent schemes. No doubt they also deterred a great deal of fraud.

Court-appointed Trustees. The famous or infamous federal RICO (Racketeer Influenced and Corrupt Organizations) statute includes a provision whereby the federal government can sue a defendant civilly to prevent ongoing racketeering. The government's complaint sets out its allegations concerning the defendant's racketeering and requests the court to issue a restraining order or injunction, ordering the defendant to cease and desist from racketeering conduct in violation of RICO. In addition, the government can ask the court to impose a trustee on the defendant union or defendant business in order to put a stop to that union or business being used to commit crimes. This remedy has been most often used against unions dominated by the organized crime families.

The majority of these lawsuits have resulted in a negotiated settlement whereby the defendants agree to cease all illegal conduct, to terminate all contacts with members and associates of organized crime, and to hire and cooperate with a trustee whose job is to monitor the organization's compliance with its promises. The trustee works for and reports to the judge. A defendant who refuses to cooperate with the trustee or continues to engage in unlawful practices can be punished for contempt of court.

These court-appointed trusteeships are familiar to American lawyers because they were routinely used in civil rights lawsuits charging schools, prisons, mental hospitals and other public institutions with unconstitutional conditions or operations. When judges found (or the defendants admitted to) unconstitutional conditions that would require a complex remedy, they appointed trustees to function on the scene as the eyes, ears and hands of the court during the remedial phase of the case. Sometimes such trusteeships lasted for more than a decade, the trustee having to develop and im-

plement new operating rules and procedures, hiring practices, and performance indicators.

Court-appointed trustees in racketeering cases have usually been appointed to purge organized crime from labour unions. The trustees themselves are almost always lawyers, usually former organized crime prosecutors. Sometimes they are drawn from the same private investigations firms from which the IPSIGS are often drawn. In other words, the same person or firm can fill the role of IPSIG or court-appointed trustee. While the IPSIGS typically report to an administrative agency, the trustees report to a judge. While the IPSIGS and trustees both have a dual role, the IPSIGS have a stronger claim to be working for the firm that hired them to assure lawful operations; the court-appointed trustee functions more like an external authority, i.e. an extension of the court. Like the IPSIG, the trusteeship almost always involves more than a single individual. An effective trusteeship requires a staff of investigators, accountants, and administrators.

The trustee's authority is set out by the judge's order or in the settlement agreement. Typically, the trustee is empowered to investigate the organization's contracts, audit its books and records, interview its employees and do whatever is necessary to determine whether there is continuing criminality emanating from the organization. The trustee usually has the authority (subject to an appeal to the judge) to expel or fire employees/members connected to organized crime. The trustee's authority is sometimes limited to investigating, disciplining, and reporting. However, some trustees have been given authority to alter a union's constitution, change its election rules, hire personnel, and enter into contracts on behalf of the organization. In effect, some trustees have run the union. A trusteeship can last for many years. For example, the trusteeship imposed on the general executive board of the International Brotherhood of Teamsters Union, has been in place since 1989.

There has approximately two dozen court-appointed trusteeships in labour racketeering cases, but no systematic evaluation has yet appeared. There are a couple of cases widely recognized as completely successful, i.e. organized crime's influence has been eliminated, competitive elections restored, and the union returned to its rank and file employees. Such success has taken many years to achieve. There have also been a number of cases widely recognized as failures. The trustees have been ineffectual and the organized crime elements have maintained their grip beyond the life of the trusteeship. Without a scientific evaluation study of a large number of

trusteeships, we cannot confidently say what methods are likely to succeed. However, it seems a worthy hypothesis that to be successful a trusteeship has to be well funded and supported by a determined judge and by the continued investigative efforts of the prosecutor's office, which originally brought the civil RICO suit. Needless to say, the trustee himself must be knowledgeable in the area of organized crime control, fearless, and absolutely committed to seeing the job through to victory.

## III

Prevention of corruption and organized crime infiltration requires vigilance, strategic thinking, and creativity. In the U.S. we have seen the emergence of public/private partnerships which can greatly leverage the government's capacity to combat organized crime activity in certain economic sectors. The government cannot do the whole job itself. It can be vastly more effective by enlisting IPSIGS and court-appointed trustees to monitor companies that are vulnerable to corruption and to purge organized crime figures from unions that have been dominated by organized crime for decades. Over the past twenty years, the U.S. has accumulated significant experience with these strategies. There have been some notable successes as well as instances of failure. There is a pressing need for a comprehensive knowledge base on these IPSIG and trusteeship experiences and for scientific evaluation studies in order to identify and refine the most successful strategies.

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# 3. The Implementation of the Convention

## Implementation of the Convention: The Sovereignty Issue

OTTO LAGODNY

### A. The Classical Concept of Sovereignty

#### *I. 19th century concepts*

Art. 4 of the convention reads as follows:

"Protection of sovereignty

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law."

This article reflects the classical concept of sovereignty as developed in the 19th century. National states were more or less isolated. They stuck to their overall powers. This induced that every state tried to "go along" with all matters on its own. Cooperation with another state was rather the exception. And if cooperation was unavoidable, it was before all a matter of state sovereignty.

The 19th-century approach is valid also today. However, when it comes to cooperation, ideas and practice have changed tremendously. The UN-Convention as a whole reflects this development. Like any other instrument

of cooperation, the convention as a whole could be regarded as a large reduction of national sovereignty. This could be said even about traditional conventions with traditional approaches. However, such concepts as e.g. the joined investigations as provided for by art. 19. of the UN-Convention reflects a new way of thinking. Such ways of cooperation would have contradicted a classical understanding of the concept of co-operation which sticks to sovereignty.

### *II. U.S.-understanding of international law*

Art. 4 explicitly forbids unilateral action on foreign territories. This sounds self-evident even in a surrounding of the 21st century. However, we have to recall the Alvarez-Machain decision of the U.S.-Supreme Court[1] in the early 90s of the last century. According to this judgment, the U.S. do not violate international law by abductions of individuals from a foreign territory by U.S. enforcement agents. The pivotal albeit strange argument was: Only if a treaty would forbid such acts, it would be a violation of international law. With the UN-Convention, at least, we would have such an explicit clause in art. 4.

## B. New Concepts of Sovereignty

### *I. Duty under international law to cooperate*

A duty to cooperate in the absence of a treaty is unknown in the area of "horizontal" cooperation between equal states. The United Nations themselves have created a new concept of sovereignty by drawing the conclusion of what is inherent in the idea of a body like the United Nations. For Security Council Resolutions the International Tribunals for the Former Yugoslavia and for Rwanda was created in 1993. The resolutions provide for an unconditional duty of national states to assist these ad-hoc International Criminal Courts. This could be characterized as "vertical cooperation"[2]. Sovereignty is no obstacle to cooperation. Also, the Rome Statute for a permanent International Criminal Court with its far-reaching obligations albeit its basis, is a convention and not a Security Council Resolution.

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[1] *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

[2] As to the difference between horizontal and vertical cooperation, see Schomburg/Lagodny, Internationale Rechtshilfe in Strafsachen, commentary, 3rd edition 1998 Munich, margins 45-48.

## *II. Background: role of human rights in international law*

### *1. Human rights protection: obligation erga omnes*

The basis for this development can be seen – amongst others – in the emerging world-wide importance of internationally protected human rights. Without tracing back this development, a milestone can be seen in the judgment of the International Court of Justice in the *Barcelona Traction* case. There it was argued that there is an obligation *erga omnes*, i.e. amongst all states to protect specific basic human rights[3]. From this a clear line can be drawn, to the idea that human rights as such can no longer be considered as internal affairs under the shield of classical national sovereignty.

### *2. Protective function of human rights*

A new development or rather a re-discovery within the discussion of human rights, is that human rights not only forbid the states to take certain actions against one person, e.g. forbids person A to do something (wrong) to person B. The state may also have the *duty to protect* person B, e.g. by forbidding person A to do something (wrong) to person B. This is called the "protective function" of basic rights. A recent development can be seen in the practice of the European Court of Human Rights: Art. 2 of the European Convention on Human Rights contains the duty of the national state to investigate into lethal crimes where officials of that state may be involved.[4] Also this reduces classical concepts of sovereignty, which are reluctant with a view to positive obligations of a national state.

### *3. Classical function of human rights*

If we look at the classical function of human rights which intend to limit state power *vis à vis* the individual, we can observe that a lot of classical substantive bars to cooperation like the reciprocity exception for political, fiscal or military offences, double criminality, etc. can be reduced to a two-dimensional approach which takes care only of the interests of sovereignty

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[3] Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain) (1962-1970), 1970 I.C.J. 3 (Judgement of Feb. 5).

[4] Cf. European Court of Human Rights, Judgments of 19 February 1998 (Kaya); 28 July 1998 (Ergi). Access to the decisions: <http://www.echr.coe.int>. See also Lagodny, in: Karl (ed.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention, Köln et al. 2002 (lose-leaf), art. 2 margins 70-82.

of the two (or more) states involved. The individual as the "third" dimension has been neglected too long and too much. Individual, international and national basic rights were considered as a *quantité négligeable* or at least as something minor which could not be considered as a serious obstacle to a "fight" against transational crime.

The other way around makes sense: The analysis of this third dimension clearly shows that it is due to the two-dimensional sovereignty-approach that bars are created or upheld.[5] The third-dimension of the individual, of course, creates new bars – like the death penalty or persecution for political reasons which, in my view, hardly concern clear-cut cases of organized crime.

Again, we can identify classical sovereignty as the main impediment for improving transnational prosecution of whatever crime, thus also of organized crime.

## *III. NATO-Forces Agreement*

Even on the basis of a classical concept of sovereignty, the NATO Forces Agreement of 1959 and its Art. VII creates far-reaching obligations for the member states. Its main features are a close and speedy cooperation: Criminal proceedings and trials of foreign authorities and of a foreign court are possible on the soil of another state. The applicable law is not that of the state in which proceedings take place, rather it is the law of the state whose officials and/or courts conduct proceedings. Cooperation, including the surrender of a person, is subject to nearly no condition. This means especially no double criminality, no political offence exception, etc.

The *Lockerbie* solution, on the other hand, where a Scottish court was sitting on the case in the Netherlands but applyed Scotch law, was considered to be an outraging exception[6]. The NATO Forces Agreement shows that this is not at all the case. However, in the 50s of the 20th century, the creation of such an agreement was only possible because military necessi-

[5] See Albin Eser/Otto Lagodny/Christopher L. Blakesley (eds.), The Individual as Subject of International Cooperation in Criminal Matters - A Comparative Study, Nomos Baden-Baden (forthcoming).

[6] Cf. Letter dated 24 August 1998 from the acting Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General (UN doc S/1998/795); Security Council, Press Release SC/6566, 27 August 1998; Security Council UN doc S/RES/1192 (1998).

ties opened minds to such a great extent. Even in the European Union it has – until now – not been possible to create such far-reaching instruments. This is true also, for the EU-arrest-warrant[7] which is under discussion.

The NATO example shows – above all – that there are no legal obstacles to such a broad cooperation.

## C. The role of sovereignty in international cooperation

We have to look on the role of sovereignty in international cooperation from the background of this development. Sovereignty in its classical understanding is one of the most hampering elements in world-wide endeavours to prosecute serious crimes. We have already seen that on the level of substantive requirements, a three-dimensional approach could lead to a significant amelioration of transnational cooperation. If we also look at the procedural formalities required for a simple request, we can imagine the "zero"-motivation of a national prosecutor to apply international instruments. A quick phone call to the colleague in another country which would ease things enormously is, at least, not legal albeit practise. A fax asking that colleague for quick help without any approval of superiors is impossible. And not to speak of an email-message for the same purpose.

The ideal should be that there is no difference between a case which concerns only one country and a case which concerns two or more countries. "No difference" means that not only the possibilities of prosecuting authorities may not be different, but also that the protection of the individual may not be lowered.[8] The latter, again, should be of minor importance in organized crime cases.

## D. Conclusions

The Convention follows the classical concept of sovereignty as it has a world-wide approach. However there are new elements which enlarge this concept.

If we evaluate the convention from a European perspective, it is – first of all – another brick in the patchwork-wall of international conventions. The

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[7] Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, JO C 332 E/305 (27.11.2001); see also the updated proposal EU doc No 5327/02 COPEN 4 CATS 1 (15.01.2002).

[8] See Schomburg/Lagodny, Internationale Rechtshilfe in Strafsachen, commentary, 3rd edition 1998 Munich, Introdution margins 105-113.

Europe of the 15 States of the European Union as well as the Europe of the 44 States of the Council of Europe, face a development, which is breath-taking in a very negative sense: One can hardly speak of a "network" of conventions nor can one speak of a "spider-web" because this shows very clear structures. It is simply a *chaos* of conventions and other legal instruments of the European Union, the Council of Europe and of others. The UN-Convention will add not only another convention but also two protocols. From a continental perspective another decisive factor has to be kept in mind: The approach of the convention is a specialized one. It concerns "organized crime". A specific case where such crimes are involved generally concerns also non-organized crimes. The consequences of cooperation is that for the non-organized crimes, another régime of cooperation than that of articles 13, 16, 18, 30 etc., of the UN-Convention is applicable. Thus, we will have to find two standards of cooperation for the same case: The chaos will be worse.

The UN-Convention, therefore, simply would not – in my view – be effective amongst all the other conventions. In other areas of the world it may be of relevance. However, if we want to achieve more effective tools, it is necessary to abandon even more elements of classical sovereignty.

# "Shifting Boundaries – between States, Enforcement Agencies, and Priorities"

MARGARET E. BEARE

## Introduction

Before looking specifically at the UN Convention Against Transnational Organized Crime from an enforcement perspective, I wish to identify some aspects of the 'policing' environment within which this Convention will eventually become operational. There are three distinct phases to this paper: the environment leading up to September 11th, post September 11th, and the UN Convention itself. Conventions do not (usually) spring from the air, but rather the prolonged negotiations that are required in order to draft them are driven by the need to adapt to changing international circumstances or shared political agendas. The requirements of an international Convention such as the UN Convention Against transnational Organized Crime, and the assumptions upon which the articles are based must reflect an accepted perception of the enforcement environment *if it is to be implemented as intended and if it is to have the desired impact.*

## Before September 11th

Before September 11th I had become interested in the blurring of control functions across an array of agencies having responsibility for some aspect of enforcement. While everyone might agree that duplication of effort is wasteful and perhaps even counter-productive, I was concerned that some of the newer partnership arrangements and shifting mandates had been implemented devoid of a policy debate or decision, with low visibility and too often low accountability.

There are important reasons why the control agencies and operational bodies have distinct mandates and powers. A system of checks and balances behind the traditional separations is one of the key reasons. Militaries in many countries tend to have extremely limited domestic operational opportunities while the police focus on domestic control with some limited joint force and international involvement on a case by case basis. National security offences were traditionally seen to be distinct from criminal code offences such as 'organized crime;' or drug enforcement and at least in Canada, assigned to a separate body – specifically because of some of the problems that can arise when citizens are subject to surveillance by an agency that shares the mandate for both policing and national security.

The 1981 *Commission of Inquiry Concerning Activities of the Royal Canadian Mounted Police*[1] emphasized repeatedly the principle that the rule of law applied to everyone – and every agency. This Inquiry and the resulting press releases for the newly established separate Security Intelligence Service (CSIS) emphasized the problems inherent in balancing security needs with the protection of the essential elements of a democratic society. The point being that the roles that are to be fulfilled by the 'police' are very different from the roles *and the accountability* mechanisms that can be put in place to oversee a national security agency. Separate agencies, clear mandates and adequate accountability regimes were seen to be required for both – but separately. Some examples of blurring across mandates in Canada include the following:

- Military in Canada are being increasingly brought in to at least 'standby' in what is traditionally the 'policing' of domestic unrest situations – OKA standoff (aboriginal community protest on a bridge in Quebec) and later the anti-globalization demonstrations i.e. APEX in BC, Quebec City trade meeting. Mandates between military and domestic policing are very different and purposely so. One looks at a Seattle or Quebec protest and you see military strategies and responses that impact directly on the responses of the police – the consequence being a tendency to forget the democratic right to protest.
- An increasingly large – and increasingly broad array of actual domestic policing is being done by private security 'police' forces – not just security and night watching work but policing tasks that are in competition

[1] Freedom and Security Under the Law, Second Report – Volume 1, Minister of Supply and Services, Canada 1981, p. 45.

with the public police in municipal communities. Duties increasingly involve street patrol and criminal investigations – on occasion sharing the same jurisdiction with the public police and with personal shifting between the two types of 'policing' agencies – either permanently as career moves or with various forms of pay-duty (public to private) and contracted put duties (private to public). These private 'police' and the 'policed populations' remain largely invisible – the poor are invisible in high-density low-cost housing and the elite are invisible behind their gated enclaves.

- Our national intelligence agency (CSIS) has declared organized crime to be a 'national security' threat and thus organized crime and drugs has become a topic of increasing CSIS concern and involvement. Domestic intelligence gathering is by law restricted to very specific 'national security related activities. What then happens when drugs and 'organized crimes' are declared to be 'national security' threats. All serious crimes are then re-defined as appropriate fodder for our intelligence agency with the lack of visibility and accountability that goes along with that change.

One final example illustrates the increasing 'policing' trend to bridge across agencies *and* bridge across jurisdictions that may on occasion hold quite different perceptions regarding law enforcement. We have both the RCMP and our military involved in peacekeeping abroad – operating under an array of arrangements with peacekeepers from various other contributing countries. All countries are not equally equipped or supervised. An in-depth analysis of peacekeeping in Haiti reveals ludicrous conditions – amusing if not for the seriousness of it all. A 5000 member civilian police force was to be created between January 1995 and February 1996 – timed to coincide with the end of the UN mandate! Hence – 300 person classes driven by 'meeting the schedule' priorities of the UN. Canada's 'human security' soft power role (with conceivably Canadian political objectives) was countered at every turn by political objectives of the US. The US had an interest in ensuring that the new policing stations were located along the west coast of Haiti known as prime drop points for Colombian drugs, rather than in the 'hot spot' urban areas. While the exercise was to have been the establishment of community-based policing, the US policing managers were a former FBI agent and a retired army Lt. Colonel who had no exposure to community policing styles.[2]

[2] Dave Beer MA thesis, 2001 Univ. of Windsor, pages 33, 52, conclusion.

All of this is to say that agencies are shifting away from their traditional more limited mandates. Good or bad? The benefits of a separation of these functions has been well documented in the wrongfully accused literature, the studies of domestic police and inquiries such as the one into the violations of the RCMP when they had responsibility for national security. Following September 11th, Commissioner Zaccardelli of the RCMP stated that his force's priority for the coming would be 'national security'. One wonders what the head of our national security agency (CSIS) felt about the RCMP priorities!

In Canada and elsewhere, for a number of compelling reasons, there has been a graduate blurring of mandates – self interest and changing economic times have perhaps driven most of the changes. The end of the 'cold-war' was supposed to signal a lessening of a need for national security and hence, even a non-cynical person might see the redefining of the role of security agencies to encompass organized crime and drug trafficking to be at least in part a step toward ensuring the viability of their agencies.

Western countries have generally shared a similar series of trends regarding domestic policing. An era of plentiful budgets was followed by a severe reduction of resources. While criminologists used to remark on the 'selling' game that took place every year at budget time – the police always got their desired – or near desired resources. All of this changed by the end of the 1980s. Police budgets were actually reduced with less police officers on the job. This era of fiscal restraint also swept through the government departments. "Doing more with less' was replaced as a slogan with 'doing less with less' as hunk of mandates were cut away. Much time was spent in the exercise of determining which were the 'core' activities that would be preserved.

There has been a general commodification of the wider enforcement and policing functions – in some extreme cases, to the highest bidder. This applies also to the 'industry' of police departments and 'consultants' that are moving around the world advising on how to set up 'democratic' policing institutions. This might be more legitimate if our police at home operated according to the instructions that we spread abroad. This selling (or giving away) of police management training and organizational expertise might help to harmonize the police around the world by harmonizing standards and practices – questions must be asked however as to whose standards are becoming the 'norm'.

Commodification together with privatization are terms that relate to the withdrawal of state funding – states have looked to off-load and 'regulate'

rather than 'run' an array of traditionally law enforcement tasks. Hence the vast literature of post-modernity and the neo-liberal state that points to these issues. While the literature speaks of a transition over multi decades, I would argue that internationally, law enforcement has been significantly altered during the past 20 years.

The solution to these cutbacks has been three-fold. First, the gradual creation of a bevy of formal and informal working arrangements that serve the positive function of coordinating efforts across and between agencies and at times across and between jurisdictions. Second, on occasion, imaginative new ways of working were identified that gave 'punch' to otherwise frozen or moribund operations. Another popular government phrase was 'bang for the buck' which usually meant high profile for a Minister! Third, some government departments appeared to deliberately align their activities with influential international groups whose recommendations for action could not be politically ignored. Hence, conventions were negotiated and signed, and for follow-up, strategies were 'launched' and new legislation was passed.

Law enforcement in Canada reflects at least two dominant influences – first, an 'Americanization' of the police and criminal justice system and second, the policies and legislation that have been initiated and monitored by a powerful international network of organizations, task forces, conventions, and other regulatory machinery. In neither of these cases was there always evidence that the policies and legislation that were being advocated, actually worked – or at least worked for the ascribed objectives. Examples would include:

- Joint operations with the DEA/ FBI – using US style undercover operations.
- Break down of our bifurcation 'checks and balances' structure whereby – being replaced with a "Law and Order" style police and prosecutors teams and close working relations whereby the prosecuting lawyers direct the police.
- Proceeds of crime seizures with the money going to pay the up-front debt of running the Integrated Proceeds of Crime units – in contradiction to our belief that the police forces should not gain directly from the seizures due to all of the following reasons – biasing of justice/ disruption of information sharing across agencies/ agency dependency on the seized proceeds.

The impact felt by countries around the world as a direct consequence of an international organization's activity is perhaps most clearly illustrated by the

work of the Financial Action Task Force (FATF). FATF began in 1989 as a 'consensual' evaluation by peer countries and evolved into a process that involved the 'black listing' of those countries who remained resistant to the 40 recommendations and the enhancements/interpretative notes that accompanied these recommendations. These recommendations are presented as a 'blueprint for action against money laundering' and more recently have been extended to include special recommendations on terrorist financing.

The Palermo UN Convention Against Transnational Organized Crime is one of these Conventions that has the potential to be an extremely influential international tool. Over 120 UN member countries assisted in the drafting of this document which will go into force after 40 governments have ratified the treaty and its protocols. Our countries participated in the negotiations and those who have signed and have ratified the Convention await the compliance of other nations.

## Post September 11 – The State moves back in – but whose State?

> "For the US, the lesson of September 11 is that homeland **security** begins abroad. ...The impact on the rest of us is far-reaching. **When an 800-pound gorilla shifts position, everyone's status quo is upset.** Given our proximity, Canadians are more practiced at coping with the behaviour patterns of the American beast, but the upsets are all that more consequential." (Edward Greenspon, "Inside Politics", G&M December 1, 2001)

The fiscal restraint era that encouraged makeshift partnerships and new operational mandates, ended over the course of one morning. What did not end however was the direction and momentum that the international community would have over financial markets and financial institutions. Now, Post September 11th, money laundering is linked to terrorism---likewise organized crime and drug trafficking are linked to terrorism---most everything is linked to terrorism!

What we are experiencing is a hijacking of criminal justice to meet political and strategic ends. Aid, foreign trade, the operation of financial institutions, criminal laws and policies, policing agreements and policies, privacy and civil rights, traditional notions of due process, and sovereignty are all up for grabs. And I literally mean grabs – although some sectors have longer arms than others of us. While there may be nothing new about

imperialism and the self-interests of powerful states – what is new is the 'alliance' that has been demanded around this anti-terrorism response.

My argument has been that the international community has actually been more interested in tax evasion and capital flight than the laundering of criminal proceeds and that drug trafficking and more generally 'organized crime' has been a powerful way to sell a concern over the movement of these proceeds. Drug trafficking pales in comparison to the introduction of 'terrorism' into the formula with the vision of horror captured by the coverage of the World Trade Towers. Terrorism has ratcheted the rhetoric *and the compliance* up ten-fold!

## *The Silencing of Dissent and the Manipulation of 'Facts'*

How does one know if the Convention articles will work effectively to curb the threats from organized crime/ corruption / terrorism if one does not know accurately what those threats are? It has been called a propaganda war and one does not want to mess with the desired tone of the message. As Bush has said – you are with us, or you are against us. Hence, 'knowing' what the real treats are becomes even more impossible than at other times – the link that is currently being made between organized crime, transnational crime, money laundering and terrorism has ratcheted the rhetoric machine way up! Even before September 11th organized crime has been traditionally clocked in secrecy. In Canada our government 'learns' about organized crime through '*in camera*' hearings at our Federal level and closed 'by invitation only' Symposium at the Provincial level.

Research is not immune. There has been a general elimination of research positions within governments in Canada – and a contracting out of research based on Requests for Proposals. Contractors need to appease the paying, usually government, contractor who may have assembled a review 'group' – of police, justice and government officials. Researchers in the US are tightly tied to their funding agencies. As we are aware there has even been controversy as to how objective UN funded research and published findings can be – i.e. to what extent it is possible for any research body that is dependent on governments for funding to be totally free from political pressures or alliances? Additional pressures to appease arise in organizations such as the UN that bring in researchers for relatively short, insecure contracted positions. The researchers must make a good impression quickly in order to be renewed. Controversial positions or findings are seldom welcome.

Post Sept. 11th the secrecy has increased. In early October, the White House informed the US television networks that they should think long and hard before beaming another pre-recording from Osama bin Laden (G &M Oct. 11, 2001, p. A 9). ABC, CBS, CNN, FOX and NBC issued statements promising not to air al-Qaeda statements live without a review. Critics in the media and out – saw this as coming close to 'war on free-press'. We now read that there was a meeting of the heads of all of the major studios in Hollywood with Karl Rove – the top political advisor to Bush. Rove outlined 20 ideas for how Hollywood could help the war and "communicate internationally our solid American values". (Toronto Star, Dec. 9, 2001 B1). Feb 19, Pentagon announced that their Office of Strategic Influence would begin to spread false information and plant fake terrorism stories.[3] We now learn that US Attorney General Ashcroft has issued a memo that vigorously urges federal agencies to resist most freedom of Information Act requests and further president Bush has initiated an executive order that allows him to seal all presidential records since 1980. [4]

## *Shifting and expanding mandates within the USA*

> "The campaign against terrorism has inverted the traditional division of labor within the military in which conventional forces focus on fighting wars while smaller, specialized units carry out missions such as fighting terrorists." (President Bush September 29, Washington Post)

Issue now is 'homeland defence' and this has direct implications for foreign jurisdictions as well as for foreigners and immigrants within the United States. The Marine Corps has a new brigade-size counter-terrorism unit. The Army is considering the creation of a Command for homeland defence.

The FBI's 'new' focus on 'preventive' anti-terrorist strategies involves rounding up suspects before they can act – if they ever intended to act. In the aftermath of September 11th, the preventive initiatives included: arresting and jailing 'suspected terrorists' on minor immigration or minor criminal charges; cutting short long-term investigations even though it might hinder a criminal trial; and, deploying hundreds of state and local police to

[3] *Globe and Mail*, " Pentagon's false-news plan sets off alarm bells", Feb 20, 2002 A1 and A15.

[4] "The Day Ashcroft Foiled FOIA" by Ruth Rosen, *San Francisco Chronicle*, January 7, 2002.

conduct voluntary interviews. High ranking FBI officials have criticized these strategies. As one officer stated:

> "It's the Perry Mason School of law Enforcement, where you get them in there and they confess".

However – given the current debate over the merits of torture and the military trials with the death penalty, the strategy might get some short-term confessions. Another officer stated categorically that: "One, it is not effective and two, it really guts the values of our society".[5]

Likewise, even within the US, the decision to prosecute by a military trial has been controversial. Former US counter-terrorism official James Lewis said that, with the government intending to kill people not prosecute them, the agency (FBI) has almost been sidelined. (BBC News Tuesday December 11, 2001 by Rob Watson in Washington):

> "The FBI's role has declined a bit because the administration has decided to take more of a military or intelligence approach... You just want the evidence to let you be sure you're hitting the right target, rather than the kind of law-enforcement judicial approach, where you need enough evidence to stand up in court".

Some European countries are questioning extraditing terrorist suspects to the US where they will face the death penalty – and it will be interesting to see if Canada sends suspects to the US. Military trials require only 2/3 majority for a guilty conviction – vs. unanimous verdict in civilian courts. The FBI can listen in on attorney-client conversations and secrecy surrounds who is to be held. In November 2001, 623 were in detention – with a refusal by Ashcroft to release the names saying that releasing the names would "violate the detainees privacy rights". At that time, he was proposing to question another 5,000 people whose names were compiled from immigration and State Department records. These were apparently not 'suspects' but there was a need to interview them because they are from countries 'where terrorists are known to operate'. One Assistant US Attorney stated that "Not one man has declined to be interviewed" during his door to door interview process.

In late November, illegal immigrants were 'offered the opportunity' to provide information on terrorists in exchange for visa and citizenship consideration – "immigration relief". The most recent development has been

[5] Washington Post November 28, 2001.

the indictment against Zacarias Moussaoui – in jail at the time of the attacks and now charged with multi-conspiracy counts that carry the death penalty. A decision in this case has been taken to bring the case to the Virginia Federal Court – a location near to the pentagon in a State more supporting of the death penalty than jurors in NY.[6]. Meanwhile the US officials are on a tour inspecting the policing and anti-terrorist capacity of foreign jurisdictions.

## *Blurring of Enforcement and Control Agencies Post September 11 The Military Moves In*

Canada now has 600 US National Guard troops and US Defence Department helicopters along our border. As the US Attorney-General stated:

> "This is not militarizing our border with Canada. It's the longest, peaceful, wonderfully co-operative border...". [7]

He added that the helicopters were there to spot security breaches but otherwise this programme was merely "to speed up clearance" of Canadian-made parts for US companies such as General Motors and Ford. Ashcroft went to some effort while in Canada to 'dispel the urban myth' (as he called it) that the terrorists had entered the US from Canada–the very 'myth' that he himself had help spread by referring to Canada's 'porous' border the day following the attacks.

The *fact* that the terrorists entered the US directly and legally made no difference to the new policies that are being put in place. [8] This National Guard initiative coincided with a broader border accord that set out new border policing arrangements, expanded international security teams, and new immigration measures. The 'partners' in this anti-terrorism era therefore include the US military. Perhaps of more of a concern for Canada ought to be the impact that the broader border agreements will have on our immigration policies.

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[6] Washington Post, Dec 12, 2001 P. A24.

[7] Globe & Mail, Dec.3, 2001 P1.

[8] As if no one in Canada has access to US newspapers over the internet or elsewhere, Ashcroft's senior officials in Washington the previous Sunday spoke of the need for the troops, not to facilitate commerce but to address the US fears that 'potential terrorists can too easily cross into the US' from the 'porous 4,000 mile Canadian border'. More recently a *60 Minutes* broadcast provided the same interpretation of Canada being a major threat to the United States (May 2002).

## *Immigration policies*

Immigration and enforcement issues are both fascinating and frustrating due in part to the fact that for most of the critically important issues there are no definitive or factually 'right' positions. From a policy perspective, it often becomes a matter of 'the collision of rights'. Policy making and enforcement strategies that are derived from these policies must balance some of these pressures and prioritize others. When we speak of 'enforcement' in the immigration context, it is a broad concept – beyond criminal enforcement to include the 'enforcement' of immigration laws and policies. It is essential to acknowledge that the 'refused' immigrant is not necessarily 'criminal' but rather for whatever reasons does not match the profile required for entry. Words such as dignity, fairness and respect must characterize the treatment of these populations.

The unique principles that determine Canadian immigration policy are claimed to be 'a defining characteristic of Canada'[9]. Beyond political rhetoric, Canada is, and has been seen internationally to be, a nation that welcomes newcomers, places a value of the unification of families, endeavours to provide humane and just treatment of both new immigrants and refugees. Rather than seeing the immigrant as a threat to the nation-state, Canada recognizes that immigration is a vital tool for social, cultural and economic nation building. While this philosophy may seem commonplace to us, it is not the norm in many countries – such as traditionally the EU countries. Canada, Australia, United States and New Zealand are the only countries today that actively recruit and integrate permanent immigrants. Canada's needs for labour have historically been supplemented by a philosophy that recognizes the intrinsic value of having an active programme for permanent immigration.

What will our immigration policies look like Post September 11?

- Tougher requirements for would-be refugees – announced immediately following the attack.
- Common immigration policies are now being discussed with common visa to match the US requirements which went into effect last week.
- Expedited removal procedures
- Mandatory detention policies
- Sprawling intelligence and interdiction networks[10]

[9] The Honourable Elinor Caplan, *2001 Annual Immigration Plan*.

[10] Indicative of the US shift between pre and post attack security: Ambassador to Canada Paul Cellucci, as governor of Massachusetts, had appointed his chauffeur to head

*Opportunism or Opportunity?*

Too many groups are benefiting from the terrorist attacks to do justice to a survey! When one of the first announcements I heard after the attack was that the Metropolitan Toronto Police would now get the helicopter that they have been long pining for, I knew the flood-gates were open wide! In government we used to speak of windows of opportunity – exactly what the planes through the towers left in their wake.

Perhaps among all of the groups to benefit, few speak more forthcomingly about this 'benefit' than the European Commission. If newspaper accounts are to be believed (and this is not always the case), Romano Prodi, the Commission's President had told all of his commissioners to 'step on the policy accelerator' declaring that:

> "the current crisis favours integration by highlighting the need for more intense action". (The Times, 01,11,2001 P.21)

EU officials spoke of the "beneficial crisis". In the UK, Peter Hain (described as Blair's cheerleader on the Euro) exclaimed that the EU was being taken much more seriously now by the US and therefore "the horror of the terrorist attacks may turn out to be both an imperative and an opportunity for Europe". The EU arrest warrant, which gained Italian consent only Dec 11th, is seen as a giant leap towards judicial union. In addition Europol has gained an intelligence-gathering function and Britain has agreed to the establishment of *Eurojust* under which national prosecutors are to coordinate their investigations.

## The (Palermo) UN Convention Against Transnational Organized Crime – from an Enforcement Perspective

This is the environment in which the Palermo Convention must operate. From an enforcement perspective the Palermo Convention stressed 6 main themes:

- **Harmonization** of acts defined to be criminal – i.e. criminalizing offences committed by organized criminals including corruption, corporate or company offences.

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security at Massport – he patronage-ridden authority that ran Logan. December 11, authorities in Salt Lake City indicted 45 Airport workers for having lied on their job applications – illegal aliens, criminals etc. Obviously no previous checks had been made.

- Legislative and policy **focus on the tracking of the criminal proceeds** – i.e. a global focus on money laundering.
- **Streamlining of the international sharing mechanisms**: MLATS, extradition, and information.
- **Protection** of those serving as **witnesses** or 'policing' these types of crimes.
- Enhancing **prevention of organized crimes.**
- Targeting the enforcement of **three specific crimes**: smuggling of migrants, trafficking in women and children, illegal firearms

Almost each and every one of these objectives are problematic from an enforcement perspective – and most have been impacted by September 11th. The processes involved in signing conventions, having them ratified, bringing these into force and implementing the changes is often a long process. I will address a couple of these issues.

## *Definition of Transnational Crime: No extra 'something' to make it 'Organized Crime'*

Without once again, haranguing over the definition of organized crime, the Convention is all about serious crime committed by a group of three or more people who have come together to commit one or more of these acts. The articles pertaining to this aspect of the Convention do not address the 'extra' risk that such an organization ought to pose in order to rank among the truly 'organized crime operations' – i.e. the Convention does not questioning whether the criminal operation has the capacity to inflict the extra risk of extortion and intimidation.

We know that there are an array of very diverse criminal activities that fall under the organized crime heading – all do not do the same degree or type of harm to human security. As Tom Naylor points out some involve very distinctly consensual activities that are very different from the use of force leading to the non-voluntary gaining of goods or services. The Convention and likewise the enforcement expectations flowing from it appear to assume an equally 'serious' array of OC activities. It is to the Convention's credit that it makes the distinction between "trafficking in persons" and "smuggling of migrants" – just one example of fundamentally different activities that have been typically lumped under the same 'criminal' heading.

In addition, I would argue that the Convention ignores the 'fringe – the professionals without whom OC would often not be possible. In my opin-

ion, the missing piece is the acknowledgement of the fringe (or not so fringe) professionals that facilitate transnational crimes and still tend to be slapped rather than handcuffed. The Convention addresses the need to hold companies and corporations liable for taking part in or profiting from serious crimes *involving organized crime groups* as well as for money laundering activities but there is still little appreciation that the corporation may in fact *be* the organized crime group.

The current court cases involving Enron provides us with an interested example of the way in which on-going, massive financial crimes are treated. At least two newspaper articles describe the bankruptcy as "crony capitalism American-style".[11] The web of alleged influence peddling, corruption, financial fraudulent manipulation of the books, and corporate theft has left thousands of people unemployed, devastated retirement accounts, wiped out billions of dollars in shareholder equity – and provided huge bonuses and incredible wealth to a hand-full of top executives. Similar situations occurring in Asia or Russia would have been seen as the meeting of corruption and organized crime opportunists. Geography determines terminology! Terminology determines societal – and international societal – responses. Does the UN Convention cover these large, international, white-collar financial crimes (if the crime is actually charged and proven)? It is not simply a matter of acknowledging the component aspects of organized crime operations but also to acknowledge and devise ways of dealing with the power and status differentials that help to determine how the various acts are defined and how much moral outrage is mustered around the different types of 'serious' 'economically motivated' 'ongoing' crimes committed by more than one person.

## *Harmonization of acts defined to be criminal – i.e. criminalizing offences committed by organized criminals including corruption, corporate or company offences.*

What appears to be missing from the Convention is an appreciation of the power imbalance across countries in determining what is best for their own circumstances. To the extent that pressures are put on countries *formally* via conventions and participatory agreements and treaties to change policies, legislation and practices there is at least a forum for debate and dis-

[11] *The Straits Times* "Crony Capitalism, American-style", Feb. 15, 2002; *The New York Times*, "Crony Capitalism, USA" January 15th, 2002.

cussion. In contrast, *informal* pressures and influences upon the operational levels of law enforcement may result in significant changes in enforcement philosophies that are not compatible with wider societal values, are not debated, and are not concurred with beyond the confines of those people directly involved in the policing operations. We have argued elsewhere that much of the discourse around corruption and anti-corruption measures, are being articulated according to an exclusively economic logic through a series of organizations and institutional intermediaries that cross nation-states. The OECD, IMF, World Bank and Transparency International dominates this discourse.[12]

## *Legislative and policy focus on the tracking of the criminal proceeds – i.e. a global focus on money laundering.*

Compliance with 'money laundering' laws have moved forward with incredible speed – with what consequences we do not know. A search in the media reveals a flurry of activity regarding a commitment to enhanced concern over money laundering to help in the 'terrorism war'. If the FATF needed a renewed lease on its mandate it now has it – it has expanded its mandate to combating terrorist financial networks. On October 31, they issue new international standards to combat terrorist financing. Basically these recommendations reiterate the previous UN instruments but include a mention of 'alternative remittance systems' and a focus on NGOs that might be used to finance terrorist groups. The press release of the FATF confirmed that it would 'intensify' its cooperation with groups such as the Egmont Group of FIUs.

This cooperation must feel very natural given the close clutch of key US men who are involved in the various management positions: Ronald Noble Secretary General of Interpol had been head of FATF and had previously worked with Stan Morris when the two of them were at FinCEN. Morris is now Noble's Director of Cabinet at Interpol and was a co-founder of the Egmont Group. As Noble states:

> "...we want to build bridges to the Egmont group. With the Egmont group's 56 nations and Interpol's 179 member States working on operational matters, we can provide the FATF with valuable and

[12] James Williams and M.E. Beare, 1999, "The Business of bribery: Globalization, economic liberalization, and the 'problem' of corruption", *crime, Law and Social Change*, 32: 115-146.

> current data on the financing of terrorist activity within our member States." (Special session of the Financial Action Task Force, Washington, DC October 29, 2001)

Banking is seen as a convergent point for illicit proceeds. Banking systems that deliberately attract illicit proceeds by facilitating money laundering provide a niche-market service to criminals. Typically we think of offshore brass-plate banking services as being the laundering centres – however, the recent focus on banks and laundering activities reveals that some of the most prestigious banks in the world (Switzerland, Monaco, United States, Britain...) are vulnerable, *or make themselves vulnerable.*

We, at the Nathanson Centre, have just completed a study on the 'voluntary' compliance of the financial institutions to the suspicious transaction protocols that were developed by the 'Big 5' banks. The results were dismal – and expectedly so for several totally rational reasons. All suspicious reporting – whether voluntary or mandatory – arguably rests on two essential principles: the 'Know your Customer' policies, and the belief in an ability to profile 'suspicious' transactions. Neither of these may be possible in today's world of banking. The notion is that while there are millions of transactions that pass through financial institutions, a certain percentage are irregular in some aspect and warrant greater – and more timely – scrutiny.

Driven by the work of the Financial Action Task Force (FATF),[13] the 'required' uniform standard now requires mandatory reporting of suspicious transactions and reporting of large transactions. Whether the system works to any significant extent becomes immaterial. The question arises as to 'who' gets to be deemed to be 'suspicious'. This form of detection could be targeting the most unsophisticated cases, where 'suspicious' literally takes the form of a hesitation to answer questions or an unease in appearance – behavioural characteristics that will be absent from the truly professional launderer. One of the most pervasive complaints about transaction reporting schemes internationally is that they have generally failed to lead to the conviction of sophisticated money launderers. The clumsy novice is most often the criminal that is caught in what is seen by some critics to be a very expensive and intrusive web. Some research also indicates that there

[13] The Financial Action Task Force (FATF) is a body created in 1989 by the Group of 7 (G7) to address money laundering. Each year an annual report is produced. The 40 recommendations made by the FATF serve as guidelines for the appropriate response to money laundering. This 'consensus' oriented body has turned to 'name and shame' techniques to encourage countries to adhere to their recommendations.

may be a class and/or racial aspect as a certain appearance, presentation of self, and/or specific countries involved in financial transfers are seen to be more 'suspicious' than other characteristics or jurisdictions.

Private banking in particular was found to be nearly wide-open to laundering, tax evasion, capital flight (and looting) by corrupt government officials.[14] The argument is made that a culture of secrecy combines with a culture of lax anti-money laundering controls due quite understandably to competing agendas. Having faced various laundering scandals in the US, the banks were still able to refusal to 'allow' the regulators to impose their 'know-your-customer' plan that had been proposed by the Federal Reserve. Post September 11th that ability to resist has perhaps ended.

In the US and elsewhere, an industry is becoming increasingly sophisticated and 'focussed' on advising on the planning for, and facilitating the construction of, business transactions that slide between tax avoidance and tax evasion – legal evasion. A 'new' contingency fee market has developed in the United States whereby forensic accountant firms – comprised of bankers, lawyers and accountants (known now as 'financial engineers') – devise schemes to save the large corporations taxes and charge a percentage of the savings. The US Treasury Department has identified corporate tax evasion as the nation's biggest tax enforcement problem – and these 'shelters' are seen to be the core of the problem. Alas, while systems are in place to catch the 'suspicious' depositor, an entire industry has grown up around assisting the corporations to move money around. [15]

The term money laundering is attractive for enforcement purposes because it has become exchangeable with transnational crime/ organized crime and drug trafficking – criminality pure and simple and surely worthy of a concerted control regime. In contrast, tax policies are burdened with confidentiality and voluntary compliance rhetoric. No such sentiment protects the drug trafficking 'money launderer'. Hence we have the enthusiastic adoption of anti-money laundering policies, investigations, and sanctions as expressed by spokespersons such as Raymond Kelly, Commissioner of US Customs Service, become part of the rhetoric of the 'war on drugs':

[14] *Testimony of Richard A. Small*, "The Vulnerability Of Private Banking to Money laundering Activities" November 10, 1999. The Federal Reserve Board.

[15] *New York Times*, December 19, 2000. "Tax Shelters for Businesses Flourish as IRS Scrutiny Fades", by David Cay Johnston.

> "We will not win the war on drugs by following the tons of cocaine and heroin and marijuana that move through our streets. We will win it by following the billions of drug dollars that move through our financial system".[16]

This claim is of course ludicrous – but politically powerful. Internationally, seemingly the entire Western world is determined to 'fight' the money laundering war. How much of the fight is mere symbolic words and how much of the concern is actually 'money laundering' ought to be more strenuously debated.

The Convention obliges nations to "set up financial intelligence units to collect, analyze and disseminate information about potential money-laundering and other financial crimes."[17] Canada has always separated tax information from criminal code information and has traditionally treated the two very differently. While there may be merit in examining some of the taken-for-granted *unique,* if not actually *peculiar,* arrangements that are in place – the FIUs will fundamentally change record keeping and dissemination in many countries. With reference to Canada, the legislative and interpretative barriers to the sharing of information between Revenue Canada and the RCMP (or other policing agencies) in one such prime example. Given the fact that a financial intelligence unit is currently being set-up to receive, analyze, and appropriately disseminate financial information and intelligence we must monitor closely the relationship between these two 'separate' spheres. Simply stated, Canada places restrictions on the type of information and the conditions under which tax department held information can be shared with other government agencies.

According to the people who will be running our Financial Transactions and Reports Analysis Centre (FINTRAC) the existence of this centralized data collection and dissemination Centre will not alter the confidentiality of the revenue income tax information. The 'basic fire-wall' will remain. However, following our discussions and a study of the legislation, there are many outstanding questions about this legislation and its likely impact little international evidence that the financial intelligence units can provide timely information to the relevant departments.

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[16] *Fortune.* September 27, 1999. quoted by Rob Norton "First-Humble Opinion – In defense of Money Laundering".

[17] *After Palermo: An Overview of what the Convention and Protocols Hope to Accomplish",* UN, 2001, p. 2 of 10.

## *Streamlining of the International Sharing Mechanics*

Police forces throughout Europe are trying to sort out what level of intelligence sharing and access to date will be possible – given different policing and legal systems and the existence of the death penalty in some jurisdictions when this sharing comes to extradition of suspects back to foreign jurisdictions. Many separate police forces are vying for anti-terrorist units and resources. Meanwhile, international cooperation and information sharing remains somewhat primitive.

Different partners in the criminal justice system may see the success or failure of the Mutual Legal Assistance Treaty (MLAT) process slightly differently. MLATs are not the only solution to transnational investigations and in some cases MLATs are seen by the police to be an obstacle to pursue criminal investigations with the collaboration of other jurisdictions.[18] From the experiences of some law enforcement officers, it appears that the development of a culture of collaboration among law enforcement agencies in the different regions is the real answer to some of the issues that arise in international criminal investigations.

Interviews with Canadian police investigators concluded that one of the best ways to build cases and collect the necessary evidence for their cases is through the personal relationships that develop between police in different jurisdictions. They agreed that successful investigations are the ones in which investigators travelled to the country where the evidence is located, and have been helped by local authorities to gather the evidence. In this respect, one officer suggested that, when a crucial piece of evidence lies in another country where it is not accessible through a "police to police" request, one of two things will generally happen:

- The target will grow old and die of old age before the responding country replies with the evidence; or
- The evidence will arrive in a form totally contrary to the rules of evidence in the requesting country.

The cop-to-cop relationship is therefore seen to be instrumental in producing information for the investigators while MOU or MLATs serve as the legalizing agents for evidence. If this is the case, then we should be looking more into fostering enhancement tools for police dialogue and cooperation

[18] Research carried out by Juan Ronderos for the May 2001 meeting of CSCAP held in Sydney Australia.

and above all, understanding of the culture and legal systems of other countries. However, there are downsides to any necessary reliance on the cop-to-cop model – too much reliance on personalities and the need to have the officers 'stay' in their positions over time.

Differences in legal systems cause the major hindrance to MLATS. For example, with relation to Latin American MLATs, the ongoing complaint is that they are viewed as totally deficient in failing to meet the Canadian legal thresholds. One of the problems that exist is the incompatibility of the two systems due to the fact that the police in most Latin American countries do not have the same powers the police forces under common law have. This problem may arise in South East Asia since many jurisdictions in this region have continental or civil law systems. Investigations within civil law jurisdictions usually involve the equivalent of the prosecutor in some cases and judges in other cases. In addition, it is the foreign affairs department – or ministry of foreign affairs – that is in charge of processing most of the MLATs. This worries prosecutors and investigators within Latin American countries because of the politicalization of the process.

Timeliness is also a serious issue. One investigator mentioned a case that involved US authorities:

> "I applied for banking records in April 1995 pursuant to the US-Canada MLAT; Reply: still pending, although they did send me a fax message in January 2000 saying they were giving the process a priority."

Some countries have legislation that allows the gathering of evidence and other legal applications without benefit of treaty upon application to a central authority. In those cases, official "Non-treaty" requests are the best way to get information. There are some countries however "that sign treaties, [but do not comply]" because the process is fraught with obstruction and bureaucracy. Other countries sign treaties, but their judiciary or law enforcement agencies either lack the expertise to gather the evidence they are being asked to seek, or the evidence is presented in a manner inconsistent with admission into another jurisdiction's courts.

While it is trite to repeat that criminals are much more proficient than law enforcement at operating across borders, it is nevertheless true. This may be one of the critically important areas for governments to improve upon if transnational organized crime enforcement is to be advanced.

## Conclusion

The UN Convention Against Transnational Organized Crime addresses many essential issues in the control of transnational crimes. While we await the coming into force of this Convention, it has already driven significant changes in many jurisdictions. Once in force, it will be difficult to alter or halt the enforcement directions that law enforcement and the justice systems adopt internationally. An important 'phase' will be the continuing monitoring of the consequences stemming from this Convention.

# Military Police and European Peace Keeping Missions

DIDIER BIGO

European police cooperation may take very different forms. Much research has been carried out on the national police, the creation of Interpol, the birth of Schengen and the third Maastricht pillar, and finally Schengen's integration into the EU with Amsterdam and Tampere.

Nevertheless, the outcome of Tampere and Laeken is not yet evident. Apart from that, the creation of Eurojust or the continuation of Corpus Juris will change relations between the police and justice and enable – we are told – more efficiency and transparency.

Yet, all this is limited to the EU only, whereas experts are complaining about the main crime-networks coming from outside EU countries! Thus, they want to extend, even more, the police's competence and activities, by fighting against organised crime "out there", "restoring failed states" and helping to "reinstall interior security" in the exterior. That is what I call "distance- and network-policing" On this occasion, one should study the Schengen visa policy and its link with local consular authorities in the departure countries.

However, today I would like to speak about yet another and even less known development, which is, in fact, the role of the civil police having a military statute in peacekeeping operations. Even if, for Javier Solana, these operations are the responsibility of the diplomats from the second EU pillar, they still mobilize civil police forces during their second and third stage. This means that Army participation does not play, any more, an exclusive or central role during large parts of the law and order re-establishment. Even less so, it is limited to the very short area of land and air control.

In order not to offend anyone, Javier Solana evokes the complementarity of the two forces – the Army and civil police, (the rough forces or gen-

darmerie) – during peacekeeping operations. However, it has to be recalled that complementarity is not an end in itself. It is a means to law and order re-establishment in the respective country where the forces intervene. This re-establishment implies an equilibrium between force imposition (in order to stop combat and oblige adversaries to negotiate) and confidence-building (in order to make the population trust their own forces and the transitional institutions).

This at least, is the lesson learned after a series of failures: the intervening forces were either overpowerful, which transformed the just-saved population into a hostile one, or helpless, which transformed the population in witnesses of Human Rights violations which nobody could stop. Luckily, in the context of NATO or EU, efforts have been made to avoid such setbacks of the interventions themselves, by improving complementarity of the civil and military interplay.

This is a point, that we are now going to develop further, in order to better understand the recent stake of civil forces having a military statute in the EU.

## The invention of CIVPOL

It is useless to recall that there already exists, since some time, a juridical context for international police operations (ONUC in Congo 1960-1964). In the past, public safety re-establishment missions outside national territory have been exclusively led by the Army, especially by RIMA troops. At that time, French forces participated in actions already then called " humanitarian" or "population protection operations", whether this had been as part of the legal operations conducted by NATO or on account of a defence-treaty with African countries (whose clauses however rarely induced such interior missions), where they had to manage relations with populations being hostile at their presence.

Nevertheless, during the last 20 years, Western governments and UNO have been driven to develop further reflection on the nature of post-bipolar crises, due to their intensity and duration in certain states (where governments let generalized violence develop with Human Rights violations, either because of their own incapacity or their action against whole or parts of the population). The idea was to associate military intervention to a second stage of law and order reconstruction, consisting of a reconstitution of the states interior security forces: the police, justice, and penitentiary system.

From 1990 on, UNO started to develop more thoroughly, the concept of civil police missions or operations, CIVPOL, a concept somehow abandoned by the international police forces. The idea is that the civil police takes over from the Army, once tranquillity has been established, in order to technically assist the local police – not only in their everyday role of juridical police and restoration of public tranquillity but also to help them construct themselves in the transition period towards a State of Law, which also demands a better respect of Human Rights from the side of the police.

At the beginning, the United States, the EU and other states, like Germany, focussed with their reflections on the transition of the police in Eastern Europe, particularly in PECO states Poland, Tchech Republic, Romania, and Bulgaria.

However, employment of CIVPOL very quickly turned away from the idea of a "democratizing force" to an "intervention force" in "failed states", i.e., states where the police is either inexistent or so biased that it is impossible for them to intervene in their role as a 3rd party, in any business whatsoever. Thus, very quickly, CIVPOL operations were characterized by multinational, unarmed police forces, being asked to act as a substitute for the local police, or to strongly manage them, as they suffered from poor technical assistance and training. Thus, the police was mainly concerned with establishing contact with the population, avoiding discriminations and maintaining order.

CIVPOL missions, imagined in a context dominated by the Anglo-American conception of justice, included accusatory procedures, (often copied by Canada, Sweden and the Netherlands), suggest a simple two-phased scheme: armed intervention under military conduct until ceasefire and agreement between adversaries, and then, once order has been assured, the arrival of unarmed civil police in order to support and train local police. Thus, "peacekeeping" with a strongly military emphasis is complemented by "peacebuilding with a civil emphasis. This scheme respects the general partition between military and civil authorities.

## Mitigated results

Coexistence of forces, and the use of armed police in order to resolve problems of public security re-establishment, contradicted immediately the principle of the two phases. Nevertheless, because of the poor results, it was necessary to reconsider the articulation between the armed- and civil-police forces, in order to improve the necessary complementarity.

When they arrived in Somalia, after much media propaganda they were convinced that they would be faced with an easy situation, American forces and the UNO ones were obliged to retreat, after relations with the population became more and more tense. These serious UNISOM incidents from 1994, showed how difficult it is for troops to manage a hostile mob, as long as they are only trained to combat an enemy, pointed out in advance. Canadian, Belgium and no doubt some other troops, transformed these crowds into their enemy and went after individuals in a way that has been condemned as an unreasonable use of force. At that time, the component of violence management and law and order control had not yet been included.

Conversely, due to the military force's inaction for political reasons, certain operations such as the one in Haiti, ended up with badly equipped and prepared CIVPOL troops. The powerlessness of the civil police has led to a profound disorder of the political battles already under way, provoking for example, an unbroken series of lynching, the macoutes reconstruction and even their entry into the newly created police. The reason for this was that certain national police corps, having been sent off on UN-CIVPOL missions, had either been overrun by the seriousness of the events, or had ignored completely, the destiny of their population, in order to concentrate only on useful intelligence for their own interior security (drug trafficking surveillance...).

Other examples can be given – Liberia, Rwanda ... There is no doubt that these interventions helped regulate local and regional crises. Yet, the interventions themselves were stuck by crisis, due to the discrepancy of interior and exterior policy and due to the lack of the force's complementarity. The principle of complementarity as well as dual phasing often seems to fail because of negative attribution, each party discharging themselves of their responsibility.

The prolongation of warfare, the Balkan specific crises, especially in the Yugoslav sphere and the EU's structural incapacity play a decisive role, all this implies that the scheme is no longer up to date: even with the best intentions and a strife for simplicity, it very often leads to the worst. Situations in Bosnia and now, in Kosovo and East Timor, suggest that it is imperative to get away from this strict task division between the police and the military. It is, in fact, essential to think about an interface of military and police missions in the area of public security maintenance and restoration.

This interface could be named differently, according to the decision making institutions.

One could continue to name it "international police operations", "US-exterior police operations", "CIVPOL operations" or "peace re-establishment missions". One could also talk about "peacekeeping missions in the EU style". One could also evoke the constitution of a third force on its own or strengthen complementarity of the Army and civil police. One could also not name at all this interior/exterior security interface but create intersectional committees as we have in the EU, where there reigns a semantic vagueness between 2nd-pillar-Petersburg missions and 3rd-pillar-exterior missions. It would also be possible to consider that, even without the 3rd force, a three-staged phasing seems more coherent to field reality and would also facilitate NATO and EU relations.

According to the doctrines, one could describe the interface as "military crowd management" – command of insurrectional, populist or mafia violence – or as "public security restoration" by the police force and consolidated presence of magistrates. One could refer to the context of legal exception and armed conflict legislation or to the legal and judicial context of population security.

The result, each time, would be a different choice of forces having to manage this interface. Nevertheless, it seems preferable to have positive attribution conflicts, probably generating bureaucratic battles, than negative ones, leaving victims alone with their aggressors and with helpless or indifferent witnesses.

## Political dimension of the intervention and legal and juridical stakes: the context of complementarity

Of course this first choice, whether or not to intervene, was a political one. In some cases as for example, Tchetchenia, western political leaders were discouraged by the risk of escalation and direct confrontation with the Russian government, even if there were flagrant Human Rights violations. There is in fact, no automatism for peace re-establishment actions, even if lawyers and Human Right NGO's demand not to apply double standards.

This politization of the choice to intervene or not plays a direct role in the logic of western media control, – a so-called independent media – and in the impact this media can have, as a sort of public opinion relay station, for citizens by assisting the "distance suffering" in the respective countries.

Decisions about non-intervention or precipitated retreat or perhaps even planned disengagement, make sense when they correspond to the battle-

ground reality but hardly do so, when they respond to short-term political interests, commanded by opinion polls.

Indeed, this political management could have created distortions between what happened on the battleground and in the press, either by means of direct governmental influence (including the army and press relation services), or, more rarely, due to NGO media coups intending to pressurize governments or UNO.

Doubt about war-time information and absence of transparency is certainly becoming more widespread which, in the long-term, is detrimental to the goal of re-establishing the rule of law. We will come back to this, in relation to the civil society's right to participate in intergovernmental debates on the non-military crises in a European context.

However, those who wish to avoid being governed by emotion, have to admit that political cynicism is what mainly destroys the already limited chances of the universalization of Human Rights. This can lead – as in Bosnia – to situations where the military authorities distance themselves from their own country's politicians, on basis of ethical considerations. This can also lead to situations, where the original justifications put forward by the actors of the mission are called into question and where another decisive element is introduced: for example, judicial intervention in public security restoration missions.

In the context of peacekeeping missions – and this since Bosnia – modifications have thus been considered in order to improve military/police complementarity. This new strategy, in fact, consisted on the one hand of identifying particular problems on the territory itself, so as to avoid further suffering, and on the other hand of appreciating Bosnia as a "special case". It consisted as well in the understanding that the spectre of relations might be larger than the civil police / military duality. In fact, it includes the role of lawyers and the applicable law during the different intervention stages, as well as the fact, that the police with a military statute will probably have a specific professional identity and thus a different role than the Army or civil police.

For some, the reasoning in terms of "failed states" was to be abandoned in favour of a distinction between the two situations: one that concerns a segmentation of the civil society, together with a profound economic crisis and quasi-disappearance of public institutions, and another, where the government continues to exist, however only on account of one party, which drives the other one to equip itself with clandestine combat organisations and solicit exterior support.

Even if situations like the first case are delicate, coherent management can ensure that a neutral position is maintained and advance in the direction of CIVPOL missions. On the contrary, in the second case, there is no lack of diverse infrastructure, which bears the risk of the belligerent party provoking tension, the moment military troops start retreating. It is thus necessary that the troops keep a permanent control of the situation and remain in place, even if that suggests sustained engagement – as in the case of Ireland. In the long run, this would lead to coordination between the military and international police, or even local police, however under military responsibility and under the UN chapter VII context. Bosnia and also Kosovo, would be particularly concerned by this scheme. Different ground troops would have to adapt to other methods of engagement than simply lethal combat, where the only goal is the destruction of the enemy – TTA 900 in France – compare as well the doctrine of RU in Germany and Italy.

Participation of a third force would only make sense for smoothing out relations, i.e. helping the Army during the first stage with crowd management and atmosphere intelligence and then, during the second stage, helping the non-armed civil police in cases of tension ascent. The essential parts would to be carried out by the Army and intelligence services. Complementarity of the police having a military statute would in fact, consist in this auxiliary position during the two stages and not in the constitution of a third force with its own identity and mission.

In order to give a French example, the "gendarmerie" would be able to help the Army with their training programme of law and order preservation and lacrymogene grenade usage as well as in a patience-training-programme for situations when confronted with a hostile stone-throwing crowd. They could also participate in military police actions and play a role in atmosphere intelligence, together with the surveillance and investigation squad PGSI and have an expert among the operational command, in order to express police and judicial sensibility. If, one day, CIVPOL missions became autonomous operations, not subordinated to military command, the "gendarmerie" could play an even more active role with respect to the police, due to their presence at the conflict from the first stage on. However, on condition that the police having a military statute, would not be marginalized in this scheme where privileges are granted to non-armed civil police.

For others, this "moderate" vision is a worst-choice-scenario that does not tackle any of the basic problems. Conflict management, as it is practised in Ireland, is far from being a success and turns at present to a de-

legitimazation of the engaged forces. Even if we suggest more subtlety in the force's employment, is it coherent to rapidly form order-maintaining ground troops having a technical particularity without using already existing know-how? Can we expect one and the same troop, first fighting an enemy and then reconciling the protagonists? Is it possible to demand the Army on the one hand, to engage in heavy armed dissuasion and on the other hand, then to take up a well-balanced dialogue? And then, even more important, should we admit that the legal context is different according to the mission and that consequently, attitude and behaviour have to adapt as well each time? How to manage relations between locally responsible magistrates and military authorities? How to avoid that troops, having been trained for guerrilla-warfare and anti-subversive operations, do not interpret a peaceful crowd manifestation as a result of manipulation?

How to avoid types of neo-colonial behaviour incompatible with the Army's confidence-building among the communities? One can imagine, that in the long run the Army could create a specific corps that would not be conditioned for warfare but for Petersburg missions. For several years, there has been a doctrinal reflection – the so-called idea of "violence control", which has now been "validated" by the apparition of the interarmed forces-theory. Another solution would be to consider a 3rd force.

Given the fact that the structure of the US army clashes profoundly with the one of the US police, America was the first to launch a research programme on this subject. In fact, they were incited to evoke the term of a 3rd force because of the failure of the Somalia operation, which began glamorously with media support but ended in disaster, as well as the delicate situation in Bosnia. Thus, a 3rd force was intended to be sufficiently powerful – without being a regular army force – in order to take over from SFOR without putting into jeopardy the already started peace process. Thinking about a new role for their national guard, and interested in the use of reservists for participation in exterior civil/military affairs – which could even bring economic advantages – America saw a 3rd force as a practical solution, combining reconstruction and quasi-military management with the possibility to experiment their non-lethal weapons. In order to justify this concept of a 3rd force, they mentioned to their Italian and French partners (and to them only) that a comparison could be made with the French "gendarmerie" and on the NATO-level, with the UNO international gendarmerie force, a project of Boutros Boutros-Ghali. This latter comparison seems paradox, as America was the first to combat this kind of troop constellation in Somalia.

Due to this ambiguity, the French government avoided responding – the Franco-American symposium in Chantilly 16-18 April 1998 – and preferred to maintain the distinction between military and civil operations.

The deal changed when the situation in Kosovo was taken into account and the EU acknowledged its own successive mistakes. This time, the concept of a 3rd force reappeared under the leadership of Javier Solana, now as the EU Council's general secretary, whose profound intention was to find a specific gap for the Union in the context of the Petersburg missions, which were demanded by the Americans as well as by NATO for crisis management.

It turned out, that the notion of a "non-military crisis management" and a "three-staged" approach satisfied at the same time the need for ground troops and the tactical considerations of US/EU relations in NATO, giving the EU for the first time, the opportunity to make itself heard.

## Three-staged approach in the context of peace support operations

In October 1999, common reflection about the 3rd force was conducted: by Commission staff, concerned with the financial implications of the Union in the Kosovo crisis and with the Union's political and media inexistence, by members of the Vittorino committee, concerned with the 3rd pillar and the formation of foreign police – Albania and Balkans – and by members of the Council's general secretary Javier Solana, concerned with the European Security and Defence Identity, (ESDI). Very quickly this led to the concept of a European forces deployment which distinguished military crisis management, mobilizing Eurofor, and non-military crisis management, mobilizing diverse security forces.

Even though both of them are considered to be part of the Petersburg missions, it appeared that a non-military crisis management was to the EU's comparative advantage. Therefore, Javier Solana asked again, what the different countries think about the 3rd force`s concept.

Italy, with its "carabinieri - initiative" was the first one to react, proposing a three-staged operation, where during the first stage – a combat stage – military ground troops would be in command, during the second stage, forces like the carabinieri would intervene and replace the army in population-contact operations, while still having their support, and during the third stage, military retreat would be compensated by the arrival of CIVPOL

forces, helping technically and training the local police and justice. Under the command of the FIEF and due to an initiative by the Portuguese presidency, this project became larger, while still remaining very specific.

The Carabinieri insisted on the particularity of the tasks within the multinational specialised NATO units and affirmed therefore that they had to be guided by forces having a special identity. French and Portuguese gendarmerie put emphasis on the dimension of the civil police having a military statute, to avoid blending them with military or even paramilitary police forces, as the English and Nordic countries were inclined to do. They insisted more on the three-staged character of the operations than on the existence of a 3rd force that would be neither military nor police and were reminded that they not only had police but also military characteristics.

In the end, the result was that peace support operations were, from now on, conceived as having three stages.

1) One military intervention stage, intended to achieve air and ground control, which in the best case was backed up by the UNO Chapter 7 engagement legislation.
2) One transitional stage, conceived as complementary to military operations and centred on law and order restoration.
3) One stabilisation stage, consisting of, on the one hand, local police training in an CIVPOL context of technical cooperation (theoretical and physical training, counselling and controlling of local police) and on the other hand, progressive restoration of competences and sovereignty of local authorities.

Civil police having a military status, is thus present during all three stages of the scheme, and the armed forces, during the first two.

In the first stage, the civil police having a military status, would act in the form of the military police and form auxiliaries to the armed forces.

In the second stage, they would dispose of a permanent representation at the international strategic level and an operative command nucleus. Discussion has showed that they could have their autonomy in the form of police experts, and still be under army command. The former would be responsible for order maintenance, for the judiciary police and atmosphere intelligence, while the latter would be concerned in backing them up and in having a force reserve status allowing dissuasion and heavy intervention. Symbiosis with the military mechanism and command authority would thus make possible, real complementarity.

In the third stage, the police having a military status would intervene in the form of the civil police and be particularly responsible for order maintenance. There would be collaboration between the two forces.

Prime Minister Lionel Jospin in his speech on October 22nd 1999, at the IHEDN, insisted on the necessity of a better transition between peacekeeping and law and order keeping missions.

In fact, the debate on this subject became a conflict of positive attribution between certain army units, who saw their chances in these kinds of missions and the gendarmerie, who did not want to end up like their Belgium neighbours, sliding towards the status of a civil and judiciary police. Even though this was more a French than a European debate, it had nevertheless an impact on the reflections of the FIEP and the inter-pillar group created by Javier Solana.

He restarted the debate from the point of view that the intermediate stage had a specific identity because the stake of responsibility was important. In spite of the interest of a non-military crisis management, which would allow them to partly resolve the contradiction between their principle of neutrality and the construction of the European Defence Identity, some of the northern countries, like Sweden, criticized this complexity and wanted to return to a dual scheme that would engage CIVPOL much earlier. This preoccupation about crisis management was at the centre of the Helsinki summit of December 1999; however the question was not tackled in detail.

## The role of the intermediate stage in the context of the European rapid reaction facility

On April 11th 2000, the EU Commission proposed a draft regulation concerning the Council's idea of a rapid reaction facility. The text recalled in an evasive manner, the relation with the Amsterdam treaty and the PECSD and with more precision the Helsinki summit from 1999, where an action plan about non-military crisis management had been adopted, additionally to the military document. Subsequently, the Commission opened a rapid reaction funds of 12 million €, to which public and private actors were invited to join their participation, and justified this on basis of article 308 of the EC treaty, which concerns communitarian support interventions in case of a security threatening crisis. These funds allowed deployment of a non-military rapid reaction facility, different from what exists in the context of ECHO. It is the political unit of the rapid alert command, placed under the

authority of Javier Solana, representing PESC, who would define and coordinate the responses. Then the funds would be attributed via a crisis committee, to the Commission's responsibility. In the long term, this aspect would be withdrawn.

The rapid reaction facility would thus be concerned with sending out not only civil protection forces in case of natural catastrophes, or humanitarian crisis, but also military forces. Its larger objective would be public law and order preservation or re-establishment, security maintenance and actions against Human Rights violations or other sorts of discriminations – be they ethical, religious or sexual. It would be engaged in cases of rising violence menacing public order, opening of combat, but also in cases of massive population movements, provoking security vacuums or again, in the case of environmental catastrophes.

It would be not only reserved for non-combat activities, but would also include the control and survey of other interventions as for example, police actions, surveillance, mine clearance, disarmament of combatants and technical assistance and training. By this, enlargement of the security notion in a humanitarian context (including society and environmental problems and thus being concerned with population control and Human Rights supervision) the EU tries to think up an interface which is still very sparsely analyzed.

This certainly is the case for the phasing in three stages, which might probably be attributed to different budgets, which would then reinforce a 3rd force´s autonomy. Yet, it would also create strange bedfellows. As a matter of fact, the diverse police forces would not be the only ones to apply to the funds. It would attract also humanitarian NGO´s, specialized in urgency cases and probably certain private international security firms, like Sandline International or MPRI, who dispose of specific know-how which they could sell to the Commission. There is no doubt that one would have to question how far it would be feasible to let liberal ideology pierce the context of the rule of law restoration. However, this is not what we want to do now.

The Feira summit under the Portuguese presidency tried to be more precise with the notion of non-military crisis management. A distinction was worked out between activities centred on the police and justice, compared to civil protection and humanitarian tasks. Additionally, Portuguese intervention in East Timor brought in new facts to the discussion which focalised only on the Kosovo case. It was decided at this summit, that member states would furnish 5000 men from the civil or military police and rapidly deploy 1000 men, during the first month. However, this operation gave the

impression that only certain countries cooperated with the forces deployment plan, only because many others were reticent to the role of the civil police having a military status, who, accordingly, would have to be sent first. The first countries asked to contribute were Italy, Portugal, France and, in a lesser degree, also Spain with its "Guardia Civil" and then – the novelty – the "Marechaussee" of the Netherlands.

Under the French presidency, this attribution continued and became more precise, each country counting its forces that could be given away. However, at the same time, the UNO general secretary tried to relaunch a classical CIVPOL force, asking the EU to adopt the same standards when considering the notion of a civil police.

## Future stakes

The idea of complementarity seems to be going in the right direction. The French army and Gendarmerie, and on the European level the other armies, the police having a military statute and the civil police brought their points of view. Nevertheless, between the Army and the Gendarmerie, many problems remain in suspense and the doctrines converge less than anticipated. If, for example, the doctrine of violence control relies technically on the way how military troops can manage hostile crowds, it does not include the question why this assisted population became hostile at all! In fact, it presupposes a manipulation by clandestine groups or parties and does not evoke at all the possibility of deceived hope, or of exactions by the troops themselves, which would explain such hostility and would logically lead to a disengagement as quickly as possible- to the advantage of other forces.

It is judged coherent to conduct dissuasion with the help of heavy materiel and close population contact because in these situations the population is not considered to be politicized but manipulated by hostile groups. It would therefore be reassured by the force's presence that would limit exactions and isolate hostile elements by the "victims".

Is it too much of a generalization of the situation in Kosovo and a particular appreciation, that there is a tendency to consider the UCK more as a mafia than a political party?

The importance given to the legal context in order to reinforce legitimacy and legality of the actions (it is, for example, possible for the population to plead in court, in cases of illegal actions coming from the intervention troops and not from the local mafia, during fierce control actions)

shows how difficult it is for military authorities to accept being controlled by civil or judiciary authorities.

The emphasis of legitimizing the force's actions is taken even more seriously with the alternative proposed by the gendarmerie, to insert violence control and crowd management in the global context of public security restoration, including tranquilisation operations and the proximity of the police to judiciary police operations and route circulation.

Individual protection suggests thus, first of all, confidence restoration into the institutions. This however, supposes more risks for the personnel and more confidence by the foreign institution, in its capacity to manage intercommunity confrontation or protestations.

Up to what point is it feasible to believe in the policy described as "politique de la chemisette".

The phasing in three stages without a 3rd force would be very delicate, as one would have to consider one force as a migrating force – from a military to a civil context – but the question is when and how! Doesn't this lead again to a phasing in two stages, with a stage three, a) military and b) civil. How far are European magistrates ready to be engaged in justice operations at distance? And even if they wanted to, would they have the means? It is too delicate now, to think about a simplified code which would be used by the security forces during the transition stage, when one looks at the difficulty the EU has to harmonize legislation – Eurojust, the Corpus Juris project, or when one recalls the difficulty to manage procedures in the international courts.

When the civil police have a military statute they will naturally also have a double allegiance, military and judiciary, would there not also be a risk of conflict between these two forces during the transition stage?

Finally, the central problem has to do less with the distribution of competences than with ethos, i.e., with "professional socializing" within the forces. This is a long-term apprenticeship, which determines the behaviour towards the populations and the sensitivity towards the rule of law. It is an apprenticeship that is different from the one which allows imposing only by force, the end of combat to the belligerents. It is necessary that the army and the police, having a military statute and the civil police work together on the enlargement of the spectre of training and decide whether or not to specialize some of their units.

# Implementation: Concepts and Actors

LETIZIA PAOLI

The UN Convention against Transnational Organized Crime represents a milestone initiative of the international community in its efforts to fight – or, better, control – serious crime. Since it was opened for signature in Palermo, Italy, in December 2000, many domestic and international policy-makers alike hope that its rapid implementation will contribute significantly to the prevention and, even more so, to the repression of transnational organized crime. However, despite the hopes raised by the UN Convention, I will argue that the prevention, repression, and control of organized crime in all its forms cannot be successful unless the following three conditions are met:

1. the heterogeneous set of players and activities that are included under the umbrella concept of transnational organized crime are properly distinguished from each other
2. there is a sustained political will a) to implement the measures foreseen by the UN Convention and other relevant treaties and, more generally, b) to overcome bureaucratic inertia and rivalries and c) to make sure that law enforcement apparatuses operate efficiently, but consistently under the rule of law
3. the resort to criminal law instruments is accompanied by a) broader and innovative regulative efforts to minimize incentives for organized crime actors and b) social and economic measures to tackle the incentives for and long-term promoting factors of both criminal organizations and illegal markets.

In the following three sections of the paper, these conditions will be synthetically specified and discussed. The first section will be devoted to the

analysis of the key concept referred to in the title of this paper – namely, organized crime. The second will focus on the actors involved in the implementation process as well as on the policies and political attitudes necessary to effectively implement the Convention and achieve some degree of success in the control of organized crime.

## A. The Concept of Organized Crime: The First Condition

Effective, sustainable progress in the understanding and control of organized crime cannot be achieved unless the heterogeneous set of players and activities that are often included under this umbrella concept are properly distinguished. Unfortunately, the UN Convention against Transnational Organized Crime represents a missed opportunity in this respect, as it brings no clarity to the confuse worldwide debate on organized crime.

### *I. The Convention Definition*

The UN Convention provides what could be termed as "a minimum common denominator definition" of organized crime. It is, in fact, a very loose definition, with no strict criteria in terms of number of members and group structure. Article 2, paragraph (a) of the Convention, in fact, states: "'Organized criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crime or offences established in accordance with this Convention, in order to obtain, directly or indirectly a financial or other material benefit." (UNGA 2000a: 25). Serious crime is defined by paragraph (b) of the same article as any offence punishable by a maximum deprivation of liberty of at least four years (ibid.). A structured group is defined by paragraph (c) as "a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure" (ibid.).

To dispel any doubts raised by this definition, in the interpretative notes for the official records, which are enclosed in the Convention, the Ad Hoc Committee for the Elaboration of the Convention states: "the term 'structured group' is to be used in a broad sense so as to include both groups with hierarchical or other elaborate structure and non-hierarchical groups where the roles of the members need not be formally defined" (UNGA

2000b: 2). Given that, it is clear that the official definition of "organized criminal group" may include anything from the Italian Cosa Nostra to a thieves' gang, from Al Qaida to a pedophile ring or a drug trafficking network.

According to inside sources, arriving at a definition of organized crime that could suit all parties was indeed the most difficult task of the preparatory work (Housten 1998). The difficulties experienced together with the ensuing loose definition of organized crime (as outlined in the Convention) come, however, as no surprise considering the ambiguities and the confusion dominating the academic and political debate on organized crime.

## *II. The U.S. and European Debate*

The expression "organized crime" was invented in the United States and since the 1950s the U.S. official standpoint identified organized crime with a nationwide, centralized criminal organization, headed by and to a great extent consisting of members of Italian (and specifically Sicilian) origin and dominating the most profitable illegal markets. Since Joe Valachi's testimony before the Permanent Subcommittee on Investigations of the U.S. Senate in 1963, this criminal organization has been known as La Cosa Nostra (U.S. Senate 1951, 1963; Smith 1990).

The idea of an alien conspiracy polluting the economic and social life of the country has been rejected by the majority of American social scientists since the 1960s. They have accused this theory of being ideological, serving personal political interests, and as lacking in accuracy and empirical evidence (Smith 1976; W. Moore 1974; Hawkins 1969). At the same time, a different conceptualization was proposed which focuses on the most visible and a-controversial aspect of organized crime: the supply of illegal products and services. In order to eradicate the ethnic stereotypes of crime and to focus direct attention on the marketplace, several authors put forward the expression "illicit" or "illegal enterprise" as a substitute for the ethnically loaded term "organized crime" (Smith 1976; 1990; Haller 1990). As Dwight Smith, one of the earliest proponents of the new approach, expressed it, "illicit enterprise is the extension of legitimate market activities into areas normally proscribed – i.e. beyond existing limits of law – for the pursuit of profit and in response to a latent illicit demand" (1990: 335).

More often, however, organized crime itself has been equated with the provision of illegal goods and services. According to Block and Chambliss, for example, "organized crime [should] be defined as (or perhaps better limited to) those illegal activities involving the management and coordination of racketeering and vice" (1981: 13). Organized crime has thus become a synonym of illegal enterprise. Indeed, according to a review of definitions conducted by Frank Hagan (1983) in the early 1980s, consensus now exists among American criminologists that organized crime involves a continuing enterprise operating in a rational fashion and focused on obtaining profits through illegal activities. Most of these definitions have no set minimum requirement as far as the size, organization or stability of the groups involved are concerned. The focus lies instead on the illegal activities themselves, regardless of how or by whom they are carried out.

This conception of organized crime has been imported into Europe, with particular success in those countries which have little or no direct experience of the mafia phenomenon. As early as the mid-1970s, Kerner and Mack (1975) talked about a "crime industry," and, in an earlier report written in German, Kerner (1973) subscribed even more explicitly to the view of organized crime as an enterprise. This emphasis on illegal market activities has remained unchallenged ever since. Hence, for example, according to Dick Hobbs, "organised crime...[is] referred to in terms of its relationship to the marketplace" (1994: 442). Likewise, the Dutch scholar Petrus van Duyne points out that organized crime results from illegal market dynamics: "What is organized crime without organizing some kind of criminal trade; without the selling and buying of forbidden goods and services in an organizational context? The answer is simply nothing" (1997: 203).

This "entrepreneurial" conception of organized crime – focusing on the provision of illegal goods and services regardless of the degree of organization shown by the actors – has shaped official definitions of organized crime in many European countries. Hence, for example, the definition agreed by the German State Ministries of Justice and the Interior in 1990 maintains that:

> Organized crime is the planned violation of the law for profit or to acquire power, whose offences are each, or together, of a major significance and are carried out by more than two participants who cooperate within a division of labor for a long or undetermined time-span using at least one of the following:

- commercial or commercial-like structures
- violence or other means of intimidation
- influence on politics, media, public administration, justice, and legitimate economy (BKA annual).

An analogous, market-oriented definition has been adopted by the National Criminal Intelligence Service in Great Britain (NCIS 2001). These "entrepreneurial" definitions can be applied not only to the members of a criminal organization in a strict sense, but also to relatively small and loose partnerships and teams set up for the pursuit of profit-oriented offences, as the data yearly collected by the Bundeskriminalamt (German Federal Criminal Office) clearly demonstrate.[1] Although organized crime is usually equated with highly structured mafias in the German media discourse, the BKA data on organized crime proceedings show the small size of the criminal enterprises targeted by German prosecutor's offices. Less than ten people were in fact involved in 54 percent of all the organized crime investigations carried out between 1991 and 1999. In 39 percent of them, the number of suspects ranged between eleven and forty-nine. Only 7 percent of the organized crime proceedings involved more than fifty suspects at a time (BKA annual; see Paoli 2000b).

The public authorities of other countries stick, instead, to the original concept of organized crime as a set of large, well-structured criminal organizations. Among these countries is the United States, though this never adopted a single, legal definition of organized crime for fear of creating legal controversy which might unduly complicate criminal trials (Lowrie 2001; Blakey 1986). But when it became evident in the early 1980s that "the histories of American organized crime have been ordinarily drawn too narrowly in that they have focused nearly exclusively on the Mafia or La Cosa Nostra" (President's Commission 1986: 176), the strategy pursued by American public institutions was to widen their conception of organized

[1] The influence of the illegal enterprise paradigm on the German conception of organized crime is also confirmed by practitioners. This is, for instance, what Peter Korneck, a Frankfurt prosecutor with many years of experience in the field, has to say on the matter: "Experts who work not only theoretically but also practically maintain that [organized crime] implies the activities of persons who commit serious offences in an enduring cooperation founded on the principle of the division of labor with the aim of maximizing profits. If you omit the reference to 'serious offences,' you are left with the description of an activity that in Germany and in all the Western world is usually described as entrepreneurial activity" (Raith 1989: 268).

crime to include other collective actors involved full-time in the supply of illegal commodities in demand by the general populace. The priority targets that the U.S. Department of Justice currently assigns to investigators and prosecutors dealing with organized crime matters are, for example, the following: 1) La Cosa Nostra and Italian organized crime 2) Asian organized crime (basically Chinese Triads and tongs as well as the Japanese Yakuza) and 3) Eurasian (primarily post-Soviet) organized crime (Lowrie 2001; see also U.S. Senate 1991).

Even in Italy, both practitioners and the general public have no doubt that the "*criminalità organizzata*" is a set of large-scale organizations that are either criminal in se or primarily engaged in illegal activities (see Ministero dell'Interno 1996; 1998; 2000; 2001). Though the enterprise model of organized crime has strongly influenced the scientific analyses of the mafia up to the mid-1990s (see Arlacchi [1983] 1988; Catanzaro [1988] 1992; Santino and La Fiura 1990), organized crime is conventionally equated with Southern Italian mafia associations, most notably the Sicilian Cosa Nostra, a coalition of about a hundred mafia families predominantly located in Western Sicily (see Paoli 2000a; 2002a). Indeed, many people, including many practitioners, still think that Cosa Nostra represents a viable model for all forms of organized crime worldwide (Paoli 2000b).

## *III. Confusion and Danger*

I became fully aware of the different and sometimes clashing conceptions of organized crime held by practitioners (but also scholars) in Europe during a two-year comparative project involving prosecutors, judges as well as academics from Germany, Italy and to a lesser extent, Spain (Militello, Paoli, and Arnold 2001). During the project, which was sponsored by the EU Falcone Programme, two joint workshops were held in Palermo and Freiburg in 2000. As it turned out, most Italian participants were firmly convinced that Cosa Nostra constitutes an archetype of organized crime worldwide, were deeply worried about Cosa Nostra's and other Italian mafia organizations' international expansion and assumed that law enforcement agencies all over the world had to deal with similar problems – and if they did not, it was because they did not try hard enough. The German prosecutors and scholars attending the two conferences instead had the formerly mentioned entrepreneurial conception of organized crime in mind, and considered Cosa Nostra an exception, rather

than a model in the panorama of international organized crime and therefore rejected some of the measures regarded by the Italians as vital in the fight against organized crime (such as extensive witness protection programs and the preventive seizure and confiscation of property belonging to mafia suspects). They considered these measures unduly prejudicial to civil liberties and not necessary to deal with the most frequent forms of organized crime in Germany (see Paoli 2000b; 2000c).

This episode is here referred to because it shows very clearly that the dispute about organized crime representations and definitions has impacted on areas well beyond academic circles. Depending on how organized crime is defined, specific preventive or repressive measures may or may not be appropriate. What is likely to deter or weaken the Cosa Nostra may not be appropriate for disrupting drug trafficking rings and discouraging illegal exchanges.

The concept of organized crime is, in other words, a victim of its own success. Traditionally regarded as an issue that concerned only a limited number of nations (such as Italy, Japan, and the United States), from the late 1980s onwards organized crime has suddenly become a "hot topic" of public discourse all over the world. The expression "organized crime" has, in fact, been used as a catch-phrase to express the growing anxieties of national and supranational public institutions and private citizens in view of the expansion of domestic and world illegal markets, the increasing mobility of criminal actors across national borders, and their perceived growing capability to pollute the licit economy and undermine political institutions. However, as a catch-phrase often all the different meanings which have been attributed to this expression since the Second World War are simultaneously implied: while networks and small groups are most frequently targeted by criminal investigations, in the public discourse all over the world reference is usually made to mafia-type criminal organizations to justify the adoption of draconian measures and foster international cooperation (Paoli 2002b).

Especially in non-democratic countries or in countries with an authoritarian past this may well be a dangerous trick. As much as the fight against terrorism, in fact, the fight against organized crime may provide an excellent excuse for the leaders of the latter countries to prosecute or outlaw their opponents and to perpetuate illiberal judicial traditions.

In this respect, a good case in point is represented by the understanding and assessment of organized crime in Russia and the uses this concept has

been bent to. According to the estimates of the Russian Ministry of the Interior, over ten thousand organized criminal groups are active in the country (MVD 2000). This is a very staggering number. By comparison, Italy, which is usually considered the home country of organized crime, has only four major criminal organizations, if one includes – in addition to the solid and lasting associations of the Sicilian Cosa Nostra and the Calabrian 'Ndrangheta – the loose coalition of the Neapolitan camorra and the even looser coalition of the Apulian Sacra Corona Unita (see Paoli 2000a; 2000c; Ministero dell'Interno 1996; 1998; 2001).

The staggering figure of the Russian Ministry of the Interior finds a partial clarification in the four different definitions of organized crime – group of persons, group of persons by prior collusion, organized group and criminal society – which are provided by the Russian criminal code and make comparisons as well as understanding on the part of foreign observers difficult (Butler 1997: 23). If we adopt the last and most stringent definition, the number of Russian organized crime groups is drastically reduced: according to Russian official data, in fact, there are only about ninety criminal societies (Europol 2001; Kichanov 1999). This figure is, however, only seldom mentioned, whereas the ten thousand estimate, which is based on the first and widest definition of organized crime, is the figure most commonly referred to.

The analysis of over fifty drug-related criminal cases, which the author carried out together with the Research Institute of the Russian Prosecutor General's Office, was even more instructive (Paoli 2001). It turned out, in fact, that the organized crime aggravating circumstances foreseen by the third and fourth paragraph of article 228 of the Russian criminal code (i.e. acts committed by a group of persons by prior collusion and by an organized group) were often applied, even when no group existed *strictu sensu* at all. To show that there is no Western prejudice in the analysis, the assessment of the Research Institute of the Prosecutor General's Office is here quoted:

> the groups described in the sentences do not meet the conventional criteria of a group nor present the well organized character of the criminal activity related to illegal drug trafficking. In most sentences, a drug transaction between the buyer and the seller or even the common purchase of illegal drugs by two users are considered sufficient to prove the existence of a group (RIPGO 2000: 52).

Furthermore, according to the Russian jurisprudence, this assumption holds even when the other components of the group remain unknown. This is often the case as most sentences, even those resorting to the third and

fourth paragraph of Article 228, entail only one defendant. Out of the fifty-two cases that were analyzed only sixteen of them involved more than one defendant: two persons stood together on trial in twelve proceedings; three persons in two, and four and five persons in one penal proceeding each.

If these are the criteria, the Russian authorities' staggering figure of ten thousand criminal groups active in their country suddenly becomes much easier to understand. To play the devil's advocate, one could even wonder whether the stigmatization and harsh prosecution of the members of these "groups" does not serve the purpose of hiding other forms of crime and deviance. According to the third and fourth paragraphs of article 228, in fact, the defendants can be sentenced from a minimum of five to a maximum of fifteen years of imprisonment, even if they are caught with ridiculous quantities of illegal drugs: in the Russian jurisprudence heroin above 0.005 grams and LSD above 0.0001 grams are usually considered large amounts (Gilinsky *et al.* 2000: 32; see also SCNDC 1999).

While drug users and petty dealers are labeled as organized crime (and sentenced accordingly), the former Soviet bureaucrats and black marketers who "privatized to themselves" over 70 percent of Russia's state-owned industry and exported hundreds of billion of dollars abroad, are left free to enjoy their enormous wealth (Ledeneva and Kurkchiyan 2000). Only if they fall in disgrace with the political leader of the moment, may the so-called "oligarchs" become the target of law enforcement investigations: this is, for example, what happened to Vladimir Gussinski and Boris Berezowski, shortly after Putin become president of the Russian Federation (Fischer 2000). Even the heads of the most powerful Russian criminal coalitions have usually been skilled enough to avoid prosecution. If they enjoy upper-level political protection, they can go unscathed even in the unfortunate case that they are arrested abroad. In 1998, for example, the Geneva court was forced to free Sergej Michailov (the former and probably still current leader of the Solntsevskaja, one of Moscow's largest criminal coalition) of all charges, because the Swiss prosecutor and judges had repeatedly asked, but received no proof of Michailov's guiltiness from their Russian counterparts (Heger 2001). It may thus be well worth asking if the "oligarchs" or the "gangster-turned-legitimate businessmen" (and sometimes even politicians) have not damaged Russia more than the "small fishes" who usually engross the official organized crime statistics.

To conclude the first part of this paper: Since the 1950s the expression "organized crime" has been attributed with various and sometimes con-

trasting meanings, making it is now impossible to avoid the polysemy that it creates; indeed, its recent success in the international political debate is very likely to be due to its multivocality. However, when considering this wide range of phenomena in detail we must highlight the distinctions and differences in its uses – the alternative being to fall back into the night described by the German philosopher Hegel, in which "all cows are black."

In a nutshell, two radically different models of organized crime can be identified:

1. Some countries, such as Italy, Japan and, to a lesser extent, the United States and China have to deal with lasting large-scale criminal organizations ranging from the Sicilian Cosa Nostra and the Calabrian 'Ndrangheta to the Japanese Yakuza and the Chinese Triads. Although these groups are usually presented as the archetype of organized crime, they are neither exclusively involved in illegal market activities, nor is their development and internal configuration the result of illegal market dynamics. Mafia-type criminal organizations are, instead, multifunctional consortia of fictive brotherhoods, which arose before the consolidation of modern illegal markets. and usually claim to exercise a political power over their areas of settlement (Paoli 2002a; 2002b). Except for Italy and perhaps Russia, most European and industrialized countries are hardly afflicted by mafia-type criminal organizations nor do the latter monopolize – or even control a large share of – illegal markets even in such countries (such as Italy) that are plagued by the most traditional forms of organized crime.
2. What most developed and even developing countries have in common is a plethora of criminal entrepreneurs hoping to make a lot of money quickly by producing and selling forbidden goods and services. Especially in countries with no genuine mafia experience, these illegal markets entrepreneurs are often labeled as organized crime, though they are far from being very organized. Due to their illegal status, in fact, drugs and other prohibited commodities are usually traded by numerous, relatively small, and often ephemeral firms. The factors promoting the development of bureaucracies in the legal portion of the economy – namely to take advantage of economies of scale of operations and specialization of roles – are outbalanced in the illegal arena by the very consequences of product illegality. As a result of these constraints, in countries with a functioning state apparatus it is rather unlikely that large, hierarchically organized firms will emerge

to mediate economic transactions in the illegal marketplace (Reuter 1983; 1985; Paoli 2002b).[2]

Avoiding distinctions between the two above-mentioned forms of organized crime leads, above all, to negative consequences for understanding and analysis. Moreover, if we do not distinguish between the different forms of crime that are labeled as "organized," we are unable to find out their different "causes" and, thus, may end up adopting undifferentiated preventive and repressive policies, which, while effective with some forms, are totally ineffective with others.

## B. Actors, Policies, and Political Will: The Second and Third Conditions

The second part of the paper focuses on the actors who are most likely to be involved in the implementation process of the UN Convention against Transnational Organized Crime. By reviewing the actors, I also intend to discuss the two other conditions, which were stated at the beginning of this essay and explain why, in my opinion, they must be fulfilled in order to achieve some success in the fight against – or rather, the control of – organized crime.

### *I. The Actors of the Implementation Process*

As of May 2002, the UN Convention against Transnational Organized Crime had been signed by 141 countries and ratified by fourteen (CICP 2002). It will go into force as soon as forty states have ratified it and, according to high-ranking UN officials, this is likely to take place by the end of the year 2002 (van Dijk 2001).

[2] Whenever they deal with drugs or other illegal commodities, even Southern Italian mafia families do not operate like monolithic productive and commercial units. On the contrary, their members frequently set up crews with a few other mafia affiliates or even with external people to make drug or other illegal deals. These crews are far from being stable working units that could be compared to the branch office of a legal firm. Their composition frequently changes depending on the moment when deals take place or on the availability of single members. After one or a few transactions some teams are disbanded, while others continue to operate for a longer time, eventually changing their composition to some extent (see Paoli 2000d).

Once the necessary legislative amendments are made by the national parliaments, the Convention implementation will be largely entrusted to the national ministries of justice and home affairs – in federal countries, such as Germany, both federal and state ministries are likely to be involved – as well as police and judicial authorities.

A Conference of the Parties to the Convention has been set up to assist governments in their struggle against organized crime and also to promote and monitor the implementation of the treaty. To this end, the Conference will meet no later than one year after the treaty has gone into force to agree on various measures, which could include

1. boosting the exchange of information among nations on patterns and trends in transnational organized crime
2. reviewing periodically the implementation of the Convention
3. making recommendations to improve the treaty and how it is implemented, and last but not least
4. cooperating with relevant international, regional, and non-governmental organizations (article 32 of the Convention; see UNGA 2000a: 49-50).

As the Centre for International Crime Prevention will provide the necessary secretariat services to the Conference of the Parties to the Convention (article 33), this UN office is also likely to significantly influence the implementation of the treaty. In addition to the United Nations, other international and, in particular, regional organizations may play a relevant role in fostering the implementation of the Convention. These can in their own capacity sign the treaty *de quo*, provided that at least one of their Member States has signed the Convention (article 36; UNGA 2000a: 51).

Regional organizations, such as the European Union, the Council of Europe and the Association of Southeast Asian Nations (ASEAN), can also act as forerunners. They can be a sort of "institutional laboratory," experimenting with closer forms of police and judicial co-operation within a more homogenous regional context. In turn, the Conference of the Convention Parties as well as the individual governments can profit from the rich experience that some regional organizations, particularly the Council of Europe and the European Union, have over the decades accumulated in fostering mutual assistance, enhancing information exchanges, organizing training seminars and promoting standard laws and common policies in such key fields as the fight against corruption, money-laundering, and organized crime itself.

Indeed, many of the measures foreseen by the UN Convention already mirror previous steps taken by regional organizations and, specifically, the European Union and the Council of Europe. This does not constitute in any way a demerit of the Convention nor weakens its main strength: namely, to set standards for domestic laws all over the world. The countries outside the Western industrialized world will probably profit most from the Convention and need to make the biggest changes to introduce its requirements into their domestic legislation. Indirectly, Western countries will also profit from the elimination of differences among national legal systems, which have hindered mutual assistance in the past.

The criminalization of offences committed by organized crime groups in particular, as foreseen by the Convention, will create a common legal background, which is desperately needed by the law enforcement agencies and courts of those countries (such as Italy) that have to deal with permanent criminal organizations. And in this respect the Convention's proposals arrive just a wheel's length behind those of the European Union, which issued a joint action to criminalize the participation in a criminal organization at the end of 1998 (EU Council 1998).

The Convention is also to be praised for promoting the criminalization of money-laundering and, even more so, for its emphasis on the confiscation of criminal assets. Under the Convention, governments agree to separate organized criminal groups from their ill-gotten aims by confiscating the proceeds of crime or property of the same value and by identifying, freezing and seizing assets. They also commit themselves to empower courts or other authorities to order that bank, financial and commercial records or property are made available or seized. For the first time in an international convention, moreover, companies and corporations become liable for taking part in or profiting from serious crime involving an organized criminal group as well as money-laundering activities. These business entities are to be punished appropriately and suffer substantial economic penalties.

Another strength of the Convention is its tightening up of extradition proceedings to keep criminal suspects from fleeing prosecution in one country to reach freedom in another. The Convention parties are, in fact, asked a) to recognize the crimes covered by the Convention as extraditable when no extradition treaty exists with the nation in which the suspect is located; b) speed up extradition procedures, and c) conclude bilateral or multilateral agreements to make extradition more effective.

To tighten the net around organized criminal suspects, who may have fled to foreign soil, parties to the treaty also agree to cooperate by legally assisting one another, collecting evidence and exchanging pertinent information. Legal assistance could include: a) carrying out searches and seizures; b) providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records; c) permitting testimony or other assistance to be given via video link or other modern means of communication; d) granting witness safe conduct when testifying in a second country; and e) granting immunity from prosecution or giving reduced penalties to people who cooperate substantially with law enforcers investigating an offence and entering into like arrangements with witnesses from one nation whose testimony is needed in another.

Nations also commit themselves to ensure a rapid information flow between authorities, agencies and services as well as to promote the exchange of personnel and experts. In some cases, nations may also set up joint teams to carry out investigations.

## *II. The Political Will*

Despite the Convention's stimuli to harmonize legislation and foster legal assistance and law enforcement co-operation, many of its measures are likely to remain "dead letter," if there is not a sustained political will to implement them. Indeed, the ratification of this and other international treaties may even become a smokescreen to formally comply and *de facto* ignore – or even come to terms with – organized and economic crime, maintain regulatory schemes which attract "hot" and "dirty" money and tolerate the most vicious illegal trades, such as the trafficking in human beings. At a recent Europol Meeting on Eastern European Organized Crime, for example, Cyprus's compliance with all the Council of Europe conventions and the money-laundering regulations of the Financial Action Task Force was used by the representative of that government to reject all allegations that Cyprus is a hub for dirty and gray money from the former Soviet Union and for Eastern European women trafficked for the purposes of sexual exploitation (Demetriou 2001).

Even in countries that have long been committed to combating organized crime and have signed all relevant international treaties, a new government, even a democratically elected government, may impose drastic changes in criminal policies. A good case in point is here given by the le-

gal acts and policies that Italy's Prime Minister, Silvio Berlusconi, has been promoting since he won the general elections in May 2001. The offence of false accounting has been decriminalized, a new bill was passed denying validity to evidence gathered in Switzerland (a favored haven for Italian criminals as well as individuals and companies seeking to avoid taxes), if only small formal procedural defects can be proved, while the cabinet even long tried to block a landmark EU agreement to create a common arrest warrant. At the same time, before being forced to resign in December 2001, the deputy minister for home affairs, Carlo Taormina, in his capacity as a lawyer, defended a mobster in court against the state prosecution and accused Milan's anti-corruption magistrates of breaking the law: they should, he declared, be all sent to prison. Finally, Berlusconi's government has announced plans to drastically reduce the power of judges and prosecutors (*International Herald Tribune*, December 10, 2001: 9; *The Economist*, August 11, 2001: 22-23 and December 8: 32-33). Whether or not these plans are passed, it is clear that prosecutor's offices have already been intimidated by Italy's current cabinet and deprived of effective instruments for their organized crime and corruption investigations.

It may be well argued that Berlusconi's "reforms" are driven by his desire to find a legislative fix for his own judicial problems and that therefore Italy represents a special case. It is probably so – at least to a certain extent. But it is less exceptional than one might think. To provide an example: If Jacques Chirac's center-right coalition gains control again of France's national government, it is quite likely that the unprecedented independence that French investigating judges gained in the 1990s would be consistently reduced, to have all charges against the French president dropped (*The Economist*, July 21, 2001: 9; and November 10, 2001: 32).

A sustained political will is also necessary to overcome a high degree of inertia – if not outright hostility – in ministries, police forces, the judiciary and the legal professions against those parts of the UN Convention against Transnational Organized Crime and other multilateral and regional agreements seeking to speed up extradition, improve mutual assistance and, more generally, promote international law enforcement cooperation. While these goals are officially shared by everybody, the changes that are necessary to concretely achieve them are often feared by national state bureaucracies that are afraid of losing competencies and privileges, squandering precious information or being obliged to accept lower judicial standards.

The concrete steps and changes that are necessary to achieve the above goals are therefore frequently slowed down, dampened, emptied of significance or thoroughly avoided.

To observe these slackening (and even sabotaging) tactics in practice, it is hardly necessary to move out of Europe. In fact, even within the European Union, criminal justice has always been a jealously guarded national prerogative and there is still a fair amount of distrust of other countries' legal regimes. Despite the dismantling of borders in thirteen of the fifteen member countries of the EU, borderless Europe has very few common criminal laws and no "Euro-prosecutors" to enforce them. The repression of cross-border crime is governed by a web of bilateral agreements and national treaties that is sometimes so complex that the police do not bother to pursue criminals.

A pan-European federal police force, similar to the Federal Bureau of Investigation in the United States, remains a pipe dream. Europol, which formally began operations in July 1999, is sometimes described as an eventual European FBI, but is yet a long way off. Europol has a current budget of €35 million (about $31 million) and a staff of 242 people. The FBI, by contrast, has 28,880 employees and an annual budget of $3 billion. Up to the end of 2001 Europol dealt exclusively with intelligence sharing among national police forces on a rather short list of serious crimes and it was only in January 1, 2002 that it was finally allowed to gather intelligence about all forms of international crime. Furthermore, Europol (and its forerunner the European Drug Unit) has not received adequate support and information from national law enforcement agencies for many years. Even today it is doubtful whether it has the financial and human resources to properly carry out the tasks that it is expected to fulfil by the media and public opinion.

The attacks of September 11, 2001 on the World Trade Center and the Pentagon served as a shock treatment for European leaders that has resulted in a speeding up of the integration process in the area of justice and home affairs. At an emergency summit, ten days after the twin towers fell, several measures were adopted which had been regarded as premature just a few weeks before. Among others, it was decided that a Europe-wide database would be set up including a list of suspected terrorists and would be administrated by Europol. Yet, several months after this decision, high-ranking Europol officials still complained that they had so far only received scraps of information from less than half of the fifteen EU Member States (Kranz 2001).

Resistance to the internationalization of justice and internal security matters is not a problem of the European Union alone. Despite sharing relatively homogenous criminal codes and criminal justice systems, most of the former Soviet Republics have not been very responsive to Russia's calls for increased law enforcement cooperation and intelligence sharing even in such uncritical issues such as the repression of drug trafficking (Paoli 2001). A UN-funded project to create a database on organized crime, to be shared by all law enforcement agencies of the Community of Independent States (the former Soviet Union, minus the Baltic countries) never really took off, because of the mistrust of the Caucasian and Central Asian Republics vis-à-vis their "big brother" Russia: the former countries simply suspected that the database could have been exploited by the Russian police and security services to mingle in their own internal affairs (UNODCCP 1999).

These examples are quoted to show that even within regional organizations the reality of police co-operation and information sharing is often less rosy and indeed much bleaker than international conventions and politicians' speeches on official occasions might imply. Besides ratifying the Convention, there is a lot of concrete and long-term work to do: to overcome consolidated fears, reduce prejudices, create mutual trust and knowledge, and encourage officers to resort to the Convention instruments. No matter what politicians may think the real work begins after the Convention ratification.

Third, a sustained political will is necessary to make sure that the repression of organized crime and, specifically the implementation of the UN Convention are entrusted to law enforcement apparatuses working under the rule of law. No "shortcuts" unduly restricting civil liberties should be allowed – very intrusive policing methods should be resorted to, only when it is absolutely necessary and under judicial oversight. In the fight against organized crime – and even more so, in the recent fight against terrorism after the September 11, 2001 attacks – national governments seem, instead, sometimes to hanker after the power to get things done without the pesky rules of the law. Proactive policing methods are, in particular, used frequently and increasingly to investigate organized crime. In many organized crime activities – most notably, in drug trafficking – there is, in fact, no complaining witness: both buyer and seller want the transaction to take place. The police therefore need to rely on informants, wire-taps and undercover tactics that are not normally used in other crimes.

Especially in the United States, the civil liberties of suspected drug offenders have often been violated with impunity to promote the war on drugs. Thanks to *in rem* proceedings, assets of suspects can be civilly seized and forfeited despite the facts that criminal charges were never brought against them or that defendants are eventually acquitted of such charges (Gerber and Jensen 1998). Drug dealer "profiling" by police has allowed police to undertake numerous searches with barely plausible cause; most of those searched are either members of minority groups or young or both. Young males belonging to ethnic minorities are also disproportionately targeted by arrests and prosecutions (MacCoun and Reuter 2001: 15-38). Another undesirable effect has been the militarization of America's police forces. Some 90 percent of police departments in cities with population over fifty thousands and 70 percent in smaller cities now have paramilitary units. These Special Weapons and Tactics, or SWAT, teams are sometimes equipped with tanks and grenade launchers. Set up initially to deal with emergencies such as hostage crises, such teams increasingly undertake drug raids. Inevitably, from time to time they raid the wrong premises or shoot the wrong suspect (Cairncross 2001: 12-13).

Though tempting, the idea that casting aside most legal constraints is necessary to fight organized crime and terrorism may easily backfire: the adoption of even a single controversial measure – such as the United States' decision to establish military tribunals for suspected terrorists – may end up delegitimizing complex and otherwise successful repressive campaigns. In Italy, for example, even the very effective anti-mafia and anti-corruption judicial campaign progressively lost people's support because its opponents were shrewd enough to exploit the few mistakes and excesses of the law enforcement agencies to question the campaign's overall legitimacy (Spataro 2000; Ingroia 2001; Di Matteo *et. al.* 2001).

Even when – as in the case of Islamist terrorism – the threat is real and indeed unprecedented, it is essential that any new police powers be as limited as possible, and that the rival claims of liberty be taken seriously. The experience of the past few years, however, shows that in the repression of organized crime and even more so, in the repression of terrorism striking the right balance is bound to be tricky.

## *III. Criminal Law as an Instrument of Last Resort*

The prevention, repression and control of organized crime in all its forms cannot be successful unless the resort to criminal law instruments is accompanied by a) broader and innovative regulative efforts to minimize incen-

tives for organized crime actors and b) social and economic measures to tackle the long-term promoting factors of both criminal organizations and illegal markets. In other words, criminal law should be an instrument of last resort. It is often a necessary and unavoidable instrument, but it should be used sparingly, as other, less stigmatizing tools might have a more lasting effectiveness in the control of organized crime. Regulating anew those sectors of the legal economy and politics from which mafia-type criminal organizations draw much of their revenues and political influence may well cause them more damage than arresting dozens of their members.

A perfect example here is represented by the market for public contracts in Italy: the manipulation of these tenders provided Sicilian Cosa Nostra families with a preponderant part of their revenues and local power for about a decade from the mid-1980s to the early 1990s (TrPA 1991; 1998). Far-reaching judicial investigations and a thorough reform of the legislation regulating public tenders, coupled with the election of a new generation of mayors and local politicians, significantly reduced mafia involvement in that market in the 1990s (Paoli 2000a).[3]

Even in the case of the so called "Russian mafia," developing a regulatory infrastructure before privatizing the main state companies would have certainly served the country better than locking up thousands of petty drug dealers and thieves. The policy "privatize now, regulate later" was adopted instead, undermining the longer-run prospects of a market economy. Worse still, the private property interests that were created today contribute to the weakening of the state and the undermining of the social order, through corruption and regulatory capture (Stiglitz 1999).

The appeal of decriminalization and administrative regulation becomes even stronger when organized crime is basically understood as the provision of illegal goods and services. Let us be realistic: despite their (il)legal status, commodities such marijuana, cocaine, prostitution and gambling will certainly be provided as long as there is a demand for them. The expected profits of these illegal activities are, in fact, so high that, no matter how many producers and suppliers of these illegal commodities are taken

[3] These achievements are, however, threatened by the new policies and attitudes of Berlusconi's cabinet: while talking about the huge public investments foreseen by the construction of a bridge over the Messina strait, the current minister for public works, Pietro Lunardi, recently stated that "in Southern Italy there is the mafia and we need to come to terms with it" (*La Repubblica* August 23, 2001).

out of the market by the police, there is a huge "industrial reserve army" of Marxian memory willing to replace them. As an Italian drug user once stated, "for every five Moroccan dealers who are arrested, there are at least fifty ready to do the same job at even less" (Paoli 2000d: 118).

In at least some of these illegal markets, strict prohibition might not be the best solution. A more pragmatic approach might be more effective in subtracting market spaces of "organized" criminals, in imposing quality and health controls, reducing consumers' harms and public nuisance and, last but not least, acquiring tax revenue from these legalized activities. Without going into detail, experiments such as Swiss and Dutch heroin maintenance program (Uchtenhagen *et al.* 2000; CCTHA 2002), the Dutch cannabis policy (MacCoun and Reuter 2001: 238-64; Korf *et al.* 1999) or the recent legalization of prostitution in Germany (Bundestag 2001) represent steps in the right direction. A more realistic immigration policy on the part of industrialized states would also discourage several dozens of thousands of people every year from buying the services of smugglers and "snake-heads" – much more effectively than mere, even harsh, repression could ever do.

Though important, regulatory efforts alone are, however, not enough. In order to be successful the law enforcement fight against organized crime must be accompanied by social and economic measures to tackle the incentives for and long-term promoting factors of both criminal organizations and illegal trades. These factors range from poverty, relative inequality and underdevelopment to the inefficiency, weakness, and corruption of state apparatuses – in addition to consumers' steady demands for illegal commodities and the (usually illusory) high profits granted by the very prohibition regimes.

The drafters of the United Nations Convention against Transnational Organized Crime were well aware of this necessity. Article 30, in fact, states that "optimal implementation of the Convention" should include economic development and technical assistance for developing countries. But, as this endeavor exclusively relies on "voluntary contributions" of State Parties, there is a concrete risk that this part of the Convention will be implemented only sparingly (UNGA 2000a: 48). It should not.

If the implementation of the Convention is not accompanied by a consistent program of social and economic development, it may merely reinforce the suspicions of several developing countries that the Convention's main goal is to strengthen the security of rich countries from thugs and threats coming from poorer ones. These suspicions have above all been

expressed in respect of the Protocol against the Smuggling of Migrants – which was, as of May 2002, signed by "only" 101 states, forty less than those that had signed the Convention (CICP 2002). The representatives of several developing countries fear that this protocol might in fact further discriminate their citizens and predominantly serve the Western nations' goal to keep their poorer neighbors out of their doors.

To put it in more general terms: The fight against – or better, the control of – organized crime can achieve lasting success only under one condition: that the members of the territorial or ethnic communities, including a disproportionate number of offenders (and, eventually, buyers of illicit goods and services), can be convinced that the judicial repression of organized crime is in their interest as well – and are offered concrete alternatives to make a living. In this sense, measures, such the alternative development programs that the United Nations International Drug Control Program runs in several drug-producing countries, can only be welcomed (and financially supported) (UNDCP 2001; but see also Farrell 1998).

*Mutatis mutandis*, this "holistic" approach should be resorted to not only in developing countries, but in developed ones as well. Possibly, the main reason behind the progressive loss of popular support for Italy's very successful antimafia campaign of the 1990s, especially in the South, is because it was exclusively entrusted to law enforcement agencies rather than being supported by a comprehensive program to foster the social, economic, and cultural development of the South (Paoli 2000a). Hopefully, the international community, in dealing with the implementation of the UN Convention against Transnational Organized Crime, will not replicate Italy's mistake on a global scale.

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# United Nations Convention Against Transnational Organized Crime

## Some Legal and Criminological Aspects of Implementation

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## I

During recent years criminal law, no doubt, has changed its character significantly. Being once almost exclusively a domestic instrument, constituting one of the most vigorously guarded attributes of the state sovereignty, it is now of a more international, supranational and extraterritorial character (Nadelmann 1993). This means first of all, closer international cooperation, common efforts by sovereign states, their respective criminal justice systems and other state agencies to deal, in a more effective way, with crime which is becomeing increasingly a transnational characteristic. There is also, however, a growing tendency to argue for supranational mechanisms to deal with the problems posed by transnational crime, mechanisms which should include both, the creation of a supranational criminal law (substantial and procedural) and supranational "criminal justice agencies".

The main reason for all this is the fact that "transnationalisation" of crime, which has been taking place rapidly for some time, requires an equally transnational response (Fijnaut 2000). This transnational response may be of various natures. Although the idea of creating a supranational, even global criminal law and criminal justice system (at least in certain areas) seems to be quite an attractive one, there are too many obstacles for it to be implemented soon. Regional initiatives and developments constitute probably a better chance for the application of such ideas, the EU consti-

tuting one good example. Still, even here, with growing integration in many other areas, criminal law seems to be particularly integration-resistant. Because of this, especially in a global perspective, the main response to the globalization of crime constitutes unification and harmonisation throughout the world of the national systems of criminal law and improved international cooperation. Its main task should be to close loopholes resulting from the differences in national criminal law systems, differences which make it often possible for the perpetrators to avoid criminal responsibility.

The main tool of such a unification and harmonization constitutes so far, various international agreements of multilateral character. With respect to substantial criminal law, they impose on the state parties first of all, the duty to criminalize certain behaviours and actions, as well as the duty to introduce certain penal measures. With respect to criminal procedures they usually require an introduction or improvement of provisions on issues such as jurisdiction, extradition, mutual legal assistance, transfer of criminal proceedings, and transfer of sentenced persons. However, such treaties, referred sometimes to as "suppression conventions"[1] (Boister 2001, 3), are mostly not of a self-executing character. Most of their provisions require implementation, which means first of all, incorporation into domestic legislation by state parliaments. In other words, criminal law is experiencing a new tendency to be created increasingly on the international level, by the international community and international bodies, and not necessarily by national parliaments (Weigend 1993). What is left often to national legislation, is implementation and enforcement of the solutions agreed upon on the supranational level. This new tendency seems to have most significant impact on the scope of criminalization existing under national legislations. The impact of the UN drug conventions on the domestic drug legislation of all countries in the world constitutes here, probably the best example.

However, this tendency to unify and to harmonize criminal law throughout the world by the means of international treaties meets many obstacles and sometimes encounters significant resistance. Arguments against both, a supranational criminal law and an internationally created criminal law are of various character. They are based not only on attempts to protect the state sovereignty. They resort also to the fact that the criminal law of most

[1] This is due to the fact, that their task is to suppress certain phenomena, such as international drug trafficking, transnational organized crime, international terrorism etc.

nations is deeply rooted in certain historical and cultural traditions. As T. Weigend observed some time ago, the essence of the problem is not the fact that criminal law is more resistant to unification than other areas of law, because of the uniquely national character of the content of particular provisions or areas of regulation (Weigend 1993, 789). What is special about criminal law is the fact that it constitutes an important tool of social policy in the area of social control. But it is not the only instrument of the policy in this area that contemporary societies have at their disposal. Social control in any society, including state social control, may consist of many types of actions and policies, many of which are not necessarily of the punitive or repressive character. In other words, the ideas about whether and how to use criminal law are, in fact, due to the great extent of historical and cultural character and may differ between the nations. Again as T. Weigend puts it "these positive and negative decisions about the threshold of punitive intervention characterise the 'culture' of a state - in the meaning of tolerance and freedom from unnecessary repression" (Weigend 1993, 789). It means that political decisions to use criminal law or to use other means and tools of social control are determined to a great extent by the historical and cultural factors. This is used as an argument against criminalization and criminal law as prescribed by the international treaties. "Due to the significance of the role and position of criminal law for the atmosphere of social coexistence it is the prerogative and duty of the leadership having the democratic legitimacy to make decisions in this area" (Weigend 1993, 789).

This may pose a really serious dilemma in certain situations and have serious consequences for the process of "internationalisation" of criminal law and implementation of the treaty-made criminal law. No doubt in the contemporary world there are sometimes conspicuous differences between "penal cultures" of some nations or continents, differences which manifest themselves in their different ideas about social inclusion and exclusion as a tools of social control, different proportions between penal and non-penal measures of social policy, different roles played by repression and prevention in crime policy. On the one hand, there are countries (primarily in Europe) which at least attempt to adhere somehow to the *ultima ratio* principle and some sort of penal minimalism in their criminalization policies. They attempt also to address many social problems in non punitive ways, using other means of social policy. On the other hand, in some other countries of the world, especially in the USA, the new repressive approach sup-

ported by the specific "culture of control" (Garland 2001) emerged some time ago. This approach is based on penal maximalism, i.e. primacy being given to the repression and punitive means of dealing with social problems. This means not only intensive recourse to criminalization, resulting in overcriminalization of social life, but also significant intensification of repression.

Such differences may have enormous consequences for the treaty-made criminal law. This affects not only the eventual finding of some sort of common denominator for criminalization policy and technical description of actions or behaviours in question. It may have also serious consequences for the implementation of such provisions. Implementation of the international treaties is often understood in a purely technical sense, as "the adoption of whatever new domestic laws or amendments may be needed, accompanied by whatever new administrative frameworks or procedures are needed to make the new law actually work" (Summary). The process of implementation does not end, however, at the moment of passing the new laws by the parliaments of state parties to the given treaty. This may be a relatively easy task. Problems may begin when it comes to making the laws "actually work", i.e. being enforced in a uniform and harmonized way. As F. Rüter wrote some time ago, there are differences in legal cultures, in the way the law itself and its enforcement are understood and they may lead to completely different law enforcement outcomes, despite similar or even identical legal provisions (Rüter 1994). He used a good example of the Dutch and German drug laws which are, as a matter of fact, very similar, almost identical. This shows also the scope of criminalization, required - by the way - by the international drug control treaties. It is the practice of law enforcement, governed respectively by the legality and expediency principles which differs enormously (and differed even more at the time when Rüter's article was written eight years ago). Because of this, unification and harmonisation of legal systems, especially in the area of substantive criminal law, should mean not only unification and harmonisation of the "law on the books". It should also influence somehow the "law in action". The first often poses enough problems. The second may constitute a much more formidable task. However, without both elements, implementation may never be complete.

A good illustration of how the above problems may be magnified by the treaty-made criminal law, may constitute some international treaties created also under the auspices of the United Nations, namely international

drug control treaties. All three UN drug conventions, namely those of 1961, 1971 and 1988, contain important provisions obliging state parties to criminalize a broad range of acts relating somehow to illegal drugs (Albrecht 1998; Boister 2001). However, it is interesting to note that the approach of the 1961 and 1971 conventions with respect to criminalization duties meets the requirements of the *ultima ratio* principle much better than the approach of the 1988 convention (Krajewski 1999). Under the first two conventions there is practically no serious doubt with respect to the differentiation of duties with respect to the supply and demand for drugs. While supply has to be treated primarily as a matter of criminal policy, demand may be dealt - primarily or even exclusively - with non-penal measures. With the provision of article 3(2) of the 1988 convention, which requires criminalization of the possession of small amounts of drugs for own consumption, this has changed. Despite the fact that most countries agreed to the 1988 convention and ratified it, this particular provision creates certain problems and difficulties, as it seems to exclude the possibility of decriminalization of consumers and adoption of a purely public health and social policy approach in this area. The result is, that the 1961 and 1971 conventions are usually not questioned at all, while the 1988 convention encounters from time to time heavy criticism. It creates also problems for the process of implementation, as the practice of enforcing provisions criminalizing possession of drugs varies greatly throughout Europe and the world. Because of this it may be argued that the 1988 convention went too far in an attempt to unify domestic legislations by the means of the "treaty made" criminal law.

The main problem with the "treaty-made criminal law" is the fact that the process of its creation is by no means a political one. Moreover, despite the fact that the "treaty-made criminal law" is always agreed upon by the nations in the process of negotiating and ratifying international treaties, it is hardly completely consensual. As N. Boister observes with respect to the UN drug conventions, prohibition is the official national and international policy on drugs issue, but not all countries share a common conception of the drug problem or its solution. This means, that despite the fact that all governments subscribe officially to the policy of prohibition, many of them apply respective international standards and as a result, domestic legislation less than enthusiastically (Boister 2001, 10). On the one hand most industrialized consumer countries stress obligation of the producing countries to suppress supply of drugs. On the other, many producing countries

are of the opinion that it is the obligation of the consumer countries to do something about the demand for drugs which stimulates supply. Consequently, "the way that the international system has developed reflects the balance of power between these two groups of states" (Boister 2001, 11). The mentioned earlier controversial article 3(2) of the 1988 convention, seems to constitute the consequence of an attempt to guarantee some sort of political balance between the obligations of producer and consumer countries under this convention (Albrecht 1998, 681). As a result, however, the practice of its implementation differs significantly among various countries and attempted unification in this area seems to be failing.

The fact that the example of the 1988 convention is used here is not accidental. As a matter of fact, this convention is mentioned quite often as being a model to the 2000 convention against transnational organized crime. Does this mean that similar ambivalence about the acceptance of this convention may be possible in some countries? To a certain extent it may be the case. First of all organized crime, or certain forms of it are a matter of serious concern for some countries, but not for all of them. In other words, organized crime may not be placed equally high on the agenda of all governments. Second, for many nations and governments, such classical manifestations of organized crime as the historically and culturally rooted phenomenon of the Mafia in Italy or in the USA, may constitute something abstract and remote. Because of this they may not be convinced that organized crime is necessarily also their own problem. Hence, although everybody has been talking since some time about organized crime and everybody officially subscribes to the idea of international cooperation in fight against it, the political will to implement relevant treaties may differ substantially. However, it may be equally true that consensus surrounding the UN convention on transnational organized crime may be more solid than in the case of the 1988 drug convention. First of all, the discord about the 1988 convention regards a very important, for the general character of the drug policies, but at the same time relatively narrow, from the convention's point of view, issue of the approach to the demand for drugs. This issue has been hotly disputed for many years, not only in the scholarly literature and in the media but also in national parliaments and international bodies. Because of this, it was probably a serious mistake to regulate it in the 1988 convention. It seems that the 2000 convention was more cautious in deciding such "hot" issues, also with respect to the scope of criminalization. This restraint is certainly praiseworthy. Es-

pecially within the domain of combating organized crime there are plenty of measures which may be quite effective. But, at the same time, they may be subject to enormous controversy.

The explicit obligation to criminalize four types of behaviour, namely participation in an organized criminal group (article 5), laundering of the proceeds of crime (article 6), corruption (article 8) and obstruction of justice (article 23), probably nowadays, does not constitute controversial issues. Many countries of the world already criminalize in some way such acts. This means that the above provisions are intended to bring greater unification and harmonization of the national laws, and not necessarily to initiate criminalization of acts not considered yet to constitute criminal offences.

From this point of view, it is interesting to note that on other issues which have been subject to various controversies, the convention adopted a much more restrained approach. For example, although in article 10(1) the convention obliges the state parties to adopt measures establishing the liability of legal persons for participation in crimes involving organized criminal group, in article 10(2) it provides that this liability must not be necessarily of a penal character. Also article 12(1) of the convention requires adoption of the measures to enable confiscation of the proceeds derived from offences covered by the convention. Formulation of article 12(7) makes it clear, however, that it does not mandate adoption of the reversal of the burden of proof in such cases and points out only to the possibility of adopting such solutions. These two examples show that the 2000 convention does not attempt to press for solutions, commonly accepted in certain legal systems and eventually quite effective in fighting organized crime, which may be, however, difficult to accept in many other legal systems due to the history, tradition and constitutional reasons. Because of this middle-of-the-road, consensual approach with respect to many controversial issues, especially with respect to the duty to criminalize or introduce particular measures, the 2000 convention most probably will not meet serious resistance in national parliaments during the ratification process and will be accepted without major reservations throughout the world. This means also better prospects for the implementation of the convention in domestic legislation and its enforcement.

This may be even easier due to the fact, that there is no major dispute on the fact (as opposed to the drug use), that organized crime is a matter of criminal policy. In other words to do something about the problem of or-

ganized crime, both on national and international levels, no doubt intensive application of criminal sanctions is required. This does not mean, however, that organized crime constitutes solely a matter of repression. Also in this area, like in the area of "ordinary" crime, other, non-repressive measures may and should play an important role. And here, the issue of non-repressive, preventive measures in actions and policies aimed against organized crime is approached as well as their role within the 2000 convention, and their significance for the implementation process.

## II

There is no doubt that the discussion on the role of the prevention of crime plays an increasingly important role in contemporary criminology and crime policy. Generally speaking, crime prevention involves the disruption of mechanisms which cause criminal events (Pease 1997, 963). Contemporary strategies of crime prevention also means the partial reassignment of the responsibility for internal security (Obergefell-Fuchs 2000, 181), and because of this, are referred sometimes to as "responsibilization" strategies (Garland 1996). This means that not only the police, prosecution, courts, prison services etc., but also citizens, are treated as important agents of crime control policies.

The answer to the question how to disrupt criminal events is a major issue and answers to it depend partially on the views and ideas about the causes of crime. According to the structural view only economic and social change may constitute an effective measure of preventing crime, as this phenomenon has economic and social origins. According to the psychological view, prevention of crime involves changing established or potential offenders by control and reform, as crime originates always within the individual. Finally, circumstantial view stresses adjustments of the social and physical settings in which crime occurs as a proper method for preventing offences. Most crime prevention strategies known and adopted in the contemporary world are based, as a matter of fact, on the third assumption. This regards not only purely situational crime prevention strategies based on rational choice perspectives, routine activities theory or the idea of target hardening. It applies also to the variety of social work oriented or socio-pedagogic concepts of community crime prevention strategies (Obergfell-Fuchs 2000, 182).

This may cause certain problems with respect to the organized crime control policies. First, it may be relatively easy to convince and mobilize

private citizens to do something about incivilities, thefts and property damage in their community. It may be much more difficult to achieve the same with respect to organized crime and the Mafia, as this is supposed to be the duty of specialized agencies (Obergfell-Fuchs 2000, 182). Second, all contemporary crime prevention concepts and strategies share one important common feature. They are based namely on the assumption that most crime is of local character and has to be dealt with on the local level. Because of this one may ask how this preventive paradigm in contemporary criminology may apply eventually to the problem of organized crime which is supposed to have a supralocal, in many cases even supranational character? This may be of special importance for the 2000 convention, which applies explicitly to the transnational organized crime.

However, one can agree fully with C. Fijnaut, when he writes that "international cooperation should primarily focus on preventing and combating the relevant problems in individual countries" (Fijnaut 2000, 124). Moreover, as the same author observes, the very term transnational organized crime may be seriously misleading, as it suggests the existence of certain supranational, organizational structures which manage criminal activities across the borders. Despite this most organized criminal activities have, nowadays, local roots and local character (Fijnaut 2000, 120), or have a local, opportunistic and entrepreneurial character (van Duyne 1996). As I. Taylor puts it "the vast bulk of the professional crime taking place, for example, in Western Europe - for example the smuggling of contraband cigarettes through the territories of the European Union (avoiding local taxation and selling in high-cost market places) - is the product of opportunistic initiatives on the part of small groups of entrepreneurial-minded 'locals' with no ties to international organizations of any serious character" (Taylor 1999, 167).

Moreover, one may ask whether this local organized crime differs significantly in types of activities from "ordinary" crime. As J. Obergfell-Fuchs rightly suggests "if the subjectively visible form in which organized crime manifests itself turns out not to differ from that of 'everyday crime', [...] one can assume that concepts implemented to fight and prevent this 'everyday criminality' will also prove effective in the context of organised crime" (Obergfell-Fuchs 2000, 183). In fact, many forms of organized property offences (theft, burglaries), but also some forms of organized violence do not differ on "executive level" from "ordinary offences". Thus methods to prevent organized theft, or organized burglary do not differ

from these, which are suitable to prevent "ordinary" car theft or burglary. This means that many standard situational crime prevention strategies or community crime prevention strategies may be and are equally suitable to prevent both forms of crime.

Of course, in many other areas of organized crime its prevention will constitute and involve something different than the prevention of "ordinary", street crime. It cannot and should not limit itself to actions within local communities. It must involve larger social structures, as well as business, finances, administration, governement and other similar structures and institutions of contemporary societies. This depends, of course, partly on how one defines and understands the very phenomenon of organized crime. However, within the currently prevailing "economic" or "entrepreneurial" paradigm (Hobbs 1997, 828 - 830; Paoli 1998) which constructs organized crime as an outgrowth of demand for illegal goods and services, which creates illegal markets and illegal profits, preventive approach targeting, whith economic and similar structures is fully justified. Of course, because of this special character of the areas of preventive activities they may be more difficult to organize, than such activities on the level of local community with respect to "ordinary" crime. This does not mean, however, that the preventive paradigm of contemporary criminology does not apply to organized crime. Just the opposite may be and should be the case.

It seems that one more argument may support the thesis about the importance of preventive strategy for all actions against organized crime. Activities of organized crime in the contemporary world result primarily from the profit motives and are conducted in a businesslike manner, within a businesslike structures. This means that the rational choice paradigm (Clarke, Felson 1993) is especially suitable not only to describe and explain such activities, but also to plan any action against them. Crime should not pay. This old formulation may be especially important in the area of the measures against organized crime. To achieve this, one has to think not only about repression[2], but also about prevention: eradicating opportunities for illegal profits, making illegal business too difficult, too risky and less profitable. Of course it is easy to say something like this, and

[2] This regards not only repression conceived as a punishment, which - according to the economic theory of human behaviour - should make given choice and given behaviour „unprofitable". This regards also such repressive measures, considered to be especially suitable to deal with organized crime, as the confiscation of the proceeds of crime.

much more difficult to implement it in practice. Nevertheless, we should pay much more attention to such an approach about organized crime. Repression alone, as the example of the organized drug trafficking clearly shows, is not much help.

It seems that the example of the "organized crime explosion" in Central and Eastern Europe, since 1990, may constitute a good example of the role of the opportunity structures and rational choices in the emergence and development of organized crime. It was the economic transformation in this region which constituted such an enormous opportunity for illegal economic activities. Enormous amounts of suitable targets (vast state property to be privatised, private economy developing, often chaotically in a grey zone) had been accompanied by the lack of suitable guardians (weakened state, lack of proper regulations and supervision agencies, legal loopholes, lack of proper ethical and professional standards). This situation constituted probably one of the best confirmations of the "routine activities approach" on the macro scale (Felson 1994). Of course, suitable targets for organized crime will always exist. However, they may be hardened, better guarded, attacks may be made more difficult and prevented.

How does this problem look like from the perspective of the 2000 convention? In my opinion provisions regarding prevention and preventive measures play a relatively important role in this convention. They are by no means limited to the article 31, which deals directly with the issue of prevention. Such provisions as article 7, on (non-punitive) measures to combat money-laundering, or article 9, on (non-punitive) measures against corruption may constitute other examples of regulations aimed at establishing certain standards and encouraging preventive programs. Most importantly these provisions pose a crucial challenge from the point of view of the convention's implementation. There may be a danger that the 2000 convention will be perceived in many countries of the world primarily as one more criminal law "suppression convention" imposing duties to criminalize certain types of behaviours or activities in domestic law and providing certain improved tools for more efficient international co-operation in criminal matters relating to organized crime. Of course, these issues are of enormous importance and the 2000 convention constitutes, no doubt, a major and important step forward for the common action of the international community in this area. However, I think it would be quite problematic to limit expected and real effects of the convention to the issues of more effective repression. Without systematically promoting and encour-

aging prevention of organized crime, criminal law may remain somehow toothless. Because of this, implementation of the convention shall not limit itself to the inclusion of the new offences into domestic legislation of the parties, creating provisions on confiscation of the proceeds of crime or creating better legal grounds for establishing jurisdiction, extraditing offenders, providing mutual legal assistance etc. All this may be important but not enough to implement the convention or to be more precise its spirit. Without creating proper support structures, also in the area of prevention, criminal law instruments may prove to be helpless.

Two following examples from Poland may illustrate the importance of the above argument that criminal law provisions constitute only a framework which has to be enforced and supported by the variety of other measures. Since the beginning of the 1990s, the Polish police have been complaining constantly that they are unable to undertake any serious and effective effort against drug trafficking and dealing without having certain special legal instruments, such as criminalization of possession of drugs, controlled delivery and controlled purchase. Because of this, up to the mid-1990s, there were very few drug trafficking and drug dealing offences registered by the police statistics, and this, despite the fact that everybody knew that the problem of drug trafficking was growing rapidly. However, it is interesting to know that the number of such offences registered by the police started to grow around 1994, some time before the new "extraordinary measures" were adopted by the parliament. This means that the police managed somehow to increase their effectiveness in this area without them. The main reason for this constituted the creation of special drugs squads in a few major cities in Poland, i.e. police units concentrated their activities on drug offences. Results came very quickly, and without major changes in the law. Appropriation of resources (financial, organizational and human) and setting out priorities was enough. New laws were not necessary to overcome prevailing inertia. This example does not refer necessarily to the issue of prevention. But nevertheless, it illustrates that results are sometimes possible without a constant activism in the area of improving and refining the law. They may require something obvious: proper and sincere organizational and institutional efforts to enforce existing provisions.

Another example may constitute the issue of money laundering. Provisions on money laundering, quite comprehensive ones and have been up-to-date with international standards, have been in existence in Polish law

since 1994. Since that time, they changed (read: improved and refined) at least three times. Despite this constant refinement there was (to my knowledge) not one single conviction for money laundering, not to mention any assets seizure or confiscation of the laundered proceeds of crime. There were only a few investigations which ended up with nothing. In other words, implementation of these (probably perfect) provisions was not even lukewarm, and this, despite the fact that Poland is known for intensive money laundering. The main reason for this may be that these provisions were not backed by the respective regulations on "whistle blowing", i.e. reporting of suspicious transactions, supervision of the banking system etc. This law, which is of quite a comprehensive character, and which includes also many regulations of preventive character imposed on the banks and other institutions involved in financial operations, was passed only in the year 2000, and entered into force in June of 2001. It may be still too early for any spectacular results, but there are, at least, some signs that the special "watchdog" agency created by this law is active. This may soon lead to respective criminal law provisions being resuscitated.

Examples of the role played by the broad spectrum of actions of legislative, administrative, social policy and of other natures in preventing and repressing organized crime are plentiful. I will limit myself to one more example. Trafficking in human beings constitutes a very serious problem of recent years (Central and Eastern Europe, but also countries such as Philippines, being one of the most important sources of the victims). It is also subject to control by the variety of criminal groups, which are "recruiting" victims of this offence, and smuggling them for the purpose of exploitation, primarily of a sexual character. From this point of view, the phenomenon of trafficking in human beings may constitute, like the drug trafficking phenomenon, the most suitable target for the intensified repressive response. However, as B. de Ruyver, K. van Impe and J. Meese wrote "action towards a phenomenon like human trafficking cannot be limited to the expansion of a mere repressive legislative arsenal. A mainly criminal restraint of the phenomenon may cause an undesired effect: there is a real danger that a repressive approach will promote rather than halt traffic in human beings. It is believed that by punishing the criminals the problem will be solved, but in reality this one-sided approach often causes several side-effects such as an increased dependence of the victims on the criminal environment, double victimisation and a shift of prostitution towards more hidden forms of sex exploitation" (De Ruyver et al. 2000, 62). Because of this, authors call for a

broad spectrum of social policy and administrative measures in this area, which should amount, first of all, to certain form of "target hardening", i.e. making it more difficult for the criminal groups to recruit potential victims. And here, the broad preventive action in the countries of origin of the victims of trafficking in human beings, is necessary. Moreover, it seems that in some countries, eg. the Philippines, such programmes and actions play an increasingly important role (Aronowitz 2001).

This proves that the implementation of the criminal law provisions of the 2000 convention, both substantive and procedural has to be accompanied by the broad spectrum of measures of supportive and preventive character. Organized crime, like any other form of crime, does not constitute solely an issue for criminal law, repression and criminal justice agencies. This is a much broader issue for proper prevention strategies within economic structures, business and financial community, state and local administration etc. It should be also an important subject for action plans aimed at the society as a whole. This means not only mobilization of the civil society, creation and support of an "anti-organized-crime culture" and attitudes (La Spina 2000). As a matter of fact, involvement in organized crime activities seems to constitute nowadays one of the most important forms of innovative behaviour, as understood by R. Merton and the anomie theory. This is especially valid in such situations, areas or entire countries where access to legitimate means of achieving culturally defined goals is especially problematic, and cultural definitions of legitimate means weak or non-existent. Unfortunately, contemporary "market societies" create very often good conditions and opportunities for organized criminal activities. They create and exert also a strong pressure to resort to illegal means in the pursuit of financial success. Because of this, it is certainly true that "the containment of transnational crime is best served by a more equal distribution of wealth in the world" (Fijnaut 2000, 124). Article 30 of the UN Convention Against Transnational Organized Crime regarding the convention's implementation through economic development and technical assistance deals briefly with this issue. It may be true, that this issue is not best suited to be dealt with in the convention itself. But it must be paid crucial attention within the implementation process. This may be especially important in Central and Eastern Europe. This region, no doubt, is especially endangered by organized crime. This is not only the result of the fact that the transformation period created enormous opportunities for various forms of illegal enrichment. This is also the result of the fact that

illegal enrichment constituted for many, the best and easiest way to participate in the market economy and to achieve (new) culturally defined goals. Paying more attention to the causes of organized crime and its prevention may be of special importance in this region which has a special tradition of limiting any action against any social problem to legislation, mainly of penal character. But this problem and such attitudes are by no means limited exclusively to this part of the European continent.

Because of this, a special role within the implementation process should play in the development and planning of more detailed programmes and recommendations on the prevention of organized crime. As mentioned earlier, there are already some provisions on this in the convention itself. They are, however, of a rather broad, even vague character. Because of this, they have to be elaborated as more detailed programmes containing concrete ideas, proposals, recommendations, guidelines etc. At the moment good examples of such programmes and recommendations already exist within certain regional organizations or structures, such as the European Union or Council of Europe[3]. It is time now to recommend and apply at least some of them on a global scale. A special role within this process may and should be played by the Conference of the Parties to the Convention established according to its article 32. Its role should be "to improve the capacity of States Parties to combat transnational crime and to promote and review the implementation of this convention". It is necessary to note that according to article 32(3)(e), this Conference is empowered to make recommendations to improve the convention and its implementation. This probably gives enough possibilities to create and plan programmes of implementation concentrating on the above mentioned prevention issues.

This paper attempted to sketch only a few very general ideas about the main issues regarding the implementation of the 2000 UN Convention Against Transnational Organized Crime, and the main problems and directions which implementation should concentrate on. As one Polish author writing on the (at that time) project of the UN Convention Against Transnational Organized Crime rightly observed, implementation of the convention constitutes largely a matter of political will. In his opinion, this politi-

[3] See for example, the recent Council of Europe's Recommendation Rec(2001)11, of the Committee of Ministers to member states concerning guiding principles on the fight against organised crime, adopted by the Committee of Ministers on 19 September 2001, at the 765 meeting of the Ministers, especially chapter II, containing provisions relating to general prevention.

cal will may be of crucial importance in acceptance of the convention's provisions and introducing them into domestic legislation, what will constitute again a precondition for its effectiveness (Płachta 1998, 32). This political will may be of even greater importance for the implementation of the general spirit of the convention, being active not only in the field of repression but also prevention of organized crime.

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# "Transnational" "Organised" "Crime" – Prospects for Success of the UN Convention

MICHAEL TONRY

Peter Gastrow, in his opening remarks, said that there is a 'perceived need to address international problems through international means, problems that are beyond the reach of national governments.' There was, throughout the two days of discussion, considerable disagreement as to precisely what the 'international problems' are, and how amenable they are to international solutions. The proposed problems, for example, range from the spectre of national crime groups, usually exemplified by 'Russian organised crime', using violence and corruption as they spread their way around the globe; through the daunting technical complexities of control of money laundering; to the need to create, from the ground up, infrastructures of independent courts, professional police, and the other apparatus of law enforcement in less developed countries. At various points in the meeting, the UN Convention Against Transnational Organised Crime was said to be aimed at each of those problems and many that fall in the interstices between them.

Slightly oddly, because I make no claim to any specialised knowledge of organised crime, I was asked to listen to the discussions, observe the deliberations, and at conference's end, to give an overview of what I believe I saw and heard. This paper, slightly built up from the notes from which an oral presentation was made, is the result. It does not purport to be a scholarly paper, nor to cite any of the massive relevant literature, but, instead, is one man's effort to summarise two days of stimulating conversations.

The strongest conclusion I draw from the Conference is that the Convention embodies many aims of many actors, and its 'success' by any sensible criterion will depend on the narrowing of those aims by agreement

among participants. This is made more difficult since some aims are overt and some are latent. Among the latter, for example, development of rule-of-law values and legal infrastructure in less developed countries are clearly important aims of some covenant supporters. Many might regard the Convention as a success even if ten years from now the Convention had no discernible effects on organised crime but had discernibly enhanced the legal infrastructures of some less developed countries.

As I develop below, there are at least six different levels of organisational and procedural development envisioned by various proponents of the Convention, and there is substantial conceptual and practical confusion about the behaviours ('transnational organised crime') that are to be attacked and for what reasons. It is not obvious by what criteria to evaluate the Convention's prospects for combating transnational organised crime. If the aim is fundamentally to weaken organised crime groups, the prospects are dim. The logistical, procedural, and legal differences impeding effective multinational collaboration are formidable, and many less developed countries have only rudimentary legal systems and law enforcement apparatus. It is not realistic to imagine all those problems being addressed and satisfactorily resolved within a few years.

From a different, incrementalist, perspective, substantial progress within a few years may be an unrealistic goal. There are major impediments to multinational cooperation to be overcome and the convention and the related Conference of State Parties and Secretariat may provide support, coordination, leadership, and resources which, over time, provide means for overcoming those impediments.

A cynic might conclude that the Convention and its related activities and organisations are likely to be no more than another international boondoggle. An optimist might conclude that big problems require big answers, sustained efforts at solutions, and patience and that the Convention provides a framework for that kind of approach.

This paper consists of four sections each of which, I believe, addresses a key theme of the conference. Section I reviews the structural and procedural aims of proponents of the Convention. Section II steps back to deconstruct the phrase 'transnational organised crime,' in order to illuminate some of the ambiguities that term raises and to suggest ways in which, depending on the circumstances and on law enforcement and national aims, the concept can be made more useful. Section III addresses issues of prevention of transnational organised crime. Section IV discusses needs for systematic knowledge and data to inform those efforts.

## I. International cooperation

Here are some of the reasons an international convention against transnational organised crime is said to be necessary. Some criminal organisations transcend national boundaries and can be attacked only through international means. Some crime problems in individual countries include participants from a number of countries and can be effectively investigated only by means of cooperation between several nations' law enforcement agencies. Some national crimes are committed by people who live in other countries or can be investigated only by resort to people who live in other countries, and gaining access to such people requires international cooperation and reconciliation of rules of procedure and evidence. Some crimes are defined differently in various countries and attacking them successfully requires that definitions be standardised. Some countries lack even the most rudimentary structures or traditions of effective law enforcement capacity that incorporates human rights and due process considerations, and that capacity must be built before attacking transnational crime in those countries becomes at all possible.

That is a long list, though it could be longer, and can be illustrated by remarks made by various people during the Conference. In the following paragraphs I describe six structural, procedural, and processual aims of various proponents of the Convention.

### *A. International agency cooperation and bureaucratisation*

Professor Jan van Dijk and Professor Frank Höpfel discussed the need for organisational support for international efforts against transnational organised crime and the provisions of the Convention that are relevant. The Convention provides for the creation of a 'Conference of State Parties,' supported by a Secretariat. The Secretariat is envisaged as being the existing Centre for International Crime Prevention in Vienna. The functions of the Conference, supported by the Secretariat, include collection and dissemination of data and research findings; training; technical assistance; some degree of revenue-sharing under Article 30 of the Convention; and, probably most importantly, the elaboration of policy statements and rules to flesh out the Convention's provisions.

Assuming that the (per Professor van Dijk) 132 countries that signed the Convention yield the minimum 40 ratifications that are required, the establishment of the Conference of State Parties and its bureaucratisation

through the Centre for International Crime Prevention will surely happen. Obtaining forty ratifications should be easy; transnational organised crime is a reverse motherhood issue; who could be in favour of it, or unwilling to ratify a Convention against it? For many poorer countries, the Convention creates at least a possibility of funding for national infrastructure-building, and that may be sufficient reason, regardless of the subject matter of the Convention, to ratify it. Concerning the Secretariat: an enormous UN bureaucracy already exists and it is unimaginable that the Centre for International Crime Prevention will not be expanded to take on these additional functions. This, then, is the one aim that is almost inexorably certain to be achieved.

### *B. Mechanisms for building infrastructure*

Professor Peter Gastrow pointed out that many developing countries lack the legal system infrastructure to attack transnational crime seriously, and that one of the important functions of the Convention should be to assist in the development of that infrastructure. Many countries, he said, lack traditions of politically independent courts and judicial independence, professionalized police committed to upholding democratic political values, and effective anti-corruption capacities. Many also lack the resources and sufficient specialised technical competence to deal effectively with crimes such as money laundering, procedures such as asset confiscation and extradition, and high-tech investigative technologies.

Professor Margaret Beare pointed out that construction of basic civil institutions is an enormously difficult job and, using the example of Haiti, pointed out that other countries' attempts to develop institutions in less developed countries, such as the U.S. effort to create a professional police force in Haiti, are often undertaken in pursuit of external aims of the assisting country rather than internal needs of the assisted country. Other examples were given. For example, many U.S. initiatives to train police in Eastern European and underdeveloped countries in practice focus heavily on enhancement of their skills in drug law enforcement and money laundering enforcement, two principal external policy preoccupations of the U.S. rather than on more basic features of democratic policing. Another example, drug eradication efforts in less developed countries are typically undertaken in the interests of consuming countries even though the effects may be detrimental to the economic or commercial development of producing countries.

This aim seems much more challenging, impossible of complete or substantial accomplishment, but worthy. If less developed countries lacking basic legal and human rights infrastructures can obtain resources under the Convention for building such infrastructures, that has to be a good thing.

### *C. Standardising statutes.*

Professor Frank Höpfel discussed features of the Convention that relate to standardisation of criminal statutes and establishment of minimum standards for criminal statutes in compliance with Convention. These include requirements that member countries adopt asset confiscation, extradition, and money launderind statutes that comply with Convention requirements. It encourages member states to adopt minimum packages of organised crime laws including, particularly, in Articles 5, 6, 8, and 23, laws on drug trafficking, money launderind, and public corruption. Professor Vincenzo Militella mentioned the concept of 'container offences,' offences that are defined in outline in the Convention but whose precise content can be filled in at the national level.

The likelihood that ratifying states will adopt statutes that formally comply with the Convention seems high. That has been the experience with the 1988 Vienna Convention on drugs. However, adopting minimum packages of complying laws does not necessarily predict how they will be applied. A number of people in discussions pointed out that German, Swedish, and Dutch national laws on drug trafficking are all in compliance with the 1988 Convention, and formally are highly similar, but in practice are enforced very differently. The legal systems of the English-speaking countries recognise a concept of desuetude, the languishing through non-enforcement of criminal statutes. The distinction between law in books and law in action is well-known. Concerning standardisation of statutes, the odds of passage of compliant laws seem high, but the extent of their practical enforcement a matter to be seen.

### *D. Developing law enforcement procedures and mechanisms.*

Professor Mark Mackarel discussed the need to establish procedures for law enforcement and judicial cooperation across national boundaries. Although this need exists for criminal organisations whose activities transcend national boundaries, and for crimes that transcend national boundaries, it also exists for practical enforcement of national laws. The overrid-

ing issue here is that of national sovereignty, a subject discussed by Professor Otto Lagodny, which can create very substantial impediments to effective investigation of crimes, wherever they occur, when evidence or witnesses or defendants are located outside national boundaries. Some solutions include such things as co-operative agreements, provisions for asset seizure and confiscation, and witness protection. Both Professor Mackarel and Dr Sabine Gless indicated that practical cooperation through official channels can be very time-consuming and cumbrous and that that provides a serious disincentive to effective cooperation of law enforcement agencies across national boundaries. EUROPOL, for example, does not now have effective case-investigative powers and thus does not have the capacity to be a European police force.

There was a widely shared view that these practical matters of the logistics of cooperation are enormously important, in principle soluble, but in practice very hard to overcome. God is in the details, an English-language aphorism goes, and the details here are devilishly difficult, diverse, and daunting.

### *E. Reconciling judicial procedures and evidence rules.*

Dr Sabine Gless discussed the challenges for effective international law enforcement cooperation of reconciling court procedures and evidence rules. For examples, she discussed two doctrines. The first is the 'double criminality requirement,' that for extradition or international cooperation European countries' laws require that an act be an offence in both involved countries. That at first impression seems a simple requirement, but as recent debates over the creation of a European arrest warrant illustrate, there are strong differences of view of what kinds of crimes are sufficiently important for countries to waive their sovereignty interests to permit judicial or law enforcement agencies of other countries to interfere with residents or citizens. The Convention establishes a qualifying category of 'serious offences' defined solely by reference to whether the maximum authorised prison sentence is four years or more. Thus in an individual case, though offence X might be punishable by ten years' imprisonment in Country A, which wishes extradition from Country B, the offence might be punishable by three years maximum in Country B and extradition would thus be unavailable.

A second example, illustrated by Austrian–German comparisons, involved questions of deposition of witnesses outside the prosecuting coun-

try. Under German law, defendants have a right to be present at depositions of witnesses, to confront their accusers, and to cross-examine. Under Austrian law, at least until recently changed in response to the European Court of Human Rights decisions, such rights did not exist and witnesses could be interviewed outside the presence of the defendant or her lawyer, and without notification to either of them. The question that arises is whether that evidence, legally admissible in Austria, can be used in Germany.

Procedural and definitional questions of these sorts are potentially easy of solution, both conceptually and analytically, though in practice they are difficult of solution politically. Although reasonable arguments can be made for a variety of positions on the detailed workings of the 'double criminality' concept or concerning questions of what minimum procedural requirements are essential before evidence may be admitted into any court, reaching those agreements at an international level is bound to be very difficult. Professor Jan van Dijk, for example, offered sardonic comments on the positive and negative contributions of law professors in meetings of working groups engaged in development of the Convention. Their positive contributions were their intelligence, their detailed understanding of issues, and their depth of understanding of relevant law and experience. Their negative contribution, however, was their rational bureaucratic belief that systematic, principled ends-based analysis should drive decision-making rather than, as Professor van Dijk said was inevitable, 'political horse-trading.'

Horse-trading is inevitable in politics and in international settings likely to be more than usually divorced from substantive policy goals. Dr Letizia Paoli, for example, described a meeting of a EUROPOL committee concerned with money launderind which included discussions of countries, whose financial institutions were known by law enforcement agencies to be actively involved in laundering. These included Cyprus. A delegate from Cyprus, however, indignantly pointed out that a non-law-enforcement international banking authority had not included Cyprus on lists of money launderind problem states, and demanded an apology for the insult to Cyprus. The apology was given, along with assurances that Cyprus would be removed from the lists of problem jurisdictions. That story is tittle-tattle, but it makes the point that concerns for national prestige, as well as matters of ideology and national financial self-interest, will play important roles in any international deliberations on technical matters. Thus, while in principle it should not be difficult to devise standard or minimum procedures that pertain to efforts to obtain evidence or to investigate crimes across national boundaries, in practice it is likely to be very difficult.

### *F. Funds for less developed countries*

Entirely independent of transnational organised crime, from a world community perspective, it is important that less developed countries be given support to develop the infrastructure that will permit them to be modern states whose law enforcement and judicial processes incorporate human rights standards and can address crime problems effectively. Article 30 of the Convention does provide, somewhat ambiguously, for funding to less developed countries. The difficulty is that the funding is 'voluntary,' and whether, and how amply, it is provided can be known only in the future. Professor Militella did point out that Italy has agreed to transfer ten per cent of assets realised under Italian confiscation and seizure laws to the UN, and that may be a start. Infrastructure development in underdeveloped countries is a worthy cause. It is unlikely that this vehicle will play a major role in its achievement.

## II. "Transnational" organised crime

Especially in a conference attended by representatives from a number of countries, academics from a number of disciplines, and a cross-section of law enforcement and prosecutorial figures, the term 'transnational organised crime' was used diversely. Professor Cyrille Fijnault pointed out that the concept of 'transnational organised crime' is vague and often misleading. He pointed out that many crimes that are referred to as transnational, for example, human smuggling or drug dealing, are in fact national crimes. National criminal statutes have provisions forbidding, for example, drug trafficking and, while the drugs themselves may have crossed national boundaries, and various actions that occurred along their route may have been crimes in particular places, the ultimate crimes themselves insofar as they trouble, say, Belgium, are Belgian crimes and can be enforced under Belgian laws.

By itself the phrase 'term 'transnational organised crime' is much too broad to be useful. A number of distinctions might be made under each of the three key words, transnational, organised, and crime.

### *A. Transnational*

The term 'transnational' can be thought of separately to modify the term 'crime' and the term 'groups'. Most 'transnational crimes' are not transna-

tional except in a trivial sense. Very little of 'transnational crime' is the work of vertically integrated organisations which conduct all phases of production, distribution, and ultimate sale of illicit goods. Colombian drug cartels may sometimes in the U.S. have been counter-examples, but they are not the norm. Thus the broadest sense of the term 'transnational organised crime' is misleading and incomplete. More narrowly, transnational crimes might be such things as smuggling and evasion of duties, cyber-crime and money launderind, and transporting illicit goods. Even with these offences, it is unclear that 'transnational' helps. Smuggling and duty evasion are positive crimes in the countries whose laws are being evaded. Cyber-crime and money launderind are crimes in the country whose laws are being evaded, but the tracing across national boundaries, or at least through the ether as it circles the globe, may be necessary, and these, accordingly, may be crimes that often are inherently and genuinely transnational.

'Transnational organisations' may be a concept of greater usefulness. There are criminal organisations, for example, organised crime groups with national origins whose corporate activities transcend international boundaries, and they might meaningfully be thought of as 'transnational organised crime groups.' Effective opposition to their activities may require genuinely transnational law enforcement cooperation. Alas, the concept of transnational organised crime *groups* has more face validity than does the concept of 'transnational crimes.'

## *B. Organised*

The Convention defines organised crime groups as involving three or more people working together attempting serious crimes (defined as crimes punishable by four or more years' imprisonment) over time for financial or other material benefit. This is, inevitably, a troubling definition. Dr Letizia Paoli in her talk reviewed the evolution of conceptual analysis of 'organised crime' and, in particular, described the disagreement between those who find 'organised crime' a useful concept and others who regard 'illegal enterprise' as the more useful concept. Whatever the case, the definition that I have cited from the Convention is much too broad to be useful. Much youth crime, for example, is committed by kids in groups, which means that any crimes committed by three or more young people potentially punishable by four years or more are instances of organised crime. That seems unhelpful.

### *C. Crimes*

This term is less troublesome, once it is understood that crimes are for the most part behaviours under national laws and that the locus of their commission, and therefore the primary location of enforcement, is likely to be national. One important issue arose in Mr Willy Bruggeman's discussion and that is the identification of those crimes that warrant specialised attention, especially internationally. He mentioned, with some disapprobation, that only three out of fifteen EU countries, a recent survey showed, were attaching high priority to human smuggling as an organised crime activity. There are two ways to think of this. The first is that the data are not in any way upsetting; they merely reflect differences in national or legal culture which have resulted in different law enforcement priorities being attached to different crimes. From that perspective, twelve out of fifteen is instructive, but only of the existence of different priorities. From another perspective, twelve out of fifteen is very disturbing if the assumption is made that international or multi-international decisions, usually taken by international bureaucrats or committees of representatives from nations, ought to have authority to decide for all countries what crimes are of especially high priority.

Probably I have made the preceding point tendentiously and it must be clear that my view is that local and national officials are better positioned to determine priorities and allocate resources among them than are distant bureaucrats. Accordingly, I see data such as twelve-out-of-fifteen as, at most, raising a question for further investigation rather than as evidence of national failures.

## III. Prevention of what?

The topic 'prevention of transnational organised crime,' has all the ambiguity of the concept 'transnational organised crime.' Professor James B Jacobs gave an overview of work under the heading 'Prevention of Organised Crime.' Four forms of organised crime prevention can be identified.

### *A. Repressive/law enforcement prevention*

This is traditional law enforcement aimed at the use of police powers and criminal sanctions to control behaviour. A great deal is known, from policing research in a variety of countries, about more and less effective ways

to apply law enforcement and judicial techniques to the control of crime. This raises classical questions of the deterrent, incapacitative, rehabilitative, and moral educative effects of law enforcement. More narrowly it raises questions about search and seizure, street-level stops, disruption of local drug and prostitution markets, and so on. The best evidence we have is that there is great uncertainty about the effectiveness of repressive measures, particularly in relation to morality-based crimes like drug use and distribution and prostitution. Little about repressive measures targeted at transnational organised crime is likely to raise different issues than are raised by national organised crime.

### *B. Social prevention*

Dr Letizia Paoli expressed regret that Italy, in its anti-Mafia efforts of the 1990s, 'failed to combine repressive and law enforcement efforts with massive social, economic, and cultural reform.' Massive social, economic, and cultural reform is a lot to ask for. Governments tend not to be very good at long-term strategic planning. It is politically easier and less costly, and more satisfying to the public, to use repressive measures, to media attention and public applause, than to invest large sums in low-visibility, long-term, social-structural programmes. This is evocative of the debate between those who have long urged attention to 'root causes of crime' and those who urge attention to material incentives and disincentives to wrongdoing. In cost-benefit terms, developmental and social programs aimed at root causes are far more efficient than repressive measures. The benefit, however, is ten to thirty years delayed and thus less appealing to elected officials.

Social prevention no doubt is a worthy thing and, in a rational and decent world, would be the primary strategy of crime prevention. In our world, it is unlikely that the Convention or any other international effort will importantly change the outcomes of national- and sub-national-level politics to produce the kind of social reforms that will make the attractions of participation in crime or organised crime significantly less beguiling than they are now.

### *C. Structural/criminal*

Situational crime prevention is in vogue in most Western countries. The idea that changes in road traffic patterns, architecture, and hardware, can

make criminal opportunities less attractive, and therefore crimes less likely, is appealing to almost everyone. There are two organised crime equivalents. Both, like situational crime prevention, depend on something that might be called 'crime analysis,' or, in this context 'organisational analysis.' Professor Jacobs gave two examples. The first, drawing on work with legitimate U.S. organisations that have long been infiltrated by organised crime, notably labour unions and various industries (construction, waste removal) in New York City, includes successful efforts in the U.S. to remove organised crime from legitimate business organisations. These included such techniques as aggressive licensing, in which review procedures assure that people with organised crime connections are not allowed to participate; the creation of trustees and monitors with authority on a day-to-day basis to conduct, in effect, continuous crime audits; the creation of compliance officers within organisations (for example, within labour unions); and the creation of independent, private-sector inspector generals (IPSIG), private firms that can be hired by licensing agencies or companies to assure that licensees do not engage in corruption and do not interact with corrupt persons or organisations.

In addition, Jacobs in other works has described ways in which various sustained law enforcement efforts, supported by extensive economic, political, even ethnographic studies of the markets in which organised crime groups operate, were used in the U.S. greatly to weaken the influence and scale of organised crime in American cities.

### *D. Structural crime*

Most 'transnational organised crime' is arbitrage in which goods and services that can be produced or obtained cheaply in one country are transported to other countries in which they can be sold at great profit. Whether the transnational organised crime is the smuggling of cigarettes, or cars, or drugs, or radioactive waste, or stolen works of art, or women for prostitution, or firearms, the arbitrage quality is the same. Those distribution networks are typically not controlled by vertically-integrated organisations that carry out each stage of the distribution but, instead, consist of large numbers of organisations of different size and permanence that perform particular functions for pay in a particular place at a particular time.

Understanding how to attack those distribution chains requires detailed and sophisticated understanding of incentives and disincentives at each stage and, in particular, requires focus on countries in which the ultimate

markets exist. For example, England and Wales have a substantial problem with cigarette-smuggling. This no doubt results from the high cost, based on taxation, of cigarettes in England and Wales. A single pack of twenty cigarettes typically costs £4. This is twenty English pence, 30 American cents, or forty Canadian cents, for an item whose production cost is a fraction of a penny. Insofar as cigarettes, a commodity that does not have the same moral dimensions as heroin, can be obtained cheaply in one country, it is almost inevitable that people will be attracted to making large amounts of money from commission of what is at most a venial offence. Seriously attacking cigarette trafficking, accordingly, would require a clear understanding of the entire distribution chain, identification of its most vulnerable points, and recognition that the ultimate incentives are in the destination country and may well need to be changed.

Most importantly, our experience from international efforts to deal with drug distribution chains outside the destination countries is that they are typically ineffective and often counter-productive. For example, there seems little question in the U.S. that drug eradication programmes in producing countries, and international interdiction efforts at borders and in the air or sea, have been completely ineffective at reducing the availability in the U.S. of drugs as measured by price and purity which, in combination, have offered cheaper drugs continuously over a twenty-five year period.

## IV. Systematic knowledge, data, and research

Systematic knowledge about 'transnational organised crime' is difficult to come by. Partly this is because of the definitional issues addressed in Section II. Much of what is called transnational organised crime is simply organised crime within the boundaries of an individual country but in which the commodities being distributed originate elsewhere. Some of what might be called transnational organised crime consists of actions that may be unlawful on both sides of national borders, or only one, by which goods are illicitly taken across. This will usually be a crime in the receiving country and, while multi-national law enforcement cooperation may aid in efforts against smuggling and duty evasion, the investigative techniques and management questions are conventional. Transnational organised crime may, for a third variation, be considered as crimes committed in a variety of countries by organised criminal networks that operate across national boundaries and that are self-sustaining and enduring.

Serious research, or collection of systematic data, on a crime problem cannot be undertaken seriously until it is clear precisely what the problem

is. Given the amorphousness of the concept of 'transnational organised crime' it should be of little surprise that relatively little research is available. This is, however, sadly, not unique to 'transnational organised crime'. Relatively little first-quality research has been completed or published on organised crime within individual countries for reasons that, presumably, include lack of access to research subjects, lack of funding, refusal of government agencies to provide access to confidential files to researchers, and possibly lack of career incentives to researchers to engage in work in this area. Whatever the rationales are, at least three kinds of research seem to be important, and one to be avoided.

To start with the negative: the one to be avoided. Professor van Dijk reported on preliminary efforts by the UN Institute for Prevention of Organised Crime, that attempted to establish organised crime indices for individual countries. He reported that, on the basis of very preliminary early work, it appeared that countries in which homicide rates and public corruption were high, organised crime's proportionate contribution to all crime was typically very high at over 50%. There appears to me to be two serious problems with research of this sort. First, since the term transnational organised crime is so amorphous, and basically useless unless closely defined in relation to particular policy or law enforcement questions, an international barometer of transnational organised crime inevitably will be uninformative. Second, however, even assuming such a barometer were useful, the kinds of measures the UN Institute is using are tautological. High levels of public corruption and high homicide rates will be associated with countries lacking legal infrastructure and well-established legal values of neutrality, judicial independence, etc. That organised groups engaged in illegal activities are especially likely to be active in countries that are fundamentally disorganised should be no surprise. (Van Dijk's barometer measured the percentage of organised crime, rather than transnational organised crime's, contribution to total crime). This does not solve the problems, however, because organised, as noted above, may mean no more than that two, three, or four people are involved and, as this is a characteristic of much crime in all places at all times, knowing the number of participants will not indicate anything about the nature of the organisation.

My notion of organised crime would focus on the use by organised groups of systematic corruption or threats of violence to achieve illicit ends and would target those organisations for special effort. I will be surprised if data exists that allows researchers or others to identify the proportions of total crime attributable to such groups.

The three forms of recommended data collection. First although most 'transnational organised crime groups' do not perform all functions in vertically integrated arbitrage markets by which goods are transported from producing countries to consuming countries, organised crime groups of various kinds may be involved in different facets of distribution of various goods between various countries. A crucial component of the knowledge base for understanding transnational transfers of illicit goods is to develop rich econometric and narrative models of the transnational markets in which goods move, identifying both pull and push factors that facilitate their movement. National and international organisations, of course, have already tried to develop such models, at least in narrative form. Such models, however, can provide important insights into intervention techniques likely to be successful. For the smuggling of cigarettes, as mentioned above, for example, the most promising measures may be in the reduction of taxes on cigarettes, thereby removing much of the pull factor. Similarly, where scarce luxury goods, or capital goods, are a pull factor, as in Eastern Europe in the 1990s, there is much to be said from a crime prevention perspective of investing international funds in building manufacturing infrastructure to produce the wanted goods in the consuming countries. In relation to smuggling of radioactive and other waste, a fully elaborated model might well suggest that solutions are likely to be in the home country and require that push factors be addressed. These might, for example, require that governments, in the interest of crime prevention, subsidise disposal costs in national facilities or provide funding to recipient countries so that they can build long-term safe disposal facilities and adequately supervise them.

A second form of systematic knowledge acquisition that would bear fruits would be to create capacity within individual countries, and, eventually, within international organisations, to centralise collection or maintenance of data related to illicit goods that move across national boundaries. Maintaining good records, or formulating plausible estimates, of drug use through measures of availability, purity and price, of confiscated firearms by country of national origin, of seized attempted-to-be-smuggled goods, could provide the basis for social indicators of changes in the relative balance of licit and illicit goods in the market or of domestically and externally produced goods. Similarly, maintenance of manufacturing data compared with consumption data over time might provide clues to goods that are being manufactured in effect for export and of changes in proportions

of goods being manufactured for export. Systematic time series data of the sorts mentioned in this paragraph could provide useful indications for law enforcement purposes of changes in markets, changes in directions of flows, and of changing incentive structures for organised criminal groups.

Finally, there is important ethnographic or even journalistic work to be done on the origins, nature, and durability of organised crime groups that are active cross-nationally. Such work inevitably presents formidable challenges but if we want to understand the emergence of internationally active criminal groups, and to try to learn whether they are different in kind, in important respects from national organised crime groups that emerged in earlier periods, the only way to find out is to inquire and observe.

Professor Margaret Beare asked, rhetorically, of Professor Gastrow, who had participated in many of the negotiation sessions that led to the Convention, 'Was there data underlying decisions or were initiatives driven by political interests and political speeches?' Jan van Dijk's insight, mentioned earlier, that in the end it's all horse-trading, no doubt was already known to Professor Beare. The validity of the rhetorical question, however, remains. This area of high political and substantive salience embodies enormously challenging problems for all countries but particularly countries with weaker national political structures in Eastern Europe and less developed parts of the world, and is a subject concerning which relatively little systematic knowledge is available on the basis of which to formulate policy. Probably it has always been so, and perhaps it will be. On the other hand, paralleling the modest account of the likely positive effects of the Convention – that if it achieves its latent function in discernible ways enhancing rule-of-law notions and legal infrastructure in countries now lacking them, it will be a success – if policy and law enforcement approaches in relation to organised crime groups operating internationally and transnationally can, incrementally, become better informed and more soundly based on evidence rather than on political symbols or misimpression, that will be a good thing.

# Organized Crime in Terms of the Transition Process and the Criminal Legislation

NIKOLA FILCHEV

The transition from a centralized state economy to a free market has proved a difficult process that has a high social price. Besides its positive aspects, such as democratization of public life and greater individual freedom, this transition also has some negative effects, most dangerous among them being the boom in crime.

## 1. The State of Crime

*1.1.*

An analysis of crime data, carried out by the Council for Criminological Research with the Prosecutor General's Office outlines the following picture of crime in Bulgaria. There is an increase in the relative share of serious violations of the individual – murder, rape, robbery, and body injuries committed with particular brutality. In the economy, there has been a growing trend of illegal privatization of state property, illegal transfer of state property into the private sector by handing out non-collectible bank loans or through tax evasion. Powerful economic cartels have come into being. These accumulate capital in a criminal way, and the "dirty money" goes into circulation, corrupting civil servants, thus generating new crimes. There arises severe competition among the cartels over the distribution of territory in the criminal business.

*1.2.*

There has also been a sharp rise in organized crime in its two forms – non-violent "white collar", and violent crime. The organized criminal activity is

characterized by a high degree of cohesion amongst the members of the criminal cartel who are active, mostly in the economic sphere. They engage in a complex long-term activity with self-interested motives, whereby there is a strict distribution of functions among the participants – some organize and manage the criminal cartel while others commit concrete crimes. Often the people involved are not aware of the complex criminal ring they have been drawn into.

For example, in organized car-thefts some commit the theft itself, others change the license plates of the vehicle, still others transfer it across the border, or sell it. All these activities are directed from a centre by a group of people who get the profit and reinvest it in other criminal undertakings. The organized criminal activity is characterized by a "division of labour" among those involved, whereby the actions of some of them, for example the leaders, remain unpunishable.

The organized criminal cartels create a "shadow economy", which crowds out the state from industry and trade. However, we have to make a distinction between the development of a market economy, accompanied by the elimination of state monopoly, and the various manifestations of organized crime.

Organized crime affects all spheres of public life including politics. It penetrates the very structures of state power. Law enforcement bodies, notably the departments of the Ministry of Interior, are powerless against criminal cartels involving former Interior Ministry officials.

Criminological analysis reveals the following main activities carried out by criminal cartels: racketeering through a "contract" for protection or insurance (including the imposition of lower purchasing prices of farm produce, known as "rural racket"), illegal privatization of tourist facilities, theft and smuggling of cars, illegal oil trafficking, cross-border drug smuggling, organizing of illegal gambling and prostitution, creating channels for the transfer of foreign citizens across borders, highway robbery, etc. The criminal cartels focus their interest on the privatization of seaside holiday resorts, banking and insurance, and the oil trade. The goal is: laundering of criminal proceeds.

It may be concluded that crime involving violence, economic, organized crime and corruption are the main elements defining the structure of crime in Bulgaria.

Among the factors determining this criminality boom are: the economic crisis, the pauperization of the population, unemployment and the increas-

ing gap between rich and poor, destruction of the system of moral values, the failure of the criminal legislation to take into account the new developments in society and new forms of socially dangerous activity they bring with them; the disrupted links between the law-enforcement bodies.

## 2. Control on Crime

Crime is a complex social phenomenon, a result of the interplay of a number of social-political, economic, and criminological and legal factors. The problem of crime has, therefore, various aspects: a) social-economic, regarding crime as an element of the economic life of the state; b) criminological, examining crime as a phenomenon of social pathology and c) criminal law aspect, whereby the emphasis is on the elements of crime (objective side, guilt) and proving the fact of the crime.

The state of criminality, as it is well known, does not depend directly on legislation. The criminal law is but one of the means (and not a crucial one) of control on crime. In addition, law is conservative and lags behind the development of society. All this accounts for the limited powers of criminal law (the punishment) in fighting crime.

The new conditions of economic life in the transition to a market economy give also rise to new forms of publicly dangerous behaviour. The effectiveness of criminal law depends on how adequately it reflects the new social realities. This is why the legislative decisions must take into account the state of crime and criminality trends.

### *2.1. Necessary amendments to the Criminal Code*

*a.*

In the first place, there is a need to study violent behaviour, that is, aggression in the economic sphere, in politics and everyday life, in the street, in inter-ethic relations, the proliferation of firearms among civilians, the formation of large armed groups, etc., in order to provide the relevant legal bans. It is also necessary to update the institute of inevitable defence, which should give people greater opportunities for self-defence; the law should also regulate the detention of a criminal as a circumstance excluding the public danger of the act, etc.

The economy is one of the most criminogenous spheres. It is necessary to make an updated legal evaluation of economic behaviour in the condi-

tions of transition to a market economy and to define the acts, deserving to be criminalized because of their high social danger and incidence. A case in point are the various forms of illegal "acquisition" of property. Criminal liability should be provided for in the following cases: a) abuse of office for unlawful gains in privatization, taxation, customs, licensing, exports and other activities; b) fraudulent bankruptcy; c) use of various forms of fraudulent business (firms, joint-stock companies etc.) with the purpose of embezzling someone else's property; d) illegal issuing of securities; e) engaging in unlicensed commercial activity: f) borrowing money by providing false information; g) unfair competition and establishing monopoly on the market and on prices; h) embezzlement by means of computer technology, to mention but a few. Foreign experience can also be helpful. For instance, under the United States law participants in a business firm operating with funds obtained by crime will be prosecuted. Worth noting here are the amendments to the Criminal Code (State Gazette, Issue 50 of 1.6.1995), whereby the legislator defines as crimes: the carrying out of banking transactions as an occupation without a license (Art. 252, Par. 1 of the Criminal Code); carrying out of banking activities with funds obtained in breach of established regulations (Art. 252, Par. 3 of the Criminal Code), etc.

*b.*

Modern organized criminal activities do not fit within the classical framework of complicity. This is why the Criminal Code should match the criminological reality by the creation of legal provisions reflecting adequately the public danger arising from contemporary collective criminal acts. The Criminal law must be amended in a way that would make it applicable to the behaviour of all accomplices in a collective crime, providing for a differentiated liability while preventing strict liability. Hence, the controversial issue of the criminal prosecution of legal entities.

Referring to corruption, the problem is not the lack of legal definition of corruption. The Criminal Code of the Republic of Bulgaria has a number of provisions prohibiting the main forms of corruption. These are the provisions on bribes (Art. 301 - 307a of the Criminal Code), violation of official duties for the purpose of acquiring benefits (Art. 282 of the Criminal Code), abuse of office in order to receive unlawful benefits (Art. 283 of the Criminal Code), etc. It is necessary to "adjust" existing provisions to contemporary acts of corruption on the one hand, and on the other, to create

concrete specifying provisions treating specific forms of corruption in different spheres of public life, notably the abuse of office in the privatization of state property.

*c.*

In addition to the above amendments to the Criminal Code, prompted by the immediate needs of life, there must be further improvement of the general part of the Criminal Code. There is a need to review the gravity of the criminal offences in the new social context and to categorize crimes, providing for the same legal consequences for all crimes of a given category. The law should make it clear that the main aim of the punishment is general prevention, which is achieved by a fair punishment, proportionate to the gravity of the crime. It is also necessary to improve the system of punishments, the institution of insanity, guilt, exemption from criminal liability, etc. In the special part of the Criminal Code, punishments should be adjusted to the new public danger and moral reprehensibility of crimes.

## *2.2. Theoretical aspect of criminal law making*

Historically, for a long time criminal law was crafted empirically, under the influence of legal tradition and intuition. Today, there is a need for a scientific approach to criminal law creation. The dynamic development of social relations in the transition to a market economy calls for a theoretical instrument that allows the legislator to take scientifically founded decisions in the process of making laws.

There are two basic problems for the legislator creating criminal legal norms. First, to define the scope of crime, i.e., to draw a line between the criminal and the non-criminal behaviour. For this purpose there must be a theory (criteria) for the criminalization of acts. However, this is not enough. The second problem is to differentiate the crimes and respective punishments within the framework of criminal behaviour.

It is taken for granted that the theoretical model of criminalization is created by the criminal law science, but the problems of the differentiation of liability are still to be examined. The differentiation of criminal liability is a means of upholding the principle of fairness in criminal law. This is why, the effectiveness of the criminal law and its impact depends largely on the differentiated approach to crimes and punishments.

The growing differentiation is a lasting, justifiable trend in the development of criminal legislation. However, any differentiation has a limit, de-

pending on the optimum degree of abstractness (concreteness) of the criminal legal norms. There is an inevitable contradiction between the requirement for abstractness (generalization) and concreteness (casuistry) of the norm. On the one hand, the legislators seek maximum precision in defining the crime in the legal provision. On the other, they must create a formula broad enough to cover all possible variations of a crime. The difficulty lies in combining these two opposite requirements – for abstractness and concreteness, i.e., to find the optimum correlation between the general (the typical) and the particular (specific) in characterizing the various crimes in the law.

The differentiation is deepening along the lines of concretization of the elements of crime, separating special offences from the general offence, the substitution of the evaluative and blanket features by ones that are formally defined, specifying the details of a crime in the law, etc. The result is: a decreasing abstractness of the disposition and a narrowing down of the limits of judicial discretion. The question is how far can the legislator go in the concretization of the elements of a crime; how deep can he/she delve when considering the specifics of an act and differentiating the liability thereof from similar forms of criminal behaviour. One of the key problems of penal policy is to strike the right balance between the legislative judgment and the discretion of the court in the process of criminal legal regulation. The basic criterion should be the effectiveness of the criminal legal provision, or its potential to achieve the targeted social result. An analysis of the current legislation and a case study of its application point to the need of a certain limitation of the court discretion.

## *2.3. Procedure for hearing criminal cases*

The criminal cases hearing procedure can have a great impact on the effectiveness of the fight against crime. Crime control goes hand in hand with the limitation of citizens' rights. Defining the principles of the criminal procedure, the legislators are always faced with the dilemma: the public interest in having control on crime, or the citizens' rights? The problem has found various solutions in different historical or national contexts. However, the global tendency is toward the establishment of a rule of law, which guarantees human rights and rejects the totalitarian methods of government. I shall highlight here but a few of the problems of the criminal procedure that arise in the period of transition to a market economy.

*a.*

Today, there is no doubt about the need for a differentiation of the criminal procedure depending on the category of the crimes considered. This is a way to achieve a higher effectiveness of the legal system. The Code of Criminal Procedure of the Republic of Bulgaria creates wide opportunities for a differentiated approach in hearing criminal cases according to the gravity and complexity (actual and legal) of the crimes. The law provides for three mutually complementing forms of criminal procedure: a) with preliminary investigation, b) with an inquest and c) summary (simplified) procedure, without preliminary proceedings. The summary (popularly called "quick") proceeding under Art. 409-414 of the Code of Criminal Procedure along the lines of the Anglo-Saxon system consists only of a court phase. Despite its shortcomings this procedure is unjustly underrated.

*b.*

According to the new Constitution, the legal proceedings in the Republic of Bulgaria are of the adversarial type (Art. 121, Par. 1 of the Constitution). In an adversary trial two parties with equal rights (prosecutor and defendant) perform the functions of the prosecution and defence, and the court decides impartially. The adversarial principle has been upheld fully in our criminal proceedings. There is an opinion, that the official obligation of the court to seek the objective truth in a case (Art. 12, Par 1 of the Code of Criminal Procedure) should be limited. In this way, the court is believed to be free from any prosecuting (accusatory) bias in its work.

*c.*

One of the most important guarantees of the legality of justice and the citizens' rights is the strict definition of the rules governing the evidence and the proof of it. These rules serve as a criterion for the admissibility of evidence, that is, can certain facts be used as evidence or not. Data obtained in violation of the law cannot be used as evidential material; they cannot serve as a basis for a conclusion that a defendant is guilty of a specific crime. The decision of the US Supreme Court in the Miranda case (1966) is well known as it imposes strict limitations on the Police in investigating crimes. The confession of the defendant Miranda that he had committed serious crimes was been ruled out as inadmissible evidence because the Police had violated the defendant's right of defence (the preliminary interrogation was conducted in the absence of a defence counsel and the rights of the detainee were not read to him).

Whenever there is a rise in crime, the executive power claims more rights for itself (mostly – the possibility of out-of-trial collection of "evidence") in order to deal with crime.

There is no criminality in the world of George Orwell, where the state establishes total control, penetrating deeply into the intimate life of people, violating basic human rights (watching, following, bugging, recording, entering homes, violating the secret of communication etc.). Our ideal, however, is not the Orwellian state.

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