PART THREE

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“CURRENT SITUATION OF AND COUNTERMEASURES AGAINST TRANSNATIONAL ORGANIZED CRIME”

UNAFEI
I. CRIME: FROM A DOMESTIC TO AN INTERNATIONAL PROBLEM

Before World War II, crime was almost solely a domestic issue. Few persons were concerned with what happened beyond their borders, since this had little effect on day-to-day life. This scenario has now changed fundamentally.

Some of the changes have been due to technology. Faster air service for people and goods means that it is easier to get around, and also easier both for offenders to move from one country to the next, keeping more than one step ahead of the law enforcement authorities, who must respect jurisdictional limits. More sophisticated telecommunications make the planning and directing of crimes possible from a distance, also from abroad. Electronic fund transfer means that the profits from crime can be rapidly moved beyond the reach of national authorities.

Among the political and economic changes have been the establishment of regional trade groupings such as the North American Free Trade Association and the European Union, which are removing barriers to the movement of people, goods, services and capital. The opening of formerly closed economies and disruptions in economic development have contributed to an enormous increase in crime, crime which has had an impact even outside the region. And because of political developments and corruption in many countries around the world, some government officials have shown their willingness to collude with offenders in, for example, terrorism, drug trafficking, money laundering and economic crime.

The social changes have included the impoverishment of people, in particular in developing countries and the countries in transition. Although informal social control still operates effectively in large parts of the developing world, many developing countries have undergone massive rural-urban migration, with the new arrivals in the cities faced with an almost total lack of prospects for education and employment. In many countries, attempts at economic development have failed, leaving a legacy of a growing external debt. War and internal conflict have not only had a disastrous effect on persons caught in their grip, they have increased the number of internally displaced persons and the international flow of refugees. Given the scale of such problems, it is understandable that the criminal justice system in many developing countries is under-resourced and under-trained.

According to one dominant explanation for changes in the structure and level of crime, the routine activity approach, the amount and structure of crime is affected by three factors: the number of suitable targets for crime, the number of likely and motivated offenders, and the absence of capable guardians to prevent would-be
offenders from committing crime.\textsuperscript{1} In all three respects, the potential for crime and for organized crime is expanding worldwide and the technological, political, economic and social changes just referred to have intensified this expansion.

The number of suitable targets for crime has increased. The increase in industrial production and, in many countries, the change from a state economy to a market economy have increased the amount of consumer goods available. Radios, televisions, video recorders, compact disk players, brand-name clothing, cosmetics and other goods are now being produced in greater numbers domestically. These factors increase the number of targets for property crime.

In a somewhat parallel manner, for example the introduction of modern telecommunications and computer systems, the proliferation of private companies, and the wide use of new forms of non-cash payment (such as credit cards) have increased the number of targets for economic crime.

The number of likely and motivated offenders has increased. Throughout the world, millions of people have been willing or unwilling participants in what has been called the “shadow economy” or “underground economy”, which grew out of the iron laws of supply and demand. What the legal market could not produce and distribute in sufficient quantities and/or of adequate quality (which in many countries often seemed to be just about anything and everything) the shadow economy sought to supply. This leads, among others, to smuggling, illegal migration, and prostitution.

The borderline between the legitimate economy and the shadow economy is often impossible to draw, and many people received their indoctrination into crime in this way. Where economic times have been bad, the standard of living has dropped, unemployment has spread and inflation has increased. As a result, more and more persons have turned to the shadow economy and to crime as a means of supplementing their income. The reality (and perception) of increased crime has contributed to the readiness to commit crime.

The pool of likely and motivated offenders is also being expanded by the prison system. The prison population in many countries (particularly in the United States, the Caribbean, Central and Eastern European and Central Asia) is quite high, and has been expanding during the 1990s.\textsuperscript{2} Conditions in such prisons appear to be very poor by UN standards, and these prisons can thus do little to rehabilitate the offenders. On the contrary, the time spent in prison can provide the prisoners with information on new crime techniques and suitable targets, as well as supply them with willing partners in crime.

The readiness and ability of society to intervene in criminal activity has weakened. The current resources and approach of the criminal justice systems in many countries cannot provide an effective response to the increase in crime. There are shortages in personnel, facilities and equipment. Training and


the level of knowledge among practitioners in many cases is woefully inadequate. With the recent economic changes, the relative salary level of criminal justice professionals has often deteriorated, making it difficult to recruit and retain competent individuals. The poor economy also means that criminal justice agencies are often unable to obtain or upgrade their facilities and equipment. For example, many officials in Central and Eastern European countries have sadly noted that they are trying, both figuratively and literally, to use Ladas and Moskvitches to catch criminals who are speeding away in BMWs and Mercedes-Benzes.

The developments reviewed briefly above have contributed to the growth of ordinary crime as well as to the growth and the internationalisation of organized crime. Organized crime as such is not new. For example Italian, Nigerian, Chinese and Japanese organized crime has long roots, and organized criminal groups from these countries have had members or cells even in foreign countries, as well as the international contacts needed to exploit emerging markets for illegal goods (such as drugs, but also illegal firearms, pornography, smuggled alcohol and cigarettes, counterfeit currency, counterfeit goods and stolen goods) as well as for illegal services (such as prostitution, slave labour, loan-sharking, money laundering and illegal immigration). What is new is the degree to which they are prepared to expand their activities internationally, supplementing their traditional criminal areas with new areas, and networking with other criminal organizations.

II. THE EVOLUTION OF INTERNATIONAL CRIMINAL JUSTICE

A. From Strict Territoriality to the Recognition of the Need for International Cooperation

And how has the criminal justice system responded to the growth and internationalisation of crime? As long as crime was defined as (and, in most respects, actually was) a local or at most national issue, criminal law remained almost wholly territorial, concerned only with acts or omissions that had been committed in the territory of the forum state. This was the approach taken in particular by the common law countries: offences committed abroad were not their concern, and their authorities would not tend to be willing to assist the authorities of another State in bringing offenders to justice.\(^3\)

Where formal cooperation in criminal cases is impossible, informal cooperation may arise. This began to emerge in law enforcement during the 1700s and early 1800s, when the major international law enforcement concerns were related to

\(^3\) This attitude was not limited to criminal law, but could also be seen in civil cases. It is true that private international law began to evolve already during the 1200s. This discipline seeks to determine what law should govern a transaction or occurrence that has a connection with two or more jurisdictions. However, international cooperation even in civil cases was almost non-existent up until the 1800s. A person who wanted to summon a person in another country or enforce a civil court judgment in another country often found this to be impossible. It was not until the mid-1800s that growing interest was expressed in international cooperation in civil matters. One of the earliest treaties on service of process for civil cases was signed in 1846 by France and by the Grand Duchy of Baden (later, part of Germany).
piracy, the slave trade, smuggling and cross-border forays by bandits. At that time, the tendency was for States to take unilateral action to make arrests and bring the offenders to justice. This could take the form of blatant incursions into foreign territory (with or without the support of law enforcement colleagues on the other side of the border), such as seizures of suspected pirate or slave-trade ships even when they lay in the territorial waters of a foreign state, or where posses rode across the Rio Grande from the United States to Mexico in pursuit of bank robbers or cattle rustlers.

Such informal and unilateral actions, colourful as they may be, were an unsatisfactory response to a growing problem. Unilateral action could create unnecessary tensions between nations. For the police to be able to work across borders, arrangements had to evolve on three different levels: the political level, the structural level and the practical level.

On the political level (what Benyon calls the macro level), governments must create the legal and political possibilities for international police cooperation. This is the level that deals with the constitution and legislation of the individual countries, and with international agreements. It is the political level that determines the legal issues relating to police operational powers across borders. Countries that had many cases in common gradually began to enter into more formalised arrangements for cooperation, including bilateral treaties. In 1919, Belgium and France even agreed on allowing their respective police forces limited cross-border authority. In its most ambitious form, the political level seeks to unify and harmonise the way in which criminal justice and law enforcement is carried out in two or more countries.

The second level, the structural level (referred to by Benyon as the meso level), deals with operational structures, practices and procedures. It is the structural level that provides the tools for cooperation. These tools include information systems, common data bases, methods of coordination, access to information, and where necessary the establishment of specialist organisations dealing, for example, with counterfeiting or fraud.5

One expanding element of international work on the second, structural level consists of training and technical cooperation. Considerable bilateral and multilateral efforts have been made to develop police skills and techniques, through joint training and joint exercises, and through the provision of direction, training and resources. Such assistance is provided not only for altruistic reasons of helping the police in other countries to deal with serious problems, but also for understandable reasons of national interest, such as efforts to stabilise a regime in a neighbouring country, or to assist in preventing and controlling crime that might otherwise spread internationally.

The third level is the practical level (referred to by Benyon as the micro level).

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5 As Benyon points out, cooperation on this second level often takes place between different law enforcement organisations even without governmental initiative or parliamentary approval.
It is this level that is concerned with the investigation of specific offences and with the prevention and control of particular forms of crime. Where the specific case at hand has points of contact with a foreign State, the practical steps may involve turning the matter over to private investigators, turning the foreign aspects of the case over in full to the foreign law enforcement body (or bodies), or granting law enforcement authorities the power to act on foreign territory.6

Judicial cooperation in criminal matters was even slower in emerging than was cooperation in law enforcement. Once again, it was cooperation in civil matters that evolved first, and in some ways paved the way for cooperation in criminal matters.7 Extradition and mutual assistance in criminal matters lagged behind. Some work was done on the subject by the League of Nations Committee of Experts for the Progressive Codification of International Law, and a draft convention was prepared in 1928, covering “measures of enquiry”, the summoning of witnesses and experts to attend in the requesting State (with immunity from prosecution in respect of earlier conduct), the transfer of persons in custody to appear as witnesses (available only on the basis of reciprocity), and the surrender of exhibits. Assistance could be refused if the relevant offence was not extraditable.8 The Harvard Draft Convention in 1939 dealt with service of process, obtaining evidence abroad and supply of certain records relating to convictions and to convicted offenders (McClean, ibid.). In respect of extradition, the first multilateral treaty did not emerge until 1933; this was the Convention on Extradition prepared within the framework of the Organization of American States.9 In respect of mutual assistance in criminal matters, even more years had to pass until a multilateral treaty was drafted: the Convention on Mutual Assistance in Criminal Matters of 1959, prepared within the framework of the Council of Europe.

This is not to say that judicial cooperation did not exist in criminal matters before the 1933 and 1959 treaties. A few bilateral treaties were

6 Nadelmann notes that today, this third type of cooperation, where law enforcement authorities from two or more countries work directly together on specific cases or types of activities, is increasing. He observes that lower-level officials tend to regard international politics as a hindrance, and that they therefore seek to establish working relationships with foreign colleagues based on a common professional culture and objectives. Ethan A. Nadelmann, in McDonald, op.cit, pp. 107–108.

7 Many bilateral treaties on the service of process and the taking of evidence abroad were made during the 1800s. At the end of the 1800s, multilateral initiatives emerged. In 1889 and 1890, a Latin American Congress on Private International Law was held in Montevideo. It produced the 1889 Convention on Civil Procedure. Only a few years later, the first permanent intergovernmental structure for progressive unification of the rules of private international law was set up: the Hague Conference on Private Law began regular meetings in 1893. The Hague Conference meets every four years, and brings together official delegations from a wide spectrum of legal systems around the world. It not only develops draft conventions, but follows their implementation and, as needed, updates them. Already in 1894, the Hague Conference produced a draft Convention on Civil Procedure, which was signed one year later. It was this Convention that created the system of central authorities, which supplemented the existing network of consular authorities.


9 This has subsequently been replaced by the 1981 Inter-American Convention on Extradition.
made already during the 1800s, and in respect of drug trafficking, which has long been the core of transnational organized crime, even multilateral treaties were made at the beginning of the 1900s. The International Opium Convention was completed in 1912, and a second Convention on this subject appeared in 1925. This was followed, in 1931, by the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, and in 1953 by the Protocol Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium.

Bringing these multilateral treaties up to the present, the 1961 Single Convention established new mechanisms and obligations. It assigned certain functions to the Commission on Narcotic Drugs and to an International Narcotics Control Board. It also required States to provide annual estimates of drugs used for various purposes, to abide by restrictions on manufacture, production and import, to criminalise the possession, supply and transport of drugs, and make them extraditable offences.

The main drug treaty today is the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which entered into force in 1990. The 1988 Convention calls for criminalisation of a range of criminal offences, including the organisation, management or financing of drug offences, and the laundering of the proceeds (art. 3). If two States have acted in this respect, there should be no problem with the double criminality requirement in extradition. According to article 6, the offences criminalised by the 1988 Convention are by definition extraditable offences, and the convention itself can be regarded as providing the necessary legal basis for extradition and mutual assistance. Art. 5 contains provisions on confiscation, art. 7 on...
mutual assistance, art. 8 on the transfer of proceedings, and art. 11 on controlled delivery.

Asides from the topic of drugs, before the United Nations Convention against Transnational Organized Crime (the Palermo Convention) was opened for signature at the end of 2000 there were almost no multilateral treaties that would have defined aspects of organized crime. During the 1970s, in response to a rash of sky-jacking and other hostage-taking, treaties were signed on this topic. In 1980, a Convention was completed on the physical protection of nuclear material, ten years later the Council of Europe completed the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and in 1996 the Inter-American Convention against Corruption was completed. As this scattered examples show, it has taken a long time for the world to realize the need for agreeing on the rules for international cooperation in responding to transnational organized crime. The Palermo Convention can well be said to represent a significant and welcome change in this respect.

B. Moving On to the Next Stage: The Emergence of International Criminal Policy

Bilateral and multilateral treaties only establish the framework for international cooperation. In many respects, even this framework remains very incomplete. Responding to transnational organized crime requires more than the capacity to extradite fugitives or provide basic mutual legal assistance. During the post-World War II period, countries around the world have shown an increased readiness to go beyond treaties, and seek to agree on a common approach to criminal justice issues—in effect, they are seeking to develop international criminal policy.

One element in this emergence of international criminal policy has been the strengthening of international academic and professional cooperation. The International Penal and Penitentiary Commission was established already in 1846, and began to organize international congresses. The International Association of Penal Law was established in 1924. Many other international academic and professional associations have been established since then. The early work of the United Nations crime prevention and criminal justice programme can be

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12 One notable aspect of the 1988 Convention is that a State Party may not refuse to render mutual legal assistance on the grounds of bank secrecy.


15 The term “international criminal policy” is used here to refer to the mutual alignment by several countries of their criminal policy. It is not intended to suggest the existence of a supranational body with the authority to establish its own “international criminal policy” independent of the will of sovereign nations.
readily described as being based on a networking of individual academics and professionals, with a focus on research, and gradually also on norms and standards.\footnote{Although the delegations at the sessions of the United Nations Committee on Crime Prevention and Control and at the quinquennial Congresses represented Member States, the discussions maintained a strong flavour of intellectual discourse and the exchange of professional experience. It was not until the reform of the structure of the United Nations programme at the beginning of the 1990s that Governments clearly began taking an active interest in the decision-making process. See, for example, Clark (op.cit.), and Manuel Lopez-Rey (1985), A Guide to United Nations Criminal Policy, Cambridge.}

Three developments in particular contributed to international alignment of national criminal policy. One, of course, was the practical reality: during the period since the Second World War, cross-border crime has become a practical problem, and countries realised that domestic or unilateral efforts alone were not enough. At the same time, crime was becoming a political issue that forced some countries to reconsider how it should be approached. This was most clearly evident with the case of the United States and its “war on drugs”, which focused attention also on the international aspects. The emergence of international terrorism during the 1960s served to enforce this internationalisation of criminal policy.

A second development was the intensifying cooperation among certain neighbouring countries, such as the cooperation among the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) and among the three Benelux countries (Belgium, Luxembourg and the Netherlands). The Nordic countries, for example, organized regular meetings among their respective ministers, at which also criminal policy issues were discussed. Cooperation was also close in the drafting of legislation, so close that in 1960, all five countries enacted similar legislation on the extradition of offenders, and in 1963 on the enforcement of sentences. As a result of this and other harmonized legislation, extradition and mutual legal assistance within this group of countries became very simple and effective.

The third and perhaps most important factor leading to the emergence of international criminal policy was the establishment of inter-governmental organisations that provided the framework for the development of such policy. These organisations took various forms.

- the United Nations has already been mentioned. As noted, during its early years the UN crime prevention and criminal justice programme focused more on academic and professional issues. Over the past fifteen years, however, it has become very active in mobilising international cooperation, as shown by the development of several model treaties, and most clearly in the drafting of the United

\footnote{Among the more widely known such organizations, in addition to the International Association of Penal Law and the International Penal and Penitentiary Foundation, are the Asian Crime Prevention Foundation, the International Criminal Police Organization (Interpol), Amnesty International, Defence for Children International, the Howard League for Penal Reform, the International Association of Juvenile and Family Court Magistrates, the International Commission of Jurists, the International Society for Criminology, the International Society for Social Defence, and Penal Reform International.}
The Nations Convention against Transnational Organized Crime.\(^{18}\)

- A second form is represented by the Commonwealth Secretariat (established in 1965), that provides a link among countries that share a similar cultural heritage. Other examples of similar cooperation can be found among the Francophone countries, and between Portugal and Portuguese-speaking African countries.

- A third form is represented by the various intergovernmental organisations for general regional and subregional cooperation, such as the Council of Europe and the European Community (later the European Union), the Economic Community of West African States, the Arab League, the Organisation of African Unity (to be replaced in 2002 by the African Union), the Organisation of American States, and by cooperation among the Southern African countries, and among the Mercosur countries (Argentina, Brazil, Paraguay and Uruguay).

- A fourth form is the organisations that focus on specific issues. These may be interregional, such as the Financial Action Task Force. On the regional level, there are many examples.\(^{19}\)

The types of cooperation carried out within these structures vary considerably. The main forms include the development of new international agreements, international legal assistance, non-binding recommendations, resolutions and guidelines, and the exchange of information and experience.

Today one can already speak of a problem with a proliferation of actors and agencies in international cooperation in criminal justice: various Government agencies (not always working in harmony even within a country), academics, Interpol, Europol, regional bodies for Africa, Europe and Latin America, the Customs Co-operation Council, the Group of Seven (which established the Financial Action Task Force), the Commonwealth Secretariat, the Organisation of Economic Cooperation and Development, and various bodies with the United Nations. Asides from the practical difficulty of too

\(^{18}\) Prior to the 1980s, the only significant organized crime issues addressed in the United Nations related to organized crime were trafficking in women, and drugs (see, for example, Lopez-Rey 1985 and Clark 1994). The spread of transnational organized crime, the establishment of the United Nations Commission on Crime Prevention and Criminal Justice, and the model of the 1988 Convention all contributed to the activation of the UN also in this area.

\(^{19}\) In the Asian and Pacific region, for example, regional cooperation has developed perhaps most strongly among Australia, New Zealand and other South Pacific jurisdictions, for example in the form of the annual Pacific Island Law Offices Meetings. Perhaps the premier recurring theme at these meetings has been law enforcement co-operation and development. Essentially the same group of countries is brought together by the South Pacific Forum on Law Enforcement Cooperation. The heads of government of the South Pacific Forum issued a "Honiara Declaration" in 1992 that dealt with such basic issues as mutual assistance in criminal matters, forfeiture of the proceeds of crime, extradition, the Financial Action Task Force, customs, police and drug issues, and training. The Asian-African Legal Consultative Committee meets regularly, as does the Asian and Pacific Conferences of Correctional Administrators. The Asian and Pacific Economic Community appears to be taking tentative steps towards including criminal justice-related issues on its agenda.
many meetings, the agencies may end up pursuing different approaches and instruments. Already now, some aspects of existing treaties (especially in relation to the proceeds of crime) are technically difficult for the legislator and the court. Multiplying them could well increase these difficulties.

III. THE DYNAMICS OF INTERNATIONAL COOPERATION IN CRIME PREVENTION AND CRIMINAL JUSTICE

Section II above has outlined some of the historical development of international cooperation in crime prevention and criminal justice. It is time to put some flesh on the bones, and look at how the system works in practice. This will be done by presenting five trends, with special reference to the need to respond to transnational organized crime:

- international cooperation is strengthening with increasing rapidity
- the intensity of international cooperation varies, and we are increasingly seeing the emergence of small groups of “fast track” countries, among which cooperation is developing very rapidly
- international cooperation is becoming formalised and “deeper”, with “soft” resolutions and recommendations being increasingly supplemented by treaties and joint decisions
- international cooperation is developing from an ad hoc (thematic) focus on individual offence categories or issues, to a more general international criminal policy
- international cooperation is becoming increasingly politicised.

A. International Cooperation is Strengthening with Increasing Rapidity

The first trend is clear enough: international cooperation has strengthened, and is doing so with increasing rapidity.

This can be seen on a number of levels:

- the increase in arrangements for informal cooperation between individual agencies, including the establishment of formal and informal networks;
- the growing mesh of liaison officers around the world;
- the growing interest in the exchange of information in different fora;
- the increase in the number of international cooperation projects;
- the increase in the number of offenders extradited;

The United States has been the most active in sending out liaison officers and legal attaches. On the European experience with liaison officers, see for example Malcolm Anderson and Monica Den Boer (eds.), Policing Across National Boundaries, London 1994.

The magnitude of this work can be seen for example in the fact that the United States Drug Enforcement Administration alone has some two hundred agents stationed abroad. Another example is that the United States Embassy in Rome has forty persons working full-time on operational cooperation in criminal justice related matters; many of them have a regional mandate.

The five Scandinavian countries have developed a unique form of cooperation: their police authorities have established a joint network of liaison officers in Austria, Cyprus, Germany, Greece, Hungary, Italy, the Netherlands, Pakistan, Poland, Spain, Thailand, Turkey and the United Kingdom. Information collected by these liaison officers is then shared directly with their colleagues back home in all five Scandinavian countries.
• the increase in the number of requests for mutual legal assistance, and so on.

Mere expansion of activity, of course, is no measure of its effectiveness. Much operational cooperation remains frustrating and bureaucratic, with for example requests for assistance often not leading to the desired results. Similarly, much cooperation in institution-building is of doubtful effectiveness for a number of reasons: the projects are poorly planned and implemented, there is needless overlap with other projects, little or no attention is devoted to follow-up, and so on.21

Nonetheless, the growth in the amount of activity reflects the growing concern over crime, and the increasing hopes being placed on the capacity of international cooperation to help in providing a suitable response.

B. The Emergence of Groups of “Fast Track” Countries

As a general rule of thumb, the wider the geographical scope, the looser the cooperation in crime prevention and criminal justice.

At one extreme, the United Nations includes some 190 member States, and has traditionally worked on the basis of consensus—something which has proven to be difficult to achieve in respect of such contentious criminal justice issues as the use of capital punishment, the use of mutual evaluation or the establishment of joint investigative teams.

At the other extreme, as already noted, bilateral forms of cooperation have constituted and will doubtless continue to constitute the mainstay of international cooperation in crime prevention and criminal justice.

Somewhere between the globality of the United Nations on one hand and bilateral cooperation on the other is regional cooperation. For example the Council of Europe is a much smaller entity than the United Nations, and has arguably had considerably more impact on the development of the criminal policy of its member States. When established in 1949, it brought together ten Western European countries which—despite the differences between the Germanic, French and common law legal systems and certain other differences in criminal justice—shared fundamental values and goals.

The Council of Europe has been expanding at a rapid rate. From ten original members in 1949, it grew to 21 Member States ten years ago, to 43 Member States today. This expansion has been largely towards the East, with the Russian Federation the most significant new member (January 1996). In joining, the new Member States have implicitly and expressly endorsed the same values and goals.

An even smaller unit, the European Union with its fifteen members at present has also been expanding. Currently, discussions are underway with twelve countries on their applications for membership in the European Union,22 and the possibility exists that some may

22 Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia. Negotiations are at an earlier stage with Turkey.
become members in 2003 or 2004. Within the EU, in turn, there are even smaller units of more intensive integration, and again these are expanding. For example, the current parties to what are known as the Schengen accord countries have agreed among themselves on such highly developed forms of cooperation and hot pursuit across borders, trans-border surveillance (i.e. surveillance carried out by law enforcement officers in the territory of another state) and controlled delivery (following the international delivery of, e.g., narcotics in order to ascertain the source and the destination). Perhaps even more importantly in the electronic age, law enforcement and border authorities in the Schengen countries share certain information systems.

Continuing with the example of the European Union, one of the current fashionable terms is “flexibility” in decision-making. In a speech given in June 2000 in Berlin, Mr. Jacques Chirac, the President of France, suggested that a new “pioneering group”, self-evidently led by France and Germany, would henceforth guide developments in the European Union. Other countries might “join forces” with France and Germany in such a group. He suggested that flexibility would allow groups of countries to go ahead with new projects and institutions whether the countries left outside those ventures liked it or not. And if flexibility was not enough, said Mr. Chirac, France and Germany should cooperate outside the framework of the EU treaties entirely.

The conclusion here is that there is an obvious need for more intensive cooperation in crime prevention and criminal justice. If this cannot be achieved within a larger entity, smaller groups of countries with the greatest interest in cooperation may well form a sub-group that moves onto the fast track. Others, realising the benefits being achieved, may soon seek to join this smaller group—but this at the same time may complicate the problems involved in finding a common approach.

C. “Soft” Resolutions and Recommendations are Being Increasingly Supplemented with Treaties and Joint Decisions

Reference has already been made to the fact that cooperation in criminal justice usually begins with law enforcement, and only then expands to include judicial cooperation. Law enforcement cooperation tends to be based on direct contacts and a pragmatic approach, while judicial cooperation often requires a legal framework. For this reason, one trend in international cooperation is towards formalisation.

This trend towards formalisation appears for example in the increasing use made of treaties and binding decisions. As has been noted, up until recently, relatively few multilateral treaties have been signed in the crime prevention and

23 Although Norway and Iceland are not members of the European Union, they are involved in Schengen cooperation. This is due to the fact that they, together with three EU members (Denmark, Finland and Sweden), form a passport-free zone of their own.

24 Mr. Chirac did not refer to any other country by name in this connection, just as he did not refer to the Commission. Past experience suggests that Belgium, Luxembourg, Italy and the Netherlands might wish to associate themselves with such a group.
criminal justice field, and only a few countries have been active in drafting bilateral treaties. As a result, intergovernmental cooperation has long relied almost solely on “soft” resolutions and recommendations, in which states are merely requested to adopt certain policies. For example the United Nations has produced a large number of non-binding statements of principles in the form of resolutions, recommendations, declarations, guidelines, and standards and norms. Also other intergovernmental and even non-governmental organizations have produced statements of principles which are designed to guide the work of their membership, but which have no binding effect.

It is true that even “soft,” non-binding instruments can be influential. For example the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations have clearly guided national practice in corrections and, in several cases, helped bring about legal reform. However, states have traditionally been quite protective of their sovereignty in this field, as can be seen in the protracted negotiations that are required when such instruments are being drafted or when there is discussion of possible monitoring of the implementation of these instruments.

As a result, the wording in resolutions and recommendations tends to allow different interpretations of how they should be applied.

Today, “soft” resolutions and recommendations continue to be produced, but there has been a clear increase in the drafting of “hard” bilateral and multilateral treaties world-wide. On the regional level, several multilateral treaties have been prepared for example in Europe and in Latin America. On the global level, the United Nations 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was a decisive step in this direction. One of the weaknesses with most multilateral agreements has been that they have been offence-specific, and have presumed (often, incorrectly) the prior existence of workable arrangements for extradition and mutual assistance. The 1988 Convention was innovative in including provisions on, for example, extradition and mutual assistance. As a result, the Convention has proven to be workable. It has, for example, contributed to the relatively rapid spread of the criminalisation of money laundering, and to the revision of legislation on the forfeiture of the proceeds of crime.

The 1988 Convention was followed by the United Nations Convention against Transnational Organized Crime. Reference should also be made to the model treaties prepared by the United Nations, on extradition, mutual assistance, the transfer of proceedings in criminal matters, the transfer of foreign prisoners, and the transfer of supervision of offenders conditionally sentenced or conditionally released. Currently, work has begun on a United Nations convention against corruption.

25 For an analysis of the legal nature of United Nations instruments, see Clark 1994, pp. 141–144 and passim.

26 Discussions on the monitoring of the implementation of standards and norms have often run up against different understandings of what exactly “monitoring” involves. Currently the preference is to use different terminology. The Secretary-General of the United Nations does not “monitor implementation” of standards and norms, but for example “promotes their use and application”. See, for example, Clark 1994, pp. 229 ff.
A parallel development—one that is so far limited to some parts of the world—has been the development of new mechanisms to ensure the effective implementation of treaty obligations related to criminal justice. One model has been the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, prepared by the Council of Europe. Acceptance by signatory states of the jurisdiction of the European Court of Human Rights means that even individual citizens can turn ultimately to the Court when they believe that their human rights (as defined by the Convention) have been violated. Since this provides considerable protection against such violations, the various articles of the European Convention on Human Rights have clearly affected national legislation and practice in criminal procedure, for example on issues related to torture or to inhuman or degrading penalties or treatment (art. 3); conditions of arrest and charges, transfer before a magistrate and right to recourse (art. 5), the right to a fair trial (art. 6), and the legality of punishment (art. 7).27

Accordingly, home and justice issues form what is called the “third pillar” of the European Union.28 In areas defined as being of “common interest,” the European Council may adopt framework decisions and joint positions, and draw up conventions. Once a framework decision has been adopted, member states are required to amend their laws and practice to bring these into line.29 Once the European Union has adopted a joint position, member states are required to abide by it in international organisations and at the international conferences they attend. This means that even in respect of contacts with non-member states, EU members must “toe the line” adopted on an international level.

Overall, “soft” methods of cooperation will remain an important element of international criminal policy. These allow individual states considerable leeway to decide on how best to realise the goals set in the resolutions or recommendations. However, in particular the response to

The tenor of international cooperation changed once again in Europe with the 1992 Maastricht Treaty, by which the European Communities metamorphosed into the European Union, and by the 1997 Treaty of Amsterdam. Having previously focused more on economic integration, the member states of the European Communities realised that also home and justice affairs must be placed on the agenda for European integration.

27 The European Convention on Human Rights has also had an impact on the use of capital punishment (protocol no. 6 from 1983, and the possibility allowed under the 1957 European Convention on Extradition to refuse extradition if the requesting country could impose the death penalty).

28 In EU jargon, the “first pillar” is essentially economic cooperation through the original European Communities, the second is foreign relations and security, and the third is home and justice issues.

29 One example of obligations on member states in respect of criminal justice relates to Community law. The European Court of Justice has found that Member States have an obligation to act against violations of Community law as if these were violations of national law (Commission v Greece, ECR 1979, p. 2965). In Germany v. Commission C-240/90, the Court ruled that the European Community has the authority to require that a Member State enact appropriate sanctions against violations of Community law. Note, however, that this is an indirect obligation: Community law cannot directly change the criminal law of a Member State. Any amendments or reforms would have to be made by the Member State through domestic legislation.
transnational organized crime is requiring "harder" methods, and at least in Europe states are agreeing to relinquish part of their sovereignty to this end. Although no other regions have intergovernmental political entities comparable with the European Union, the "European model" may point the way to multilateral development also elsewhere.

D. From an Ad Hoc Focus to a More General International Criminal Policy

The traditional pattern in international cooperation in this field has been for states that find that they share a common concern to agree among themselves, on a case-by-case basis, on the appropriate mechanism and response. The existing international treaties that deal for example with criminal justice issues have all been signed by quite different sets of states.

Such a case-by-case approach has undeniable benefits, in that the states can focus on a specific issue and find the appropriate response. It nonetheless does not promote a more integrated and long-term policy in international cooperation. Theoretically, each state, as it were, continues to act entirely on its own, without any reference to the interests of other states in crime prevention and criminal policy.

The alternative would be for groups of states to agree on certain priority issues, and develop an integrated strategy for dealing with these issues.

The Council of Europe has been a forerunner in this. The Council has regularly organized meetings on European criminal policy, and its Committee on Crime Problems has offered a forum for discussion on further action.

More recently, also the European Union has been identifying priority areas. In June 1997, the European Union adopted a "Plan of Action" to combat organized crime. This plan of action was drawn up following discussions about what types of measures in general were needed to respond to organized crime nationally and internationally. In effect, the 1997 decision embodied an agreed-upon international criminal policy. Moreover, instead of being presented as a resolution, recommendation or declaration that have so often been adopted in other fora, regrettably often with little practical impact, the European Union decided on specific action, with a clear division of responsibilities, a clear timetable and a mechanism for implementing the action plan. The strong consensus reached by Member States on the 1997 Plan of Action helped to create the political and professional climate required on both the EU level and the national level to take and implement the necessary decisions.30 In the year 2000, the Plan of Action was replaced by a new integrated EU strategy to prevent and control organized crime, "The Prevention and Control of Organized Crime: A European Union Strategy for the beginning of the new Millennium."

The shift from an ad hoc approach to attempts to formulate a more coherent and general international criminal policy can also be seen in the work of the United Nations. Formerly, there was little

30 The model for this was taken from the "European Plan against Narcotics" adopted by the European Union in December 1990, and updated several times since then, most recently in December 2000, when a strategy was adopted for the years 2000–2004.
evidence of an over-all strategy in the work of the United Nations Committee on Crime Prevention and Control. Although the Committee dealt with a large number of important issues, this was almost invariably done on a piece-meal basis.

At the beginning of the 1990s, two developments took place that ensured that organized crime would become a central issue in the United Nations crime prevention and criminal justice programme, and that a strong attempt would be made to move from an ad hoc approach to the setting of policy.

The first development was that the structure of the United Nations Programme was reformed. The 27-member Committee on Crime Prevention and Control, which consisted of individual experts, was replaced by a 40-member Commission on Crime Prevention and Criminal Justice. These members were Member States. The reform also called for the setting of priorities in the programme.

At its second session in 1993, the United Nations Commission decided on the priority themes for the United Nations crime prevention and criminal justice programme. Organized crime was identified as part of one of three priority themes. The formulation of this priority theme is “national and transnational crime, including organized crime, economic crime (including money laundering), and the role of criminal law in the protection of the environment”.31

The second development was a series of three meetings, culminating in a major conference at the end of 1994. First, an expert group meeting was held in Bratislava (Czech and Slovak Federal Republic) in 1991. The meeting developed a set of fifteen recommendations on “strategies to deal with transnational crime”. Only five months later, a seminar, co-organized by HEUNI, was held in Suzdal, Russian Federation. This international seminar brought together leading law enforcement officers and experts from fifteen countries. The seminar prepared a report which sought to describe the profile of organized criminal groups, and went on to provide a large number of recommendations on substantive legislation, procedural legislation, law enforcement methods, organisational structures, international cooperation, and evaluation. Both sets of recommendations were forwarded to the newly established United Nations Commission. The Commission annexed the two sets to a brief resolution on organized crime, which was subsequently adopted by the Economic and Social Council.32

The third and most important meeting was the World Ministerial Conference on Organized Transnational Crime, held in Naples, Italy on 21–23 November 1994. Delegations from 142 countries agreed on the broad outlines of cooperation in the prevention and control of organized transnational crime. The agreement was

31 The other two priority themes are (ii) crime prevention in urban areas, juvenile and violent crime; and (iii) efficiency, fairness and improvement in the management and administration of criminal justice and related systems with due emphasis on the strengthening of national capacities in developing countries for the regular collection, collation, analysis and utilisation of data in the development and implementation of appropriate policies.

32 E/CN.15/1992/7, draft resolution II. The Commission also adopted a resolution entitled "Control of the Proceeds of Crime", which in general called on Member States and the Secretary-General to take action to prevent and control money laundering; ibid, resolution 1/2.
embodied in a draft resolution for the General Assembly entitled “Naples Political Declaration and Global Action Plan against Organized Transnational Crime.” This was approved by the General Assembly by its resolution 49/159.

The Naples Political Declaration consists of ten paragraphs that express the intention of the countries represented at the Conference to join forces to develop co-ordinated strategies and other forms of international cooperation. Special reference was made to the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. States which had not yet done so were urged to become parties to this Convention, and to fully implement it as well as other relevant existing agreements.

The same document also expresses the wish of the participants to strengthen international cooperation, in particular in relation to closer alignment of legislation on organized crime, operational cooperation in investigation, prosecution and judicial activity, the establishment of modalities and basic principles for regional and global cooperation, the elaboration of international agreements, and measures and strategies to prevent and control money-laundering.

The Global Action Plan consists of seven sections:

a. the definition and description of transnational organized crime,
b. specific issues in national legislation and guidelines,
c. operational cooperation,
d. regional and international cooperation,
e. the feasibility of international instruments on organized transnational crime,
f. the prevention and control of money-laundering, and

g. follow-up and implementation.

The Naples Political Declaration and the Global Action Plan led, in time, to the United Nations Convention against Transnational Organized Crime, and thus their significance has to a large extent been overtaken by events. Even so, they, together with the Vienna Declaration adopted at the Tenth United Nations Congress in the year 2000, are further illustrations of the trend towards adopting broad statements on international policy regarding criminal justice issues.

E. International Cooperation is Becoming Increasingly Politicised

Although all states are undoubtedly agreed on the necessity of determining priorities and establishing policy, this process has not run smoothly. Different states will continue to have different priorities. Furthermore, if too many “priority issues” are accepted into a programme, or if these priority issues are defined too broadly, they do not assist decision-making on the national or international level.

These difficulties are clearly perceptible in the work of the United Nations. One of the fundamental reasons for restructuring the United Nations Crime Prevention and Criminal Justice Programme was that the Programme had become inundated with a large number of mandates, and the Secretariat as well as the other implementing bodies had not been provided with the resources required to implement anywhere near all of these mandates.
The four trends in international cooperation described above—the increasing rapidity of its strengthening, the development of groups of “fast track” countries, the supplanting of “soft” forms of cooperation with treaties, and the shift towards the formulation of a more general international criminal policy—are all in themselves welcome features. It is the fifth trend—the increasing politicisation of international cooperation—that raises questions.

Furthermore, the politicisation of international criminal policy (a process which is perceptible at least in the work of the United Nations Commission, but also for example in the European Union) raises the spectre that international criminal justice forums will be used as a tool in national and international politics. One illustration of this danger can be taken from the recent global debate over money laundering. In July 2000, the Financial Action Task Force on Money Laundering published a so-called “blacklist” of 15 jurisdictions that, in its view, had not been sufficiently cooperative in preventing and controlling money laundering.33 Since the blacklist appeared, many if not all of these jurisdictions have been more active in, for example, reforming their legislation and filing suspicious activity reports (SARs). Some, however, have regarded this public blacklisting and the related measures as a violation of their sovereignty, and as an attempt to steer their economy, to the advantage of the wealthier FATF members.

The negotiations over the United Nations Convention against Transnational Organized Crime provided a few examples of the politicisation of international criminal policy. Among these were the debate over whether or not to include a specific reference to the recommendations adopted by the FATF,34 how to address the interrelationship between terrorism and organized crime,35 how to deal with the issue of sovereignty,36 and whether or not a mechanism should be created to monitor

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34 The solution adopted was to delete references to the FATF resolutions or any other resolutions, and refer only to using as a guideline “the relevant initiatives of regional, interregional and multilateral organizations against money laundering”. References to FATF as well as to several other regional organizations were inserted into the travaux preparatoires.

35 The issues involved here are complex. Essentially, several States are convinced that terrorism is one form, and indeed a particularly dangerous form, of organized crime. The majority of States, however, were of the view that a distinction should be made between terrorism and organized crime, not least because including terrorism in the scope of the Convention would raise vexatious political problems with the definition. The view of the majority was that terrorism ultimately had political aims, while organized crime had material aims. Having said that, it was explicitly recognized that terrorists may commit acts (such as murder, arson, extortion and robbery) to which the Convention would clearly apply.

36 One source of tension in the discussions was the concern of some States that, when transnational organized crime is at issue, some States may engage in actions that violate the sovereignty of other States. This concern was raised, for example, when speaking about joint investigations (art. 19) and special investigative techniques (art. 20). The issue was resolved by including in the Convention a separate article entitled “Protection of sovereignty”.

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IV. CONCLUSIONS

Crime has evolved considerably over the past few years. Economic, social and political factors have contributed to changes in the amount and structure of crime. Theories that are based on the concept of a weakening of self-control and on the opportunity for crime help us to understand what has happened.

The background factors—economic integration, political and economic reforms, wide-spread wars and civil disturbances, and demographic changes—are factors that either cannot be changed (or will not be changed solely) in the interest of crime prevention. For example, although economic integration leads to a greater opportunity for economic crime, this is the cost we seem to be prepared to pay for a higher standard of living. And although there are loud calls in many countries for a return to the “good old days” before economic and political reform, such reform will presumably not be halted—and certainly not on the grounds that the process appears to increase the amount of crime.

Many states are responding to their national crime problem by reviewing the effectiveness of their criminal policy and by setting up a variety of crime prevention councils and projects. Because of the growing ties between countries, it is not surprising that information on successful initiatives is spreading internationally. Although each country’s situation is unique, and projects that have worked elsewhere can rarely be transplanted as such, they can lead to modified approaches that are successful in this different environment.

The response to the international aspects of crime has also been notable. International cooperation is broadening and strengthening to the extent that, in such areas as drug trafficking and organized crime, we can speak of broad agreement on the general goals. However, even with such regional initiatives (in Europe) as the Council of Europe, Schengen, Maastricht and Europol, we are a long way from developing a truly international crime policy, much less an international criminal justice system. The different states will continue to have different views of the general role of criminal law in society. Integration can help the different states in responding to their crime problems, but it can never replace national and local action.

For example European Union countries advocated the inclusion in the Convention of arrangements for mutual evaluation. According to this system, international experts assess how well the authorities of a State are implementing their responsibilities. Several States were sceptical of such a system, for example on the grounds that it amounted to interference with State sovereignty. Ultimately, the reference was modified to a rather vague “information provided ... through such supplemental review mechanisms as may be established by the Conference of the Parties.”
INTERNATIONAL COOPERATION AGAINST TRANSNATIONAL ORGANIZED CRIME: EXTRADITION AND MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

Matti Joutsen*

I. EXTRADITION AND MUTUAL LEGAL ASSISTANCE: THE BASIC TOOLS OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

Investigating and prosecuting cases against persons suspected of participation in organized crime is often notoriously difficult. It is all the more difficult to try to bring a case together when the suspect, the victim, key evidence, key witnesses, key expertise or the profits of crime are located outside one’s jurisdiction. Dealing with such cases can be so daunting that the file may be placed aside and “forgotten”, perhaps with the fervent hope that the authorities in other countries will take up the matter.

This, of course, is what organized criminals acting across international borders very much hope will happen. By fleeing to another country and in particular by sending the profits from crime beyond the reach of the domestic authorities, offenders seek to frustrate the purposes of law enforcement. If law enforcement remains passive in the face of transnational crime, this will only encourage offenders to continue to commit crime. For the investigator and prosecutor confronted with modern organized crime, relying on international cooperation has become a necessity, and extradition and mutual legal assistance in criminal matters have become two key tools.¹

Extradition and mutual legal assistance, however, are not tools that can simply be taken down from the shelf. The legal basis (whether treaty or legislation) must exist, the practitioners must know how (and if) this basis can be applied to the case at hand, and above all the practitioners in both the requesting and requested country must be able to work together to achieve the desired result.

Furthermore, as tools, extradition and mutual legal assistance can take many different forms. The possibilities depend not only on the existence, age and contents of a valid international agreement, but also, for example, on the type of offence and on the legislation and practice in a country. The new United Nations Convention against Transnational Organized Crime (the “Palermo Convention”) is a case in point. It does, indeed, set out detailed provisions on how extradition and mutual legal assistance should be provided. In many ways, it has expanded the possibilities available. However, these possibilities must first be implemented in domestic law and practice.

This presentation looks at the extent to which the new Palermo Convention can

¹ The terms mutual assistance, mutual legal assistance and mutual legal assistance in criminal matters are often used interchangeably.
improve the basic tools available to the practitioner. Even though the focus is on extradition and mutual legal assistance, the Palermo Convention also requires States Parties to make other major changes that can facilitate international cooperation. Examples of this are the criminalisation of four specific offences, provisions on joint investigations, special investigative techniques, protection of victims and witnesses, improving the readiness of suspects to cooperate with law enforcement authorities, cooperation among law enforcement authorities themselves, confiscation and seizure, the transfer of proceedings and the transfer of sentenced persons, the collection, exchange and analysis of information on organized crime, and training and technical assistance. As noted by Mr. Kofi Annan, the Secretary-General of the United Nations, the Palermo Convention is a milestone in the fight against Transnational Organized Crime. He emphasised that “we can only thwart international criminals through international cooperation.” It is the Palermo Convention that provides a strong framework for this cooperation.

II. EXTRADITION

A. The Evolution of the Extradition of Offenders

Extradition is the process by which a person charged with an offence is forcibly transferred to a state for trial, or a person convicted of an offence is forcibly returned for the enforcement of punishment (see, for example, Third Restatement, pp. 556–557).

For a long time, no provisions or international treaties existed on the conditions for extradition or on the procedure which should be followed. Extradition was largely a matter of either courtesy or subservience, applied in the rare cases where not only did a case have international dimensions, but also the requesting and the requested states were prepared to cooperate. In short, extradition was rarely required, even more rarely requested, and even more rarely still granted.

In the absence of effective treaties on extradition and on mutual legal assistance, some States have engaged in unilateral actions. This, however, is a violation of international law. According to universally accepted and well-established principles, states enjoy sovereign equality and territorial integrity. States should not intervene in the domestic affairs of other states. In particular,

“a party has no right to undertake law enforcement action in the territory of another party without the prior consent of that party. The principle of non-intervention excludes all kinds of territorial encroachment, including temporary or limited operations (so-called “in-and-out operations”). It also prohibits the exertion of pressure in a manner inconsistent with international law in order to obtain from a party “the subordination of the exercise of its sovereign rights” (Commentary to the 1988 Convention, para. 2.17).”

2 The Commentary cites as authority the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex), and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, contained in para. 2 of the Charter.
The principles of sovereign equality, territorial equality and non-intervention in the domestic affairs of other States are explicitly noted in art. 4(1) of the Palermo Convention. To further clarify the point, art. 4(2) of the Palermo Convention states specifically that “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.”

Bilateral extradition treaties did not begin to emerge until the 1800s. In particular the common law countries and the (former) USSR have made wide use of bilateral treaties. The first multilateral convention was the Organization of American States Convention on Extradition in 1933.³ It was followed twenty years later by the Arab Extradition Agreement in 1952, and then by the influential European Convention on Extradition in 1957 and the 1966 Commonwealth scheme for the rendition of fugitives.⁴ The most recent multilateral treaties have been the 1995 European Union Convention on simplified extradition within the European Union, and the 1996 European Union Convention on the substantive requirements for extradition within the European Union.

In order to promote new extradition treaties and to provide guidance in their drafting, the United Nations prepared a Model Treaty on Extradition (GA resolution 45/116 of 14 December 1990).

³ This has subsequently been replaced by the 1981 Inter-American Convention on Extradition.
⁴ As amended in 1990. The Commonwealth scheme, although not a formal treaty, has been unanimously approved by all members of the Commonwealth.

In addition to these general treaties on extradition, provisions on extradition have also been included in several international conventions that deal with specific subjects. Perhaps the best-known example is the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the twelve paragraphs of article 6 deal with extradition. Article 16 of the Palermo Convention was largely drafted on the basis of this 1988 Convention.

B. The Conditions for Extradition

Among the common conditions included in agreements are the double criminality requirement (generally accompanied by the definition of the level of seriousness required of the offence before a State will extradite), a refusal to extradite nationals, and the political offence exception.

1. The Principle of Double Criminality
   (Dual Criminality)

The great majority of extradition treaties require that the offence in question be criminal in both the requesting and the requested State, and often also that it is subject to a certain minimum punishment, such as imprisonment for at least one year.⁵ Even where a State allows extradition in the absence of an extradition treaty, this principle of double criminality is generally applied.⁶

⁵ The Palermo Convention does not directly stipulate a certain minimum punishment as a condition for extradition, since art. 16(1) provides only that the article applies to extradition for the offences covered by the Convention. However, the entire Convention is drafted to cover serious crime, which is defined by article 2 as “conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.

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The double criminality principle may cause legal and practical difficulties. Legal difficulties may arise if the requested State expects more or less similar wording of the provisions, which is often an unrealistic expectation in particular if the two States represent different legal traditions. Practical difficulties may arise when the requesting State seeks to ascertain how the offence in question is defined in the requested State.

Double criminality can be assessed both in the abstract and in the concrete. In *abstracto*, what is required is that the offence is deemed to constitute a punishable offence in the requested State. In *concreto*, only if the constituent elements of the offence in both States correspond with each other will the offence be deemed extraditable.

The United Nations Model Treaty on Extradition clearly favours the simpler approach, an assessment *in abstracto*. According to article 2(2)(a), “In determining whether an offence is an offence punishable under the laws of both Parties, it shall not matter whether ... the laws of the Parties place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology.”

An example from Finland cited by Korhonen7 is that during the summer of 2000, the Ministry of Justice of Finland was informed that a former high Kremlin official who is wanted by the Swiss for money laundering offences had been granted a visa to Finland. The Finnish authorities were prepared to take him into custody pending a formal request for his extradition. The suspected money laundering offence related to the taking of bribes in Moscow from Swiss construction companies in return for granting them lucrative contracts in the renovation of the Kremlin, and to the depositing of the money in Swiss banks. The problem faced in Finland is that he was suspected of laundering the proceeds of his own crime, which is not separately punishable according to Finnish law. On the basis of the *in concreto* approach, Finland would have had to turn down a possible Swiss request for extradition.

On the other hand, the Finnish authorities could take into account all of the facts that were provided in the Swiss warrant of arrest. Clearly, some offence which was punishable also according to Finnish law had been (allegedly) committed in the Russian Federation. Since those facts were included in the Swiss warrant, which implied that the Swiss had considered them in issuing the warrant, the Finnish authorities concluded that double criminality had been sufficiently established *in abstracto*. (Ultimately, the Finnish authorities did not have to take any more action, since the person in question never showed up in Finland.)

The question may also arise as to whether double criminality should be assessed at the time of the commission of the offence, or at the time of the request for extradition. This problem arose in a recent and notorious case in the United Kingdom, where the House of Lords rejected most of the Spanish claim for the surrender of the former head of Chile, General Augusto Pinochet, on the

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6 See, for example, article 15(1) of the Palermo Convention.
grounds that his alleged offences had not been criminalised in the United Kingdom at the time of their commission (Korhonen, p. 4). (Ultimately, Jack Straw, the UK Home Secretary, decided that Pinochet was not fit to stand trial and therefore would not be extradited to Spain. Pinochet thereupon returned to Chile.)

Yet another special problem in the application of the principle of double criminality is if the law of the requesting State allows extraterritorial jurisdiction for the offence in question, but the law of the requested State does not. This is included as an optional ground for refusal in art. 4(e) of the UN Model Treaty on Extradition.

Finally, in practice it is possible that extradition is sought for several separate offences, and some of these do not fulfil the conditions of double criminality. The general rule expressed in art. 2(4) of the UN Model Treaty on Extradition and art. 2(2) of the Council of Europe Extradition Convention is that the offences in question must be criminal in both countries; however, the condition of the minimum punishment can be waived for some of the offences. Thus, for example, if extradition is sought for a bank robbery as well as for several less serious offences for which the minimum punishment would not otherwise meet the conditions for extradition, all of them can nonetheless be included in the request.

The corresponding provisions of the Palermo Convention are constructed somewhat differently. Art. 16(1) lays down the basic rule that extradition is possible only where the offence in question is punishable under the domestic laws of both States. Art. 16(2) states that as long as the request refers to at least one offence that is extraditable under the Convention, the requested State may grant extradition for all of the serious offences covered in the request. The purpose of art. 16(2) is two-fold. It limits extradition only to serious offences. At the same time, however, it allows extradition also for additional offences where these do not as such (necessarily) involve an organized criminal group.

Recent trends in extradition have attempted to ease difficulties with double criminality by inserting general provisions into agreements, either listing acts and requiring only that they be punished as crimes or offences by the laws of both States, or simply allowing extradition for any conduct criminalised to a certain degree by each State (Blakesley and Lagodny, pp. 87–88).

2. The Rule of Speciality

The requesting State must not, without the consent of the requested State, try or punish the suspect for an offence not referred to in the extradition request and committed before he or she was extradited.

This rule does not prevent an amendment of the charges, if the facts of the case warrant a reassessment of the charges. For example, even if a person has been extradited for fraud, he or she may be prosecuted for embezzlement as

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9 See, for example, art. 14 of the UN Model Treaty on Extradition.
long as the facts of the case are the ones referred to in the request for extradition.

The rule of speciality is universally accepted, but in practice it does not automatically rule out all possibilities of bringing an offender to justice even for offences not referred to in the request. This, however, would require separate consent from the authorities of the requested State (Korhonen, p. 8). Let us assume that the suspect has been extradited, and in the course of the proceedings it is found that he or she has apparently committed another offence not referred to in the extradition request. Since the fugitive is already in custody in the requesting State, the authorities usually have the time to submit a supplementary request to the State from which the fugitive was extradited, requesting permission to proceed also in respect of these newly uncovered offences. Such supplementary requests must usually be accompanied by a warrant of arrest. It should be clear, on the other hand, that the authorities should not deliberately delay the initial proceedings in anticipation of receiving consent to the bringing of the new charges.

If, following extradition, the person in question is released in the territory of the requesting State, he or she may not be prosecuted for an offence that had been committed before the extradition took place until after this person has had a reasonable opportunity to depart from this State.10

3. The Non-Extradition of Nationals

As a rule, States have long been willing to extradite nationals of the requesting State, or nationals of a third State. When it comes to extraditing their own citizens, however, most States have traditionally been of the opinion that such extradition is not possible. Some States have even incorporated such a prohibition into their Constitution. Furthermore, the principle of the non-extradition of nationals is often expressly provided for in treaties. The rationale for such a view is a mixture of the obligation of a State to protect its citizens, a lack of confidence in the fairness of foreign legal proceedings, the many disadvantages that defendants face when defending themselves in a foreign legal system, and the many disadvantages of being in custody in a foreign country.11

The United States, the United Kingdom and most other common law countries, in turn, have been prepared to extradite their own nationals. This may have been due in part to the fact that these States have been less likely than for example civil law countries to assert jurisdiction over offences committed by their citizens abroad—and thus, failing extradition, the offender could not have been brought to justice at all. The common law countries have also been aware of the advantages of trying the suspect in the place where the offence was alleged to have been committed. There is, for example, the greater ease with which evidence and testimony can be obtained in the forum delicti, and the difficulties in submitting evidence obtained in one country to the courts of another country.

In cases where the requested State does in fact refuse to extradite on the grounds that the fugitive is its own

10 See, for example, art. 14(3) of the UN Model Treaty on Extradition.

national, the State is generally seen to have an obligation to bring the person to trial. This is an illustration of the principle of aut dedere aut judicare—"extradite or prosecute", "extradite or adjudicate". Such adjudication, however, would presuppose that the requested State applies the active personality principle, i.e. exercises jurisdiction over offences that its nationals have committed abroad (Korhonen, p. 5).

Such a provision is contained, for example, in article 16(10) of the Palermo Convention. Jurisdiction for such offences is covered by article 15(3) of the Palermo Convention. Paragraph 16(12) of the Palermo Convention contains a parallel provision on enforcement of a sentence imposed on a national of the requested State, by a court in a foreign State.

In practice, some States that have refused to extradite their nationals have also been reluctant to prosecute. To address this issue, art. 16(10) of the Palermo Convention has a new feature in comparison with art. 6(9)(a) of the 1988 Convention and art. 4(a) of the UN Model Treaty on Extradition. It states that the authorities of such a State “shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party.” The emphasis here is that, since the offence is by definition a serious case of transnational organized crime, the State in question should make an earnest effort to bring the suspect to justice. The provision goes on to enjoins the two States Parties to cooperate in order to ensure the efficiency of prosecution.

Especially in Europe, the distaste towards extradition of nationals appears to be lessening. The Netherlands, for example, has amended its Constitution and drafted legislation to allow such extradition, as long as the national will be returned to the Netherlands for the enforcement of any sentence passed.

The Palermo Convention incorporates a provision that reflects this development. According to article 16(11),

> "Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such a conditional extradition or"

12 The principle of aut dedere aut judicare can, of course, be applied also to other cases where the requested State refuses extradition. See, for example, art. 4(f) of the UN Model Treaty on Extradition.
13 See also art. 6(9)(a) of the 1988 Convention and art. 4(a) of the UN Model Treaty on Extradition.
14 Germany is currently in the process of making a corresponding amendment to its Constitution.
15 The 1988 Convention does not contain a similar provision. Article 12 of the UN Model Treaty speaks obliquely of the possibility that the requested State may “temporarily surrender the person sought to the requesting State in accordance with conditions to be determined between the Parties”; this, however, is in the context of possible proceedings for offences other than the one mentioned in the request for extradition.
surrender shall be sufficient to discharge the obligation set forth in paragraph 10 of this article.”

Thus, under the Palermo Convention a national can be extradited on condition that he or she be returned to serve out the possible sentence. Such a guarantee that the actual enforcement of any punishment will take place in the person’s home country can well be helpful in overcoming any reluctance to extradite one’s nationals.

4. The Political Offence Exception

During the 1700s and the early 1800s, extradition was used very much on an ad hoc basis primarily in the case of political revolutionaries who had sought refuge abroad (Third Restatement, p. 558). However, during the 1830s, the idea developed in France and Belgium that suspects should not be extradited for politically motivated offences (Nadelmann, p. 419).

There is no universally accepted definition of what constitutes a “political offence”. In deciding whether an offence qualifies as “political”, reference is generally made to the motive and purpose of the offence, the circumstances in which it was committed, and the character of the offence as treason or sedition under domestic law. One of the leading cases internationally is In re Castione ([1891] 1 Q.B. 149), where the refusal to extradite the suspect was based on the view that alleged offences that had been committed in the course of, or incident to, a revolution or uprising are political (cited in Nadelmann, p. 420).16

Gully-Hart argues that “The emergence of an international concept of a political offence should now be accepted”.17 He notes that the European Convention on the Suppression of Terrorism has barred a large number of offences from the political offence exception. He balances this by noting a tendency to “enlarge” the definition of a political offence in cases where there is a danger of persecution or an unfair trial. On the other hand, it may be noted that the danger of persecution or unfair trial is now emerging as a separate grounds for refusal in its own right (see below).

Although it may well be that the existence of such an international concept of a political offence “should now be accepted”, recent developments suggest that attempts are being made to restrict its scope or even abolish it (Korhonen, p. 4). This is the case, for example, in extradition among the European Union countries. The recent Palermo Convention does not make specific reference to political offences as grounds for refusal, even though the UN Model Treaty on Extradition, adopted only ten years earlier, had clearly included this as a mandatory ground for refusal.

The failure to specifically include the political offence exception in the Palermo Convention is significant. One of the reasons that the scope of the political offence exception has been lessening is that States have tended to avoid entering into extradition treaties with those States with whom such political problems might arise in the first place. This is not the

16 In respect of the United States, Nadelmann (p. 426) sees two trends: one trend is towards a narrower definition of the political offence exception, and another, somewhat opposing, trend is towards greater consideration of foreign policy interests and its bilateral relationship with the requesting Government.

case with the Palermo Convention, which has been signed by over 120 States. With so many signatories, it is quite likely that a need for extradition may arise between States that are on less than friendly terms with one another. In the discussions on the Convention in Vienna, it was argued that the political offence should not be specifically mentioned, since the Convention itself was limited to serious transnational organized crime.

On the other hand, article 16(7) of the Palermo Convention provides States Parties with a built-in escape clause. It states that

“Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, . . . the grounds upon which the requested State Party may refuse extradition.”

Thus, if the domestic law of the requested State allows for the possibility of the political offence exception (as would almost inevitably be the case), this option remains, even if not specifically mentioned in the Palermo Convention.

One factor behind the restriction or abolition of the political offence exception is the growth of terrorism, a subject that was raised many times (both directly and obliquely) during the drafting of the Palermo Convention. A distinction is commonly made between “pure” political offences (such as unlawful speech and assembly), and politically motivated violence (Third Restatement, p. 558). If the offence is serious—such as murder, political terrorism and genocide—courts in different countries have (to varying degrees) tended not to apply the political offence exception. Examples include the extradition from the United States of several persons suspected of being Nazi war criminals or IRA terrorists (Nadelmann, pp. 421 and 424). Violation of international conventions is one criterion in determining such seriousness; a case in point is the readiness of many countries to extradite persons suspected of skyjacking.

An example in which the political offence exception arose in European practice, cited by Korhonen (p. 5), is when the Kurdish leader Abdullah Öcalan was taken into custody in Rome in November 1999 on the basis of a German warrant for his arrest. However, Germany, which was clearly concerned with the possibility of domestic unrest if Öcalan would be extradited to Germany to stand trial, withdrew its warrant and did not proceed with the request for extradition. At the same time, Turkey had also issued a warrant for the arrest of Öcalan. In the extradition hearings, the local court in Rome decided that since Germany had withdrawn its warrant and there was a risk that Öcalan would face the death penalty if he were to be extradited to Turkey, the court had no legal grounds to proceed in the matter. (Apparently the Italian court had not considered the possibility of extraditing Öcalan under the condition that he would not be sentenced to death if found guilty. Upon accepting such a condition, Turkey would have been bound by it.) Öcalan was consequently expelled from Italy and moved from one country to another in Europe, with no country willing to allow him in. He finally ended up in Nairobi, Kenya, where he was kidnapped and transported to Turkey to stand trial. He was eventually sentenced to death by a Turkish court, a sentence which on 25 November 1999 was upheld by a court of appeal.18
5. The Refusal to Extradite on the Grounds of the Danger of Persecution or Unfair Trial, or of the Expected Punishment

Originally, extradition treaties between States were seen to be just that, treaties between sovereign and equal States as parties. According to this approach, other parties, in particular the fugitive in question, had no standing to intervene in the process, nor was the nature of the proceedings or expected treatment in the requesting State a significant factor. Recently, however, also the individual has been increasingly regarded as a subject of international law. This has perhaps been most evident in extradition proceedings. Democratic countries have been increasingly reluctant to extend full co-operation to countries which do not share the same democratic values, for example on the grounds that the political organization of the latter countries is undemocratic, or because their judicial system does not afford sufficient protection to the prosecuted or convicted individual (Gully-Hart, p. 249).

In line with this reassessment in the light of the strengthening of international human rights law, many of the more recently concluded treaties pay particular attention to the nature of the proceedings or the expected treatment in the requesting State. States will generally refuse to extradite if there are grounds to believe that the request has been made for the purpose of persecution of the person in question, or that the person would not otherwise receive a fair trial (Gully-Hart, p. 249–251, 257).

Refusal on the grounds of expected persecution is dealt with in, for example, article 16(14) of the Palermo Convention:

“Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.”

This wording is taken from art. 3(b) of the UN Model Treaty on Extradition (see also the United Nations Convention Relating to the Status of Refugees).

Within the European context, such refusal would be highly unusual, since the European Convention on Extradition is based on mutual trust in the administration of criminal justice of one another's State.

The question of fair trial and treatment is in principle distinct from the question of persecution. Art. 3(f) of the UN Model Treaty on Extradition gives as a mandatory ground for refusal the possibility that the person in question would be subjected to torture or cruel, inhuman or degrading treatment or punishment, or the absence of the minimum guarantees in criminal proceedings, as contained in art. 14 of the International Covenant on Civil and Political Rights.

The issue of fair trial and treatment is dealt with in article 16(13) of the Palermo Convention:

According to “The Economist” (11 January 2001), the death sentence passed on Mr. Öcalan has been stayed pending a review of his case by the European Court of Human Rights, a process that could take years.
“Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.”

This provision is a new one in UN Conventions. No similar provisions are to be found in the 1988 Convention or in the UN Model Treaty on Extradition.

Perhaps the most notable and influential case concerning fair treatment is the transatlantic case of Soering v. the United Kingdom (ECHR 1/89/161/217). Soering had been charged with murder in Virginia, where murder was a capital offence. Following a request for extradition from the United States, he was arrested in the United Kingdom and his extradition was prepared. He appealed the extradition decision, however. Article 3 of the European Convention prohibits torture or inhuman and degrading treatment or punishment. ECHR unanimously found that extradition would be a violation of this, since circumstances on death row—6–8 years of isolation, stress, fruitless appeals, separation from family and other damaging experiences—would be inhuman and degrading. (The follow-up to this case is that Soering was extradited, after the Attorney General had promised not to seek the death penalty.)

Another recent example is the case of Ira Einhorn, who was arrested in 1981 for the 1979 murder of his lover in the United States. Before being brought to trial, however, he jumped bail and disappeared. He was convicted in the US in absentia. In 1997, he was finally found living under an alias in France. The US called for his extradition. The French Court of Appeals ruled in 1999 that he could be extradited provided that he would be allowed to have a new trial and would not face the death penalty. After the United States agreed to this, and his appeal all the way to the European Court of Human Rights was denied, he was finally extradited to the United States at the end of July 2001.

Following the adoption in 1983 of Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which abolished the death penalty, European countries have been reluctant to extradite suspects to countries where the death penalty might be imposed.21 One common outcome is that, as in the Soering case, the requesting State agrees to waive the death penalty or, if this is imposed by the court, the requesting State agrees to ensure that it is not enforced. Another option is to agree that the suspect, if convicted, will be returned to the requested State for enforcement of the sentence. This latter option has been followed in art. 16(11) the Palermo Convention, already referred to above.

20 Furthermore, art. 3(g) of the UN Model Treaty on Extradition cites as mandatory grounds for refusal the rendering of the judgment of the requesting State in absentia, the failure of the convicted person to receive sufficient notice of the trial or the opportunity to arrange for his or her defence, and the failure to allow him or her the opportunity to have the case retried in his or her presence.

21 See also art. 4(d) of the UN Model Treaty on Extradition.
6. **Other Grounds for Refusal to Extradite**

Some extradition treaties specifically rule out extradition for military offences or fiscal offences, or extradition when the person in question has already been judged for the offence.\(^{22}\)

Art. 16(15) of the Palermo Convention makes specific reference to fiscal offences: “States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.”

One of the fundamental legal principles of the rule of law is that no one should be subjected to double jeopardy (*non bis in idem*). Consequently, extradition will generally be refused if the person requested has already been prosecuted in the requested State for the acts on the basis of which extradition is requested, regardless of whether the prosecution ended in conviction or acquittal (Third Restatement, p. 568). According to art. 3(d) of the UN Model Treaty on Extradition, extradition shall not be granted “if there has been a final judgment rendered against the person in the requested State in respect of the offence for which the person’s extradition is requested.”

Some States may also deny extradition if the person in question has been prosecuted in the requesting State or in a third State (ibid.). The UN Model Treaty on Extradition also includes, as a mandatory grounds for refusal, the fact that “the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty.”

A ground for refusal that is becoming increasingly rare is that the proof of the guilt of the person in question supplied by the requesting State does not meet the evidentiary standards of the requested State. According to Korhonen (pp. 6–7), at least within the European context requiring additional proof of the guilt of the person in question would be in violation of the principle of mutual trust in one another’s administration of criminal justice.

### C. The Extradition Procedure

**Provisional arrest.** The process of extradition may be lengthy. In order to ensure the continued presence of the person in question, the requesting State may request that the fugitive be taken into custody pending the outcome of the proceedings (see, for example, art. 9 of the UN Model Treaty on Extradition). According to article 16(9) of the Palermo Convention,

> “subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.”

One issue that may arise in this connection is who determines the urgency of the request: is it the requesting State or the requested State (Korhonen, p. 9)? Although the Palermo Convention is phrased so that it is the requested State

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\(^{22}\)Art. 3(c) refers to military offences as a mandatory grounds for refusal, and art. 3(d) refers to double jeopardy.
that is to be “satisfied that the circumstances ... are urgent”, it should in fact be left to the requesting State to determine the urgency of the matter.

The Palermo Convention and many extradition treaties do not require that provisional arrest be used in such circumstances, as long as “other appropriate measures are taken”. Korhonen (p. 9) has argued that it can be reasonable to assume that there is a presumption that the fugitive is indeed placed under provisional arrest, since otherwise there is the risk that the fugitive will attempt to flee from justice. This, of course, very much depends on the effectiveness of the “other appropriate measures”.

“Disguised extradition” and abduction. A State generally has the right to expel a foreign national who is deemed to be “undesirable”, for example on the basis of his or her criminal activity. Occasionally, the authorities of the State in question have expelled the foreign national not to his or her home State or to the State from which he or she arrived, but to the State which has requested extradition. The use of such “back-door” procedures instead of the normal extradition procedure has rightfully been criticized as a violation of international comity and international law.

An example of how this can operate in practice is provided by a case involving the return of a Chinese national from Canada to China. The same person was wanted in the United States on charges related to alleged organized crime activity, but the extradition process appeared to be becoming quite complex and time-consuming. Ultimately, Canada placed the person on a flight back to China—knowing that the flight touched down in San Francisco for refuelling. At

San Francisco, the US authorities boarded the plane and took the person into custody.

The case of United States v Alvarez-Machain ((91-712), 504 U.S. 655 (1992)) raises another type of improper extradition, that of abduction. A Mexican physician, Humberto Alvarez-Machain, was suspected of taking part in the torture and murder of a US narcotics agent in Guadalajara, Mexico in 1985. Alvarez-Machain was seized by Mexican bounty hunters in Mexico and flown to the United States. The defendant argued that the US court had no jurisdiction to try the case because he, a Mexican citizen accused of a murder that had been alleged to have been committed in Mexico, had been improperly brought to the United States by a US-sponsored abduction. The defendant further argued that such an abduction was a violation of the extradition treaty between the United States and Mexico. The majority on the Supreme Court ruled, however, that the forcible abduction of the defendant does not prohibit his trial in a United States court for violations of this country’s criminal laws. (This is an application of the doctrine of “male captus, bene detentus”, which essentially holds that the court need not look at how a defendant was brought before it.) The Supreme Court also held that there was no violation of the treaty, since this treaty did not expressly say that the two States Parties were obliged to refrain from forcible abductions of persons from one another’s territory.

Supplementary information and consultation. Many agreements provide that, if the information provided by the requesting State is found to be insufficient, the requested State may (or even “shall”) request the necessary supplementary information (for example
According to article 10(16) of the Convention against Transnational Organized Crime, “before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.” This is a new provision, which has no parallel in the 1988 Convention or in the 1990 UN Model Treaty. The provision can thus be understood as a reflection of “good practices” as they have evolved during the 1990s.

Simplification of extradition proceedings. As noted, extradition can be a long, drawn-out and expensive process. During recent years, many efforts have been made to expedite and simplify the process, in particular by eliminating grounds for refusal.

Art. 16(8) of the Palermo Convention calls for the simplification of extradition: “States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.”

In 1995, the European Union adopted a Convention on simplified extradition within the EU. Essentially, the Convention focuses on the many cases where the person in question consents to extradition.24

In 1996, the EU adopted a convention that supplements the 1957 Council of Europe Convention, and is designed to facilitate and speed up extradition. The 1996 Convention widened the scope of extraditable offences, restricted refusals on certain grounds (the absence of double criminality, or the nationality of the offender) and eliminated the political offence exception as well as refusals on the grounds that the prosecution or punishment of the person in question would be statute-barred in the requested State.25

The European Union is currently considering various options for “fast-track extradition”. These discussions have been held within the context of the discussion on mutual recognition of decisions and judgments in criminal matters. In regards to extradition, the goal is to have a warrant of arrest issued by the competent authorities of one State recognized as such by the authorities of another EU State, establishing a basis for extradition.

24 This 1995 Convention has been ratified by Austria, Denmark, Finland, Germany, Greece, the Netherlands, Portugal, Spain and Sweden.
25 The 1996 Convention has been ratified by Denmark, Finland, Germany, Greece, the Netherlands, Portugal and Spain.

In December 1992, the defendant was acquitted by the U.S. District Court in Los Angeles of all charges on the grounds that the Government had not produced any credible evidence linking him to the torture and murder of the narcotics agent. In a somewhat Kafkaian follow-up to the case, on his release by the court, the defendant was arrested by the US Immigration Service and held for several hours on the grounds of “illegal entry into the U.S.”
III. Mutual Assistance in Criminal Matters

A. The Evolution of Instruments on Mutual Assistance in Criminal Matters

The purpose of extradition is to get a foreign State to send a fugitive to the requesting State so that he or she can be placed on trial, or so that any punishment imposed can be carried out. The purpose of mutual assistance, in turn, is to get a foreign State to assist in other ways in the judicial process, for example by securing the testimony of possible victims, witnesses or expert witnesses, by taking other forms of evidence, or by checking judicial or other official records.

Generally, mutual legal assistance is based on bilateral or multilateral treaties. No global mutual assistance treaties have been drafted that would apply to a broad range of offences. Efforts to smooth international cooperation by developing such a global mutual assistance treaty had long been thwarted in particular by the United States and the United Kingdom, which prefer bilateral treaties that would take into consideration the idiosyncratic features of their common law systems.

Instead, over the years, some international treaties have been drafted that deal with specific offences. These instruments generally include extensive provisions on mutual legal assistance as well as on extradition. The sets of provisions included in some of these agreements are so extensive that they have been referred to as “mini-treaties” on mutual legal assistance.

Such is the case, for instance, with the following conventions:

- the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 (article 10),
- the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (article 11),
- the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988 (article 7),
- the International Convention against the Taking of Hostages of 17 December 1979 (article 11), and
- the Palermo Convention, opened for signature on 12 December 2000 (article 18).

In addition, there are two influential multilateral arrangements that apply to a wide spectrum of offences, a Convention prepared by the Council of Europe, and an instrument applied within the context of the British Commonwealth (the so-called “Harare Scheme”).

The oldest, most widely applied and arguably most influential is the Council of Europe Convention on Mutual Assistance in Criminal Matters. This was opened for signature in 1959, and entered into force in 1962.

The Council of Europe Convention focuses on assistance in judicial matters (as opposed to investigative and prosecutorial matters). Furthermore, since it has been in force for almost 40 years, it has in some respects been bypassed by practice. In order to improve the effectiveness of the Convention, the
fifteen European Union countries have prepared their own Mutual Assistance Convention of 29 May 2000. This supplements the 1959 Council of Europe convention and its protocol in order to reflect the emergence of “good practices” over the past forty years.

The Commonwealth Scheme for Mutual Assistance in Criminal Matters does not create binding international obligations; instead, it represents more an agreed set of recommendations. It deals with identifying and locating persons; serving documents; examining witnesses; search and seizure; obtaining evidence; facilitating the personal appearance of witnesses; effecting a temporary transfer of persons in custody to appear as a witness; obtaining production of judicial or official records; and tracing, seizing and confiscating the proceeds or instrumentalities of crime. A model Bill to assist countries in preparing legislation has been developed by the Commonwealth Secretariat.

The Commonwealth scheme extends to both “criminal proceedings that have been instituted in a court” and when “there is reasonable cause to believe that an offence in respect of which such proceedings could be instituted have been committed”. Thus, it effectively also allows mutual assistance when certain serious offences, such as terrorism, could potentially be prevented.

The United Nations, in turn, has prepared a Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/117 of 14 December 1990). The purpose of the Model Treaty is to provide a suitable basis for negotiations between states that do not have such a treaty. The Model Treaty is by no means a binding template. The States can freely decide on any changes, deletions and additions. However, the Model Treaty does represent a distillation of the international experience gained with the implementation of such mutual legal assistance treaties, in particular between States representing different legal systems.

Competing international treaties. Over the years, several multilateral treaties have been drafted that deal with mutual legal assistance. In addition, many states have entered into bilateral treaties with other countries. This raises the possibility that two or more treaties may be applicable to the same facts. Since there may be differences between these treaties (for example in relation to the conditions under which mutual legal assistance can be provided, or the procedure used), the question arises of which treaty should be applied.

General conflicts between treaties can be decided on the basis of the Vienna Convention on the Law of Treaties, which was concluded on 23 May 1969. Among the principles applied are that, other things being equal, a later treaty replaces
an earlier one, and a treaty dealing with a specific issue replaces a treaty dealing only with general issues.

In addition, some new treaties contain specific provisions on the resolution of possible conflicts between treaties. For example, article 18(6) of the Palermo Convention stipulates that “the provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.” (Article 7(6) of the 1988 Convention is similar.)

This provision means in practice that obligations under other agreements remain in force. The Palermo Convention (or the 1988 Convention) does not in any way diminish these obligations. The practitioner should examine the agreements side by side, and identify which provisions of the different agreements would, in combination, result in the highest possible level of mutual assistance.

Despite the network of international instruments, cases will continue to arise between States that are not linked by a mutual legal assistance treaty. If the States in question are, nonetheless, Parties to the Palermo Convention, and the case involves transnational organized crime, the Palermo Convention can form the basis for mutual legal assistance. According to article 18(7) of the Palermo Convention, paragraphs 16(9)–(29) of the Convention apply to such requests. (Article 7(7) of the 1988 Convention contains a similar provision.) Even if the States in question are bound by a treaty, they can decide to apply paragraphs 16(9)–(29), and indeed the Palermo Convention strongly encourages them to apply the corresponding provisions of this new Convention. As noted in the Commentary to the 1988 Convention (para. 7(23)), “this enables pairs of States to follow the procedures with which they have become familiar in the general context of mutual legal assistance”.

B. The Scope of Mutual Legal Assistance

In article 18(1), the Palermo Convention calls for States Parties to afford one another the widest measure of mutual legal assistance (see also art. 1(1) of the 1959 Council of Europe Convention). The scope of measures that can be requested under mutual legal assistance is rather large, and the practice appears to be moving towards a constant expansion of this scope.

According to art. 18(3) of the Palermo Convention, which in this respect is based on the 1988 Convention, mutual legal assistance can be requested for any of the following purposes:

a. taking evidence or statements from persons;

b. effecting service of judicial documents;

c. executing searches and seizures, and freezing;

d. examining objects and sites;

e. providing information, evidentiary items and expert evaluations;

f. providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

g. identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

h. facilitating the voluntary appearance of persons in the requesting State Party; and

i. any other type of assistance that is not contrary to the domestic law of the requested State Party.
Most of the items on the above list are familiar from art. 7(2) of the 1988 Convention, art. 1(2) of the UN Model Treaty and para. 1 of the Commonwealth Scheme, as well as from many bilateral Conventions. There are, however, four new elements in the Palermo Convention that reflect the evolution of thinking on mutual assistance.

- point (c) also includes the freezing of assets, and not just searches and seizures. The freezing of assets has been found to be particularly important in preventing and controlling organized crime. (Para. 1(i) of the Commonwealth Scheme separately refers to the tracing, seizing and confiscating of the proceeds of criminal activities.)

- point (e) includes the provision of expert evaluations; the earlier multilateral treaties had not specified this form of assistance.

- point (f) specifies that originals or certified copies can be obtained also of government records; again, this was not clearly noted in the 1988 Convention or the UN Model Treaty. The Commonwealth Scheme, on the other hand, does refer to the “production of judicial or official records”. (See also below under “Provision of documents”.)

- point (i), which is a catch-all reference to “any other type of assistance that is not contrary to the domestic law of the requested State Party”, provides considerable flexibility to the listing.28

Requests related to offences for which a corporate body may be liable. One feature of (transnational) organized crime is that corporate bodies (legal persons) may be involved, often as the front for the activities of the actual offenders, and in particular for the laundering of the proceeds of crime. The situation may arise where State A, which recognizes the possibility of corporate criminal liability, requests assistance from State B, which does not recognize such a possibility. Since art. 10 of the Palermo Convention requires that corporate bodies be held liable for serious crime in some manner (no matter whether criminal, civil or administrative), art. 18(9) requires States Parties to provide mutual legal assistance to the fullest extent possible under relevant laws, treaties, agreements and arrangements. Absence of corporate criminal liability in the requested State is thus not a bar to providing mutual legal assistance.

Video conferences. Art. 18(18) of the Palermo Convention adds the possibility of the hearing of witnesses or experts by means of video conference.29 This is a completely new provision in UN conventions; nothing similar was contained in the 1988 Convention or in the 1990 UN Model Treaty. Its newness, of course, is a reflection of the rapid

28 Mutual legal assistance is distinct from the transfer of proceedings and the transfer of persons in custody to serve sentences, which would thus not be covered by point (i). The Palermo Convention deals with these subjects separately in articles 17 and 21. Some commentators and even courts have held that mutual legal assistance treaties are general, and can apply to forms of assistance not specifically mentioned in them. For example, in the United States, the Re Sealed Case (1987; 832 F.2d 1268. US Court of Appeals for the District of Columbia) determined that the existence of a treaty does not limit evidence gathering to the procedures stipulated in the treaty; indeed, this point is generally explicitly stated in such treaties.
development of communications technology. Even though this possibility requires an initial investment in the necessary equipment, video technology can considerably facilitate the hearing of witnesses and experts, since they would no longer have to travel from one country to another. It can also serve to protect witnesses or experts, if they fear to reveal their location or fear travelling to a court hearing in the requesting State.

Having a “direct” connection between two countries, however, raises some interesting issues. A normal situation would be when an attorney or a judge located in the requesting State uses a video link to hear a witness located in the requested State. In order to forestall concerns that the requested State may have about possible violations of its sovereignty, or concerns about due process, art. 18(18) specifies that the States may agree that a judicial authority of the requested State may attend the hearing.

The spontaneous transmission of information. In the investigation and prosecution of offences, now and then the law enforcement authorities of a country receive information that may be of interest to the authorities of another country. Art. 18(4) of the Palermo Convention allows the authorities, even without a prior request, to pass on information to the competent authorities of another State. Again, this is a new element in UN conventions. Its usefulness has been demonstrated in practice in, for example, Europe.

Providing of documents. Art. 18(3)(f) of the Palermo Convention states in general that mutual legal assistance can be requested in the provision of originals or certified copies of relevant documents and records. A practical question that was not addressed in the 1988 Convention was the scope of application of this provision. Does it, in particular, extend to documents that are considered secret in the requested State? The matter was considered in art. 16 of the UN Model Treaty, which served as the basis in the drafting of art. 18(29) of the Palermo Convention. This provision requires that the requested State provides copies of government records, documents or information in its possession that under its domestic law are available to the general public, but leaves the requested State with discretion over whether or not to provide any other government records, documents or information in its possession.

Transfer of persons in custody. In the investigation and prosecution of transnational organized crime cases, a situation may well arise where a person

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29 According to article 18(18) of the Palermo Convention, wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party. See also article 10 of the 2000 European Union Convention. Art. 11 of the 2000 European Union Convention also permits teleconferences.

30 This spontaneous exchange of data is provided under article 10 of the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. See also art. 7 of the 2000 European Union Convention.
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held in custody in one State can provide key testimony in a case in another State.

Art. 7(4) of the 1988 Convention states quite generally that States Parties shall facilitate “to the extent consistent with their domestic law and practice, the presence or availability of persons, who consent to assist in investigations or participate in proceedings”. Art. 18(10)–(12) of the Palermo Convention provide more detail on the transfer of persons in custody for this purpose. Transfer is possible only if the person in question consents, and the competent authorities of the two States agree (subject to possible conditions). The person is to be kept in custody in the State to which he or she is transferred, and is to be returned without delay as agreed by the two States. In addition, the person transferred is to receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

When persons in custody are transferred from one State to another under art. 18(11) of the Palermo Convention, a form of the principle of speciality applies (art. 18(12)). Thus, unless the requested State agrees, they cannot be prosecuted, detained, punished or subjected to any other restriction of liberty in the territory of the State to which such persons are transferred in respect of offences committed or convictions imposed prior to their transfer.

The concept of “international subpoenas”. One, albeit rare, feature of some mutual legal assistance treaties is that they allow for the issuing of subpoenas “backed up” by compulsion, such as penalties for failure to obey. This concept is applied for example in the United States-Italian Mutual Assistance Treaty, which provides for compulsory appearance of a witness in the requesting State (McClelan 1992, p. 158). Also, Australia has such an arrangement with New Zealand and Fiji, and Malaysia has such an arrangement with Singapore and Brunei (ibid.).

As noted above, art. 18(7) of the Palermo Convention refers only to facilitating the presence of persons who consent to assist in investigations or participate in proceedings. Witnesses and experts are thus completely free not to go to the requesting country. The Palermo Convention thus does not allow the use of compulsion against witnesses or experts in another State. This same approach is used in, for example, art. 8 of the 1959 European Convention, paras. 15(5), 23(4) and 24(3) of the Commonwealth Scheme, and art. 7(4) of the 1988 Convention.

C. Grounds for Refusal
There are several basic common grounds for refusal for granting a request for mutual legal assistance:

- the absence of double criminality;
- the offence is regarded as a political offence;
- the offence is regarded as a fiscal offence; and
- the granting of mutual legal assistance would be counter to the vital interests (ordre public) of the requested State.

Absence of double criminality. According to art. 18(9) of the Palermo Convention, a State may decline mutual legal assistance if the offence in question is not an offence under its laws. However, the Palermo Convention specifies that

31 Parallel detailed provisions can be found in para. 24 of the Commonwealth Scheme.
this is not a mandatory ground. Thus, the State may decide at its discretion to provide mutual legal assistance even if the condition of double criminality is absent.

Also the Commonwealth Scheme includes a “discretionary double criminality rule” (art. 7(1)). According to the author of the scheme (McClean 1992, pp. 155–156), this was to prevent a situation arising where mutual assistance is requested in respect of certain acts that are heavily punished in some Islamic law jurisdictions are not seen as appropriate for any penal sanctions in other jurisdictions.

Political offences. In respect of extradition, the political nature of the offence is generally a mandatory cause for refusal. In the field of mutual legal assistance in criminal matters, in turn, this is generally only an optional reason for refusing cooperation. Moreover, over the years the possibility or obligation to refuse assistance in such considerations has in general been curtailed, in particular with a view towards the need to combat terrorism. See, for example, art. 2 of the 1959 Council of Europe Convention, when read together with art. 8 of the European Convention on the Suppression of Terrorism of 27 January 1977.

Fiscal offences. Under the 1959 Council of Europe Convention, legal assistance may be refused where the requested party considers the offence to be a fiscal offence. In order to restrict the scope of these grounds of refusal, an additional protocol to the European Convention was drawn up at the same time, in 1959. Signatories to this additional protocol undertake not to refuse assistance on the grounds that the offence in question is a fiscal offence.

According to article 18(22) of the Palermo Convention, States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

Violation of the vital interests of the requested State (ordre public). Generally speaking, conventions on mutual legal assistance on criminal matters provide that the requested State can refuse assistance which it deems might endanger its sovereignty, security, law and order or other vital interests. This same “escape clause” is maintained even by the 2000 European Union instrument on mutual legal assistance.

The same principle is embodied in art. 18(21)(b) of the Palermo Convention, according to which the requested State Party may refuse to grant mutual legal assistance if it considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests.

Conflict with the laws of the requested state. According to art. 18(21) of the Palermo Convention, mutual legal assistance may be refused:
• if the request is not made in conformity with the provisions of this article;
• if the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction; and
• if it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

**Bank secrecy.** One relatively common ground for refusal is that granting the request would be contrary to bank secrecy. The scope of this ground for refusal has been restricted during recent years. In line with this development, art. 7(5) of the 1988 Convention and article 18(8) of the Palermo Convention stipulate that States Parties shall not decline to render mutual legal assistance on the ground of bank secrecy.

The need to indicate the ground for refusals. Good practice in mutual legal assistance requires that the requested State, if it refuses to grant assistance, should indicate the grounds for such refusal. Art. 18(23) of the Palermo Convention requires that reasons be given for any refusal of mutual legal assistance. Art. 19 of the 1959 Council of Europe Convention and para. 6(3) of the Commonwealth Scheme are similar.

Reciprocity. As noted above, art. 18(1) of the Palermo Convention requires that States Parties afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the type of offences covered by the Convention. States are not allowed to refuse assistance unless they have a clear ground to do so.

However, in the drafting of the Palermo Convention, there was considerable discussion over at what stage it should be evident that the offence in question is covered by this Convention. After all, the requested State can simply say that, in its view, the requesting State has not shown that the offence is in fact transnational; this may well be difficult to prove especially at the earlier stage of the investigation.

The solution adopted was innovative. If State A has met with refusals from State B to provide assistance under the Palermo Convention even when State A has reasonable grounds to suspect that the offence in question falls under the Convention, then State A can legitimately refuse, in turn, to help State B should it happen to come forward with a corresponding request.

**D. The Mutual Legal Assistance Procedure**

**Letters rogatory.** The traditional tool of mutual legal assistance has been *letters rogatory*, a formal mandate from the judicial authority of one State to a judicial authority of another State to perform one or more specified actions in the place of the first judicial authority (see, for example, chapter II of the 1959 Council of Europe Convention). The concept of letters rogatory had been taken from civil procedure, and focuses on judicial action in the taking of evidence. More recent international instruments simply refer to "requests".

In international practice, letters rogatory have typically been transmitted through diplomatic channels. The request for evidence, almost always originating from the prosecutor, is authenticated by
the competent national court in the requesting State, and then passed on by that State’s Foreign Ministry to the embassy of the requested State. The embassy sends it on to the competent judicial authorities of the requested State, generally through the Foreign Ministry in the capital. Once the request has been fulfilled, the chain is reversed.

Central authorities or direct contacts? Increasingly, treaties require that States Parties designate a central authority (generally the Ministry of Justice) to whom the requests can be sent. The judicial authorities of the requesting State can then contact the central authority directly. Today, to an increasing degree even more direct channels are being used, in that an official in the requesting State sends the request directly to the appropriate official in the other State.\(^3\)

In the drafting of the Palermo Convention, there was considerable discussion regarding whether or not direct channels could be used. Some states, which were not familiar with this practice, had a clear preference for the use of central authorities. The basic rule laid out by art. 18(13) of the Palermo Convention (see also art. 7(8) of the 1988 Convention and para. 4 of the Commonwealth Scheme) is that each State Party designate a central authority. Such a central authority has in effect three roles: (1) to receive requests for mutual legal assistance; (2) to execute such requests; and (3) to transmit such requests to the competent authorities for execution.

Where a State Party has a special region or territory with a separate system of mutual legal assistance (as is the case, for example, with Hong Kong in China), it may designate a distinct central authority that shall have the same function for that region or territory. This is a new feature of the Palermo Convention; art. 7(8) of the 1988 Convention and art. 3 of the Model Treaty only contain a general reference to the designation of “an authority or when necessary authorities”.

Direct requests may be possible also under some treaties in case of emergency. For example, art. 15(1) of the 1959 Council of Europe Convention allows the judicial authority of the requesting State to send the letter of request directly to the competent judicial authority of the requested State. Art. 18(13) of the Palermo Convention allows the possibility that, in urgent cases and when the States in question agree, the request can be made through the International Criminal Police Organization, if possible.

The form and contents of the request. The Palermo Convention contains several provisions on the procedure to be followed in sending a request for mutual legal assistance.

According to article 18(14) of the Palermo Convention (cf. art. 7(9) of the 1988 Convention), “requests shall be made in writing or, where possible, by any means capable of producing a written record ... under conditions allowing that State Party to establish authenticity. ... In urgent circumstances and where

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\(^3\) One of the earliest bilateral treaties to allow for this was the additional protocol to the 1959 Council of Europe Convention drawn up by France and Germany on 24 October 1974. The 1990 Schengen agreement in the framework of the European Union specifically allows the use of direct contacts between judicial authorities (art. 53). The same concept is embodied in the even more recent European Union 2000 Convention on Mutual Legal Assistance.
agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.”

The Palermo Convention, by referring to requests made “where possible, by any means capable of producing a written record ... under conditions allowing that State Party to establish authenticity”, opens up the possibility of for example transmission by fax or electronic mail. This was not possible under, for example, the 1988 Convention.34

The minimum contents of a request for mutual legal assistance are listed in article 18(15):35

a. the identity of the authority making the request;

b. the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

c. a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

d. a description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

e. where possible, the identity, location and nationality of any person concerned; and

f. the purpose for which the evidence, information or action is sought.

Article 18(16) notes that the requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

The formulation used in the Palermo Convention refers to “a language acceptable to the requested State Party”. This is a deliberately wide formulation. It includes the national language of the requested State Party, but the special circumstances of the relations between the two countries may suggest the use of other languages. For example, many countries around the world are prepared to accept requests in English and/or French.

E. Execution of the Request for Mutual Legal Assistance

Law governing the execution. The procedural laws of countries differ considerably. The requesting State may require special procedures (such as notarized affidavits) that are not recognized under the law of the requested State. Traditionally, the almost immutable principle has been that the requested State should follow its own procedural law.

This principle has led to difficulties, in particular when the requesting and the requested State represent different legal families. For example, the evidence transmitted from the requested State may be in the form prescribed by the laws of this State, but such evidence may be unacceptable under the procedural law of the requesting State.

The 1959 Council of Europe Convention is one international

34 Recommendation R(85)10 of the Council of Europe (which is non-binding) in principle encourages the acceptance of the use of telephones, teleprinters, fax and similar means of communication in the transmission of letters rogatory in the application of the 1959 Convention.

35 The list is word for word the same as in article 7(10) of the 1988 Convention.
instrument that applies to States representing two quite different legal families, the common law and the continental law systems. Although art. 3(1) of this Convention follows the traditional principle referred to above, the Commentary notes that the requesting State can ask that witnesses and experts be examined under oath, as long as this is not prohibited in the requested State.\textsuperscript{36}

According to art. 7(12) of the 1988 Convention, a request shall be executed in accordance with the domestic law 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. Thus, although the 1988 Convention does not go so far as to require that the requested State comply with the procedural form required by the requesting State, it does clearly exhort the requested State to do so. This same provision was taken verbatim into art. 18(17) of the Palermo Convention.

\textit{Promptness in fulfilling the request.} One of the major problems in mutual legal assistance world-wide is that the requested State is often slow in replying, and suspects must be freed due to absence of evidence. There are many understandable reasons for the slowness: a shortage of trained staff, linguistic difficulties, differences in procedure that complicate responding, and so on. Nonetheless, it can be frustrating to find that a case must be abandoned because even a simple request is not fulfilled in time.

The 1988 Convention does not make any explicit reference to an obligation on the part of the requested State to be prompt in its reply. The 1990 UN Model Treaty (art. 6) does require that requests for assistance “shall be carried out promptly”. Para. 6(1) of the Commonwealth Scheme calls for the requested country to grant the assistance requested as expeditiously as practicable.

The Palermo Convention is even more emphatic about the importance of promptness, and makes the point in two separate provisions. Art. 8(13) of the Palermo Convention provides that, if the central authority itself responds to the request, it should ensure its speedy and prompt execution. If the central authority transmits the request on to, for example, the competent court, the central authority is required to encourage the speedy and proper execution of the request. Art. 18(24) provides that the request is to be executed “as soon as possible” and that the requested State is to take “as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given”.

\textit{Good practice in execution.} Other elements of “good practice” in mutual legal assistance also worked their way into the Palermo Convention, making the life of the practitioner easier than under, for example, the 1988 Convention. According to art. 18(24) of the Palermo Convention,\textsuperscript{37}

- the requested State should not only execute the request as soon as possible but also “take as full account as possible of any deadlines suggested by the requesting State Party”;

\textsuperscript{36} Explanatory Report to the 1959 Convention, p. 14.

\textsuperscript{37} Cf. Art. 4 of the 2000 European Union Convention.
the requested State should respond to reasonable requests by the requesting State for information on progress of its handling of the request; and

• the requesting State should promptly inform the requested State when the assistance sought is no longer required.

Art. 18(25) of the Palermo Convention states that mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding. Art. 7(17) of the 1988 Convention is in this respect similar.

Art. 18(26) of the Palermo Convention states that, before refusing a request for mutual legal assistance, or postponing its execution, the requested State should consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. The 1988 Convention (art. 7(18) called for consultations only in the case of postponements, not refusals. The model for the wider formulation used in the Palermo Convention was taken from art. 4(4) of the 1990 UN Model Treaty.

Confidentiality of information and the rule of speciality. Once the information has been sent by the requested State to the requesting State, how can it be used?

The requested State may ask that any information provided be kept confidential except to the extent necessary to execute the request (art. 18(5) and 18(20) of the Palermo Convention). However, the situation may arise that the information received in respect of one offence or suspect at the same time exculpates another suspect in a completely separate procedure. To address this potential problem, art. 18(20) goes on to provide that the State receiving the information is not prevented from disclosing it in its proceedings if this information is exculpatory to an accused person. (The provision also deals with the necessity to inform and, if requested, consult with the other State prior to such disclosure.)

Art. 18(19) of the Palermo Convention embodies the rule of speciality: the State receiving information may not transmit or use it for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Again, however, exculpatory information may be disclosed.

Costs. According to article 18(28) of the Palermo Convention, the ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne. This latter provision has been modelled on, for example, art. VIII(3) of the Canadian-US treaty and para. 12(3) of the Commonwealth Scheme.38

IV. SUMMARY: THE GENERAL EVOLUTION OF EXTRADITION AND MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

With the increase in international travel, the improvement in technology

38 In 1999, the Law Ministers of the Commonwealth adopted guidelines on the apportionment of costs incurred in providing mutual assistance in criminal matters.
and communications, the greater likelihood that a crime can have an impact beyond national borders, and the increased profits that can be made from organized crime, the need to obtain assistance from other states in bringing offenders to justice has expanded rapidly. The basic tools that can be used—extradition and mutual legal assistance in criminal matters—have regrettably not evolved to keep pace with developments in crime.

Much of the everyday practice of extradition and mutual assistance continues to be reliant on bilateral and multilateral treaties that have been drafted many years ago. Moreover, many States which are parties to such treaties still do not have the necessary legislation or resources to respond to requests for extradition or mutual assistance.

- Requests are often transmitted through diplomatic channels or from Government to Government, and the resulting delays may cause a carefully assembled case to collapse in the hands of the prosecutor.
- The requesting State may misunderstand the formal requirements in the requested State as to the presentation and contents of the request. For example, the requesting State may not realize that, under some treaties, it must present documentation that the double criminality requirement is met, that the offence is extraditable, and that execution is consistent with the law of the requested party.
- The requested State, in turn, may not always demonstrate flexibility in demanding more details about the offence and the offender. Often, very specific information may be difficult to provide if the investigation is still underway.

Nonetheless, as shown in this paper, some developments have taken place in both extradition and mutual legal assistance, in particular over the past ten years.

Some of the main trends in the evolution of extradition are summarized in the following table.

<table>
<thead>
<tr>
<th>The traditional extradition regime</th>
<th>The “new, improved” extradition regime</th>
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</thead>
<tbody>
<tr>
<td>bilateral</td>
<td>multilateral</td>
</tr>
<tr>
<td>limited scope of offences; lists of offences</td>
<td>broad scope of offences; no offence lists</td>
</tr>
<tr>
<td>need to present prima facie evidence</td>
<td>an arrest warrant suffices</td>
</tr>
<tr>
<td>extradition of nationals not possible</td>
<td>nationals can be extradited, although conditions may be imposed</td>
</tr>
<tr>
<td>broad grounds for refusal</td>
<td>few grounds for refusal</td>
</tr>
<tr>
<td>no reference to the expected treatment or punishment of the suspect</td>
<td>human rights standards applied</td>
</tr>
<tr>
<td>slow</td>
<td>trend towards mutual recognition and the “backing of warrants”</td>
</tr>
<tr>
<td>bureaucratic</td>
<td>“good practice” standards followed; e.g. the possibility of consultation before possible refusal</td>
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bilateral treaties are being increasingly replaced by multilateral treaties. Although bilateral treaties have been preferred for example by the common law countries, the simultaneous existence of many international instruments complicates the work of the practitioner. For this and other reasons, also the common law countries are seeing the advantages of multilateral treaties with a wide scope of application.

The earliest treaties were based on lists of offences. If an offence was not included in the list, extradition could not be granted. More recent treaties are generic, in that they apply to a broad scope of offences.

Because courts have traditionally been cautious in applying coercive measures, the courts in particular in common law countries have required prima facie evidence that the suspect had indeed committed the offence in question. Because of the differences in the law of evidence and in criminal procedure in different countries, such prima facie evidence was often difficult to provide. More recent instruments have generally regarded it as sufficient that the requesting State (at least if it belongs to a select group of states) produce a valid arrest warrant.

One of the most cherished principles in extradition law has been that States will not extradite their own nationals and will, at most, undertake to bring them to trial in their own courts. Today, more and more States are allowing extradition of their own nationals, although some conditions may be placed, such as that the national, if convicted, should be returned to his or her own country to serve the sentence.

There is currently a clear trend towards elimination of the many grounds for refusal to extradite, such as the political offence exception.

There is a trend towards granting greater rights to the person in question as an object (as opposed to subject) of the process, and to greater consideration of how he or she would be treated or punished in the requesting State. Consideration can be given, for example, to the possibility of persecution on the grounds of sex, race, religion, nationality, ethnic origin or political opinions, the possibility of unfair trial, and the possibility of punishment which, in the requested State, is deemed inhumane.

Another trend is toward less rigid procedural requirements, including direct communications and simplified procedure.

There has also been a clear dynamic in the development of mutual assistance. New international instruments open up the possibility of mutual assistance between an expanding number of countries, the scope of offences has been enlarged, conditions and grounds of refusal have been tightened or entirely eliminated, and the process has been expedited. Some of the main trends are summarized in the following table.
The traditional mutual assistance regime | The “new, improved” mutual assistance regime
---|---
bilateral | multilateral
limited scope of offences | broad scope of offences
assistance limited to the service of summons | many possible forms of assistance
use of central authority | possibility of direct contacts between lower level authorities requesting and granting assistance
broad grounds for refusal | few grounds for refusal
requested State applies solely its own laws in granting assistance | procedures requested by the requesting State can be applied if these are not contrary to the laws of the requested State
bureaucratic | “good practice” standards followed; e.g. the possibility of consultation before possible refusal

- as with extradition treaties, bilateral mutual legal assistance treaties are being increasingly replaced by multilateral treaties
- the earliest mutual legal assistance treaties covered only a limited scope of offences. More recent treaties cover a broad scope of offences.
- the measures offered under mutual legal assistance treaties (and domestic laws in many States) has expanded. At first, the focus was on service of summons. Today, a wide range of measures are offered.
- traditional mutual legal assistance treaties required that requests be sent through diplomatic channels or through a central authority. More recent treaties allow the use of direct contacts
- more recent treaties have restricted or even eliminated the many grounds for refusal to provide assistance
- requested State applies solely its own laws in granting assistance; procedures requested by the requesting State can be applied if these are not contrary to the laws of the requested State
- as with extradition treaties, another trend in mutual legal assistance treaties is toward less rigid procedural requirements, including towards the use of direct communications and simplified procedure.

The Palermo Convention, which was negotiated between 1998 and 2000, reflects in many ways the “state of the art” of extradition and mutual legal assistance. In particular, it includes many provisions that are new for practitioners in many countries, and may well improve the day-to-day practice of international cooperation.

Negotiation of the Palermo Convention, however, is only the first
stage. The Convention must be ratified and the investigators, the prosecutors and the judges must be given the tools they need to complete the job.
INTERNATIONAL COOPERATION AGAINST
TRANSNATIONAL ORGANIZED CRIME: THE PRACTICAL
EXPERIENCE OF THE EUROPEAN UNION

Matti Joutsen*

I. DEVELOPING COUNTERMEASURES AGAINST TRANSNATIONAL ORGANIZED CRIME: HOW FAR CAN WE GO?

As long as crime and organized crime remained domestic issues, the history of international law enforcement and judicial cooperation proceeded at a leisurely pace. Many years passed from when private policemen and private security companies were first used to collect evidence and apprehend offenders abroad, to when the first formal arrangements were made for law enforcement cooperation. Initiatives for formal judicial co-operation arrangements emerged even more slowly. The first modern multilateral treaties on cooperation in criminal matters did not appear until less than fifty years ago.

It is thus all the more remarkable how much progress has been made world-wide during the last few years.

It is true that we had a right to expect a qualitative change in our response to crime and international crime. After all, we are facing considerable increases in crime as a result of many factors. These factors include developments in technology, transportation and telecommunications, the social changes related to massive impoverishment, natural disasters and internal conflict, the establishment of regional trade groupings removing barriers to the movement of people, goods, services and capital, and fundamental political changes in many parts of the world.

Nonetheless, it would have required a visionary to have said, only five years ago, that in the year 2001:

• over 120 countries would have signed a wide-ranging global convention against transnational organized crime;
• work is underway on a global convention against corruption;
• a controversial campaign against off-shore and on-shore financial centres engaged in money laundering is leading to significant results; and
• regional cooperation is evolving rapidly in places as diverse as Southern Africa, the Andes countries, the countries around the Baltic Sea, and Southeast Asia.

How far and how fast can this intensification of global cooperation go? One way to try to answer this question would be to look at existing cooperation on a smaller scale, and see if it could be expanded world-wide. The European Union countries provide one useful point of reference. If cooperation can be developed among these fifteen countries, with their quite different legal systems and different criminal justice structures, it can be at least visualised elsewhere.

This paper looks at police cooperation, prosecutorial cooperation, judicial

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cooperation, and cooperation in the formulation of domestic law and policy. In each case, the present status quo in most parts of the world will be set out, and then the practical reality in the European Union will be described.

A few words about the European Union. It consists of fifteen Member States, comprising almost all of Western Europe. (In addition, ten Central and Eastern European countries, and Malta and Cyprus are negotiating on membership.) One important area of cooperation is known as “justice and home affairs”, which to a large extent deals with the control of organized crime. Decisions in this sector are made by the European Union Council, which consists of the respective Ministers from each Member State.\(^1\) The Council can adopt so-called framework decisions (formerly known as “joint actions”), common positions, resolutions, recommendations and conventions. “Framework decisions” are binding in respect of their goal, although each Member State has some flexibility on how to amend its legislation in order to ensure that this goal is met. “Joint positions” are used, for example, in negotiations with third States and inter-governmental organizations; Member States are required to adhere to any joint position agreed to. Resolutions and recommendations are non-binding, although they do express a political goal. Conventions are binding on the signatories, and there is political pressure on all Member States to sign them.

A second major decision-making body in the European Union is the Commission, which has responsibilities in particular for deciding on the economic integration of the European Union. It does not have any powers to decide on “justice and home affairs”, although it does have the right of initiative. A third power is the directly elected European Parliament, which has a right to be consulted, also on justice and home affairs.

II. POLICE COOPERATION

The global status quo:
The general rule around the world is that law enforcement personnel do not have powers outside of their jurisdiction. Notices are communicated through Interpol. A few countries have posted liaison officers abroad, and informal contacts are used on an ad hoc basis. Otherwise, officially, information may not and is not exchanged except through formal bilateral channels, and even then only in a few cases. Coordination of cross-border investigations is rare, and requires considerable preparation through formal channels.

The European Union reality:
• an international organization, Europol, co-ordinates cross-border investigations, and seeks to provide support to domestic law enforcement services in specialist fields.
• a network of liaison officers has been developed.
• Europol produces annual situation reports on organized crime, bringing together data from all Member States.

\(^1\) To avoid some confusion: the European Union and the Council of Europe are different organizations. The former consists of fifteen Member States, and as noted covers most of Western Europe. Its top decision-making body is called the European Council of Ministers, or the European Council for short. The Council of Europe, in turn, today has 43 Member States, and covers almost all of Europe, East and West, North and South.
Within the framework of the Schengen conventions, which apply to almost all EU Member States,

- the Schengen information system allows national law enforcement agencies to share data on many key issues almost instantaneously with their colleagues in other countries. The system extends to some 50,000 terminals in the member states.
- law enforcement authorities are allowed hot pursuit across borders.
- law enforcement authorities are allowed to engage in surveillance in the territory of other countries.
- law enforcement authorities are allowed to engage in controlled delivery.

A. Europol

Europol was established in October 1998, when the Europol Convention entered into force among the fifteen European Union countries. It is an international organization that has its headquarters in the Hague, in the Netherlands. It is not at present an operational entity. It is not, for example, a “European Bureau of Investigations”, with agents mandated to carry out investigations or to arrest suspects in the different European Union countries.

The objective of Europol is essentially “to improve ... the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications than an organized criminal structure is involved and two or more Member States are affected by the forms of crime in question in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned.”

Europol is charged, more specifically, with acting to prevent and combat unlawful drug trafficking, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime. After Europol’s establishment, its mandate has been successively expanded, to include for example crimes committed or likely to be committed in the course of terrorist activities, and money laundering. Proposals are now being considered to extend the mandate even further, for example to the forgery of money and means of payment.

The principal tasks of Europol consist of:

1. facilitating the exchange of information between the Member States,
2. obtaining, collating and analysing information and intelligence (including the preparation of annual reports on organized crime),
3. notifying the competent authorities of the Member States of information concerning them and of any connections identified between criminal offences,
4. aiding investigations in the Member States by forwarding all relevant information to the national units, and
5. obtaining a computerized system of collected information.

Europol is also charged with developing specialist knowledge of the investigative procedures of the competent authorities in the Member States and providing advice on investigations, and with providing strategic intelligence to assist with and promote the efficient and effective use of the resources available at the national level for operational activities. For this purpose, Europol can assist Member States through advice and research in training, the organization and
equipment of the authorities, crime prevention methods, and technical and forensic police methods and police procedures.

Work in progress. What about the future of Europol? In October 1999, soon after the Europol Convention entered into force, a special European Union Summit was held in Tampere, Finland, to discuss, among other issues, further improvement of cooperation in responding to transnational organized crime. In respect of Europol, the Tampere meeting concluded, inter alia, that:

• joint investigative teams should be set up, as a first step, to combat trafficking in drugs and human beings as well as terrorism. Representatives of Europol should be allowed to participate, as appropriate, in such teams in a support capacity.
• Europol's role should be strengthened by allowing it to receive operational data from Member States and authorising it to ask Member States to initiate, conduct or coordinate investigations or to create joint investigative teams in certain areas of crime, while respecting systems of judicial control in Member States.

In March 2000, a new action plan against organized crime was adopted. It contains a number of points regarding Europol:

• Europol could carry out studies of practice at national and Union level and of their effectiveness, develop common strategies, policies and tactics, organize meetings, develop and implement common action plans, carry out strategic analyses, facilitate the exchange of information and intelligence, provide analytical support for multilateral national investigations, provide technical, tactical and legal support, offer technical facilities, develop common manuals, facilitate training, evaluate results, and advise the competent authorities of the Member States.
• consideration should be given to the feasibility of setting up a database of pending investigations, making it possible to avoid any overlap between investigations and to involve several European competent authorities in the same investigation.
• Europol should help in establishing a research and documentation network on cross-border crime, and in organizing the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions. The establishment of compatible criminal intelligence systems among Member States should be a long-term goal.

Europol is now up and running. There is a clear need for it in Europe. Its potential for developing strong cooperation between the law enforcement agencies of the fifteen different Member States of the European Union is immense, and the pressures on it to succeed are great. The experience of the European Union shows that practical law enforcement cooperation is possible also within a formal structure.

B. Schengen

Due in part to the slowness with which police cooperation was being developed and to political differences of opinions over the extent of this cooperation, some European Union countries (originally,
Belgium, France, Germany, Luxembourg and the Netherlands) decided on a “fast-track” alternative. The result was the Schengen Agreement of 1985 and the Schengen Convention of 1990, which has sought to eliminate internal frontier controls, provide for more intensive police cooperation, and establish a shared data system.

The “Schengen group” currently consists of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden, as well as, from outside the EU, Iceland and Norway.3 The United Kingdom and Ireland have not joined, since they wish to retain separate passport controls.

Police cooperation within the framework of Schengen includes cross-border supervision, “hot pursuit” across borders into the territory of another Member State; and controlled delivery (i.e. allowing a consignment of illegal drugs to continue its journey in order to discover the modus operandi of the offenders, or to identify the ultimate recipients and their agents, in particular the main offenders). These forms of cooperation have been hard-won: they did not see the light of day until after protracted negotiations between the Governments concerned, and even then they have been hedged by a number of restrictions.

The need for Schengen arose with one of the primary goals of economic integration, the elimination of border controls on the transit of persons, goods, capital and services. Although this elimination of border control undoubtedly promotes trade and commerce, at the same time it makes more difficult the task of controlling the entry and exit by offenders. In return for ending checks on internal borders, the Schengen countries agreed on the establishment of the Schengen Information System (SIS). This consists of a central computer (in Strasbourg, France) linked to a national computer in each country, and to a total of some 50,000 terminals. When fully operational, data entered into any one computer (for example data on wanted persons, undesirable aliens, persons to be expelled or extradited, persons under surveillance, and some stolen goods) would immediately be copied to the other national information systems. An electronic mail system (SIRENE; Supplementary Information Request at the National Entry) allows for the transfer of additional information, such as extradition requests and fingerprints. Yet another data-connected acronym is VISION, which refers to the “Visa Inquiry System in an Open-border Network”.

The strength of the Schengen arrangements lies in the fact that they allow for highly practical law enforcement cooperation, at a level that is unique in the world. At the same time, the arrangements have been subjected to criticism. Although the arrangements have been made specifically to respond to the opening of the borders between the countries in question, the question remains whether these arrangements are still insufficient to respond to the increased mobility of offenders. Secondly, the arrangements do not include all European Union countries, while on the other hand they do include two non-EU countries. This inevitably leads to some

3 The principal reason for the inclusion of Norway and Iceland is that these two countries are part of the passport-free zone formed among the Nordic countries. The other three Nordic countries, Denmark, Finland and Sweden, are members of the Schengen group.
practical difficulties. Third, since there is no supervisory court structure or any effective parliamentary review of Schengen decisions, it has been suggested that human rights concerns will receive less attention than the law enforcement priorities. (On the other hand, any actions taken would necessarily fall under the jurisdiction of at least one of the Schengen countries, and so the legality of the action could then be scrutinized under the appropriate national law.)

C. Information Gathering and Analysis

Law enforcement authorities worldwide would be among the first to agree that a more proactive, intelligence-led approach is needed to detect and interrupt organized criminal activities, apprehend the offenders, demolish the criminal networks, and seize and confiscate the proceeds of crime. Information is needed on the profile, motives and modus operandi of the offenders, the scope of and trends in organized crime, the impact of organized crime on society, and the effectiveness of the response to organized crime. This information includes operational data (data related to individual suspected and detected cases) and empirical data (qualitative and quantitative criminological data).

Regrettably, on the global level the arrangements for the exchange of operational and empirical data continue to be ad hoc, between individual law enforcement agencies or even individuals. Such ad hoc arrangements also raise concerns over whether or not domestic legislation on data protection is being followed. Implementation of the United Nations Convention against Transnational Organized Crime (in particular articles 27 and 28) should provide a firmer foundation for this exchange of data, but the Convention has not yet entered into force.

Within the European Union framework, on the other hand, several arrangements are already in place for gathering and analysing data:

- a joint action adopted in 1996 deals with the role of liaison officers. Their function is specifically to focus on information gathering. They are to “facilitate and expedite the collection and exchange of information though direct contacts with law enforcement agencies and other competent authorities in the host State”, and “contribute to the collection and exchange of information, particularly of a strategic nature, which may be used for the improved adjustment of measures” to combat international crime, including organized crime. So far, over 300 liaison officers have been posted by EU countries, and they work in close cooperation with one another.

- Europol already produces annual reports on organized crime based on data provided by Member States. These annual reports are being used in an attempt to define strategies. Over the years, the quality and utility of these annual reports have improved, even though continued work is needed to improve the validity, reliability and international comparability of the data.\(^4\) One particular feature of the annual reports is that they contain

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\(^4\) The work on the annual situation reports is primarily done by a “Contact and Support Network” consisting of representatives of the law enforcement authorities of the different Member States.
recommendations based on an analysis of the data.

- various decisions have been taken on the exchange of information on specific subjects. For example, a Joint Action adopted on 20 May 1997 requires the exchange of information between law enforcement agencies when potentially dangerous groups are travelling from one Member State to another in order to participate in events.

- the European Union has created a number of financial programmes to encourage the closer involvement of the academic and scientific world in the analysis of organized crime.

- a European police research network is being established to act as an information source on research results, other documented experiences and good practice in crime control.

III. PROSECUTORIAL COOPERATION

The global status quo:

International contacts between prosecutorial authorities are based on bilateral and the few multilateral treaties on mutual legal assistance. Informal contacts are facilitated by the International Association of Prosecutors and other, similar non-governmental organizations.

The European Union reality:

- a special structure, the European Judicial Network, has been set up to promote direct contacts between prosecutors. The system involves computerized links between the Member States, and in time will probably even allow automatic translation and transmission of requests.

- several European Union Member States have posted liaison magistrates abroad, with a specific mandate to facilitate responses to requests for extradition and mutual legal assistance, and a more general mandate to promote international cooperation.

- prosecutorial and judicial cooperation is promoted also by direct contacts through the Schengen structures.

- an international organization, Eurojust, is being set up to assist in the coordination of the prosecution of cross-border cases.

A. The European Judicial Network and the Strengthening of Informal Contacts

Among the greatest difficulties in extradition and mutual legal assistance are the lack of information on how a request should be formulated so that it can readily be dealt with in another country, and the lack of information on what progress is being made in the requested State in responding to the request.

In those (rare) cases where the practitioner personally knows his or her counterpart in the other country, informal channels can be used. The European Union has decided to create a more solid base for these informal contacts by establishing a “European Judicial Network” (EJN). This network consists primarily of the central authorities responsible for international judicial cooperation in criminal matters, and of the judicial or other competent authorities with specific responsibilities within the context of international cooperation. The EJN focuses on

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*Joint Action of 29 June 1998. A similar structure has been set up for cooperation in civil matters.*
promoting cooperation in respect of serious crime such as organized crime, corruption, drug trafficking and terrorism.

The EJN is promoting cooperation in a number of different ways. First of all, it organizes regular meetings (at least three times a year) of representatives of the contact points. These meetings have dealt, for example, with case studies, general policy issues, and practical problems. Organizing the meetings in the different EU Member States provides an additional benefit: the host country can present its system for international cooperation, and the participants can get to know one another. Both factors are important in instilling confidence in one another’s criminal justice system.

Second, the EJN is preparing various tools for practitioners. One very useful tool is a CD-rom that provides practitioners with information on what types of assistance can be requested in the different Member States (sequestration of assets, electronic surveillance and so on) for what types of offences, how to request it, and whom to contact. The CD-rom also contains the texts of relative international instruments and national legislation. A second tool is a computerized “atlas” of the authorities in the different Member States, which shows who is competent to do what in the different Member States in relation to international cooperation. Soon, the contact points in all fifteen Member States will be connected with one another by a secure computer link that can be used not only to follow up on requests, but even to send the requests themselves.

A third tool is a uniform model for requests for mutual legal assistance. Consideration is currently being given to developing a system for automatic translation of these requests, at first at least into the major European languages.

B. Liaison Magistrates

The concept of the liaison magistrate is based on the positive experiences with the growing network of liaison officers used to promote cooperation between law enforcement agencies. In law enforcement, the liaison officer uses direct contacts to facilitate and expedite the international collection and exchange of information, in particular information of a strategic nature.6

The liaison magistrate is

- an official with special expertise in judicial cooperation,
- who has been posted in another State,
- on the basis of bilateral or multilateral arrangements,
- in order to increase the speed and effectiveness of judicial cooperation and facilitate better mutual understanding between the legal and judicial systems of the States in question.7

The liaison magistrate does not have any extraterritorial powers, and also otherwise must fully respect the sovereignty and territorial integrity of the host State.8

6 The recent Treaty of Amsterdam of the European Union (article 30(2)(d)) called on the European Council to “promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organized crime in close cooperation with Europol”. In order to create a basis for the development of this work, on 22 April 1996, the European Council adopted a Joint Action on a framework for the exchange of liaison magistrates to improve judicial cooperation.

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Liaison magistrates are—so far—used almost solely by the European Union countries. In general, liaison magistrates are sent to countries with which there is a “high traffic” in requests for mutual assistance, and where differences in legal systems have caused delays. France has been the most active in sending out liaison magistrates, and has sent them not only to Germany, Italy, the Netherlands, Spain and the United Kingdom, but also outside the European Union, to the Czech Republic and the United States. France is also considering sending a joint liaison magistrate to the Baltic countries (Estonia, Latvia and Lithuania).

Several other European Union countries have sent one or two liaison magistrates: the United Kingdom to France and Italy; Italy to France (and is considering sending one to Spain and the United Kingdom); the Netherlands also to France (and is considering sending one to the United States); Finland to Estonia (and is considering sending one to the Russian Federation); Germany to France; and Spain to Portugal.9

Liaison magistrates work on the general level (by promoting the exchange of information and statistics and seeking to identify problems and possible solutions) and on the individual level (by giving legal and practical advice to authorities of their own State and of the host State on how requests for mutual assistance should best be formulated in order to ensure a timely and proper response, and by trying to identify contact persons who might help in expediting matters). The exact profile of the work of the liaison magistrate varies, depending on such factors as the types of cases, and the extent to which there are direct contacts between the judicial authorities of the two States.

The advantages, from the point of view of the sending State and the host State, are numerous. Language problems are reduced, requests for judicial co-operation can be discussed already before they are sent in order to identify possible problems, and there is a basis for promoting trust and confidence in one another’s legal system.

C. Eurojust: A Formal Structure for Prosecutorial Coordination

Even the direct contacts and expertise provided by the EJN and the liaison magistrates cannot always provide the type of coordination needed in investigating transnational organized crime. Over recent years, the idea gradually evolved of setting up a separate entity, somewhat comparable to Europol in the law enforcement field, to

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7 A related concept is that of the legal attache, who is posted in the mission of the sending State to look after legal issues in general that concern the host State and the sending State. Reference can also be made to temporary exchanges of personnel, which are designed to increase familiarity with one another’s legal system and foster direct, informal contacts. Neither legal attaches or personnel on temporary exchange, however, have the same expertise and job profile as the liaison magistrate.


9 From outside the European Union, Estonia has sent a liaison magistrate to Finland.
coordinate national prosecuting authorities and support investigations of serious organized crime extending into two or more Member States.\textsuperscript{10}

The idea for the establishment of such an entity received a considerable push at the special European Union Summit held in Tampere, Finland in October 1999. At the Summit, everyone was agreed on the need for such a new entity. However, there appeared to be different opinions regarding what the precise mandate of Eurojust should be, and how it should go about doing its work.

The Tampere meeting decided that these questions should be solved by the end of 2001—a rather tight schedule, but one which remains feasible. In the meantime, a temporary unit, called "Pro Eurojust" (short for "Provisional Eurojust") started work in Brussels in March 2001.

The way in which the work of Pro Eurojust is evolving provides some indicators of how Eurojust itself will work once it begins operations. Each Member State has sent a senior prosecutor or magistrate to Brussels on permanent assignment. These representatives meet every week to discuss both individual cases and general policy for coordinating investigations. Plenary meetings tend to be devoted to policy issues, while most cases will be dealt with in smaller meetings, among representatives of only the individual countries involved.

Pro Eurojust itself does not have any operational powers. Instead, the national representatives, having agreed on what needs to be done, contact the competent authorities in their own Member State for the required action. In addition, individual members of Pro Eurojust may have operational powers according to their national legislation. One of the topics now being debated is what type of operational powers Eurojust itself will have. For example, it may be able to ask a Member State to initiate criminal proceedings or to provide Eurojust with data regarding the case.\textsuperscript{11}

IV. JUDICIAL COOPERATION

The global status quo:

\textit{Mutual legal assistance and extradition} are based on an incomplete patchwork of bilateral treaties and, in rare cases, multilateral treaties. These treaties tend to cover only some offences, and offer only limited measures. Requests must be sent through a central authority. The procedure tends to be slow and uncertain, with requests often being frustrated by bureaucratic inertia, broad grounds for refusal, and differences in criminal and procedural law.

The European Union reality:

\begin{itemize}
  \item all European Union Member States are parties to broad multilateral treaties on mutual legal assistance and extradition.
  \item the European Union has decided on standards of good practice in mutual legal assistance, and regularly reviews compliance with these standards.
  \item separate European Union treaties on mutual legal assistance and on
\end{itemize}

\textsuperscript{10} See Hans G. Nilsson, Eurojust—the Beginning or the End of the European Public Prosecutor? in Europarattslig Tidskrift, vol. 4, 2000

\textsuperscript{11} In order for Eurojust to have the power to ask for data, considerable attention will have to be pay to data protection, for example, on how data are to be transmitted, on who has access to the data, on confidentiality, and on the maintenance of personal records. In this respect, the laws of the different Member States remain quite different.
extradition have been drafted to update and supplement the existing multilateral treaties prepared within the framework of the Council of Europe.

- the European Union is now moving towards a system of mutual recognition of decisions and judgments in criminal matters. When this system is in place, cooperation will be speeded up considerably: a decision or judgment in any Member State can be enforced as such in any other Member State.

- a mutual evaluation system has been established, in which experts from different countries assess the practical conduct of international cooperation in the target country.

A. Mutual Legal Assistance

The Member States of the European Union are all parties to the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters.

The 1959 Convention, however, was drafted almost a half century ago. Since then, ideas regarding how mutual assistance should be provided have changed considerably, especially in Europe, where there has been extensive experience in this sector. There has been a clear trend towards simplifying and speeding up mutual assistance by eliminating conditions and grounds for refusals. Since the European Union Member States have a lot of cases in common, they have come to expect certain standards of conduct—after all, if the central authority of one country is itself slow or sloppy in responding to requests, it can scarcely expect others to be better when responding to its requests for assistance.

In 1998, the European Union decided to adopt a set of standards on good practice in mutual legal assistance. Each Member State was required to prepare, in one year’s time, a national statement of good practice. These were then circulated among all the Member States. The idea here was that the Member States publicly commit themselves to upholding these standards, and can be held accountable.

The sets of standards include at least the following eight points:

a. to acknowledge all urgent requests and written enquiries unless a substantive reply is sent quickly;

b. when acknowledging requests and inquiries, to provide the name and contact details of the authority (and, if possible, the person) responsible for executing the request;

c. to give priority to requests which have been marked “urgent”;

d. where the assistance requested cannot be provided in whole or in part, to provide an explanation and, where possible, to offer to discuss how the difficulties might be overcome;

e. where it appears that the assistance cannot fully be provided within any deadline set, and this will impair proceedings in the requesting State, to advise the requesting State of this;

f. to submit requests as soon as the precise assistance that is needed has been identified, and to explain the reasons for marking a request as “urgent” or in setting a deadline;

g. to ensure that requests are submitted in compliance with the relevant treaty or arrangements; and

h. when submitting requests, to provide the requested authorities with the name and contact details of the

authority (and, if possible, the person) responsible for issuing the request.

Although some of these points may seem trivial, they all have an immediate impact on the day-to-day work of judicial authorities involved in international cases.

The fifteen European Union countries have prepared their own Mutual Assistance Convention (adopted on 29 May 2000). This is not intended to be an independent treaty, but instead supplements the 1959 Council of Europe convention and its protocol. It brings these earlier treaties up to date by reflecting not only the “good practices” referred to above, but also the development of investigative techniques and arrangements.\textsuperscript{13} Given that this Convention and the United Nations Convention against Transnational Organized Crime were negotiated at the same time, it should not come as a surprise that they share many ideas.

For example, the new European Union Convention includes provisions that deal with:

\begin{itemize}
\item the sending of procedural documents directly to the recipient in another State (article 5);
\item the sending of requests by telefax and e-mail (article 6);
\item the spontaneous exchange of information (article 7);
\item restitution of property to its rightful owner (article 8);
\item temporary transfer of persons held in custody for purposes of investigation (article 9);
\item hearing by videoconference (article 10);
\item hearing of witnesses and experts by telephone conference (article 11);
\item the use of controlled deliveries (article 12);
\item the use of joint investigative teams (article 13);
\item the use of covert investigations (article 14);
\item interception of telecommunications (articles 17 to 22); and
\item the protection of personal data provided in response to a request (article 23).
\end{itemize}

In particular the provisions on the interception of telecommunications are quite lengthy, and were the subject of extensive debate. Different Member States have different provisions on the conditions under which the interception of telecommunications is allowed. However, given the ease with which people can now move from one country in the European Union to another, and given also the ease with which communications can be traced and listened to, this presumably will become an increasingly important issue, and the time spent on it was undoubtedly well spent. The basic solution in this respect was to allow interception, but to keep the authorities in the countries in question informed.

The Convention brings in some other innovations. Perhaps the most interesting one is that it reverses one fundamental principle in mutual legal assistance. Today, the almost universal rule is that the law applicable to the execution of the request is that of the requested State. The new Convention states that the requested State must comply with the formalities and procedures expressly indicated by the requesting Member State. The requested

\textsuperscript{13} In May 2001, political agreement was reached on a protocol to the 2000 Convention, which would simplify mutual assistance even further. The proposal is currently under consideration.
Member State may refuse to do so only if compliance would be contrary to the fundamental principles of law of the requested State.

B. Extradition

The Member States of the European Union are all parties to the 1957 Council of Europe Convention on Extradition.

Also here, the Member States of the European Union have sought to supplement the Council of Europe Convention by drafting new treaty obligations. In 1995, the European Union adopted a Convention on simplified extradition within the EU. Essentially, the Convention focuses on the many cases where the person in question consents to extradition. One year later, in 1996, the European Union adopted a Convention on the substantive requirements for extradition within the European Union.\textsuperscript{14}

The European Union is currently considering various options for “fast-track extradition”. These discussions have been held within the context of the discussion on mutual recognition of decisions and judgments in criminal matters. In regards to extradition, the goal is to have a warrant of arrest issued by the competent authorities of one State recognized as such by the authorities of another EU State, establishing a basis for extradition. A proposal on such a procedure is expected by the end of the year 2001.

In advance of any decision on “fast-track extradition”, Spain and Italy have signed a bilateral treaty on this type of extradition, and the United Kingdom is introducing legislation along the same lines.

The Spanish-Italian treaty applies to persons suspected of or convicted for terrorism, organized crime, drug trafficking, arms trafficking, trafficking in human beings or sexual abuse of minors, where the maximum sentence is at least four years. A copy of the court order is to be sent directly to the Ministry of Justice of the other country, which translates it and sends it without delay for enforcement. What is noticeable here is that the procedure does not call for any court hearings at all. The only grounds for refusal are if the documentation is not in order, or the person in question has been granted immunity for some reason.

The United Kingdom proposal is for a “backing of warrants” scheme.\textsuperscript{15} The UK already today uses such a “backing of warrants” approach with Ireland.\textsuperscript{16} Under this approach, the extradition request is replaced by a simple arrest warrant, which is transmitted through the Home Office to the local court. The local court only has to establish (1) that the person arrested is the person for whom extradition is sought; (2) that the warrant and accompanying documentation are in order; and (3) whether any of the restrictions on extradition apply.\textsuperscript{17} If none of these are a bar to extradition, the court simply notes

\begin{itemize}
\item This 1995 Convention has been ratified by nine of the fifteen Member States: Austria, Denmark, Finland, Germany, Greece, the Netherlands, Portugal, Spain and Sweden. The 1996 Convention has been ratified by Denmark, Finland, Germany, Greece, the Netherlands, Portugal and Spain.
\item Similar arrangements exist among Belgium, Luxembourg and the Netherlands. The five Nordic countries—Denmark, Finland, Iceland, Norway and Sweden—also have a fast-track extradition scheme among themselves.
\end{itemize}
on the back of the warrant that this can be enforced.

According to the UK proposal the backing of warrants scheme would cover extradition requests from all European Union countries as well as from Iceland, Liechtenstein and Norway (referred to as “tier one” countries). It can be extended to other extradition partners, as appropriate. For “tier two” and “tier three” countries, certain additional conditions should be met: double criminality; the political offence exception; the passage of time has not made it unjust or oppressive to extradite; whether the basis of the extradition is a conviction imposed in absentia; and whether the offence is a military offence that is not also an offence under the general criminal law.

From the point of view of the United Kingdom, all remaining states, “tier four” states, would be subject to the prima facie requirement. This means that the authorities of these countries should demonstrate, to the satisfaction of the UK authorities, that there is sufficient evidence of the guilt of the person in question to proceed with the extradition.18

C. Mutual Recognition of Decisions and Judgments

Because of jurisdictional limits (and perhaps also a deep-rooted lack of confidence in the criminal justice systems of other countries), decisions made in the investigation of organized crime cannot be directly enforced abroad. For example, if a court in one country orders that a suspect be arrested, that his or her house be searched for evidence, mutual legal assistance has to be requested in order to have the decision carried out abroad. The process inevitably takes some time—time during which the suspect can empty out his or her bank accounts and move on to a third country.

So far, little attention has been paid to what can, in a way, be seen as a parallel to mutual legal assistance: recognising the validity of a decision taken by a foreign authority or court, and enforcing it as such. The principle would enable competent authorities to quickly secure evidence, seize assets and immobilize offenders. This would, of course, also be in the interests of the victim.19

Internationally, mutual recognition of foreign decisions and judgments is almost

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19 Protecting the interests of the victim is one of the priorities of the European Union. On 15 March 2001, a framework decision was adopted on in order to ensure victims uniform minimum legal protections in criminal proceedings. In September 2001, the Commission submitted a proposal on unification of compensation to victims from the State.

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non-existent. There are few bilateral or multilateral treaties on this topic. One of the few is the European Convention on the International Validity of Criminal Judgments, prepared within the framework of the Council of Europe in 1970. Even this treaty has very few signatures, and even fewer ratifications. Indeed, most EU Member States have not ratified it, and so it has very little practical importance. Furthermore, this only applies to legally final judgments, and not for example to decisions made in the course of an investigation.

With the increasing integration of Europe, Member States are now seriously considering the potential for mutual recognition of decisions and judgments. It is widely regarded as an effective and indeed almost unavoidable tool in cooperation. Furthermore, proponents argue that the close ties among the European Union countries, and the fact that they are all signatories to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, has lead to a situation in which all Member States should have full faith and confidence in the operation of the criminal justice system in each other’s country. To give an example, if a judge in one country orders that a suspect should be arrested, courts in all other European Union countries should have confidence that the decision was made according to law and with due respect to human rights.

As a result, the Tampere European Summit in October 1999 endorsed the principle of mutual recognition and called for the preparation of a programme to gradually make mutual recognition a working reality. In the view of the Tampere Summit, mutual recognition should become the cornerstone of judicial co-operation in both civil and criminal matters within the European Union. The programme requested by the Tampere Summit was adopted on 30 November 2000.

There is currently discussion in the EU about whether the system of mutual recognition should allow refusals, for example on the grounds that the human rights of the person in question had not been sufficiently taken into consideration. Some regard such a “fail-safe” system as necessary, while others consider that the European Union member states should have confidence that other member states respect the European Convention on Human Rights. Another item of discussion is whether the condition of double criminality should be maintained.

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20 Of the European Union Member States, only Austria, Denmark, the Netherlands, Spain and Sweden have ratified the 1970 Convention. The other countries that have ratified it are Cyprus, Estonia, Iceland, Lithuania, Norway, Romania and Turkey. An additional eleven countries have signed, but not yet ratified, the Convention.

21 There is one further exception to the lack of mutual recognition internationally. The five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) recognize one another’s decisions and judgments, and refusals are almost unheard of. This system is based on the fact that the Nordic countries share very much the same legal system, and also otherwise have long-standing cooperation with one another.

22 An analogy can be made with the “full faith and credit” doctrine contained in article IV, section 1 of the Constitution of the United States. According to this section, “Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.”
Work in progress: In February 2001, Belgium, France and Sweden submitted a proposal regarding the mutual recognition of decisions on the freezing of property and of evidence. The goal is to adopt a decision on this by the end of 2001. In July 2001, the European Union began considering a proposal from France, Sweden and the United Kingdom regarding the mutual recognition of fines. In March 2001, Germany has a somewhat parallel proposal to this latter one on fines. A proposal is expected on the mutual recognition of pre-trial orders in investigations into computer crime. The programme of work adopted in November 2000 also contains measures in regard to the transfer of prosecution and the exchange of information on criminal records; work on these may begin in the year 2002 or 2003. Work is also planned on ways to avoid double jeopardy in connection with mutual recognition.

D. Mutual Evaluations

The Member States of the European Union have made a number of commitments to improving their response to organized crime, and to improving international cooperation. These commitments were undoubtedly made in good faith. However, the practical reality of investigation, prosecution and adjudication (for example, lack of resources, and differences in priorities in different sectors and on different levels) can mean that the work that is actually carried out remains at odds with the commitments.

One way to diagnose what problems exist is to carry out expert reviews. The OECD has instituted a system of mutual evaluations of Member States on measures taken to prevent and control money laundering. These evaluations are carried out by teams of experts from different countries who, because of their background, are able to talk as colleagues with experts and practitioners in the target country, and ask the right questions and understand the answers they are given. This approach has been deemed so successful that the European Union has adopted it on a broader scale. Accordingly, on 5 December 1997 the European Union decided on the establishment of a mechanism for evaluating the application and implementation at the national level of international undertakings in the fight against organized crime.

Following the OECD model, small teams of experts visit the target country, interview practitioners, report on their assessment and make recommendations. The assessment is confidential, and the target country is given every opportunity to correct any errors that may have been made.

So far, two rounds of evaluations have been carried out in all fifteen Member States. The first round dealt with mutual legal assistance and urgent requests for the tracing and restraint of property, and the second round dealt with law enforcement and its role in the fight against drug trafficking. A third round, which will deal with extradition, will soon begin.

The Member States are quite satisfied with the way in which the mutual evaluations have been carried out. The process has not only contributed to greater understanding of the differences that exist between the countries, but has also lead to many changes in law and practice.

23 With the permission of the country in question, the report can be published. Indeed, all of the reports so far have in fact been published.
V. COOPERATION IN THE FORMULATION OF DOMESTIC LAW AND POLICY

The global status quo:

International cooperation on the formulation of domestic law and policy is almost entirely limited to general provisions in bilateral and multilateral treaties, and to even more general recommendations, resolutions and declarations.

The European Union reality:

- the European Union has accepted decisions calling for criminalisation of a number of offences. The definitions are generally rather tightly drawn, and have forced countries to amend their legislation accordingly.
- the European Union has begun cooperation in the prevention of crime, including organized crime.
- the European Union has adopted a number of action plans and programmes that have had a clear effect on policy and practice in all the Member States.
- the cooperation in this regard has been extended to the twelve candidate countries, which are rapidly amending their own procedural and criminal laws.
- there are signs that the European Union may be moving towards what is called the “communitisation” of criminal law, in other words to a situation where the power to determine the contents of criminal law is increasingly shifted from the individual Member States to the fifteen Member States working together.

A. Criminalisation

On the global level, in the area of substantive criminal law, very little international cooperation exists. Where it does exist, it primarily concerns the very few substantive provisions in bilateral and multilateral treaties, such as the minimum definitions of participation in a criminal organization, corruption, money laundering and obstruction of justice in the United Nations Convention against Transnational Organized Crime. There are also a number of resolutions, recommendations and declarations regarding criminal law and criminal justice, but these have tended to have little actual impact on law, practice and policy.

This is not the case with the European Union, where there is not only extensive discussion about the harmonisation of both criminal and procedural law, but much has been done in practice.

The question of how far the criminal law (and procedural law) of the Member States should be harmonised is a subject of considerable controversy. Everyone appears to agree that some degree of harmonisation is necessary in order to ensure smooth international cooperation, as long as by “harmonisation” one means the approximation or co-ordination of different legal provisions or systems by eliminating major differences and creating minimum requirements or standards. To use a musical analogy, we can continue to play our national music, as long as it is in harmony with the music of the other fourteen Member States.

Everyone also appears to agree that at this stage at least we are not talking about the unification of criminal and procedural law, in the sense that the fifteen distinct legal systems would be replaced by one system. To use the musical analogy, no one supports the idea of replacing the orchestra with a single piano, no matter how beautiful or large.
The process so far has involved a focus on certain key issues, where the Member States have agreed that harmonised legislation is necessary. Among the issues dealt with are the following:

**Fraud and counterfeiting**
- fraud and other crimes against the financial interests of the Communities (Convention of 26 July 1995, protocols of 27 September 1996 and 19 June 1997)\(^{24}\)
- fraud and counterfeiting of non-cash means of payment (framework decision on 28–29 May 2001)
- counterfeiting of the euro (framework decision on 28–29 May 2001)

**Drug trafficking**
- illicit cultivation and production of drugs (Council Resolution of 22 November 1996)
- “drug tourism” (Council Resolution of 22 November 1996)
- sentencing for serious illicit drug trafficking (Council Resolution of 6 December 1996)
- drug addiction and drug trafficking (Joint Action of 9 December 1996)

**Trafficking in persons and related offences**
- trafficking in human beings and sexual exploitation of children (Joint Action of 21 January 1997)
- combating illegal immigration (Council recommendation of 22 December 1995)

**Corruption**
- corruption (Convention signed on 26 May 1997)
- corruption in the private sector (Joint Action of 22 December 1998)

**Other offences**
- racism and xenophobia (Joint Action of 15 July 1996)
- football hooliganism (Council Resolution of 28 May 1997)
- money laundering (Joint Action of 3 December 1998)
- arms trafficking (Council Recommendation of 7 December 1998)
- participation in a criminal organization (Joint Action of 21 December 1998)

**Procedural issues**
- interception of telecommunications (Council Resolution of 17 January 1995)
- protection of witnesses in the fight against international organized crime (Council Resolution of 23 November 1995)
- individuals who cooperate with the judicial process in the fight against international organized crime (Council Resolution of 20 December 1996)

**Work in progress.** The work on further harmonisation of criminal and procedural law in the European Union is proceeding on the priority areas identified at the Tampere European Summit in October 1999. Work is underway for example on the minimum provisions on the constituent elements of offences and penalties relating to drug trafficking, on the sexual exploitation of children and child pornography, and on racism and xenophobia. A Commission proposal on the constituent elements and penalties relating to terrorism is expected in October 2001, and another proposal on cyber-crime and other high-tech crime is expected towards the end of 2001. A considerable amount of attention has also been focused on money laundering, and on the freezing of the assets of offenders. For example, a framework decision on

\(^{24}\) In May 2001, the Commission proposed an amalgamation of the various Convention provisions relating to fraud against the financial interests of the EU.
money laundering and on the identification, tracing, freezing or seizure, and confiscation of the instrumentalities and proceeds of crime was adopted on 26 June 2001.

One general priority area is the protection of the financial interests of the European Union, for example against subsidy fraud, embezzlement and corruption. Here, there is a much further-reaching proposal, called the “Corpus Juris” project. Briefly, this project seeks not only to harmonise the definition of offences against the financial interests of the European Union, but also to set up a European Public Prosecutor system, using identical procedural law provisions in each Member State. Proponents have said that this degree of uniformity is necessary to prevent organized criminal groups from utilising differences between the Member States. Critics, in turn, see this as an attempt to create a supranational criminal law and procedural law, which in time may lead to the unification referred to above.

The Corpus Juris project raises broader issues of how far the harmonisation of criminalisations can go, and who can make the decisions. Questions of criminal law have so far always been reserved to the Member States themselves to decide, on the basis of consensus. Article 31(e) of the Treaty of Amsterdam gave the Commission a right of initiative in these matters. The exact implication of article 31(e), however, has been questioned. Most Member States are of the view that the Commission is limited to the right of initiative, and only the Member States themselves may make any decision on criminalisation. A minority, however, are of the view that article 31(e) in effect gives the Commission the right to oblige Member States to adopt criminalisations on certain issues, if criminal law sanctions are the only way to protect Community interests. The issue is still open. So far, a working compromise has been reached: decisions under article 31(e) are being made in tandem, with the Commission taking a decision on matters within its power, and the Member States (through the Council) taking a decision at the same time on matters within their powers.

B. The Prevention of Organized Crime

Organized crime, just as is the case with crime in general, does not spread at random. It is often a planned and deliberate activity. Accordingly, it depends to a great deal on the presence of motivated offenders, on the existence of the opportunity for crime, and on the orientation of the work of those who seek to control organized crime. In line with this so-called situational approach, the Member States are exploring ways to ensure that committing crime is made more difficult, that committing crime involves greater risks to the offender (in particular the risk of detection and apprehension), and that the possible benefits to the offender of committing crime are decreased or eliminated.

Also the Tampere European Summit stressed the importance of crime prevention. It suggested that common crime prevention priorities should be developed and identified. Elements for the crime prevention policy are contained in the Council resolution of 21 December 1998 on the prevention of organized crime. In March 2001, the Commission and Europol presented a report on a European strategy on the prevention of organized crime.

One step in developing and identifying priorities was made on 15 March 2001, when the European Union decided on the establishment of a crime prevention network. This network consists of contact points in each Member State, representing not only the authorities but also civil society, the business community and researchers. The network functions by organizing meetings, compiling a database and otherwise by seeking to gather and analyse data on effective crime prevention measures on the local and regional level in order to disseminate information on “good practices.”

C. European Union Policies and Programmes

The various measures listed above and that have been taken by the European Union did not come piecemeal, one by one. Instead, they are elements of a wider EU policy against organized crime. A critical step was taken on 16–17 June 1997, when the European Union adopted a Plan of Action to combat organized crime. Instead of the resolutions, recommendations and declarations that have so often been adopted in other fora—regrettably often with little practical impact—the European Union decided, for the first time anywhere, on specific action, with a clear division of responsibilities, a clear timetable and a mechanism for implementing the action plan. The strong consensus reached by Member States on the 1997 Plan of Action helped to create the political and professional climate required on both the EU level and the national level to take and implement the necessary decisions.

The 1997 Plan of Action changed the rate of the evolution of international cooperation against organized crime. Examples of the progress that has been achieved are the mutual evaluation mechanism, the entry into force of the Europol Convention, the establishment of the European Judicial Network, criminalisation of participation in a criminal organisation, the establishment of a variety of funds to support specific measures, the adoption of joint actions on money laundering, asset tracing, and good practices in mutual assistance, the pre-accession pact with the candidate countries, and the identification of further measures in respect of the prevention of organized crime.

The period allotted for the 1997 Plan of Action ended on 31 December 1999. However, more work needed to be done. When Finland held the Presidency of the European Union during the second half of 1999, it led discussions on the necessary follow-up plan. These discussions were given added push by the decision to hold a special Summit, the Tampere European Council (15–16 October 1999), which dealt with, among other issues, cross-border crime.

Among the priorities identified by the Tampere European Summit are:

- the prevention and control of crime through the reduction of opportunities;
- the facilitation of cooperation between Member States in criminal matters;
- co-ordination and, where appropriate, centralisation of criminal proceedings;
- protection of the rights of victims and the provision of assistance;
- development of operational police cooperation and law enforcement training at the EU level;
- enhancement of customs cooperation in the fight against crime and in the use of information technology;
- the fostering of international cooperation in the fight against transnational organized crime;
• reinforcement of the role of Europol;
• adoption of a common approach throughout the EU on cross-border crime;
• depriving criminals of the proceeds of crime; and
• enhancing knowledge and capacity to fight money laundering activities.

These various priorities—known in the European Union as the “Tampere milestones”—set out a fairly clear programme for the European Union for the years to come. More detail was provided by the follow-up to the 1997 Plan of Action that was worked out during the Finnish Presidency of the European Union, and adopted in March 2000.26 The core of the document consists of eleven chapters that set out the political guidelines, the respective mandates and initiatives, and the detailed recommendations. Specific forms of crime that are the focus include economic crime; money laundering and off-shore centres; terrorism; computer crime; and urban crime and youth crime.

D. Cooperation with Candidate Countries and Other Third Countries

Even if the European Union Member States could effectively develop their laws and systems to prevent and control organized crime within their borders, this would not be enough. Preventing and controlling organized crime requires global co-operation.

One particular focus is cooperation with the so-called candidate countries. The European Union is currently negotiating actively with twelve countries on membership. In December 1999, the European Union decided in addition to start preparations for the extension of this process to Turkey. Enlargement on such a scale, from fifteen Member States to 28, will constitute not so much an evolutionary step for the EU as a leap into the unknown. Institutions, interests, policies, balances of power: everything will change. The European Union is faced with a political challenge of the first order.

In this process, considerable attention is being paid to the prevention and control of organized crime. The European Union has already adopted a large number of measures (referred to as the acquis communautaire),27 and the Member States have implemented them in their domestic legislation and practice. In order to avoid a situation where organized criminal groups take advantage of a sudden expansion of the European Union, also the candidate countries must fully accept and implement the acquis. To this end, on 28 May 1998 the European Union has made a so-called pre-accession pact with the candidate countries on how the process should be carried out. Considerable work is underway multilaterally and bilaterally to assist the candidate countries in this work.

A second focus is the Russian Federation. Again during the Finnish Presidency, a special European Union Action Plan was prepared on common action with the Russian Federation on combating organized crime. This in essence sets up a structure and process

26 The new plan of action is known as “The Prevention and Control of Organized Crime: A European Union Strategy for the beginning of the new Millennium.”

27 The “acquis communautaire” can be loosely described as the legislation of the European Union. It consists not only of the Treaties and all EU legislation, but also of the judgments of the Court of Justice and joint actions.
for continuous consultations and cooperation between the European Union and the Russian Federation. In addition, there is a broader “partnership” agreement with the Russian Federation (and with Ukraine) that provides a basis for cooperation.

Other geographical areas with which the European Union is seeking to strengthen co-operation include the Mediterranean, South Eastern Europe, China, North America, Latin America and the Caribbean.

The European Union is also active in working through intergovernmental organizations such as the Council of Europe and the United Nations. For example, throughout the negotiations on the United Nations Convention against Transnational Organized Crime, the European Union countries worked very closely together in seeking to ensure that the resulting Convention was as effective and broad as possible.

VI. LESSONS TO BE LEARNED

As can be seen, the European Union has put into place an enormous number of measures in only a few years in order to better prevent and control organized crime. The strengths of the European Union in international criminal justice lie in the considerable political pressure and interest in cooperation, as a result of which consensus will often be found even if some countries initially resist the pressure to change their criminal policy.

In this connection, two questions come to mind. Have the measures actually been effective in preventing and controlling organized crime? And if the European Union has been successful, can the progress made within the European Union be repeated elsewhere?

Whether or not the European Union has improved its effectiveness in responding to organized crime can, of course, be debated. It is difficult to show a clear cause-and-effect relationship. For example, it is misleading to try to judge effectiveness against organized crime by an increase in the number of arrests, prosecutions or convictions. To a large extent, organized crime remains hidden. Evaluation of progress remains difficult. When the present plan of action was being drafted, the Finnish Presidency wanted to include indicators of performance, measures that would provide a more precise tool for evaluating how effective we have been in implementation. Regrettably, it proved to be impossible to incorporate such an element into the plan of action. As long as we have no way of assessing the true extent of organized crime, or of its impact on society, it is almost useless to speculate if, for example, the creation of Europol or Eurojust has had an impact on organized crime in Europe.

On the other hand, it is possible to say from the practitioner’s point of view that cooperation has been made more effective and easier. The creation of Europol has clearly improved cooperation among law enforcement authorities, just as the creation of the European Judicial Network, the institution of liaison magistrates and the creation of Pro Eurojust have streamlined cooperation among prosecutors. Information can be received more quickly and analysed more effectively, and the response can be made more promptly.

The networking that is taking place in the European Union has also increased the degree to which practitioners know about, and have confidence in, one’s another criminal justice system. Also this makes cooperation more effective.
Can the developments in the European Union be replicated elsewhere?

There are undeniably certain features of the European Union which make progress easier than may be the case elsewhere. One is the existing structure for decision-making. Without the Council and the various networks, it would be difficult if not impossible to get sovereign countries to agree on measures which may have at least the appearance of infringements on sovereignty: examples include the setting up of such formal structures as Europol and Eurojust, the adoption of decisions on the harmonization of key legislation, and decisions related to mutual recognition of decisions and judgments. A second factor which eases progress in the European Union is the fact that the Member States have worked closely together for a long time, and have come to understand and, to at least a modest degree, have faith and confidence in one another’s criminal justice system.

Nonetheless, many elements of the European Union response to transnational organized crime can, and in fact are, being implemented elsewhere. The European Union has had the benefit of experience with far-reaching cooperation, and has learned considerably from experience what works and what does not work. As shown in the negotiations on the United Nations Convention against Transnational Organized Crime, the practical experience among the European Union Member States has often served as a guide for other countries and regions. Examples are the “good practices” in mutual legal assistance, the use of videoconferences in the hearing of witnesses, the establishment of joint investigative teams, and the use of liaison officers.

We have come a long way from the period when countries ignored crime beyond their borders. The speed with which the European Union Member States have agreed on cooperation, and the commitment that is being shown on a high political level on implementation, show that the Member States are very mindful of the danger that organized crime poses to the individual, the community, the country and the international community. Over the past few years, there has been remarkable, indeed unprecedented progress in the national and international response to organized crime, as shown by the strengthening of the legislative framework, the reorganisation of the criminal justice system, the growing network of bilateral and multilateral agreements, and the strengthening of formal and informal international contacts.

In the prevention and control of organized crime, we all still have a long way to go. Nonetheless, the first steps have been taken, and the experience in the European Union can help in charting out the possibilities as well as pitfalls on the road ahead.
INTERNATIONAL COOPERATION AGAINST TRANSNATIONAL ORGANIZED CRIME: CRIMINALISING PARTICIPATION IN AN ORGANIZED CRIMINAL GROUP

Matti Joutsen*

I. INTERVENING IN CONSPIRACIES AND ORGANIZED CRIMINAL GROUPS

Let us assume that the competent law enforcement authorities in three countries, Japan, the United States and Mexico, are informed of the existence of a wiretap of a telephone discussion between A and B. In this, B informs A that he has talked with C, who has said that he can supply B with cannabis in Mexico for a good price. During the same telephone call, A tells B that he knows of a good way to smuggle the cannabis from Mexico to Japan, and that he also knows of people who would be interested in buying cannabis. Has a crime been committed, and can the authorities intervene in any of the three countries?

In responding to the threat of transnational organized crime in particular, criminal justice authorities have a need to intervene as soon as possible in order to prevent crime, break up criminal organisations and apprehend the offenders. Ideally, they should be able to arrest offenders before an offence has been committed. Otherwise, there is the considerable risk that the offenders will be able to carry out the offence and escape across national borders, thus evading justice.

Here, however, there is a difficulty. In the case described above, no actual purchase of drugs has been made, much less has there been any overt attempt to smuggle the drugs into Japan. The criminal laws of many countries would even hold that, since there has been no act other than the first contact between A and C, and the telephone call between A and B, there has not even been an attempt at any offence (such as an attempt at purchasing illegal drugs). If indeed no offence has been committed, then the authorities would not have the right to make any arrests. The law enforcement authorities would have to wait and, in the worst-case scenario, would lose the trail of A and B, and the drugs will be successfully smuggled into Japan.

A second concern has to do with proving complicity in an offence in connection with crimes undertaken by a large, well-structured organized criminal group. Trafficking in persons, for example, may involve a number of offenders, acting in different capacities. Some may seek to identify the persons to

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be trafficked, others will forge the papers needed to cross borders, others will see if key authorities can be bribed, yet others will take care of transport and lodging, and finally some people will look after the placement of the people in the destination country, and perhaps will continue to control their movement. Each activity may involve a different individual crime (fraud, forgery, corruption, illegal border crossing, extortion and so on), and some activities may in fact not involve a crime at all (transport within a country). Proving complicity in trafficking in persons, or in any other organized criminal activity, may be difficult.

A third concern has to do with procedural economy. If a large number of persons agree to commit crimes, and these are in fact committed at different times by different people (as is often the case, for example, with extortion carried out by large organized criminal groups), it may be difficult to obtain sufficient evidence to convict all of them of the substantive offences. However, it may be easier to prove that they have been acting as conspirators, or as members of an organized criminal group.

A fourth concern has to do with international co-operation. In our case, each of the three persons is located in a different country. Of all the fields of law, criminal law is perhaps most closely tied to the essential values of a country. Over the centuries, considerable variety has emerged in what is criminalised and what is not in the different jurisdictions. From the point of view of domestic legal systems, this does not cause any particular difficulties, since the legal systems almost invariably apply their own criminal law.

From the point of view of international co-operation, however, the existence of different criminal laws has caused, and will continue to cause, considerable difficulties. One of the greatest difficulties in practice is caused by the principle of double criminality. International agreements on extradition and mutual legal assistance almost invariably require that the offence in question is a crime in both the requested and the requesting State. The requested State will presumably not extradite a suspect to the requesting State if the conduct in question is not criminal under its laws. However, even if the two countries agree that the conduct is criminal, the details of the definition may vary to such an extent that the requested country may well decide not to co-operate.

It is against this background of domestic and international concerns that the United Nations Convention against Transnational Organized Crime (the Palermo Convention) requires States Parties to criminalise either conspiracy or participation in an organized criminal group. Both concepts require some explanation.

II. CONSPIRACY

The concept of conspiracy arose at common law during the early 1600s in England, from where it spread to other common law countries. At English common law, if an offence was not completed, it was not punishable.

This, of course, was not considered satisfactory. The concept of “inchoate crime” arose. Inchoate crimes are crimes

2 The leading decision was that of the Star Chamber in the Poulterer’s Case in 1611. See Glanville Williams, Criminal Law. The General Part, second edition, Stevens and Sons Limited, London 1961, p. 663, and the literature cited in footnote 1 therein.
that are committed by an act done with the purpose of effecting some other crime (called the substantive crime or the consummated crime).\(^3\) The three types of inchoate crimes are attempt, conspiracy and incitement. By and large, attempt of, conspiracy to commit, and incitement to commit any offence is punishable.

The concepts of attempt and incitement are universally recognised, and need no further introduction in this connection. It is the third concept, conspiracy, which is of interest here. Under common law, mere thought did not constitute a crime. A person could think of doing evil deeds, but would remain unpunished for this. However, should he or she agree with another person about the commission of a crime, this was regarded as increasing the direct risk to the community of criminal activity in two ways. First, it increased the likelihood of success of the crime. Secondly, it makes the commission of other crimes more likely. Because of this increased risk, it was deemed useful to bring such conduct into the scope of criminal law even before it reached the stage of attempt. The concept of conspiracy was born.\(^4\)

The first statutory definition of conspiracy in the United Kingdom did not come until with the Criminal Law Act 1977.\(^5\) As subsequently amended by the Criminal Attempts Act 1981, section 1(1) of this law states:

> Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either:

> a. will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement; or

> b. would do so but for the existence of facts which render the commission of the offence or any offences impossible,

> he is guilty of conspiracy to commit the offence or offences in question.”

The corresponding provision in, for example, the Canadian criminal code (section 423(2) avoids defining conspiracy, and merely states that “Every one who conspires with any one (a) to effect an unlawful purpose, or (b) to effect a lawful purpose by unlawful means, is guilty of an indictable offence.”\(^6\)

A few particulars about conspiracy:\(^7\)
1. In its basic form, the mere agreement to commit an offence constitutes conspiracy (see, however, below).
2. Negotiating the commission of an offence is insufficient to constitute


\(^4\) Regarding the justification of the law on conspiracy, see Williams 1961, op.cit., pp. 710–713.


\(^6\) See, for example, Alan Mewett and Morris Manning, Criminal Law, second edition, Butterworths, Toronto 1985, pp. 179–189.
conspiracy. There must be a concluded agreement, even if the agreement leaves open the method and time of commission is left open (for example, the conspirators agree to act “as and when the opportunity arises”).

3. The agreement can be manifested by word or conduct.

4. There must be two or more parties. However, a person may still be convicted of conspiracy even if none of the other co-conspirators are apprehended or even identified.8

5. The conspirators must be knowledgeable of the elements of the conduct that amount to the offence. This means that each must know or believe he or she knows the facts that will make the conduct criminal when done. (For example in the case of fraud, if one person agrees only to deliver an invoice, without knowing that the invoice is for goods that have not been delivered, this person would not be guilty of conspiracy to fraud.)

6. Any act done by any of the conspirators in the furtherance of the conspiracy is an act of all, even if this act was not planned or contemplated by all.

7. It is not necessary that the offence is in fact consummated, and may indeed lie in the indefinite future.

8. A person who supplies a necessary weapon or service, even if he or she knew that this would be used for an unlawful purpose, can be convicted of conspiracy only if he or she somehow promotes the unlawful conduct itself.

9. Even if the conspiracy falls apart almost immediately (for example a key conspirator backs out), the conspiracy exists. The withdrawing conspirator remains guilty of conspiracy and of any acts committed in furtherance of the conspiracy up to that point.

10. An offender can be convicted of both conspiracy and the actual offence.9

By its very nature, conspiracy may be difficult to prove. A conspiracy may be inferred from conduct (in other words from overt acts). The testimony of a co-conspirator regarding the existence of the conspiracy may be difficult to prove. A conspiracy may be inferred from conduct (in other words from overt acts). The testimony of a co-conspirator regarding the existence of the

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8 Some limitations exist regarding who can be deemed a co-conspirator. At English law, no conspiracy exists if the only other conspirator is the spouse of the first conspirator, or under the age of criminal responsibility, or the intended victim of the offence (section 2 of Criminal Law Act 1977). The law in some other common law jurisdictions may vary somewhat; for example, in the United States a husband and wife can now constitute a conspiracy. Ferguson and Stokke, op.cit., pp. 138–139. On this point, Canadian legal practice follows that of England; Mewett and Manning, p. 183.

9 A special case arises when one of the two co-conspirators is a law enforcement officer who is an undercover officer trying to break up drug trafficking. For example in England, the officer himself or herself can, technically, be convicted of conspiracy although the court will probably hold that his or her “mental reservation” against the conspiracy meant that he or she had not in fact agreed. The other co-conspirator, however, can be convicted. See the Yip case cite in Molan et al, op.cit., pp. 159–160. Under Canadian law, however, the fact that the second conspirator was a police agent provocateur led to the acquittal of the first conspirator of conspiracy; O’Brien [1954] S.C.R. 666, cited in Mewett and Manning, p. 181.
conspiracy may also be taken and used as
evidence. This latter rule (which has been
construed somewhat differently in
different common law jurisdictions)
means in practice the allowing of hearsay
evidence.10

At English law, the mere agreement to
commit an offence constitutes conspiracy.
In some other jurisdictions, however,
statutes have added a requirement of an
overt act committed in the furtherance of
the agreement. This overt act may be
comparatively slight, but nonetheless
such an additional element is thus
required.11

English law has also explicitly
addressed the question of jurisdiction.
The courts in England are deemed to
have jurisdiction both when a conspiracy
in England is directed towards an offence
to be committed in another country, and
when a conspiracy abroad is directed
towards an offence to be committed in
England.

In the United States, it was decided to
build on the concept of conspiracy to come
to grips specifically with organized crime,
and its attempt to infiltrate into the
legitimate economy. This was done with
the 1970 Racketeer Influenced and
Corrupt Organisations Statute (18 USCA
§ 1961), commonly referred to as the
RICO statute. This statute criminalised
participation in or conducting of the
affairs of an enterprise involved in
racketeering.12 The definition of
“racketeering” is rather complex, but
essentially it is based on a list of offences
that are commonly associated with
organized criminal activity. The
definition of “enterprise” is based on the
definition of conspiracy, and involves an
“association in fact” of two or more
people. A refinement to the definition of
conspiracy is that the racketeering
activity must involve at least two
racketeering acts committed within ten
years of each other (as opposed to the fact
that a conspiracy may be designed to
commit only one wrongful act).13

RICO allows not only stiff punishment
for the offences within its scope, but also
civil remedies such as treble damage
actions, corporate dissolution and
reorganisation. This aspect has been
deemed to be particularly useful in
coming to grips with organized crime.

Canada has enacted the concept of
“enterprise crime offence” (art. 462(3) of
the Criminal Code), which is based on a
list of offences that is more limited than
the RICO statute in the United States.

9 The Federal Model Penal Code in the United
States, however, holds that where the conspiracy
has only one object or crime as its purpose, the
conspirators may not be punished for both the
crime and the conspiracy. Myron Hill, Howard
Rossen and Wilton Sogg, Smith’s Review.
Criminal Law, West Publishing Company, St.
Paul 1977, p. 133.
12 See Norman Abrams, Federal Criminal Law and
Its Enforcement, West Publishing Company, St.
13 Further refinements in the United States include
the Continuing Criminal Enterprise Statute,
which is targeted at large-scale drug trafficking,
and the Violent Crime Control and Law
Enforcement Act of 1994, which in turn is
targeted at street gangs. See Sabrina Adamoli,
Andrea Di Nicola, Ernesto U. Savona and Paola
Zoffi, Organized Crime Around the World,
III. THE OFFENCE OF PARTICIPATION IN AN ORGANIZED CRIMINAL GROUP

The concept of conspiracy has been developed on the basis of common law. In civil law countries, the concepts of attempt and incitement are widely recognised, but conspiracy is not. The general position in civil law countries is that mere planning of an offence, without an overt act to put the plan into operation, is not criminal. (As noted, some statutes in some common law jurisdictions have taken this very same position.) For example, mere planning of a robbery, and even such preliminary stages as an examination of the premises, arrangement for a getaway car or the recruiting of assistants, do not constitute criminal conduct. The offenders may be arrested and brought to trial only when they have gone so far as to, for example, enter the premises with weapons.

In Italy, which has long had difficulties in coming to grips with organized criminal groups, this was regarded as unsatisfactory. Groups such as the Mafia and the Camorra may be highly organized, and it may be difficult for the law enforcement authorities to show how individual members of the group, and in particular the leadership, have participated in actual criminal activity. The Italian legislature therefore decided, in 1982, to adopt special legislation that was directed not at individual criminal acts, but at the role of the member in the organized criminal group. The assumption was that members of criminal organisations commit crimes. For this reason mere membership was regarded as a crime, and persons suspected of this could be arrested.14

Article 416bis of the Italian criminal code thus criminalises “participation in a Mafia-type unlawful association”.15 Such an association is said to exist “when the participants take advantage of the intimidating power of the association and of the resulting condition of submission and silence to commit criminal offences, to manage, at all levels, control, either directly or indirectly, of economic activities, concessions, authorisations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for others, or with a view to preventing or limiting the freedom to vote, or to get votes for themselves or for others on the occasion of an election.”

If the participants have firearms or explosives at their disposal, the punishment is higher. The punishment is also higher if the economic activities that the participants intend to control are funded even in part by the price, product or proceeds of criminal activities.

The assessment of the impact of this legislation has been that it is effective. The prosecutor no longer needs to prove that, for example, a leader of an organized criminal group has in some way participated in a criminal offence. It is enough to demonstrate that such a person is a member of a certain type of organisation.

The Italian definition can be regarded as quite broad, since even a person who is a passive member of an organized criminal group can be punished. Other civil law countries have been reluctant to follow suit. Portugal has been one country that has adopted somewhat similar

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14 See Adamoli et al, op.cit., p. 133.
15 Other provisions in Italian criminal law deal with "common association crime" and "drug-trafficking association crime". See Adamoli et al, op.cit., pp. 132–133.
legislation. Portugal has criminalised the founding of a group for the purpose of committing crimes, becoming a member of such a group, or providing such groups with help, particularly in the form of weapons or ammunition, or seeking to recruit further members. Among Central and Eastern European countries that have enacted somewhat similar legislation are Estonia, Lithuania, Moldova and Poland.16

In addition, several civil law countries have enacted legislation directed at more tightly defined forms of participation or conspiracy in the case of particularly serious offences. For example, the respective criminal codes of Denmark and Finland contain provisions regarding conspiracy to commit treason. Furthermore, several civil law countries regard commission of an offence as a member of an organized criminal group to be an aggravating factor to be considered in sentencing.

Finally, several civil law countries have enacted legislation that criminalises active participation in an organized criminal group. Germany, for example, criminalised the formation of a group whose goals are the commission of offences, [active] participation in the group, soliciting for the group, and providing support for the group.

In 1997, the European Union adopted an Action Plan against organized crime. One of the key elements of this Action Plan called for the adoption of a joint action requiring all fifteen Member States of the European Union to criminalise participation in an organized criminal group. Such a joint action was indeed adopted in December 1997.

In the discussions leading up to the joint action, there was considerable controversy over its formulation. The two Member States with a common law system, the United Kingdom and Ireland, noted that they already use the concept of conspiracy, and were not prepared to change their law in this regard. Italy strongly advocated legislation that would follow its model in criminalising “participation in a Mafia-like unlawful association”. Countries that did not have either option were adverse to adopting them, in particular on the grounds that both options (conspiracy and “participation”) were rather vague, and in this respect were seen to be in violation of the principle that conduct to be criminalised should be defined explicitly (the “legality principle”).

The end result was, as so often in such a context, a compromise. All member states of the European Union were required to ensure that their legislation criminalised either conspiracy or participation in an organized criminal group, and the definition of participation was drawn to require an overt act, “active participation”.17

It was this joint action which contributed to the definition adopted in the Palermo Convention.

IV. ARTICLE 5 OF THE PALERMO CONVENTION AND ITS IMPLICATION

A. The Text of Article 5

Article 5 is one of only four criminalisation obligations contained in the Palermo Convention. It requires States Parties to ensure that their laws criminalise either conspiracy or participation in an organized criminal

group, or both. The article reads as follows:

### Article 5
**Criminalisation 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;
      (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;
   (b) Organising, directing, aiding, abetting, facilitating or counselling the commission of a serious crime involving an organized criminal group.
2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.
3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

### B. The Criminalisation Obligation

2(a)Conspiracy

For the purposes of the Palermo Convention, conspiracy is thus defined as:

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57 In September 2001, the Commission of the European Union introduced a proposal for a Council framework decision on combating terrorism (12103/01 DROIPEN 81, 24 September 2001). If accepted, this framework decision would require that each of the fifteen Member States of the European Union (and, in time, the twelve candidate Member States) "take the necessary measures to ensure" that inter alia the following offences will be punishable:
- directing a terrorist group, and
- promoting of, supporting of or participating in a terrorist group.

The definition of a "terrorist group" is quite similar to that of an organized criminal group. It is "a structured organisation established over a period of time, or more than two persons, acting in concert to commit terrorist offences..."
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• intentionally 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.

Certain key points emerge when this definition is compared with for example the statutory definition of conspiracy under English law.

First, however, a point of similarity: a conspiracy can be present even when there are only two conspirators. It may be recalled that art. 2(a) of the Palermo Convention defines an “organized criminal group” as a structured group of three or more persons.

One difference is that the conspiracy must be directed to the commission of a “serious crime”. Art. 2(b) of the Palermo Convention defines serious crime as “conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”. Thus, States Parties need not extend their definition of conspiracies to include those directed at less serious offences.

A second difference is that the purpose of the serious offence in question must be related “directly or indirectly to the obtaining of a financial or other material benefit”. Also this is in line with the definitions given in article 2 of the Palermo Convention. States Parties need not extend the concept of conspiracy beyond offences that are basically covered by the Palermo Convention. (In this regard, the criminalisation obligation in article 5 is narrower than any of the other three criminalisation obligations.)

A third difference is that the State Party may, if its domestic law so requires, include the additional condition that one of the participants has undertaken an act “in furtherance of the agreement” or that the act involves an organized criminal group. This would be in line with statutory law in some common law jurisdictions that require an overt act in furtherance of the conspiracy. It is not enough to have a “meeting of the minds”; there must also be action. How substantive this additional act must be to fulfil the condition laid down in article 5(1)(a)(i) of the Palermo Convention is left open to the individual State Party.

Article 5(3) makes reference to the fact that some States Parties may wish to limit the scope of conspiracy to only a list of serious offences. In such case, the States Party must “ensure that their domestic law covers all serious crimes involving organized criminal groups”, and must inform the Secretary-General of the United Nations accordingly.

Article 5(3) also requires that States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) so inform the Secretary-General.

2(b) Participation in an Organized Criminal Group

“Participation proper” is defined in article 5(1)(a)(ii) as:

• 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,
intentionally takes an active part in either the criminal activities of the organized criminal group or 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.

Here again there are key points of difference between the criminalisation requirement in art. 5 of the Palermo Convention, and such predecessors as art. 416bis of the Italian Criminal Code.

First, the person must know the aim and general criminal activity of the group in question, or of its intention to commit crimes.

Second, the person must take an active part in the organisation. The clearest form of such participation is in the criminal activities of the organisation. Here, it may be noted that if this option is taken, art. 5 requires criminalisation of such participation as distinct from the attempt or completion of the criminal activity itself. Let us assume that A joins an organized criminal group and intentionally takes part in robberies. This person, A, should then be held guilty of both the robbery and of participation in an organized criminal group that commits the robberies. (In this respect, the thinking behind this requirement is closer to that of conspiracy, since most common law jurisdictions hold that the offender could be convicted of both conspiracy and the offence in question.)

The alternative form of participation can be in “other activities of the organized criminal group”. However, here there is the additional condition that the person in question is aware that “his or her participation will contribute to the achievement of the above-described criminal aim”. It is left to the State Party to determine how substantive this contribution should be. Presumably an accountant knowingly working for an organized criminal group would fulfil this definition, even if he or she in no way engages in illegal accounting practices or in money laundering; merely helping the group with its accounts would seem to be sufficient. A driver who drives the leader of the group from place to place—especially where none of the meetings would appear to be related to the planning or commission of illegal activities—would be a more doubtful case. And going to the other extreme, persons who work for members of the group as, for example, gardeners, cooks or custodians would presumably not be seen to “contribute to the achievement of the ... criminal aim,” although this would ultimately depend on the individual case.

C. Attempt and Forms of Participation

As noted, under the Palermo Convention either conspiracy or participation in an organized criminal group are to be criminalised as distinct from attempt or completion of the criminal activity in question.

Article 5(1)(b) makes the further point that States Parties are also to criminalise certain specific forms of participation in the commission of serious crime involving an organized criminal group. The forms themselves (organising, directing, aiding, abetting, facilitating and counselling) are fairly well recognised in criminal law, although the construction placed on the words may well vary from one legal system to the next.

Presumably most, if not all, legal systems of the world are already in compliance with this requirement, in that e.g. aiding and abetting in the
commission of any serious crime is punishable. Although art. 5(1)(b) makes reference to e.g. aiding and abetting “the commission of serious crime involving an organized criminal group,” it can be argued that a State Party need not separately enact such a qualified criminalisation. Nothing, however, would prevent States Parties from adopting a statute that does define an organized criminal group, and sets a special tariff of punishment for various forms of participation in its criminal activities. This has, indeed, already been done by several states around the world.

D. Evidence of Conspiracy and Participation

Art. 5(2) very briefly states that “the knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.” This is basically a rule for interpreting the evidence of guilt. States Parties can, alternatively, provide that their courts may look at the totality of evidence, thus giving courts much more leeway in construing possible guilt.

E. Coda: Applying the Convention to the Case Study, and Assessing its Utility

The case cited at the outset involves three persons, A, B and C. How would this be dealt with under the two definitions in article 5 of the Palermo Convention?

Under the heading of conspiracy, art. 5(1)(a)(i), all three suspects could be found guilty of conspiracy, since A and B, and B and C, had apparently agreed on the (illegal) purchase of cannabis, and A and B had further agreed on its import into Japan.

Under the heading of participation in an organized criminal group, the prosecutor would have to show that A, B and C constituted a structured group existing for a period of time. If this can successfully be done, then all three can be convicted of participation.

Would either or both approach add anything to the arsenal of the investigator and the prosecutor, and would there be any drawbacks?

To summarise on the basis of the foregoing,

• the criminal justice authorities would have the possibility of intervening at an earlier stage of the criminal activity,
• all three could be charged with conspiracy or participation even if their role had been more marginal than in the case used as an illustration;
• should the three suspects continue their activity, the prosecutor need not prove complicity in each and every act of drug trafficking;
• the concepts of conspiracy and participation allow, in effect, double punishment: one for the conspiracy or participation, and one for the offences committed in furtherance of the conspiracy or participation;
• legislation referring to conspiracies and organized criminal groups could provide the framework for the use of civil measures in addition to punishment.

There has also been significant criticism of the concepts of conspiracy and participation in an organized criminal group:

• the concepts are ambiguous and confusing, in particular if juries are involved. The legal practice has
shown that the concepts can be confusing even to trained lawyers;
• some critics have said that the concepts violate the principle of legality, which requires definition of precisely what acts or omissions constitute criminal conduct;
• this ambiguity raises concerns regarding legal safeguards, such as ensuring that the defendant knows exactly what conduct he or she is charged with having committed;
• the ambiguity also raises concerns that the concept will be used to expand the scope of criminal behaviour to an unacceptable extent; and
• the concept of conspiracy has been used, in the view of some, to “convert innocent acts, talk and association into felonies”. The discussion within the European Union regarding the joint action requiring Member States to criminalise participation in an organized criminal group shows that these same qualms exist regarding this latter concept. The concern here is that the concepts may be abused by over-zealous prosecutors.

Even so, the experience that has been collected in the growing number of countries applying one or the other of these concepts shows that, in the hands of trained investigators and prosecutors, they can be highly useful tools in the constant efforts of the criminal justice system to come to grips with organized crime. The drafters of the Palermo Convention have seized this opportunity, and are requiring States Parties to act accordingly.

18 Ferguson and Stokke, op.cit., pp. 140–141. The authors cite the use of the concept in the United States against, for example, union organisers, members of the Communist Party, and conscientious objectors during the Vietnam War.
THE CURRENT SITUATION OF AND COUNTERMEASURES AGAINST TRANSNATIONAL ORGANIZED CRIME IN THE REPUBLIC OF THE PHILIPPINES

Severino H. Gaña, Jr.*

I. INTRODUCTION

The end of the Cold War and the rapid pace of globalization has provided opportunities for criminals and organized crime groups to globalize their illegal activities, thus they have led to the emergence of all forms of transnational crimes and led to the development of new security threats. These new threats include various types of transnational organized crime, such as trafficking in persons, international terrorism, money laundering, intellectual property rights violation, illicit trafficking of drugs, piracy on the high seas, illicit trafficking of firearms, and cybercrime. This globalization has also led countries to take new security adjustments/arrangements as organized transnational crime exploit these advances in technology, services, and communication. These incidences of the various transnational crimes, at least within the Philippines, has created a significant impact on its political, economic and socio-cultural stability and security.

II. PHILIPPINE EXPERIENCE

A. Trafficking in Persons

Human trafficking refers to the recruitment, transportation, transfer, harboring, or receipt of persons, by threat or use of force, by abduction, fraud, deception, coercion or the abuse of power or by the giving or receiving of payments or benefits for the purpose of exploitation. Persons may be trafficked for the purpose of prostitution, other sexual exploitation or forced labor. When the practice involves coercion or deceit, consent of the victim is not an issue.

Human smuggling on the other hand is the procurement of illegal entry or illegal residence of a person into a state of which the latter person is not a national or a permanent resident in order to obtain, directly or indirectly, financial or other material benefit. Children refer to persons' under eighteen years of age.

The Philippines is a major source of people that are trafficked to other countries with able economies. In Europe alone, almost 705,439 Filipinos are undocumented and most of them are victims of trafficking, reportedly perpetrated by Philippine-based organized crime groups that have contacts with similar criminal syndicates in the receiving country. Their operation runs parallel with the continuing deployment of documented Overseas Filipino Workers (OFWs) to fill in the manpower requirements of developed countries and at the same time to solve the soaring unemployment problem of the country. Aggravating this scenario is the presence of some unscrupulous foreigners who reportedly exploit Filipino women and children ranging from pedophilia to sex trafficking and prostitution, especially those sent abroad for the same reason.

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From 1995 to early 2000, 751 cases of human trafficking were recorded. Most of the victims come from Region III (11%), NCR (10%) and Region IV (9%). Of the 66% of women victims, 18% were forced into prostitution. Furthermore, 51% were trafficked to the Asia-Pacific, 27% to the Middle East, and 19% to Europe.

As of December 2000, based on a report from the Commission on Filipinos Overseas (CFO), there are already 7.38 million Overseas Filipinos of which 2.99 million are documented and 1.84 million are products of irregular migration. A significant number are victims of all forms of human trafficking and smuggling while more than half are “informed victims” (58%) who voluntarily went out of the country on the strength of fraudulent travel documents or false identities or travel abroad as tourists, pilgrims, students, or any other lawful means but prolong their stay in the country of destination in their attempt to find jobs and earn more wages even after the expiration of their appropriate visas, thus categorizing them as undocumented or illegal migrants. Almost 10% of cases involved intermarriages. Other mode includes introduction through pen pal clubs, marriage bureaus, and the Internet.

The CFO reports the top regions of destination of undocumented Filipinos are America, South and East Asia, the Pacific, Europe, the Middle East and Africa. Top ten countries of destination of undocumented Filipinos in chronological order include the United States, Singapore, Canada, Japan, Italy, United Kingdom, Saudi Arabia, Greece, Germany and France. However, according to the reports, within the last quarter 2000 and during the first quarter

### Table 1

<table>
<thead>
<tr>
<th>Recorded cases of human trafficking (1995 to early 2000)</th>
<th>751 cases</th>
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</thead>
<tbody>
<tr>
<td>Increase in trafficking cases in 1999</td>
<td>37%</td>
</tr>
<tr>
<td>Victims coming from Region III</td>
<td>11%</td>
</tr>
<tr>
<td>Victims coming from NCR</td>
<td>10%</td>
</tr>
<tr>
<td>Victims coming from Region IV</td>
<td>9%</td>
</tr>
<tr>
<td>Women victims</td>
<td>66%</td>
</tr>
<tr>
<td>Women forcibly put into prostitution</td>
<td>18%</td>
</tr>
<tr>
<td>Forced to work in slavery-like conditions</td>
<td>42%</td>
</tr>
<tr>
<td>Trafficked to Asia Pacific</td>
<td>51%</td>
</tr>
<tr>
<td>Trafficked to the Middle East</td>
<td>27%</td>
</tr>
<tr>
<td>Trafficked to Europe</td>
<td>19%</td>
</tr>
<tr>
<td>Victims aware of what they were getting into</td>
<td>58%</td>
</tr>
<tr>
<td>Victims that were deceived</td>
<td>42%</td>
</tr>
<tr>
<td>Victims that were recruited by parties not related/unknown to them</td>
<td>53%</td>
</tr>
<tr>
<td>Victims that were repatriated by the Philippine Government</td>
<td>31%</td>
</tr>
</tbody>
</table>

* Philippine embassies and consulates noted cases of wholesale recruitment at the barangays/local communities

### Table 2
**Estimated Number of Overseas Filipinos as of December 2000**

<table>
<thead>
<tr>
<th>Total Number of Overseas Filipinos</th>
<th>7.38 Million</th>
</tr>
</thead>
<tbody>
<tr>
<td>OFWs</td>
<td>2.99 M</td>
</tr>
<tr>
<td>Permanent Residents</td>
<td>2.55 M</td>
</tr>
<tr>
<td>Irregular</td>
<td>1.84 M</td>
</tr>
</tbody>
</table>
of 2001 reveal the increasing incidences of irregular migration in all its forms to countries such as Jordan, Malaysia, Italy, and Japan which may drastically change to order of arrangement by the end of this year if such trend remains unabated.

Transit countries being used in going to states of destination include most members of ASEAN, countries in Eastern Europe and just recently Morocco. Most of these transit countries have no visa requirements for entering Filipino nationals thus complicating the problem of irregular migration. Apart from this, the Eastern European countries, being newly independent and sovereign states, have yet to formulate and strictly enforce their immigration policies and laws to discourage human trafficking syndicates as well as illegal immigrants from turning them as transit countries in entering Western Europe.

The Philippines is being utilized also as a transit and destination country as well. Recent apprehensions by the Bureau of Immigration reveal that Iranian, Bangladesh and Chinese nationals are using the Philippines as a transit point to other countries such as Japan, Canada, United States, and Australia. Indian nationals, on the other hand, are illegally entering the country to establish illegal business such as lending with exorbitant interests.

Below is a list of identified seaports used to smuggle persons in and out, both Filipinos and aliens:

- Iloco Sur (Salomague Island)
- Zamboanga del Sur (Zambo Port, Digos, Bauin Point)
- Davao del Sur (Davao Gulf, Digos Point, Panabo Port)
- Bicol (Pio Duran, Albay)
- Dagupan City

The nationalities of those involved in human trafficking in the Philippines are mostly Filipinos with contacts in transit and destination countries. Others include Malaysians who have been assisting Indians to enter the country via the southern backdoor, Nauru and Kiribati nationals who have been facilitating the entry into the country of undocumented Chinese as well as Chinese, Taiwanese and Hong Kong nationals.

The following are some significant cases:

1. “Baby Tanya” Case
   This is a case of smuggling through adoption by using spurious supporting documents and false statements of John Lopez and Maria Ella Carrion who presented themselves as the biological parents of the child, Baby Tanya Samantha Lopez. However, upon arrival in the U.S., the INS upon receipt of report from the U.S. Embassy that the documents and statements presented and executed by Ms. Carrion and Mr. Lopez were not true, held Baby Tanya. Tanya Samantha was repatriated on June 16, 2001 and is now under the custody of the DSWD. The case is now with the Department of Justice, undergoing preliminary investigation.

2. “Kimber” Case
   This is the complaint filed by the PCTC and Mr. James H. Kimber (complainant) against respondents William S. McKnight, Lilian U. McKnight, Rudelyn P. Uriarte and Elvira U. Mandap dated January 6, 2000 for violation of Republic Act No. 6955 Mail Order Bride and Estafa.

   Mr. James H Kimber, corresponded to the advertisement of the Pacific Islands Connection to meet girls in the Philippines he could marry, choosing
Rudelyn P. Uriarte, 16 years old and sister-in-law of William McKnight. He, upon arrangement made by William McKnight, married Rudelyn. He returned to the United States without his wife, Rudelyn, with the assurance that his wife would join him after six months. The promise was not fulfilled. He sought help from concerned agencies of both the US and the Philippines. He later learned that their marriage was never registered and that Rudelyn was married to another foreigner named Howard W. Gardner. He formally filed a case against the respondents. The tour and travel operation of McKnight was put under investigation.

3. “Marilou Pontana et al’’ Case
   This is a case of trafficking women through illegal recruitment. The respondents, Evelyn A. Tuprio and Grace Cervantes, recruited young girl victims in the guise of domestic helpers but they were later utilized as sex slaves in Malaysia. Their illegal activities were busted when police operatives intercepted four young victims holding tampered documents on board a vessel bound for Malaysia.

B. Terrorism
   Terrorism is “the use of violence, threat or intimidation, or destruction of lives and properties by any other means, with the objective of creating a state of fear in the public mind to achieve a purported political end; or to coerce or to influence their behavior; or to undermine the confidence of the general public on the government.”

   The Philippines’ experience on international terrorism was first felt as early as 1985 when international terrorist groups attempted to establish a foothold in our country. They were able to stage terrorist activities and tried to establish their cells in the country but were later on neutralized. These groups which came to the Philippines with barely three years interval, were identified as the Abu Nidal Organization (ANO), the Japanese Red Army (JRA), the Iraqi terrorists, the Ramzi Yousef Terrorist Cell, the Liberation of Tigers Tamil Eelam (LTTE) and the recent Free Vietnam Revolutionary Group (FVRG).

   1. Abu Nidal Organization (ANO)
      In 1985, some members of the group, using student visas, have reportedly slipped into the Philippines on a recruitment and indoctrination mission. It was also recorded that during that time there were about 3,000 Palestinian students enrolled in different colleges and Universities in Metro Manila. The local members of this group remained unidentified up to December 1987 when the police arrested five members. The arrest led to the discovery of ANO’s attempts to organize terrorist cells in the country to be employed in the Asian region.

   2. Japanese Red Army
      On November 15, 1986, the Manila-JRA cell conducted a joint operation with the New Peoples’ Army (NPA), known as the “Operation Customer” in kidnapping Nobuyuki Wakaiji of Mitsui Corporation (Philippines).

      Investigation revealed that three top-ranking cadres of the NPA-General Command in close coordination with two JRA members were responsible for the planning, execution and supervision of the said operation. Wakaiji was released in December 1986 in Quezon City after paying 3M US dollars to the kidnappers.

   3. Ramzi Yousef Terrorist Cell
      On January 7, 1995, police authorities arrested Abdul Hakim Murad, a
Pakistani national in one of the apartments in Manila. Murad was a member of an international terrorist group planning to kill Pope John Paul II on his scheduled visit to Manila from January 10–15 for the Celebration of the World Youth Day. Pieces of evidence recovered revealed the group’s plan to bomb U.S commercial airlines plying the Manila - Hong Kong - Los Angeles route. This plot was to be the centerpiece of the so-called “Oplan Bojinka” which was an intricate network of international terrorists using the Philippines as a venue of their terrorists activities. The bombing of a Philippine Airlines jet bound for Japan from Cebu on December 11, 1994 was a test-run to Oplan Bojinka. It can be recalled that one Japanese national was killed while several others were wounded during the incident.

4. Free Vietnam Revolutionary Group (FVRG) Terrorist Cell

The presence of this terrorist cell was recently discovered with the arrest of Vu Van Doc, a U. S. citizen of Vietnamese origin, Huynh Thuan Ngoc, a Swiss citizen of Vietnamese origin and Makoto Ito, a Japanese national on August 30, 2001. One of the arrested suspects, Vu Van Doc, who operates a terrorist cell in the Philippines is a member of the Free Vietnam Revolutionary Group (FVRG), the military arm of the Government of Free Vietnam (GFV), a worldwide organization engaged in liberating the Republic of Vietnam from communist rule.

The arrested suspects were reportedly planning to conduct bombing activities targeting the Vietnamese Embassy in Manila on or before September 2, 2001, which is the National Day of the Republic of Vietnam.

C. Money Laundering

In the Philippines, the problem has its own dimension. The perception that the Philippines is a haven for money laundering is supported by data. The US Treasury Department’s Financial Crimes Enforcement Network reported that the Philippines ranked second among 15 non-cooperative jurisdictions in terms of the number of suspicious activities relating to financial transactions from April to July 1996. During this period, the total number of reports on suspicious activities filed reached 566, second only to Russia, which reported a total of 847.

Since drug trafficking is a lucrative business in the country, money laundering becomes the parallel activity of drug syndicates. It is further aggravated with the absence of punitive laws for this crime. The proceeds from the illicit drugs industry in the country reaches P 265 billion annually, about 8 percent of the local economy’s output and roughly a third of the government’s budget this year. Another source of dirty money cleaned through the country’s financial system is through corruption. Transparency International, using its “corruption perception index,” ranks the Philippines as the 65th least corrupt out of 91 countries. The Office of the Ombudsman, the agency tasked to run after corrupt government officials, estimates that about Php100 million is being lost daily to corruption. The figure is actually closer to about Php150 billion a year or Php278 million a day. Based on this data alone, graft and corruption in a larger scale is so pervasive that it is capable of triggering money laundering.

The Philippines’ efforts to be taken out of the list suffered from the scandal that erupted over allegations of corruption and money laundering involving the former President Joseph Estrada who
allegedly stashed from P10 billion to P15 billion in payoffs from operators of the “jueteng” illegal numbers game, kickbacks from tobacco excise taxes and questionable government investments during his 31 months in office. He was arrested and jailed for plunder, a non-bailable offense punishable by death as well as the Jose Velarde scandal, where Estrada allegedly used a false name to launder illegally acquired wealth. In testimonies given to the Senate last year, key witnesses provided details on how Estrada allegedly amassed and “legitimized” dirty money using the financial system. In yet another case of money laundering in the Philippines, an official of Equitable PCI Bank Inc., disclosed that Yolanda Ricaforte, the alleged auditor for the “jueteng” payoffs to Estrada, deposited more than Php200 million in the bank’s six branches in Metro Manila.

D. Intellectual Property Rights

“Intellectual property” is a property interest in an idea or creation granted by the creation of law. It exists only in countries that recognize laws on intellectual property rights.

The Annual BSA Global Software Piracy Study, which involves the Software and Information Industry Association (SIIA), confirms that the country’s piracy rate decreased from 77% in 1998 to 70% in 1999 and eventually to 61% last year, causing the Philippines to have the second lowest piracy rate among Southeast Asian countries. Despite the drop of the country’s piracy rate, however, the software industry continues to suffer an annual loss amounting to P1.3 billion in revenues due to software piracy.

The prevalence of software piracy among selected countries in Asia/Pacific in 2000 are identified as follows:

<table>
<thead>
<tr>
<th>Country</th>
<th>Piracy Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vietnam</td>
<td>97%</td>
</tr>
<tr>
<td>China</td>
<td>94%</td>
</tr>
<tr>
<td>Indonesia</td>
<td>89%</td>
</tr>
<tr>
<td>Thailand</td>
<td>79%</td>
</tr>
<tr>
<td>India</td>
<td>63%</td>
</tr>
<tr>
<td>Philippines</td>
<td>61%</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>57%</td>
</tr>
<tr>
<td>Korea</td>
<td>56%</td>
</tr>
<tr>
<td>Singapore</td>
<td>50%</td>
</tr>
<tr>
<td>Japan</td>
<td>37%</td>
</tr>
<tr>
<td>Australia</td>
<td>33%</td>
</tr>
<tr>
<td>New Zealand</td>
<td>28%</td>
</tr>
</tbody>
</table>

(Source: Sixth Annual BSA Global Piracy Study, 2000)

The International Planning and Research Corporation (IPRC), in a study commissioned by Business Software Alliance (BSA), to review available data and to utilize systematic methodology to determine worldwide business software piracy and associated dollar losses, has noted that the world piracy rate in 2000 has increased to 37%, and dollar losses have reached a total of US$11.75 billion worldwide. The Asia/Pacific region in particular has increased its piracy rate to 51% and a loss of over US$4 billion in 2000.

The Asia-Pacific sustains the most dollar losses, followed by Western Europe and North America (see the following for the distribution of dollar losses by region).
According to the data from the International Anti-Counterfeiting Coalition (IACC), trademark counterfeiting is a highly profitable tax-free business.

Below is the pattern of distribution of counterfeit goods of organized crime groups by region:

(Source: International Anti-Counterfeiting Coalition)

It must be noted as well that most counterfeit products are often sold at a third of its original price or even cheaper. In this regard, wholesalers and retailers are having second thoughts in procuring legitimate items over the pirated ones.

E. Drug Trafficking

Drug trafficking refers to the act of transporting and eventually selling illegal drug substances. A diversion occurs when drugs legally shipped eventually end up on the hands of drug traffickers and syndicate groups and sold in the illegal market.
The drug problem in the Philippines resurrected in the latter part of the 1960's with marijuana, valium, mercodol, mogadon, madrax, opium and heroin as the popular drugs of abuse. Even after the execution of drug smuggler Lim Seng in 1972 which tremendously cut off the supply of heroin entering the country, there were already 20,000 drug users. This number increased by more than twelve times in 1980. It was during this year when the smuggling of hashish and mogadon tablets into the country and the exportation of marijuana were perpetrated by foreigners. In 1981, the country became a transit point for heroin and cocaine and as a consequence, drug users increased to about 312,000. In 1983, the drug problem started to transcend international borders even as drug users continue to increase at a rapid pace with corex-d, hylorin, ornacol, peracon, DM, and lagaflex as additional drugs of abuse. At that time there were already 343,750 drug users.

The production and exportation of marijuana increased during the following year. It was also at this time that methamphetamine hydrochloride or shabu manifested its presence as one of the growing popular drugs of abuse.

Thus, the government intensified its campaign against the drug problem based on a three-pronged approach namely law enforcement, preventive education campaign and treatment and rehabilitation programme. Even so, the problem remained unabated such that prior to the restoration of the death penalty on December 13, 1993, there were already 800,000 drug abusers with a significant number concentrated in Metro Manila.

The drug users comprised approximately 5% or 3.7 million of the 74 million Filipinos of which according to the NDLEPC's survey the drug users and more than 500,000 were in need of rehabilitation. Unfortunately, only 5,098 are treated in the 26 public and private drug rehabilitation centers throughout the country.

The drug pushers on the other hand are roughly placed at 560,000 in Metro Manila alone victimizing about a million drug dependents aggravated by the involvement of 83 drug syndicates. Foreign criminal syndicates mostly run the local drug trafficking business with 62% of their activities conducted in the Metro Manila area. The local illegal drug trade is worth about P251 billion and is likely to increase as the Philippines is gradually emerging as a major transit point for drugs and as a producer of marijuana for export to consuming countries.

Narcotics operations conducted by different drug law enforcement agencies nationwide for year 2000 resulted in the arrest of 36,753 persons and the filing of 14,258 drug cases in various courts. The total value of drugs seized for that year was pegged at 3,994,264,482.00 billion. The tables below illustrate the gains of all operating drug law enforcement agencies for the year 2000.
Comparative Accomplishment 1997–2000

From January to August 2001, the series of narcotics operations nationwide conducted by different drug law enforcement agencies resulted in the arrest of 23,395 persons and filing of 16,636 drug cases in various courts. The total value of P828,557,053.40 worth of illegal drugs were seized (DDB estimated value) and a total of 26 foreign nationals were arrested.

A successful police operation resulted to the discovery of a shabu laboratory in Brgy. Sto Nino, Lipa Batangas and the arrest of nine Chinese nationals and one Filipino national in the name of Benjamin Tubay Marcelo, the owner of the 2.5 hectares where the shabu laboratory was located. Confiscated were 200 kgs of high grade shabu, 400 kgs of newly processed shabu and 500 kgs of ingredients of shabu.

Early this year, over P7 million worth of fully grown marijuana plants and seeds were destroyed by law enforcement agencies in a huge plantation in Sugpon, Ilocos Sur, La Union and Benguet. According to police operatives, New People’s Army guerillas operating in the province are reportedly giving protection to the plantation.

The popular drugs of abuse at this point in time are marijuana and methamphetamine hydrochloride (shabu).

F. Illicit Trafficking of Firearms

Firearm is defined as “any barreled weapon that will or is designed or may be readily converted to expel a bullet or projectile by the action of an explosive, including any frame or receiver of such a barreled weapon but not including any antique firearm manufactured before the twentieth century or its replicas.” This includes “revolvers and self-loading pistols; rifles and carbines; submachine guns; certain hand-held under-barrel and mounted grenade launchers; portable
anti-aircraft guns; portable anti-tank guns, recoilless rifles; certain portable launcher of anti-aircraft missile and rocket system; certain portable lahar launchers of anti-aircraft missile systems; mortars of caliber less than 100 mm cal."

The main sources of loose firearms are the unregistered local gun manufacturers. We call these sources as “PALTIK" manufacturers. They are concentrated in the island of Cebu particularly in Danao City, Mandaue City and other neighboring towns. These are clandestine backyard or cottage industries manned by family members purposely to produce “paltik” firearms for trade and economic alleviations.

Illicit trafficking of firearms is another menace to Philippine society. It becomes a stumbling block to our country’s economic development and poses a serious threat to national security. The ultimate goals to have political control, economic advantage, power, revenge, seek for immediate justice and personal security are just but a few of the factors that a firearms trafficker has in mind. It is in this context that he violates the existing laws of the country.

The “gun trail” can be traced from the individual “paltik” manufacturers elusive dens and production sites to the consumers through the enterprising individuals or groups whose main agenda is economic gain. Syndicated Crime Groups involved in trafficking of firearms collect finished products from individual sources and consolidate these firearms on pre-designated bodegas. Caches of firearms are shipped to Manila or any port for delivery to contacts for the cash trade by Yakuza contacts/agents. Thereafter, the agents transport the said firearms mostly by ships, barges, motor bancas and other water carriers. Some utilize helicopters and aircraft for shipments and use of major international airports.

The gun trail had been monitored ever since. Reports of confiscation, buy-bust operations and police raids prompted the Yakuza to import technology of the gun manufacturer by hiring individual gun makers. These gunsmiths are brought to Japan in the guise of tourists, contract workers, and other legitimate cover purposely to manufacture guns inside Japan.

While the government campaign to dismantle all private armies in the Philippines has resulted in a significant decline in gunrunning transactions and incidents of firearms smuggling, the proliferation of loose firearms remains unabated. This can be attributed to the opportunities offered for local transshipments of firearms and inbound smuggling of foreign-made weapons through International airports and maritime ports. Sometime in 1992, it was monitored that a big shipment of firearms, mostly cal. 5.56 US made rifles, were unloaded in Mindanao and local officials allegedly purchased the firearms.

Information gathered states that the Yakuza is engaged in illegal firearms trade. Members of the Yakuza organization acquire the bulk of “paltik” productions in Cebu using different exit points like Batangas, Ilocos Sur and other northern parts of the country.

The following factors contribute to the flow/movement of firearms in and out of the country:

(i) The country’s geographic configuration with its long and irregular coastlines, and some sparse and isolated islands,
afford gunrunners numerous natural covers for landing sites and storage points;
(ii) The prospects of huge profits and ready markets for smuggled firearms;
(iii) Increased connivance among gun-running syndicates and some corrupt law enforcers; and
(iv) Persistent involvement of some political families and other influential families in these activities either to beef up their private armies or as instruments in the conduct of illicit activities

G. Piracy on the High Seas and Armed Robbery Against Ships
Article 101 of the 1982 UN Convention of Law of the Sea (UNCLOS) defines piracy as any of the following acts:

(i) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   - on the high seas, against another ship or aircraft, or against persons or property on board such as ship or aircraft;
   - against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
   - any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate-ship or aircraft;
   - any act of inciting or of intentionally facilitating an act described in subparagraph (i) or (ii).

Based on IMB-PRC records, piracy in the Philippines exhibited a downward trend, from a high of 39 incidents in 1996 to only nine (9) last year (2000). However, the country was reported to have the highest number of crew members/ passengers killed (40) during piracy attacks in 2000. Yemen, Bangladesh and Guatemala followed suit, in that order. In 1996, the same report also highlighted the Philippines as a Flag State with the highest number of attacks at 27 or 12% of the total number of Nationalities of Ships Attacked.
Among the most significant incidents of piracy that transpired in the Philippine waters were the following:

(i) On April 23, 2000, a group of 21 people were forcibly taken from Sipadan Island, Malaysia by members of the **Abu Sayaf** Group. After taking some of their money and personal belongings, the victims were transported on board two vessels to the island of Jolo in the southern Philippines. The Philippine authorities believed that the members of the group were pirates and bandits who have joined the **Abu Sayaf** solely for monetary considerations;

(ii) The hijacking of MV Juliana, a General Cargo Ship loaded with 1,993 tons of steel sheets as ordered by the Philippine Steel Company from Indonesia. Investigations revealed that the said cargo ship was repainted and renamed several times and had earlier been used by the Thai Mafia for several years to smuggle goods; and

(iii) The hijacking of MV Inabukwa, an Indonesian vessel carrying US$2.1 million worth of tin ingots, tin concentrate and white pepper on board. The vessel was seized in Sayap Island, Indonesia on March 15, 2001 by Indonesian pirates. The vessel was heading towards Singapore when it was hijacked. The vessel was directed to an undetermined destination before it finally entered the Philippine territorial waters. The Philippine Coast Guard (PCG) officials on March 25 arrested seven alleged Indonesian pirates and took custody of the vessel, which name had been changed to MV Chungsin, at Salomague Port, Cabugao, Ilocos Sur.

Both the Indonesian and Philippine governments, through their respective action agencies, conducted initial investigations into the incident. The vessel and the Indonesian nationals were released on June 27, 2001 to the authorities of the Indonesian Embassy in the Philippines. The Indonesian government paid all expenses arising out of the detention of the vessel and the arrest of its alleged pirates as well as other fees incurred during their custody by the Philippine authorities. The Indonesian government promised to provide the Philippines with investigation update and results thereof.

**H. Cybercrime**

Cyberterrorism is the “unlawful acts and threats of attack against computers, networks, and information stored therein when done to intimidate or coerce a government or its people in furtherance of political or social objectives. Further, to qualify as cyberterrorism, an attack should result in violence against persons or property, or at least cause enough damage to generate fear.”

The infamous ILOVEYOU virus and its variations as a result of mutation, which is so far considered to be the most damaging and most widespread virus outbreak in history, is a manifestation of cyberterrorism that unfortunately involved the Philippines. According to final estimates, this virus was able to invade tens of millions of computers representing 80% of computer systems worldwide and caused a staggering financial damage amounting to $10 billion. It was able to cause various irreparable damages to computers in Hong Kong, Malaysia, Germany, Belgium, France, the Netherlands, Sweden, Great Britain and the United States. Specifically, the virus disabled ATMs in Belgium leaving citizens...
cashless for quite sometime, disrupted the British House of Commons' internal communications system and corrupted the e-mail systems of the US Congress including that of the Pentagon with specific reference to the classified information system of the US Defense Department.

The use of computers as instruments for terrorist operations can be best illustrated by the case of Ramzi Ahmed Yousef who is now serving a life sentence in the United States for the 1993 bombing of the World Trade Center in New York. A laptop seized from him during his arrest by members of the Philippine National Police reveals a detailed operational plan to bomb dozens of American airlines over the Pacific. Osama Bin Laden's terrorist activities and underground infrastructures are sustained by personal computers complete with sophisticated satellite uplinks and encrypted messages which provide him with the capacity to direct terrorist operations in other countries while maintaining a secluded underground network in Afghanistan with the aid of the Taliban militia.

The Philippines is a home to 180 internet service providers and at least 700,000 computers of which 50% are connected to the internet. With a developing economy that is slowly embracing electronic technology, it is also gradually becoming a vulnerable prey to the onslaught of computer crimes and cyberterrorism. At this early, the development of its computer networks is hampered by threats posed by these perverse activities. The more notable of these computer crimes include Internet Service Provider (ISP) hacking involving the illegal use of ISP accounts, denial of service which includes web defacing and other service interruptions of websites which was done to the website of the Department of Foreign Affairs, the AMA Computer College, the BBPilipinas.com, Globe.com.ph, and the Fapenet.org., backdoor/Trojan involving the sniffing of important documents of other websites, and credit card fraud which is the most prevalent computer crime being committed.

Since January of this year, several institutions were hacked to include the PLDT, the Office of the President and that of the Press Secretary, Ateneo de Manila University, and the University of Santo Tomas. Just recently, Senator Roco's website was hacked by a malicious prankster who defaced the site and replaced it with irrational and incomprehensive information.

The cyber-terrorist threat, on the other hand, could be perpetrated by the CPP/NPA/NDF which has been computer reliant since 1987. The movement is able to enhance its intelligence networks and intercept classified information with its sophisticated computer system. To deny government authorities classified information of the movement, the latter has institutionalized encryption as a means of relaying information to operating units in other parts of the country. Even its recognized leader, Jose Maria Sison, maintains a personal website from which he can communicate and rally the local insurgents into launching terrorist attacks against the government. Non-government organizations here and abroad that are sympathetic to their cause and giving financial and other assistance can also be reached through the internet thus facilitating unhampered transactions.

The National Youth Student Bureau, which serves as an important subordinate party organ of the National Organizational Department of the CPP/
NPA, maintains a pool of computer literates and experts. Several party members have enrolled in different computer schools while others have infiltrated the underground computer networks to gain expertise on how to initiate computer crimes and utilize the same in their terrorist activities.

III. COUNTERMEASURES/INITIATIVES

The prospect of law enforcement cooperation in Asia has come of age. In an era of regionalization and globalization, states have to recognize that in combating a threat together it is likely that they will have to collaborate and coordinate their actions.

The array of regional and global arrangements takes many forms: standing bodies, ad hoc conferences, bilateral agreements, and multilateral conventions. These non-state actions form the basis for cooperation and, at its essence, is the basis for a continuing union of states. The ultimate objective of such cooperation is the formation of global and regional groupings with the stated minimum aim of providing a forum on issues of significant mutual concern.

A. Trafficking in Persons

The Philippines has no specific law that deals squarely with human trafficking. However, a bill titled as “Anti-Trafficking in Human Beings Act of 2001” that seeks to criminalize human trafficking in all its forms is pending in the Philippine Congress. Pending the passage of this legal measure, law enforcement authorities to penalize those involved in human trafficking are utilizing several laws. These are the following:

1. Republic Act No. 6955 entitled “An Act to Declare Unlawful the Practice of Matching Filipino Women for Marriage to Foreign Nationals on a Mail-Order Basis and Other Similar Practices Including the Advertisement, Publication, Printing or Distribution of Brochure, Filers and Other Propaga\da MATERIAL SERIES No. 59

2. Republic Act No. 7610, known as the “Special Protection of Children Against Abuse, Exploitation and Discrimination Act”. This law prevents the prostitution and other forms of sexual abuse committed against children (Article III) and also penalizes child trafficking (Article IV).

3. Republic Act No. 8042, known as the “Migrant Workers and Overseas Filipino Act of 1995”. It penalizes illegal recruitment of persons for employment abroad.

4. Republic Act No. 8239, known as the “Philippine Passport Act of 1996” penalizes the procurement and use of spurious Philippine passports.

The Philippine law enforcement organization has specialized units to deal with human trafficking cases. These are the following:

1. Human Trafficking Desk of the Philippine Center on Transnational Crime (PCTC). This desk is in charge of gathering data on human trafficking cases as well as in the maintenance of the central database, continuous gathering of information to sustain the data requirements of the database, generating reports from the database needed in police investigation, and operations, trend analysis, strategic studies and policy recommendations.
2. Anti-Ilegal Recruitment Branch of the Philippine Overseas Employment Administration (POEA). It is specifically tasked to investigate cases of illegal recruitment for employment abroad and filing cases in appropriate courts.

3. Violence Against Women and Children Division of the National Bureau of Investigation. This specialized unit takes cognizance of all cases with women and children as victims to include trafficking and smuggling, forced labor and prostitution.

4. Women and Children Concern of the Criminal Investigation Detection Group. This is counterpart of the Violence against Women and Children Division of the NBI at the Philippine National Police and as such its functions is similar with the former.

The following are the programmes of various international and national organizations as well as the Philippine governments to stop trafficking in women and children:

1. Prevention
   (i) Philippine Overseas Employment Administration—offers dancing skills development for would-be entertainers and caregiver's training to potential domestic helpers, in the belief that these talents and skills would protect Filipino women workers abroad.

   (ii) National Commission on the Rights of Filipino Women (NCRFW)—Advocating policies and programmes to stop trafficking in women and children such as the enactment of an anti-trafficking bill into law and the development of information and education materials for advocacy and public dissemination.

   (iii) Other government agencies into advocacy and awareness are the Department of Tourism (DOT), Department of Social Welfare and Development (DSWD), Philippine Overseas Employment Administration and the Commission on Filipinos Overseas (CFO). The Department of Education, Culture and Sports (DECS)—conceptualizing integrated programmes to be conducted for school officials, curriculum developers, student/community leaders and parents.

   (iv) Philippine Network against Trafficking in Women (PNATW)—lobbied for the introduction of anti-trafficking legislation and has been involved in the production of several videos and broadcast programmes about the risks of working aboard.

   (v) The International Organization on Migration (IOM)—also supported various information, advocacy law development activities.

   (vi) The United Nations Coalitions Against Trafficking in Persons Global Programme—enables the country’s coordinating agencies to draft a Strategic Action Plan Against Trafficking in Persons. More over, representatives from the Coalition are consistently monitoring the programmes of the Center as well as continuously sharing information, which could facilitate and effectively implement such programmes.

   (vii) Other NGOs advocate initiatives paying attention to prostitution as a violation of human rights.

2. Protection and Return
   Protection and return activities focuses on the special assistance to victims who come out of prostitution by providing
shelter, health care, counseling, education, and vocational training.

3. Reintegration
Reintegration programmes are aimed at facilitating the recovery from any traumatic experience and the turn to normal life of victims to pursue their aspirations in life.

B. International Terrorism
It is the national policy of the Philippine government to declare a total war against terrorism. It considers all terrorist actions, regardless of motivation, as criminal acts, not to accede to blackmail or demand nor grant any concession, not to provide sanctuary or "safe haven" for terrorists whether they are Filipino or foreign nationals. It also adheres to all international conventions and initiatives against terrorism and participates in all endeavors designed to strengthen international cooperation in order to prevent and neutralize terrorist acts.

Because of the global character of terrorism, the Philippines has sought to strengthen its international linkages by signing the Joint Communiqué on international terrorism during the 1993 Conference of ASEAN Chiefs of Police (ASEANAPOL) and the Memorandum of Agreement on Counter-Terrorism with several countries and pursued various agreements with the USA, likewise establishing an INTERPOL-National Central Bureau.

In 1996, the Philippines hosted the International Conference on Counter-terrorism (ICCT) in Baguio, which was attended by nineteen representatives from different parts of the world to enhance international cooperation against all forms of terrorism. The "Baguio Communiqué" took into consideration some fundamental principles such as: 1) there must be no sanctuary for terrorists; 2) there must be no compromise in the fight against terrorism; 3) the strengthening of multilateral and bilateral cooperation or coordination of policy and action against terrorism; etc.

The Philippine government established the Philippine Center on Transnational Crime (PCTC) on 15 January 1999 pursuant to EO. Nr 62, to deal specifically with all transnational crimes including that of terrorism. The PCTC's primary functions among others are: to establish a shared central database among government agencies for information on criminals, methodologies, arrests and convictions regarding transnational crimes, to explore and coordinate information exchanges and training with other government agencies, foreign countries and international organizations.

Relatedly, on 7 May 1999, Executive Order No. 100 was issued transferring the INTERPOL-NCB functions from PNP to PCTC's supervision in order to fortify and facilitate the coordination between and among foreign countries. This, in essence, placed other agencies, offices and instrumentalities such as the Loop Center of the NCCAS (before NACAHT); the Police Attaches of the PNP and Political Attaches/Counselors for Security Matters of the DILG under its supervision and control in order to strengthen the operational, administrative and information support system of the PCTC. Additionally, E.O No. 110 was issued, dated June 15 1999, which directs the PNP to support the AFP in Internal Security Operations for the suppression of insurgency and other serious threats to national security, the Department of the Interior and Local
Government (DILG) was relieved of its primary responsibility on matters involving the suppression of insurgency and other threats to national security.

On the other hand, Memorandum Order No. 121 dated October 31, 2000, provides and defines measures and guidelines on how to effectively address terrorism particularly hostage-taking situations. However, all aviation-related incidents shall be covered by existing laws and procedures under the National Action Committee on Anti-Hijacking and Terrorism (NAC-HT), and this Memorandum shall be supplementary thereto.

To further ensure the effectiveness of the government’s drive against terrorism, the government issued Executive Order Nr 336 on 5 January 2001, reconstituting the National Action Committee on Anti-Hijacking and Anti-Terrorism to National Council for Civil Aviation Security (NCCAS). The reconstituted NCCAS was established primarily to contain threats of aviation-related terrorism and to strengthen the law enforcement capabilities in order to effectively address all forms of terrorist acts against civil aviation.

Just recently, President Gloria Macapagal Arroyo announced the fourteen point policy including six measures to combat terrorism as follows:

Six Measures
- One, to join the International Counter-Terrorist Coalition and to work with the United Nations.
- Two, to work closely with the United States on intelligence and security matters concerning terrorism.
- Three, to make available Philippine air space and facilities when these are required as transit or staging point.

Four, to contribute logistical support in the form of food supply, medicines and medical personnel;
- Five, to subject to the concurrence of Congress, to provide combat troops if there is an international call for such troops.
- Six, to prevent the flow of funds to terrorist groups to the Philippines by passing and implementing legislation against money laundering.

Fourteen Pillars
- Organize the whole enterprise and delineate clear lines of responsibility and accountability (including the cabinet oversight committee on internal security).
- Anticipate events more efficiently and effectively (with the national security advisers undertaking special intelligence coordinating projects).
- Strengthen internal focus against terrorism (with all the government units “down to the barangay level” involved).
- Hold accountable all public and private organizations and personalities abetting or aiding terrorism.
- Synchronize internal efforts with the global outlook (including the fast-tracking of a regional consensus with Indonesia and Malaysia in the war against terrorism).
- Combine a policy of tactical counter force with a set of strategic legal measures.
- Pursue broader inter-faith dialogue to promote Christian and Muslim solidarity.
- Exercise vigilance against movements of suspected persons, firearms, explosives, raw materials of explosives, toxic materials and biological materials.
• Coordinate preparations and actions in the event of catastrophic terrorist attacks.
• Draft a comprehensive security plan for critical infrastructure.
• Support the immediate transfer out of overseas Filipino workers.
• Modernize the armed forces and the national police considering current and emerging needs to contain the global terrorist threat.
• Seek the support of media to promote consensus and counsel prudence.
• Take cognizance of terrorism's political, social and economic underpinnings.

C. Money Laundering

The Senate and the House of Representatives of the 12th Congress had passed recently the much-debated Anti-Money Laundering Bill through the Republic Act No. 9160, an Act Defining the Crime of Money Laundering, Providing Penalties Therefor and for other Purposes. This Act shall be known as the “Anti-Money Laundering Act of 2001.” This act, which is a consolidation of House Bill No. 3083 and Senate Bill No. 1745, was finally passed by the House of Representatives and the Senate on September 29, 2001 and was approved into law by President Gloria Macapagal-Arroyo. The bill makes it a crime to transact through the banking system money in excess of four-million pesos (US$80,000.00) representing proceeds for 14 specific crimes.

Included in the predicate crimes of this law are kidnapping for ransom; drug trafficking; graft and corruption; plunder; robbery and extortion; jueteng and masiao; piracy on the high seas; qualified theft; swindling, smuggling, cyber-crimes; hijacking; destructive arson and murder, including those perpetrated by terrorists against non-combatants; securities fraud; and offenses of a similar nature punishable under the penal laws of other countries.

D. Intellectual Property Rights’ Violations

Below are some specific initiatives undertaken by the Philippine government for the protection and promotion of intellectual property rights:

1. BSA and NBI Campaign Against Software Piracy—Coordinated and conducted a campaign against the continuing problem of illegal software.
2. Republic Act 8293—Known as the “Intellectual Property Code of the Philippines”, it is being implemented as the primary law on intellectual property to combat all forms and manner of infringement, piracy and counterfeit of intellectual property rights.
3. Creation of Intellectual Property Office (IPO)—Tasked to administer and implement the State Policy to protect the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations which are beneficial to people, for periods as provided in the Intellectual Property Code.
4. Creation of the PIAC-IPR—Created to coordinate concerned government agencies and private entities for the proper enforcement of intellectual property rights in the country.
5. Creation of the PCTC—Tasked to perform the necessary and proper courses of action to contribute in the battle against intellectual property rights crime.
6. BSA and PISO Campaign Against Internet Piracy—Both agreed to work together in addressing internet...
piracy problems specifically in generating greater awareness and the appreciation of the roles of internet service providers in the prevention and control of this problem.

7. **Private Sector Initiatives**—Forced an agreement to restrict the sale of pirated compact discs and to sanction those who will violate such agreement.

**E. Drug Trafficking**

**Republic Act No. 6425** otherwise known as “The Dangerous Drugs Act of 1972” as amended by Presidential Decree Numbers 44, 1675, 1683, 1707, Batas Pambansa Blg. 179, and Republic Act No. 7659—this law institutionalizes the internationally accepted two-pronged approach of supply and demand reduction. Supply reduction is manifested through the imposition of penalties for acts punishable in relation to prohibited and regulated drugs and the forfeiture of the proceeds or instruments of the crime so penalized in favor of the government.

**Department of the Interior and Local Government (DILG) Circular No. 98-227**—this DILG issuance mandates all local government units (LGUs) to organize Anti-Drug Abuse Councils in their respective areas of responsibility. The chief executives of all local political units (barangays, municipalities, cities, and provinces) are concurrently the chairmen of these ADACs with the provincial directors, chiefs of police and precinct commanders as vice chairmen. These organizations are tasked to implement demand and supply reduction through the realization of programmes and projects on preventive education, treatment and rehabilitation, research, and interdictions. These organizations also offer venues through which various organizations and individuals will work together in the planning, implementation and evaluation of programmes on drug abuse prevention and intervention. As of year 2000, forty thousand four hundred and forty six Barangay Anti-Drug Abuse Councils (BADACs) were organized through the orchestration of the National Drug Law Enforcement and Prevention Coordinating Center (NDLEPCC).

**Letter of Instruction Nr. 1 (LOI Nr 1)**—this LOI was signed by President Gloria Macapagal Arroyo on July 4, 2001 the purpose of this LOI was to seek to mobilize and bring to bear the entire Governments machinery and the Civil Society in all-out and sustained anti-drug campaign nationwide towards the attainment of a drug free Philippines 2010.

**F. Piracy on the High Seas and Armed Robbery Against Ships**

Currently, the Philippine Government is coming up with a national plan of action to address piracy on the high seas and armed robbery against ships.

In the meantime, the Maritime Group of the Philippine National Police, Philippine Coast Guard, Philippine Navy, MARINA and the PPA primarily enforce all applicable laws regarding piracy and armed robbery. These agencies and offices have congruent functions to implement such laws, although with specific limitations in terms of equipment and facilities. A core group composed of selected representatives from these agencies drafted a programme of activities on matters pertaining to law enforcement, legal and information exchange.

On August 3, 2001, CABCOM-MOAC Core Group on Piracy expressed its support to the Japanese proposal on the “Regional Agreement on Anti-Piracy in
Asia”. This ASEAN-Japan proposal was discussed on October 4–5, 2001, in the aspect of the scope of agreement, information network, capacity building and cooperation, among others.

G. Illicit Firearms Trafficking

The control of “Paltik” manufacturing is one of the problems that beset our law enforcement agencies. The country through its PNP Firearms and Explosive Division is encouraging illegal manufacturers to come to terms and organize a license industry. As of now, there are two licensed manufacturers in Danao City, Cebu—the Danao Arms Corporation (DAMCOR) and the Workers League of Danao Multi-Purpose Cooperative (WORLD-MPC). These two manufacturers are authorized to produce a total of 6,000 assorted firearms annually based on their manufacturers license issued by the PNP Chief. This power to approve and disapprove applications for firearms manufacturing license was expressly delegated to the Chief, PNP under Section 27 (f) of Republic Act 6975.

There is a need therefore to liberalize the issuance of manufacturer’s license to eliminate red tape, and come up with a simpler system. Decentralizing of the processing to the regional level may encourage illegitimate “paltik” manufacturers to come out in the open and abide with the regulations.

The Bureau Customs is the primary agency tasked to address the smuggling of firearms. The Philippine government formed an AD-HOC committee to incorporate the efforts of all law enforcement and intelligence agencies by creating a coordinating body called the National Law Enforcement Coordinating Committee (NALECC). Each member-agency passes information to other agencies to come up with SPIDER WEB efforts to identify and entrap smugglers even at local inter island ports of entry and exit. Intensified information gathering by appointed intelligence agents and informants is likewise being undertaken. Searches by Coast Guard and Custom Officials are implemented on suspected carriers.

1. On Pilferage of Firearms

The counterintelligence units and respective Security Officers of AFP/PNP are now addressing the problem of pilferage of firearms. Inventory and inspection of physical establishments are being monitored regularly. Aside from the enhancement of physical structure on camps and other military installations, safeguard mechanisms are employed.

2. On Losses from Police and Military Operations

Professionalizing the police and the military can negate losses during legitimate Police and Military operations. Training, Information and Education of troops in order to take care of their individual equipment are every now and then undertaken. Executive Order 122 dated 8 September 1994 pertains to proper reporting of lost FA’s as well as recovered firearms from the enemy. This includes the proper accounting of all government firearms as basis for future audit and inventory.

H. Cybercrime

The government is continuously strengthening its legal as well as structural mechanisms to counter the proliferation of computer crimes and cyberterrorism vis-à-vis the implementation of the National Information Technology Plan that seeks to ensure the electronic interconnection of all government units, agencies and instrumentalities and also ensures that
all sectors of society will have access to information technology.

Foremost of these initiatives is the passage into law of Republic Act No. 8792, also known as the Electronic Commerce Act. It seeks, among others, to ensure network security and penalize unauthorized access, illegal use of electronic documents and the wanton destruction of computer files.

Complimenting this law is the Task Force on National Information Infrastructure Protection established on May 20, 2000. It is tasked to conduct an assessment of all national infrastructures that form part of the country’s social backbone, identify their vulnerabilities to cyberterrorism and other related crimes and recommend response measures to ensure their protection leading to the realization of a comprehensive National Information Infrastructure Security Programme.

**IV. ASSESSMENT**

The rapid growth of technology has created a paradox in society, such that we have to live side by side with the advances it has for our lives, as well as the dangers it poses to man and society. For no matter how remarkable these advances have become, there also will always be advancements in criminal undertakings and activities that use the very same technology to “advance” their very own peculiar interests.

The Philippines has remained as a source, transit and destination country for illegal emigrants to include victims of trafficking and smuggling. This is due to wide range of national conditions that favor the exodus of people out of the country as well as large economic and social opportunities abroad. This phenomenon is further enhanced by globalization, which is easing the mobility of people across national borders.

Institutional mechanisms and international/regional arrangements are sound actions that will definitely strengthen national capabilities against human trafficking and smuggling and other transnational crimes.

Terrorism has always existed and the chances are strong that it will continue to exist. It will remain as long as there is little regard for the emotional component of political, social and economic problems besetting two or more opposing states. These factors motivate individuals, groups or class to conduct aggressions as a means to correct perceived injustices or inequity in their relationship. The threat of terrorism will continue to be felt in the Philippines. This is a strong indication that the Philippine government should be determined and sincere in addressing the threat of domestic and international terrorism.

In Asia, money laundering is on the rise. The reasons cited are official corruption, strict bank secrecy laws, traditional ethnic underground banking networks and in some countries a lack of anti-money laundering laws. The report pinpointed China, Hong Kong, and Macau as major money laundering centers, and also named India, Indonesia, and the Philippines. The Philippines has taken its move. It is expected that other countries, especially those falling under the category as probable havens of money launderers, will finally heed the call of FATF.

The massive increase in piracy, counterfeit and infringement of intellectual property rights has
significantly affected the Southeast Asian region, including the Philippines. The proliferation of the crime has also been implicated in the continuing economic crisis being experienced by the region. Despite the efforts and measures taken by the government, the nation is still at risk and great danger. According to Business Software Alliance's Chief Executive Officer, Robert Holleyman, “the Philippine laws are not enough to protect IPR and copyright.”

The illicit trafficking of firearms is a common problem shared by many state. The gravity of the problem depends on how rules on firearms regulations are being implemented. The definition of firearm has been a subject of debate. But the scope of its operation and impacts are undermining the security of every individual. The Philippines should address the problems posed by unregistered firearms and the production of “paltik” guns. Control through effective regulation is needed. A proactive concept should also be developed to counter illicit trafficking of firearms.

Another transnational crime recognized as an offense against the law of nations is piracy. Incidents of piracy were expected to increase with increase trade and commerce using international sea lanes. There is, therefore, a need for greater regional naval cooperation, diplomatic dialogue and continuing understanding of various maritime issues. These issues could include the following: information sharing; joint exercise/patrolling; standard operating procedure on piracy reporting; training of personnel; technology exchange and the establishment of anti-piracy networks and rescue center.

In drug trafficking, international, regional and national initiatives to combat the problem on illegal drugs are sufficient in substance but not in a way these are being implemented. With respect to international and regional initiatives, their implementation within the territory of signatory states are hampered.

Unfortunately, the economic environment is being transformed by transnational criminal syndicates to their advantage. With the emergence of a borderless world, member of these criminal syndicates can enter any country with ease to perpetrate their illegal activities masquerading as legitimate investors and tourists.

V. CONCLUSION

Transnational crimes have existed and a consensus has emerged that these will be a growing challenge. Not all states, however, agree which of these crimes are to be given priorities because they do not affect every country equally. Its effects in a country, like the Philippines, facing the challenges of sustaining a certain level of economic growth, can be more severe compared to its neighbors. For example, migration can be harmful to sending state, but in some respects, it can be helpful to a sending state because of pecuniary remittance being sent back to the families of migrants. The harm, however, is greater than the help because a number of these migrants end up exploited. Other national conditions vulnerable to exploitation by transnational organized syndicates include the following:

1. Archipelagic condition of the country characterized by scattered islands and islets and a long and virtually unguarded coastline;
2. The widening gap between the rich and the poor accompanied by an
unemployment problem and the shortage of manpower and specialized skills in industrialized countries;
3. Proximity to drug producing and exporting countries and source of illegal migrants; and
4. The absence or ineffectiveness of laws against transnational crime.
OVERVIEW OF THE PROVISIONS OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND ITS PROTOCOLS

Dimitri Vlassis*

I. THE NEW CONVENTION: A NEW ERA IN INTERNATIONAL COOPERATION

In December 1998, the United Nations General Assembly established an Ad Hoc Committee for the elaboration of the United Nations Convention against Transnational Organized Crime and three additional Protocols addressing: trafficking in persons, especially women and children; illegal trafficking in and transporting of migrants; and illicit manufacturing of and trafficking in firearms, their parts and components and ammunition. In establishing this Committee, the Assembly took a giant step toward closing the gap that existed in international cooperation in an area generally regarded as one of the top priorities of the international community in the 21st century. The Assembly also lay to rest the uncertainty and uneasiness that surrounded the endeavor by manifesting the collective political will of all States to tackle conceptual and political problems and find commonly acceptable solutions. One year later, in December 1999, the General Assembly adopted another resolution, by which it asked the Ad Hoc Committee to intensify its work in order to complete it by the end of 2000. The Assembly thus formalized the deadline under which the Ad Hoc Committee had been working since its establishment. Apart from the symbolism involved, the deadline reflects the urgency of the needs faced by all States, developed and developing alike, for new tools to prevent and control transnational organized crime. It also reflects the need of sustaining and building on the momentum that made the original decision possible in order to foster consensus while not compromising the quality of the final product.

The process leading up to the establishment of the Ad Hoc Committee may seem long and arduous. However, the reader is urged to keep in mind that only four years passed from the time that the idea of a convention first surfaced until the official commencement of the negotiation process. This compares extremely favourably with other similar initiatives, especially in areas that are as complex as that of criminal justice and the development of international criminal law. Further, the Ad Hoc Committee charged with conducting the negotiations operated from the beginning under a self-imposed short deadline, which is rather unusual in international negotiations of


1 See General Assembly resolution 53/111 of 9 December 1998. In resolution 53/114, also of 9 December 1998, the General Assembly asked the Ad Hoc Committee to devote sufficient time to the elaboration of the Convention and the three additional international legal instruments.

2 See General Assembly resolution 54/126 of 17 December 1999.
this sort, especially in the context of the United Nations. This deadline set a very vigorous pace for the negotiations, which often taxed heavily the capacity of smaller delegations.

The reader should also keep in mind that the Ad Hoc Committee was essentially negotiating in parallel four international legally binding instruments. All this notwithstanding, the Convention was finalized in July, a few months ahead of schedule, and two of the Protocols were completed within the deadline, in spite of the numerous complexities and political concerns they might have entailed.

Finally, the reader should always bear in mind that the United Nations is a global organization founded on the principle of equality. The concerns of all States, big or small, more or less powerful, deserve equal attention and should be taken into account in all of the activities in which the United Nations is engaged. The principal strength of international action, especially that of a normative nature, is its universality. In the case of an instrument intended to address an issue as complex as transnational organized crime, the active participation of both developing and developed countries from all regions is essential. The very nature of transnational organized crime, with the ability of criminal groups to seek the most favourable conditions for their operations, demands no weak links in the chain of joint action.

The spirit guiding the negotiations has been one of constructive engagement and sensitivity to the concerns of everyone involved in the process. Everyone agrees that the objectives of the negotiations cannot be expediency but consensus, together with conscious and genuine commitment, which are the cornerstones of successful action. Consensus has often been equated with weakness and obscurity, especially when it comes to negotiated texts. It may be true that, at first glance, many documents that have been the results of prolonged negotiations may appear convoluted and inefficient. After all, very often one of the key elements of compromise is ambiguity. Having said this, however, it is also important to bear in mind that equally often the ideal is far removed from the feasible. An international legal instrument that upholds the highest standards of clarity and directness of language, and includes strong and straightforward obligations is desirable and commendable. It also deserves careful study at the academic level and is an essential component of any course in international law. However, if this instrument fails to come into force, or, if it does, is acceded to and implemented by a handful of countries, its practical utility becomes doubtful, to put it mildly, and is destined to languish in library books and soon forgotten.

The Ad Hoc Committee operated with these guiding principles from the time of its establishment. The negotiation process was highly participatory. Over 125 countries participated in the sessions of the Ad Hoc Committee. With the generous help of Austria, Japan, Norway, Poland and the United States, on average 23 of the Least Developed Countries (a group of 48 countries from Africa, Asia and Latin America determined by the General Assembly each year) attended the sessions. Its members agreed early on that the quality of the final product was essential. Other existing Conventions,

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3 It should be noted that the General Assembly made this deadline official with resolution 54/126 of 17 December 1999.
such as the 1988 Vienna Drug Convention and the Convention against Terrorist Bombings would provide inspiration, as they had often dealt with similar issues. However, the Ad Hoc Committee also agreed that every conscious effort would be made to improve upon the texts of these Conventions, to the extent possible, in order to meet the needs of the new Convention and to reflect new trends.

Before proceeding to giving an overview of the text of the Convention, it is important to note a very interesting feature of the negotiation process. It will be recalled that, to a large extent, the driving force behind helping the idea of the convention mature was the enthusiasm of developing countries. Faced with the breakneck pace of the negotiations, several developing countries began complaining that the deadline was having an impact on their ability to study the text fully and prepare their positions. These countries felt that keeping the deadline should not have an adverse impact on the ability of developing countries to express their concerns and negotiate solutions they regarded as acceptable. In addition, as the text was gradually embellished and enriched with new proposals, several developing countries started to entertain fears that developed countries viewed the Convention as an opportunity to impose approaches and solutions on their less powerful counterparts, and this was the reason that the Convention had become highly desirable to them.

Criminal justice is an integral component of a country’s soul and, as such, one of the key attributes of sovereignty. In a rapidly developing and very demanding field as action against transnational crime, particularly organized crime, the tendency to expand jurisdiction at will, in order to respond to specific exigencies, has been noted and feared. Further, developing countries realized that the new Convention would impose a multitude of obligations, which would require the investment of considerable resources. With limited resources and competing priorities, especially at present when most efforts are directed towards addressing problems related to infrastructure and meeting the challenges of globalization, many of these countries foresaw the difficulty of meeting those obligations. This latter dimension of the thinking of those few countries was also a result of two perceptions.

Firstly, all developing countries and countries with economies in transition had gradually become aware, in a more or less painful way, of the ramifications and potential of modern transnational organized crime. However, for several of them the problem had not caused dramatic crises domestically. Consequently, the new obligations were viewed as being out of proportion with their domestic experiences and their political agenda at home.

Secondly, many policy-makers in some developing countries had geared their thinking towards the short-term, mainly as a result of pressing needs. Consequently, the implications of the expansion of transnational organized crime were not included as a parameter in the development of policies for the future. In addition, this short-term thinking could not capture the ramifications of concerted action against transnational organized crime, using the new Convention as the framework and main tool. In other words, the short-term

4 Adopted by the General Assembly by resolution 52/164.
thinking failed to assess the impact of the tendency of organized criminal groups to seek conditions of relative safety when governmental action increases the risk and cost of operations. It should be made very clear that the political commitment and the conviction about the need for the Convention and the desirability of concluding it remained totally undiminished. The negotiations, however, went through a phase of caution on the part of several developing countries and became, as a result, more intricate.

The new Convention can be divided into four main areas: criminalisation, international cooperation, technical cooperation and implementation.

It will be recalled that one of the main reasons for the initial scepticism was whether the concept of transnational organized crime could be defined in an appropriate manner, from both the legal and political perspectives. The negotiators decided to use a two-pronged approach to the issue. First, it was agreed that it would be sounder to define the actors rather than the activities. The rationale behind this approach was that the international community was embarking on negotiating a binding international legal instrument for the future. Organized criminal groups are known to shift from activity to activity, from commodity to commodity and among geographical locations, often on the basis of what in the business world would be called a cost-benefit analysis.

Given this known characteristic, it would be futile to try and capture in a negotiated legal text everything that these groups are known to engage in at present or might decide it makes good business sense to carry out in the future. In this context, the Convention defines an organized criminal group as being “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 pursuant to [the] Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”

Second, the new Convention should bring about a certain level of standardization in terms of offences as they are codified in national laws, as a prerequisite of international cooperation. Working on these premises, the Ad Hoc Committee begun discussing the concept of serious crime. At the beginning, many countries expressed doubts as to whether the term would be appropriate, arguing that it signifies different things to different systems. It would be useful to bear in mind that this discussion was closely linked to the question of whether the Convention would include a list of offences.

The Ad Hoc Committee asked the Secretariat to carry out an analytical study on serious crime and on if and how the concept was reflected in national laws. The study, which was based on the responses of over 50 States, showed that the concept of serious crime was well understood by all, even if the qualification might not necessarily be used in legislation. The doubts about, or objections to the use of the term gradually subsided. Serious crime is defined as “conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”

The Convention establishes four offences: (a) participation in an organized criminal group; (b) money laundering; (c) corruption; and (d) obstruction of justice.
The provision establishing the offence of participation in an organized criminal group is a carefully crafted one, which balances the concept of conspiracy in the common law system with that of the various versions of participation as such versions have evolved in various continental jurisdictions. The aim was to promote international cooperation under the Convention by ensuring the compatibility of the two concepts, without attempting to fully harmonize them.

The provision on criminalisation of money laundering departs from a previous similar provision in the 1988 Vienna Drugs Convention, but goes beyond by expanding the scope of predicate offences covered.

The provision on the establishment of the offence of corruption was the subject of considerable debate, mainly because it was deemed a limited effort against a much broader phenomenon. The approach finally selected was to include a provision in the Convention, in view of the fact that corruption is one of the methods used, and activities engaged in by organized criminal groups. This was done on the understanding that this Convention could not cover the issue of corruption in a comprehensive manner and a separate convention would be needed for that purpose. In fact, on the recommendation of the Ad Hoc Committee and the Commission, the General Assembly adopted a resolution on this matter. This resolution sets out the preparatory work, which would need to be carried out in 2001, for the elaboration of the terms of reference of the negotiation of a new separate convention against corruption. Following the completion of this work, a new Ad Hoc Committee will be established and asked to negotiate the text.

Finally, the provision establishing the offence of obstruction of justice captures the use of force, intimidation or bribery to interfere with witnesses or experts offering testimony, as well as with the performance of the duties of justice or law enforcement officials.

In the area of international cooperation, the Convention includes articles on extradition, mutual legal assistance, transfer of proceedings and law enforcement cooperation.

The provision on extradition adopts the approach of double criminality to this tool of international cooperation. The article provides that most of the particulars of extradition would be essentially left to national legislation or treaties that exist or will be concluded between States. It is for this reason that, with the exception of a safeguard clause on prosecution or punishment on account of sex, race, religion, nationality, ethnic origin or political opinions, the article does not contain grounds for refusal of extradition. There is an implicit recognition of nationality as a traditional ground for refusal of extradition, because this was identified as an area where the new Convention could not attempt to bring about change in national legislation, due to very strict traditions or constitutional impediments. The Convention, however, embodies the principle aut dedere aut judicare when extradition is refused on the ground of the nationality of the alleged offender. The article on extradition provides that the offences covered by the Convention would be deemed to be included as extraditable offences in any treaty existing between States Parties, or would be included in future treaties. States Parties can use the

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* General Assembly resolution 55/61.
Convention for extradition purposes even if they make extradition conditional on a treaty. Those which do not make extradition conditional on a treaty will recognize the offences covered by the Convention as extraditable offences between themselves.

Another important feature of the article is that it contains an obligation for States Parties to try and resolve differences by consultation before they refuse an extradition request.

The article on mutual legal assistance is much more extensive, having been called by some a “treaty within a treaty”. In its 31 paragraphs, the article details every aspect of mutual assistance, including grounds for refusal. It is important to note that, while the article is largely based on similar provisions in other Conventions, it brings forth the considerable evolution of the concept of mutual legal assistance, as one of the primary tools of international cooperation against transnational crime. In this vein, the article speaks of the use of modern technology, such as electronic mail for the transmission of requests, or video link for the giving of testimony. The Convention also includes language regarding the spontaneous provision of information and assistance, without prior request. In the area of law enforcement cooperation, the Convention includes provisions on the exchange of intelligence and other operational information and on the use of modern investigative methods, with the appropriate safeguards.

Prior to proceeding to the area of technical cooperation, it is important to mention that the Convention includes detailed provisions on the development of regulatory regimes to prevent and control money laundering and on confiscation, including provisions on the sharing of confiscated assets. The Convention also includes provisions for the protection of witnesses, a key component of any successful action against organized crime. The relevant article includes a provision asking States to consider entering into agreements with other States for the relocation of witnesses. Further, and in the same vein, the Convention includes an article on the protection of and assistance to victims and another on measures to enhance cooperation with law enforcement authorities of persons involved in organized criminal groups (those who have been described in recent years using the Italian term pentiti).

As mentioned earlier, the involvement and participation of all countries in the joint effort against transnational organized crime lies at the core of the decision to negotiate a new international legal instrument. It also inspired the negotiations throughout the work of the Ad Hoc Committee. The new Convention will create numerous obligations for countries, which range from updating or adopting new legislation to upgrading the capacity of their law enforcement authorities and their criminal justice systems in general. Many of the activities required to meet these obligations are resource intensive and, as a consequence, will create a considerable burden for the limited capacities of developing countries. The spirit of the discussions around this subject has been very interesting. These discussions have been based on the understanding that the implementation of the Convention would be in the interest of all countries. Consequently, such implementation would be the responsibility of all countries, regardless of their level of development. Developing countries would gear their systems and bring their limited resources to bear in discharging this responsibility. However, everyone recognizes that, once this has
been done, there will be many areas where developing countries and countries with economies in transition would require significant assistance until they are able to bring all their capacities up to a common standard.

Following extensive discussion, the Convention includes two articles on technical cooperation, one intended to cover cooperation to develop specific training programmes and the other to deal with technical assistance in the more traditional sense of the term, i.e., involving financing of activities at the bilateral level or through international organizations, such as the United Nations. The latter provision foresees that States Parties will make concrete efforts to enhance their cooperation with developing countries with a view to strengthening the capacity of the latter to prevent and combat transnational organized crime.

States Parties are also asked to enhance financial and material assistance to developing countries in order to support efforts to implement the Convention successfully. For the provision of technical assistance to developing countries and countries with economies in transition, the Convention foresees that States Parties would endeavour to make adequate and regular financial contributions to an account specifically designated for that purpose in a United Nations funding mechanism. The Ad Hoc Committee decided that this account will be operated for the time being within the Crime Prevention and Criminal Justice Fund, a mechanism set up to receive voluntary contributions for the technical cooperation activities of the Centre for International Crime Prevention.

In the resolution by which it adopted the Convention, the General Assembly established this special account under the Crime Prevention and Criminal Justice Fund. It is interesting to note that almost immediately, donor countries began making contributions to that account, demonstrating the seriousness with which they regard the matter of providing assistance to developing countries and countries with economies in transition, even at the pre-ratification stage.

On implementation, the Convention has taken a very interesting course. The Convention will establish a Conference of the Parties, which will have the dual task of improving the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of the Convention.

The Conference of the Parties will accomplish these tasks by (a) facilitating the activities of States Parties foreseen under the articles on technical cooperation, including by mobilizing resources; (b) facilitating the exchange of information among States Parties on patterns and trends in transnational organized crime and on successful practices for combating it; (c) cooperating with relevant international and non-governmental organizations; (d) examining periodically the implementation of the Convention by States Parties; and (e) making recommendations to improve the Convention and its implementation. The relevant article goes on to say that the Conference of the Parties will acquire the necessary knowledge on the measures taken by the States Parties in implementing the Convention and on the difficulties encountered by them in doing so by the States Parties themselves, and
through such supplemental review mechanisms as it may establish.

The mechanism set up is a clear movement forward from previous practices in the field of implementation of international conventions, at least in the context of the United Nations. The provision establishes a dual form of review. On the one hand, it preserves the more traditional obligation, found in most other Conventions, for States Parties to file regular reports on the progress they have made in implementation. This is supplemented by additional review mechanisms, which the Conference may establish. This is an indirect reference to a system of “peer review”, which has been developed in various forms in recent years in the context of regional instruments. Another important feature of the provision is that the Conference of the Parties will not only function as a review body. It will pay equal attention to serving as a forum for developing countries and countries with economies in transition to explain the difficulties they encounter with implementation and seek the assistance necessary to overcome such difficulties. This link between implementation and technical cooperation and assistance reinforces the collective will that guided the negotiations to take into account all concerns and needs and address them jointly in order to achieve the common goals embodied in the new Convention.

Another innovative feature of the new Convention is its scope of application. Its analysis was left last because of the long debate its finalization required, but also because it conditions the entire text of the Convention.

The Convention will apply “to the prevention, investigation and prosecution of (a) the offences established in accordance with [the Convention]; and (b) serious crime as defined [by the Convention], when the offence is transnational in nature and involves an organized criminal group.” However, the criminalisation obligations that countries will undertake, regarding the offences they would have to establish in accordance with the Convention, would be “independent”. This means that States will legislate to establish as criminal offences the four types of conduct described in the Convention, regardless of whether they are transnational or involve an organized criminal group.
The Convention also defines transnationality. An offence is transnational in nature if it is committed in more than one State; it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or it is committed in one State but has substantial effects in another State.

In addition, the provisions on extradition and mutual legal assistance contain specific and very carefully negotiated language to permit application of these articles in order to establish both the transnationality and the involvement of an organized criminal group. Solutions to these matters were based on the demonstrated political will of all countries involved in the process to conclude a Convention that meets all their concerns. Such solutions were also based on the shared desire to reach agreement without diminishing the functionality and quality of the new instrument.

II. THE THREE PROTOCOLS

A. The Protocol Against Trafficking in Persons, Especially Women and Children

1. General Provisions (Articles 1–5)

Article 1 sets out the relationship between the Convention and the Protocol, complementing Article 37 of the Convention. The same text appears in Article 1 of the Protocol against the smuggling of Migrants and has been added as Article 1 of the revised draft Protocol against the Illicit Trafficking in Firearms. The Protocol supplements the Convention, and provisions of the two should be interpreted together.

Provisions of the Convention apply to the Protocol mutatis mutandis unless otherwise specified or the Protocol contains provisions which specifically vary or are inconsistent with those of the Convention. All Protocol offences are also regarded as Convention offences, which makes all Convention provisions (e.g., legal assistance, applicable to cases which involve only Protocol offences. The Conference of States Parties, which is established by Article 32 of the Convention, will have similar functions for each protocol by the application of Article 32 to the protocol in question, mutatis mutandis.

Articles 2 and 4 set out the basic purpose and scope of the Protocol. The Protocol is intended to “prevent and combat” trafficking in persons and facilitate international co-operation against such trafficking. It applies to the “prevention, investigation and prosecution” of Protocol offences, but only where these are “transnational in nature” and involve an “organized criminal group”, as those terms are defined by the Convention.

The key definition, “trafficking in persons”, appears in Article 3. This term, which is being defined for the first time, is intended to include a range of cases where human beings are exploited by organized crime groups where there is an element of duress involved and a transnational aspect, such as the movement of people across borders or their exploitation within a country by a transnational organized crime group. The definition is broken down into three lists of elements: criminal acts, the means used to commit those acts, and goals (forms of exploitation). At least one element from each of these three groups is required before the definition applies.
Thus, to constitute “trafficking in persons”, there must be:

- an act of “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 having control over another person”;
- for the purpose of exploitation, which includes, at a minimum, “...the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

The question of whether a victim could consent to trafficking was a major issue in the negotiations. In many trafficking cases, there is initial consent or cooperation between victims and traffickers followed later by more coercive, abusive and exploitive circumstances. Some States, and many NGOs felt that incorporating an element of consent in the definition or offence provisions would make enforcement and prosecution difficult because such early consent would be raised by traffickers as a defence. Other States felt that some element of consent was needed to limit the scope of the offence, distinguish trafficking from legitimate activities and for constitutional reasons. To resolve the issue, paragraph (b) of the definition clarifies that consent becomes irrelevant whenever any of the “means” of trafficking has been used. This compromise addressed the concerns of both positions. To further clarify the relationship between consent, the offence and criminal defences, it was agreed that the travaux préparatoires would draw attention to Article 11(6) of the Convention, which applies to this Protocol mutatis mutandis, and which ensures that existing criminal defences in domestic law are preserved.

2. Protection of trafficked persons
   (Articles 6–8)

The negotiation of the Protocols against Trafficking in Persons and the Smuggling of Migrants both found it necessary to deal with the fact that the primary subject-matter, while often treated as a commodity by smugglers and traffickers, consists of human beings whose rights must be respected and who must be protected from various forms of harm. The terms “smuggling” and “trafficking”, have acquired different definitions from those traditionally associated with narcotic drugs, for example. The need for an appropriate balance between crime-control measures and measures to support or protect smuggled migrants and victims of trafficking arose in two primary places in each Protocol: the provisions dealing with the return of persons to their countries of origin, and provisions expressly providing for protection, support. These provisions are similar in some respects, but they are not identical. The language of the two instruments also takes account of the fact that there are critical differences between migrants, who have consented to smuggling and for whom repatriation generally poses no significant risks, and victims of trafficking, who have been subjected to various forms of coercion and who face significant risks of re-victimisation or retaliation if they are sent home, particularly if they have assisted law enforcement in prosecuting their traffickers.

Article 6 of the Protocol against Trafficking in Persons contains a series of
general protection and support measures for victims. Paragraphs 1 and 2 require States Parties to take basic measures, subject to constitutional or similar constraints, which include shielding the identities of victims and providing access and input into legal proceedings. While the physical safety of victims cannot absolutely guaranteed, States Parties are required to endeavour to do so by Article 6(5), as well as by Articles 24(2)(a) (witnesses) and 25(1) (victims) of the Convention. Further measures in Articles 6(3) and 7 of the Protocol are subject to the discretion of States Parties. These include a list of social support benefits such as counselling, housing, education, medical and psychological assistance (Art. 6(3)) and an opportunity for victims to obtain legal status allowing them to remain in the receiving State Party, either temporarily or permanently (Art. 7). The provisions of Convention Articles 24 and 25 may apply in such cases. Where victims have also been witnesses, for example, the relocation provision of Article 24(2)(a) may apply.

The return of victims of trafficking to their countries of origin is dealt with in Article 8 of the Protocol, which is similar but not identical to the corresponding provision (Art. 18) of the Protocol against the Smuggling of Migrants. A major concern with the return of trafficking victims is that it may leave them vulnerable to being trafficked all over again, or in some cases, vulnerable to retaliation from traffickers for having co-operated with law enforcement or prosecution authorities. Another concern is that in some cases, victims have been sent home while criminal or other legal proceedings in which they have an interest are still ongoing. To respond to these concerns, the text requires all States Parties involved to have due regard for the safety of the victim and for the status of any ongoing legal proceedings (Art. 8(1), (2)). Returns may be carried out involuntarily, but the text states that the process "...shall preferably be voluntary" (Art. 8(2)). This reflects a compromise between concerns that giving victims any concrete formal legal status or right to remain in destination states might provide further incentives and opportunities for traffickers on one hand, while excessive or rapid returns might unnecessarily expose victims to further hardship and risk on the other. The text does not make any special provision for victims who are also witnesses, but the additional safeguards for witnesses found in Article 24 of the Convention would apply in such cases. More generally, Articles 24 (witnesses) and 25 (victims) of the Convention will generally apply to trafficking victims.

The negotiation of the provisions governing the repatriation or return of smuggled migrants and trafficking victims in both Protocols also faced the need to specify the legal preconditions on which the right of destination States to return individuals and the obligations of countries of origin to facilitate and accept the return, should be based. There was general agreement that States Parties should be required to accept the return of their own nationals and permanent residents, but views differed on whether the status of a smuggled migrant or trafficking victim should be determined at the time of entry into the State seeking to return the person or at the time of the actual return itself. The former option precludes States from revoking status as a national or resident to prevent the return, whereas the latter does not.

Different language was used to address this question in each of the two instruments. In the case of victims of trafficking, countries are obliged to accept
the return of any person who is a national at the time of the return or who had a right of permanent residence at the time he or she entered the destination State (Art. 8(1)). In the case of smuggled migrants, the obligation is only to accept those who are nationals or have a right of permanent residence at the time of the return (Art. 18(1)), although States Parties are also required to consider the return of migrants who had permanent residency rights at the time of entry into the destination State. The travaux préparatoires for the Protocol against the Smuggling of Migrants also record the understanding of the Ad Hoc Committee that States Parties “...would not deprive persons of their nationality contrary to international law, thereby rendering them stateless.” This acknowledges that nationality can be taken away for cause, but should not be taken away exclusively to prevent repatriation.

Apart from these differences, the obligations placed on States concerning return or repatriation are the same in both instruments. The basic obligation on States Parties is to “facilitate and accept” the return of nationals or specified permanent residents without undue delay and to verify without delay whether illegal migrants in other countries are in fact their nationals or residents (Art. 8(1), (3)). This includes the obligation to issue any necessary travel documents such as passports, entry or transit visas (Art. 8(4)).

3. Prevention, Co-operation and Other Measures (Articles 9–13)

Generally, the law enforcement agencies of countries which ratify the Protocol would be required to co-operate with such things as the identification of offenders and trafficked persons, sharing information about the methods of offenders and the training of investigators, enforcement and victim-support personnel (Art. 10). Countries would also be required to implement security and border controls to detect and prevent trafficking. These include strengthening their own border controls, imposing requirements on commercial carriers to check passports and visas (Art. 11), setting standards for the technical quality of passports and other travel documents (Art. 12), and co-operation in establishing the validity of their own documents when used abroad (Art. 13). Social methods of prevention, such as research, advertising, and social or economic support are also provided for, both by governments and in collaboration with non-governmental organisations are dealt with both in Article 9, which supports Article 31 of the Convention6.

B. The Protocol Against the Smuggling of Migrants by Land, Air and Sea

1. General Provisions (Definitions, Criminalisation, Scope and Purpose, Articles 1–6)

Article 1 sets out the relationship between the Convention and the Protocol, complementing Article 37 of the Convention. The same text appears in Article 1 of the Protocol against Trafficking in Persons and has been added as Article 1 of the revised draft Protocol against the Illicit Trafficking in Firearms. The Protocol supplements the Convention, and provisions of the two should be interpreted together. Provisions of the Convention apply to the Protocol mutatis mutandis unless otherwise specified or the Protocol

6 See in particular Article 31(5) (public awareness campaigns) and 31(7) (projects aimed at alleviating the circumstances which make certain groups vulnerable to transnational organized crime).
contains provisions which specifically vary or are inconsistent with those of the Convention. All Protocol offences are also regarded as Convention offences, which makes all Convention provisions (e.g., legal assistance, applicable to cases which involve only Protocol offences. The Conference of States Parties, which is established by Article 32 of the Convention, will have similar functions for each protocol by the application of Article 32 to the protocol in question, mutatis mutandis.

Article 2 expresses three purposes: preventing and combatting smuggling, promoting cooperation among States Parties and protecting the rights of smuggled migrants. The scope of application of the instrument (Art. 4) applies both to combatting smuggling and protecting rights, but limits both to offences which are transnational in nature and involve an organized criminal group as defined by the Convention. The Protocol applies only to the prevention, investigation or prosecution of such offences and the protection of the rights of persons who have been the objects of such offences. The phrase “persons who have been the object of such [i.e.: trafficking] offences” in this and other Protocol provisions is intended to clarify that smuggled migrants, while sometimes exploited or endangered by smugglers, are not “victims” of the primary Protocol offence.

The criminalisation provision, Article 6, requires States Parties to criminalise the smuggling of migrants as defined in Article 3, and enabling a person who is not a national or permanent resident of a State to remain there illegally. Producing, procuring, providing, or possessing fraudulent travel or identity documents must also be made an offence, but only where these acts are committed for the purpose of smuggling migrants. This will generally apply to smugglers without also including the illegal migrants who may only possess the documents for the purpose of use in their own smuggling. A major political and legal concern during negotiations was the general agreement among participants that the Protocol should criminalise the smuggling of migrants without criminalising mere migration or the migrants themselves. This was difficult because illegal migrants have generally committed offences relating to illegal entry or residence in most countries, and would usually be complicit in their own smuggling without language in the Protocol and any implementing legislation to the contrary. The solution, found in Article 5 and Article 6(4) is that the Protocol specifies that the provisions of the Protocol and its implementing legislation should criminalise smuggling but not create any liability for having been smuggled (Art. 5), while providing that offences or other measures adopted or applied by States Parties on their own authority could still apply to mere migrants. As noted, the document offences of Article 6(1)(b) also apply only to those who commit them for the purpose of smuggling others and not for their own migration.7

In recognition that smuggling is often dangerous, and to increase protection for migrants, States Parties are also required to make smuggling in circumstances which endanger the migrants’ lives or safety, or which entail inhuman or degrading treatment as aggravating circumstances to the Protocol offences (Art. 6(3)).

7 See the note in the travaux préparatoires to Art. 6(1)(b) on this point.
2. **Smuggling of Migrants by Sea**  
   (Articles 7–9)

While all of the Protocol applies to all forms of smuggling by land, sea or air, it was felt necessary to make specific provision for smuggling by sea because of the seriousness and volume of the problem, and the body of international maritime law already in existence. Many of the specific provisions of this Part were drawn from or developed based on provisions from three earlier sources dealing with the boarding and searching of vessels and related safeguards: Article 110 of the 1988 U.N. Convention on the Law of the Sea, Article 17 of the 1988 U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and a more recent (1988) Circular from the International Maritime Organization titled *Interim Measures for Combatting unsafe practices associated with the trafficking or transport of migrants by sea*.

Generally, the provisions of Part II are intended to give states which encounter ships which are believed to be smuggling migrants sufficient powers to take actions to apprehend the migrants and smugglers and to preserve evidence, while respecting the sovereignty of the states (if any) to which the ships are flagged or registered. A major factor for most delegations in striking a balance between sovereignty and effective powers to intervene was the fact that, in many cases, vessels used to smuggle migrants are decrepit or unsound to the point where fast action could be essential to preserving the safety of any migrants on board.

The general rule for taking actions against a ship at sea is that this can only be done with the approval of the State whose flag the ship flies or with whom it is registered. The Protocol requires States Parties to co-operate “to the fullest extent possible” in accordance with the “international law of the sea”, which term includes both the 1988 U.N. Convention and other instruments (Art. 7). The taking of measures against ships at sea is governed by Article 8, which provides separately for three basic cases:

- States seeking assistance against ships they believe to be their own (Art. 8(1));
- States seeking permission to act against ships believed to be flagged or registered to another State (Art. 8(2)); and
- States taking action against ships believed to be without nationality (Art 8(7)).

The remaining provisions of Article 8 deal with the mechanisms whereby the nationality of ships can be established and other relevant information can be transmitted from one interested State Party to another. Under Article 8(1), a state which believes that one of its ships, or a ship which is flying its flag, is being used for smuggling may call upon other States Parties to take action to suppress this, and those States are required to render such assistance as necessary, within available means. Under Article 8(2), a State which believes that a ship registered or flagged to another State is involved in smuggling may check the registry, and ask the registry state for authorisation to board, inspect, and if evidence of smuggling is found, to take other actions. The responding state must answer the requests expeditiously, but may place limits or conditions on what may be done (Art. 8 (4), (5)). Such conditions must be respected, except where there is imminent danger to lives or safety, or where there a bilateral or multilateral agreement between the states involved says otherwise (Art. 8(5)).
Where there is no apparent nationality or registry cannot be determined, the ship may be boarded and inspected as necessary (Art. 8(7)).

The other provision of Part II, Article 9 contains “safeguard clauses” which limit the powers of States Parties to act under Article 8, ensure that fundamental interests such as the safe and humane treatment of persons found on board vessels and the security of vessels and other cargoes are protected, preserve the existing jurisdictions of coastal states and the flag states of vessels, and provide for compensation in cases where the grounds for having taken measures against a vessel later prove unfounded. As a further safeguard, Art. 9(4) also requires that any vessel or aircraft used by a State Party to take actions under Part II must be a warship, military aircraft or other ship or aircraft clearly marked to identify it as being on government service when the action is taken.

3. Prevention, Co-operation and Other Measures (Articles 10–18)

As with the provisions of Articles 27–29 of the Convention, the Protocol provides for the exchange of information which may range from general research or legislative information which would assist others in implementing the Protocol or combatting smuggling in more general terms to much more specific and sensitive information about specific smuggling cases or more general means and methods being used by smugglers (Art. 10). As in the Protocol against Trafficking in Persons, specific legal and administrative measures to combat smuggling which involves commercial carriers are also required, “to the extent possible” (Art. 11). These include penalties where carriers found carrying smuggled migrants are complicit or negligent and requirements that carriers check basic travel documents before transporting persons across international borders.

The use of false or fraudulent passports and other travel documents is an important element of smuggling, and documents are often taken from migrants upon arrival so that they can be re-used by the smugglers over and over again. To address this part of the problem, Article 12 requires the use of travel documents that cannot easily be used by a person other than the legitimate holder, and of such quality that they cannot easily be falsified, altered or replicated, and Article 13 requires States Parties to verify the legitimacy and validity of any documents purported to have been issued by them. A number of delegations noted that countries which became parties to the Protocol against Trafficking in Persons as well as this Protocol would find it necessary to implement the parallel provisions on travel documents jointly, since it would not be practicable to adopt or apply different rules for smuggling and trafficking cases. As a result, the requirements of Articles 12 and 13 are identical in both instruments.

States Parties are called upon to undertake training activities (Art. 14) and adopt general preventive measures (Art. 15). Training under Article 14 for officials can be domestic or in cooperation with other States Parties where appropriate. It must include not only methods and techniques for investigating and prosecuting offences, but also background intelligence-gathering, crime-prevention, and the need to provide humane treatment and respect for the basic human rights of migrants. Adequate resources are called for, with the assistance of other States where domestic resources or expertise are not enough (Art. 14(3)). Based on the
assumption that a key element of prevention is the dissemination of information about the true conditions during smuggling and after arrival to discourage potential migrants, Article 15 requires the creation or strengthening of programmes to gather such information, transmit it from one country to another, and ensure that it is made available to the general public and potential migrants. This supports Article 37 of the Convention which calls for information campaigns directed at groups who are particularly vulnerable to the activities of transnational organized crime, which would include regional or ethnic groups likely to be solicited or recruited as potential migrants.

Part II of the Protocol also contains provisions which deal with the protection, assistance and return of migrants. As with the Protocol against Trafficking in Persons, these provisions take account of the fact that migrants, while often treated as a commodity by smugglers, are human beings whose rights must be respected and who must be protected from various forms of harm. Articles 16 (protection and assistance) and 18 (return) provide for the basic assistance of smuggled migrants, taking into account the fact that they are not generally victims of crime and are in far less jeopardy of retaliation from traffickers, but also considering the fact that smuggling is often conducted in circumstances which endanger their lives or safety.

Several provisions of the Protocol are intended to ensure that the basic human rights of migrants are protected from infringement, whether by traffickers, government officials or others. The primary provision is Article 16, which requires appropriate legislative or other measures to “preserve and protect” the rights of smuggled migrants. Article 14(2)(e) also requires the training of officials in “the humane treatment of migrants and the protection of their rights”, and Article 19 ensures that any rights (e.g., for migrants who are also refugees) under other international humanitarian and human rights law are not affected by the Protocol. Article 16(5) requires conformity with the provision of the Vienna Convention on Consular Relations which requires States Parties to that instrument to inform apprehended migrants of their rights to consular access.8

Other provisions address concerns about the fact that migrants are in many cases subjected to dangerous conditions, degrading conditions or physical violence in the course of smuggling. Article 16(2) requires the adoption of appropriate measures to afford migrants protection against violence. Article 6(3) requires States Parties to make the existence of circumstances which endanger lives or safety or entail inhuman or degrading treatment in the course of smuggling an aggravating circumstance to the basic smuggling offence, and Article 16(3) requires appropriate assistance to migrants whose lives or safety are endangered in the course of being smuggled.

The return of smuggled migrants to their countries of origin is dealt with in Article 18 of the Protocol, which is similar but not identical to the corresponding provision (Art. 6) of the Protocol against Trafficking in Persons. Since migrants

8 The relevant provision is Article 36 of the Vienna Convention, 596 UNTS 8638–8640. In the discussion of this provision, it was pointed out that as conventional international law, the Convention, and hence the obligation to provide consular access, was binding on all States.
are less likely to be witnesses in transnational organized crime proceedings, the Protocol makes no specific provision for protection or participation in such proceedings, although migrants who are in this position would still be covered by Articles 24 and/or 25 of the Convention, depending on the exact circumstances of their cases. The only protection specifically provided for returned migrants is found in Art. 18(5), which requires all of the States Parties involved in return of a migrant to ensure that it is carried out "...in an orderly manner and with due regard for the safety and dignity..." of the migrant.

The negotiation of the provisions governing the repatriation or return of smuggled migrants and trafficking victims in both Protocols also faced the need to specify the legal preconditions on which the right of destination States to return individuals and the obligations of countries of origin to facilitate and accept the return, should be based. There was general agreement that States Parties should be required to accept the return of their own nationals and permanent residents, but views differed on whether the status of a smuggled migrant or trafficking victim should be determined at the time of entry into the State seeking to return the person or at the time of the actual return itself. The former option precludes States from revoking status as a national or resident to prevent the return, whereas the latter does not.

Different language was used to address this question in each of the two instruments. In the case of victims of trafficking, countries are obliged to accept the return of any person who is a national at the time of the return or who had a right of permanent residence at the time he or she entered the destination State (Art. 8(1)). In the case of smuggled migrants, the obligation is only to accept those who are nationals or have a right of permanent residence at the time of the return (Art. 18(1)), although States Parties are also required to consider the return of migrants who had permanent residency rights at the time of entry into the destination State. The travaux préparatoires for the Protocol against the Smuggling of Migrants also record the understanding of the Ad Hoc Committee that States Parties "...would not deprive persons of their nationality contrary to international law, thereby rendering them stateless." This acknowledges that nationality can be taken away for cause, but should not be taken away exclusively to prevent repatriation.

Apart from these differences, the obligations placed on States concerning return or repatriation are the same in this instrument as in the Protocol against Trafficking in Persons. The basic obligation on States Parties is to "facilitate and accept" the return of nationals or specified residents without undue delay and to verify without delay whether illegal migrants in other countries are in fact their nationals or residents (Art. 18(1), (3)). This includes the obligation to issue any necessary travel documents such as passports, entry or transit visas.

C. Protocol Against the Illicit Manufacturing of or Trafficking in Firearms

1. Status

Many provisions of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms were finalised at the 11th session of the Ad Hoc Committee, but several key issues had not been resolved, and the General Assembly called upon the Ad Hoc
Committee to conclude the Protocol at an additional session.\(^9\) The Committee decided to apply a narrow, conventional definition of "firearm", excluding other forms of destructive device such as rocket-launchers and explosive devices. It also developed language for Article 4(1) and (2) which excludes legitimate State-to-State and national security-related activities from the application of the Protocol while ensuring that the exclusion is not so broad as to opt out virtually any activity. The language developed for Articles 4 and 8 also ensures that all firearms, even those made for government purposes, will be marked at manufacture, allaying concerns about unmarked government firearms later stolen or otherwise diverted into illicit traffic. The language developed for Article 8 ensures the unique marking of each firearm with “alpha-numeric” characters, but allows countries which have previously used “simple geometric” markings as part of their marking systems to maintain this practice. Based on these agreements, the entire Protocol was agreed by the Ad Hoc Committee on consensus. It was then referred to the General Assembly, which adopted it on 31 May 2001.\(^{10}\) Under Article 17 of the Protocol, it is open for signature at U.N. Headquarters in New York from 2 July 2001 until 12 December 2002.\(^{11}\)

2. Relation with the U.N. Convention

Article 1 sets out the relationship between the Convention and the Protocol, complementing Article 37 of the Convention. The same text appears in Article 1 of the Protocols against Trafficking in Persons and the Smuggling of Migrants. The Protocol supplements the Convention, and provisions of the two should be interpreted together. Provisions of the Convention apply to the Protocol \textit{mutatis mutandis} unless otherwise specified or the Protocol contains provisions which specifically vary or are inconsistent with those of the Convention. All Protocol offences are also regarded as Convention offences, which makes all Convention provisions (e.g., legal assistance, applicable to cases which involve only Protocol offences. The Conference of States Parties, which is established by Article 32 of the Convention, will have similar functions for each protocol by the application of Article 32 to the protocol in question, \textit{mutatis mutandis}.

3. Purpose, Scope and Application

The purpose provision (Art. 2) was concluded at the 12th session. It was decided to make the language consistent with that of the other instruments, giving the purpose as: “to promote, facilitate and strengthen cooperation...to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition.”

As noted above, Article 4, dealing with scope of application, was also not concluded until the 12th session. There was general agreement that all types of transfer, transaction and firearm should

\(^9\) GA/Res/55/25.

\(^{10}\) GA/Res/55/255. For travaux preparatoires notes, see A/55/383/Add.3.

\(^{11}\) Since the adoption of the Protocol by the General Assembly was too late for the Palermo signing conference at which the other instruments were opened for signature, conventional language concerning signature was added to Art. 17 during the final drafting session. The instrument opens for signature somewhat later than those adopted earlier, but it was decided to close all 4 instruments on the same date, 12 December 2002, which is the 2-year anniversary of the opening of the initial 3 instruments.
be prima facie included in the Protocol, provided that there is some link to offences which are transnational in nature and involve an organized criminal group in some way as required by Article 3 of the Convention itself. There was also general agreement that the Protocol, which deals with individual criminality and not disarmament or State activities, should not apply to “State-to-State” transactions. The issues not resolved until the final session involved activities which directly involved either only one or no States, but which were nevertheless seen as raising legitimate “national security” concerns on the part of one or more States Parties. This was eventually addressed using language which opts out “national security” transfers, provided that this is consistent with the United Nations Charter (Art. 4(2)). The agreed text of Article 4 also included all illicit “manufacturing” of firearms (Art. 4(1)), while only excluding “transactions” and “transfers” (Art. 4(2)). The effect is to ensure that all firearms must be marked, addressing concerns about the problem of firearms which might otherwise be made without marking for legitimate government or national security purposes and then subsequently diverted, creating a supply of untraceable illicit firearms.

4. Definitions (Article 2) "Firearm"

The question of subject-matter is dealt with in the definition provision (Art. 2). It was agreed that the term “firearm” should include any “barrelled weapon which expels a shot, bullet or projectile by the action of an explosive”, with the exception of some antique firearms. To address concerns that this applied to very large “firearms”, such as artillery-pieces, the word “portable” was added, accompanied by a note in the travaux preparatoires to the effect that “portable” itself was intended to mean portable by one person without mechanical or other assistance. After discussion at several sessions, the Committee ultimately decided not to apply the Protocol to other so-called “destructive devices”.

“Illicit manufacturing”

The agreed definition of illicit manufacturing includes three distinct activities: manufacturing without a license, manufacturing from illicit (i.e., trafficked) parts, and manufacturing without marking. Each of these is intended to address a major source of diverted or trafficked firearms. Unlicensed manufacture would include illegal factories and firearms made in a legal factory, but of a type or quantity the producer was not licensed to make. Assembling from trafficked parts would address schemes in which stages of the manufacturing process were split among several jurisdictions to avoid committing offences in any of them. Manufacturing without marking requires that all firearms be marked at manufacture, which ensures that unmarked firearms cannot be diverted before being marked at a later stage. There is some overlap between the definitions of illicit manufacturing and illicit trafficking, since each includes an element (and hence an offence) relating to the manufacture and transfer of firearms without the necessary markings.

“Illicit trafficking”

The agreed definition of “illicit trafficking” is the core of the Protocol. As defined, “Illicit trafficking” would include any transaction or transfer in which a firearm moves from one country to another where the exporting, importing, and transit States, if any, have not licensed or authorized it. This must be read in conjunction with Article 5(1)(a), which requires illicit trafficking to be made a domestic criminal offence, and
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11(2), which precludes the issuance of any export license until the corresponding import and transit license has already been issued. The combined effect is to commit States Parties to criminalise the export of any firearms, parts, components or ammunition unless the subsequent import is authorized.

5. Criminalisation Requirements (Article 5)
The structural approach taken to the criminalisation of illicit trafficking and illicit manufacturing is similar to those of the other instruments: the detailed specification of conduct or activities to be criminalised is set out in the definitional provisions, and then merely criminalised by cross-references back to the definition. States Parties are also required to criminalise attempting to commit, participating as an accomplice in, or organizing or directing others to commit any Protocol offence, although these obligations are subject to limits that make criminalising some of these things impossible in some legal systems (Art. 5(2)).

In substance, States Parties are required to criminalise the two basic activities against which the Protocol is directed, illicit manufacturing and illicit trafficking. They are also required to create one supporting offence, the obliteration, removal or alteration of the serial numbers or other markings on a firearm (Art. 5(1)(c)). It was not necessary to criminalise failing to mark a firearm or transferring an unmarked firearm per se, because these activities are included in the definitions and general offences of illicit manufacturing and illicit trafficking. Further offences relating to the financing of illicit trafficking and domestic possession or misuse of trafficked firearms and the breach of arms-embargoes had been proposed, but were ultimately dropped because they were redundant either with the Convention itself or domestic criminal law or beyond the scope of the Protocol.

6. Confiscation Seizure and Disposal (Article 6)
The subject of confiscation, forfeiture and disposal is dealt with in Convention Articles 12–14, which deal with both proceeds of crime and instrumentalities of crime, and which apply to the Protocol, mutatis mutandis. These would also apply to firearms which have been used in crime as instrumentalities and firearms which have been trafficked as a commodity as proceeds. The Convention definition of “proceeds” (Art. 2(e)) includes “...any property derived from or obtained, directly or indirectly, through the commission of an offence.” This was seen as problematic, because the customary method of disposal for proceeds and instrumentalities is generally to sell them and use the resulting funds for legitimate State purposes or to pay compensation or restitution to victims. Where firearms are concerned, many States felt that the better course was to simply destroy them, thereby ensuring that they could never enter illicit commerce or be used in crime. As a result, Article 6 of the Protocol creates an exception to the general principle established by the Convention, providing that, in the case of firearms parts, components or ammunition, the property should be disposed of either by destruction, or by other disposal only where officially authorised and where the items have been specifically marked and the disposal recorded.

7. Record Keeping (Article 7)
Critical to the overall control of trafficking in firearms is the marking of firearms (Art. 8) to ensure that they can be uniquely identified, and the keeping of
records based on the markings in order to make it possible to distinguish between legitimate and illicit activities and to facilitate investigations when a transaction subsequently proves to have been illicit or where firearms are diverted to illicit hands in the course of a legitimate, authorized transaction or transfer. Some delegations had concerns about the need for keeping records with respect to legitimate activities, but it was ultimately agreed that legitimate activities must be scrutinised in order to identify and suppress illicit activities.

Article 7 requires States Parties to either keep records themselves, or to require others (e.g., the actual parties to each import/export transaction) to do so, for a period of ten years, the period being a compromise between the need to limit the administrative burdens on States Parties and the fact that firearms are durable goods which can surface many years after having been transferred. The means whereby States “shall ensure” the keeping of records by others is not addressed by the Protocol, but would in most cases involve a legal requirement that those involved in import/export transactions create and preserve the necessary records. It is open to States Parties to create additional offences to compel the keeping of appropriate records, but the Protocol does not require it. The record-keeping requirement extends to records of transactions in parts, components and/or ammunition only “where appropriate and feasible”. This recognizes the practical difficulties in dealing with smaller parts and components, which may be impossible to mark and are difficult to identify and inspect. Creating and verifying a complete record of parts and components might require the disassembly of each firearm in a shipment to record and inspect each of its parts, for example. In the case of ammunition, individual marking and record keeping was also seen as impracticable because of the very large numbers of individual cartridges in most shipments. One option for keeping records “where appropriate and feasible” in such cases is for States Parties to require the keeping of records which describe shipments or batches of parts or ammunition, but not individual elements of each.

The actual substance of the records which must be kept consists of whatever information is needed to trace and identify the items involved. This must include the serial number or other markings on the firearm and specified information relating to the source, transit and destination countries in international transfers, but the list is indicative and not exhaustive. Since there is no overall co-ordination of the marking schemes of manufacturers or countries, markings are only unique when other information about a firearm is also known. In most cases, to permit identification and tracing as required, States Parties will therefore find it necessary to keep additional information about a firearm, such as its manufacturer, model, type or calibre.

8. Marking (Article 8)
As noted, the marking requirements were also not finalised until the 12th session of the Ad Hoc Committee. There was general agreement that firearms should be marked in a way which would permit unique identification, but the actual content of markings varies from country to country and manufacturer to manufacturer. Some delegations also sought to exempt firearms made for State agencies, but this was seen as problematic because of the large numbers of State firearms later transferred or diverted to private hands, whether by legitimate or illicit means, which would
provide a substantial source of untraceable illicit firearms. The identification of the content of “unique” markings was also complicated by the fact that firearm manufacturers employ serial numbers or other markings which are generally only unique when combined with other characteristics of the firearm in question, such as type, calibre and the place, country or factory where it was made. A handgun made in the United States might well have the same serial number as a rifle made in Germany, for example, and ensuring that this could never occur would prove difficult for the countries and companies involved. Ultimately, it was decided to require “unique” marking using the “...name of the manufacturer, the country or place of manufacture, and the serial number” but to allow countries already using a combination of numeric, alpha-numeric and simple geometric symbols to maintain their existing practices.

9. Deactivation of Firearms (Article 9)
In most countries, records tracking firearms are purged whenever the firearms to which they apply are themselves destroyed. Problems have arisen in some cases where firearms are not completely destroyed if the records are purged and the firearms are subsequently restored and used for criminal purposes. Firearms which have been “deactivated” in ways which make them inoperable but leave them intact from a standpoint of outward appearance are popular as display items, and this process is often used to preserve war-trophies which would otherwise be prohibited by domestic laws. To deal with the problem of reactivation, Article 9 of the Protocol contains technical standards which ensure that firearms are not considered to have been destroyed for the purposes of a State Party’s licensing and record-keeping practices unless the process is essentially irreversible. Paragraph 9(a) also requires essential parts to be disabled and incapable of removal from the deactivated firearm, which precludes any re-circulation of individual parts, or the assembly of new firearms using parts from deactivated ones.

10. Import-Export Requirements (Article 10)
As noted, the offence of “illicit trafficking” consists of international transfer without the legal authorisation of all of the states concerned. To support this, Article 10 contains the requirement that exporting States verify that subsequent transit and import is authorized by the States involved before they license the export itself (Art. 10(2)) Article 10 also provides standard requirements for the documents involved, which provide information about the transaction and identify the firearms involved for purposes of record keeping and any subsequent tracing or other investigative inquiries. After extensive discussion about whether to require the authorization of “transit” States and how to define “transit” for the purposes of imposing such a requirement, a simpler approach was adopted in this Article. The simplified scheme requires that documents identify any transit states and that such States be notified in advance of the transit (Art. 10(3)). If a transit State does not give written notice that it does not object, the exporting State cannot issue an export permit for the transaction (Art. 10(2)(b)). To address concerns about the application of the Protocol to individuals who import or export firearms for temporary use for occupational or recreational purposes, Article 10(6) provides for “simplified procedures” in such cases.
11. Security and Preventive Measures (Article 11)

Some illicitly trafficked firearms are manufactured directly for the illicit market, but most are firearms originally made for lawful purposes and subsequently diverted into criminal hands. To address this, Article 11 calls for security measures to prevent theft or diversion at every stage of the manufacturing, storage, import, export, transit, and distribution process.

12. Information and Tracing (Article 12)

As with Articles 27–28 of the Convention, Article 12 of the Protocol covers the exchange of information ranging from very general scientific or forensic information about firearms to specific and potentially sensitive information about organized criminal groups, their means and methods and information about specific legal or illegal transactions. Information about specific individuals or companies involved in the firearms trade can only be provided on a case by case basis (Art. 12(1)). Information about the means and methods of offenders can be requested on a more general basis (Art. 12(2)). Article 12(3) contains the third core obligation of the Protocol, the obligation of States Parties to assist one another as necessary in the tracing of firearms. The term “tracing” itself is defined in paragraph 3(f).

13. Brokers and Brokering (Article 15)

During negotiations, there was extensive discussion about whether the brokering of firearms transactions was a separate activity from trafficking itself, and if so whether it required regulation under separate provisions of the Protocol. A further issue, given the fact that most brokers operate in many jurisdictions, was which of the jurisdictions involved should regulate a broker and what specific licensing, record-keeping, security and other requirements should be imposed. It was ultimately decided to adopt a flexible provision which leaves these matters to the discretion of each State Party. Where a State Party does impose requirements on brokers, Article 15(1) contains an indicative list of what should be included: basic licensing and registration, and a requirement that brokers identify themselves and state their involvement on import, export and transit documents. Article 15(2) further urges States Parties to keep records with respect to brokering and to exchange such information with other States Parties under Article 12. Article 7, which states that States Parties “shall ensure the maintenance...” of records, does not specify by whom such records would be kept. This means that States Parties could impose a requirement on brokers within their jurisdiction to keep the records of transactions in which they are involved.
THE GLOBAL SITUATION OF TRANSNATIONAL ORGANIZED CRIME, THE DECISION OF THE INTERNATIONAL COMMUNITY TO DEVELOP AN INTERNATIONAL CONVENTION AND THE NEGOTIATION PROCESS

Dimitri Vlassis*

I. TRANSNATIONAL ORGANIZED CRIME IN PERSPECTIVE

The threat posed to national and international security by transnational crime, in all its forms and manifestations, is not the inadvertent by-product of long-term trends. On the contrary, this threat is an inevitable consequence of the activities of individuals and organizations as they corrupt state institutions, undermine the rule of law, threaten the integrity of financial and commercial sectors of society, contravene legal and social norms and conventions, transgress national sovereignty and violate national borders. New opportunities offered by the globalization of trade and communications have been exploited eagerly and effectively by criminals, leaving law enforcement trailing behind and working to match the inventiveness, adaptability and resilience of criminal organizations that have become transnational in both thought and deed.

The toll of crime has become frightening. Not to mention the misery it leaves in its wake, the financial damage to societies is staggering. The economic price exacted on nations is enormous, while its social and hidden human costs are even higher. In addition to traditional and “street” crime, the consequences of organized crime present real and present dangers to progress and a brake to development. Violence associated with this form of crime is extending its reach far beyond national frontiers. Organized criminal groups are spreading their operations around the globe and are engaging in a variety of activities that range from the traditional to the modern with an increased level of sophistication. They also display a remarkable ability to shift across borders and from activity to activity with speed and adaptability that would be the envy of any legitimate business. Overall, the annual profits of organized crime are estimated, according to some sources, at one trillion dollars world-wide; almost as much as the United States annual federal budget. Moreover, the export of precious raw materials, including chemical, biological and nuclear material, is increasingly attracting the attention, and often falling into the hands of organized crime. Through its interfaces with other licit and illicit activities, organized crime is infiltrating national economies, taking advantage of the difficulties of following the trail of criminal proceeds. It has become clear that only by tackling organized crime in a concerted manner inroads can be made into a problem that exceeds the capacity of national mechanisms operating alone.

Developing countries and emerging democracies are becoming a target for organized criminal groups operating across borders, because of their vulnerabilities, while their institutions are either young or in the process of being built. Often, the sophisticated *modus operandi* of these groups is no match to the criminal justice systems of developing countries and countries with economies in transition. The need for foreign capital to give new life to the economy and assist these countries in entering today’s competitive and demanding global market, frequently obscures the long-term threat posed by the investment of criminal proceeds. Criminal groups are keen to enter developing countries and economies in transition, not only because of their potential, but also because of the decreased risks involved. The advantages that such groups enjoy, due to the sizeable amounts of money at their disposal and their ability to eliminate competition through intimidation and violence, make risks that would daunt any legitimate business perfectly acceptable. The consolidation of their power places in grave danger the growing economies of those countries, particularly in terms of their future development, their competitiveness in the international arena, and their stability.

Money laundering is a vital component of all forms of organized crime. The infiltration of legal financial markets and the attempts of organized crime to control sectors of national economies through the laundering of its illicit proceeds continue to represent grave threats for the international community and for national and international financial systems. Free trade and high-speed telecommunications make it easier to engage in multiple activities and launder money across national borders, with an estimated one billion dollars in crime profits wire-transferred through the world financial markets every day. In addition to concealing wealth and laundering proceeds, organized criminal groups are turning to “borderline” economic endeavours, while diversifying their operations in response to a principle that has been driving international business for ever: reduce risks and maximize profitability. Since these types of crime often involve no violence, they offer the additional advantage of not drawing public attention, which puts increased pressure on national authorities for action. Such activities come with the potential for power, which organized crime has never shunned. Another feature in these types of crime is that the successful engagement of criminals in economic crimes is often viewed by the public as an act of cunning and even bravery. This attitude amply demonstrates the corrosive effects that such crimes have on the social fabric. It is fundamental that this attitude be reversed, because it can prove equally or more dangerous than the offences themselves.

**Novel threats demand novel combinations of expertise and novel operational capabilities.** If the international community is to respond effectively to the threats posed by transnational criminal organizations, then policy solutions need to be not only comprehensive and well-coordinated, but also highly imaginative. Strategies should take full account of the nature of the challenge. On the grounds that it takes a network to defeat a network, emphasis should be given not simply to extending the formalities of law enforcement and judicial cooperation, but also to building a transnational network of coordinated measures that would eventually be global. An effective concerted approach should also take into...
account the risk management strategies of criminal organizations and should initiate appropriate action to reduce or overcome them. The responses should be the converse of the criminal organizations. Among the objectives to be achieved is to eliminate safe havens for criminal organizations, recognizing that a safe haven is more likely to be the result of limited state capacity than to be the result of lack of will. A multilateral approach offers distinct advantages and a higher probability of success. Equally important is the targeting of the assets of criminal organizations, focusing less on the money laundering process as such and more on the uncovering and forfeiture of the assets accrued by these organizations. States must reflect very seriously on the impact of organized transnational crime on the lives and economic activity of their citizens. It is imperative to promote worldwide a culture of legality and tolerance, instead of accepting a culture of lawlessness and violence, which dangerously threatens national institutions and their principal foundation: global values. Policy- and decision-makers, and leaders must begin, as a matter of urgency, to think in terms of new partnerships to safeguard global values and protect mutual interests.

II. UNITED NATIONS EFFORTS TO STRENGTHEN INTERNATIONAL COOPERATION AGAINST ORGANIZED CRIME: THE EARLY YEARS

The work of the United Nations to strengthen international cooperation against organized crime dates back twenty-five years. The issue in its various aspects has been debated and analysed by successive congresses on the prevention of crime and the treatment of offenders, the quinquennial event organized by the United Nations Crime Prevention and Criminal Justice Programme since its establishment.¹ This debate and its results reflect the changing perceptions and comprehension of the problem over several decades. It must also be viewed as

¹ The Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders was held in Vienna from 10 to 17 April 2000.
a series of steps, as a sustained course in the direction of raising awareness among policy- and decision-makers and challenging the conventional thinking about crime prevention and criminal justice matters. The process must be viewed in perspective and in context. The United Nations is a global organization, with a steadily increasing membership, especially after the end of the Cold War. In this environment, there are various and multiple political concerns and differences in political and substantive approaches to problems. Dominant among the concerns remains safeguarding sovereignty, which is for many smaller developing countries and countries with economies in transition (or emerging democracies) the last bastion of national integrity and identity. Criminal justice matters are at the core of sovereignty concerns, being perceived as essentially domestic in nature, touching as they are on institutions ranging from national constitutions to legal regimes and systems.

The Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1975, examined the “Changes in Forms and Dimensions of Criminality—Transnational and National” under agenda item 5. In what could today, with the benefit of hindsight, be termed prophetic, the Congress focussed on crime as business at the national and transnational levels: organized crime, white-collar crime and corruption. Crime as business was recognized to pose a more serious threat to society and national economies than traditional forms of crime. While it was a serious problem in many developed countries, the national welfare and economic development of the entire society in developing countries was found to be drastically affected by such criminal conduct as bribery, price-fixing, smuggling and currency offences.

In 1980, the Sixth United Nations Congress, under agenda item 5 entitled “Crime and the Abuse of Power: Offences and Offenders beyond the Reach of the Law,” added new elements to the international perception of organized crime. Among these offences were those crimes with respect to which the law enforcement agencies were relatively powerless because the circumstances under which they had been committed were such as to decrease the likelihood of their being reported or prosecuted. Organized crime, bribery and corruption were among the first examples listed.

The Seventh Congress considered the issue further in 1985 under its Topic 1, entitled “New dimensions of criminality and crime prevention in the context of development: challenges for the future.” The Congress emphasised that multiple illicit operations carried out by international criminal networks represented a major challenge to national law enforcement and to international cooperation.

In 1990, within the framework of its Topic III, entitled “Effective national and international action against: (a) Organized crime; (b) Terrorist criminal activities,” the Eighth Congress examined the problem of organized transnational crime in the light of new historic developments. The rapid increase in the number of independent countries, together with the growing expansion of criminal activities beyond national borders, had created the need for new international institutions, which could introduce a measure of order and enhance the effectiveness of crime prevention efforts. On the recommendation of the Congress, the General Assembly focused
on strengthening international cooperation by adopting the Model Treaties on Extradition, on Mutual Assistance in Criminal Matters, on Transfer of proceedings in Criminal Matters and on Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released. The Congress also adopted a set of guidelines against organized crime in resolution 24, which was welcomed by the General Assembly in resolution 45/121. In resolution 45/123, the General Assembly urged Member States to implement these guidelines and invited them to make available to the Secretary-General their national legislation against organized crime and money laundering.

The Eighth Congress also marked the beginning of a new era for the United Nations Crime Prevention and Criminal Justice Programme. At first glance, the changes that were precipitated by the recommendations of the Congress, and the action that followed at the legislative level, were of a mostly institutional nature. Quite to the contrary, the significance of these changes lies in the fact that States confronted, albeit imperfectly, one of the core concerns of the international community. The question was to what extent the United Nations, faced with radically changed political and historical realities, would credibly perform its primary function of being a policy-making forum and medium, while simultaneously providing developing countries with the means to effectively cooperate with their peers. On the recommendation of the Eighth Congress, the Secretary-General convened the Ministerial Meeting on the Creation of an Effective United Nations Crime Prevention and Criminal Justice Programme, which was held in Versailles from 21 to 23 November 1991. The Meeting developed a Statement of Principles and Programme of Action, which the General Assembly adopted in December 1991. In this document the Assembly determined that the revamped Programme would focus its activities on specific areas of priority, and direct its energies toward providing timely and practical assistance to States at their request. Action against organized crime figured prominently among the areas of priority attention for the new Programme. On the institutional level, the Assembly decided that the Committee on Crime Prevention and Control, the governing body of the Programme composed of experts nominated by Governments but serving in their individual capacity, would cease to exist. In its place, the Assembly established the Commission on Crime Prevention and Criminal Justice, a functional Commission of the Economic and Social Council, composed of the representatives of 40 Governments, thus ensuring direct governmental involvement in both decision-making and oversight of the Programme’s activities.

The Commission was established and held its first session in 1992. One of its first endeavours was to flesh out further the general guidelines established by the General Assembly regarding the priorities of the Programme. On its

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3 See General Assembly resolution 45/117, of 14 December 1990.
4 See General Assembly resolution 45/118, of 14 December 1990.
7 See General Assembly resolution 46/152, of 18 December 1991.
recommendation, the Economic and Social Council determined that one of the priority themes that should guide the work of the Commission and the United Nations Crime Prevention and Criminal Justice Programme would be: "national and transnational crime, organized crime, economic crime, including money laundering, and the role of criminal law in the protection of the environment". The Council also took note of the recommendations of two Ad Hoc expert group meetings, which had been held in 1991, in Smolenice, Slovak Republic, and in Suzdal, Russian Federation, and requested the Secretary-General to continue the analysis of the impact of organized criminal activities upon society at large. The Commission, also at its first session, requested the Secretary-General to examine the possibility of coordinating efforts made at the multilateral level against the laundering of proceeds of crime, and to propose means for technical assistance to requesting Member States in drafting legislation and in training of law enforcement personnel, as well as in developing regional, subregional and bilateral cooperation.

III. THE ROAD TO THE CONVENTION

The direct governmental involvement in setting the agenda for the United Nations Crime Prevention and Criminal Justice Programme, assured through the establishment of the Commission, helped give new impetus to the importance of international action against organized crime. In its first couple of sessions, the Commission engaged in intense work, reviewing and assessing the activities of the Programme until that time and paving the road for the future. International concerted action had been identified as a key component of success against organized crime, which was sorely missing at the time. This was one of the conclusions which one of the prominent figures of the fight against organized crime, Judge Giovanni Falcone, had derived from all his efforts against the Mafia. Judge Giovanni Falcone is known for sweeping successes against organized crime in Italy through meticulous work, expansion of his investigations into fields previously beyond the scope of traditional prosecutorial work, and through cooperation with the authorities of other countries. What is perhaps less well known is that about two months before his tragic death, Judge Falcone led his country’s delegation to the inaugural session of the Commission. In what probably was his last public address at an international forum, he called for more meaningful action at the international level against organized crime, in order to address the problem of national authorities trying to cope with a phenomenon that was no longer national. In explaining why he thought more international cooperation was a must, Judge Falcone launched the idea of a world conference at a sufficiently high political level to lay the foundations for such cooperation.

The Commission took up the idea of a major world conference on organized crime the year after Judge Falcone’s death. In doing so, it built on the efforts of the United Nations and the awareness and interest displayed by the international community through the significant work at the policy-making
level that it had accomplished in its short existence. The result was the organization of one of the most significant events in the history of the United Nations Crime Prevention and Criminal Justice Programme. The World Ministerial Conference on Organized Transnational Crime, held in Naples, from 21–23 November 1994 was also one of the best attended events ever, with over 2000 participants and delegations from 142 States (86 of them at the Ministerial level, while others were represented by their Heads of State or Government). The Conference unanimously adopted the Naples Political Declaration and Global Action Plan against Organized Transnational Crime,11 which was approved by the General Assembly one month later.12

The Naples Political Declaration and Global Action Plan emphasised the need for urgent global action against organized transnational crime, focussing on the structural characteristics of criminal organizations. Countries were called upon to begin the process of harmonising their legislation, while special attention was paid to the need for countries to ensure that their criminal justice systems had the capacity to prevent and control organized transnational crime in all its manifestations. Equal attention was given to the need for the international community, particularly donor countries and financing institutions, to assist developing countries and countries with economies in transition to bridge the gap between the capacity of their criminal justice systems in general, and law enforcement authorities in particular, and the ability of organized criminal groups to shift their operations from activity to activity and to elude efforts against them by using sophisticated methods of operation.

The Naples Political Declaration and Global Action Plan stressed the need for the international community to arrive at a generally agreed concept of organized crime as a basis for more compatible national responses and more effective international cooperation. Particular attention was given to more effective bilateral and multilateral cooperation against organized transnational crime, asking the Commission on Crime Prevention and Criminal Justice to examine the possibility for a convention or conventions against organized transnational crime. Furthermore, the prevention and control of the laundering and use of the proceeds of crime were considered essential elements of any international effort.

The negotiations for the Naples Political Declaration and Global Action Plan were long and difficult. One issue of contention was whether the document would issue a clear mandate for the elaboration of a new convention against transnational organized crime. Most of the members of what is known in the United Nations as the Western European and Others Group (a regional group which includes all Western European countries as well as Australia, Canada, New Zealand and the United States) were sceptical, if not openly negative to the idea of a convention. The reason was that they regarded the subject as too thorny to approach, especially since it involved a number of conceptual and legal difficulties, with definitions figuring prominently among them. These conceptual and legal problems, coupled with the inherent difficulty of negotiations with the full membership of the United Nations around the table, led

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11 See United Nations document A/49/748.
12 General Assembly resolution 49/159 of 23 December 1994.
these countries to conclude that the final product was likely to be the lowest common denominator. An instrument without “teeth” was something that was not desirable and perhaps not worth the time and effort for most developed countries. A further concern stemmed from the perception that the more or less quite well developed networks of regional and bilateral arrangements that developed countries had developed, especially in the field of international cooperation in criminal matters, was sufficiently operational and functional to deal with organized crime. These countries thought that a new convention might place those arrangements in jeopardy, especially regarding the presumably stronger provisions they contained.

At the other end of the spectrum stood the vast majority of developing countries that thought the idea of a new convention was a good one for several reasons. First, the prospect of a universal instrument held appeal for developing countries because of the nature of the problem they were beginning to witness crossing into their territories and affecting their efforts towards development. In this regard, many developing countries and countries with economies in transition were experiencing sentiments bordering on genuine shock because they had no way of accurately estimating the malicious potential of organized criminal groups. For many years, they were under the impression that organized crime was the problem of industrialised countries. Most of them were also under the impression that organized crime was synonymous to drug trafficking and that issue had been the object of numerous international and regional initiatives and instruments, which provided a certain degree of guidance and coordinated response. Second, the possibility of dealing with a problem in the context of a global forum, such as the United Nations, has always been favoured by developing countries because of the relative parity, which that forum affords them. Strengthening this conviction is the tendency of United Nations in most of its entities to favour decisions by consensus and to avoid, if at all possible, voting. Consensus decision-making allows more room for the concerns of smaller countries to be taken into consideration and reflected in the final outcome of the endeavour. Third, as any instrument against transnational organized crime would dwell at length on methods of international cooperation, developing countries saw a new convention as the way of addressing pressing needs in that area. Lacking the resources, both human and financial, as well as the negotiating power, developing countries and emerging democracies had quickly recognized their inability to embark upon the development of extensive networks of bilateral agreements or arrangements in the field of international cooperation in criminal matters. An international convention offered the potential of making up for this inability and of filling the gaps these countries had identified in the cooperation they needed.

In view of all this, developing countries and countries with economies in transition, as a block, threw their support behind the idea of a convention in Naples and tried to use the Declaration as the vehicle for promoting its elaboration. The final language of the Declaration was a compromise solution, which was the result of the tireless efforts of the then Vice-President of Colombia (who was chairing the negotiating committee at the Conference) and the delegate of Italy in charge of these negotiations, Ambassador Luigi Lauriola (who is now serving as the Chairman of the Ad Hoc Committee on
the Elaboration of the Convention). It is important to keep this background in mind, when the elaboration of the Convention itself will be discussed, because over time and with changing circumstances and political agendas, there has been considerable evolution of that position.

The Commission on Crime Prevention and Criminal Justice followed up on the implementation of the Naples Political Declaration and Global Action Plan at its fourth 13 and fifth 14 sessions. On its recommendation at its fourth session, the Economic and Social Council requested the Secretariat to perform the following functions: (a) to initiate the process of requesting the views of Governments on a convention or conventions; (b) to collect and analyze information on the structure and dynamics of organized transnational crime and on the responses of States to this problem, for the purpose of assisting the international community to increase its knowledge on the matter; (c) to submit to Member States at the following session of the Commission a proposal on the creation of a central repository of existing legislative and regulatory measures and information on organizational structures designed to combat organized transnational crime; (d) to submit proposals to the Commission for the development of practical models and practical guidelines for substantive and procedural legislation in order to assist developing countries and countries in transition; (e) to provide advisory services and technical assistance to requesting Member States in needs assessment, capacity-building and training, as well as in the implementation of the Naples Political Declaration and Global Action Plan; and (f) to join efforts with other relevant international organizations in order to reinforce common regulatory and enforcement strategies in the area of prevention and control of money laundering, and to assist requesting States in assessing their needs in treaty development and the development of criminal justice infrastructure and human resources. 15 An in-sessional intergovernmental working group was established at the fifth session of the Commission to review the views of Governments on a convention or conventions, as well as the proposals of the Secretariat described under (c) and (d) above. The (then) Crime Prevention and Criminal Justice Division, on the basis of information provided by Member States, prepared a report for the Commission’s consideration at its fifth session, in which the actual situation of organized crime was reviewed. Most responding Member States expressed their favourable disposition towards a convention against organized transnational crime.

In November 1995, the Division organized a regional Ministerial Workshop on the Follow-up to the Naples Political Declaration and Global Action Plan, hosted by the Government of Argentina in Buenos Aires. The Workshop adopted the Buenos Aires Declaration on Prevention and Control of Organized Transnational Crime. The countries of Latin America and the Caribbean expressed their support for expeditious follow-up to the Naples Political Declaration and Global Action Plan and endorsed the idea of developing a convention against organized transnational crime, offering a list of elements that such a convention should include.

13 Vienna, 30 May to 9 June 1995.
14 Vienna, 21 to 31 May 1996.
15 Economic and Social Council resolution 1995/11.
At its fifth session, the Commission devoted particular attention to the issue of organized crime in general and to the follow-up to Naples in particular. On its recommendation, the General Assembly adopted the United Nations Declaration on Crime and Public Security. By this Declaration, Member States undertook to protect the security and well-being of all their citizens, by taking effective national measures to combat serious transnational crime, including organized crime, illicit drug and arms trafficking, smuggling of other illicit articles, organized trafficking in persons, terrorist crimes and the laundering of proceeds from serious crimes. Member States also pledged to promote bilateral, regional, multilateral and global law enforcement cooperation and assistance, while taking measures to prevent support for and the conduct of operations of criminal organizations in their national territories. In addition, Member States agreed to provide, to the fullest extent possible, for effective extradition or prosecution of those who engage in serious transnational crimes in order to ensure that these criminals find no safe haven.

According to the Declaration, mutual cooperation and assistance in these matters would also include the strengthening of systems for the sharing of information among Member States, and the provision of bilateral and multilateral technical assistance. This cooperation was also considered important in connection with the agreement of States to take steps to strengthen the overall professionalism of their criminal justice, law enforcement and victims assistance systems, as well as relevant regulatory authorities. Member States were urged to become parties as soon as possible to the principal existing international treaties relating to the various aspects of the problem of international terrorism, as well as to the international drug control conventions. The Declaration called upon States to take measures to improve their ability to detect and interdict the movement across borders of those engaged in serious transnational crime, as well as the instrumentalities of such crime, and to protect their territorial boundaries. Such measures would include adopting effective controls on explosives and against illicit trafficking in certain materials and their components that are specifically designed for use and manufacturing of nuclear, biological or chemical weapons; strengthening supervision of passport issuance and enhancement of protection against tampering and counterfeiting; strengthening enforcement of regulations on illicit trafficking in firearms; and coordinating measures and enhancing information exchange to combat the organized criminal smuggling of persons across national borders.

In connection with the control of the proceeds of crime, Member States agreed to adopt measures to combat the concealment or disguise of the true origin of the proceeds of serious transnational crime and the intentional conversion or transfer of such proceeds for that purpose. Member States also agreed to require adequate record keeping by financial and related institutions and the reporting of suspicious transactions and to ensure effective laws and procedures to permit the seizure and forfeiture of the proceeds of serious transnational crime. Member States recognized the need to limit the application of bank secrecy laws with respect to criminal operations and to obtain the cooperation of financial institutions in detecting these and other
operations, which may be used for the purpose of money laundering.

Further, Member States agreed to combat and prohibit corruption and bribery and to consider developing concerted measures for international cooperation to curb corrupt practices, as well as developing technical expertise to prevent and control corruption.

On the recommendation of the Commission at its fifth session, the Economic and Social Council adopted a resolution,\textsuperscript{17} in which it took note of the Buenos Aires Declaration and requested the Secretary-General to continue his consultations with Member States on the possibility of elaborating a convention or conventions against organized transnational crime. The Council also requested the Secretary-General to assist in the implementation of the Naples Political Declaration and Global Action Plan and to meet the needs of Member States for increased knowledge on the structure and dynamics of organized transnational crime in all its forms, as well as trends in its development, areas of activity and diversification. In addition, the Secretary-General was called upon to assist Member States in reviewing existing international instruments and exploring the possibility of elaborating new ones to strengthen and improve international cooperation against organized transnational crime and to intensify technical assistance in the form of advisory services and training. The Secretary-General was also requested to establish a central repository for national legislation, including regulatory measures, on organized transnational crime; information on organizational structures designed to combat organized transnational crime; and instruments for international cooperation, including bilateral and multilateral treaties and legislation to ensure their implementation. For the purpose of providing increased technical assistance to requesting Member States, the Secretary-General was requested to develop training manuals for specialised law enforcement and investigative personnel on action against organized transnational crime, taking into account differences in legal systems.

In 1995 and 1996, the issue of the convention was a topic of discussion and debate during the annual Commission sessions but also in other fora, both within and outside the United Nations. The doubts and hesitation that had resulted in the compromise language of the Naples Declaration persisted, even though the surveys carried out by the Secretariat showed that the majority of countries were favourably disposed to the convention. In numerous discussions, the issue that appeared to be the most difficult was how would the international community define organized crime in a way that would be acceptable to everyone, despite differences in concepts, perceptions and legal systems. But even within the group of countries which had been the most sceptical, there were signs of at least a change in thinking. The Group of Senior Experts, which was established by the Group of Seven Major Industrialised Countries and the Russian Federation (what was then known as G7/ P8 and since 1998 is referred to as the G8) at Lyon, deserves much of the credit for this reversal of opinion. The Group’s mandate was to explore ways and means to strengthen cooperation against transnational organized crime. Chaired by Ambassador Lauriola of Italy, the Group produced a set of forty recommendations, which set the stage for

\textsuperscript{17} Economic and Social Council resolution 1996/27.
much of what has been done since in the field.

In September 1996, the President of Poland submitted to the General Assembly the draft of a framework convention against organized crime.\textsuperscript{18} Poland had been one of the most vocal proponents of the new convention since the Naples Conference. Its initiative was a component of its consistent policy of support for the new instrument, but also resulted from the Government's conviction that the issue was urgent and required commensurate action. The Government of Poland was of the view that the best way to allay the fears and dispel the doubts expressed by several countries about the difficulty of approaching the matter was to get them to focus on something in writing. Poland's methodological approach was sound. The question of the new convention until that time had been a largely abstract one. Every discussion revolved around whether the approach to international cooperation was more effective at the bilateral and regional level, or whether there was tangible benefit to be gained by elevating normative efforts to the global level. In the absence of a draft, which people could study and discuss at capitals with their criminal law and other experts, there was hardly any debate about what the contents of a new convention could be. Consequently, hardly anyone was visualising the possible benefits of a new international binding legal instrument. Poland tried to shift the focus of the discussion and stimulate national thinking along the lines of assessing potential benefits and coming to terms with the individual problems that would be associated with the process of obtaining those benefits. Poland also wanted to show that isolated manifestations of the type of criminality, which the new instrument would target, had already been the object of previous international negotiations. In order to achieve these goals, Poland included in its draft a list of offences, based on the terminology used in other previous international conventions.

Poland's objective about focusing the thinking and discussions on the possibility of the convention was achieved. The General Assembly adopted a resolution in December 1996.\textsuperscript{19} by which it took note of Poland's proposal and asked the Commission to devote priority attention to the question of the convention at its sixth session. Even if on the face of it that resolution did not give the green light for the beginning of the process towards the new convention, the discussions that preceded its final drafting were indicative of a change in attitude. This change ranged from acceptance of the merit of having a new convention to resignation to what appeared to be inevitable. This latter approach stemmed from the building and expanding momentum in favour of the convention, which began increasing the political cost of its rejection.

On the other hand, the inclusion of the list of offences in Poland's draft, and especially the inclusion of terrorism in that list, created two problems. First it was immediately picked up by a number of countries, which had serious problems with terrorism. For these countries, including terrorism into a list of offences usually committed by organized criminal groups, thus treating terrorism as just another form of organized crime, was the answer to their frustrations of many years about the lack of progress in


\textsuperscript{19} General Assembly resolution 51/120 of 12 December 1996.
concerted action against terrorism at the international level. This is an important feature of the development and evolution of the convention because it was resolved only at the very last moment in the negotiations. Second, including offences established or defined in other conventions created problems for those countries that were not Parties to these conventions.

In preparation for the sixth session of the Convention and in order to boost the chances of the convention, the Giovanni and Francesca Falcone Foundation (a foundation established in Palermo in the memory of Judge Giovanni Falcone and his wife, who was killed with him) organized from 6 to 8 April 1997 in Palermo an informal meeting. All members of the Commission were invited to discuss what issues a new convention should cover. The meeting in Palermo confirmed the attitude described earlier but also showed that whatever reservations remained were still to be reckoned with.

The key turning point for the fate of the new convention was the sixth session of the Commission.20 During that session, the Commission established a working group to deal with the matter of the implementation of the Naples Declaration. The core mandate of the group, however, was to discuss the question of the convention. Even if, as mentioned earlier, attitudes had begun to change and even those still holding reservations about whether the new convention was truly feasible or desirable had begun to accept the inevitable, the group had to tread a fine line. The careful formulation of the group's report to the Commission is perhaps the best indication of how precarious the whole question remained. The group reported that “... it was [its] sense that its contribution would be most useful to the Commission if it would canvass the scope and content of a convention, rather than engage in a drafting exercise, which would be outside the mandate given by the Council and the Assembly, and would require significantly more time than that available. ... In determining the scope and content of a convention, the international community could draw on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, but should be able to come up with new and more innovative and creative responses. The Group recognized that it was desirable to develop a convention that would be as comprehensive as possible. In this connection, several States indicated that their remaining reservations on the effectiveness and usefulness of a convention were contingent upon a convention's scope of application and the measures for concerted action that such an instrument would include. Several States stressed the importance they attached to the nature of a convention as a framework instrument. One difficult issue was arriving at an acceptable definition of organized crime. It was indicated, however, that this issue was not insurmountable, especially in the presence of a strong and sustained political will. Several States were of the view that a definition was not necessarily the most crucial element of a convention, and that the instrument could come into being without a definition of organized crime. In this connection, it was also suggested that the phenomenon of organized crime was evolving with such rapidity that a definition would limit the scope of application of a convention, by omitting activities which criminal groups may engage in. Other States felt that the absence of a definition would send the

20 Vienna, 28 April to 9 May 1997.
wrong signal regarding the political will and commitment of the international community. In addition, avoiding the issue would eventually create problems in the implementation of a convention. In view of all this, concerted efforts to arrive at a solution should be made. ... The problem of definition could be solved by looking at each of its elements separately. It was suggested that a first step towards a definition might be to use the definitions of offences contained in other international instruments. ... There was also discussion about whether in approaching the definition, the focus should be on the transnational aspects of organized crime or on organized crime in general. It was pointed out that the mandate of the Commission was related to transnational organized crime but that the issue required further serious consideration in the context of determining the overall scope of a convention. In the context of the discussion on whether a convention should include a list of offences, some States expressed their support for the inclusion of terrorist acts in such a list. Most States were of a contrary view, recalling the initiatives currently under way in the United Nations and other forums on terrorism and the conclusions of the Commission at its fifth session. The Group agreed that it would be useful to focus on widely accepted constituent elements of organized crime. In the discussion that ensued, the elements identified included some form of organization; continuity; the use of intimidation and violence; a hierarchical structure of groups, with division of labour; the pursuit of profit; and the purpose of exercising influence on the public, the media and political structures. The Group decided that the best way to proceed for the purpose of advancing the issue was to seek common ground, utilising as many previous contributions as possible, and building on the positive experience and valuable work done at other forums, such as the European Union and the Senior Experts Group on Transnational Organized Crime. The draft United Nations framework convention against organized transnational crime (A/C.3/51/7) was a useful point of departure and a good basis for further work. In this connection, the Group decided to discuss matters related to international cooperation in criminal matters that would form an essential part of an international legally binding instrument. The overriding concern would be to equip the international community with an effective instrument to strengthen action against organized crime.

In spite of this careful language, it was evident that the tide had changed. In fact, several delegations began putting proposals on the table that went beyond a mere discussion of the desirability or feasibility of the convention. The issue became not whether there would be a new convention but what should the new convention contain and how soon it should be developed. It is interesting to note that some of these proposals were submitted in the form of “non-papers”, in order to afford their authors the possibility to keep the option of backing out open. The Group agreed that considerable work was required on the issue of the convention. For this purpose, it proposed that an open-ended intergovernmental group of experts should be established to consider all pending proposals related to the issue of conventions, as well as all elements thereof and appropriate cooperation modalities and mechanisms.

Continuing its efforts for the implementation of the Naples Political Declaration and Global Action Plan, the
Crime Prevention and Criminal Justice Division organized a regional Ministerial Workshop in Dakar, Senegal, for the countries of the African region in July 1997. That was the second follow-up ministerial meeting after the one organized in 1995 in Buenos Aires. The purpose of the meetings was to sustain the commitment and political will, which developing countries had clearly displayed in Naples, and to further build on it in order to promote the idea of the convention. In unanimously adopting the Dakar Declaration, the Ministers reaffirmed their commitment to fight against organized transnational crime and reiterated their collective political will to support the efforts of the Commission towards the elaboration of an international convention against organized transnational crime. In addition, the Ministers reviewed and approved two regional projects for technical cooperation, aimed at providing assistance to the Governments of the region in strengthening their capacities to prevent and control organized transnational crime.

The Warsaw meeting was the first occasion on which the question of the desirability or possibility of the new convention was laid to rest. The intergovernmental working group reported that “there was broad consensus on the desirability of a convention against organized transnational crime. There was much to be gained from this international legal instrument, which would not only build on, but also go beyond, other successful efforts to deal with pressing issues of national and international concern in a multilateral context.”

The Group then went on to develop a “list of options” for the convention, which amounted to a first draft containing several options for various provisions. The term “list of options” was deliberately used as a way of satisfying those few who were still reluctant to speak of a “preliminary draft”, considering this term as determining in an unequivocal manner the resolution of the issue of whether the negotiations for the new convention should be authorised. It is interesting to note that before embarking on the very loose drafting exercise, the Group put down a number of general principles, which it understood would guide “the efforts to elaborate a new international convention.” The main principles emanating from the general discussion, were as follows:

“(a) While the contours of organized crime were generally understood, there continued to be divergences of a legal nature that made it difficult to reach a comprehensive definition. Engaging in such an endeavour might require considerable time, whereas there was a general feeling of the urgency of action in the direction of elaborating the new convention. Organized crime continued to evolve and manifest itself in different ways. As there was a general
understanding of criminal organizations, efforts to determine the scope of the convention should build on that understanding, focusing action under the new convention against those groups.

(b) Certain States were of the view that attempting to list all possible criminal activities in which criminal organizations were likely to engage would be difficult and might lead to a convention that was too narrow. Such an approach entailed two major risks. First, it would *ab initio* prejudice the applicability and effectiveness of the convention, as a list could not be all-inclusive and would most probably exclude emerging forms of criminal activity. Secondly, it would present considerable difficulties with regard to other provisions of the convention, as specific crimes often demanded specific responses. The need to deal with specific offences might be accommodated by additional protocols, which could be negotiated separately, not affecting the comprehensiveness of the convention or its operability and effectiveness. Furthermore, it was observed that such an approach might prove more conducive to a more expeditious negotiating process that would make the new convention a reality in a shorter period of time.

(c) An alternative approach that was proposed might be based on the seriousness of the offence, which might be determined on the basis of the penalty foreseen in national legislation and a requirement that the offence be committed in connection with a criminal organization, association or conspiracy. That approach was not free of difficulties, as the concept of seriousness was not as meaningful in all national systems. However, there was merit in further considering such an approach as a potential solution, especially combining it with a focus on the organized nature of the offence in question, as well as looking at elements that would necessitate international cooperation, including its transnational reach.

(d) There was agreement that the convention should include practical measures of international cooperation, such as judicial cooperation, mutual assistance in criminal matters, extradition, law enforcement cooperation, witness protection and technical assistance. The convention should be a capacity-building instrument for States and the United Nations alike in connection with the collection, analysis and exchange of information, as well as the provision of assistance. Furthermore, the convention should expand the predicate offences for the purpose of action against money-laundering, while it should include provisions creating the obligation of States to confiscate illicitly acquired assets and regulate bank secrecy. The convention should also include provisions to prevent organized crime, such as measures to reduce opportunities for criminal organizations or limit their ability to engage in certain activities. The convention should have provisions that require legislative action on the part of Governments, in order to facilitate meaningful and effective cooperation. Certain delegations expressed strong opposition to a “serious crimes convention” as opposed to an instrument focused on organized crime.

(e) Other international instruments, especially the International Convention for the Suppression of Terrorist Bombings (General Assembly resolution 52/164, annex) and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, were useful sources of inspiration. They contained provisions
of direct relevance to the new convention. Some of those provisions could provide solutions to similar problems, or serve as a point of departure in order to go beyond their scope, taking into account new needs and developments. In addition, the convention should empower the law enforcement authorities of States parties to employ extraordinary investigative techniques (e.g. wire-tapping and undercover operations), consistent with constitutional safeguards.

(f) Finally, the convention should incorporate appropriate safeguards for the protection of human rights and to ensure compatibility with fundamental national legal principles.”

In March 1998, the Centre for International Crime Prevention organized the third regional ministerial event in follow-up to the Naples Political Declaration and Global Action Plan. This time, the meeting was convened in Manila, was attended by countries of the Asian and Pacific region and adopted the Manila Declaration on the Prevention and Control of Transnational Crime, in which renewed support for the convention was expressed.

The proposals of the Warsaw Intergovernmental Group were submitted to the Commission at its seventh session. During that session, the traditional in-sessional working group on the implementation of the Naples Declaration began what in essence was a first reading of the draft prepared in Warsaw. That same working group also made recommendations to the Commission, which formed the basis for a draft resolution, for eventual consideration and adoption by the General Assembly, by which an Ad Hoc Committee would be established to elaborate the new instrument. One key element of the debate on that draft resolution was whether it would include a deadline for the work of the Ad Hoc Committee. Many delegations thought this would be premature and a deadline was not included in the text. However, everyone began speaking in terms of making every effort possible to complete the work by the end of 2000. The symbolism was certainly one motive for the choice of the unofficial deadline. Other motives included the desire of many countries to ensure that embarking on negotiations was not an open-ended endeavour, not wishing to see the issue embroiled in endless debate, as had been the case with other international conventions. Another, perhaps more powerful, reason was the prominent place on the international agenda that action against transnational organized crime had acquired. Linked with this was the realization that attempting to negotiate such a major international legal instrument was fraught with all kinds of conceptual and political difficulties, which had the potential to erode the political will that made the commencement of the negotiations possible.

The negotiations of the draft resolution that would give the green light for the elaboration of the new convention to begin were conditioned by an interesting development. Faced with pressing political priorities, or frustrated by other processes, some countries had begun identifying individual issues, which they

22 As part of the reform of the United Nations, the Crime Prevention and Criminal Justice Division was reconstituted into the Centre for International Crime Prevention in October 1997.
23 Vienna, 21 to 30 April 1998.
24 General Assembly resolution 53/111.
thought merited attention at the international normative level.

Argentina had for quite some time favoured action, in the form of a new convention, against trafficking in minors. It had tried to push forward the initiative in the context of the work done in Geneva on additional protocols to the Convention on the Rights of the Child. However, progress there was frustratingly slow, mainly because of the fact that the proposed new protocol approached the issue from a purely human rights perspective. Therefore, Argentina decided to give the whole matter a new spin and see whether the international community was ready to deal with it in the context of criminal justice. At the seventh session of the Commission, Argentina proposed the drafting of a new convention against trafficking in minors, citing the growing evidence of this becoming an activity in which organized criminal groups were engaged.

Austria was experiencing an increase in incidents of smuggling of migrants. Its efforts to cope with the problem led it to discover that it was not alone in having to deal with more and more cases of illegal entry of migrants, organized by criminal gangs from various regions of the world. As part of its consolidated effort to see the issue rising in the international agenda, and building on previous work on smuggling of migrants done by the Commission and the Secretariat, Austria presented to the Commission the draft of a new convention against trafficking in minors, citing the growing evidence of this becoming an activity in which organized criminal groups were engaged.

The Commission was thus found in front of a major decision. Whereas it had been engaged in discussing whether the time was ripe to ask that the international community embark on the negotiations of a new convention, it was now faced with the prospect of authorizing negotiations for four such instruments. All of the proposed subjects deserved attention, having risen, in one way or another, to the top of the political agenda. However, there was also the question of limited resources, especially

immigrants off its coast. Consequently, Italy undertook an initiative at the International Maritime Organization (IMO) aimed at the issuance of directives regarding trafficking of migrants by sea. When it found out about Austria’s initiative at the Commission, Italy joined forces and presented a proposed protocol to deal with trafficking by sea, to be attached to the proposed Austrian convention.

The Crime Prevention and Criminal Justice Division had been mandated to carry out a study on firearms regulation. The study had been assigned to the Division on the initiative of Japan and had been carried out with voluntary funding provided by that country. The study (which was eventually published in 1998) was before the Commission at its seventh session. The Governments of Canada and Japan thought that, as a result of the conclusions of the study, the issue of action against the illicit manufacturing of and trafficking in firearms had sufficiently matured to merit attention at the normative level. They thus proposed a new instrument on that subject, which could draw upon and be inspired by the Organization of American States Convention on Firearms, which had recently been concluded.
of the United Nations, in supporting, both substantively and organizationally, the negotiations. In addition, there was the political issue of whether authorization to commence negotiations on four separate conventions would not result in dispersing efforts and diluting the political commitment required for success. Then, there was the issue of which of these instruments would command priority. The question facing delegations was whether prioritising was feasible and, if so, what would be the criteria for determining which of these proposed instruments would be elaborated first. The political decision reached at the end was to link the more recent initiatives to the proposed convention against transnational organized crime. The talk among delegations was along the lines of negotiating protocols to the convention on each of these subjects. Not everyone was happy with that solution, mainly because of the lower status of a protocol compared with a full-fledged convention. As a result, the draft resolution proposed by the Commission for adoption by the General Assembly did not speak of protocols but of additional instruments, leaving their status open for further consideration at a more opportune moment.

On the recommendation of the Commission, the General Assembly decided “to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration, as appropriate, of international instruments addressing trafficking in women and children, combating the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, and illegal trafficking in and transporting of migrants, including by sea.” The Assembly also decided to accept the recommendation of the Commission to elect Luigi Lauriola of Italy as the Chairman of the Ad Hoc Committee.

As mentioned earlier, the discussions that led to the final version of this resolution revolved around establishing a deadline for the completion of the negotiations. Even if the draft did not include such a deadline, planning for the work of the Ad Hoc Committee had to be carried out taking into account the commonly shared understanding about the total time available to it to complete its tasks. At the seventh session of the Commission, the delegation of Argentina came forward with an invitation to host a meeting of the Ad Hoc Committee. However, the resolution remained a draft, as it was intended for adoption by the General Assembly. The annual sessions of the General Assembly begin in September and the Third Committee, which is the committee responsible for crime prevention and criminal justice matters, does not take up relevant recommendations before October. Legally speaking, the Ad Hoc Committee would not come into existence before the General Assembly had adopted the resolution establishing it. A paragraph was included in the resolution to deal with this institutional problem, while assuring that the time between May and October would be productively used. The General Assembly “welcomed with appreciation the offer of the Government of Argentina to host an informal preparatory meeting of the intergovernmental ad hoc committee at Buenos Aires, so as to ensure the continuation without interruption of

work on the elaboration of the convention.” In order to further advance the work, the Chairman invited interested countries to form an informal group of “Friends of the Chair”, which would explore mainly procedural matters to pave the way for the Ad Hoc Committee.

The “Friends of the Chair” held a meeting in July 1998 in Rome, where they began discussing a host of issues surrounding the new convention. One of these was the timetable for the negotiations, in order to ensure that the work could finish by the end of 2000. Even if the terms of reference of the group were oriented primarily towards procedure, several substantive matters began to be ventilated by delegations. It is important to note that the size of the group kept increasing. Wishing not to let anyone out, the Chairman of the Ad Hoc Committee had specifically indicated that the group was open-ended. As countries started coming to terms with the implications of the negotiations, they joined the group in order to participate in decisions that could have a bearing on the process.

The meeting in Buenos Aires was held from 28 August to 3 September 1998. It picked up where the Commission had left off in going through the Warsaw text by way of a first reading. Already at this early stage, delegations started beefing up the text with new proposals on most major issues that it was supposed to cover. Also at this early stage, one of the questions that was intensely debated was the list of offences and whether such a list would make reference to terrorism. Perhaps most importantly for the negotiation process, the Buenos Aires meeting marked the formation of a core group of delegates, who were experts in their fields and shared considerable experience from previous negotiations. One important feature of this core group was that it was highly participatory, in the sense that it included representatives from virtually all regions and all legal systems of the world. The formation of this core group brought with it a gradually increasing sense of ownership regarding the text, which is a key element of the success of the endeavour.

The group of “Friends of the Chair” held two more meetings, one in the margins of the Buenos Aires meeting and another in November 1998 in Vienna. Its contribution was considerable especially in mapping the road towards the completion of the process and discussing in a very informal way other procedural matters, including the question of the Ad Hoc Committee’s Bureau.

The Ad Hoc Committee was officially established in December 1998 and held its first session in Vienna in January 1999. It finalized the text of the Convention at its tenth session in July 2000 and the text of the Protocols against Trafficking in Persons, Especially Women and Children and against Smuggling of Migrants at its eleventh session in October 2000. The Ad Hoc Committee tried very hard but did not manage to overcome differences impeding the finalization of the text of the third Protocol, against Illicit Manufacturing of and Trafficking in Firearms. Therefore, it scheduled another session (its twelfth) for February/March 2001, in order to complete this task. After a very intense week, the Committee’s efforts were crowned with the successful conclusion of the negotiations for the third Protocol, which completed the package that the international community had set out to conclude only two years before.
EFFORTS OF THE CENTRE FOR INTERNATIONAL CRIME PREVENTION TO PROMOTE EXPEDITIOUS ENTRY INTO FORCE OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND ITS PROTOCOLS AND EXPECTED IMPACT OF THESE NEW INSTRUMENTS

Dimitri Vlassis*

I. THE PALERMO HIGH-LEVEL SIGNING CONFERENCE

The Convention and the two Protocols finalized by the Ad Hoc Committee at its October 2000 session were submitted to the General Assembly for consideration and action at its fifty-fifth session, together with a draft resolution that the Ad Hoc Committee prepared at its July and October sessions. The General Assembly adopted unanimously the resolution1 and, by virtue thereof, the Convention and the two Protocols. By striking his gavel in the morning of 15 November, the President of the General Assembly brought to a successful conclusion the strenuous efforts of the international community to negotiate in good faith a set of instruments to collectively fight organized crime. Because of the fully participatory nature of the negotiating process and the sustained political commitment that formed the core of the joint efforts of the all States, the new instruments take into full consideration all legitimate concerns of all countries, big or small. They do so without in any way compromising the quality, functionality and, most importantly, universality of the instruments. Perhaps one of the most significant features of the negotiation process was that all countries engaged in it came away with a strong sense of ownership of the new instruments. It will be this sense of ownership that will constitute the best guarantee for the expeditious entry into force of the Convention and its Protocols and their subsequent implementation.

The new Convention and the two Protocols were opened for signature on 12 December 2000 at a high-level political signing conference in Palermo. The symbolism and significance of this action by the General Assembly2 extend beyond the obvious. By gathering in Palermo, the 149 States present sent a powerful message to the world about their determination to join forces against transnational organized crime. The successful conclusion of the negotiations for the Convention and its Protocols in record time was only the beginning of joint efforts in this field. The political commitment remained as strong as ever. In evidence of this commitment, the Convention was signed by 123 countries and the European Community, while the Protocols against Trafficking in Persons


1 General Assembly resolution 55/25 of 15 November 2000.
2 The High-Level Political Signing Conference was convened pursuant to General Assembly resolution 54/129 of 17 December 1999.
and Smuggling of Migrants received 81 and 78 signatures respectively.

The Protocol on the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition was finalized at the twelfth session of the Ad Hoc Committee in March 2001. It was submitted to the General Assembly, which had kept the item entitled “Crime Prevention and Criminal Justice” on the agenda of its fifty-fifth session open, in anticipation of the successful completion of the work of the Ad Hoc Committee. The Assembly adopted resolution 55/255 of 31 May 2001, by which it unanimously adopted the Protocol and opened it for signature at United Nations Headquarters in New York on 2 July 2001.

Since Palermo, the number of signatories to the Convention and the first Protocols has increased to 127, 88 and 84 respectively. The third Protocol has been signed by two countries so far, but a significant number of signatures are expected on the occasion of the 56th session of the General Assembly, which opened on 11 September 2001. Five countries have ratified the Convention to date, while there are three parties to the Trafficking in Persons Protocol and two parties to the Smuggling of Migrants Protocol.

II. EFFORTS OF THE CENTRE FOR INTERNATIONAL CRIME PREVENTION TO PROMOTE SPEEDY RATIFICATION OF THE NEW INSTRUMENTS

Immediately after the Palermo Conference, the Centre for International Crime Prevention embarked on a consolidated and comprehensive effort to promote expeditious entry into force of the Convention and its Protocols. The Centre developed a framework for action, based on a number of key strategic precepts and objectives.

The Centre structured its activities along two major lines: first, bringing itself to a position of being able to respond rapidly to individual requests for assistance; and second, sustaining and nurturing the political will and momentum that made the completion of instruments of such complexity in such a record time.

The first course of action was geared towards achieving the objective of supporting and strengthening the efforts of individual countries, which had already embarked on, or were about to begin the pre-ratification process. Several of these countries were intent on incorporating the Convention and its Protocols into their domestic legal system, but found themselves in need of specialized expertise or consolidated information about the experience of other countries, in order to successfully and expeditiously review their existing legislation. Further, these countries required the same type of assistance in order to amend their existing legislation, or draft new legislation, as the case may be, which would bring their systems in line and in compliance with the new instruments. This course of action was pursued by engaging in consultations with the national authorities of the countries requesting assistance, which were directly responsible for the ratification process and working with them in reviewing existing legislation or drafting amended or new laws.

The second course of action intended to achieve the objective of providing countries the opportunity to exchange experiences and analyze difficulties encountered in the pre-ratification
process, as well as mutually reinforce each other, on both the political and substantive levels. The Centre decided to pursue this course of action by organizing sub-regional or regional consultations or seminars. The Centre opted for a balance between the sub-regional and regional approach, in order to engage, in groups, countries which share common legal traditions and systems, or pursue common goals in economic and social development, while gradually expanding to cover countries which share geographical regions and are active in that context in pursuing common political objectives. In order to maximize the impact of its activities, the Centre decided to seek close cooperation with sub-regional and regional organizations, which pursue similar objectives and bring into the process the profound knowledge of their respective region or sub-region and their political presence and influence.

The underlying premise of all of the Centre’s activities is that at this stage, emphasis should be placed on supporting and promoting the efforts of countries to bring the new instruments in force. Implementation of the Convention and its Protocols would be a subsequent goal, which would require a much broader and more detailed set of strategies and activities. Implementation would also require a much more comprehensive and larger technical cooperation programme, supported by a considerably expanded and sustained financial base. The Convention has established its own mechanism, the Conference of the Parties, which is charged with the task of overseeing and guiding implementation efforts.

In this context, the Centre made proposals to donor countries and was gratified by the immediate response. Several countries, among which Japan figures prominently, made voluntary contributions to the special account established under the United Nations Crime Prevention and Criminal Justice Fund, which was set up in accordance with the General Assembly adopting the Convention. At the time of writing this paper, the Centre had undertaken the following activities:

In January 2001, the Centre attended the annual meeting of the Law Ministers and Attorneys-General of the Caribbean Community, at the invitation of that organization, and presented the Convention and the two Protocols that had at the time been adopted by the General Assembly. The CARICOM countries had not been able to attend the Palermo Conference and, as a consequence, were a group of countries that had not signed the new instruments. Working closely with the CARICOM Secretariat, the Centre managed to secure the commitment of the majority of the CARICOM countries to sign the Convention and its Protocols, as appropriate. Bahamas signed the Convention and the two Protocols in March, and several more of the CARICOM countries have confirmed their intention to do so at a special signing ceremony which will take place during the current session of the General Assembly. As a follow-up, the Centre is organizing, in cooperation with the Commonwealth Secretariat, a Ministerial Seminar in Trinidad and Tobago at the end of November to review progress on the ratification process and help the CARICOM countries analyze the requirements for ratification.

In March, the Centre organized, in close cooperation with the Southern Africa Development Community, a sub-regional Ministerial Seminar in Pretoria, South Africa for the 14 SADC States. The
SADC States agreed to work intensely towards ratification and review progress towards the end of the year.

In April, the Centre organized another Ministerial Seminar in Guatemala for the countries of Central America and in July, the Centre participated in a meeting of the ASEAN countries devoted to the common efforts towards transnational organized crime and the ratification of the Convention and its Protocols.

The Centre is planning similar events for the ten countries of the Economic Cooperation Organization in Teheran, Islamic Republic of Iran, for the countries of the Economic Community of West Africa (ECOWAS) in Ouagadougou, Burkina Faso, for the countries of the Latin American region in Quito, Ecuador, for the entire African region in Algiers, Algeria, and for the countries of Central and Eastern Europe, in Vilnius, Lithuania. The Centre is also engaged in consultations with interested host countries in order to organize a similar regional event for the countries of the Asia and Pacific region.

The Centre is cooperating closely with the Inter-Parliamentary Union and attended its most recent annual conference in Ouagadougou, Burkina Faso, engaging in very useful dialogue with parliamentarians from around the world on the contents of the new instruments and the crucial importance of their support at the legislative level.

The Centre has been joined in its efforts by the International Scientific and Professional Advisory Council (ISPAC), which organized an interregional meeting involving thirty countries on the ratification of the Convention and its Protocols, on 14 and 15 September in Courmayeur, Italy.

Meanwhile, the Centre has begun responding to individual requests for assistance and has built into its work plan several more advisory missions before the end of the year.

In all of these activities, the Centre has been using a “checklist” containing substantive elements of ratification plans. This tool is reproduced below.

### A. Substantive Elements of Ratification Plan

1. **Legislative Action**

   **Article 5—Criminalization of Participation in an Organized Criminal Group**

   Establish the following criminal offences as distinct from those involving the attempt or completion of a criminal activity:

   - Agreeing to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit.
   - Conduct by a person, who with knowledge of an organized criminal group or its intention, takes an active part in:
     - Criminal activities of the organized criminal group.
     - 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.
   - Organizing, directing, aiding, abetting, facilitating or counseling the commission of crime involving an organized criminal group.

Ensure that domestic law covers all serious crimes involving organized criminal groups.
Article 6—Criminalization of the Laundering of Proceeds of Crime

Establish the following criminal offences:

- The conversion or transfer of known proceeds of crime, to conceal or disguise the illicit origin.
- The concealment or disguise of the true nature, source, location, disposition, movement or ownership of known proceeds of crime.
- The knowing acquisition, possession or use of proceeds of crime.
- Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of the above offences.

Ensure that above criminalization applies to widest range of predicate offences (both within and outside domestic jurisdiction).

Article 8—Criminalization of Corruption

Establish the following criminal offences:

- The promise, offering of an undue advantage or giving to a public official, in order that the official act or refrain from acting in the exercise of his or her official duties.
- The solicitation or acceptance by a public official of an undue advantage, in order that the official act or refrain from acting in the exercise of his or her official duties.
- The participation as an accomplice in the above offence.

Article 10—Legal Persons

Establish the liability of legal persons (to the extent consistent with the State’s legal principles) for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of the Convention.

Article 23—Criminalization of Obstruction of Justice

Establish following criminal offences:

- The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or the production of evidence in a proceeding.
- The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official.

B. Procedural Legislation/Administrative Measures

Article 11—Prosecution, Adjudication and Sanctions

Make the commission of an offence established in accordance with articles 5, 6, 8 and 23 of this Convention liable to sanctions that take into account the gravity of that offence.

Establish under domestic law (where appropriate) a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where alleged offender has evaded the administration of justice.

Article 12—Confiscation and Seizure

Adopt the following measures to enable confiscation of:

- Proceeds of crime derived from offences or property the value of which corresponds to that of such proceeds.
- Property, equipment or other instrumentalities used in or destined for use in offences.
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- Adopt measures to enable the identification, tracing, freezing or seizure of any item referred to in para 1 of the article for the purpose of eventual confiscation.

Empower courts or other competent authorities to order that bank, financial or commercial records be made available or be seized (bank secrecy shall not be a legitimate reason for failure to comply).

Article 15—Jurisdiction

Adopt measures to establish jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:

- The offence is committed in the territory of that State Party
- The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.
- May also establish jurisdiction when:
  - 2.(a) The offence is committed against a national of that State Party.
  - 2.(b) The offence is committed by a national of that State Party or a stateless person, who has his or her habitual residence in its territory.
  - 2.(c) The offence is:
    - 2.(c)(i) One of those established in accordance with article 5, para 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory.
    - 2.(c)(ii) One of those established in accordance with article 6, para 1 (b)(i), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, para 1 (a)(i) or (ii) or (b)(i), of this Convention within its territory.
- Adopt measures to establish jurisdiction over the offences when the alleged offender is present in the territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

May also adopt measures to establish jurisdiction over the offences when the alleged offender is present in the territory and it does not extradite him or her.

Article 24—Protection of Witnesses

Provide evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness.

Take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings and their relatives and other persons close to them.

Article 25—Assistance and Protection of Victims

Take appropriate measures within its means to provide assistance and protection to victims of offences covered by this convention, in particular in cases of threat of retaliation or intimidation (in so far as legislation is concerned).

Establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this convention (in so far as legislation is concerned).

Article 26—Measures to Enhance Cooperation with Law Enforcement Authorities

Consider providing for the possibility of mitigating punishment of an accused
person who provides substantial cooperation.

Consider providing for the possibility of granting immunity from prosecution to a person, who provides substantial cooperation.

Take appropriate measures to encourage persons, who participate or who have participated in organized criminal groups:

- 1.(a) To supply information for investigatory and evidentiary purposes.
- 1.(b) To provide factual, concrete help contributing to depriving organized criminal groups of their resources or of the proceeds of crime.

2. International Cooperation Measures

Article 16—Extradition

Review current extradition arrangements and/or legislation to ensure compliance with Article 16. In particular:

- If States make extradition conditional on the existence of a treaty: review extradition treaties currently in force to ensure that offences covered by the Convention and the Protocols are extraditable offences and seek were appropriate to conclude extradition treaties with other State parties to this Convention.
- If States do not make extradition conditional on the existence of a treaty, review legislation or arrangements to ensure recognition of the offences covered by the Convention and the Protocols as extraditable offences.
- Review legislation applicable to extradition to ensure expeditious extradition procedures for offences covered by the Convention and the Protocols.
- Review legislation applicable to extradition to provide for simplification of evidentiary requirements relating to extradition for offences covered by the Convention and the Protocols.
- Review legislation to ensure extradition requests under the Convention are not refused on the sole ground that the offence is also considered to involve fiscal matters.

Article 18—Mutual Legal Assistance

Review current mutual legal assistance arrangements and/or legislation to ensure compliance with Article 18. In particular:

- Review mutual legal assistance legislation, treaties, agreements or arrangements, as appropriate, to ensure that such assistance is extended where the requesting State has reasonable grounds to suspect that an offence established or covered by the Convention and the Protocols is transnational in nature.
- Review legislation and other administrative arrangements to ensure confidentiality of information provided by another State as a result of a request for mutual legal assistance under the Convention.
- Review legislation to ensure that requests for mutual legal assistance under the Convention are not refused on the ground of bank secrecy.
- Designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to competent authorities.

Notify the Secretary-General of the UN at the time of ratification, acceptance or
approval of or accession to this Convention of the language or languages acceptable to each State for the transmission of requests for mutual legal assistance.

III. EXPECTED IMPACT OF THE CONVENTION AND ITS PROTOCOLS

Combating crime and the organizations that pursue it for achieving wealth and power is the central goal of the new instruments. It denotes the perception of the problem and the will of countries to act. Shifting from this dimension to the reality prevailing in each country, the perception of the problem and the will to act are influenced by many intervening variables, which condition the effectiveness of the action. These variables include a number of objective elements, such as the level of resources available, the qualifications and professional skills of decision-makers and those charged with implementation, in particular the criminal justice system personnel, including law enforcement agencies.

The Convention and its Protocols have been designed and negotiated as cooperation tools that will enable countries throughout the world to work together in raising the standards, consolidating their approach and maximizing the effects of joint action against transnational organized crime. The new instruments contain a variety of mechanisms employed in the achievement of these objectives. Their strength lies in the ingenuous and careful combination of measures, as well as in the innovative solutions they contain to problems of a substantive as much as a political nature.

Substantive criminal law must adapt to the challenges posed by organized crime in different ways. Those countries which have had more threats posed by organized crime have been the first to react, by refining their legislation. The main changes relate to the crime of participating in an organized criminal group and to the confiscation of assets acquired through criminal activities. In some countries, legislation allows the confiscation of crime proceeds through civil action against the proceed (in rem). This can be seen as a further expansion of the capability of the law in dealing with the changing trends of organized crime.

The Convention has solidified and expanded the trend of modified criminal legislation to include the offence of “participation in an organized criminal group”. In many countries, this would coincide with the crime of “conspiracy”. The Convention’s negotiators went to great lengths to ensure the full compatibility of the legal concepts and traditions, which are at the core of these two approaches. The purpose of the new instrument was not to engage in efforts towards full unification of national legislation, recognizing the futility of the task, but to bring about a sufficient degree of harmonization, understood in the sense of convergence and compatibility. Criminal legislation is the point of departure and reference for the collective efforts of a criminal justice system. Criminal justice systems, however, are constructed on the basis of legal, cultural and social traditions, which are evidenced throughout that systems operations and methods of work. The transnational nature of the threat demands close interoperability and cooperation of criminal justice systems representing numerous and diverse traditions and approaches. The purpose of the new Convention and its Protocols is
to achieve harmony in that interoperability and cooperation.

The success of efforts against the laundering of criminal proceeds directly depends on the level of accessibility of law enforcement agencies to the activities of financial bodies. A problem here is that opening up the activities of the financial bodies to outside scrutiny can affect their competitive position. However, the activities of organized crime may undermine the entire financial market, affecting the whole society. Furthermore, the money derived from organized crime often circulates through the same channels as money concealed from taxation authorities. In view of this, it is vital for the banks to maintain records of the identity of their clients, and to cooperate with law enforcement agencies whenever there are suspicious deposits or other transactions. It may be necessary to strengthen mechanisms of control over banking operations and even to centralize information of this kind.

In the last decade, many countries have introduced in their criminal laws the crime of money laundering in compliance with the Vienna United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. However, due to the fact that drug trafficking is only one of the sources of the proceeds of crime, there is a tendency in many Western countries to expand the predicate offences from drug offences to virtually all serious crimes. But the approach had been far from uniform. In most other regions of the world, countries which criminalised money laundering as a separate offence often limited its application to drug proceeds. The new Convention intends to set a standard of criminalisation of money laundering that would not greatly expand the predicate offences.

Compliance with the obligation contained in the new Convention would result in extending money laundering legislation to all serious crime, as defined in the Convention, and to the offences established by the Convention and its Protocols.

A number of areas have been identified as implementation priorities for an effective anti-money laundering strategy. These areas are predicated on a number of assumptions about the presence of certain enforcement mechanisms. Key among them, is the concept that a net or web operates at three complementary levels—international, regional and national. Political support, adequate resources, and high professionalism are essential conditions for effective action at all three levels. Governmental institutions must allocate adequate means and facilities to successfully regulate or exercise other types of control over activities which enjoy the benefit of a high level of sophistication and which may involve a high volume of legitimate transactions, as may be the case with electronic transfer technology.

The key element that characterizes the approach of the new Convention, not only with respect to criminalisation, but also with regard to the measures that countries should take in order to put in place an effective regime against money laundering, is the fact that the new Convention sets a truly global standard. That standard is the product of a negotiation process, which was characterized by respect for diversity and took into account the concerns of all countries. The result is a combination of actions that countries can subscribe to and incorporate into their systems, without constrains of a substantive or political nature.
Corruption greatly facilitates the activities of organized criminal groups. In view of this, many countries have enacted special anti-corruption legislation. Prosecution of corruption is difficult and the adjudication of the alleged offender even more difficult, especially when organized crime is involved due to the problems in obtaining evidence. Laws often create incentives for solidarity between corrupted and corrupter, with both punished equally. For these reasons, there is broad agreement within the international community that it is urgently necessary to develop new sets of policies against corruption, from regulatory to criminal ones. Many regulations in areas sensitive to corruption need be reshaped (preventive policies), with the incorporation of incentives to the reporting of corruption cases in the same legislation which criminalizes the corrupted officials and with the creation (at a legislative or judicial level) of a conflict of interest between the corrupter and the corrupted, in order to get evidence.

The new Convention includes a specific criminalization provision against corruption and an article setting out a set of basic measures against this form of criminal activity. The inclusion of both provisions was done on the understanding that the purpose of the Convention was by definition limited in this particular area. It was deemed appropriate to set a standard insofar as corruption is a modality that features prominently in the operations of organized criminal groups, either as a direct activity or as corollary to their other activities. The negotiators of the Convention realized that the issue of corruption was much broader than the scope and purposes of the new Convention. It would risk not doing justice to the concerted political will prevailing among the international community to deal with corruption in a comprehensive manner to try and cover such a broad issue in this Convention. Thus, the decision was made, relatively early on in the negotiation process, to limit the provisions on corruption to those absolutely essential for the purposes of the new Convention and embark on negotiations of a new separate Convention against corruption at a later stage. The process of embarking on these negotiations is already under way. In July 2001, an open-ended intergovernmental group of experts met in Vienna and successfully complied with the mandate given to it by the General Assembly to draft terms of reference for the negotiation of the new Convention. Subject to final approval by the General Assembly at its current session, a new ad hoc committee will begin negotiations on the new instrument in early 2002.

The Convention pays particular attention to the problem of deterring and punishing misconduct by legal entities, such as multinational and other corporations. Individual executives may frequently be beyond national jurisdiction and personal responsibility may be difficult to establish. Criminal punishment of the entity itself, by fine or by forfeiture of property or legal rights, is utilized in some jurisdictions against corporate misconduct, and an increasing number of countries are including corporate crimes in their legislation. Criminalization of a legal entity for corporate crimes is a powerful deterrent tool, intervening in the invisible or intangible good of the “reputation”. The growth of economic crimes strictly connected with organized crime, such as frauds, calls for more attention to the activities of legitimate enterprises. These are the places where the infiltration of organized crime begins the process of
pollution of the legitimate economy and corporate sanctions can help to reduce the vulnerability of the economic systems.

The new Convention establishes an obligation to direct appropriate attention to this matter. The fact that the Convention leaves the choice of the nature of the liability that countries will decide to incorporate in their legislation is yet another reflection of the care with which the Convention approaches the issue of diversities among national systems. The approach of the Convention in this area has been one of pragmatism. If countries concentrate on the effectiveness of measures designed to attribute liability to legal persons, and on the appropriate enforcement of these measures, instead of trying to introduce concepts that might be alien to their legal system and might create conflicts of a nature related to fundamental principles of these systems, the result cannot but be beneficial for international cooperation.

Crime committed for economic gain can be successfully countered by the forfeiture of such gains and of any other assets of the individuals and organizations involved. In some legal systems great significance is attributed to the freezing, seizure, and confiscation of assets related to illegal activity. The need for more effective organized crime control makes it necessary to regard forfeiture as a strategic weapon, an economic method of discouraging organized crime activities and a means of eliminating the financial advantages of such antisocial activities.

The Convention takes the approach that the procedures for freezing, seizure, and confiscation need to be broad in their scope and permit the confiscation of a wide range of assets of an offender in order to eliminate all gain from the criminal activity. A subsidiary benefit of such action is allowing law enforcement agencies to use confiscated assets or funds to further the activities of the agency. This can have a powerful incentive effect. International agreements may provide also for sharing such assets.

The Convention will also set in motion consideration to allowing certain liberal evidentiary rules to be used in the procedures for confiscation of the assets of criminals involved in organized crime.

Confiscation has acquired growing importance as a necessary complement to anti-money laundering policies drawing on the experience of those countries, which have practiced it. Drawing on the experience of those countries, which have practiced it, other countries could be encouraged to develop these sanctions in their legislation.

The Convention builds on the experience which suggests the advantages provided by using information obtained with the help of electronic surveillance, undercover agents, controlled delivery, the testimony of accomplices and similar methods of investigation for the collection of evidence. The use of the testimony of accomplices can be extremely helpful in prosecutions involving organized crime. Careful assessment and use of such testimony can enable law enforcement authorities to penetrate the layers of secrecy which are characteristic of organized criminal groups and which would otherwise protect them from prosecution.

The Convention attributes great importance to provisions for the protection of witnesses. Its application will encourage national systems of criminal justice to pay close attention to
If effective action is to be taken against organized crime, the law enforcement authorities must be able to prevent and detect any manifestation of such crime. This requires the systematic collection and analysis of all relevant information from all appropriate sources in order to make possible the production and use of intelligence for both strategic and tactical purposes. The methods employed for the collection and utilization of such information may be authorized and controlled by legislation. Even so, it is important that the technical facilities and techniques which law enforcement authorities are allowed to use are always sophisticated enough to enable them to match those employed by organized crime.

The production of intelligence requires the collection, processing and analysis of a wide range of information on the persons and organizations suspected of being involved in organized criminal activity, often including even information which at first sight does not directly relate to organized crime. There may be no rigid borderline between strategic and tactical intelligence, but the main aim of tactical intelligence is to help in the planning of particular police operations and to identify the sources for obtaining the evidence which makes it possible to arrest a suspect and to prove guilt. Trained intelligence analysis greatly increases the effective application of law enforcement intelligence. It is important to note that there is often a need to continue the collection of information during all appropriate stages of the legal process. Intelligence should always be collected in such a manner that even years later it can be retrieved and used as evidence.

Computerized information systems are of particular benefit in combatting
organized crime where resources permit. Computers are used to store information on the various persons and organizations suspected of being involved in organized crime, as well as information about the crimes committed, and those under preparation. Where there are different law enforcement agencies collecting information, appropriate arrangements need to be made to allow a regular exchange of information between local and national (or federal) authorities, and between local police forces in different areas. Careful attention must be paid to the compatibility of computerized systems, and the convertibility of manual systems to computerized ones. Creation of a centralized data bank may be appropriate in some countries, with the information shared internationally on the basis of mutual agreements. Furthermore, technical assistance in setting up and organizing criminal intelligence systems represents a mutual benefit to both developing and developed countries.

Particular attention has to be paid to information from confidential police sources, including prisoners. However, important intelligence comes from other sources, in particular, financial and taxation bodies. When permitted to do so, they can be of great assistance, as they frequently find themselves directly in contact with organized groups seeking to utilize the proceeds of crime. Also of value may be legislative inquiries and official and public records. An essential resource in the effective investigation of organized crime is the capability to collect, and present in an intelligible manner as evidence, complicated financial and commercial information. The collection of information concerning forfeitable assets allows the forfeiture of such property and makes it available for police use.

The infiltration of organized crime into legal enterprises and any contacts it may make in political circles, can create a superficial respectability, facilitate corruption and be used by criminals to hinder investigations of their activities. Therefore, law enforcement agencies, when collecting data on the criminal activity of a particular person or organization need to obtain the most comprehensive intelligence picture possible. A range of measures have been adopted, which include the following: a) to develop intelligence, through informants, searches and other techniques, in order to uncover large-scale organized criminal enterprises; b) to determine the factors and conditions facilitating the development of organized criminal activity; c) to provide for centralized collection, storage and analysis of information (including use of criminal organization charts) and for the tactical application of such information; d) to ensure cooperation with law enforcement authorities and other bodies involved using a multi-agency approach; e) to study other countries’ experience of organized crime control; and g) to develop on the basis of the above factors a systemic approach to criminal policy, based on appropriate legislation, proper allocation of resources and mobilization of public support.

To lift the veil of secrecy, conspiracy and fear-induced silence of possible witnesses, as well as to understand how the criminal groups function, who directs their activities and, where their illegal income is channelled, police bodies generally collect intelligence and evidence by using undercover methods. With appropriate safeguards, secret operations directed against organized crime can be conducted effectively through the use of undercover agents and informants, often in conjunction with the
use of technical facilities to intercept and to record conversations, the contents of which may facilitate the disclosure of crimes. These techniques may include wire-taps, surveillance by means of closed circuit systems, night vision equipment, as well as video and audio recording of on-going events. In some jurisdictions, such technical surveillance may be used only in cases when other mechanisms of investigation have failed, or there are no reasons to think that they lead to the directed results, or where other mechanisms are too dangerous.

If extreme care is exercised with regard to the reliability of their testimony, and due account is taken of the severity of their offence, the cooperating witnesses for the prosecution may be a valuable means of infiltrating organized crime groups. Mitigation of sentence or even dismissal of charges, where possible, can motivate lesser criminals to assist in investigations of organized crime. Incorporation of such procedures into national legislation or recognized practice, together with the protective services previously discussed, has served to attract such cooperating witnesses.

The Convention and its Protocols are expected to spark considerable activity and improve methods in the field of collection, analysis and exchange of intelligence and information. One of the key features of cooperation in this area under the Convention and its Protocols is the standard-setting element of the new instruments, thus guarding against the inherent risks posed by the necessarily intrusive nature of many of the methods used for the collection of information and intelligence.

Organized crime may be investigated by a variety of law enforcement agencies with different jurisdictions. In this connection, it is essential to ensure that close coordination is maintained between central and peripheral structures, as well as effective liaison between intelligence and operations. In countries with federal structures it is also essential that effective mechanisms be established to ensure coordination of jurisdiction, intelligence and operations among federal policing agencies and those of other Governmental units. Whole coordination within and between agencies and units is a condition for to successful action against organized crime, a clear delineation of jurisdiction contributes to a harmonious and effective working relationship.

When resources permit, there may be great value in the formation of one or more specialized units dedicated to the investigation of organized crime, particularly in the areas of corruption, money laundering and illegal drug trafficking. However, the danger must be recognized that exclusive jurisdiction over an area of investigation may create susceptibility to corruption, and appropriate safeguards should be developed.

Within any individual law enforcement agency a strictly centralized senior management system which can scrutinize all aspects of investigations and monitor their course is necessary to ensure that all investigations are conducted in accordance with national laws and with proper respect of human rights. It is important for senior management officials to take due account of the necessity of ensuring financial, logistical, and moral support.

Investigators and in particular those leading the investigation should be selected on the basis of their ability, experience, moral qualities, and
dedication. The importance of basic and in-service training should not be underestimated not only for the police, but also prosecutors and judges. High professionalism and specialization are key factors of success.

The relationships between investigative functions and prosecutorial, and judicial organs vary markedly between different legal systems. To combat organized crime, effectively, in any system, it is necessary to ensure that there is harmonious coordination among them. Obviously, due respect must be accorded to maintaining the proper relationships between the functions, keeping in mind the importance of preserving the independence and impartiality of the judiciary, as well as the proper role of defence lawyers.

The Convention and its Protocols contain specific provisions on cooperation between law enforcement agencies and, most importantly, detailed provisions on training and technical cooperation. Regarding the latter, the Convention and its Protocols were negotiated on the basis of a fundamental assumption. It was clearly understood by all countries involved in the negotiating process that the joint fight against transnational organized crime would entail the incorporation into the new instruments of a number of obligations. Many of these obligations would be onerous for many developing countries, which had limited resources and competing priorities for these resources. Conversely, it was also understood that effective cooperation against transnational organized crime required sustained commitment on the part of all countries, manifested among other things by a decision to bring limited resources to bear in the common effort. However, when that was done, it was clearly accepted that for many countries there would still be needs, which would be covered through the provision of technical assistance. In this respect, it was the common belief that effectiveness and efficiency in international cooperation depended on the equally sustained commitment to efforts to promote the provision of this technical assistance.

Due to the inherent characteristics of organized crime, which is simultaneously engaged in providing illegal services and goods and in infiltrating the legitimate economy, the criminal justice system alone cannot successfully fight it. For these reasons, the Convention and its Protocols have incorporated a range of “preventive” policies, aimed at, for example, reducing the demand for illicit goods or deregulating/regulating some markets, in order to minimize their vulnerability to infiltration by organized crime groups. These preventive policies, as opposed to crime control policies, relate to various sectors of the social and economic systems. Their increased use (e.g., the regulation of non bank financial institutions as an anti-money laundering policy), calls for their close integration with crime control policies and, consequently, with the criminal justice systems.

A systemic approach oriented to identifying the most effective strategies against organized crime focuses on two elements: goals and policies. The more these are rationally linked, the better are the chances that the prevention and control system will be effective. “Rationally” is intended to mean that a given society or country should select priorities among the goals desired, being ready and willing to accept trade-off effects, and relating this selection to the choice of those policies which are less costly and present fewer political and
juridical constraints, keeping also in mind that organized crime is at the same time a domestic and an international problem.

In terms of strategies, the main question is that of identifying which are the most effective policies for preventing and controlling organized crime. The distinction between prevention and control is based on the nature of the policies pursued (defensive or offensive). Although they may appear closely interlinked in terms of the effects that they produce, the difference lies in the goals that are to be achieved. For example, with respect to prevention policies, decreasing the demand for illicit goods and services reduces the opportunities for organized crime and prevents its expansion. Conversely, the deregulation, or the introduction of a different type of regulation, of the construction industry has tended to minimize its vulnerability, preventing criminal organizations from obtaining dominant, often monopolistic positions in the market and impeding their infiltration of the legitimate economy. On the other side, crime control policies aim at disrupting the structure of criminal organizations. These two policies, to be effective, should be integrated in a systemic approach. In fact, when crime control policies are used without considering the advantages of preventive measures, and general deterrence receives the overwhelming attention and is intended as the only form of prevention, the criminal justice system becomes overburdened and, therefore, less effective.

When considering how to prevent or reduce the incidence and expansion of organized crime, the main assumptions are the following: a) organized crime is a derivative of a complex society: the more complex societies become in their organizational structure, the more the crime problem reflects this complexity, featuring varying and more sophisticated organizational patterns; b) the criminal justice system is overloaded. Some experts are questioning whether the economic costs of control policies have reached the point of diminishing utility. Criminal law alone, and law enforcement in isolation, cannot succeed in dealing with the increasing complexity, flexibility and sophistication of large-scale organized crime operations; c) as organized crime is oriented to providing illicit goods and services and to infiltrating legitimate activities through a variety of methods, including corruption and violence, it is necessary to identify preventive strategies that, while reducing the opportunities, also increase the threshold of vulnerability of the economic systems to infiltration. These strategies need to be integrated with—and not opposed to—crime control measures.

These policies should be integrated, as they tend to achieve the same goal. On the one hand, there is the aggregated demand, while on the other, there is only the demand for illegal goods and services. Since the problem is highly complex, it should be treated as such, taking into account the trade-offs and side effects that might occur. Deeper knowledge and thorough evaluation of the different implications, as well as their effects in the different regions of the world are necessary for addressing this side of preventive strategies.

In relation to preventive measures against crime, the strengthening of the values of morality and legality must occupy a prominent position. They are the essential prerequisites for building social and cultural consensus against organized
crime. The operations of organized crime groups, and their continued existence in territories where they are established and traditionally located, require social consensus which helps minimize the risk of law enforcement activities and in the process facilitates recruitment of new members. Organized crime groups achieve consensus through a redistribution of resources and, consequently, by creating incentives to employment in economically and socially depressed areas, and also creating disincentives through corruption and fear of violence. Building and maintaining high moral standards in political and administrative structures through respect for the law is the first commitment for effective action against organized crime. A culture of morality and legality has strong messages to convey to those who violate the law and to those who allow them to do so. These values need to be implanted, nurtured with extreme care, and passed on to new generations. As organized crime represents the organized violation of these values, it is essential to devise and implement comprehensive strategies to restore legality wherever it has been eroded, and to create “incentives for morality” for those who are exposed or susceptible to corruption. Measures for the protection of the criminal justice system against violence and the fear of violence are in the direction of restoring legality. Codes of conduct established in different areas of Government and administration are also in the direction of restoring morality.

Policies oriented toward civic education can produce important results against organized crime by building a social consensus against it, disseminating information and increasing awareness of the cost of organized crime to society. In this context, mass media play an important central role. Messages transmitted by the media, however, may have contradictory educational effects, as they may often be oriented to producing spectacular or sensational effects. Fiction crime stories and non-fiction accounts are attracting increasingly wider audiences. Crime, violence, and corruption capture public attention in all parts of the world: the issue of reconciling the rights of information and freedom of artistic expression, with the civic and social responsibility of promoting values of morality and legality, is a very difficult one. The interrelationship between media and crime, and their role in crime prevention, are truly challenging questions that will become even more important in the future. Research and documentation on experiences acquired so far, as well as an increasing attention by educational institutions, are essential for gaining the support of the media in this area.

A second goal within the framework of preventive strategies is related to the need to reduce the level of vulnerability of legitimate industries to the infiltration of organized crime groups. The assumption is that organized crime tends to infiltrate the legitimate economy for different purposes, such as: a) laundering and investing the proceeds of crime in less-risky activities; b) acquiring respectability and social consensus for its members; and c) controlling the territory where it operates in order to maximize economic and political advantages and minimize the risk of apprehension, arrest, and conviction (law enforcement risk). Activities in the illegal markets and infiltration in the legitimate business are not separated in the life of an organized crime group. Opportunistic criminal organizations go where there is money to take, and mono-task organizations such as those specializing in drug trafficking
become opportunistic when they have to invest the money produced by their criminal activities. For both, infiltration of legitimate business is part and parcel of their activities. The reverse aspect of the same goal, i.e. reducing vulnerability, means increasing the transparency of the economic system.

Successful policies involve a good chemistry of regulation and deregulation, for example a strong regulation of licensing all those economic activities that could easily be infiltrated by organized crime has recently been pursued in a number of countries. Another example of regulation is the licensing of all those economic activities, such as the banking and financial services, that can be infiltrated by organized crime. In particular, the regulation of the transactions requested by the banks for anti-money laundering purposes helps to identify money-laundering operations and trace criminal organizations. Furthermore, new regulations and codes of conduct of business and professionals also help as an anti-money laundering policy, by keeping high standards of transparency in the system and avoiding illicit infiltration.

Preventive strategies and policies, although not sufficiently used in the past, are increasingly being explored in recent times in the area of organized crime. They are promising and cost effective if carefully planned and implemented. As such, they represent the natural complement to traditional crime control policies.

The Convention and its Protocols promote effective action against organized crime which is based on priorities in objectives and efficient management of resources. It is possible that in those countries where organized crime does not appear to the public as violent or as damaging as in others, it may not be regarded to as a top priority. Also, street crimes are closer to the day-by-day experience of the general public, than transnational organized crime. Decision makers, who are necessarily sensitive to public opinion and are also aware of the costs and the impact of these forms of crime on the society at large, may be forced to take decisions that privilege an immediate response to street violent crimes. The reality, however, is that there clearly exists a global-local nexus in relation to organized transnational crime.

As far as police action and criminal proceedings are concerned, the Convention and its Protocols promote strategic measures in the following areas:

- improvement of intelligence in order to identify the organizational structure of criminal groups, types of activities of these groups, interrelations between the various groups and the means used to sustain themselves;
- development of investigative methods that permit to “penetrate” criminal organizations, such as the creation of specialized investigative units, the interception of communications, the use of undercover operations and controlled deliveries, the protection of witnesses and victims, and rewards/protection of turncoats;
- investigative methods and other mechanisms aimed at seizing and freezing illicit profits, thus facilitating confiscation, such as the establishment of appropriate structures at the national level (integrated proceeds of crime units, seized property management directorates).
Strategic measures are also those addressed to the law enforcement agencies in terms of enhanced capability, professionalism and coordination. Strategic intelligence should not be sacrificed to the tactical one. Investment in this area is essential, as is the cooperation between different agencies. The experience of concentrating energies and resources against organized crime in a specialized agency could be an innovative organizational measure only if this concentration truly happens. When this is not possible because of the notorious difficulties and resistance, substantial and effective coordination among existing agencies and between them and the prosecutors should be consistently pursued. Different patterns of cooperation and coordination can be found in the most experienced law enforcement agencies of many countries.

The Convention and its Protocols would promote responses to the growing threat to the economy posed by organized crime through the progressive development of preventive strategies, mostly addressed at preserving the stability of financial institutions and focused on:

- the provision of technical and forensic training for police, prosecutors and judges, enabling them to understand financial operations, and collect evidence;
- the limitation of bank secrecy and other relevant regulations;
- a more active role of financial institutions in appropriate controls, such as suspicious transactions reporting.

The criminal justice system alone, usually overburdened and overloaded, has structural limitations in controlling organized crime. This imposes a deep investment in preventive strategies, which probably had traditionally been neglected in the past. This development requires that the different systems to which these strategies are addressed are increasingly more integrated. The process which begun asking for more cooperation between the banking system and the criminal justice system should be extended to the educational system and to all the areas of media communications. Commissions of inquiry and overviewsing legislative committees could encourage such a process which is a progressive one, involving a wide set of new policies and institutions traditionally outside the area of criminal justice. Property laws in common law systems and civil law in the civil law countries are being confronted with new forms of regulation of confiscated assets. Administrative law and other forms of regulation of public contracts could reduce the probability of corruption and defend the legitimate businesses from the infiltration of organized crime groups. Together with the existing “hard laws”, a new set of “soft laws” is being accepted domestically and internationally for achieving new standards.

In conclusion, the Convention and its Protocols will promote an integration of strategies, policies, and mechanisms, with their effective and transparent management, as the challenging answer to the growing danger posed by transnational organized crime.
AN OVERVIEW OF ELECTRONIC SURVEILLANCE IN THE UNITED STATES; LAW, POLICY, AND PROCEDURE

Julie P. Wuslich*

I. INTRODUCTION

In the United States, there are two primary levels of government—the federal system and the state system.1 Although these independent systems each have their own governing bodies and law enforcement agencies, shared areas of legitimate governmental interests, such as combating drug-trafficking, result in overlapping and concurrent jurisdiction where the federal and state governments act independently or even jointly to address these mutual problems. This discussion will focus on the use of electronic surveillance as an investigative technique used in the federal system and will not discuss the systems of the various states and their laws.

As practiced in the federal system, electronic surveillance (commonly referred to as “wiretapping”) is one of the most effective law enforcement tools for investigating many types of criminal enterprises. In the United States, electronic surveillance has been used successfully to prosecute traditional organized crime (the American mafia or La Costra Nostra), large drug-trafficking organizations, violent street gangs, and criminals involved in various types of public corruption and fraud. In a recent, for example, electronic surveillance was used successfully to uncover a fraud scheme that victimized the McDonald’s restaurant chain and its customers. McDonald’s was sponsoring games of chance for its customers, which involved prizes of up to one million dollars. The defendants, who were responsible for running the contests for McDonald’s, pre-selected the winners in exchange for a portion of the prize money. In this case, the electronic surveillance led to the arrests of several persons who are currently awaiting trial.

Since 1990, the number of federal investigations using electronic surveillance has increased dramatically, and that trend is expected to continue. In 1990, federal law enforcement agencies submitted a total of 791 electronic surveillance requests to the Department of Justice for approval. Between October 1, 2000, and September 20, 2001, the federal agencies submitted over 1,700 electronic surveillance requests. Over the past ten years, there has been not only an increase in the number of electronic surveillance requests, but also a growing number of investigations that have multi-jurisdictional and international components, particularly in the area of drug trafficking and alien smuggling.

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**As a consequence of the terrorist attacks in the U.S.A. on 11 September 2001, Ms. Wuslich was unable to attend the 119th International Training Course. Copies of the two lectures Ms. Wuslich had prepared were distributed to all of the participants.

1 The federal system includes federal law affecting all 50 states, as well as the territories of the United States Virgin Islands, the District of Columbia, Puerto Rico, Guam, and the Northern Mariana Islands. The state system is comprised of the 50 state governments.
where American traffickers and smugglers have co-conspirators overseas and in multiple states within the United States. Crime, once primarily a local concern, has gone global. The proliferation of the Internet and the use of hand-held communications devices, such as cellular telephones and two-way pagers, has increased a criminal’s mobility, expanded the reach of his or her criminal enterprise, and shortened the time necessary to plan and execute even the most complex crimes.

While electronic surveillance is a very valuable technique, and has yielded tremendous results in some significant investigations, it is also a very intrusive one that implicates privacy rights protected under the United States Constitution, particularly the Fourth Amendment protection against unreasonable searches and seizures. For that reason, significant legal and policy restrictions have been placed on the use of electronic surveillance in the United States, mostly imposed by Congress and some imposed by the courts. These restrictions are designed to balance the needs of law enforcement to fight crime against the right of citizens to be free of overbroad or unnecessary government intrusion into individual privacy.

II. LEGAL REQUIREMENTS

A. Background Of Title III

In 1968, the United States Congress enacted the federal electronic surveillance statutes, which are often referred to as Title III of the Omnibus Crime Control And Safe Streets Act of 1968 (hereinafter, “Title III”). Congress enacted Title III in response to several United States Supreme Court decisions recognizing the applicability of constitutional protections to an individual’s communications, and because it wanted to regulate the use of electronic surveillance by law enforcement and private citizens, resolve conflicts in the law, set a federal standard by which electronic surveillance would be conducted and, most importantly, to combat organized crime. In 1968, organized crime (La Cosa Nostra) was seen as a plague on American society, and was credited with controlling various criminal enterprises, such as drug-trafficking, gambling, loansharking, and prostitution, and corruptly influencing legitimate businesses, labor unions, and the political process.

While Congress wanted to give law enforcement an effective tool to eradicate organized crime, it also wanted to tightly control the use of electronic surveillance to avoid abuse of the technique and to protect individual privacy, as constitutionally required. To accomplish these conflicting, yet important goals, Congress: 1) enacted a two-step approval process requiring Executive and Judicial Branch concurrence for two of three types of communications a law enforcement officer is permitted to intercept; 2) limited the types of crimes for which electronic surveillance can be authorized; 3) restricted electronic surveillance to thirty-day intervals and; 4) required the government to submit an affidavit to the authorizing authorities which would justify the electronic surveillance and outline how the government would comply with the statutory requirements. Each of these fundamental requirements and their related statutory components will be discussed, in turn.

B. The Approval Process

When law enforcement agents of a government investigative agency want to conduct a wiretap over a telephone or install listening devices in a location, they must obtain approval from two entities. First, they must obtain approval from a statutorily specified high-level official at the Department of Justice, who must concur in the need for the proposed interception and find that it meets all of the statutory and constitutional requirements. The Department official does not authorize the interception, but instead authorizes the government agents to apply to the appropriate federal court for an order authorizing the interception. Second, the agents must then obtain such an order from a federal district court judge. Congress enacted the provision requiring Justice Department approval because it believed that centralized review by the Department would promote national uniformity in the way electronic surveillance was conducted, and because Congress wanted to hold a politically accountable official responsible for any abuses that might occur.

With regard to approval by a judge, Congress enacted this provision in accordance with constitutional principles that require a detached and neutral authority to review and authorize certain types of law enforcement action directed against the citizenry.

Unless the government has obtained both approvals, and in the correct order, it cannot conduct the electronic surveillance. If the government fails to get both approvals, but conducts the electronic surveillance, the evidence must be suppressed and the government will not be allowed to use that evidence, or any derivative evidence, at trial.

The approval process at the Justice Department usually takes a few days and involves the following process. When a federal investigative agency and the United States Attorney's Office in the location where the crime is being committed is ready to conduct electronic surveillance in an investigation, it submits an affidavit as part of its application to conduct surveillance to the Electronic Surveillance Unit, which is part of the Justice Department's Criminal Division. An attorney in that Unit reviews the affidavit for legal sufficiency. If the affidavit meets the statutory requirements, it is forwarded to the appropriate high-level official for review along with a recommendation that the request be approved. If the official agrees that the affidavit is legally sufficient, he or she will grant the request. At that point, the government may submit the application and approved affidavit to a judge, who may grant or deny the request to conduct the surveillance. If the judge grants the request, he or she will issue an interception order, which allows the law enforcement agency to conduct surveillance over a particular telephone/facility or within a particular location for a thirty-day period. Most judges will issue

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5 United States v. Reyna, 218 F.3d 1108 (9th Cir. 2000).
7 Many times throughout this paper, the term "government" is used to refer collectively to the federal investigative agencies and the United States Attorney's Offices, or their representatives.
8 18 U.S.C. §2518(1); United States v. Williams, 124 F.3d 411 (3d Cir. 1997)(The procedure of submitting a sworn affidavit by a law enforcement officer, which is attached to prosecutor's application, is sufficient.).
the order the same day they receive the request from the government.

It should be noted that when Title III was amended in 1986 to specifically provide for the interception of electronic communications, which are communications that occur, *inter alia*, over a paging device, a computer, or a facsimile machine, Congress required only approval by a judge, without the predicate Department review and approval. Congress did not consider the interception of these communications to involve the same level of intrusion into a person's privacy as the interception of a person's telephone calls or private conversations. Nevertheless, by agreement between Congress and the Justice Department, internal Department policies require review and approval prior to applying to the court for an order authorizing the interception of electronic communications over computers, facsimile machines, and two-way paging devices.

The requirements for the government's affidavit in support of the electronic surveillance application to the court are discussed below.

C. The Affidavit

1. **Sworn to by a Law Enforcement Officer**

   Like a traditional search warrant under longstanding United States law, Title III requires the application to be made by a federal law enforcement officer, who has investigative and arrest powers for the crimes under investigation and who swears to the facts and statements set forth in the affidavit.\(^9\) As a matter of policy, the Department of Justice limits the number of federal agencies which can conduct electronic surveillance. The Department does this to ensure that only the agencies with the most expertise, resources, and experience can conduct electronic surveillance as part of their investigations. Those agencies that are not historically approved to conduct electronic surveillance can do so only when partnered with an approved agency, usually the Federal Bureau of Investigation (“FBI”), where both agencies have jurisdiction over the crimes under investigation.

2. **Identifying the Persons Committing the Crimes**

   Title III requires the government to identify by name, if it can, the persons who are committing the crimes under investigation and who are expected to be intercepted over the specified telephone or within the location.\(^11\) This provision serves two purposes. First, it requires that the government determine if the persons identified in the affidavit have been the subject of prior electronic surveillance.\(^12\) If they have, the government must include in the affidavit all of the information about such prior surveillance. One of the reasons this information is required is so that the judge may determine if the government is being overzealous in its investigation of these individuals, such as could be the case if numerous, prior court-authorized interceptions had failed to produce any evidence of criminal involvement by the targets. In such a situation, the judge may require the government to justify the request.\(^13\) Second, at the conclusion of the

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investigation, the government must give notice to the persons named in the affidavit that they were intercepted so that these persons can prepare their defense if charges are brought, or otherwise challenge the legality of the surveillance.14

3. Identifying the Facility or the Location and the Type of Communication

Next, under Title III, and in compliance with the Fourth Amendment, the government must identify, with particularity, the telephone facility or location that will be the subject of the electronic surveillance, and the type of communication that will be intercepted, i.e., telephone conversations (wire communications), face-to-face conversations (oral communications), or computer transmissions, pager data, or facsimile transmissions (electronic communications).15 This requirement ensures that the law enforcement officer who is conducting the surveillance knows what facility or location—and what kind of communications—he or she is allowed to intercept. This prevents the law enforcement officer from conducting an open-ended or overly broad search, targeting any telephone or location used by a subject (except for “roving” interceptions, discussed infra). However, once the government has established that a particular telephone or a location is being used to facilitate criminal activity, the court’s order generally provides that the government can intercept the criminal-related communications of anyone who may use that telephone or location, and not just those persons named originally in the court order.16

The exception to the particularity requirement is the “roving” provision of Title III. Under Title 18, United States Code, Section 2518(11), the government can obtain a court order for a 30-day period to intercept communications over any telephone/facility or within any location that a specific subject may be using to commit the crimes. For example, drug traffickers often use a series of different cellular telephones to carry out their criminal activities, and will often use a telephone for only a few days in order to prevent law enforcement detection of their crimes. By the time the government has identified the telephone the subject is using and obtains the requisite approvals, the subject may no longer be using it. The roving provision allows the government to intercept communications over any telephone the subject may obtain and use during the 30-day period as long as the government can show that the subject’s behavior has the effect of thwarting its ability to intercept his or her calls, and that the subject has a pattern of using multiple telephones to conduct his or her criminal activity. With respect to a location, the government must show that it is unable to specify in advance to the reviewing court where the subject and his or her co-conspirators will be meeting to conduct their criminal activity. In one case, the government obtained a court order to intercept communications of Mafia members who were planning to conduct a ceremony to induct new members into the crime family.17 The government’s confidential informant, who would be present at the ceremony, would not learn of the meeting location until a few hours before the ceremony was to take place. A more recent example involved a public corruption case, wherein the subject of

the investigation scheduled meetings with his co-conspirators at the last minute to make bribe payments, and had not been seen meeting with them at the same location twice.

After the government obtains a court order to conduct roving interceptions over different telephones or within different locations, the government may only intercept the communications of the subjects identified in the affidavit as the users of the telephones or locations, and subjects in communication with them. If other subjects of the investigation are using the telephones or locations, without the named subjects also participating in the communication, the government cannot intercept those communications, even if they are criminal in nature.18

4. Listing the Crimes under Investigation
Title III allows for electronic surveillance only when the government is investigating one of several crimes listed in the statute. Congress decided that electronic surveillance should be used to investigate only the most serious types of offenses. If the government wants to wiretap a telephone (wire communications) or install listening devices in a location to capture face-to-face communications (oral communications), the government must be investigating one of the enumerated offenses listed in Title III.19 If the government wants to intercept communications over a computer, a pager, or a facsimile machine (electronic communications), the government only needs to be investigating a federal felony offense, which again recognizes Congress’s view that electronic communications warrant lesser protection than required for wire and oral communications.20 By requiring the government to identify which crimes are under investigation, the statute again ensures that the electronic surveillance will not be overly broad or unnecessarily intrusive.

5. Establishing Probable Cause
In accordance with the Fourth Amendment, Title III requires the government to outline the facts that show a particular telephone or location is being used to facilitate the commission of criminal acts.21 There are several ways the government can do that. For example, the government may have a confidential informant or an undercover law enforcement agent who can engage the subject in a discussion of criminal activity during a call over the telephone or during a meeting within the location. The drug dealer may instruct the informant to call the drug dealer on a particular telephone when the informant wants to buy cocaine. Thereafter, the informant calls the drug dealer at that telephone. During the call, the informant asks to buy a quantity of cocaine and the dealer agrees to make the sale at a nearby parking lot. The informant travels to the parking lot, meets the dealer, and buys the cocaine. It is clear from that chain of events that the drug dealer used the telephone to facilitate his or her drug business.

6. Establishing the Need for the Electronic Surveillance
Because electronic surveillance is so intrusive, the government must show why it needs to conduct electronic surveillance to gather the evidence necessary to prosecute the subjects.22 Specifically, the government must state

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18 United States v. Gaytan, 74 F.3d 545 (5th Cir. 1996); United States v. Jackson, 207 F.3d 910 (7th Cir. 2000).
what other investigative procedures have been tried, and if not, why they would be unlikely to succeed or would be to dangerous to use. These other procedures include physical surveillance of the subjects, search warrants executed at locations or residences known to be used by the subjects, interviews of the subjects or their associates, the use of a grand jury to investigate the subjects, examination of telephone records for their telephones, and seizures of contraband. If the government has not performed each of these investigative techniques, it must explain why it cannot do so, or, even if it did, why using the technique would not be sufficient in and of itself to meet the goals of the investigation. For example, the government may have conducted physical surveillance of the subjects, but the subjects observed the surveillance agents and stopped their criminal activities, or the subjects routinely engage in counter-surveillance maneuvers, which create a danger to the police officers or others, or the subjects live or travel in an area that makes such surveillance difficult. In one case, the FBI was investigating a cocaine conspiracy in a small town. One day, FBI agents were conducting physical surveillance, and the mayor of the town began to follow the agents. The mayor escalated his pursuit of the agents and forced the agents to drive out of town. The FBI learned later that the mayor chased the agents because they were suspicious strangers. Moreover, the government may have used confidential informants or undercover agents at one time in their case producing some evidence supporting the investigation, but the subjects discovered their identities and to continue to use them would compromise their safety. The government may also have seized contraband from a vehicle during a search, but the driver of the vehicle refuses to cooperate or was only privy to limited information about the person to whom he was delivering the drugs.

7. Prior Electronic Surveillance
Title III requires that the government set forth in the affidavit whether any of the subjects, facilities, or locations have been the subject of prior surveillance.23 The government is required to give a full and complete statement of any prior electronic surveillance orders. That statement includes the dates of the prior orders, the names of the subjects of the investigation in those orders, and what facilities or locations were the subject of the electronic surveillance. As explained previously, one of the purposes of this requirement is for the judge to determine if the government is being overzealous in its investigation of these individuals. These checks must be done by all of the investigative agencies that may have conducted electronic surveillance of the subjects, and not just the agency making the instant request.

8. Statement of Time
Under Title III, the government can only conduct electronic surveillance for a period of up to 30 days, and the affidavit must contain a statement to this effect.24 If the government has not met its investigative goals during the first 30 days of interceptions, the government may seek approval from the Department of Justice and the judge to conduct interceptions for another 30-day period. Each time the government applies for an extension order, it must describe the evidence derived from the wiretap and demonstrate a continuing investigative need to intercept the communications.25 There is no statutory limit on the number of times the government can seek to

extend the electronic surveillance. As long as the government meets the statutory requirements each time, and the judge so permits, the government may continue to conduct surveillance. The average electronic surveillance investigation is conducted for approximately four months. It is the exceptional electronic surveillance investigation that lasts for a year or longer.

9. Minimization

Title III requires that the government minimize the interception of communications not related to the crimes under investigation.26 This means that the government is required to terminate the interception of the communication when the communication does not concern the criminal matters under investigation or any other type of criminal activity.27 For example, if a law enforcement officer is listening to a telephone call and the subjects are not talking about their identified criminal activities or any other crime, the officer must turn off the monitoring equipment. After a reasonable interval, the officer can turn the equipment back on to determine if the call has become criminal in nature. If the subjects are now talking about their crimes, the officer can listen to and record the call. When monitoring a call, the officer may have to turn the equipment off and on several times. To determine if the government lawfully minimized the communications, the courts consider the following factors: 1) the number of co-conspirators; 2) the complexity of the crimes being committed; 3) the size and longevity of the criminal enterprise; 4) the actions taken by the monitoring officers to minimize the communications and whether they showed a high regard for the subjects’ privacy; 5) the use of coded language by the subjects; 6) whether the telephone or the location is the center of the criminal activity; 7) judicial review and approval of the minimization efforts; and 8) whether the monitoring agents were adequately instructed on the proper minimization techniques.28

There is a statutory exception to the requirement to minimize communications as they are occurring. If the subjects are conversing in a foreign language or in a code that the law enforcement officers do not understand, and the government does not have translators available to translate and minimize the communications as they are occurring, Title III allows the government to record the conversations in their entirety and minimize the communications later.29 This procedure is called “after-the-fact minimization.” The key to after-the-fact minimization is that the process used must protect the subject’s privacy interests to approximately the same extent as would contemporaneous minimization. To achieve this result, translators are told to translate only the portions of the recorded communications that seem relevant to the crimes under investigation. The translators then give only the relevant portions of the communications to the law enforcement officers.

27 Congress anticipated that communications about crimes that were not identified in the order might be intercepted during a lawfully conducted wiretap. The government may intercept those communications, and disseminate those communications to law enforcement officers for further investigation. If the government wants to use those communications in subsequent court proceedings, it may do so if it obtains an order under 18 U.S.C. §2517(5).
28 United States v. Parks, 1997 WL 136761 (N.D. Ill.).
officers investigating the case. The non-relevant parts of the communications are placed under seal with the court and are not reviewed by the law enforcement officers.30

While not explicitly provided for in Title III, there are other instances when the government cannot minimize the interception of communications as they are occurring, but must intercept, record, and review the entire communication to determine its relevance to the investigation.31 One instance involves electronic communications over facsimile machines, computers, and pager devices, and another instance involves voice-mail left on a telephone system. Given the nature of the communication and the way it is transmitted, the government must intercept the whole communication and use the after-the-fact minimization procedures, disclosing and using only those communications that are relevant to the investigation, and sealing the information that is not relevant.

III. EMERGENCY INTERCEPTIONS

Congress, in recognizing that there are emergency circumstances under which the normal approval processes must be circumvented, enacted a provision by which law enforcement may conduct electronic surveillance without first obtaining a court order. A discussion of that provision follows.

With the approval of a highly-placed Department of Justice official, Title III allows the government to conduct interceptions over a particular facility or within a location without first obtaining a court order when: 1) there is an imminent threat of death or serious bodily harm to an individual; 2) there is a threat to national security; or 3) events characteristic of organized crime are about to occur, and interceptions must begin before a court order can, with due diligence, be obtained in order to prevent the harm, forestall the threat, or capture evidence of the organized crime activity.32 To illustrate these principles and the process involved, consider the following example. The FBI receives information that several armed gunmen have robbed a bank and have taken hostages. Upon arrival at the scene, the FBI observes through the windows of the bank three masked, armed gunmen and four hostages, bound and blindfolded. The FBI also sees that one of the gunmen is talking on a cellular telephone, leading them to believe that the gunman is conversing with co-conspirators. The FBI hostage negotiator reports that the gunmen are making demands for money and safe passage from the bank and out of the country, and that they want to take one of the hostages with them. The gunmen have given the FBI four hours to comply with their demands. At this stage, the FBI identifies the telephone that the gunman is using33 and decides to contact the telephone company to obtain records for the telephone that will show what telephone numbers are being called from the gunman’s telephone.34 An analysis of the calling records reveals that the gunman’s telephone is being used to call a telephone that is registered to the person who also appears as the registered owner

30 United States v. David, 940 F.2d 722 (1st Cir. 1991); United States v. Padilla-Pena, 129 F.3d 457 (8th Cir. 1997).
31 United States v. Tutino, 883 F.2d 1125 (2nd Cir. 1989).
33 When turned on, a cellular telephone emits certain signals. Law enforcement can capture these signals through specialized equipment and identify the telephone.
of a suspected getaway car parked outside of the bank. (A check of motor vehicle records reveals that the name and address information listed for this person is fictitious.) Unable to proceed further, the FBI decides to seek emergency authorization to intercept communications over the telephone used by the gunman. The FBI hopes to obtain information that will help to resolve the situation peacefully, as well to gather evidence about the identities of the gunmen and any of their co-conspirators. To begin the process, the FBI contacts a federal prosecutor in the appropriate United States Attorney’s Office, who contacts the Criminal Division of the Justice Department and talks to one of the lawyers in the Electronic Surveillance Unit. That lawyer coordinates the approval process orally within the Department and with the FBI, and one hour later, the Attorney General personally grants the head of the FBI permission to decide whether an emergency situation exists as defined by the statute and, if so, to intercept calls over the gunman’s phone.

From the time the Attorney General authorizes the interception, the prosecutor has 48 hours to obtain a court order approving the emergency interception. The court order must be based on a written affidavit that is sworn to by a law enforcement officer and sets forth the facts known at the time the emergency was authorized by the Attorney General. If the prosecutor fails to obtain the order within the 48-hour time period, the intercepted telephone calls and any evidence derived from the electronic surveillance must be suppressed. If the emergency situation has not been resolved within the 48-hour period, and the government wants to continue to intercept calls over the telephone, the government must submit an affidavit to the Department of Justice for approval to seek a court order to do so. It is important to note that all of the requirements of Title III apply to emergency situations. The government must have probable cause to believe that communications about a crime listed in the statute will be intercepted over the telephone/facility, or within the location, and that alternative investigative techniques will not suffice to prove the crimes or forestall the danger or threat.

IV. POST-INTERCEPTION REQUIREMENTS

A. The Sealing Requirement
Title III requires that when the government has concluded its electronic surveillance investigation, it must take the original recordings of the communications and place them under seal with the court. The sealing requirement ensures the integrity of the recordings and enables their use at trial. If the government fails to seal the recordings in a timely manner, the court may prohibit their use at trial. Because sealing is only required at the end of the electronic surveillance investigation, the government could continue the interceptions for over a year without having to seal the recordings. However, the Justice Department recommends sealing the recordings every 30 days to ensure the continuing evidentiary value of the recordings.

B. The Notice Requirement
Within 90 days of the conclusion of the electronic surveillance investigation, the government must notify the named subjects that they were the targets of an electronic surveillance investigation.

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This provision gives the subjects the opportunity to challenge the electronic surveillance evidence. If, at the end of the 90-day period, the government is still investigating the subjects, it may seek to postpone the notice for another 90 days, or until further order of the court.

V. ACTIVITY NOT COVERED BY TITLE III

A. Consensual Recordings

Title III, by its terms, does not apply to the interception and recording of telephone calls, face-to-face conversations, or computer or pager transmissions that are made by a law enforcement officer, a confidential informant, or a private citizen, when that person is a participant in the communication.\(^38\) The legal rationale is that a person does not have a reasonable expectation to believe that the person with whom he or she communicates will keep his or her confidence.\(^39\) Therefore, the government does not have to obtain Department of Justice approval or a court order before an undercover government agent or a confidential informant may record a telephone call or a conversation with the subject of a criminal investigation. Additionally, a private citizen may record his or her communications with others as long as he or she is not recording the communications for the purpose of committing a crime or a tortious act. An example of a criminal or tortious act would be that the communication was recorded in order to blackmail someone.

Consensual recordings of a person’s communications are strong evidence of that person’s criminal culpability, and they are commonly used to establish that a person is using a location or a telephone to facilitate the commission of a crime. Therefore, consensual recordings are a very valuable technique for law enforcement to use when a government agent or an informant has gained the trust of someone suspected of criminal wrongdoing.

B. Prison Monitoring

Under Title III, the government may monitor inmate calls over prison telephone lines without obtaining Department of Justice approval or a court order. Specifically, 18 U.S.C. §2510(5)(a) allows the recording of telephone conversations of inmates by prison officials to ensure the safe and orderly administration of the prison. If, however, the government wants to investigate the criminal activities of a particular inmate involving crimes with persons outside of the prison system, the Department of Justice, as a matter of policy, requires the government to obtain its approval and a court order to conduct the electronic surveillance.

C. Video Surveillance

Another common investigative technique that is not proscribed by Title III involves the use of closed-circuit, hidden cameras to record a subject’s criminal conduct. Although Title III does not regulate or prohibit the use of video surveillance, several court opinions have circumscribed its use.\(^40\) In accordance with:

\(^38\) 18 U.S.C. §2511(2)(c), (d).
\(^40\) United States v. Falls, 34 F.3d 674 (8th Cir. 1994); United States v. Kovomejlan, 970 F.2d 536 (9th Cir. 1992); United States v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987); United States v. Biasucci, 786 F.2d 504 (2d Cir. 1986); United States v. Torres, 751 F.2d 875 (7th Cir. 1984); United States v. Mesa-Rincon, 911 F.2d 1433 (10th Cir. 1990).
Title III evidence has been suppressed because the government failed to establish an investigative necessity for the electronic surveillance. Title III evidence has also been suppressed because the government failed to determine if the subjects had been the subject of prior electronic surveillance, and when the government failed to obtain Department of Justice approval before it obtained the court order for the electronic surveillance.

Because of the safeguards placed on the government’s use of electronic surveillance, Title III evidence is rarely suppressed.

VII. CONCLUSION

While Title III limits government conduct with regard to the use of electronic surveillance, this law has provided reasonable guidelines well understood by investigative agents and prosecutors, and these guidelines ensure that the interceptions conducted pursuant to court orders will result in the successful prosecutions of those who communications are intercepted.
ELECTRONIC SURVEILLANCE IN THE UNITED STATES:
A CASE STUDY

Julie P. Wuslich*

I. INTRODUCTION
The following is a case study of a typical electronic surveillance investigation. This case study begins with the initial investigation, and proceeds through preparing the evidence for trial.

II. THE INVESTIGATION
On February 22, 2001, FBI Special Agent Clark Kent interviewed a confidential government informant ("CI-1"). CI-1 has provided reliable information in other investigations, and in those investigations, CI-1 bought drugs and introduced undercover agents to the targets of those investigations. CI-1's information has been corroborated by physical surveillance of the subjects, and information from other confidential informants and an undercover agent. CI-1 has a prior conviction for possession of cocaine, and is cooperating with the FBI in this investigation in hopes of gaining leniency for a family member who has pending drug charges.

During the interview on February 22, CI-1 told Agent Kent that Robert Gerard ("Gerard") and members of his drug crew distribute cocaine and heroin in the Keeney Heights area of Washington, D.C., and that CI-1 bought cocaine from "J-Boy," a member of Gerard's crew, in December 2000. CI-1 identified the following persons as members of Gerard's drug crew: "Little G," "Kay Kay," and "Sweet Nancy." Agent Kent showed driver's license photographs to CI-1 and CI-1 was able to identify Little G as Gene Blum, Kay Kay as Katrina Karr, and Sweet Nancy as Nancy Prim.

On March 30, 2001, Agent Kent learned that Fred Hendricks was murdered that day in the same neighborhood in Keeney Heights where Gerard lives. Agent Kent reviewed the official police reports written by the local police officers investigating the murder. Based upon those reports, Agent Kent learned that Gene Blum, Bridget Lynn, and Natasha Spencer were present at the scene of the murder on March 30. Those reports also contained the following information: The police questioned each of these individuals about the murder. Lynn and Spencer denied any knowledge of the circumstances surrounding the murder. As to Blum, when police arrived at the scene, he was seen trying to leave the area on a motorcycle. Blum was detained and he volunteered to answer some questions. During the questioning, Blum advised the police that there was a quantity of cocaine inside a locked compartment in the motorcycle. Blum gave the keys to the compartment to the...
officer. Later that day, the police obtained a search warrant for the motorcycle compartment. The next day, the search warrant was executed and approximately one quarter of a kilogram of cocaine was found inside. Because Blum is suspected in the murder of Fred Hendricks, a decision was made not to charge Blum with any crime at this time, but rather to continue the investigation.

On April 5, 2001, Gerard’s house was burned to the ground. Agent Kent reviewed police reports of the incident, which reflected that witnesses saw three unidentified males enter the house carrying gasoline, and set the house on fire. Two persons, one of whom was an infant male, were inside the house when the fire was set, and died as a result. Gerard was not at home at the time of the fire.

On April 25, 2001, Agent Kent interviewed Stephen Simon, who has been indicted on charges of distributing cocaine. Simon provided the following information as part of a plea bargain in his pending case. In the presence of his attorney, Simon told Agent Kent that he was a member of a rival drug gang, and that he knows Gerard and Blum. Simon stated that Gerard had given Hendricks two kilograms of cocaine on consignment, and when Hendricks failed to pay Gerard for the cocaine, Gerard had Hendricks killed. Simon stated that he learned this information from his girlfriend, Natasha Spencer, who was at the scene of the murder. Simon stated further that Gerard receives large shipments of cocaine every few months, and that he sells cocaine for $17,500 per kilogram.

On May 5, 2001, the local police interviewed an individual who was willing to provide information about Gerard’s drug trafficking activities. This person (“CI-2”) has never provided information to law enforcement before and, therefore, his reliability is unknown. CI-2 stated that Gerard and Blum are heavily involved in drug trafficking and are very violent. On May 11, 2001, CI-2 told the local police that Gerard and members of his crew were at the Starlight Motel in Raljon, Maryland. Based on this information, local police officers established surveillance at the motel. During the surveillance, officers saw Gerard, Blum, and several unidentified males enter and exit two motel rooms.

On May 13, 2001, an undercover FBI agent (“UC”) was sent to the Starlight Motel to apply for employment. On May 18, 2001, the UC began work at the Starlight Motel as a maintenance worker.

On May 20, 2001, CI-2 told the local police that Gerard and Blum were at the Starlight Motel, and that they were selling drugs from a room there. That day and the following day (May 21, 2001), surveillance agents observed Gerard and Blum entering and exiting room 123. In addition, throughout the day, several unidentified males were seen entering room 123, staying a few minutes, and then leaving the room.

On May 25, 2001, CI-2 stated that Blum had gone to the Starlight Motel again to sell drugs. The local police conducted surveillance of the motel and saw Blum exit room 178. Blum entered a Chevy Suburban truck that was being driven by a female. Surveillance agents later identified this female from photographs as Nancy Prim. One hour later, agents saw the Chevy Suburban return to the motel. Blum exited the car and entered room 178. Prim, the driver, departed the area.
On May 25, 2001, the UC was working at the motel, when someone from room 178 called the front desk to complain about a maintenance problem. The UC went to room 178 to fix the problem and observed Blum and two unidentified males inside the room. When the UC arrived, he heard Blum refer to one of the unidentified males as “J-Boy.” While in the room, the UC used the telephone to make a call to another police officer. During the call, the UC mentioned going to a party and getting some cocaine to take to the party. Blum overheard the UC’s call and offered to sell the UC some cocaine. The UC, who was wearing a recording device, recorded his conversation with Blum. During the conversation, Blum stated, “I can get you all the coke you want. How much do you want?” The UC replied, “I’ll take an oz (one ounce of cocaine).” Blum told the UC to call him later at the motel. The UC then left the room.

That evening, the UC called the telephone in room 178 and spoke to Blum. The UC recorded his conversation with Blum. During the conversation, Blum stated, “I can get you all the coke you want. How much do you want?” The UC replied, “I’ll take an oz (one ounce of cocaine).” Blum told the UC to call him later at the motel. The UC then left the room.

That evening, the UC called the telephone in room 178 and spoke to Blum. The UC recorded his conversation with Blum. During the conversation, Blum stated, “I can get you all the coke you want. How much do you want?” The UC replied, “I’ll take an oz (one ounce of cocaine).” Blum told the UC to call him later at the motel. The UC then left the room.

On May 26, 2001, at 9:15 a.m., the UC paged Blum at the number he was given, and input the telephone number of his cellular telephone. At 9:20 a.m., the UC received a call from Blum. The caller identification device on the UC’s cellular phone revealed that Blum was calling from a telephone bearing the number (202) 514-1234. During this conversation, which the UC recorded, the UC told Blum that he was ready to buy some cocaine from him. Blum instructed the UC to meet him at room 178 at the Starlight Motel at 10:30 a.m. Blum then ended the call. Later, the FBI subpoenaed telephone records for Blum’s phone, (202) 514-1234 (hereinafter, referred to as the “target phone”). Those records show that immediately after Blum ended the call with the UC, the target phone was used to call a pager. The FBI subpoenaed records for the pager from the service provider, and learned that the pager is subscribed to in the name of Dorothy Gerard, Gerard’s mother. At 10:30 a.m., the UC arrived at the motel and met Blum in room 178. The UC bought one ounce of cocaine from Blum in exchange for $1,100. Meanwhile, surveillance agents were outside the motel. After the transaction, the UC left the motel room, followed by Blum. Blum entered a white Ford Navigator sport utility vehicle and drove away from the motel. Surveillance agents followed Blum to Interstate Highway 95. While Blum was driving on Interstate 95, he slowed down and drove along side of the car being driven by the surveillance agents. Blum waived to the agents and then sped off. Realizing that they had been detected, the agents discontinued surveillance of Blum.

On June 2, 2001, the UC attempted to contact Blum at the pager number Blum had given the UC. The UC never received a call back from Blum.

On June 22, 2001, a local police officer contacted Agent Kent and advised that she had been contacted by a confidential informant (“CI-3”). The police officer advised Agent Kent that CI-3 was reliable, and that CI-3 had provided credible information to her in the past. The police officer advised that CI-3, who is associated with many gang members, knows that Blum uses the target phone in furtherance of his drug business.

On June 28, 2001, Agent Kent learned of another confidential informant working for the local police ("CI-4"). CI-4 has never provided information before, but knows Blum and has bought cocaine from Blum on several occasions within the last six months, most recently in the beginning of June 2001. CI-4 stated that he has never bought cocaine from Gerard, but knows that Blum works for Gerard as a drug distributor. CI-4 indicated that he would be willing to contact Blum to buy cocaine, but that he was not willing to record any of his conversations with Blum. CI-4 stated that, given the drug crew’s reputation for violence, he feared retribution from Blum or others, if the recording equipment was detected on his person.

On August 1, 2001, at 1:20 p.m., CI-4 paged Blum and input the telephone number where CI-4 could be reached. At 1:45 p.m., Blum called CI-4. Subpoenaed phone records for the target phone show that at approximately 1:45 p.m., the target phone was used to call CI-4’s phone. According to CI-4, he told Blum that he wanted to buy an ounce of cocaine. Blum told CI-4 to meet him at a gas station in one hour. One hour later, CI-4 went to the gas station. Before CI-4 arrived at the gas station, Agent Kent searched CI-4 for contraband, with negative results, and gave CI-4 $1,100 in pre-recorded government funds. Surveillance agents then observed CI-4 approach the gas station. A short while later, Blum arrived at the gas station in a red Lexus automobile. Blum got out of his car and walked over to CI-4. Agents saw CI-4 hand something to Blum. Blum returned to his car, reached inside, and returned to CI-4. Blum handed an object to CI-4. CI-4 left the gas station and Blum drove away. CI-4 then met with Agent Kent and gave him one ounce of a substance that later tested positive for the presence of cocaine.

On August 5, 2001, Agent Kent subpoenaed telephone records for the target phone from the service provider. A review of those records shows that between July 2, and August 2, 2001, the target phone was used to make and receive a total of 1,144 calls. Of that total number of calls, Agent Kent determined that the target phone was used to make calls to the following telephone numbers: 1) 34 calls to the pager believed to be used by Gerard, most recently on August 1, 2001; 2) 22 calls to a residential phone subscribed to by Dorothy Gerard, most recently on July 23, 2001. Agents conducting physical surveillance have seen Gerard frequent this residence; and 3) 19 calls to a telephone at the Starlight Motel, most recently on July 28, 2001. Agents observed Gerard, “J-Boy,” and Nancy Prim at the Starlight Motel on July 22, 2001, and saw “J-Boy” at the motel on July 28, 2001.

III. POST-APPROVAL PROCESS

Based upon the above facts, on August 10, 2001, the FBI agent and the prosecutor submitted an application and an affidavit\(^2\) to the Department of Justice, seeking approval to conduct electronic surveillance over Blum’s phone—the target phone—in connection with their investigation of federal drug crimes being committed by Blum and others. On August 12, 2001, the Department of Justice approved the application,\(^3\) authorizing the prosecutor to seek a court order for the electronic surveillance. On August 13, 2001, the prosecutor submitted the application and affidavit to a judge for approval. On

\(^2\) See Attachments A and B.

\(^3\) See Attachment C.
August 13, 2001, the judge signed the order granting authorization to intercept wire communications over the target phone used by Blum to investigate federal drug violations being committed by him and his co-conspirators.

IV. CONDUCTING THE ELECTRONIC SURVEILLANCE

A. The Logistics

1. The Personnel

Conducting an electronic surveillance investigation is a manpower intensive operation, requiring the requisite number of monitors (those persons who will be intercepting and recording the communications) and an adequate number of law enforcement officers to provide investigative assistance during the course of the investigation.

Depending on the type of criminal activity being investigated, the government may want to monitor the telephone or the location, 24 hours a day, seven days a week. In a typical drug investigation, like the one described above, the government will monitor the telephone on a constant basis and an issue will be whether the government can locate and train enough monitors in order to comply with Title III's minimization requirements as outlined in 18 U.S.C. §2518(5). In addition to the hours during which the interception will be conducted, the government must determine if it will need monitors who speak a foreign language or who are conversant in the coded language that the subjects may be using to discuss their criminal activity. Drug dealers often discuss their illegal activities in coded terms. In one investigation, the drug traffickers had their own language, where they used numbers to represent the letters of the alphabet. By the end of the investigation, the government had a complete dictionary of coded words that the drug dealers used.

Many times, the monitors are not federal law enforcement agents. Title III permits the use of local and state police officers and contract personnel (such as foreign language translators) to monitor the communications as long as they are under the supervision of a federal agent.5

As to the requisite number of law enforcement personnel, it is critical that the government has enough officers to engage in complimentary investigative action to corroborate and support the electronic surveillance evidence. For example, as explained above, drug dealers often use coded language when conversing with one another over the telephone, and sometimes will use code words that reflect legitimate business activities in which they may be involved. In one recent case, the drug dealer owned an auto repair shop. When the dealer discussed his drug trafficking activities over the telephone, he often used terminology related to the auto repair business. Physical surveillance of his business was used to show that, despite his claims that his calls were related to his legitimate business, he had very few customers, performed very little, if any, auto repair work, and that his business was often closed during normal business hours. In addition, through physical surveillance, the agents were able to seize a load of cocaine based upon a series of calls that were intercepted over the drug dealer's telephone,6 in which the dealer used words related to his business.

4 See Attachment D.


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Without physical surveillance, the government would not have been able to contradict the drug dealer’s assertions that his calls were innocent in nature, nor would it have been able to seize corroborative evidence, in this case a load of cocaine, of his drug dealing.

Intercepted communications, in and of themselves, are rarely enough to convict the subjects of the crimes. Rather, intercepted communications are a means by which to establish relationships between individuals and to locate evidence that will be used at trial to prove the crimes. Without corroborative evidence obtained through physical surveillance and other investigative techniques, the wiretap evidence has little or no meaning to a trier of fact.

2. Where to Monitor the Communications

Under Title III, a court can only issue an order for communications that will be intercepted within its territorial jurisdiction. Judicial opinions have defined the term “interception” broadly so that it can occur in at least two places: 1) where the interception (or initial capture of the communications) will occur technically for the first time (this is usually the place where the premises are physically located or where the telephone is being used), or 2) where the communications will be redirected and heard or accessed by the government for the first time (the monitoring location). It is the policy of the Department of Justice that if the government is going to listen to, or access, the communications in a jurisdiction where the premises are not located or where the telephone is not being used, there must be some investigative connection to that jurisdiction, i.e., some element of the criminal conspiracy is occurring there. Usually, the telephone or the premises is located in the same jurisdiction where the government will be monitoring (i.e., listening to or accessing) the communications, but that is not always the case. In the scenario outlined above, subject Blum uses a cellular telephone in two jurisdictions, Washington, D.C., and Maryland, to commit his drug trafficking activities. It would be permissible under Title III to obtain the court order in either place. In this instance, it is likely the government would obtain the court order from a judge in the jurisdiction where it can monitor the communications.

Given the mobility of cellular telephones and the ability to access the Internet from anywhere, traditional notions of jurisdiction and where an interception of a communication actually takes place no longer apply. In the case of computers, consider this example: the subject lives in jurisdiction A, where he or she orchestrates a nationwide criminal conspiracy using his or her home computer; the Internet service provider that processes the communications is in jurisdiction B, where the communications are captured or intercepted, in technical terms, for the first time; and the law enforcement agency investigating the

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6 18 U.S.C. §2517(1), (2) permit the disclosure of electronic surveillance evidence by law enforcement officers to other officers while acting in the proper performance of their duties. See also United States v. Vento, 533 F.2d 838 (3rd Cir. 1976); United States v. Rabstein, 554 F.2d 190 (5th Cir. 1977). Section 2517 does not authorize disclosure of wiretap information to foreign law enforcement officers. United Kingdom v. United States of America, 238 F.3d 1312 (11th Cir. 2001).

7 18 U.S.C. §2518(3).
case is in jurisdiction C, where some elements of the criminal conspiracy are occurring and where it has the technical capability to access the subject's communications from the service provider. Arguably, jurisdiction could lie in all three of these places. Most likely, the government would obtain the court order authorizing the interception of the subject's communications in jurisdiction A, where the subject is actually using the computer to commit the crimes and where he or she will ultimately be prosecuted for them.

Consequently, when considering the court's jurisdiction to authorize the interception of communications in today's technically advanced world, it is important to consider the types of communication devices that criminals use to facilitate their crimes, law enforcement's ability to intercept those communications, and the telecommunication industry's ability to assist law enforcement in this area. Jurisdiction is no longer a concept defined strictly by geographical boundaries. Technology has erased those boundaries and now permits criminals a global reach, allowing them to facilitate the commission of crimes in places far from where they may be.

B. The Role Of The Prosecutor

1. Training the Monitors

The prosecutor and the lead investigating agent are responsible for training the monitors, those persons who will be intercepting, listening to, and recording the communications. The monitors may not be law enforcement agents, but could be support personnel who work for the law enforcement agency, foreign language translators, or local police officers with no experience in conducting an electronic surveillance investigation. The initial training of the monitors involves two components. First, the monitors must read the affidavit that was submitted for approval so that they understand the investigation, know who the subjects are, and what crimes are being committed. Second, the prosecutor must instruct the monitors about the proper minimization procedures. The monitors must not only attempt to minimize the interception of innocent communications, but also they must avoid intercepting communications between persons and their attorneys, between husbands and wives, between doctors and patients, and between parishioners and clergy. Additionally, the prosecutor must instruct the monitors about how long they can intercept a communication to determine if it is criminal in nature, what to do if a privileged communication was intercepted inadvertently, and how to maintain the recordings in a way that

9 See Attachment E.
10 18 U.S.C. §2517(4). It should be noted, however, that if an attorney, spouse, doctor, or clergyman is involved in the criminal conspiracy, the government may intercept the communications. For example, in alien smuggling cases, attorneys are often used to obtain fraudulent documents for the illegal aliens. In insurance fraud cases, doctors are often co-conspirators by performing unnecessary medical procedures or providing false documentation to support an insurance claim. See United States v. Zolin, 491 U.S. 554 (1962) (crime fraud exception to attorney-client privilege); United States v. Dube, 820 F.2d 886 (7th Cir. 1987) (clergy-penitent privilege did not apply where person was seeking relief from his obligation to pay taxes); United States v. Gotti, 771 F. Supp. 535 (E.D.N.Y. 1991) (outlines elements of a privileged attorney-client relationship); United States v. Cooper, 2000 WL 135248 (D.D.C.) (crime fraud exception applies to marital communications).
will preserve their integrity for use later at trial.

Once the interception begins, the prosecutor and the lead agent will need to continue to advise the monitors, particularly any new monitors, about developments in the case of which they are not aware. For example, they will need to inform the monitors of: 1) patterns of innocent conduct that are developing and the need to minimize the interception of communications relating to it; 2) whether the subjects are involved in crimes that were not listed in the court’s order; 3) whether new subjects have been identified; 4) whether a privileged relationship now exists involving any of the subjects; and 5) the identification of locations that may be used by the subjects to facilitate their crimes.

2. Submission of Progress Reports

When the government applies for an order to conduct electronic surveillance, the judge routinely orders the prosecutor to submit progress reports to him or her every ten days during the 30-day authorization period.12 There is no standard format for progress reports but, typically, they include information about: 1) the total number of communications intercepted; 2) the number of communications that related to the crimes under investigation; 3) the number of innocent communications intercepted; 4) whether any new subjects have been identified; 5) whether there have been seizures of contraband or arrests of any of the subjects; 6) whether communications about crimes not listed in the order were intercepted; 7) whether there have been technical problems with the interception; and 8) why the government needs to continue the interception to meet its investigative goals.

Progress reports are meant to keep the judge apprised of developments and problems in an electronic surveillance investigation, thereby giving the judge the opportunity to exercise his or her discretion and terminate the interceptions if the judge determines that the investigative goals have been met, or that the government is not conducting the interceptions in a lawful manner.

3. Providing Legal Advice and Support

The prosecutor should be an active participant in the conduct of the electronic surveillance, by supervising and advising the law enforcement agents conducting the investigation. Often, problems will arise that require a legal opinion that the law enforcement officers are incapable of making because they lack the experience or training. Generally, the prosecutor’s role is to ensure the admissibility of the evidence at trial, to ensure the development of the best evidence, and to make sure that the electronic surveillance is conducted properly. Consider the following examples.

Many times during a Title III investigation, the government will intercept communications about crimes that were not listed in the court’s order. If the government wants to be able to use

11 The monitors often use a procedure called “spot monitoring,” whereby the monitor will listen to a telephone call or face-to-face conversation for a short period of time to determine if the communication is criminal in nature. If the call or conversation does not appear to be criminal, the monitor will cease interceptions for a brief period of time, and then resume listening to the call or conversation once again. This process may be repeated several times during the interception of a call or conversation.

this evidence later, the prosecutor must apply to the court for an order allowing the government to use these communications in furtherance of its investigation, particularly in any court proceeding that may arise from the investigation. For instance, if the court order authorized the interception of communications related to drug-trafficking, and telephone calls about prostitution were intercepted, the prosecutor must submit an application to the judge asking permission to be able to use the prostitution calls in its investigation of the subjects, and to disclose the contents of those calls at a subsequent trial of the subjects. In the investigation outlined above, it is likely that conversations about crimes related to the subjects’ drug-trafficking activity will be intercepted. Given the subjects’ propensity for violence, the government may intercept calls about attempts to commit acts of violence in connection with the subjects’ drug business. Likewise, the government would have to obtain a court order allowing it to use these calls in its prosecution of the subjects. Alternatively, if the government wants to extend the electronic surveillance investigation beyond the first 30 days of interceptions, the government may seek to expand its investigation by including information about these new crimes in the application and affidavit in support of the extension order. The judge may then issue an order authorizing the government to continue to intercept communications about these crimes for a 30-day period.

When contemplating this action, the prosecutor must advise the agents how to seize that evidence legally, without compromising the ongoing electronic surveillance investigation. For example, the government may intercept calls indicating that a load of drugs will be transported in a vehicle from one location to another. Given drug traffickers’ natural wariness that they could be under investigation, the prosecutor and the agents must decide when and how to seize the drugs without alerting the subjects of the ongoing electronic surveillance investigation. In this scenario, the prosecutor could advise the agents to give a description of the vehicle to the local police, telling them that the vehicle may contain drugs, and ask them to stop the vehicle on a pretext, such as a traffic infraction. The police officer could then ask the driver of the vehicle to consent to a search of the car. If the driver does consent to the search, which is common, the officer could discover and seize the drugs.

It is also common during the course of an electronic surveillance narcotics investigation that the law enforcement agents will develop evidence about where drugs are being stored or how they are being transported, and the prosecutor must advise the agents how to seize that evidence legally, without compromising the ongoing electronic surveillance investigation. For example, when the vehicle was stopped was based on information from the wiretap that the vehicle contained drugs. In the investigation outlined herein, there is another, more sinister risk. Given Gerard’s propensity for violence, he may take retaliatory action against the driver, if the driver cannot show that the drugs were seized.

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by law enforcement. Gerard, suspecting that the driver kept the drugs for himself, may harm him.

C. The Role Of The Judge

When Congress enacted Title III, it contemplated, by permitting or requiring the judge to assume certain responsibilities, that the judge who issued the order authorizing the electronic surveillance would be an active participant in the investigation. Specifically, as discussed above, Title III permits the judge to require that the prosecutor submit progress reports during the 30-day interception period. In addition, if the government intercepts communications about crimes not authorized for interception in the order, the government must obtain permission from the judge to use those communications in its investigation and prosecution. Additionally, the judge must order the recordings of the communications sealed for safekeeping, and direct the government's efforts to notify those persons who were intercepted during the course of the electronic surveillance investigation that they were the subject of a wiretap.

Not only does Title III encourage a judge's active participation in an electronic surveillance investigation, but appellate courts are more forgiving of government mistakes or missteps in an electronic surveillance investigation if the supervising judge was aware of, and condoned, the government's actions.16

V. TERMINATION OF THE INVESTIGATION

A. Policy Considerations

In every investigation, a tension always exists between tolerating ongoing criminal activity known to have a devastating effect on individuals and the community at large, and the need to accumulate enough evidence to dismantle the criminal organization and to prosecute the subjects successfully. For instance, in a drug investigation, the intercepted communications and the accompanying physical surveillance show that cocaine is being sold on a daily basis from an abandoned building near a school, and that this activity is putting children at risk. In alien smuggling investigations, there is evidence that the illegal aliens are being subjected to dangerous conditions that might result in their death. Child pornography investigations may reveal that a pedophile is contacting potentially hundreds of children a month. In the scenario set forth above, drug trafficker Gerard has exhibited a willingness to use violence in connection with his drug trafficking activities, and retaliatory action by unknown persons resulted in additional deaths.

Occasionally, during an electronic surveillance investigation, communications may be intercepted where the subjects are planning to kill someone. Most of the time, the intended victim is another criminal. In that instance, the law enforcement agency has an obligation to warn the intended victim, offer protection, and continue to monitor the situation through the interception of communications and other investigative techniques. Other times, the intended victim may be a law enforcement officer or an innocent bystander, and there may or may not be prior notice of the crime.

16 United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984) (court authorized interceptions to continue over a telephone with a different telephone number); United States v. Ozar, 50 F.3d 1440 (8th Cir. 1995) (court approved the government's minimization procedures).
In one investigation of a group of drug traffickers, the government learned that the subjects were planning the murder of a law enforcement officer who had been instrumental in the conviction of one of their co-conspirators. The government wanted to continue the electronic surveillance investigation of the subjects' drug-trafficking activities while it attempted to thwart the threat against the officer's life. Through the use of a confidential informant, the government was able to fake the officer's death to the satisfaction of the subjects, and it continued its investigation into the subjects' drug activity until it accumulated enough evidence to convict every member of the conspiracy.

In a public corruption investigation that was conducted several years ago, the FBI intercepted calls over a cellular telephone used by a corrupt local police officer. During one call, the FBI intercepted a conversation between the police officer and a co-conspirator, wherein the officer ordered the co-conspirator to kill a woman who had filed a complaint against him. The call, however, did not reveal enough details about the intended murder victim or where the murder was to occur. The FBI learned later that the co-conspirator killed the woman shortly after the call ended. The electronic surveillance investigation was terminated soon thereafter, and the police officer and his co-conspirators were arrested. At some point, the risk of further investigation outweighs the benefit of accumulating additional evidence against the subjects.

B. Legal Requirements And Practical Considerations

Title III requires that an electronic surveillance investigation must be terminated when the government's defined investigative goals have been met, i.e., the identification of a drug supplier, sufficient evidence of a fraud conspiracy, or the interception of a particular criminal event. When the government is ready to end the electronic surveillance investigation, it must perform certain administrative tasks required by Title III, and formulate a plan that will result in the greatest number of arrests and seizures of evidence.

1. Administrative Tasks

At the end of every electronic surveillance investigation, the government must seal the recordings of the intercepted communications, and notify the subjects that they were the targets of the wiretap.

As to sealing the recordings, Title III requires that the government seal the original recordings of the communications immediately upon the termination of the electronic surveillance investigation in order to protect their authenticity and integrity for use at trial. In order to seal the recordings, the government makes the recordings available to the judge for inspection. If the judges waive inspection of the tapes, or after he or she inspects them, the tapes are placed in containers and sealed. After the containers are sealed, the judge, the prosecutor, and the lead investigative agent initial and date each container. The judge then issues an order, directing the law enforcement agency to maintain the sealed tapes in a secure location. Sealing of the recordings can be an arduous undertaking if the electronic surveillance investigation has involved numerous

telephones and locations, and spanned several months. If the government fails to seal the tapes or fails to seal them in a timely manner, and cannot offer a satisfactory explanation for the delay or failure to seal, the court may find that either the defendant was prejudiced by the government’s actions or that the tapes were tampered with, and exclude the evidence from the trial.\textsuperscript{20}

With regard to the notification requirement, Title III and related judicial opinions mandate that the government notify the subjects of the electronic surveillance that they were either named as subjects in the court order or that their communications were intercepted during the electronic surveillance investigation.\textsuperscript{21} Specifically, the government informs the subjects whether the court granted its application to conduct the surveillance and, if so, the date of the court order, when the interceptions occurred, and whether their communications were intercepted. Occasionally, the government may not be able to identify all of the persons who were intercepted during the course of the electronic surveillance and, therefore, cannot provide them with notice. In the investigation outlined above, “J-Boy” may never be identified by his true name, and if he was intercepted during the investigation, he may never receive notice of it. Of course, if the government cannot identify him, he will not be prosecuted for his role in the conspiracy.

\textsuperscript{20} \textit{United States v. Gangi}, 33 F. Supp.2d 303 (S.D.N.Y. 1999) (two-day delay in sealing the tapes was legally acceptable); \textit{United States v. Wilkinson}, 53 F.3d 757 (6th Cir. 1995) (court found no prejudice to the defendant, tampering with the recordings, or any effort to gain a tactical advantage by failure to seal the recordings in a timely manner).


2. \textbf{How and When to Terminate the Investigation}

The type of criminal organization under investigation will dictate how and when the subjects are arrested and when locations are searched for contraband or documentary evidence. In cases involving drug organizations, gangs, and alien smuggling, for example, it is imperative to coordinate the arrests and the searches on the same day, even if the criminal organization is a nationwide one with persons and locations in different parts of the country. Once the existence of the investigation has become known, subjects are more likely to flee and destroy evidence. Therefore, the largest number of arrests and seizures of evidence will occur if they are done simultaneously. To facilitate the “takedown” of a case, it is often helpful to continue the electronic surveillance investigation after the individuals have been arrested. It is not uncommon to intercept communications about the identities of subjects not previously known to law enforcement or locations where contraband is being stored during the period after the takedown. Under American jurisprudence, continuing to intercept the communications of those persons who have been arrested does not violate the individual’s constitutional rights against self-incrimination or right to counsel.\textsuperscript{22}

VI. TRIAL PREPARATION

A. Evaluating The Evidence

Once the electronic surveillance investigation has been terminated, the prosecutor must evaluate the evidence and review how the investigation was conducted. The prosecutor must

determine if all of the technical requirements of Title III were met and, if not, whether the technical violations are fatal to the case. It is the general rule that if the government acted in good faith and without a reckless disregard for the statute, wiretap evidence will not be suppressed as long as the defendant was not prejudiced by the errors. On rare occasions, the courts have suppressed evidence when the affidavit supporting the government’s request for the wiretap contained misleading statements, or when law enforcement agents made a conscious decision not to comply with certain provisions of Title III.

B. Discovery Obligations Under Title III

Under 18 U.S.C. §2518(9), the government must provide the defendant with a copy of the application and order under which the electronic surveillance was approved ten days before the trial, hearing, or proceeding, at which evidence of the communications will be introduced. The purpose of this provision is to give the defendant “an opportunity to make a pretrial motion to suppress” the evidence. It is within the court’s discretion to order the government to provide any other documentation, including the recordings of the communications themselves, to the defendant at this time.

While section 2518(9) provides the defendant with a right to the application, order, and related documents, section 2518(8)(b) makes it clear that the defendant is entitled to only that evidence which is relevant to his or her defense and is not protected from disclosure by some other right or privilege. In some instances, courts have ordered information redacted from the application and order before those documents were provided to the defendant.

With regard to the recordings of the communications, general rules of discovery require that the government provide the defendant with copies of those recordings which are relevant to his or her defense. Typically, the government will provide copies of all of the recordings.

23 United States v. Donovan, 429 U.S. 413 (1977); United States v. Ozar, 50 F.3d 1440 (8th Cir. 1995) (inadvertent interception of attorney-client communications); United States v. Estrada, 1995 WL 577757 (S.D.N.Y) (inaccurate summaries of conversations was careless but there was no intentional disregard for the truth); United States v. Velazquez, 1997 WL 564674 (N.D. Ill.) (mistake in initial identification of a subject did not constitute a knowing false statement and a reckless disregard for the truth).


25 United States v. Luong, No.CR-94-0094 MHP (N.D. Cal. 7/14/98) (unpublished) (law enforcement officer admitted that he did not perform the check for prior applications as required by 18 U.S.C. §2518(1)(e) because it would have taken too much time.).
to the defendant to forestall any later argument by the defendant that the government withheld evidence that might have been exculpatory or helpful to the defendant’s case.

VII. CONCLUSION

As demonstrated herein, electronic surveillance is a valuable technique to use to combat crime. Congress, while allowing law enforcement to use this very invasive technique, has proscribed the manner in which it can be used, attempting to design a legal regime that protects the individual from unnecessary invasions into privacy and according the individual certain due process rights to challenge the evidence against him or her.
ATTACHMENT A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

IN THE MATTER OF AN
APPLICATION FOR AN ORDER
AUTHORIZING THE INTERCEPTION
OF WIRE COMMUNICATIONS

APPLICATION FOR
INTERCEPTION OF WIRE
COMMUNICATIONS

Lois Lane, an Assistant United States
Attorney, District of Columbia, being
duly sworn, states:

1. I am an investigative or law
enforcement officer of the United
States within the meaning of Section
2510(7) of Title 18, United States
Code, that is, an attorney authorized
by law to prosecute or participate in
the prosecution of offenses
enumerated in Section 2516 of Title
18, United States Code.

2. This application is for an order
pursuant to Section 2518 of Title 18,
United States Code, authorizing the
interception of wire communications
until the attainment of the authorized
objectives or, in any event, at the end
of thirty (30) days from the earlier of
the day on which the investigative or
law enforcement officers first begin to
conduct an interception under the
Court’s order or ten (10) days after
the order is entered, of Gene Blum,
Robert Gerard, Katrina Karr, Nancy Prim,
“J-Boy” (hereinafter the “Target
Subjects”), and others as yet
unknown.

3. Pursuant to Section 2516 of Title 18,
United States Code, the Attorney
General of the United States has
specially designated the Assistant
Attorney General, any Acting
Assistant Attorney General, any
Deputy Assistant Attorney General or
any acting Deputy Assistant Attorney
General of the Criminal Division to
exercise the power conferred on the
Attorney General by Section 2516 of
Title 18, United States Code, to
authorize this Application. Under the
power designated to him by special
designation of the Attorney General
pursuant to Order Number 2407-
2001, dated March 8, 2001, an
appropriate official of the Criminal
Division has authorized this
Application.

4. I have discussed all of the
circumstances of the above offenses
with Special Agent Clark Kent of the
Federal Bureau of Investigation, who
has directed and conducted this
investigation and have examined the
Affidavit of Special Agent Kent, which
is attached to this Application and is
incorporated herein by reference.
Based upon that Affidavit, your
applicant states upon information and belief that:

a. there is probable cause to believe that the Target Subjects and others as yet unknown have committed, are committing, and will continue to commit violations of Title 21, United States Code, Sections 841, 843, and 846.

b. there is probable cause to believe that particular wire communications of the Target Subjects concerning the above-described offenses will be obtained through the interception of wire communications. In particular, these wire communications will concern the distribution of cocaine and heroin, the identities of co-conspirators, the sources of supply for the drugs, and the methods by which the Target Subjects carry out their illegal activities. In addition, the communications are expected to constitute admissible evidence of the commission of the above-stated offenses;

c. normal investigative procedures have been tried and failed, reasonably appear to be unlikely to succeed if tried, or are too dangerous to employ, as is described in further detail in the attached Affidavit;

d. there is probable cause to believe that the Target Telephone is being used and will continue to be used in connection with the commission of the above-described offenses.

5. The applicant is aware of no previous applications made to any judge for authorization to intercept the oral, wire or electronic communications involving any of the same persons, facilities, or premises specified in this application.

WHEREFORE, your applicant believes that there is probable cause to believe that the Target Subjects and others as yet unknown are engaged in the commission of offenses involving Title 21, United States Code, Sections 841, 843, and 846, and that the Target Subjects and others yet unknown are using the Target Telephone in connection with the commission of the above-described offenses; and that wire communications of the Target Subjects and others yet unknown will be intercepted over the Target Telephone.

Based on the allegations set forth in this application and on the affidavit of Special Agent Kent, attached, the applicant requests this court to issue an order pursuant to the power conferred upon it by Section 2518 of Title 18, United States Code, authorizing agents of the Federal Bureau of Investigation, and officers of the Metropolitan Police Department and the Prince George's County Police Department, and contract personnel under the supervision of a federal agent, to intercept wire communications to and from the Target Telephone until such communications are intercepted that reveal the manner in which the Target Subjects and others unknown participate in the specified offenses and reveal the identities of their coconspirators, places of operation, and nature of the conspiracy, or for a period of 30 days measured from the day on which the investigative or law enforcement officers first begin to conduct the interception or ten days from the date of this order, whichever occurs first.

IT IS REQUESTED FURTHER that the authorization given be intended to apply not only to the target telephone number listed above, but to any changed telephone number subsequently assigned to the instrument bearing the same
electronic serial number (ESN) as the Target Telephone within the thirty (30) day period. It is also requested that the authorization be intended to apply to background conversations intercepted in the vicinity of the target telephone while the telephone is off the hook or otherwise in use.)

**IT IS REQUESTED FURTHER,** pursuant to Title 18, United States Code, Section 2518(3), that in the event that the Target Telephone is transferred outside the territorial jurisdiction of this Court, interceptions may take place in any other jurisdiction within the United States.

**IT IS REQUESTED FURTHER** that this Court issue an order pursuant to Section 2518(4) of Title 18, United States Code, directing Killion Communications, an electronic communications service provider as defined in Section 2510(15) of Title 18, United States Code, to furnish and continue to furnish the Federal Bureau of Investigation with all information, facilities and technical assistance necessary to accomplish the interceptions unobtrusively and with a minimum of interference with the services that such provider is according the persons whose communications are to be intercepted, and to ensure an effective and secure installation of electronic devices capable of intercepting wire communications over the above-described telephone. The service provider shall be compensated by the Applicant for reasonable expenses incurred in providing such facilities or assistance.

**IT IS REQUESTED FURTHER,** to avoid prejudice to this criminal investigation, that the Court order the provider of electronic communication service and its agents and employees not to disclose or cause a disclosure of this Court’s Order or the request for information, facilities, and assistance by the Federal Bureau of Investigation or the existence of the investigation to any person other than those of their agents and employees who require this information to accomplish the services requested. In particular, said provider and its agents and employees should be ordered not to make such disclosure to a lessee, telephone subscriber, or any participant in the intercepted communications.

**IT IS REQUESTED FURTHER** that this Court direct that its Order be executed as soon as practicable after it is signed and that all monitoring of wire communications shall be conducted in such a way as to minimize the interception and disclosure of the communications intercepted to those communications relevant to the pending investigation, in accordance with the minimization requirements of Chapter 119 of Title 18, United States Code. The interception of wire communications authorized by this Court's Order must terminate upon attainment of the authorized objectives or, in any event, at the end of thirty (30) days measured from the day on which investigative or law enforcement officers first begin to conduct an interception or ten (10) days after the Order is entered.

Monitoring of conversations must immediately terminate when it is determined that the conversation is unrelated to communications subject to interception under Chapter 119 of Title 18, United States Code. Interception must be suspended immediately when it is determined through voice identification, physical surveillance, or otherwise, that none of the named subjects or any of their confederates, when identified, are participants in the conversation unless it is determined
during the portion of the conversation already overheard that the conversation is criminal in nature.

IT IS REQUESTED FURTHER that the Court order that either the applicant or any other Assistant United States Attorney familiar with the facts of the case provide the Court with a report on or about the tenth, twentieth, and thirtieth days following the date of this Order showing what progress has been made toward achievement of the authorized objectives and the need for continued interception. If any of the aforementioned reports should become due on a weekend or holiday, it is requested further that such report become due on the next business day thereafter.

IT IS REQUESTED FURTHER that the Court order that its Order, this application and the accompanying affidavit and any other orders, and all interim reports filed with the Court with regard to this matter be sealed until further order of this Court, except that copies of the Order(s), in full or redacted form, may be served on the Federal Bureau of Investigation and the service provider as necessary to effectuate the Court’s Order as set forth in the proposed order accompanying this application.

DATED this 13th day of August, 2001.

Lois Lane
Assistant United States Attorney

SUBSCRIBED and SWORN to before me this 13th day of August, 2001.

UNITED STATES DISTRICT COURT
JUDGE
DISTRICT OF COLUMBIA
ATTACHMENT B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES OF AMERICA FOR AN ORDER
AUTHORIZING THE INTERCEPTION
OF WIRE COMMUNICATIONS

AFFIDAVIT IN SUPPORT OF
APPLICATION

Introduction

Clark Kent, being duly sworn, deposes and states as follows:

1. I am a Special Agent with the Federal Bureau of Investigation ("FBI"), United States Department of Justice. I have been so employed by the FBI since August 1994. Since becoming a Special Agent, I have participated in numerous criminal investigations, including investigations into suspected narcotics trafficking. For the past five years, I have been assigned to the Washington, D.C., resident agency of the FBI, where I am responsible for investigations focusing on the distribution of narcotics by violent drug trafficking organizations. In that time, I have participated in the execution of numerous search warrants and arrests, and have been the affiant on three previous affidavits submitted in support of the authorization to intercept wire communications. As such, I am familiar with the operation of illegal drug trafficking organizations, and the methods used to distribute narcotics.

2. I am an investigative or law enforcement officer of the United States within the meaning of Section 2510(7) of Title 18, United States Code, and am empowered by law to conduct investigations and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

3. This affidavit is submitted in support of an application for an order authorizing the interception of wire communications occurring to and from a cellular telephone bearing the number (202) 514-1234, electronic serial number ("ESN") 12CE568L, and subscribed to by Julio Iglesias, 123 Main Street, N.W., Washington, D.C., 20005 (hereinafter referred to as "the target telephone"). As will be set forth below, the investigation has revealed that this phone is being used by Gene Blum, aka “Little G.”

4. I have participated in the investigation of the offenses set forth below. As a result of my personal participation in this investigation, through interviews with and analysis of reports submitted by other Special Agents of the FBI, as well as other state and local law enforcement personnel, I am familiar with all aspects of this investigation. On the basis of this familiarity, and on the basis of other information which I have reviewed and determined to be reliable, I allege the facts to show that:

a. there is probable cause to believe that GENE BLUM, aka “Little G,” ROBERT GERARD, KATRINA KARR, aka “Kay Kay,” NANCY
PRIM, aka “Sweet Nancy,” First Name Unknown (FNU) Last Name Unknown (LNU), aka “J-Boy,” (hereinafter referred to as “the target subjects”) and others as yet unknown have committed, are committing, and will continue to commit offenses involving the distribution of, and possession with intent to distribute narcotics, including cocaine and heroin, the use of communications facilities to facilitate narcotics offenses, and conspiracy to commit the above offenses, in violation of Title 21, United States Code, Sections 841, 843(b), and 846.

5. In particular, these communications are expected to concern the specifics of the above offenses, including (i) the nature, extent and methods of the narcotics distribution business of the target subjects and others; (ii) the nature, extent and methods of the operation of the drug trafficking business of the target subjects and others; (iii) the identities and roles of accomplices, aiders and abettors, co-conspirators and participants in their illegal activities, including sources of supply for the narcotics; (iv) the distribution and transfer of the contraband and money involved in those activities; (v) the existence and location of records; (vi) the location and source of resources used to finance their illegal activities; (vii) the location and disposition of the proceeds from those activities; and (viii) the locations and items used in furtherance of those activities. In addition, these wire communications are expected to constitute admissible evidence of the commission of the above-described offenses.

6. The statements contained in this affidavit are based in part on information provided by Special Agents of the FBI, on conversations held with detectives and officers from the Metropolitan Police Department of Washington, D.C., and the Prince George's County Police Department, on information provided by confidential sources and a named source, and on my experience and background as a Special Agent of the FBI. Since this affidavit is being submitted for the limited purpose of securing authorization for the interception of wire communications, I have not included each and every fact known to me concerning this investigation. I have set forth only the facts that I believe are necessary to establish the necessary foundation for an order authorizing the interception of wire communications.

PERSONS EXPECTED TO BE INTERCEPTED

7. Gene Blum: As set forth in more detail below, Blum, the user of the target telephone, has been identified through source information as being a member of Robert Gerard’s drug distribution “crew.” The FBI has conducted controlled narcotics purchases with Blum.
8. **Robert Gerard**: Gerard has been identified through source information, set forth below, as the leader of a Washington, D.C.-based narcotics distribution network that sells multi-kilogram quantities of cocaine and heroin. Gerard resides in the Keeney Heights area of Washington, D.C., and is believed to be responsible for the murder of one of his narcotics customers, who had failed to pay a drug debt. At this time, Gerard’s narcotics suppliers are unknown.

9. **Katrina Karr**: In December 1994, Karr was convicted of possession of cocaine with intent to distribute in Raljon, Maryland, and was sentenced to two years incarceration and five years probation. Karr is currently on probation. Karr has been identified by confidential sources as a member of Gerard’s narcotics distribution “crew.”

10. **Nancy Prim**: Prim has been identified through source information, as set forth below, as a member of Gerard’s “crew.” Prim has also been observed accompanying Gerard and Blum to the Starlight Motel, which Gerard and Blum use as a location to conduct narcotics transactions.

11. **FNU LNU, aka “J-Boy”**: Several confidential sources have stated that J-Boy, who has not yet been identified, is a narcotics distributor for Gerard.

Facts and Circumstances

12. On February 22, 2001, your affiant interviewed a confidential informant (“CI-1”). CI-1 has provided reliable information in other investigations, and in those investigations, bought drugs and introduced undercover agents to the targets of those investigations. CI-1’s information has been used previously in arrest and search warrants. The information that CI-1 has provided in this case has been corroborated by physical surveillance of the subjects, information from other, reliable confidential informants, and the analysis of telephone records. CI-1 has a prior conviction for possession of cocaine, and is cooperating with the FBI in this investigation in hopes of gaining leniency for a family member who has pending drug charges.

13. During the interview on February 22, 2001, CI-1 told your affiant that Robert Gerard and members of his drug crew distribute cocaine and heroin in the Keeney Heights area of Washington, D.C., and that CI-1 bought cocaine from “J-Boy,” a member of Gerard’s crew, in December 2000. CI-1 identified the following other persons as members of Gerard’s crew: “Little G,” “Kay Kay,” and “Sweet Nancy.” Your affiant showed CI-1 some driver’s license photographs and he was able to identify Little G as Gene Blum, Kay Kay as Katrina Karr, and Sweet Nancy as Nancy Prim.

14. On March 30, 2001, your affiant learned that Fred Hendricks was murdered that day in Gerard’s neighborhood in Keeney Heights. Your affiant reviewed reports made by the local police officers investigating the murder. Based upon those reports, your affiant learned that Gene Blum, Bridget Lynn, and Natasha Spencer were present at the scene. The local police questioned each individual about the murder, and it was learned that Blum was seen trying to leave the scene on a motorcycle. Blum was detained and
he volunteered to answer some questions. During the questioning, Blum advised the police that there was a quantity of cocaine inside a locked compartment in the motorcycle. Blum gave the keys to the compartment to the officer. Later that day, the police obtained a search warrant for the motorcycle compartment. The next day, the search warrant was executed and approximately one quarter of a kilogram of cocaine was found inside. Blum was never charged with any drug offenses. Spencer and Lynn claimed to know nothing about the murder.

15. On April 5, 2001, Gerard’s house was burned to the ground. Your affiant reviewed police reports of the incident and learned that three unidentified males entered the house carrying gasoline, and set the house on fire. Two persons, one of whom was an infant male, were inside the house when the fire was set, and they died as a result. Gerard was not at home at the time of the fire.

16. On April 25, 2001, your affiant interviewed Stephen Simon, who has been indicted on charges of distributing cocaine. Simon agreed to provide the following information as part of a plea bargain in his pending case. Simon told your affiant that he was a member of a rival drug gang, and he stated that he knows Gerard and Blum. Simon stated that Gerard had given Hendricks two kilograms of cocaine on consignment, and when Hendricks failed to pay Gerard for the cocaine, Gerard had Hendricks killed. Simon stated that he learned of this information from Natasha Spencer, his girlfriend, who was at the scene of the murder. Simon stated further that Gerard receives large shipments of cocaine every few months, and that he sells cocaine for $17,500 per kilogram.

17. On May 5, 2001, the local police interviewed an individual who was willing to provide information about Gerard’s drug trafficking activities. This person (“CI-2”) has never provided information to law enforcement before and, therefore, his reliability is unknown. CI-2 stated that Gerard and Blum are heavily involved in trafficking and are very violent. On May 11, 2001, CI-2 told the local police that Gerard and members of his crew were at the Starlight Motel in Raljon, Maryland. Based on this information, local police officers established surveillance at the motel. During the surveillance, officers saw Gerard, Blum, and several unidentified males come and go from two motel rooms.

18. On May 20, 2001, CI-2 told the local police that Gerard and Blum were at the Starlight Motel, and that they were selling drugs from a room there. That day and the following day (May 21, 2001), surveillance agents observed Gerard and Blum coming in and out of room 123. In addition, throughout the day, several unidentified males were seen entering room 123, staying a few minutes and then leaving the room.

19. On May 25, 2001, CI-2 stated that Blum had gone to the Starlight Motel again to sell drugs. The local police conducted surveillance of the motel and saw Blum exit room 178. Blum entered a Chevy Suburban truck that was being driven by a female. Surveillance agents later identified this female from photographs as Nancy Prim. One hour later, agents
saw the Chevy Suburban return to the motel. Blum exited the car and entered room 178.

20. Shortly after May 5, 2001, an undercover police officer ("UC") was sent to the Starlight Motel to seek employment there as a maintenance worker. On May 25, 2001, the UC was working at the motel, when someone from room 178 called the front desk to complain about a maintenance problem. The UC went to room 178 to fix the problem and observed Blum and two unidentified males inside the room. When the UC arrived, he overheard Blum refer to one of the males as “J-Boy.” While in the room, the UC used the telephone to make a call to another police officer. During the call, the UC mentioned going to a party and getting some cocaine to take to the party. Blum overheard the UC’s call and offered to sell the UC some cocaine. The UC, who was wearing a recording device, recorded his conversation with Blum. During the conversation, Blum stated, “I can get you all the coke you want. How much do you want?” The UC stated that he wanted an ounce. Blum told the UC to call him later at the motel. The UC then left the room.

21. That evening, the UC called the telephone in room 178 and spoke to Blum. The UC recorded his conversation with Blum. The UC and Blum agreed to a purchase price of $1,100 for one ounce of cocaine. Blum gave the UC his pager number and told the UC to page him at that number when the UC was ready to conduct the drug deal.

22. On May 26, 2001, at 9:15 a.m., the UC paged Blum at the number he was given, and input the telephone number of his cellular telephone. At 9:20 a.m., the UC received a call from Blum. The caller identification device on the UC’s cellular phone revealed that Blum was calling from a cellular telephone with the number (202) 514-1234. During this conversation, the UC told Blum that he was ready to buy some cocaine from Blum. Blum instructed the UC to meet him at room 178 at the Starlight Motel at 10:30 a.m. Blum then ended the call. The FBI later obtained telephone records for Blum’s phone, (202) 514-1234 (hereinafter, referred to as the “target phone”). Those records show that immediately after Blum ended the call with the UC, the target phone was used to call a pager. The FBI obtained records for the pager and learned that it is subscribed to in the name of Dorothy Gerard, Gerard’s mother. At 10:30 a.m., the UC arrived at the motel and met Blum in room 178. The UC bought one ounce of cocaine from Blum in exchange for $1,100. Meanwhile, surveillance agents were outside the motel. After the transaction, the UC left the motel room, followed by Blum. Blum entered a white Ford Navigator sports utility vehicle and drove away from the motel. Surveillance agents followed Blum as he drove away. The agents followed Blum to Interstate Highway 95. At one point, Blum slowed down and was driving along side of the surveillance agents. Blum waived to the agents and then sped off. Realizing that they had been detected, the agents discontinued surveillance of Blum.

23. On June 2, 2001, the UC attempted to contact Blum at the pager number Blum had given the UC. The UC never received a call back from Blum.
24. On June 22, 2001, a local police officer contacted your affiant and advised that she had been contacted by a confidential informant ("CI-3"). The police officer advised your affiant that CI-3 was reliable, and that CI-3 had provided credible information to him in the past. The police officer advised that CI-3, who is associated with many gang members, knows that Blum uses the target phone to conduct his drug business.

25. On June 28, 2001, your affiant learned of another confidential informant working for the local police ("CI-4"). CI-4 has never provided information before, but knows Blum and has bought cocaine from Blum on several occasions within the last six months, most recently in the beginning of June 2001. CI-4 stated that he has never bought cocaine from Gerard, but knows that Blum works for Gerard as a drug distributor. CI-4 indicated that he would be willing to contact Blum to buy cocaine, but that he was not willing to record any of his conversations with Blum.

26. On August 1, 2001, at 1:20 p.m., CI-4 paged Blum and input the telephone number where CI-4 could be reached. At 1:45 p.m., Blum called CI-4. Phone records for the target phone show that at approximately 1:45 p.m., the target phone was used to call CI-4's telephone. According to CI-4, he told Blum that he wanted to buy an ounce of cocaine. Blum told CI-4 to meet him at a gas station in one hour. One hour later, CI-4 went to the gas station. Before CI-4 arrived at the gas station, Agent Kent searched CI-4 for contraband, with negative results, and gave CI-4 $1,100 in pre-recorded government funds. Surveillance agents then observed CI-4 approach the gas station. A short while later, Blum arrived at the gas station in a red Lexus vehicle. Blum got out of his car and walked over to CI-4. Agents saw CI-4 hand something to Blum. Blum returned to his car, reached inside, and returned to CI-4. Blum handed an object to CI-4. CI-4 left the gas station and Blum drove off. CI-4 rendezvoused with Agent Kent and gave him one ounce of a substance that later tested positive for the presence of cocaine.

ANALYSIS OF TELEPHONE RECORDS

27. On August 5, 2001, your affiant obtained telephone records for the target phone. A review of those records show that between July 2, and August 2, 2001, the target phone was used to make and receive a total of 1,144 calls. Specifically, those records reflect the following pertinent contacts:

a. 34 calls to Gerard's pager, with the most recent call on August 1.

b. 22 calls to and from a telephone subscribed to by Dorothy Gerard at a residence located at 1253 Corey Lane, N.W. The most recent call to this telephone was on July 23, 2001. Agents conducting physical surveillance have seen Robert Gerard entering this residence on several occasions since the fire at his home. Your affiant believes that Blum calls this telephone to speak with Robert Gerard.

c. 19 calls to a phone located at the Starlight Motel, with the most recent call on July 28, 2001. Based on physical surveillance and source information, your affiant believes that Gerard, J-Boy, Prim,
and Blum use that motel as a location to conduct narcotics transactions. Surveillance agents saw J-Boy at the Starlight Motel on July 28, 2001.

NEED FOR INTERCEPTION

Based upon your affiant's training and experience, and based upon all of the facts set forth herein, it is your affiant's belief that the interception of wire communications is the only available technique that has a reasonable likelihood of securing the evidence necessary to prove beyond a reasonable doubt that the target subjects and others as yet unknown are engaged in the above-described offenses. In addition, information recently obtained from C1-2 indicates that Gerard is expecting to receive a large shipment of heroin during early September 2001. It is hoped that the interception of wire communications over the target phone will help to reveal further information about this shipment.

Your affiant states that the following investigative procedures, which are usually employed in the investigation of this type of criminal case, have been tried and have failed, reasonably appear to be unlikely to succeed if they are tried, or are too dangerous to employ.

ALTERNATIVE INVESTIGATIVE TECHNIQUES

Physical Surveillance

Physical surveillance has been attempted on numerous occasions during this investigation. Although it has proven valuable in identifying some activities and associates of the target subjects, physical surveillance, if not used in conjunction with other techniques, including electronic surveillance, is of limited value. Physical surveillance, even if highly successful, has not succeeded in gathering sufficient evidence of the criminal activity under investigation. Physical surveillance of the alleged conspirators has not established conclusively the elements of the violations and has not and most likely will not establish conclusively the identities of various conspirators. In addition, continued surveillance is not expected to enlarge upon information now available; rather, such prolonged or regular surveillance of the movements of the suspects would most likely be noticed, causing them to become more cautious in their illegal activities, to flee to avoid further investigation and prosecution, to cause a real threat to the safety of the informants, or to otherwise compromise the investigation.

Physical surveillance is also unlikely to establish conclusively the roles of the named conspirators, to identify additional conspirators, or otherwise to provide admissible evidence in regard to this investigation because the subjects appear to be extremely surveillance conscience. For example, as set forth above, Blum detected law enforcement surveillance on May 26, 2001. While surveillance agents have attempted to follow Blum and Gerard while they were driving, both Blum and Gerard tend to drive very erratically by slowing down or speeding up with little warning, turning without signaling, and stopping on the side of the road unexpectedly to watch cars as they go by. Such counter-surveillance techniques have made it difficult, if not impossible, to maintain effective surveillance of Blum or Gerard. Furthermore, Blum lives on a cul-de-sac in a very close-knit neighborhood. Neighbors are often on the porches, and appear to be watching the activity in the
neighborhood. On February 10, 2001, surveillance agents attempted to conduct surveillance near Blum’s residence by parking just outside the entrance to the cul-de-sac. However, agents observed a neighbor appear to be watching the vehicle from her porch. The neighbor eventually began walking towards the vehicle, as if to confront the agents. At that time, the agents drove away.

In my opinion, further surveillance would only serve to alert the suspects of the law enforcement interest in their activities and compromise the investigation.

**Use of Grand Jury Subpoenas**

Based upon your affiant’s experience and conversations with Assistant United States Attorney Lois Lane, who has experience prosecuting violations of criminal law, your affiant believes that subpoenaing persons believed to be involved in this conspiracy and their associates before a Federal Grand Jury would not be completely successful in achieving the stated goals of this investigation. If any principals of this conspiracy, their co-conspirators and other participants were called to testify before the Grand Jury, they would most likely be uncooperative and invoke their Fifth Amendment privilege not to testify. It would be unwise to seek any kind of immunity for these persons, because the granting of such immunity might foreclose prosecution of the most culpable members of this conspiracy and could not ensure that such immunized witnesses would provide truthful testimony. Additionally, the service of Grand Jury subpoenas upon the principals of the conspiracy or their co-conspirators would only (further) alert them to the existence of this investigation, causing them to become more cautious in their activities, to flee to avoid further investigation or prosecution, to threaten the lives of the informants, or to otherwise compromise the investigation.

**Confidential Sources**

Reliable confidential sources have been developed and used, and will continue to be developed and used, in regard to this investigation. However, CI-1 is merely a purchaser of narcotics from J-Boy, and has not had any direct contact with Blum or Gerard. Although CI-1 is aware that J-Boy obtains narcotics from Gerard, J-Boy has never made any attempts to introduce CI-1 to Gerard, or to any other possible sources of supply. While CI-1 can continue to make controlled purchases of narcotics from J-Boy, it is not believed that further purchases would help to reveal the identities of Gerard’s sources of supply, or help to reveal the full extent of the organization’s narcotics trafficking activities. Although CI-1 is willing to testify if necessary, CI-1 has expressed a fear for his safety and for that of his family should his cooperation with law enforcement become known. CI-1 has stated that he knows the organization to be very violent, and that he has seen J-Boy carrying a gun.

CI-2 has provided useful information regarding Gerard’s and Blum’s narcotics trafficking roles, and has also been able to advise law enforcement of the approximate dates when narcotics transactions have occurred. However, CI-2 has not been able to provide any specific information about Gerard’s narcotics suppliers or couriers. In addition, CI-2’s reliability is unknown, because he has never provided information to law enforcement in the past.

CI-3, who has provided useful background information about violent
gangs in the Keeney Heights area of Washington, D.C., and has confirmed that Blum uses the target phone, has only limited contact with Gerard. CI-3 has seen Gerard with Blum, but CI-3 cannot provide any direct information about Gerard’s drug trafficking activities, and does not know who Blum’s or Gerard’s narcotics suppliers are.

CI-4 has been used to make a controlled purchase of narcotics from Blum. CI-4 has also been able to provide useful information about Blum’s role as one of Gerard’s narcotics distributors. While CI-4 can be used to make additional controlled narcotics purchases from Blum, CI-4 is not in a position to purchase narcotics directly from Gerard. In addition, it is unlikely that Blum or Gerard will introduce CI-4 to their narcotics suppliers or to other narcotics distributors of Gerard. Furthermore, CI-4 has refused to permit the FBI to record any of his conversations with Blum and has refused to testify against Blum for fear for his safety.

Undercover Agents

Undercover agents have been unable to infiltrate the inner workings of this conspiracy due to the close and secretive nature of this organization. As detailed above, during May 2001, an undercover agent obtained employment at the Starlight Motel, and was able to conduct a narcotics purchase from Blum. However, during that meeting, Blum said that he rarely conducts transactions with “anyone new,” and that he agreed to meet with the undercover agent because he knew him from the Starlight Motel. The undercover agent was unable to obtain any information about Blum’s narcotics supplier. In addition, after Blum observed surveillance agents after his drug deal with the agent, he has not returned any of the agent’s calls. Accordingly, the FBI is unable to conduct any additional narcotics transaction with that undercover agent. Your affiant believes that there are no undercover agents who can infiltrate the conspiracy at a high enough level to identify all members of the conspiracy or otherwise satisfy all the goals of this investigation. Furthermore, given the violent nature of Gerard’s organization, there are concerns for the safety of any undercover agent who participates in drug deals with the organization.

Interviews of Subjects or Associates

Based upon your affiant’s experience, I believe that interviews of the subjects or their known associates would produce insufficient information as to the identities of all of the persons involved in the conspiracy, the source of the drugs, the location of drugs, and other pertinent information regarding the named crimes. Your affiant also believes that any responses to the interviews would contain a significant number of untruths, diverting the investigation with false leads or otherwise frustrating the investigation. Additionally, such interviews would also have the effect of alerting the members of the conspiracy, thereby compromising the investigation and resulting in the possible destruction or concealment of documents and other evidence, and the possibility of harm to cooperating sources whose identities may become known or whose existence may otherwise be compromised. When the police interviewed Natasha Spencer and asked her about the murder of Fred Hendricks, she denied knowing anything about it. However, her boyfriend, Stephen Simon indicated to your affiant that Spencer knew that Gerard ordered Hendricks’ murder. As to Simon, he knows of Gerard’s and Blum’s activities.
only through his own past drug dealings in the same neighborhood where Gerard and Blum operate. Given that Simon is currently incarcerated, he can provide no further information about the drug activities of Blum and Gerard.

**Search Warrants**

The execution of search warrants in this matter has been considered. However, use of such warrants would, in all likelihood, not yield a considerable quantity of narcotics or relevant documents, nor would the searches be likely to reveal the total scope of the illegal operation and the identities of the co-conspirators. While some members of Gerard's crew use the Starlight Motel as a location to sell narcotics, it is not believed that members of that crew use that location to store a large portion of their narcotics. The search warrant executed on the motorcycle driven by Blum yielded a quantity of cocaine, but that evidence in and of itself is not sufficient to prosecute and convict all of the members of this conspiracy. At this time, it is unknown where Blum or Gerard store their narcotics. Further, it is unlikely that all, or even many, of the principals of this organization would be at any one location when a search warrant was executed. The affiant believes that search warrants executed at this time would be more likely to compromise the investigation by alerting the principals to the investigation and allowing other unidentified members of the conspiracy to insulate themselves further from successful detection.

**Phone Records**

Pen register and trap and trace information has been used in this investigation, including a pen register and trap and trace on the target telephone, as described above. The pen register and trap and trace information has verified frequent telephone communication between the target telephone and telephones suspected of being used by co-conspirators. Pen registers and traps and traces, however, do not record the identity of the parties to the conversation, cannot identify the nature or substance of the conversation, or differentiate between legitimate calls and calls for criminal purposes. A pen register and trap and trace cannot identify the source or sources of the controlled substances, nor can it, in itself, establish proof of the conspiracy. Telephone toll information, which identifies the existence and length of telephone calls placed from the target telephone to telephones located outside of the local service zone, has the same limitations as pen registers and traps and traces, does not show local calls, and is generally available only on a monthly basis.

**Prior Applications**

Based upon a check of the records of the Federal Bureau of Investigation and the Drug Enforcement Administration conducted on or about August 1, 2001, no prior federal applications for an order authorizing or approving the interception of wire, oral, or electronic communications have been made involving the same persons, premises or facilities named herein.

**Minimization**

All interceptions will be minimized in accordance with the minimization requirements of Chapter 119 of Title 18, United States Code, and all interceptions conducted pursuant to this Court's Order will terminate upon attainment of the authorized objectives or, in any event, at
the end of thirty (30) days measured from the earlier of the day on which investigative or law enforcement officers first begin to conduct an interception under the Court’s Order or ten (10) days after the Order is entered. Monitoring of conversations will terminate immediately when it is determined that the conversation is unrelated to communications subject to interception under Chapter 119 of Title 18, United States Code. Interception will be suspended immediately when it is determined through voice identification, physical surveillance, or otherwise, that none of the named interceptees or any of their confederates, when identified, are participants in the conversation, unless it is determined during the portion of the conversation already overheard that the conversation is criminal in nature. If a conversation is minimized, monitoring agents will periodically spot check the conversation to insure that the conversation has not turned to criminal matters.

__________________________
Clark Kent
Special Agent, Federal Bureau of Investigation

Sworn to before me this 13th day of August, 2001.

__________________________
UNITED STATES DISTRICT COURT
JUDGE
DISTRICT OF COLUMBIA
MEMORANDUM

TO: Jimmy Olson, Director
   Office of Enforcement
   Operations
   Criminal Division

FROM: Perry White
   Assistant Attorney General
   Criminal Division

SUBJECT: Authorization for
   Interception Order
   Application

This is with regard to your recommendation that I, an appropriately designated official of the Criminal Division, authorize an application to a federal judge of competent jurisdiction for an order under Title 18, United States Code, Section 2518, authorizing for a thirty (30) day period, the original interception of wire communications occurring to and from the cellular telephone bearing the number (202) 514-1234, subscribed to by Julio Iglesias, 123 Main Street, N.W., Washington, D.C., in connection with an investigation into possible violations of Title 21, United States Code, Sections 841, 843, and 846, by Gene Blum, Robert Gerard, Katrina Karr, Nancy Prim, “J-Boy,” and others as yet unknown.

By virtue of the authority vested in the Attorney General by Section 2516 of Title 18, United States Code, the Attorney General of the United States has by Order Number 2407-2001, dated March 8, 2001, designated specific officials in the Criminal Division to authorize applications for court orders authorizing the interception of wire or oral communications. As a duly designated official in the Criminal Division, this power is exercisable by me.

WHEREFORE, acting under this delegated power, I hereby authorize the above-described application to be made by any investigative or law enforcement officer of the United States as defined in Section 2510(7) of Title 18, United States Code.

The authorization given is intended to apply not only to the target telephone number listed above, but also to any other telephone numbers subsequently assigned to the instrument bearing the same electronic serial number used by the target telephone within the thirty (30) day period. The authorization is also intended to apply to background conversations intercepted in the vicinity of the target telephone while the telephone is off the hook or otherwise in use.

___________________________________________________________
Perry White
Assistant Attorney General
Criminal Division

Date
United States District Court
District of Columbia

In the Matter of the Application of the United States of America for an Order Authorizing the Interception of Wire Communications

Order Authorizing the Interception of Wire Communications

Application under oath having been made before me by Lois Lane, Assistant United States Attorney, District of Columbia, an investigative or law enforcement officer of the United States within the meaning of Section 2510(7) of Title 18, United States Code, for an Order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matter set forth therein, the Court finds:

a. there is probable cause to believe that Gene Blum, Robert Gerard, Katrina Karr, Nancy Prim, “J-Boy,” (hereinafter, the “Target Subjects”) and others as yet unknown have committed, are committing, and will continue to commit violations of Title 21, United States Code, Sections 841, 843, and 846.

b. there is probable cause to believe that particular wire communications of the Target Subjects and others as yet unknown concerning the above-described offenses will be obtained through the interception for which authorization has herewith been applied. In particular, there is probable cause to believe that the interception of wire communications to and from the telephone bearing the number (202) 514-1234, and ESN 12CE568L, and subscribed to by Julio Iglesias, 123 Main Street, N.W., Washington, D.C. (hereinafter, the “Target Telephone”) will concern the specifics of the above offenses, including the manner and means of the commission of the offenses;

c. it has been established that normal investigative procedures have been tried and have failed, reasonably appear to be unlikely to succeed if tried, or are too dangerous to employ; and

d. there is probable cause to believe that the Target Telephone has been and will continue to be used in connection with commission of the above-described offenses.

Wherefore, it is hereby ordered that Special Agents of the Federal Bureau of Investigation (“FBI”), officers of the Metropolitan Police Department and the Prince George’s County Police Department, and contract personnel who are under the supervision of the FBI, are authorized, pursuant to an application authorized by a duly designated official of the Criminal Division, United States Department of Justice, pursuant to the power delegated to that official by special designation of the Attorney General and vested in the Attorney General by Section 2516 of Title 18, United States Code, to intercept wire communications to and from the Target Telephone.
PROVIDED that such interception(s) shall not terminate automatically after the first interception that reveals the manner in which the alleged co-conspirators and others as yet unknown conduct their illegal activities, but may continue until all communications are intercepted which reveal fully the manner in which the above-named persons and others as yet unknown are committing the offenses described herein, and which reveal fully the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of thirty (30) days measured from the day on which investigative or law enforcement officers first begin to conduct an interception under this order or ten (10) days after this order is entered, whichever is earlier.

IT IS ORDERED FURTHER, pursuant to Title 18, United States Code, Section 2518(3), that in the event that the Target Telephone is transferred outside the territorial jurisdiction of this court, interceptions may take place in any other jurisdiction within the United States.

IT IS ORDERED FURTHER that the authorization apply not only to the target telephone number listed above, but to any changed telephone number subsequently assigned to the instrument bearing the same electronic serial number as the Target Telephone within the thirty (30) day period. It is also ordered that the authorization apply to background conversations intercepted in the vicinity of the Target Telephone while the telephone is off the hook or otherwise in use.

IT IS ORDERED FURTHER that, based upon the request of the Applicant pursuant to Section 2518(4) of Title 18, United States Code, Killion Communications, an electronic communication service provider as defined in Section 2510(15) of Title 18, United States Code, shall furnish the FBI with all information, facilities and technical assistance necessary to accomplish the interceptions unobtrusively and with a minimum of interference with the services that such provider is according the persons whose communications are to be intercepted, with the service provider to be compensated by the Applicant for reasonable expenses incurred in providing such facilities or assistance.

IT IS ORDERED FURTHER that, to avoid prejudice to the government’s criminal investigation, the provider of the electronic communications service and its agents and employees are ordered not to disclose or cause a disclosure of the Order or the request for information, facilities and assistance by the FBI, or the existence of the investigation to any person other than those of its agents and employees who require this information to accomplish the services hereby ordered. In particular, said provider and its agents and employees shall not make such disclosure to a lessee, telephone subscriber or any Target Subject or participant in the intercepted communications.

IT IS ORDERED FURTHER that this order shall be executed as soon as practicable and that all monitoring of wire communications shall be conducted in such a way as to minimize the interception and disclosure of the communications intercepted to those communications relevant to the pending investigation. The interception of wire communications must terminate upon the attainment of the authorized objectives, not to exceed thirty (30) days measured from the earlier of the day on which
investigative or law enforcement officers first begin to conduct an interception of this order or ten (10) days after the order is entered.

Monitoring of conversations must terminate immediately when it is determined that the conversation is unrelated to communications subject to interception under Chapter 119, Title 18, United States Code. Interception must be suspended immediately when it is determined through voice identification, physical surveillance, or otherwise, that none of the Target Subjects or any of their confederates, when identified, are participants in the conversation unless it is determined during the portion of the conversation already overheard that the conversation is criminal in nature. If the conversation is minimized, the monitoring agent shall spot check to insure that the conversation has not turned to criminal matters.

IT IS ORDERED FURTHER that Assistant United States Attorney Lois Lane or any other Assistant United States Attorney familiar with the facts of this case shall provide this Court with a report on or about the tenth, twentieth, and thirtieth days following the date of this Order showing what progress has been made toward achievement of the authorized objectives and the need for continued interception. If any of the above-ordered reports should become due on a weekend or holiday, IT IS ORDERED FURTHER that such report shall become due on the next business day thereafter.

IT IS ORDERED FURTHER that this Order, the application, affidavit and any related orders, and all interim reports filed with this Court with regard to this matter, shall be sealed until further order of this Court, except that copies of the orders, in full or redacted form, may be served on the FBI and the service providers as necessary to effectuate this order.

UNITED STATES DISTRICT COURT
JUDGE
DISTRICT OF COLUMBIA

Dated this 13th day of August, 2001.
ATTACHMENT E

MINIMIZATION INSTRUCTIONS FOR WIRE COMMUNICATIONS

MEMORANDUM

TO: Monitoring Personnel

FROM: AUSA Lois Lane

RE: Minimization Instructions

DATE: August 14, 2001

1. All agents and monitoring personnel must read the affidavit, application, order and these instructions and sign these instructions before monitoring.

2. The Order of August 13, 2001, only authorizes the interception of conversations between the Target Subjects and others occurring to and from the telephone number (202) 514-1234, subscribed to by Julio Iglesias, 123 Main Street, N.W., Washington, D.C., regarding offenses involving Title 21, United States Code, Section 841, 843, and 846.

3. Personnel may monitor for a reasonable period not to exceed two minutes to determine whether a subject is participating in a conversation.

4. If, during this monitoring, it is determined that additional individuals are engaged in a criminal conversation, intercepts may continue despite the fact that a named subject is not engaged in the conversation, until the conversation ends or becomes non-pertinent. If individuals other than a subject are participating in the criminal conversation, continue to monitor and advise the case agent or supervisor immediately. If these individuals can be identified, provide this information also.

5. If a subject is engaged in conversation, interception may continue for a reasonable time, usually not in excess of two minutes, to determine whether the conversation concerns criminal activities.

   a. If such a conversation is unclear but may be related to the drug trafficking offenses, interception may continue until such time as it is determined that the conversation clearly no longer relates to that topic.

   b. If such a conversation is unclear but may relate to other criminal activities, interception should cease after about two minutes unless it can be determined within that time that the conversation does in fact relate to other criminal activities, in which case interception may continue.

6. The above instructions regarding the number of minutes of permissible interception will vary once experience has been gained. If experience shows that conversations between certain people are invariably innocent, interception of such conversations should be ended sooner. If experience shows that other individuals always discuss criminal activities, a longer interception may be justified. This is especially true for individuals who can be identified as participants with the subjects in possessing and distributing controlled substances.
Read all of the logs of the interceptions on a continuing basis and notify the case agent if patterns develop.

7. No conversation may be intercepted that would fall under any legal privilege. The four categories of privileged communications are described below:

a. Attorney-Client Privilege: Never knowingly listen to or record a conversation between a subject and his or her attorney when other persons are not present or are not participating in the conversation. Any time that an attorney is a party to a conversation, notify the case agent immediately. If it is determined that a conversation involving an attorney constitutes legal consultation of any kind, notify the case agent, shut off the monitor and stop recording, unless you are able to determine from the interception of any conversation involving an attorney that third parties who are not involved in the legal matters being discussed are present. If such third parties are present, and only if they are present, may you intercept such conversations following the above-described rules of minimization. In any event, notify the case agent immediately.

b. Parishioner-Clergyman Privilege: All conversations and conduct between a parishioner and his or her clergyman are to be considered privileged. An electronic surveillance order could not be obtained to listen to a subject confess his or her sins to a priest in a confessional booth; similarly, a subject discussing his or her personal, financial or legal problems with his or her priest, minister, rabbi, etc. may likewise not be intercepted. Thus, if it is determined that a clergyman is a party to a communication being intercepted and that the communication is penitential in nature, turn off the monitor, stop recording, and notify the case agent.

c. Doctor-Patient Privilege: Any conversation a patient has with a doctor relating to diagnosis, symptoms, treatment, or any other aspects of physical, mental or emotional health, is privileged. If it is determined that a person is talking to his or her doctor and that the conversation concerns the person’s health (or someone else’s health), turn off the machine and notify the case agent.

d. Husband-Wife Privilege: As a general rule, there is also a privilege covering communications between lawfully married spouses. Monitoring should be discontinued and the case agent notified if it is determined that a conversation solely between a husband and wife is being intercepted. If a third person is present, however, the communication is not privileged and that conversation may be monitored in accordance with the previously described rules of minimization. If the conversation is between the named subjects and their respective spouses, the conversation may be monitored in accordance with the previously described rules of minimization regarding monitoring these individuals’ conversations to determine whether they are discussing crimes. If the nature of
the conversation is criminal, monitoring may continue; otherwise, it may not be monitored.

8. Abstracts or summaries of each conversation are to be made at the time of interception and are to be included in the logs and the statistical analysis sheet. If the conversation is not recorded entirely, an appropriate notation should be made indicating the incomplete nature of the conversation and why the conversation was not recorded completely (e.g., “non-pertinent” or “privileged”).

9. The logs should reflect all activity occurring at the monitoring station concerning both the intercepted conversations as well as the equipment itself (e.g., “replaced tape,” “malfunction of tape recorder,” “no conversation overheard”). These logs will be used ultimately to explain the monitoring agent’s actions when intercepting communications. It is important to describe the parties to each conversation, the nature of each conversation, and the action taken. All monitoring agents will record the times their equipment is turned on and off.

10. All conversations that are monitored must be recorded.

11. The Log
   The monitoring agents should maintain a contemporaneous log, by shifts, of all communications intercepted, indicating location of each communication on the cassette tape or computer disc; the time and duration of the interception; whether the telephone call was outgoing or incoming; the telephone number called if the call was outgoing; the participants, if known; and a summary of the content of the pertinent conversations. Any peculiarities, such as codes, foreign language used, or background sounds, should also be noted. When the interception of a communication is terminated for purposes of minimization, that fact should be noted. This log should record the names of the personnel in each shift and the function performed by each, malfunctions of the equipment or interruptions in the surveillance for any other reason and the time spans thereof, and interceptions of possibly privileged conversations or conversations relating to crimes not specified in the original interception order. Each entry in the log should be initialed by the person making it.

12. Protection of the Recording
   The following procedure should be followed during the period of authorized interceptions:
   
   a. Either during or at the end of each recording period, copies of the recorded conversations should be made for the use of the investigative agency and the supervising attorney;
   b. The original recording should be placed in a sealed evidence envelope and kept in the custody of the investigative agency until it is made available to the court at the expiration of the period of the order; and
   c. A chain of custody form should accompany the original recording. On this form should be a brief statement, signed by the agent supervising the interception, which identifies:
(i) the order that authorized the recorded interceptions (by number if possible);
(i) the date and time period of the recorded conversations; and
(i) the identity (when possible) of the individuals whose conversations were recorded.

d. The form should indicate to whom the custody of the original recording was transferred and the date and time that this occurred. Each subsequent transfer, including that to the court, should be noted on the form.

e. The case agent should mark a label attached to the original tape reel/cassette/computer disc in order to identify it as corresponding with accompanying chain of custody forms. The date of the recording should also be marked on the label and this should be initialed by the agent.

f. Each agent or other person signing the chain of custody form should be prepared to testify in court that the original tape, while in his or her custody, was kept secure from the access of third parties (unless noted to the contrary on the form) and was not altered or edited in any manner. It is the responsibility of the investigative agencies to ensure that original recordings in their custody will be maintained in such a way as to ensure their admissibility in evidence at trial over objections to the integrity of the recording.

13. Procedure When No Recording Can be Made
In those unusual instances when no recording of the intercepted conversations can be made, the following procedure should be used:

a. The monitoring agent should make a contemporaneous log or memorandum that is as near to a verbatim transcript as is possible;

b. The log or memorandum should close with a brief statement signed by the agent indicating the date, time, and place of the intercepted conversation. The order authorizing the interception should be identified. The agent should indicate that the log or memorandum contains the contents of the intercepted communication which he or she overheard. This should be followed by the agent's signature; and

c. This log should be treated by the investigative agency as if it were an original recording of the intercepted communication.

14. If the conversation occurs in a language other than English that no one at the monitoring post understands, the entire conversation should be monitored and recorded and then minimized by a person familiar with the investigation, but who is not actively involved in it, in accordance with the minimization rules set forth above.

15. If any problems arise, please call the case agent or the AUSA. Several telephone numbers will be posted at the monitoring post.

Assistant United States Attorney
Lois Lane
PARTICIPANTS’ PAPERS

CURRENT SITUATION OF ORGANIZED CRIME IN HONDURAS

Gina Antonella Ramos Giron*

I. THE SPECIAL OFFICE AGAINST ORGANIZED CRIME

The special office against organized crime was created in July 1999, as a response to the Honduran’s call for the development of new modalities to tackle crime that threatens the internal security of the country.

In Tegucigalpa, the capital, the main office is located, but they have created two more offices against organized crime, one in the north zone of the country and another in the south, which are in charge of handling all the organized crime cases. All the attorneys have been trained in these specific areas, such as investigation methods, prosecution, special legislation, etc.

This special office has five sections:

1. Section against drugs
   This section handles all the cases to do with drug trafficking, e.g. people that sell drugs in small amounts, etc.

2. Section against kidnapping
   This also handles firearms trafficking and illegal immigration, where illegal people pass through the country where their final destination is to get into the United States.

3. Stolen vehicles section

4. Bank robbery, which has increased in the last few months in Honduras

5. Money laundering section
   All these sections have special attorneys, and also investigators that manage all of the investigations. These investigators come under the Security Minister and there are two branches; the uniform police and the investigation division, that also have sections with certain specializations such as organized crime. They help the attorneys to get all the evidence that they need for the prosecution of the cases.

The office itself has an intelligence section that is in charge of taking the information from all the sections and putting it together so they can recognize the different organized groups. Much of the time, the same people that are bank robbers are also kidnappers and car thieves. This section helps a lot in solving cases; they have internet access and they share information with other police departments, and a telephone system where they can access the telephone company system and find out the name and the address of the owner of that number.

One of the difficulties that we have is that we have a very small budget, so we do not have enough cars, not enough attorneys, at the moment, but we hope in the near future we will get more help from the government, and also we work really closely with other countries too, such as the American Embassy. They help us a lot in sharing information about drugs, with DEA (Drug Enforcement Agency) people, with the Immigration

* Public Prosecutor, Department against Organized Crime Public Ministry, Honduras
Department about illegal trafficking of persons, etc. and with other governments such as Japan. This kind of course helps a lot in the training of attorneys and enables them to share information with other countries.

II. ACTUAL SITUATION OF ORGANIZED CRIME IN HONDURAS

Organized crime in Honduras has increased in the last 5 years. We started having many bank robberies and, for the first time, ransom kidnappings. Automobile theft has always occurred, but not as much as in the last few years. Now the criminals have become more professional and steal cars to commit other crimes. At present, we only have two cases of money laundering that are active in court, because the special law against drugs covers money laundering but only that related with drugs. Money sometimes comes from drug trafficking and we know that money has not necessarily come from drugs, it could also have come from stolen vehicles, bank robberies etc. The attorneys that work in the money laundering section right now are working on a new money laundering law that will regulate money laundering crime. We hope this law will be approved by the national congress very soon.

A. Situation of Drug Trafficking

Drug trafficking has increased in Honduras in the last years also. Honduras has a very good geographic location, having two oceans and the trafficking comes from both sides.

In the south of the country we have trafficking coming from Nicaragua and El Salvador, that enters the country through the borders, most of the time with cocaine and marijuana hidden in big containers and small cars. We found a large amount of cocaine of about 30kg in the roof and trunk of a small car and more than 100kg in containers.

In the north of the country we have two ports that have more active drug trafficking, the port of La Ceiba on the north coast and the port of Roatan in the Bay Islands. Usually drugs come from Colombia, because Roatan, as an island, has small docks where any boat can stop and nobody would know about.

In La Ceiba we caught this speedboat coming from Colombia with more than 200kg of cocaine. We arrested two Colombians and this has been one of the biggest loads coming in that way.

Also in the Bay Islands we have these cruise ships that come from Houston or Miami, and sometimes the crew of these ships buy cocaine to take back to the U.S. When I was working there we had several such cases.

We can imagine that on the north side of the country people use more drugs, more than in central and southern areas.

The selling of marijuana and cocaine in small amounts have become very popular in Honduras lately, we can find a number of small houses in the middle of the city where people come at night to buy two or three cigarettes of marijuana or 2 or 3 grams of cocaine. Also in some discotheques people can find cocaine. Society is really concerned about this because we never saw this kind of situation before, but we know it is very common, so as a result, the investigators that work against drugs have more work to do, trying to close these businesses and searching houses, and conducting a lot of undercover investigations.
B. Actual Situation of Kidnappings

Since 1995 we started having an increased incidence of this crime in Honduras. One of the first kidnappings for money was when these criminals kidnapped the son of a presidential candidate, he is also a big business man who used to be the president of the central bank. Since we had that case, kidnappings have become very common, sometimes we finally arrest the people and get the victim to safety, but in some cases we have not been that lucky and we have found the victims dead, and the family had already paid the amount of money demanded.

Most of the above cases happened in the north zone. These are the most complicated cases because they are committed by very well organized groups, that are also the groups that steal cars. In the west we had a lot of kidnappings also but most of the time we do not know about them because the victims families do not inform the police. They pay the money for the rescue and the victims are set free. In this area, we had a lot of farmers that work with coffee so they have a lot of money, so that is the reason kidnappers choose this area of the country.

The families of the victims now are very afraid that their relatives might get killed, so that is why sometimes they prefer to pay the money and ask the police not to interfere in the negotiation and in the rescue. About 1 month ago we had a case where they kidnapped a very rich lady in the city of Tegucigalpa, and her family paid three million six hundred thousand lempiras (Honduras currency) to set her free the next morning. The police did not interfere at all because the family asked them not to because they wanted her mother alive.

But in other cases we have found the victims and rescued them without paying the money. As you can imagine when we have this type of case, a lot of people work on it for a long time; uniformed police, investigators, attorneys, etc.

In 2000 we had 26 kidnappings in Honduras, that is a lot, and in 2001 until August we have had, at the moment, 18. Most of them occurred in the north zone and we have had some cases where the victims have disappeared and we have not found them yet.

C. Actual Situation of Firearms Trafficking

In Honduras we have had firearms trafficking since we had the war with El Salvador and the contra of Nicaragua. So much of the time the guns come from Nicaragua. In the north zone, close to the border with Nicaragua, we had these places where Nicaraguan soldiers hide the guns, and cover them with bombs, so we have to localize these places, and we are working on getting some bomb experts to recover those guns. That takes time, and they have to be very careful. Firearms trafficking is closely related with drug trafficking because some Central Americans, (Hondurans, Nicaraguans, etc.) make deals with people from south America and they exchange the guns for drugs, so this is another king of organized crime.

Three months ago we had a case where we arrested a Lieutenant from the uniformed police with 88 AK-47 rifles. He was transporting them from the south to the north, he was wearing his uniform, and the investigators arrested him with the guns. Also, the car that he was driving had been stolen in Guatemala. As you can see we have corruption too, and this is a very dangerous situation for the country.
The problem that we have right now with this crime is that our law does not talk to much about gun trafficking, the legislation only covers cases when guns are used for terrorism purposes. They can pay bail and then have to be released. We are trying to get higher punishments for these crimes.

Other big cases that we have had involve gangs, because they manufactured their own guns, homemade guns. Almost all juveniles that are part of gangs carry one of these homemade guns, and also commit crimes with them. We usually make searches in their houses, but this is very difficult to control because they can manufacture more.

Most of the time we do not have many complaints about these crimes, so the investigators have to do a lot of undercover work to try to identify these people trafficking in firearms.

**D. Situation of Illegal Immigration**

In Honduras we do not have too many cases of organ or children trafficking. Most cases that we have is the trafficking of people to the United States. There are very well organized groups from south America to Mexico, who traffic people from South America and pass them through Central America to Mexico and then enter into the United States illegally.

We have had big cases with people from India and Cuba, but the biggest problem is with Chinese people. A lot of Chinese enter the country and then try to get into the United States. We have many Chinese restaurants, and hotels, where they keep people, and which are used as offices. The immigration office has a lot of work, they go to hotels to inspect everyday and they always find Chinese that are living in those hotels, staying illegally in Honduras and waiting for the right moment to leave for the United States. Sometimes they are lucky and get an American visa, but most of the time they go by car to Mexico to enter the United States.

These Chinese groups are also very well organized, and they can protect their people a lot. In my office we had a lot of these cases related with Chinese gangs and some of their some members are in jail. But most of the time we deport them from Honduras back to China, because there is no sense in putting them in jail; they have no family in Honduras and the people we need to arrest are the people that create the procedures and ask them for money. They provide them with a Honduran passport so that it is easier for them to get a visa to enter the United States.

**E. Situation of Bank Robberies**

Bank robbery has been a very common crime in Honduras. Almost every week we have a bank raid where robbers steal millions of Lempiras and it is found that they are also kidnappers and car thieves.

In CCTV videos of the banks, we recognize a lot of gangs, and one man that was arrested for kidnapping was identified in the video of two bank raids. This is a very serious crime, because these men are really dangerous and they do not care if they kill somebody. Another problem is that some managers or cashiers do not like to testify because they are afraid of them. The thieves are very well organized groups and they are very professional. These crimes are committed all over Honduras, even in the small towns, and also on the islands, where they have speed boats ready to escape. These are the biggest gangs that we have in Honduras.
F. Situation of Stolen Vehicles

There are very well organized groups. First, this crime happened only on the north coast and the west, but now it is all over the country. They steal more pick up trucks and luxury cars. They take them, most of the time, to Guatemala over the border in the north and over the borders of Nicaragua and El Salvador in the south. They manufacture false invoices, registration documents of the vehicle and the license plates.

Other times they steal the cars and then use them during a bank robbery or a kidnapping. Later we find these cars abandoned by the roads. We have a lot of fancy cars that have been stolen in other countries, they change the color and then they sell them here. We send cars back to other countries from which they have been stolen, mostly from El Salvador, Guatemala and Nicaragua.

The investigators and attorneys that work in stolen vehicles are the ones that have the most work to do, trying to find cars and identifying gangs, the average number of stolen cars is about 20 cars a day and we are not that lucky to find all of them. We recover about 50% of them.

G. Situation of Money Laundering

As I mentioned before, money laundering as a crime in Honduras is only related to drug trafficking. Before 1993, money laundering crime did not exist, it was only mentioned in one article of the drug law, that was in 1998 when the money laundering law was created but only in relation with drug trafficking. The attorneys that actually work with that crime are working on some reforms of that law and they are trying to establish money laundry provisions related to other crimes such as stolen vehicles, kidnappings, bank robberies, human trafficking, etc.

At this moment we only have three big cases of money laundering, the biggest of which is one of a Colombian organized crime group that came to Honduras to launder money. Three of the Colombians began a business selling home appliances and domestic electrical goods. The investigators began an investigation of the business, because it was strange that these places were not open to the public, people needed to use a doorbell to get in. Also, the Colombian police sent the Honduran investigators information about them because they found out that some drug dealers that were located in the sea on boats had communication with a cell phone number in Honduras. So we started an intensive investigation, and finally found probable cause to present in court. The business and their houses were searched and all these people have been arrested or have arrest warrants. During the search, we found about 60 bank account books, check vouchers where they have paid pilots, they had bought boats, and paid the boat captains, and there was nothing related to the domestic electrical goods business. The judge ordered the arrest warrants and confiscated about 8, 2001-model luxury cars, froze all bank accounts and also all the houses that they were building at a cost of over 2 million lempiras.

When the investigators were doing the investigation they noticed that in some accounts people received large amounts of money. This money was in the bank for 5 days and in the next week all the money was gone, and the money transfer was very often from banks in Honduras to other banks, most of them in Miami, New York, Panama and Mexico.

The total money that they uncovered was several million dollars, and further investigation revealed bank accounts with other banks in Central, South and
North America, and even in Spain and Thailand.

We already know the people that send and receive money in Colombia and we are working with assistance from the legal authorities in Colombia.

III. INVESTIGATION TECHNIQUES

According to the criminal procedure law, investigators are not allowed to carry out electronic surveillance. They do this type of investigation but it is not allowed to be used as evidence. We present this but only as an illustration to the judge. We now have a new law and it will be implemented by next February. Electronic surveillance will then be admissible as evidence at future trials.

A. Undercover and Electronic Surveillance Investigation

In drug trafficking investigations, the detectives use a lot of undercover methods. In the smaller cases they go and buy the drugs and when the transaction is done they arrest the people on the spot. The people and the drugs are presented in court for trial.

With the bigger cases, undercover investigators infiltrate drug organizations using microphones, calculators, pencils, etc. A micro video camera can identify the dealers. They take part in the negotiations and when the day and hour is set for the controlled delivery they arrest the criminals at that moment. The undercover agents are allowed to escape police movement, or sometimes we arrest the undercover agent also. Later he and any informants are then released. To do this type of cases we, as attorneys, have to talk in advance with the judge and let him know what is going on so we avoid any problem of illicit evidence.

B. Investigative Techniques in Kidnappings

In kidnapping cases we have to use a lot of people and time for the investigation. Sometimes the case is solved quickly but other times we can spend a lot of time trying to find the victim.

Much of the time when we have a kidnapping, two investigators go to the victim’s house to be there and tell the family how they have to act, tell them about the negotiation and how to ask for proof that the victim is still alive. The family can be nervous and confused and forget to ask for proof of life, also how and how much to offer the kidnappers is discussed, because we always offer less than the amount the kidnappers demand. Only in cases where the kidnappers do not want to negotiate will the family accept the amount demanded. Also the time that they spend in negotiation helps the investigators to try to get more information about them, listen to the phone calls and try to locate the place where they are and also the place where the victim is hidden.

We have had cases in which we located the kidnappers, the phone number and their location, then we follow them all the time, because much of the time they go to the place where the victim is being held, so in that way we can discover the location and search in that location to rescue the victim.

Other ways of doing this is at the delivery moment when we locate the place where they choose to make the delivery of the money, and when the family goes to leave the money we wait until the kidnappers pick it up. In some cases we wait until they release the victim, in other cases we arrest the kidnappers at that moment.
C. Other Types of Investigation

In other cases, such as stolen vehicles, the investigators work most of the time with informants. They can provide good information about cars, because every gang has their own area of operation, which means that a member of a gang cannot enter and steal a car from another area that does not belong to them.

Also they have a list of all the places that the car thieves bring the cars to change the color of different parts, to make the car look different. Also in these places they change the VIN (Vehicle Identification Number). Investigators work with some chemicals which they can apply to reveal the real VIN number.

The investigators share a lot of information with other police agencies, and also with Interpol, and they have a list of all the stolen cars in Central America. When they find a car that they think that could be stolen, they check it out on the system and they know if it is stolen or not.

With bank robberies it is very important to make a very good study of the crime scene because in that manner we can know the modus operandi of the gang and, in this manner, perhaps recognize the gang. Also the video cameras help a lot in these cases, to show to the judges, and, most of the time, they grant the arrest warrants.

IV. LEGISLATION

The criminal law in Honduras regulate car crime, kidnappings and bank robberies. The Congress has improved the punishment for these organized crimes.

We have a special law against drugs and money laundering, with very severe punishment. With drugs, for example, if a person is found with an amount that is considered more than would be for personal use, then it is considered to be trafficking and the punishment is 15 to 20 years in jail, plus a 1 to 5 million lempira fine.

We are trying to make some changes in that law because sometimes we arrest people that, for example, sell marijuana in small amounts and during a search we will find about 10 to 50 pounds, and most of the time they are poor people that sell drugs to live. We agree that they should receive punishment, but 15 years in jail is considered too harsh for 10 pounds of marijuana and the fine is more than they can pay. As attorneys, we try to find a way to help people, asking them to tell us about who gave them the drugs, so we can catch the big players and we offer to talk with the judge to obtain a more lenient punishment.
I. A BRIEF OVERVIEW

Today, a criminal considers the world as his field of operation. He commits a crime in one country, deposits the money derived from criminal activities in an offshore bank in another country and takes refuge in yet another country. The widespread political, economic, social and technological changes as well as variations in legislation, procedures and policies in different countries on mutual assistance in criminal matters have allowed organized crime groups to become increasingly active in the international arena. International criminal organizations are taking full advantage of globalization of world markets, dismantling of trade barriers, the increased ease of international travel, liberalized emigration policies, high-tech communications equipment and sophisticated money laundering techniques to enhance and further their criminal efforts and to forge alliances with other criminal groups. They are engaged in such felonious activities as illicit drug trafficking, money laundering, the use of violence and extortion, acts of corruption, trafficking in women and children, illicit manufacturing of and trafficking in firearms, environmental crime, credit card fraud, computer related crime, illegal trafficking of stolen vehicles, industrial espionage and sabotage, maritime piracy, etc. The problems raised by the current acceleration of the globalization process cannot be brought under control unless various governments coordinate the strategies and policies at the national level with the strategies, policies and regulations issued at the international level.

II. ORGANIZED CRIME—THE INDIAN PERSPECTIVE

Criminal gangs have been operating in India since ancient times. There is no firm data to indicate the number of organized criminal gangs operating in the country, their membership, their modus operandi and the areas of their operations. Thousands of organized criminal gangs operate in the countryside. Their structure and leadership patterns may not strictly fall in the classical Italian Mafia module. They may sometimes be operating in loose structures, but the depredations of such criminal gangs are too well known to be recounted. However, the purpose of organized crime in India, as elsewhere in the world, is monetary gain and this is what makes it a formidable force in today's socio-political set up.

In India, organized crime is at its worst in Mumbai, the commercial capital of the country. The first well-known organized gang to emerge in recent times was that of Varadharajan Mudaliar in the early sixties. His illegal activities included illicit liquor, gold smuggling, gambling, extortion and contract murders. Three other gangs emerged shortly thereafter, namely, Haji Mastan (gold smuggling),
Yusuf Patel (gold smuggling) and Karim Lala (drug smuggling). During the emergency in 1975, when there was a crackdown on the Indian Mafia, new gangs emerged. Dawood Ibrahim, the most successful, came in conflict with the Pathan gangs of Alamzeb and Amirzada which led to bitter internecine gang warfare. The Pathan gangs were liquidated to leave the field free for Dawood Ibrahim. In 1985, there was increased police pressure which made Dawood Ibrahim flee the country. In March 1993, Dawood Ibrahim was behind the serial bomb blasts in Mumbai in which 257 persons died and 713 were maimed. Public and private property worth several million rupees was destroyed. Investigation revealed the transnational character of the conspiracy, the objective of which was to cripple the economy, create communal divide and spread terror in the commercial capital of India. Dawood Ibrahim, Tiger Memon and Mohammed Dosa are presently reported to be operating from Dubai. Their field of activity primarily extends to extorting money from builders and film producers, mediating in monetary disputes, and undertaking contract killings. The other major gangs of Mumbai indulging in organized crime are those of Chhota Rajan (Drug Trafficking and Contract Killings), Arun Gawli (Contract Killings and Protection Money), Late Amar Naik (Protection Money) and Choota Shakeel.

Organized crime exists in other cities too, though not to the same extent as in Mumbai. There are several gangs operating in Delhi from neighboring State of Uttar Pradesh indulging in kidnapping for ransom. Om Prakash Srivastava, alias Babloo Gang of Uttar Pradesh, has been responsible for organizing kidnappings in Delhi and Mumbai in which ransom amounts were paid in foreign countries through “Hawala”. Land Mafia has political connections and indulges in land grabbing, intimidation, forcible vacation, etc. Of late, the ganglords of Mumbai have started using Delhi as a place for hiding and transit. Chhota Rajan group is strengthening its base in Delhi.

Ahmedabad city has been a hotbed of liquor Mafia because of a prohibition policy (banning of liquor). The Mafia became synonymous with the name of Latif, who started in the mid-seventies as a small time bootlegger and grew up to set up a 200 strong gang after eliminating rivals with intimidation, extortion, kidnappings and murders. He won municipal elections from five different constituencies with strong political patronage. He was killed by the police in an encounter in 1997.

A boom in construction activities in Bangalore city has provided a fertile breeding ground for the underworld. Builders are used for laundering black money. Forcible vacation of old disputed buildings is a popular side business for the underworld. The local gangsters in the State of Karnataka have connections with the underworld of Mumbai. One of the Mumbai gang operations here is the Chhota Rajan gang.

Brief profiles of three major transnational organized criminal groups are as follows:

A. Dawood Ibrahim Gang

Dawood Ibrahim group is the most dreaded mafia gang with countrywide network and foreign connections. He has stationed himself in Dubai since 1985 and has indulged in drug and arms trafficking, smuggling, extortion and contract killings. His brother Anees Ibrahim looks after smuggling, drugs and
contract killings, Noora looks after film financing and extortion; and Iqbal is in charge of the legitimate business which includes stock broking in Hong Kong. Anees is in legitimate business too, managing the Mohd. Anees Trading Company in Dubai. His business interests in India are shopping centres, hotels, airlines and travel agencies in Mumbai with an annual turnover of about Rs.20000 million. Extradition of offenders from Dubai has not been possible since there is no extradition treaty with Dubai. Moreover, some of these offenders have strong social links with politicians and other top personalities in Dubai.

B. Chhota Rajan Gang

Chhota Rajan was a member of the Dawood gang but parted company after the 1993 serial bomb blasts in Mumbai. He raised his own gang in 1994–95 which is reported to have a membership of several hundred persons today. Chhota Rajan himself is in a foreign country to avoid elimination by the Dawood gang. His gang indulges in drug trafficking and contract killings. In collaboration with another local gang, he organized the killing of a trusted leader of the Dawood Ibrahim gang, Mr. Sunil Samant, in Dubai in 1995.

C. Babloo Shrivastava Gang

Om Prakash Shrivastava in Babloo Shrivastava is facing 41 cases of murder, kidnappings for ransom, etc. He was arrested in Singapore in April 1995 on the basis of a Red Corner Notice issued by INTERPOL and extradited to India in August 1995. He has since been in jail but his gang continued to indulge in organized kidnappings and killings. The ransom amount is received by them in foreign countries through hawala (alternative non-banking remittance channel). The power of this gang has dwindled after his arrest.

III. ILLICIT DRUG TRAFFICKING

Illicit drug trafficking is the most significant transnational organized crime which has become a serious issue confronting both developing and developed countries. In most countries, despite years of drug suppression and prevention efforts, the cycle of drug trafficking and drug abuse continues. If allowed to remain unabated, the drug menace will considerably destroy the quality of life of people and hamper countries in their social, economic and cultural development.

India is a vast country with land borders extending over more than 15000 kilometers and a sea coast line of over 7000 kilometers. India’s narcotic problem needs to be visualized from its geographical situation. India is flanked on either side by two regions which are internationally acknowledged as major sources of illicit opiates namely, South-West Asia (Afghanistan and Pakistan) and South-East Asia (Myanmar, Laos, Thailand). Additionally, Nepal, a traditional producer of cannabis, both herbal and resinous, fringes the country in the North.

India is a traditional producer of licit opium for medicinal and scientific purposes. It is grown in three states, namely, Uttar Pradesh, Rajasthan and Madhya Pradesh under official control of Narcotics Commissioner. A part of the licit opium enters the illicit market in different forms. Although opium production is strictly under Government control in India, illicit poppy plantations have been reported in some places. Besides, there is illicit cultivation of opium in the hill tracks of some states.
India has a large presence of chemical industries producing precursor materials like acetic anhydride, acetyl anthranilic acid, etc. for lawful purposes. These chemicals are also utilized for processing and manufacturing heroin. The illicit cultivation of opium as well as the precursor chemicals can be used for the manufacture of heroin. For the last several years, India has also become a base for the manufacture of heroin, particularly in and around the opium producing districts of Uttar Pradesh, Madhya Pradesh and Rajasthan.

The illicit drug trade in India has centered around five major narcotic substances namely heroin, hashish, opium, herbal cannabis and methaqualone. The Indo-Pak border has traditionally been the most vulnerable to drug trafficking. Drug trafficking through India consists of hashish and heroin from Pakistan, hashish from Nepal, white heroin from Myanmar and heroin from Bangladesh. In the early eighties, the Border State of Punjab became affected with narco-terrorism with the smuggling of narcotic drugs and arms from across the border. This was also the time when the drug Mafia emerged in Golden Crescent countries.

Although the use of India by the drug traffickers as a transit country has resulted in an increase in drug abuse due to the spill-over effect, drug addiction in India has not assumed such a serious magnitude as in some of the western countries, but there are no grounds for complacency. There have been reports of drug use among the students of universities in Delhi, Mumbai, Calcutta and Chandigarh. Indian society is not agitated too much. It is customary in some places to consume Bhang (crushed leaves of the cannabis plant) on the popular festival of Holi. There is no such tolerance for charas or ganja which also derived from the same cannabis plant.

1. **Quantities of the most common drugs and precursors seized in India during the years 1997 to 2000**

<table>
<thead>
<tr>
<th>Name of the drug/precursor</th>
<th>Quantities seized in kilograms</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1997</td>
</tr>
<tr>
<td>Opium</td>
<td>3,316</td>
</tr>
<tr>
<td>Morphine</td>
<td>128</td>
</tr>
<tr>
<td>Heroin</td>
<td>1,332</td>
</tr>
<tr>
<td>Ganja</td>
<td>80,886</td>
</tr>
<tr>
<td>Hashish</td>
<td>3,281</td>
</tr>
<tr>
<td>Cocaine</td>
<td>24</td>
</tr>
<tr>
<td>Methaqualone</td>
<td>1,740</td>
</tr>
<tr>
<td>Acetic Anhydride</td>
<td>8,311</td>
</tr>
</tbody>
</table>

2. **Details of significant seizures of narcotic drugs and psychotropic substances made during 2001**

(i) On 5 January 2001, the Directorate of Revenue Intelligence, Amritsar Regional Unit seized 17,900 kg heroin from a truck at octroi post. The suspected source of the seized drug was Pakistan and it was concealed in three packets kept in a...
(ii) On 8 February 2001, the Narcotics Control Bureau, Mumbai Zonal Unit seized 1423.690 kg of mandrax tablets from a truck at the premises of M/s High Point Industries, MIDC, Taloja.

(iii) On 17 April 2001, the Directorate of Revenue Intelligence, New Delhi seized 17.000 kg of heroin at National Highway No.8, opposite Shiva temple, Delhi-Gurgaon Road when the occupants of two vehicles were transferring the drug from one vehicle to another. The suspected source of the seized heroin was South-West Asia.

(iv) In the first week of August, 2001, the Directorate of Revenue Intelligence, New Delhi seized two tonnes of hashish from two godowns in Mordabad, near Delhi. It is the biggest ever seizure in Northern India. The hashish was brought from Nepal, where it was processed initially for over a period of 2 to 3 months. The bundles of 200 to 300 kgs of hashish were brought hidden in a mini luxury bus over a period of 3 to 4 months, and stashed away in a godown in Mordabad. The bundles were then covered in polythene bags, wrapped with aluminum foils, vacuum-packed and the bundles shifted to another godown nearby. The machine used in vacuum packing was also recovered. A total of 4,000 packets, each containing 500 gms of hashish in cake form, were recovered. The vacuum-packed hashish concealed in packages of handicrafts was to be transported to Mumbai docks and then shipped to the United States.

The Government of India have taken various legislative, administrative and preventive measures to counter drug trafficking in the country. Among the prominent legislative measures are the provisions of deterrent punishment under the NDPS Act, 1985, applications of preventive detention of drug traffickers under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), notification of certain chemicals like acetic anhydride as a 'specified item' under the Customs Act, 1962 and India's land border with Myanmar falling within the territories of the States of Arunachal Pradesh, Nagaland, Manipur and Mizoram having been declared as 'specified areas' under the said Act for the purpose of checking illegal trafficking across the border. The creation of the Narcotics Control Bureau as an apex coordinating and enforcement agency at the national level is one of the prominent administrative measures taken by the Government.

The Narcotic Drugs & Psychotropic Substances (NDPS) Act, 1985, which was enforced with effect from 14 November 1985, provides for a minimum punishment of 10 years’ rigorous imprisonment and a fine of one hundred thousand Rupees extendable to 20 years rigorous imprisonment and a fine of two hundred thousand Rupees. In respect of repeat offenses, the Act provides for the death sentence in certain circumstances. In remaining cases, a minimum punishment of 15 years rigorous imprisonment and a fine of Rs.1.5 hundred thousand, which is extendable up to 30 years rigorous imprisonment and fine of three hundred thousand Rupees. The courts have been empowered to impose fines exceeding the above limits for reasons to be recorded in their judgments.
The N.D.P.S. Act also provides for:

(i) Constitution of a National Fund for Control of Drug Abuse to meet the expenditure incurred in connection with the measures for combating illicit traffic and preventing drug abuse.

(ii) Control over chemical substances which can be used in the manufacture of narcotic drugs and psychotropic substances through appropriate licensing and deterrent punishment for violation thereof.

(iii) Total ban on suspension, remission or commutation of sentences under the penal provision.

(iv) Forfeiture of all illegally acquired properties derived from or attributable to illicit trafficking. All enforcement agencies have been empowered to trace and freeze/seize such property as are liable to forfeiture under the Act, subject to confirmation within a period of 30 days by the competent authority appointed under this Act. The law applies to all properties and assets of traffickers acquired within a period of six years immediately preceding the date on which such a trafficker is charged with an offense under this Act.

In India, the states of Punjab which were affected by terrorist activities during the 1980s and Jammu & Kashmir have been particularly vulnerable to arms trafficking across the border. India has a long border with Pakistan, Nepal, Bhutan, China, Myanmar and Bangladesh. The Border Security Force, which guards the borders, continues to seize large quantities of AK Series rifles, heavy machine guns, pistols and revolvers, rocket launchers, rifles, magazines and ammunition.

India is one of the few countries in which an adequately deterrent penal system has been developed with regard to drug trafficking. This is in conformity with the UN Resolutions of 1961, 1971 and 1988 on Narcotic Drugs and Psychotropic Substances.

IV. ILLEGAL FIREARMS TRAFFICKING

Firearms trafficking is a global phenomenon and generally resorted to for generating profit, purchasing narcotics and supporting illegal activities of organized criminal groups.

In 1993, a consignment of AK-56 rifles, magazines, live rounds and hand grenades was sent from a Gulf country by land at the cost of Dighi Jetti in the State of Gujarat. Subsequently, huge quantities of arms, ammunition and explosives were smuggled into India by sea route at Shekhadi in District Raigad. These were used for bomb blasts in Mumbai on 12 March 1993, which caused terror, widespread damage, loss of 257 lives and maiming of 713 persons. During investigation, some of the arms recovered included 62 AK-56 rifles with 280 magazines and 38,888 rounds, 479 hand grenades, 12 pistols of 9 mm make with ammunition, 1100 electronic detonators, 2313 kgs. of RDX, etc.

The Police Authorities in the state of Madhya Pradesh in central India recovered 24 AK-56 rifles, 5250 cartridges, 81 magazines and 27 hand grenades on 4 November 1995.

On 17 February 1996, Delhi Police recovered 361 pistols of 0.30 caliber with the inscription “Made in China by Norinco”, 728 magazines and 3738 live rounds in a cavity in the undercarriage of a caravan bus. In this case, a Swiss
national and an Iranian national living in Pakistan since 1981, were detained and the investigation disclosed that this in fact was the second consignment, the first one having been successfully smuggled into India in 1995. 22 persons including five foreign nationals have been prosecuted in the court of law in this case.

A sensational case called the Purulia arms drop case was an example of illicit arms trafficking by air. On 17th December 1996, an Antonov 26 aircraft dropped over 300 AK47/56 rifles and 20,545 rounds of ammunition, dragnov sniper weapons, rocket launchers and night vision devices in Purulia village in West Bengal. The aircraft was bought from Latvia for US$2 million and chartered by a Hong Kong registered company Carol Airlines. Payments were made mostly from foreign bank accounts. The aircraft picked up a consignment of arms from Bulgaria using end-users certificate issued by a neighboring country. The arms were airdropped over Purulia in the state of West Bengal.

This case was investigated by the Central Bureau of Investigation and a charge sheeted in the City Sessions Court, Calcutta. After trial, the court found the accused persons guilty of offenses under the Indian Penal Code, Explosive Substances Act, Arms Act, Explosives Act, and the Aircraft Act and sentenced Mr. Peter James Gifran Van Kalkstein Bleach (British National), Mr. Alexander Klichine, Mr. Igor Moskvitine, Mr. Oleg Gaidash, Mr. Evgueni Antimenko, Mr. Igor Timmerman (all Latvian nationals) and Mr. Vinay Kumar Singh (Indian national) to various terms of rigorous imprisonment on 2 February 2000.

V. HUMAN (WOMEN AND CHILDREN) TRAFFICKING

Emigration of human beings from one country to another for trade, commerce, religious and other purposes is as old as human civilization itself. However, the word ‘traffic in human beings’ implies illegal movement of people from one country to another in violation of existing national laws and procedures. The countries of the West have become highly vulnerable on this count as they are attracting hoards of illegal emigrants mainly because of their relative economic prosperity. Illiterate, innocent and gullible persons from underdeveloped and developing countries, in their urge to earn more money from overseas employment, fall easy prey to unscrupulous and unauthorised agents. Such activities in India have turned into a lucrative business as the agents induce/make the immigrants part with large sums of monies towards their commission/service charges, expenses on journeys as well as for arranging passports, visas and statutory clearance. Often the travel documents are not valid and sometimes they are simply dumped into foreign lands without giving them promised employment.

India has also been significantly affected by such immigrants. India is found to be both the country of origin and destination for trafficking in women. According to intelligence reports, about 1200 thousand emigrants from Bangladesh have settled in the border States of West Bengal and Assam after independence. The problem, however, has spread as far wide as Mumbai, Rajasthan and Delhi, which have an estimated 300 thousand emigrants from Bangladesh. Similarly, a large number of Indians are working abroad, particularly in the Gulf region. A number of young girls from
southern India have been sent to the Gulf countries. There have also been reports that India has served as a transit point for trafficking of young virgins from Nepal, Myanmar and Bangladesh to the Middle East, mostly Dubai.

An estimated 5,000 to 7,000 Nepali girls are annually sold into brothels in India for prostitution. According to a press report, 9 Nepalese girls aged between 14 and 25 years, were rescued at Nepal-India border point at Kakarbhitta in Eastern Nepal in September, 2000. The rescued girls said that they were lured by the agents on the pretext of getting them married or obtaining jobs for them in India. According to another press report, the Nepal police arrested one Dhan Bahadur Gurung in November, 2000 on charges of selling more than 300 women and girls. He is accused of luring them into prostitution by falsely promising marriage and jobs in the circuses in India. In early 2001, an emigration racket, in which a nexus of policemen deployed at the Hyderabad airport and travel agents facilitated more than 3,000 people sneaking out on fake papers, came to light when nearly 40 women mostly illiterate were being sent to the Gulf countries from Hyderabad airport on fake papers.

Paedophiles now have a titillating new tool—the Internet. It allows them to access pornographic photographs of children, enter their homes, and 'groom' them for rape. The first case of paedophilia appears to have come to light in India in April, 1991 when the police raided the house of Father Freddy Peat, who had been running an orphanage in Goa, and recovered drugs and 2,305 photographs of children forced into sexual acts. Peat was arrested and later sentenced for life. It is believed that copies of a large number of pictures seized from Peat in 1991 have made their way onto the Web.

On December 16, 2000, a Swiss couple William and Loshier Marty, who were part of an international paedophile racket with operations in the West, Thailand, Sri Lanka and India were arrested at a resort in Madh Island, Mumbai with two minor girls. According to the police sources, photos of the couple’s victims—some as young as seven—were supplied to paedophiles rings and were also posted on the Web. The internet has facilitated the organization of paedophiles, who can now easily down load pictures, forward them to friends, enter chat rooms and pick out targets and eventually lure them into a meeting.

Another site came into the focus of CBI's Cyber Crime Investigation Cell during routine surfing. The site sold itself as a platform for those who would like to buy or sell sex slaves. In business since 1998, it offered members a sickening variety of slaves: virgin, black, teen, pregnant and more. A membership fee could be waived if a person tortured a slave and sent in photographs. The CBI set up a decoy customer and were promptly offered a teenage girl. The site's pimp was learnt to be operating from cybercafes in Delhi. At the last minute, however, he backed out of the deal and remained untraceable.

India’s first case of child porn on the Net came to notice last year. The site in question had a deceptively innocent homepage. But persist with the links and the site brought out 27 files with titles such as “Little bitches on the beach” and “All in the family”. By paying a little more one could watch the “VIP series” and customized videos. Most of the girls featured were under 10 and South Asian. Investigation reveals that the site was
created in Lima, Peru. But its domain server was being provided by Arvind Shyam Jagdam from Hyderabad. Jagdam was arrested in September, 2000. Information was sought from Peru police but the response is still awaited. An interesting fact revealed during investigation was that the naked children shown on the site were missing from their homes.

Child-porn sites showcase India as a paedophile’s paradise. However, most Indians still discount child porn on the net as a western perversion. Paedophilia and more so its prevalence online is still not a priority crime for the police in India. The Indian mind set is such that few are willing to accept that their children can be at such risk.

India has sufficient legislation to deal effectively with the problem of Suppression of Immoral Traffic as well as illegal emigration out of India. The Suppression of Immoral Traffic in Womens and Girls Act, 1956 to deal with these offenses, was re-enacted under the name of Immoral Traffic (Prevention) Act, 1986 to rectify some lacunae in the earlier Act.

The National Commission for Women reviews laws, conducts inquiries for redressal of complaints, undertakes promotional research for policies, advises the Government and ensures custodial justice for women. The Commission enjoys the powers of a Civil Court by virtue of Section 10(4) of National Commission for Women Act, 1992. It has formed an Expert Committee and has formulated a 10-year National Plan of Action (1997–2006) to coordinate with the 9th and 10th Indian Five Year Plans.

The law relating to emigration of citizens of India was consolidated and amended by enacting the Emigration Act, 1983 which repealed the earlier Act of 1922. In order to protect and aid, with advice, all intending emigrants, a provision was made for the appointment of a Protector-General of Emigrants and Protector of Emigrants by the Central Government. The Act prohibits a recruiting agent to commence or carry on the business of recruitment except under, and in accordance with, a certificate issued on that behalf by the Prosecutor-General of Emigrants or any other officer notified as registering authority under the Act. It further prohibited an employer to recruit any citizen of India for employment in any country or place outside India except through a recruiting agent competent under the Act to make such recruitment or in accordance with a valid permit issued on this behalf under the Act.

The Act provides for a punishment of imprisonment for a term which may be extended to two years and with a fine which may extend to two thousand rupees for contravening the above provisions or collecting, from an emigrant, any charges in excess of the limits prescribed under the Act or cheating any emigrants, etc. All offenses under the Emigration Act, 1983 are cognizable.

V. MONEY LAUNDERING

Crime pays and criminals naturally want to be able to enjoy their profits without worrying about the police or the courts. This is not a new economic or sociological problem. However, geopolitical developments over the past 50 years together with economic globalization have meant that the international movement of money has increased. The rapid expansion of international financial activity has gone
hand-in-hand with the development of transnational crime, which takes advantage of political borders and exploits the differences between legal systems in order to maximise profits. The groups involved are genuinely multinational and pose a direct threat to the financial stability of economic systems. They destabilise democracy because they are backed by clandestine networks subject to the law of the underworld.

Money laundering cannot be disassociated from other forms of crime. It is a fact that it thrives on corruption. Corrupt people use financial techniques to hide their fraudulently obtained assets and the continued successful application of these techniques depends on the involvement of influential accomplices. Money laundering is therefore at the centre of all criminal activity, because it is the common denominator of all other criminal acts, whether the aim is to make profits or hide them.

Laundering operations are, in fact, intended more to conceal the origin of the money than its criminal nature, in other words to hide the traffic from which it is derived rather than the general criminal activity which actually generated it. It is therefore essential to move the money in order to scramble the route it takes. The operation is wholly successful when the nature of the money is also concealed and it is impossible to establish a link with any criminal activity because the different circuits taken give it the appearance of legitimate income.

The Indian “Hawala” or “Hundi” system can be explained as a transfer of money through unofficial channels, normally outside the banking channels used by businessmen. The money so transferred often includes the money derived from criminal activities or in violation of the country's legislation. Underground banking which conveys a sense of a system may not strictly cover misuse of banking channel. It may refer to, in a restricted manner, a system of rendering services which are similar to banking services, the most important in this context being the transmission of money. Hawala represents such services.

As a developing nation, India feels seriously concerned not only because money laundering, including compensatory payments known as HAWALA transactions, have been threatening the economy but also because such practices contribute to the country's illicit drug trafficking and terrorist and subversive activities leading to large scale violence.

Of late, an impression is gaining ground that India is becoming increasingly vulnerable to money laundering activities and is becoming a transit point for drug traffickers and other criminals from the Golden Crescent i.e. Pakistan, Afghanistan and Iran and the Golden Triangle i.e. Burma, Thailand and Laos. The Economic Intelligence Council meeting of August, 1993 also observed that money laundering is now a major issue and has become a means of financial clout and strength of economic offenders and drug traffickers. India is fast becoming a conduit for the South East, Middle East, Far East and Latin American countries. The Indian hawala system or underground banking is used extensively for drug trafficking and remittances of money by both non-resident Indians and resident Indians.

In 1992–93, there were press reports on the U.S. State Department’s investigations into the possible use of Indian Banking Channels for laundering
drug money, including the possibility of links with the securities irregularities of 1992. An article in the London Times of May, 1993 had suggested that India, more specifically Bombay, was attracting huge amounts of Narcotics money from drug cartels in Columbia.

There were also, in 1994, reports in the press that the private sector in India is making its presence felt in the area of quick transfer of cash across continents. Travel agents and courier companies are targeting Indians living abroad who want to repatriate money. As no minimum/maximum limits are prescribed, the time taken to transfer money is much less. As such private companies do not fall within the direct control of the banking system, it could perhaps lead to the facility being used by money launderers, though there is no such case reported so far.

The high tax rate and the Exchange Control Regulations (though now considerably liberalised) have been the major reasons for hawala and other economic crimes in India. The Indian hawala system or underground banking is used extensively for drug trafficking and remittances of money by both non-resident and resident Indians. It is the Hawala where the economic offenders and the launderers meet. These offenders easily become prey for money launderers, or it can be said that these offenders on the one side and the money launderers on the other side close the circle.

In India, money laundering is also indulged in by some corporate houses to evade taxes as well as by the organized criminal groups to launder dirty money. Money laundering techniques include smurfing, establishment of front companies, acquisition of commercial and non-commercial properties, remittances through Hawala (non-banking channels), over-invoicing and double invoicing legitimate business and foreign remittances. Non-resident Indians have been given some special banking facilities. These facilities are misused to bring back the money as white money. For example, a portfolio account is opened in a foreign country and the money is laundered back to be invested in the stock markets. Another modus operandi is to launder the money through bogus exports. The conversion of black money is done by over-invoicing the products. Some shell companies are setup to issue bills or invoices accompanied by bogus transport receipts in order to obtain funds against these documents from bank/financial institutions and then divert major parts of such proceeds by issuing cheques in the names of non-existent front companies of cheque drawers. The cheque drawers then hand over cash immediately to the party after deduction of their commission. The cheque drawers are generally associated with commodities markets where fake transactions in commodities can largely go unnoticed. The cheque drawers also issue fake Letters of Credit and false bills. The cheque drawers file income tax returns in which the commission is shown as taxable income.

Money laundering per se has not been made a criminal offence in India so far. Certain activities like diversion of funds, submitting false statements relating to inventories, multiple financing etc. which could serve as means towards the end of money laundering are also not considered as crimes. The problem had so far been dealt with mainly under the Foreign Exchange Regulation Act, 1973, but with effect from June 2000, FERA has been replaced by the Foreign Exchange Maintenance Act. A bill to enact a money laundering law to be named 'The
Prevention of Money Laundering Bill has been introduced in Parliament by the Government of India but the same still remains to be enacted as law. Money laundering has been proposed as a cognizable crime punishable with rigorous imprisonment of 3–7 years which could be extended to 10 years and a fine of up to Rs. 0.5 million. The acquisition, possession or owning of money, movable and immovable assets from crime, especially from drug and narcotic crimes, would be tantamount to money laundering. Concealment of information on proceeds or gains from crime made within India or abroad is proposed to be an offence. An adjudicating authority is proposed which would have powers to confiscate properties of money launderers. An administrator may be appointed to manage the confiscated assets. An appellate tribunal is proposed to be set up with three members to hear appeals from the orders of the adjudicating authority. The rulings of the adjudicating authority would thus not be contestable in the local courts. Financial institutions are expected to maintain transaction records and furnish these to the adjudicating authority. Failure to do so would be punishable too.

However, at present, there is certain legislation to deal with such offenders. Such legislation is specifically intended to deprive offenders of the proceeds and benefits derived from the commission of offences against the laws of the country. Besides, such legislation also provides for the confiscation or forfeiture of the proceeds or assets used in connection with the commission of certain crimes. In the offences relating to narcotic drugs and psychotropic substances in particular, the very act of acquisition of property derived from or used in illicit trade and in relation to which proceedings for forfeiture have been initiated has been made punishable, also as a distinct offence (Sec. 68-Y of NDPS Act, 1985).

To deprive persons of the proceeds and benefits derived from the commission of an offence against the law of the land including forfeiture or confiscation of such property, Indian legislation also include the following Acts:

(i) Criminal Law (Amendment) Ordinance, 1944;
(ii) Customs Act, 1962 (Secs. 119 to 122);
(iii) Code of Criminal Procedure, 1973 (Sec.452);
(iv) Smugglers & Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976;
(v) Narcotic Drugs & Psychotropic Substances Act, 1985 (Secs. 68-A to 68-Y);
(vi) In addition, Indian statutes also contain provisions for preventive detention of foreign exchange racketeers under the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974, and of the drug traffickers under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances (PITNDPS) Act, 1988.

In one of the cases of money laundering dealt with by the Central Bureau of Investigation, an organized group of Hawala dealers operating from London and Dubai used to receive remittances from foreign banks for transferring the same to India. A telephonic message in coded words would be passed to agents in India to pay money in Indian currency. The remittances so received by the above mentioned persons in Dollars or Pounds Sterling at London and Dubai were used for purchase of gold, drugs, arms, ammunitions and explosives through the
VII. CYBER CRIME

The exponential growth of computer-related crime commensurate with the increasing dependence of computers in our day-to-day lives has posed new challenges to the law enforcement agencies in India. With the physical growth of the Internet over the past few years, a number of new generation crimes affecting the LAN, WAN and Internet have created extraordinary situations. Hacking, computer network breaches, copyright piracy, software piracy, child pornography, password sniffers, credit card frauds, cyber squatting are some of the new terms in the average criminal investigator’s dictionary. Highly intelligent persons commit these new generation crimes leaving hardly any trace and making investigation highly difficult and complicated. Recently, one of the hurdles in the investigation of computer-related crimes in India was overcome by the enactment of legislation in the form of the Information Technology Act, 2000, which came into force on October 17, 2000.

The Act delineates two separate types of penal provisions: contraventions and information technology offences. While contravention results in monetary penalty, the IT offences may result in the offender being imprisoned or paying a fine or both. Tampering with computer source codes, obscenity, hacking, unauthorized access to a protected system, misrepresentation before authorities, breach of confidentiality and privacy, publication of false particulars in digital signature certificates, etc. have been listed as criminal offences under this Act. Amendments have also been made to the Indian Penal Code, Indian Evidence Act, the Bankers’ Book Evidence Act and Reserve Bank of India Act to facilitate investigation and prosecution of cyber crime.

The Central Bureau of Investigation has recently created a Cyber Crime Research & Development Unit which maintains close liaison with international agencies like the FBI, Interpol and other foreign police agencies to share skills and techniques in investigating cyber crimes. The officers of CBI associated in this exercise share their expertise with the State police forces through regional training programmes held periodically.

VIII. CURRENCY COUNTERFEITING

Currency counterfeiting is one of the organized white collar crimes which has assumed serious proportions globally. It not only causes serious setbacks to the world’s economy but also jeopardizes the genuine business transactions. Nowadays, the counterfeiting of currency notes is done with the help of modern equipment such as colour scanners, colour copiers and printers, as well as by offset process. Most of the security features are copies from genuine notes by using modern techniques to produce the counterfeit currency notes very close to genuine currency notes. For achieving the required finish in the art of counterfeiting, the advance computer technology provides them with sophistication and perfection.

There has been an upsurge in the incidents of supply of counterfeit Indian currency notes from across the border of India especially from the Indo-Pakistan border and Indo-Nepal border. During
the year 1999, counterfeit Indian currency notes valued at Rs.18.4 million were seized as compared to Rs.6.5 million during 1998 indicating a threefold increase. During the year 1999, the three States of Uttar Pradesh, Bihar and West Bengal accounted for almost 40% of the total seizures. There are two recent cases of recovery of counterfeit Indian currency notes which have international ramifications:

(i) In January, 2001, the Uttar Pradesh Police, with the arrest of a suspected ISI agent, identified as Abal, from Muzaffarnagar District, busted a gang responsible for circulating fake currency notes across Western Uttar Pradesh, Delhi, Haryana, Rajasthan and Punjab. Currency notes worth Rs.17,000/- in the denominations of Rs.500/- and Rs.100/- were seized from Abal.

(ii) In March, 2001, the Mumbai Police, in one of the biggest hauls, seized counterfeit currency notes worth Rs.15 million in two separate cases. Ten persons linked to a Dubai-based notorious ISI agent Aftab Batki, were arrested. The counterfeit notes were of Rs.500/- denomination. The consignment had arrived from Dubai by air a couple of weeks ago. The notes were concealed in water dispensers and TV sets. After being smuggled into Mumbai, these were handed over to the Dawood gangsters for circulation. The interrogation of the arrested accused revealed that they worked for Aftab Batki. The police recovered from them a separate consignment of fake currency notes worth Rs.9 million meant to be supplied to certain businessmen in Mumbai.

India, as a signatory to the Geneva Convention, 1929, is committed to extend full cooperation to all other countries for eliminating or containing to the furthest extent possible, the counterfeiting of domestic as well as foreign currencies. Indian laws and enforcement measures are in full conformity with the principles laid down in the Convention. The Indian Penal Code provides for punishment of life imprisonment or imprisonment for up to 10 years for counterfeiting any currency note or bank note, using as genuine, forged or counterfeit currency notes or bank notes and making or possessing instruments or materials for forging or counterfeiting currency notes. It also provides for punishment of imprisonment up to 7 years for possession of forged or counterfeit currency notes or bank notes. The making or using of documents resembling currency notes or bank notes is also an offence punishable with a fine. The investigation of cases involving counterfeit currency is done by specially trained staff of the State Police.

At the national level, the Central Bureau of Investigation has created a separate unit to take up the investigation of offences of counterfeit currency which have inter-state or international ramifications.

IX. SPECIAL INVESTIGATIVE TOOLS TO COMBAT TRANSNATIONAL ORGANIZED CRIME

The use of traditional investigative methods to combat transnational organized crime has proved to be both very difficult and ineffective. This demands that law enforcement agencies utilise special investigative tools such as controlled delivery, undercover operations and electronic surveillance (wiretapping, communications interception etc.) to effectively fight transnational organized crime. However, the use of these tools are often
surrounded with controversy because there is always public fear that they might infringe on human rights to privacy or are likely to be misused by the government to oppress citizens.

A. Controlled Delivery

Controlled delivery techniques have proven an important enforcement tool in identifying the principles involved in drug trafficking and other major smuggling offences. It is particularly important in countering the criminal activities of drug traffickers who, by the use of couriers, creation of false documents and other deceptive practices, carefully disassociate themselves and try to be remote from the drug trafficking operations.

The United Nations Conference for the adoption of a Convention against illicit traffic in narcotic drugs and psychotropic substances has defined controlled delivery as follows:

"Controlled delivery" means the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, substances in Table-I and Table-II annexed to this Convention, or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences established in accordance with Article 3, paragraph 1, of the Convention."

Further, Article 11 of the Convention, covering controlled delivery, reads as follows:

"1. If permitted by the basic principles of their respective domestic legal systems, the Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offenses established in accordance with Article 3, paragraph 1, and to taking legal action against them.

2. Decisions to use controlled delivery shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned."

Section 4 of the Indian Narcotic Drugs and Psychotropic Substances Act, 1985 provides:

1. Subject to the provisions of this Act, the Central Government shall take all such measures as it deems necessary or expedient for the purpose of preventing and combating abuse of narcotic drugs and psychotropic substances and the illicit traffic therein.

2. In particular and without prejudice to the generality of the provisions of subsection (1), the measures which the Central Government may take under that subsection include measures with respect to all or any of the following matters, namely:
   a. ............
   b. Obligations under the International Conventions;
   c. Assistance to the concerned authorities in foreign countries
and concerned international organisations with a view to facilitating coordination and universal action for prevention and suppression of illicit traffic in narcotic drugs and psychotropic substances.

The above provisions thus enable the drug law enforcement agencies in India to use the controlled delivery technique as an effective tool of investigation against organized syndicates, nationally and internationally. However, before adopting this technique, the originating country and the recipient country should discuss in detail the entire operation, maintain surveillance simultaneously in both the countries, keep close surveillance on the movement of drugs either through cargo or through couriers, and time the final strike operation simultaneously in both the countries to achieve maximum results. It will also be necessary to authenticate the evidence gathered in both the countries for successful prosecution of the traffickers.

In India, the Narcotics Control Bureau, the nodal agency for enforcement of laws concerning narcotic drugs and psychotropic substances, has undertaken controlled delivery operations with a number of countries from time to time both on its own initiative or when suitable cases are brought to its notice by other enforcement agencies.

The operation of controlled delivery is very difficult and complicated, particularly when it involves many countries and there is a difference in their legal systems and practices. In using this technique, there is always a fear that the consignment of illicit drugs may be lost during transit. The uniformity of legislation and close cooperation amongst the law enforcement agencies of different countries are necessary make this technique effective.

B. Electronic Surveillance

Electronic surveillance covers wiretapping, communications interception, etc. Telephone interception and the monitoring of all electronic communications are the most controversial aspects of electronic surveillance. Yet these are very useful in assisting law enforcement agencies to combat transnational organized crime. Wiretapping or telephone interception is defined simply as the interception of a telephone conversation between parties without their knowledge, using equipment that is inserted into the electronic circuit between the transmitter and the receiver.

In India, interception of messages, transmitted or received by any telegraph is covered under subsection 2 of section 5 of the Indian Telegraphic Act, 1885, when it is necessary or expedient to do so in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with a foreign country or for preventing incitement to commission of an offence. The issue of constitutional validity of this provision came under scrutiny of the Supreme Court of India in a writ petition filed by the People's Union for Civil Liberties. The Supreme Court passed a judgment on 18th December, 1996, upholding the constitutional validity of the Act but laid down certain guidelines prescribing that the order for interception will be issued by the Home Secretaries at the Centre and in the States. A copy of the order should be sent to the Review Committee within a week. The order will cease to have an effect after two months unless renewed. The Review Committee will review the order passed by the authority concerned within two months of the passing of the order.
The total period shall not exceed six months.

The Government of India has made a legal provision in the licensing conditions formulated along with the cellular operators to make it mandatory on the part of the cellular companies to provide parallel monitoring facilities for all communications being received and emanating from a particular mobile set. Cellular operators operating in four metropolitan cities of Mumbai, Kolkata, Delhi and Chennai have made this facility available whereas others are bound to provide this facility within three years of the initiation of the mobile network.

C. Undercover Operations
The law enforcement agents, through undercover operations, are able to infiltrate the highest levels of organized crime groups by posing as criminals when real criminals discuss their plans and seek assistance in committing crimes. In India, there is no legislation or regulations to undertake undercover operations.

D. Immunity Systems
Immunity refers to the process of exempting from prosecution a co-accused, in order to maximise the potential of witness co-operation as a tool for combating transnational organized crime. The testimony of a person, who is party to a crime is very reliable because of his relationship to any co-accused. During investigation, a co-accused can reveal the true identities of other suspects, assist the police in locating the victim of a crime, or point out the corpus delicti or body of the crime. It is a very effective tool in prosecuting terrorists or members of criminal organisations.

Section 306 of Code of the Criminal Procedure, 1973, provides for the obtaining of evidence of an accomplice by tender of pardon subject to his voluntarily making a full disclosure of the facts and circumstances relevant to the offence for which the accomplice and co-accused are being charged with or investigated for. This provision is applicable in offences punishable with imprisonment of seven years or more.

E. Witness and Victim Protection Programmes
There is no legislation in India at present for protection of witnesses and the members of their families. Section 171 of the Criminal Procedure Code prohibits police officers to carry the complainant or witness to court. The intention of such legislation appears to be to ensure independence of evidence given by the witnesses without any influence from the police.

X. CONCLUSION
National strategies are inherently inadequate for responding to challenges that cross multiple borders and involve multiple jurisdictions and a multiplicity of laws. The rapid growth in transnational organized crime and the complexity of their investigations requires a global response. At present, the measures adopted to counter organized crime are not only predominantly national, but these measures differ from one country to another. It is absolutely imperative to increase cooperation between the world’s law enforcement agencies and to continue to develop the tools which will help them effectively counter transnational organized crime.

In India, the Extradition Act, 1962 deals with extradition of fugitive
Extradition can be made if the offence is an extraditable offence, i.e., an offence provided for in the extradition treaty with a State which is a treaty state and for other countries, an offence which is specified under the Second Schedule of the Act. Under this schedule, there are 18 types of offences. India has extradition treaties with Nepal, Belgium, Canada, Netherlands, the United Kingdom, the United States of America, Switzerland, Bhutan and Hong Kong and extradition arrangements with Sweden, Tanzania, Australia, Singapore, Sri Lanka, Papua New Guinea, Fiji and Thailand. Extradition treaties with Russia, Germany, UAE, Bulgaria, Thailand, France, Ukraine, Romania, Oman, Spain, Kazakhstan, Greece, Egypt, Malaysia and Mauritius are under finalisation.

India has entered into Mutual Legal Assistance Agreements/Treaties in criminal matters with the United Kingdom (1992 agreement concerning the investigation and prosecution of crime and the tracing, restraint and confiscation of the proceeds and instruments of crime, including currency transfer and terrorist funds), Canada (1994), France (1998), Russia (1993), Kyrgyzstan, Kazakhstan (all Mutual Legal Assistance Agreements in Criminal Matters), Egypt, China, Romania, Bulgaria and Oman. Mutual Legal Assistance Treaties have been negotiated with United Arab Emirates but is yet to be ratified. Negotiations are continuing for signing treaties on Mutual Legal Assistance in Criminal Matters with countries such as Australia, Norway, Mongolia, Turkmenistan, Bulgaria, Hong Kong, Ukraine, Uzbekistan and Azerbaijan.

Section 166 of the Criminal Procedure Code deals with reciprocal arrangements regarding processes. A court in India can send summons or warrants in duplicate to a court in a foreign country for service or execution and the said foreign court will cause the service or execution. Section 166-A of the Criminal Procedure Code provides for letters of request to the competent authority for investigation in a foreign country. A criminal court in India may issue a letter of request to a court or a competent authority to examine orally any person supposed to be acquainted with the facts and circumstances of the case, to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing. Similarly, Section 166-B provides for letters of request from a country or place outside India to a court or an authority for investigation in India. Under this provision, the Central Government may forward the letter of request received from a foreign country to a magistrate who may summon such person and record his statement. The Central Government can also send the letter to a police officer who will investigate the offence.

India is a signatory to the South Asia Association for Regional Cooperation (SAARC) Convention for Suppression of Terrorism. SAARC consists of India, Pakistan, Bangladesh, Nepal, Sri Lanka, the Maldives and Bhutan. Pursuant to the SAARC Convention, India enacted the SAARC Convention (Suppression of Terrorism) Act. Extraditable crimes include unlawful seizure of aircraft; unlawful acts against the safety of civil aviation; crimes against internationally protected persons; common law offences like murder, kidnapping, hostage taking; and offences relating to firearms, weapons, explosives and dangerous substances, etc. when used as a means to perpetrate indiscriminate violence involving death or serious injury, or serious damage to property.
CURRENT SITUATION OF AND COUNTERMEASURES AGAINST TRANSNATIONAL ORGANIZED CRIME IN RELATION TO CORRUPTION IN MALAYSIA

Sazali Bin Salbi*

I. INTRODUCTION

Corruption has existed ever since antiquity as one of the worst and, at the same time, most widespread forms of behaviour, which is inimical to the administration of public affairs. Corruption can occur in various form. Klaus M. Leisinger divides forms of corruption into ‘petty’ corruption, gift and ‘big’ corruption.

‘Petty’ corruption is defined as small payment to get someone empowered to take and enforce decisions to see to it that something he or she is duty bound to do is actually done within a reasonable period of time. These payments are used as stimulus or nothing would happen or it happens with some delay. The word ‘petty’ in petty corruption refers to both the size of the financial transaction and the size of the obligation the transaction buys. In some societies, petty corruption pervades almost every public service institution like the police and customs department.

Gifts are another type of corruption. In many societies gifts, including an invitation to dinner or other favors, are considered as something to respect which will strengthen a friendly relationship. Refusing them would be an offence. In other societies, accepting gifts may be close to corruption. The problem lies not only in the intention behind offering the gift but in the value of the gifts themselves. If their values are too high, they are likely to be ethically suspect. The intention of the giver is also relevant. If the gift is intended to motivate the receiver to do or not to do a certain thing within a period of time in the interest of the giver, it will be a corrupt practice.

A more serious type of corruption is ‘big’ corruption. One of the usual practices in this type of corruption is getting ‘commission’. In many developing countries, big construction schemes, purchases of armaments and other equipment like telecommunications and commercial planes, the tenders who won the bids had to give commissions to the people in the authority concerned. Since the commissions are high, they are one of the major attractions for political leaders and top ranking public officials who want to increase rapidly their personal wealth.

In which ever way one defines corruption, the effect toward one’s society due to the practices of corruption are devastating in the way it:

• erodes the moral fabric of every society;
• violates the social and economic rights of the poor and the vulnerable;
• undermines democracy;
• subverts the rule of law which is the basis of every civilized society;
• retards development; and,
• denies societies, and particularly the poor, the benefits of free and open competition.

* Assistant Commissioner, Anti-Corruption Agency, Malaysia
In view of the seriousness of the effect of corruption in all societies, delegates of the 8th International Anti-Corruption Conference held in Lima, Peru from 7–11 September 1997 adopted that:

• fighting corruption is the business of everyone throughout every society
• the fight involves the defence and strengthening of the ethical values in all societies;
• it is essential that coalition be formed between government, civil society and the private sector;
• a willingness to enter such a coalition is a true test of an individual government's commitment to the elimination of corruption;
• the role of civil society is of special importance to overcome the resistance of those with stake in the status quo and to mobilize people generally behind meaningful reforms;
• there must be a sustained campaign against corruption within the private sector as, with greater privatization and deregulation, it assumes a greater role in activities traditionally performed by the state;
• that top leadership sets the tone in all societies, as “You clean a staircase by starting at the top”.

II. ANTI-CORRUPTION AGENCY MALAYSIA

A. Perspective
The Anti-Corruption Agency (ACA) Malaysia is one of the agencies under the Prime Minister’s Department. It was officially established on 1st October 1967. The setting up of the ACA is closely linked to the hopes and intentions of the government to create an administration which is clean, efficient and trustworthy. In line with this aim, it is the role and responsibility of the ACA to eradicate corruption and the abuse of power.

B. Objective
The elimination of all forms of corruption and abuse of power prohibited by Government regulations and the laws of the country.

C. Vision
1. Toward the creation of a Malaysian society free from elements of corruption and based on high spiritual and moral values, led by a Government which is clean, efficient and trustworthy;
2. To make the ACA a professional, world class agency dedicated to the eradication of corruption, guided by principles of justice, resoluteness and integrity.

D. Mission
The eradication of corruption and the abuse of power in an integrated, ongoing manner in which:

1. All agencies and major institutions of the Government are fully involved in the enforcement of the relevant laws and regulation in a just and firm way in order to ensure the sovereignty of the law and to protect the national and public interest;
2. All levels of leadership, political, administrative, corporate, religious and non-governmental agencies are involved in the task of nurturing and internalizing the highest moral values until there is a consensus in Malaysian society that corruption is abhorrent and must be wiped out.

E. Function
1. To detect and ascertain the commission of corruption and the abuse of powers based on information and complaints obtained through
accurate, comprehensive and efficient covert and open investigations;
2. To procure and compile concrete and comprehensive evidence to prove commission of corruption, abuse of power and disciplinary misconduct through prompt and effective investigation;
3. To ensure that public interest and justice are continually safeguarded under the guidance of the relevant national laws and regulations through legal counsel and fair trial in cases of corruption and abuse of power;
4. To assist heads of public and private sectors in handling disciplinary action against officers who have violated work regulations and the code of ethics based upon comprehensive ACA reports;
5. To curb roots and opportunities for corruption and abuse of powers due to apparent weakness in the system of management that have been ascertained from ACA investigation results and analytical reports;
6. To assist in ensuring that only candidates who are not involved in corruption and abuse of powers are confirmed based on the ACA’s expeditious and accurate vetting of:
   (i) The promotion, optional retirement, conferment of prestigious awards and titles including filling-up vacancies for important posts in the public sector; and,
   (ii) The filling of important posts in certain institutions as well as conferment of prestigious awards and titles in the private sector;
7. To enhance participation and garner undivided and continuous support from leaders, influential groups and the general public in efforts to counter corruption as well as the abuse of power;
8. To ensure that actions taken by the ACA in intelligence gathering, investigations and prevention of corruption and abuse of powers are executed with discipline through its relationship and cooperation with relevant agencies at the national and international levels;
9. To create values of excellence by enhancing expertise and professionalism and fostering the spirit of solidarity amongst ACA officers through dedicated and dynamic leadership as well as planned and systematic training programmes;
10. To enhance the leadership capability and departmental management quality of ACA officers at all levels through development programmes in human resources, information technology and systematic work processes.

F. Strategy
The ACA has identified the following three principal strategies to achieve its stipulated Vision and Mission.

1. Reinforcement Strategy
To enhance the effectiveness of the ACA, this strategy focuses on reinforcing the professionalism of its officers as well as enhancing co-operation with other international anti-corruption law enforcement agencies and the mass media.

2. Encouragement and Prevention Strategy
This strategy emphasizes unwavering efforts to inculcate noble value, prevent corruption and improve the supervision system when enforcing laws and regulations.
3. **Enforcement Strategy**

New laws to enhance the powers of the ACA so that they will include aspects of mandatory punishment, burden of proof on the accused found in possession of property in excess of known legal income, seizure of property where no satisfactory explanation of its source is provided as well as the ability to deploy agent provocateurs in its investigations. These aspects seek to generate a deterrent effect on the offender.

**III. CURRENT SITUATION OF CORRUPTION IN MALAYSIA**

To have a clearer current situation of corruption in Malaysia, figures and statistics for the year 1999 will be used in place of figures and statistics for the year 2000 which are still in the process of gathering and analysis.

**A. Information**

For the fiscal year 1999 ACA Malaysia received a total of 7,829 complaints and reports through various sources as indicated in Table 1.

<table>
<thead>
<tr>
<th>No.</th>
<th>Source of Information</th>
<th>Total</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Anonymous letters</td>
<td>2674</td>
<td>34.16</td>
</tr>
<tr>
<td>2</td>
<td>Official letters from individuals</td>
<td>1963</td>
<td>25.07</td>
</tr>
<tr>
<td>3</td>
<td>ACA officers</td>
<td>1921</td>
<td>24.54</td>
</tr>
<tr>
<td>4</td>
<td>Personal visits</td>
<td>434</td>
<td>5.54</td>
</tr>
<tr>
<td>5</td>
<td>Telephone call</td>
<td>405</td>
<td>5.17</td>
</tr>
<tr>
<td>6</td>
<td>ACA aerogramme</td>
<td>114</td>
<td>1.46</td>
</tr>
<tr>
<td>7</td>
<td>Electronic media (homepages, e-mail, facsimile)</td>
<td>106</td>
<td>1.35</td>
</tr>
<tr>
<td>8</td>
<td>Letters from private companies</td>
<td>69</td>
<td>0.88</td>
</tr>
<tr>
<td>9</td>
<td>Letters from government department/statutory bodies</td>
<td>43</td>
<td>0.55</td>
</tr>
<tr>
<td>10</td>
<td>Police</td>
<td>42</td>
<td>0.54</td>
</tr>
<tr>
<td>11</td>
<td>Printing media</td>
<td>40</td>
<td>0.51</td>
</tr>
<tr>
<td>12</td>
<td>Letters from political parties</td>
<td>11</td>
<td>0.14</td>
</tr>
<tr>
<td>13</td>
<td>Official letters from government companies</td>
<td>4</td>
<td>0.05</td>
</tr>
<tr>
<td>14</td>
<td>Public Complaint Bureau</td>
<td>3</td>
<td>0.04</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>7829</td>
<td>100</td>
</tr>
</tbody>
</table>

After being processed and assessed, only 3,526 or 45.05% of the information received contained elements of corruption capable of open and covert investigations while 2,205 or 28.16% contained only general complaints in connection to the services and administration of certain departments or private companies. The information was then referred to the respective departments or private companies for their internal action. No action taken on the rest of the 2,098 complaints or 26.80% as they had no basis for investigation.

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B. Investigation

In 1999, 413 Investigation Papers (IP), 157 Preliminary Inquiry Papers (PIP), 2,282 Intelligence/Surveillance Papers (SP) and Project Papers were opened in respect of the 3,526 complaints. Other action such as making secret observations together with opened IPs/PIPs/SPs were taken on the remaining 674 complaints.

From 413 complaints investigated in 1999, a total of 406 involved offences under the Anti-Corruption Act 1997 while the remaining 2, 1 and 4 complaints involved the Prevention of Corruption Act 1961, the Emergency (Essential Powers) Ordinance No. 22 of 1970 and the Penal Code respectively. Table 2 shows a statistical breakdown of the total IP(s) opened by types of offence under the relevant laws.

<table>
<thead>
<tr>
<th>No.</th>
<th>Type of Offence</th>
<th>1999</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Prevention of Corruption Act 1961 Sec. 4 (c) - using of claims containing false particulars.</td>
<td>2</td>
</tr>
<tr>
<td>2</td>
<td>Anti-Corruption Act 1997 Sec. 10 (a) (aa) - Offence of accepting benefits from members of the public.</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>Sec. 10 (a) (bb) - Offence of accepting benefits on account of being a public servant.</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Sec. 10 (b) (aa) - Offence of giving benefits by members of the public.</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Sec. 11 (a) - Offence of accepting benefits by an agent.</td>
<td>201</td>
</tr>
<tr>
<td></td>
<td>Sec. 11 (b) - Offence of giving benefits to an agent.</td>
<td>61</td>
</tr>
<tr>
<td></td>
<td>Sec. 11 (c) - Using claims containing false particulars.</td>
<td>82</td>
</tr>
<tr>
<td></td>
<td>Sec. 15 (1) - Offence of using office/position for benefit.</td>
<td>29</td>
</tr>
<tr>
<td></td>
<td>Sec. 29 (b) - Obstruction of inspection and search.</td>
<td>1</td>
</tr>
<tr>
<td>3</td>
<td>Emergency (Essential Power) Ordinance No. 22 of 1970 Sec. 2 (1) - Offence of using an office/position for benefit.</td>
<td>1</td>
</tr>
<tr>
<td>4</td>
<td>Penal Code Sec. 165 - Public servant accepting an item of value without consideration.</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Sec. 193 - Fabricating evidence in court.</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Sec. 409 - Criminal breach of trust by a public servant.</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>413</td>
</tr>
</tbody>
</table>

C. Arrest

By the end of the year 1999, a total of 289 persons have been arrested, of which 21 were detained for offences under the Prevention of Corruption Act 1961, 241 for offences under the Anti-Corruption Act 1997, 5 under the Ordinance No. 22/70 and the remaining 22 for offences under the Penal Code. The total amount of gratification gleaned from the arrests was RM 39,063,674.54 while the comparison of arrests according to categories of person is shown in Table 3.
From the figures and statistics above, it's safe to say that the general public in Malaysia is well aware of the existence of ACA and its function as an agency which is responsible to eradicate corruption and abuse of powers. This is clearly shown by the amount of information received by ACA, excluding information gathered by ACA officers, totaling 5,908. Although more than half of the information received from the public does not contain elements of corruption or abuse of power, it does reflect the general obligation of the public to fight, hand-in-hand with the ACA, to eradicate corruption and abuse of power in Malaysia.

The statistics from Table 2 show that most offences of corruption in Malaysia are related to accepting of benefits by an agent. An 'agent', under Section 2 of the Anti-Corruption Act 1997 means:

“any person employed by or acting for another, and this includes an officer of a public body or an officer serving in or under any public body, a trustee, an administrator or executor of the estate of a deceased person, a sub-contractor, and a person employed by or acting for such trustee, administrator or executor, or sub-contractor”.

As such it shows that most of the IP(s) open for investigation under the offence of accepting benefits involve agents of a certain body, whether public or private sector. Mostly the accepting of benefits which are investigated under Section 11 (a) of the Anti-Corruption Act 1997 is regarded as 'stimulus', as stated by Klaus M. Leisinger, or inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to the agent’s principal affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to the agent’s principal affairs or business.

The second most investigated offence in relation to the Anti-Corruption Act 1997 for the year 1999 is in relation to Section 11 (c) in which 82 IP(s) were open. Section 11 (c) stated that:

“any person knowingly gives to an agent, or if an agent knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal”.

Looking at the above given figures and statistics, it is not wrong to say that the larger portion of corruption offences that occur in Malaysia are those that could be categorized as ‘petty’ corruption. The act of corruption is done more on the basis of one's personal gains. Although many of

<table>
<thead>
<tr>
<th>No.</th>
<th>Category</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Management &amp; Professional</td>
<td>18</td>
</tr>
<tr>
<td>2</td>
<td>Support staff/group</td>
<td>136</td>
</tr>
<tr>
<td>3</td>
<td>Members of public/private sector</td>
<td>127</td>
</tr>
<tr>
<td>4</td>
<td>Politicians</td>
<td>2</td>
</tr>
</tbody>
</table>
the offences are done by one person, it can not be denied that there exists syndicated or organized corruption. The nearest example that could be put forward is the investigation in the year 2000 against officers of the Forestry Department which is said to receive large benefits from illegal loggers. Also there was an investigation against officers of the Road And Transport Department and driving school instructors with regard to the issuing of driving licenses without the applicant going through the normal driving test conducted by the department.

Whatever it is, petty or syndicated, corruption in Malaysia is basically an internal problem that has to be dealt with by all segments of society. In view of this, the government, public agencies, private sectors, non-government agencies, political parties and the public have a role to play.

IV. COUNTERMEASURES AGAINST CORRUPTION IN MALAYSIA

A. Anti-corruption Act, 1997
1. Efforts in combating corruption started in the colonial days of the British administration with the setting up of a commission which is responsible to investigate malpractices in the public service sector. When Malaysia achieved its independence, the government setup the Anti-Corruption Agency in 1967 which is equipped with the Prevention of Corruption Act 1961 and the prescribed laws as its weapon in combating corruption.

2. Having considered the past trends and current challenges, the Malaysian Government, has carried out a comprehensive evaluation of the circumstances and symptoms of corruption and its effect at the national and international level. As a result, a new Anti-Corruption Act has been passed by the Parliament in 1997 to combat corruption and related crimes. In this act, several new provisions to widen and enhance the scope of the Anti-Corruption Agency and the Public Prosecutor’s functions in areas of detection, enforcement and punishment of corruption, abuse of public position or powers and related crime which are lacking under the old Prevention of Corruption Act, 1961.

3. Among the important aspects of this new Act was the inclusion of provisions pertaining to the forfeiture of property and the explanation of excessive properties acquired or held. The ACA 1997 doesn’t have a specific provision which has a “money laundering” word in it or specifically spells out the offence of “money laundering”. Nevertheless, Section 18 of the act provides a provision which makes it an offence for any person whether within or outside of Malaysia to be involved in any dealing in relation to any property which is the subject matter of the corruption offence.

4. As with any other legislation that intends to penalize the criminals, the ACA 1997 provides the Agency with several provisions which are to be used for the purpose of “asset tracing”, seizure and forfeiture. Among the provisions of the ACA 1997 are as follows:
(i) *Dealing in Property (Laundering)*

<table>
<thead>
<tr>
<th>No</th>
<th>Provision</th>
<th>Effect</th>
<th>Offence or Non-Compliance (NC)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>S. 18 Dealing in property</td>
<td>Besides the accused person, this provision also allows investigation and prosecution of any person who assists or abets the accused.</td>
<td>Fine &lt; RM50,000 or Jail &lt; 7 years or both</td>
</tr>
</tbody>
</table>

(ii) *Investigation Powers in Relation to “Asset Tracing”*

<table>
<thead>
<tr>
<th>No</th>
<th>Provision</th>
<th>Effect</th>
<th>Offence or Non-Compliance (NC)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Officer’s Powers (Direct)</td>
<td>Compel any person to produce documents without having to conduct a search.</td>
<td>NC—S. 22 (10) and punishable by S.58. Fine &lt; RM10,000 or Jail &lt; 10 years or both</td>
</tr>
<tr>
<td></td>
<td>S. 22 (1)(b) Order to produce documents.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>S. 22 (8) Recording of witness’ statement</td>
<td>Witness shall not refuse or answer questions which are incriminating. Used as a source of information pertaining to property acquired/held, details of incomes/expenditure, network analysis, etc. Statement to be admissible as evidenced for forfeiture of property.</td>
<td>S. 19—giving false statement or a misleading one. Fine &lt; RM100,000 or Jail &lt; 10 years or both</td>
</tr>
<tr>
<td>3</td>
<td>S. 23 (3) Search without DPP’s Order</td>
<td>Search can be done immediately and as such reduce the possibilities of documents or properties being destroyed.</td>
<td>S. 29—obstruction and punishable by S. 58. Fine &lt; RM10,000 or Jail &lt; 2 years or both</td>
</tr>
<tr>
<td>No</td>
<td>Provision</td>
<td>Effect</td>
<td>Offence or Non-Compliance (NC)</td>
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</tr>
<tr>
<td>4</td>
<td>S. 45 (3) Recording of accused’s statement</td>
<td>Compel the accused to give his defence or else if he holds back until in court, then he/she will be less likely to be believed by the court. Used as a source of information pertaining to property acquired/held, details of incomes/expenditure, network analysis etc.</td>
<td></td>
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<tr>
<td>5</td>
<td>Officer’s Powers (through DPP) S. 23 (1) Search with DPP’s Order</td>
<td>Search done with a written authorization from DPP.</td>
<td>S. 29—obstruction and punishment by S. 58. Fine &lt; RM10,000 or Jail &lt; 2 years or both</td>
</tr>
<tr>
<td>6</td>
<td>S. 27 (1) Solicitors to disclose information by High Court order.</td>
<td>Overcome ‘privileged information’ barrier in respect of dealing of properties under investigation.</td>
<td>NC—S. 27 and punishable by S. 58 Fine &lt; RM10,000 or Jail &lt; 2 years or both</td>
</tr>
<tr>
<td>7</td>
<td>S. 31 (1) Order allowing investigation of any bank account.</td>
<td>Supersede banking secrecy provision. Banking documents are used to trace movements of money and to ascertain <em>modus operandi</em>.</td>
<td>NC—S. 31 (4) Fine &lt; RM10,000 or Jail &lt; 2 years or both</td>
</tr>
<tr>
<td>8</td>
<td>S. 32 (1) Notice for declaring assets to the accused or any person, and to the bank for disclosure of any account of the above party.</td>
<td>An avenue for investigators to have detailed information pertaining to any property owned/held within or outside Malaysia.</td>
<td>NS—S. 32 (2) Mandatory Jail &gt; = 14 days &lt; 20 years and fine &lt; RM100,000</td>
</tr>
</tbody>
</table>
(iii) **Seizure**

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<tr>
<th>No</th>
<th>Provision</th>
<th>Effect</th>
<th>Offence or Non-Compliance (NC)</th>
</tr>
</thead>
</table>
| 1  | Officer’s Powers (Direct)  
S. 23 (1) Seizure of movable property (except under bank’s custody.) | Allows property to be seized for further due course. | S. 29—obstruction and punishable by S. 58.  
Fine < RM10,000 or Jail < 2 years or both |
| 2  | DPP’s Powers  
S. 33 (1) Seizure of movable property under bank’s custody. | Allows seizure/restraining order on bank accounts for further due course. | NC—S. 33 (3)  
Fine < 2 times the amount paid out in contravention of the order or RM50,000 whichever is higher and mandatory Jail < 2 years |
### Forfeiture

<table>
<thead>
<tr>
<th>No</th>
<th>Provision</th>
<th>Effect</th>
<th>Offence or Non-Compliance (NC)</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>S. 34 (1) Seizure of immovable property.</td>
<td>Allows seizure/restraining order on property for further due course.</td>
<td>NC—S. 33 (3) Fine &lt; 2 times the value of the property or RM50,000 whichever higher and mandatory Jail &lt; 2 years</td>
</tr>
<tr>
<td>4</td>
<td>S. 35 Property outside Malaysia (by High Court order)</td>
<td>Prohibit any dealing on property owned/held overseas.</td>
<td>NC—S. 57 and punishable by S. 58. Fine &lt; RM10,000 or Jail &lt; 2 years or both</td>
</tr>
</tbody>
</table>

### Evidence

<table>
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<tr>
<th>No</th>
<th>Provision</th>
<th>Effect</th>
<th>Offence or Non-Compliance (NC)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>S. 43 Evidence of unexplained wealth</td>
<td>Any evidence of unexplained wealth shall corroborate any evidence relating to the commission of the offence under the Act.</td>
<td></td>
</tr>
</tbody>
</table>
B. Integrity Management Committees

To complement and in tandem with the new legislative anti-corruption measure, the Prime Minister's Directive No. 1 of 1998, provides that the Special Cabinet Committee On Management Integrity, be entrusted with more functions and wider scope of duties to oversee and monitor the activities of similar Integrity Management Committees (IMC) setup at Ministerial, Federal Department, even at state and district levels. This directive is to consolidate a further integrity system of administrative management of the Government of Malaysia to enable efforts in combating corruption and malpractices among civil servants to be enhanced by agencies of the Government of Malaysia internally, comprehensively, systematically and continuously.

The objective of the IMC is: “to create a Government and Public Administration that is efficient, disciplined and imbued with the highest integrity through enhanced inculation of moral values over and above tackling problems and weakness particularly in the areas of Government financial management, public administration, handling of disciplinary referrals, corruption, abuse of powers and malpractices prohibited by regulation, laws and religion.”

C. Anti-Money Laundering Act

As a member of Asia Pacific on Money Laundering Group (APG) since May 2000, Malaysia have seriously taken steps to met the 40 Recommendations of the Financial Action Task Force on Money Laundering (FAFT). Malaysia have made a commitment to implement legislation and other measures based on the 40 FATF Recommendations. As such, Malaysia, as a member APG, is committed in providing a regional focus for co-operation against money laundering, especially in the implementation of the 40 FAFT Recommendations in legal, financial and law enforcement sectors.

By that Malaysia has responded to the call of the international community by enacting the Anti-Money Laundering Act 2001 expeditiously. It is hoped that the law, with 119 serious offences including drug trafficking, corruption, kidnapping, robbery, human trafficking, gambling and fraud, will provide a strong foundation for Malaysia’s efforts in
ccountering money laundering. The Act provides comprehensively for prevention, detection, investigation and prosecution of money laundering and forfeiture of property derived from, or involved in, money laundering activities. In addition, the law incorporates the requirement of customer identification, record-keeping and reporting of suspicious transactions by reporting institutions. With the new law Malaysia has adopted the majority of the FAFT's 40 Recommendations.

V. CONCLUSION

The fight against corruption involves the defence and strengthening of ethical values in all societies. The lack or absence of the element of accountability and responsibility is a frightening symptom of moral decadence and the real threat of increasing economic crimes, corruption, violence and crimes of all sorts in every part of the world. Mankind, therefore, should seriously start looking beyond codes of ethics, criminalized or otherwise. No laws, regulations or codes of ethics, no matter how good and comprehensive they are, unless effectively enforced, can wholly eradicate crime, greed, corruption, incompetence or sin. For this reason again we have to fall back on religion and that god is the source of correct principles and that our conscience should be guided by the divinely-inspired values, principles ethics and norms.
I. INTRODUCTION

Crime is unwanted in every society, but it seems that crime inevitably exists in every country. No matter how hard we try to suppress, prevent or eliminate crime, we still hear reports of crimes every day everywhere in this modern world. Moreover, some of the criminals nowadays have changed their activities and taken advantage from the progress of easy communication and transportation. They organize and build up their networks and spread their activities across the borders of countries. Only minor crime seems to happen in individual countries while serious crime has become borderless and transnational in nature. Thus, the impact of their activities is greater than before and usually involves more than one country.

Organized criminal groups in Thailand exist in many forms and engage in many activities. Thai criminals join with foreign criminals and operate illegal activities in Thailand which have a impact in other countries. They are well organized and difficult to detect. The examples of such transnational organized crime activities in Thailand are as follows.

II. SPECIFIC CRIMES IN THAILAND

A. Drug Related Crimes

The most serious criminal problem in Thailand is illegal drugs trafficking. Thailand is one of the countries that encounters the full scale of criminal activities in the illegal drug trade, from producing, trading, smuggling and the wide use of illegal drugs among Thai people. Illegal drugs and narcotics popularly used in Thailand are methamphetamine or “speed pills”, heroin, cannabis, opium, ecstasy and cocaine. Heroin is the most dangerous drug and is very popular. However, the Narcotic Suppression Office has tried very hard to arrest and prevent the trafficking and smuggling of heroin. In recent years we have seen the decreasing significance in the trafficking of heroin but we have seen an increase in producing and trafficking of methamphetamine or speed pills instead. The reasons are that speed pills are easier to produce and more difficult to catch. With a simple machine easily found in markets and a vehicle like a minivan which can be modified to be a mobile factory. To make the situation much worse, people tend to have a wrong attitude that speed pills are not as dangerous as heroin. All of these factors allow speed pills to penetrate schools and universities and every section of society. Students use speed pills, believing that they can stay up all night long preparing for examinations and they will never become addicted to them. Truck drivers use speed pills in order to be able to work all day long without exhaustion. Thus, there is news of methamphetamine traffickers having been arrested everyday with more than one hundred thousand pills seized at a time. The manufacturing plants for speed pills are located along the Thai-Burma border. The chemical, namely “Ephedrine” used as the
precursor, is smuggled from the Southern border of China down to the Thai-Burma border. The Thai intelligence service estimates 600–700 million speed pills would be produced this year (2001) inside Burma. Forty million methamphetamine pills are ready for gradual smuggling into Thailand. On July 13, 2001 the Thai Army patrolling the border clashed with the smugglers, seizing about 2.6 million pills. One Thai soldier was killed in the clash. Meanwhile, the narcotics police seized 74 kilograms of heroin and seized nearly 90 million baht ($2 million) in cash and bank deposits. The drugs were smuggled from laboratories in Pangsang, Burma’s Northern Shan State, through Laos to Chiang Saen district in Chiang Rai, Thailand. The drugs were seized in Bangkok and were believed to be destined for the United States. The suspects were placed under police surveillance for some time before the arrest. They were also known by the Thai and US Drugs Enforcement Administration to have close ties with Wei Hsueh-kang, a fugitive drugs warlord, who heads methamphetamine production in the United Wa State Army in the Shan State.

C. Illegal CD Copying
Copyright infringement is also another practice that many people are involved in and can get very good rewards. The cost of producing an infringed CD is just only 20 baht or almost 50 cents but it can be sold at 150 baht or almost US$3. Moreover, the machines and materials to produce the infringed CDs are not difficult to obtain while the CDs can be produced in a large number in a rather short period of time. The infringed CDs are sold not only in Thailand but also in the neighboring countries, such as Laos, Cambodia, Burma and Malaysia. Recently, the police and customs officers have seized the infringed CDs disguised as export goods to Mexico.

D. Money Laundering
The Office of Anti-Money Laundering has been set up after the Money Laundering Control Act B.E. 2542 (1999) came to effect. After only 9 months of operation, the amount of money it has confiscated is more than 240 million baht. It is believed that much more money is being laundered in Thailand.

E. Illegal Firearms Trafficking
Geographically, Thailand is located among the neighbor countries that have political unrest in their countries i.e. Burma and Cambodia. In the past 10 years, a number of firearms have been smuggled in and out of Thailand into those two countries. Firearms control in Thailand seems to fail. Many of the 400,000 handguns imported since 1995 were brought in on fake import licenses. Guns imported on fake licenses were mainly sold to third parties. This illicit but highly profitable business was a
major obstacle to the suppression of crimes.

**F. Human Trafficking**

The growth and development of Thailand in the past 10 years, compared to neighboring countries, have induced foreign people to make every effort to migrate to Thailand. Some of them, mostly Chinese, try further to make their way to a third country illegally with the help of organized crime gangs. Firstly, the criminal networks that help send people into a third country will send their people into Thailand to operate as a travel agency in order to disguise their operations. The travel agency, then, brings in foreign tourists, mostly Chinese who later on will jump their visa, stay in Thailand and wait for a new passport. The travel agency will get the real passports from many countries, e.g. Singapore, Japan, Thailand, Taiwan, etc. in the amount of 15,000–35,000 baht per passport. For someone who already has a visa the cost is about 100,000–200,000 baht. Then, the travel agent will change the photos in these passports into the photos of the immigrants. Each immigrant needs to study Japanese, English or the Korean language depending on what passport he shall get. Then, a group of immigrants is ready to travel to the destination country. Obviously, the proceeds in this activity are quite large.

**G. Smuggling of Stolen Vehicles**

Many vehicles, particularly pick-up vans and motorcycles, in Thailand are stolen everyday and have been smuggled to Cambodia, Burma and Laos. The stolen vehicles are sold at a very cheap price. The vehicles are stolen at night and are driven to the border the next morning with fake license plates and then they are taken across the border. However, there are reports that some vehicles stolen from Malaysia and Singapore have been smuggled for sale in Thailand.

**H. Financial and Securities Fraud**

On July 26, 2001, a total of 85 foreigners and 17 Thais were arrested at the offices of the Brinton Group and Benson Dupont Capital Management, two companies accused by securities regulators of running unlicensed securities services and defrauding foreign investors. Total damages incurred by foreign investors were estimated at 300 million Australian dollars or 6.9 billion baht. The raids were led by the Securities and Exchange Commission, Anti-Money Laundering Office, economic crime suppression police, immigration and labor officials with the co-operation in investigation of the US Federal Bureau of Investigation and the Australian Federal Police. The foreign suspects included 30 Englishmen, 14 Americans, 10 Irish nationals, 10 Australians, 6 Filipinos, 5 Canadians, 2 Singaporeans, and one person each from Burma, Jamaica, Liberia, New Zealand, Malaysia, Spain, Scotland and India. This is the largest case of its kind in Thailand.

The criminal nowadays is getting more complex in terms of activity and organization. People involved in an organized criminal group are of many nationalities. They may plan in one state to take action in another state. However, every domestic law of every country is applicable within its jurisdiction only. It is almost impossible for one state alone to combat against such transnational organized crimes. In Thailand there are many laws and regulations which are outdated and have not been amended to deal with this new kind of organized criminal group. A lack of sharing information among law enforcement agencies has been seen as one obstacle.
where our officers need to improve their performance.

II. MEASURES TAKEN TO STEP UP INTERNATIONAL COOPERATION

A. Cooperation in Criminal Matters Among States

A better way of combating organized crime is to prevent it from occurring instead of suppressing it. To guarantee successful crime prevention, the accuracy of information is a vital part of the operation. Since each law enforcement agency in every country still works independently within its jurisdiction, combating transnational organized crimes shall never be successful without cooperation between the states in sharing information and other matters needed to get the criminals brought to justice.

The Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) has been enacted in order for law enforcement to be able to cooperate with foreign authorities in these matters when requested. The “Assistance” means assistance regarding investigation, inquiry, prosecution, forfeiture of property and other proceedings relating to criminal matters. The Office of the Attorney General shall be the central authority that has the authority and function to be the coordinator in providing assistance to a foreign state or in seeking assistance from a foreign state under this Act.

The duties of the central authority are as follows:

1. To receive the request for assistance from the Requesting State and transmit it to the Competent Authority;
2. To receive the request seeking assistance presented by the agency of the Royal Thai Government and deliver to the Requested State;
3. To consider and determine whether to provide or seek assistance;
4. To follow and expedite the performance of the Competent Authorities in providing assistance to a foreign state for the purpose of expeditious conclusion;
5. To issue regulations or announcements for the implementation of this Act;
6. To carry out other acts necessary for the success of providing or seeking assistance under this Act.

The assistance that may be rendered is as follows:

1. Taking statements from persons, providing out of court documents, articles and evidence;
2. Serving documents, searching and seizing of documents or articles;
3. To locate a person;
4. Taking the testimony of witnesses;
5. Forfeiture or seizure of properties;
6. Transfer of persons in custody for testimonial purposes;
7. Request for initiating criminal proceedings.

B. Extradition

To prevent any criminal from escaping from justice, no matter how far the criminal runs, the law shall be able to get him brought back to justice. The most effective tool to get the runaway criminal from another state is to ask the authority in such state to send him back home for trial. This is known as extradition. Thailand has had an Extradition Act since B.E. 2472, since 1929. The person accused or convicted of crimes committed within the jurisdiction of other States may be sent to such States, provided that by the law of Thailand such crimes are
punishable with imprisonment of not less than 1 year. In addition, Thailand also has bilateral agreements with Belgium, the Philippines, Indonesia, the United Kingdom and the United States of America. Thailand has extradited one Thai politician alleged of sending tons of cannabis to the US. Recently, Thailand has requested the extradition of one executive of a financial company alleged to have committed financial fraud in Thailand from the UK but the result was not successful.

III. MEASURES TAKEN TO IMPROVE RELATED LAWS AND REGULATIONS

A. Measures Against Drug Trafficking

The Act on Measures for the Suppression of Offenders in Offences Relating to Narcotics B.E. 2534 (1991) is enacted with the objective to cut the growing trade in narcotics by seizing any property related to the narcotic offences and any tools, machines, transportation vehicles and properties used for committing narcotics offences. Property related to narcotics offences means money, proceeds received in relation with the narcotic offences including any property derived from such proceeds or money. All of the seized properties and proceeds shall go to the Narcotic Suppression Fund for use in the suppression of such crimes.

B. Anti Money-Laundering Law

In 1999, the parliament enacted the “Money Laundering Control Act B.E. 2542 (1999)” in order to combat money laundering practices. The Act requires the financial institutions to report every transaction in the amount exceeding 2 million baht to the Office of the Money Laundering Control for investigation. The Office also has the power to gather evidence for the purpose of taking legal proceedings against offenders of predicate offences, which is any offence:

1. relating to narcotics;
2. relating to sexuality in respect of procuring, seducing or taking away for an indecent act a woman and child for sexual gratification of others, offence of taking away a child and minor;
3. relating to public fraud;
4. relating to misappropriation or fraud or exertion of an act of violence against property or dishonest conduct under the law governing financial institutions;
5. of malfeasance in office or judicial office;
6. relating to extortion or blackmail committed by claiming an influence of a secret society or criminal association;
7. relating to smuggling under the customs law.

C. Capital Punishment

On July 26, 2001 the Criminal Court sentenced 19 drug traffickers to death and two others to life in five different cases involving over 2 million methamphetamine pills and 9 kilograms of heroin. Only 5 days later, the Criminal Court sentenced another 14 drug traffickers to death. They were charged with the possession of methamphetamine to the total of 450,000 pills and 30 kilograms of heroin. The death penalty has been a hot issue for debate among lawyers in Thailand about its justification for combating crime. It is not so long ago that the government amended the narcotics law by changing methamphetamine from a stimulant substance to a narcotic. The result is that the traffickers shall face capital punishment. It is submitted that the
death penalty is still useful in Thailand although it is argued by the human rights activity groups that there is no concrete evidence that the death penalty helps decrease crime.

D. Plea Bargaining

The concept of “Plea bargaining” is quite a new legal concept in Thailand. It is believed that one who commits the crime deserves to be punished at a certain level. However, since criminal activities are getting more complex as they are organized into groups and their activities go beyond the geographical border of the state, therefore, the defendant who has been arrested may hold some useful information from their groups which, once revealed, may be useful to law enforcement to be able to arrest the ring leader. Recently, there is a discussion of how we shall implement the plea bargaining concept into Thai laws. There are several studies and seminars about the appropriate solution to implement plea bargaining practices in criminal proceedings. It is felt that there are some difficulties, since the Thai criminal procedure allows an injured party to file criminal cases in court. The use of plea bargaining might have some affect on such injured parties. Therefore, it is felt that plea bargaining shall be used only in illegal drug cases where the state is the injured party.

E. Witness Protection Scheme

Witnesses in criminal cases normally try to refuse to testify in court against influential suspects, including organized criminal groups, in fear of danger to themselves and their families which result in the dismissal of cases. Every year, 20% of all criminal cases are thrown out of court because the prime witnesses are too afraid to take the stand. The Ministry of Justice has proposed the “Witness Protection Bill” in order to overcome such fear. Under the draft bill, protection will be the responsibility of the police to carry out this task until the Witness Protection Office is established. There shall be general and special measures for witness protection. In general cases, the investigator or prosecutor, with the request of the witness, may ask the Witness Protection Office to order protection for up to 30 days subject to necessity in the case. However, in an emergency situation, the investigator or prosecutor would be empowered to order the police protection for their witness for up to 5 days at a time. The special measures are designed to apply to cases involving trading in narcotics, women and children. The Minister of Justice may order special measures for witness protection. The measures include relocation of a witness residence, changing of witness identity and records, as well as providing the living allowances job training for up to 2 years. Both general and special measures can be extended to the witness’s spouse, parent, children and person in close relationship with such witnesses. Although there is a worry about the shortage of budget, this witness protection programme is inevitably necessary to combat organized crime. Moreover, the use of modern technology in trials are also being introduced. To reduce the fear of witnesses taking the witness stand and confronting the defendant who may be an influential person or member of an organized crime gang, the use of video conferencing where witnesses testify in front of the video camera in a room separate from the trial room should be used instead of the ordinary method. This should make the witnesses feel more relaxed and comfortable to tell the whole truth. The proposed bill to amend the Thai Criminal Procedure Code for allowing the use of
video conferencing is at the scrutiny of the Office of the Council of State.

IV. CONCLUSION

Transnational organized crime has spread and done harm to many countries. The cooperation of every state to suppress such crime is important and needs to be established as soon as possible. Moreover, the need of harmonizing the domestic laws in order to make cooperation possible is also vital.
REPORTS OF THE COURSE

GROUP 1
PHASE 1

ANALYSIS OF CURRENT SITUATION OF ILLICIT DRUG TRAFFICKING

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<th>Ms. Gina Ramos                (Honduras)</th>
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<td>Mr. Bechem Eyong-Eneke (Cameroon)</td>
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I. INTRODUCTION
Ordinarily, drugs should be used to treat or control diseases. To this end, the use of drugs is entirely lawful and poses no problem. The problem, however, arises when the drugs are used abusively, for example, to intentionally activate such a degree of ecstasy in the subconscious that it leads to negative degeneration and devastation of the social fabric.

Illicit drug trafficking is accelerating at an unprecedented pace, spreading very rapidly across the globe, as a result of rapid globalization. The IT revolution has reduced the world to a small village and has made communication exceptionally fast and easy. The drug trafficker has found very useful tools to reach his desired destination with ease and with a high degree of secrecy, speed and specificity (three S).

Illicit drug trafficking is one, if not, the biggest of all transnational organized crimes. A large variety of drugs are involved, leading amongst which is cannabis (marijuana and hashish), opiates (opium and heroin), stimulants and cocaine. According to the United Nations Office for Drug Control and Crime Prevention, cannabis continues to be widely cultivated and trafficked. More than 155 countries reported seizures of cannabis in 1999. In the Central Asian Republics, fields of cannabis cover several thousands of hectares and these constitute the major source of supply for the illicit Russian drug market. Indoor cultivation of cannabis continues to develop especially in the Netherlands, Canada and the U.S.A. Opium production was, however, in decline in the year 2000 in some countries. It is mainly produced in Afghanistan, Myanmar, Laos, Thailand, Colombia and Mexico.
In spite of the versatile countermeasures taken by the various countries of the world to fight illicit drug trafficking, the trade continues to grow. Several reasons have been advanced to explain the survival of this heinous and illicit business. Corruption of government officials apart, the drug traffickers employ a wide range of other means to establish and expand their trade through various trafficking modes which include concealment in “double-bottom” bags; hide-outs in sea vessels, trains, cargo containers, aircraft, vehicle fuel tanks and tyres; using children as innocent carriers, the list is exhaustive. It is thus difficult to stop this illicit drug trade. But it is the view of this group that consumer countries, in order to stop production, must take all necessary measures not to allow this material to reach their countries and if it does reach it should not be distributed. All this can be done by persuasion through various media and groups. This will not only discourage the traffic in narcotics but also the distribution and even the users of these drugs.

II. CURRENT SITUATION

A. Global Situation

The recent increase in the scope, intensity and sophistication of crime around the world threatens the safety of citizens everywhere and hampers countries in their social, economic and cultural development.

Drug abuse is a global phenomenon. It effects almost every country, although its extent and intensity differ from region to region. Drug abuse trends around the world, especially among youth, have started to rise over the last few decades. Criminal groups have established international networks to carry out their activities more effectively through sophisticated technology and by exploiting today’s open borders, in some countries.

Illicit cultivation of opium and coca bush is now mostly concentrated in the territories of two and three countries respectively. The year 2000 recorded a decline in global opium production and a stabilization in cocoa production. The total increase in cultivation in the year 2000 is due to a 19,200 ha increase in cultivation in Myanmar, partly offset by a 8,400 ha decrease in Afghanistan and a 3,500 ha decrease in Laos.

In the year 2000, close to 50% of the global illicit poppy cultivation areas were located in Myanmar, 36% in Afghanistan, and 10% in other Asian countries. The Americas, Colombia and Mexico accounted together for 4% of global cultivation. Overall, the cultivation of cocoa bush, the production of cocoa leaf and the potential production of cocaine remained more or less stable in the year 2000 due to (1) continued eradication in Bolivia; (2) a decline of cultivation in Peru; (3) some increase in Colombia. In the absence of reliable information on global cannabis cultivation, seizures seem to confirm that cannabis continues to be widely cultivated and trafficked.

According to Interpol, “the indoor cultivation of cannabis continued to develop during the year 2000, especially in the Netherlands, Canada and the U.S.A. An increasing amount of cannabis from Colombia and Jamaica made its way to Europe during the year. The Central Asian Republics, where vast fields of cannabis cover several hundreds of hectares, remain for the time being a major source of supply for the illicit Russian market.
Cannabis ranked first, both in terms of numbers of seizure cases and amounts seized. Large scale seizure cases of cocaine, notably when it is trafficking by sea, are more likely than heroin or amphetamine-type stimulants.

The most significant increases in seizures in 1999 were reported for amphetamine-type stimulants (ATS), reflecting increasing levels of trafficking and law enforcement activities in East and South-East Asia. Seizure of opiates, expressed in heroin equivalents, grew by 14%, largely reflecting the 1999 bumper harvest in Afghanistan.

The estimates show that worldwide the most widely consumed substances are cannabis (144 million people), followed by amphetamine-type stimulants (29 million people), cocaine (14 million people) and opiates (13.5 million people of whom some 9 million are taking heroin). The total number of drug users was estimated at some 180 million people, equivalent to 3% of the global population or 4.2% of the population age 15 and above.1

B. Country Specific Situation

1. Cameroon

Cameroon is in a region where drug trafficking is expanding. It is more of a transit than a producing country. It however produces a very insignificant quantity of marijuana when compared with the volume of production of the world. Much of what is consumed in the country is smuggled into it from the neighbouring countries, especially from Nigeria. Cameroon does not grow cocaine.

The illicit drug traffickers employ a wide range of modus operandi to go ahead with their illegal business. These include, inter alia, the concealment in double-bottom bags, hide-outs in sea vessels, cargo containers, aircraft and vehicles. Women may have it hidden in their plaited hair. In some cases, children may be innocent carriers on the understanding that they are generally less suspected. In extreme cases, the traffickers take the risk to swallow small water-proof balls of the drug. Some others have had incisions in some parts of their bodies on which the drug is placed and the broken portion of the body stitched. Here, medical people are involved in the illegal business.

For now, there are no known groups in the illicit drug business in Cameroon.

2. Honduras

Drug trafficking in Honduras has increased in the last few years because it has a very good geographical location, i.e., it lies in the heart of Central America and, adjacent to two oceans. That is an advantage for the drug traffickers.

In the south of the country the drugs are smuggled in by land, most of the time from Nicaragua and El Salvador, and in the north of the country the trafficking is more often carried out by sea, and drugs from Colombia reach Honduras via speed boats.

Honduras is not only a transit country but it also has a lot of consumers. The trafficking is not only inside the country but there is international trafficking among the countries of South and Central America. Traffickers use Honduras as a transit country to the final destination, that is, the U.S.A.

(i) Drugs more currently used

The drugs more currently used in Honduras are:

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1 Global Illicit Drug Trends 2001, UNODCCP
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- Marijuana (Cannabis)
- Powder cocaine
- Crack cocaine
- Heroin
- Amphetamines

(ii) Principal countries

Based on the experience and analyzing the current situation of the countries in the area we can say that the principal countries related with drugs are:

Producing: Colombia and Mexico
Transit: Central America
Market: U.S.A.

(iii) Modus operandi

The modus operandi more frequently used is bringing the cocaine from Colombia in speed boats or by plane. The traffickers drop it in Honduras, either in the water or on the land where there is usually someone waiting to collect it by boat or by car and take it to the borders in Guatemala and then Mexico. From where it goes into the U.S.A. Another way is by bringing the drugs in big containers from Nicaragua, which go across Honduras to the borders with Guatemala, and Mexico and finally to the U.S.A.

(iv) Organized Groups

In Honduras, there are many organized groups, inside the country and abroad. Police have identified three major organized groups inside the country that deal only with Marijuana, and also two big international organized groups that have members from Colombia, Nicaragua, El Salvador and Mexico.

3. Japan

The most frequently abused drugs in Japan are stimulant drugs (mostly metamphetamine) and the second is cannabis. In the year 2000, the seizure of Stimulant drugs totaled 1,026.9 kg. Arrests made in violations of the Stimulant Drug Control Law totaled 18,942. The seizure of dried cannabis amounted to as much as 306.4 kg.

The main sources of stimulant drugs are traced to China and North Korea. Most of the cannabis came from the Philippines, Thailand and the Netherlands.

Each smuggling case has come to involve a large amount of drugs. On a beach in Kagoshima prefecture in October 1999, police and concerned authorities seized 564.6 kg, the largest single seizure ever. While most of the illicit drugs in circulation in Japan have been smuggled from abroad by international drug and criminal syndicates, visiting foreign nationals have been found operating as consignees.

These illicit drugs have been smuggled by vessels or cargo aircraft disguised as bona fide articles. Some arrivals were found carrying parcels of illicit drugs concealed about their persons or in their carry-on luggage. Approximately 76% of the total volume seized was in smuggling incidents using vessels in 2000. It appeared that there were also criminal acts that attempted to unload substances from regional ports as well as coastal areas outside the ports by methods including the transfer of cargo from mother ship to small boats and concealment in trading vessels.

Boryokudan, traditional organized criminal groups, were quick to realize that the stimulant drug trafficking yielded huge profits because of the significantly large margins between the wholesale costs and retailing prices. Moreover, a stable demand could be expected as abusers develop dependency for the drug. Boryokudan groups smuggled in the stimulant drug in
partnership with transborder drug syndicates and dominated domestic traffickers, thus contributing to the spread of abuse.

In 2000, a quarter of arrested Boryokudan members were Stimulant Drug Control Law violations. And this figure accounts for 40.8% of the total stimulant drug offender’s arrests. Boryokudan members often use sophisticated methods, for example, using cellular phones with a system of prepaying charges for calls to be made in which the users can remain anonymous and conclude drug sales without meeting the buyers.²

4. Kyrgyzstan

In Kyrgyzstan the most common abused drugs is opiates (opium and heroin). Cannabis is gradually increasing. A small amount of stimulant drugs such as ecstasy are also abused.

Opium is produced in Afghanistan. Most of the opium is transferred to Europe and the USA through Russia, and the rest are consumed in Kyrgyzstan. Cannabis is produced in Kyrgyzstan. Approximately 90% of cannabis is exported to Russia, and the rest is consumed in Kyrgyzstan. Stimulant drugs like ecstasy are produced in Europe, and trafficked to Kyrgyzstan through Russia and consumed in Kyrgyzstan.

The world center of illegal drug production is shifting from the so-called Golden Crescent (area of Iran, Afghanistan, Pakistan and northern part of India) to Afghanistan intensively. It has resulted in an increase of drug trafficking in its neighboring countries, mainly in Central Asia. The mass production of illegal drugs in Afghanistan has led to a decline of price in the world drug market. It also has a great influence on Kyrgyzstan, and drug abusers have increased more than before.

At present there are four major routes to smuggle drugs from Tajikistan to Kyrgyzstan:

- **Route 1:** Kyzyl-Art, covering Osh-Khorog highway and peripheral zones, bordering Mt. Badakhshan.
- **Route 2:** Altyn-Mazar, which begins at Raushan plateau of Zaalay mountain range and spreads to the Chon Alai valley.
- **Route 3:** Batken, including mountain routes, used to cross through Jergital and Garm rayons to Batken and Kadamjai rayons of Osh Oblast.
- **Route 4:** Leninabad, including all of the highways, starting with Laylak rayon and adjoining areas of Uzbekistan and oblast centers.

Automobiles can be used in route 1 and route 4. Therefore, drugs are hidden inside the containers of vegetable and fuel tanks loaded on large size trailer trucks. Route 2 and route 3 are located in the high mountain areas, thus, drugs are transferred by horses and people.

No stable organized groups are recognized in the country.

5. Pakistan

(i) Illicit Drug Trafficking

Drug trafficking is presently, in most probability, one of the biggest illegal national and transnational activities

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earning titanic profits (and generating other transnational crimes) and threatening the present and future economies and generations.

The drugs situation in Pakistan has improved almost miraculously so much so that by 1999–2000 only 16.8 tons of heroin yield was possible as compared to 800 tons in 1979–1980. Pakistan is thus struck off the list of producer countries and on the other hand has become a victim and a transit country.

The increase in poppy cultivation in Afghanistan since 1993 and growth in the sophistication of the Afghan drug trade is putting enormous pressure on the GOP’s (Government of Pakistan) border control efforts and Pakistani society. Successful interdiction operations occur, but traffickers have superior fire power and faster vehicles, the territory is enormous and law enforcement is widely dispersed, with little mobilization capacity. This means more problems in fighting this crime.

Both Afghan origin cannabis and opiates transit through Pakistan. Afghanistan produced an estimated 3656 metric tons of opium in 2000. However drug abuse escalated after the introduction of heroin in 1980, (Soviet invasion of Afghanistan). Since, it has affected every class, every age group and every income bracket all over Pakistan. According to a rough survey there are about 4 million addicts half of whom are heroin addicts as against only 5000 in 1981. The social impact is of course immeasurable.

Presently, Drug law enforcement is done by a number of agencies. These include the Anti-Narcotics Force, Frontier corps NWFP and Balochistan, Provincial Police Forces, and the Airport Security Force (ASF). However the principal agency is the Anti-Narcotics Force (ANF), whose only mandate is to coordinate and control drug trafficking.

Acetic Anhydride, the essential chemical required for conversion of opium into heroin, was previously on the “free list” for purpose of import in the licit industry. But it has been placed on the “Restricted list” and its import is allowed to legitimate industrial consumers, after due verification.

Pakistan is a signatory to the major instruments on international drug control of 1961, 1972 and 1988, and to the UN convention on TOC, December 2000.

Pakistan is a victim state in that it has become a transit and a consumer country for Afghan opiates and cannabis. GOP’s cooperation with the world is viewed as excellent by the U.S.A. and other developed countries. Intensive law enforcement efforts by the ANF have forced the narcotic traffickers to adopt a low profile. Interdiction of heroin increased to 85% and several major traffickers have been arrested. The GOP has prevented the re-emergence of large heroin processing laboratories. As apparent from the above, the main drugs of abuse in Pakistan are heroin, hashish (chars) and opium. Other countries involved in the region are Afghanistan, India, Iran, China, Central Asean States and Myanmar.

(ii) Organized Groups
As per the latest reports released there are no well known organized groups in Pakistan involved in drug trafficking. In Pakistan the scenario is a bit different, being not a producing country, but being
used mainly as a transit country and to some extent a market country.

In Pakistan transit is being helped to reach its destination by individuals who are called Narco-barons. They usually belong to the tribal areas of the NWFP province. The infrastructure of their activities does not fit into the definition of an organized group. Groups have equal partners, a hierarchy, specializations assigned and even research being done. Then they have alliances with each other, globally known organized groups like the Boryokudan, Colombian cartels, Nigerian criminal organization, Turkish drug trafficking organization, Ukrainian criminal syndicates, Polish criminal groups, Dominican criminal organizations, etc. while individual drug or Narco-barons in Pakistan, e.g. Rehmat Shah Afridi, has his own chain of employees who act as his agents or subordinates and carry out orders of the boss through managers. It is not known, neither could it be proved till now that these Narco-barons of Pakistan have very strong bonds, partnerships, linkages, etc. to the known organized groups in other countries.

(iii) Modus Operandi
The common modes to transport drugs used in Pakistan are through airports and shipping camouflaged containers. They use different airlines operating in Pakistan. PIA has often been suspected of being involved but it has never been proved according to reports.

Other common methods used include body wraps, use of false bottoms of luggage, concealment in imported equipment, concealment in hidden compartments of vehicles, ships and containers as mentioned above, delivery by courier services, installing it in human body by operations or human babies.

(iv) Due to usage of these Modes—the Arrests, Extradition and Freezing of Assets etc. carried out to date
So far, by using one or more of the modus operandi 21 Narco-barons or drug traffickers (transit helpers) of Pakistan have been extradited to the U.S.A. from 1991–2000. Seven are yet to be arrested, four cases are pending in court and two are out of the country. The total amount of frozen assets of drug traffickers from 1999 to April 2001 is Rs.4718.76 million, and the total value of assets forfeited is Rs.305.75 million and the total number of cases registered during the above period is 141. In addition, to foil any designs of traffickers to take advantage of refuge in another country by manipulating its laws or due to an absence of specific laws there, Pakistan has extradition treaties with 27 countries to date and is a party to several regional and bilateral agreements pertaining to drug traffic controls.3

6. Peru
In Peru, the most frequently abused drugs are cocaine and marijuana. However lately, heroin and ecstasy appear in the drug scenario.

In South America, producers of cocaine are from Colombia, Peru and Bolivia. Peru produces marijuana for domestic consumption.

The principal routes of exporting drugs are Colombia, Panama, El Salvador, Honduras, Mexico, the U.S.A., Europe and Asia. Another route is Chile to Europe and Brazil to Europe.

The modus operandi most used is air mail. Also drugs are transferred to the U.S.A from Peru through Colombia and Mexico. By sea, drugs are hidden inside

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3 Saad Imtiaz ALI, UNAFEI Individual Presentation, 21 September 2001
containers on the ships sailing to the U.S.A., Europe, Spain, Italy and Mexico.

Organized groups of drug trafficking are Mexican cartels, Colombian cartels, Peruvian groups and Bolivian groups. The activities of the Mexican cartels and the Colombian cartels extend throughout the world. These cartels run plantations, process the drugs, package them, put their original logos on the product and deliver to many countries, just like running big companies. The activities of the Peruvian groups and Bolivian groups are domestic.

III. CONCLUSION

After analyzing the current situation with special reference to our respective countries, we can say that drug trafficking is a gigantic concern, specially when we have such well organized groups that really threaten the internal security of the countries and the world.

The analysis further shows that formerly transit countries are progressively becoming consuming countries. The modus operandi of transporting these drugs is changing day by day both in scope and complexity and it often requires devising new methods of detection and adequate controls.

1999 seizures show that about one third of all drugs were seized in North America, a quarter in West Europe, a fifth in Asia and a tenth in South America. 1999 interception rates (quantities seized/quantities produced) were 39% for cocaine and 15% for opiates.

UNDCP estimates 180 million people consume illicit drugs (annual prevalence in the late 1990s) this includes 144 million for cannabis, 29 million for ATS, 14 million for opiates (of which 9 million for heroin). These numbers are not cumulative because of poly-drug use. The strongest increases recorded in 1999 were for cannabis and ATS consumption. At the regional level, cocaine consumption remained stable in North America (though significantly down compared to the mid-1980s), but increased in West Europe, as in a number of countries in South America in 1999.

To reduce or eliminate drug abuse, Governments and UNDCP need up-to-date statistics on who is taking drugs and why. Drug abuse cuts across age, class, ethnic and gender lines. People with drug abuse problems have different needs. Women, the young, the poor, refuges and ethnic and religious minorities need easier access to early intervention and services. Once in treatment, drug abusers may need job training and referral, assistance in finding housing and reintegrating into society. Drug abusers who commit crimes require alternative treatment in order to break the cycle of drug abuse and crime.

4 Global Illicit Drug Trends 2001, UNODCCP
I. INTRODUCTION

Although this planet has many beautiful things for us to enjoy, in the dark side of it still exists the unpleasant activities of transnational organized criminal groups. Their operations exist in various forms, including but not limited to, illegal firearms trafficking and human trafficking.

Illegal firearms trafficking has recently developed to be a serious problem. It is not only posing dangers to the countries concerned but also the global community as a whole. Many of the firearms are mainly smuggled, to be used for the internal purposes of one nation. However, there are a certain amount of firearms that have been smuggled by the criminal groups for making profits as well as for fueling the operations of international terrorism. Illegal firearms trafficking has a direct impact on the world economy and social values. Moreover, it has indirectly damaged the democratic institutions.

Human trafficking especially women, children and migrants is another area that recently has increased in terms of volume and practice. The International Organization for Migration (IOM) estimated that the global human trafficking industry generates up to US$8 billion each year from this “trade on human misery.” Nearly 2 million children are abused and trafficked globally every year. South Asia and South East Asia take the lead in the volume of trafficking in children for sexual exploitation. Understanding how these activities operate is a vital part before an appropriate countermeasure is taken.

Thus, this paper is a production of an effort to point out and analyze some
current situations of illegal firearms trafficking and human trafficking which occur in some parts of this world.

II. ILLEGAL FIREARMS TRAFFICKING

The term “illegal trafficking” includes any form of transfer where firearms, parts, components or ammunition move from one country to another without the approval of the countries concerned. Basically there are three categories of country involving in this trafficking as follows:

(i) Illegal manufacturing countries
(ii) Transit countries
(iii) Effected countries

A. Global Perception of Firearms Trafficking

Firearms trafficking is committed internationally by organized criminal groups and it poses a significant threat not only to the lives of people but also to the security and development of each country. Some trafficked firearms are considered illegally manufactured or surpluses from military conflicts. For example, it is estimated that America’s proxy war with Russia has left approximately 3 million weapons of all kind unused (packed and greased) on Afghanistan’s soil.

[An estimated $6–8 billion were allocated by Washington for the supply of light weapons only (Chalk, Peter; Focus). The International Institute of Strategic Studies (I.I.S.S) in London estimate the illicit global market at $5 billion a year (Focus, Vol. 3, No. 13).]

1. African Continent

In Uganda, small arms come from neighboring countries that are faced with civil wars. These countries are Sudan, Somali, Congo and Rwanda.

The Karamojong, a nomadic tribe in the Northeastern part of Uganda has in its possession about 200,000 guns, mainly from Sudan and Somali, and they are using the arms for cattle rustling. The firearms originally imported by the Government of Somalia eventually find their way out of the country. Rebel groups and criminals are using these arms in Uganda to commit atrocities.

In Tanzania, the illegal firearms come from its neighboring countries which are Rwanda, Burundi, Uganda, Congo, Mozambique and Somali. These guns find markets in Tanzania and they are used in committing offences or are taken to other countries for illegal use.

In Nigeria, the Nigerian Civil War, between 1967–1970, exposed the country to an influx of firearms. The illegal firearms trafficking to Nigeria from neighboring countries has fueled ethnic/religious armed conflicts and armed robbery in the country.

2. Asian Continent

In the Islamic Republic of Pakistan certain categories of weapons are illegally manufactured in its tribal area. These illegal weapons are sold on profit inside of Pakistan and gets into the hands of certain sectarian organizations—who in turn use them for terrorist purposes inside the country. More over some of these weapons trickle down to neighboring countries such as India, Afghanistan and Iran.

But Pakistan is also an effected country. The reason being the period from 1979–1988, when the people of Afghanistan fought a war with the former Soviet Union, many categories of
weapons entered this country. These weapons were supplied almost all by western countries, especially the U.S.A and its allies, moreover to this were also added countries like Egypt, Saudi-Arabia and other Muslim countries who were against the communist ideology of the USSR. This brought in its wake a culture known as the “Kalashnikov-culture”.

Organized criminal groups therefore made good money by selling and smuggling them to other countries like India, Iran and Kashmir, where already certain internal discord existed, and the demand by terrorist groups existed. These weapons were supplied by both land and sea routes.

As far as Nepal is concerned, this is an effected country. Due to an increase in Maoist activities internally and terrorism by Tamil-Nadu, in Sri-Lanka, the trafficking of arms has increased to dangerous levels. In Nepal firearms are mainly smuggled for the purpose of Dacoits and political activities from the neighboring countries. It is said that Nepalese Maoist (political party) has many types of firearms which have been illegally kept and used.

Whereas in India, the state of Punjab was affected by terrorist activities during the 1980’s and Jammu and Kashmir have been particularly vulnerable to arms trafficking across the border. India has a long border with Pakistan, Nepal, Bhutan, China, Myanmar and Bangladesh.

Thailand is geographically located among the neighboring countries that have political unrest in such countries as Burma and Cambodia. In the past 10 years, a number of firearms has been smuggled in and out of Thailand into those two countries. A total number of 400,000 firearms have been imported since 1995 and were brought in on fake import licenses. Those illegal firearms were then sold to the third parties/ countries. Thailand is found to be a transit and effected country.

In the Philippines these activities works in two ways. The organized crime groups smuggled the U.S made firearms into the countries and these firearms are used by the rebel groups in fighting against the government. On the other hand, locally made handguns manufactured in the Province of Cebu, in Central Philippines, are smuggled to other countries, particularly Japan, Taiwan and other ASEAN countries through air and sea. The Philippines is an illegal manufacturing and effected country.

Firearms trafficking is not considered a serious problem in Malaysia and many criminals fear the mandatory death sentence that they are liable to face if arrested with a firearm. For the past two years (till June 2001) statistics show that only 413 such firearms comprising mostly pistols, revolvers and shotguns were seized and the number of arrests were about 461. In 1999, a few have been shot dead in East Malaysia but they were rather foreigners who were involved in activities such as piracy. Investigation shows that most of the firearms are smuggled from neighboring countries such as Thailand and the Philippines either by organized groups or individuals where they can be obtained quite cheaply and easily. It is very easy to bring in firearms into the country via the borders, especially land and sea where it is next to impossible for the authorities to conduct thorough observations. Firearms are used mainly in committing crime. It is estimated that the actual number of firearms made in this country could be 20
times or even more than the firearms seized. Malaysia is an effected country.

Papua New Guinea is also faced with the increase of illegal firearms trafficking. Reports indicate that firearms trafficking occur in areas like the highlands where people have been using them in their tribal fights. High-powered firearms are also being used in the cities of Port Moresby and Lae as well as in Bougainville. It is evident that firearms trafficking in Bougainville were conveyed from the Solomon Islands and Indonesia. It is noted that firearms are smuggled into PNG by shipping cargo containers, light aircraft, parcel port, fishing trawlers, and small boats, crossing the Solomon and Indonesian border. Papua New Guinea is considered an effected country.

In Japan, the possession of firearms is strictly controlled by the Firearms and Swords Control Law. Strict regulations contribute to the relatively low rate of firearms-related crimes in Japan, and it is almost impossible to produce firearms illegally inside Japan. However, it is also the fact that occasionally firearms are used in crimes, especially in robbery cases. In 1999, police seized 837 authentic handguns (down 92 from the year before) and the majority of them were trafficked into Japan from foreign countries by crime syndicates. The countries where they were made range from the U.S, the Philippines, Thailand, to Russia, Korea, China, Brazil, and Turkey. They are cunningly brought into Japan by such means as being taken into pieces and hidden in containerized cargo. In these contexts, Japan could be categorized as one of the effected countries by trafficking of firearms.

3. Latin American Continent
In countries such as Argentina and Venezuela, illegal firearms trafficking is a new problem to them. The weapons of Syrian origin have been smuggled to Argentina. However there is no record on any organized crime group involved in those two countries.

Likewise in Honduras, the problem of firearms trafficking started since their war with El Salvador and the Contra of Nicaragua. The weapons come from Nicaragua through their boundaries in the northern zone. There is a record where some of the firearms trafficking have been linked with drugs trafficking because some Hondurans make deals with organized crime groups in South Africa where they exchange weapons with drugs. The situation becomes worse where a few organized gangs in Honduras have a capability in manufacturing their own hand made guns and almost all the juveniles in those groups have one each and they often use them in committing crime. Honduras authorities find it hard to control this because more hand made guns can be manufactured any time.

Brazil also has the same problem where weapons have been smuggled from Paraguay through the Port of Rio de Janeiro and Santos in Sao Paulo. Firearms are used by members of organized criminal groups to commit crimes of threat and murder. There is also evidence that a group involved in illicit drug trafficking in Brazil have exchanged firearms for cocaine with terrorist groups from other neighboring countries.

III. HUMAN (WOMEN, CHILDREN AND MIGRANTS) TRAFFICKING
Trafficking in human beings implies illegal movement of people from one
country to another country in violation of existing national laws and procedures. In human trafficking activity, the attention has been paid mostly to women and children because they are more often the victims. Basically, there are 2 categories of country involved in this human trafficking as follows:

(i) Source countries
(ii) Destination countries

Focusing on the trafficked person, there are two types of human trafficking:

Some persons, mainly women and children, are forced to engage in labor including prostitution in exchange for money and are exploited. Thus, they are so called forced laborers. On the other hand, some persons voluntarily engage in illegal work with the purpose of getting money. Thus, they are so called illegal immigrants.

A. Global Perceptions of Human Trafficking

1. African Continent
   Apart from South Africa and Libya, the other countries in Africa are source countries of human trafficking.

   Nigeria is a source, transit and destination country for trafficked persons. The majority of trafficking from Nigeria involves females destined for Europe. Italian authorities estimate that 10,000 Nigerian prostitutes work in Italy and many of them are victims of trafficking. Nigerians, primarily women and children are trafficked to work on plantations in other African countries, including Gabon, Cameroon, Equatorial Guinea and Benin. Other significant destination countries for trafficked Nigerians include the Netherlands, the Czech Republic, Spain, France and countries in the Middle East. Nigeria also serves as a transit hub for trafficking in West Africa and to a lesser extent a destination point for young children from nearby West African countries. Women and children are also trafficked within Nigeria. There are illegal syndicates operating within and outside Nigeria doing human trafficking. The entire business is shrouded in secrecy and some of the victims are transported outside Nigeria in the guise to pursue education and gainful employment. The traffickers employ subtle force, coercion, fraud and outright deceit to accomplish their objectives.

   Mali is a source and destination country for trafficked persons, primarily children. Children from Mali are trafficked to Ivory Coast to work on cotton and cocoa plantations or for domestic servitude. Women from Nigeria are trafficked to Mali for sexual exploitation.

   Due to the prevailing civil war in the northern part of Uganda, the country has become a source of trafficked persons, primarily women and children. The Lords Resistance Army (an antigovernment rebel group) based in Sudan has kidnapped about 10,000 persons from Uganda to southern Sudan; and forced them to become soldiers, forced laborers and sex slaves. Also some women are being taken to Europe and the Middle East by organized groups for purposes of prostitution. Some of the children taken to Sudan are sold into slavery to Sudanese Arabs or exchanged for guns.

   The Democratic Republic of Congo is a significant source country for trafficking in persons. Women are trafficked to Europe, mainly France and Belgium, for sexual exploitation; and boys are
trafficked by rebel groups within Congo for forced military services.

Ugandan and Rwandan soldiers, in addition to Congolese for Democracy Rebels, reportedly in the recent past have abducted many Congolese women and girls from the village they raided and forced them into sexual servitude.

South Africa is a destination country for trafficked persons. Women are trafficked within South Africa and from other African countries (e.g. Angola, Zimbabwe, Lesotho, Swaziland, Zambia, Cameroon, Malawi and Rwanda), Asia (specially Thailand and Taiwan), Eastern Europe, Russia and the new independent States. South Africa is also a transit point for trafficking operations between developing countries and Europe, the United States and Canada.

Generally, human trafficking networks in Africa are often informal and secretive in nature, which makes the identification of networks and traffickers extremely difficult.

2. Asian Continent

Many people seeking gainful employment from underdeveloped and developing countries travel on unusual routes to reach their destination where there is relative economic prosperity (developed countries). Laos has had this problem since 15 years ago.

Some countries are also found to be both countries of origin and destination for human trafficking such as India, China, Thailand, etc.

The growth and development of Thailand in the past 10 years compared to the neighboring countries have induced foreign people to migrate to Thailand. Persons from Burma, Cambodia and Laos are the primary trafficked persons to Thailand to work in farms, industrial places and other sectors. A large number of Thai persons, especially young women and girls, have been trafficked internationally to Japan, Taiwan, Malaysia, Singapore, Europe and the United State chiefly for sexual exploitation and, to a lesser degree, sweatshop labor. Besides, Thailand has been used as a transit country and the number involved is obviously large. Persons especially from China are trafficked through Thailand to a number of developed countries and more prosperous neighboring countries. The organized crime groups bring them as tourists and later will arrange for forged visas and passports. Related foreign languages are arranged while waiting for those documents ready. With the co-operation of certain airline officers, they then traffic persons to the destination countries.

Malaysia is both a source and destination country for trafficked persons. Young women from Indonesia, Thailand and the Philippines are trafficked into Malaysia for sexual exploitation. Some, with the help of organized criminal groups, misuse their tourist visas while many have been cheated by these groups. They entered Malaysia without any valid travel document or through other illegal landing point and were forced to work until they pay the organized crime group substantial amounts of money, normally unaffordable figures, under threat of physical harm and under threat to expose their illegal alien status to the authorities. A number (3,625) of them have been arrested in the last two years and will be sent back to their country of origin after undergoing punishment for violation/illegal entry to this country. Also, a small number of
young Malaysian women, primarily ethnic Chinese are trafficked to Japan, Canada, the United States and Taiwan also for sexual exploitation.

In the context of Nepal as a source country, the main reasons for children and women trafficking include natural disaster, poverty, illiteracy, divorce between the parents, death of parents, child labor, sexual abuse, unemployment, migration, child marriage, polygamy, violence in the family, etc. Most of the women and girls have been taken to many countries and sold to brothels for the purpose of prostitution. Organized criminal gangs have been found to be active behind such inhuman crime and cruelty. This type of crime is mostly committed outside the national boundary. It has become very difficult for the criminal justice authorities to arrest and punish the criminals. It is said that 5,000 to 7,000 women are sold every year from Nepal to other countries. They are trafficked either forcefully or on the pretext of finding a good job or marriage or false promise and also are sold as maids. In recent years some Nepalese girls, especially from rural areas, have been trafficked to the Middle East, East Asia and South East Asia for commercial sex purposes. Most of them would not know where they are taken until the people who brought them to strange places have slipped away and they are in the custody of some strangers who start to abuse them. Moreover, the children are trafficked for labor and begging purposes. Nepal has to face some illegal migrant problems from Tibet.

Pakistan's domestic flesh trade does not appear to be backed by powerful organized criminal networks as known in other countries of the world. Tiny operations are clandestine and behind the curtains.

In India and Pakistan the commercial sex trade is profitable. However women are kidnapped and end up as prostitutes domestically. A large number of Indian young girls from southern India have been sent to Saudi Arabia and Gulf countries for the same purpose of sexual exploitation. Moreover certain syndicates have been identified who indulge in sending men and children for purposes of labor to western and far eastern countries, including Japan and certain rich Arab countries.

After the break-up of the U.S.S.R., women trafficking in Iran increased in the sense that these two countries are acting as transit countries because of their close proximity. However, the trafficked women cannot stay for long in Pakistan and Iran because of stringent immigration laws and Islamic laws.

In Japan, although there are few instances of trafficking in the strict sense, there are many illegal immigrants (smuggling). However, trafficking in the broad sense is probably not rare because transnational crime organizations are involved in almost all these smuggling cases. The number of persons taken into custody involved in collective smuggling cases was 770 (44 cases) in 1999 and 90% of them were Chinese nationals. Most of the cases were linked to Chinese transnational crime organizations, Snake Head, which is a generic term applied to organizations in charge of smuggling Chinese people into Japan and other countries. Snake Head solicits would-be illegal immigrants and undertakes, in exchange for considerable amounts of payment, not only their transportation to Japan but also their shelter after their arrival in Japan and prepares forged passports and other necessary documents.
IV. ANALYSIS

A. Causes

1. Illegal Firearms Trafficking

Focusing on the causes of the above-mentioned two kinds of trafficking, some factors could be seen in common. Apparently, one of the common causes is the fact that these two kinds of trafficking could bring enormous sums of monetary benefit, both in cash and kind to the transnational crime organization.

In addition to that, there are some factors peculiar to each type of trafficking like warfare in the source country and effected country as well as demand for terrorist and crime activities in the effected country.

It is analyzed that illegal arms proliferation is a global phenomena. It has extracted a heavy toll in terms of human lives and socio-economic development of entire regions.

In Asia, especially Afghanistan, the death toll has passed 200,000 (dead and injured during the war) and is still rising. In India, Pakistan, Cambodia, Sri-Lanka and some African states, they continue to see conflict related deaths in hundreds.

In Latin American countries such as Argentina, Brazil, Honduras, etc. firearms were found to be exchanged for illegal drugs and money making. The relationship between arms and narcotics dealers overlap, thus creating a deadly combination.

It is analyzed that illegal trafficking of arms disturbs the public peace, tranquility and disturbs the balance of the economy—thus reducing reliance of the public on government organization, thus causing anarchy.

2. Human Trafficking

There are some factors peculiar to each type of trafficking, like economic imbalances between source country and effected country, social and political insecurity in the source country and demand in effected country.

It is analyzed that the favorite destinations of illegal migrants are the developed industrialized nations like the U.S.A., Japan, Canada, Germany and France. Most women from under developed countries wind up as sex slaves or maidservants in the above-mentioned countries.

The problem has increased in both size and seriousness by the growing involvement of organized crime groups. These groups have disrupted the immigration policies of the governments. Therefore, there are substantial humanitarian concerns and issues related to the global problem of alien smuggling. This also poses administrative problems to concerned countries.

For example, European criminal organizations may pay $6,000 to Asian Syndicates to buy Chinese men and women. The person may have to pay more than $15,000 to their employers to purchase their freedom. The profit is $9,000 plus free labor.

It is analyzed that at least 700,000 persons, especially women and children, are trafficked each year across international borders (UN Human Rights Report).
B. Modus Operandi

1. Illegal Firearms Trafficking
   The modus operandi (hereinafter “m.o.”) of the trafficking route is as follows:
   a. Firearms arrive in receiving country as undeclared or misdeclared items and included with other goods, consigned to fictitious names and addresses;
   b. Firearms can also be dismantled into pieces and included among metal items or machinery parts legally imported or exported in containerized cargo;
   c. Firearms are sometimes thrown from vessels, boats, etc. at pre-arranged areas some distance from the shore where they are later picked up by small boats and brought to undisclosed places.

2. Human trafficking
   The m.o. of the trafficking route is as follows:
   a. Some persons arrive at the destination hiding in the container cargo. This sea route is the typical and traditional m.o;
   b. Some persons take airlines with forged or altered passports and other necessary documents. This air route is a relatively new one.

C. Effect and Conclusion
   Looking at the current situation we analyzed in our Group Work Shop, it is indispensable to take necessary countermeasures urgently against trafficking in firearms and humans. These crimes have tremendous harmful effects on each country involved. Firearms trafficking cause even social and political instability, and human trafficking results in the disruption of families in source countries and economic and social disorder in effected countries as well as violations of human rights of victims, especially women and children. International law and other legal frameworks have regrettably been insufficient to combat these crimes. Law enforcement in each country and international cooperation in this field seems to have been ineffective and inefficient so far. Taking into due consideration such a situation, the U.N. Convention against Transnational Organized Crime and the Protocol against trafficking in persons, especially women and children, and the Protocol against the smuggling of migrants were adopted in November 2000. The Protocol against Illicit Trafficking, Parts, Its Components and Ammunition was also adopted in May 2001. All agencies involved in criminal justice have to make every effort to eradicate trafficking in firearms and humans by fully utilizing these new legal tools.
ANALYSIS OF CURRENT SITUATION OF MONEY LAUNDERING

I. A BRIEF OVERVIEW

Money laundering briefly means "making dirty money look clean." It can be defined as, "the processing of the criminal proceeds to conceal their illegal origin." The objective of the money launderer is to disguise the illicit origin of substantial profits generated by criminal activity, so that such profits could be used as if they were derived from a legitimate source.

Money laundering is at the center of all criminal activity, because it is the common denominator of predominantly all other criminal acts. Since it cannot be disassociated from other forms of crime, money laundering becomes an integral part of any transnational organized crime. The transnational criminal organizations have resorted to money laundering in different countries in an effort to legitimize the proceeds of crime.

It needs to be emphasized that money laundering is not a new economic, sociological or legal problem. However, geo-political developments over the last few decades, together with increased economic globalization have resulted in increased international movement of money. The rapid expansion of international financial activity has gone hand in hand with the development of transnational organized crime, which takes advantage of political borders and exploits the differences between the legal systems in order to maximize profits. The organized criminal groups involved are genuinely multinational and pose a very serious threat to the financial stability of all economic systems viz, the underdeveloped, the developing and also the highly developed nations of the world.

The extent of money laundering is difficult to estimate since it is an illegal activity for which no exact data or...
statistics are available. However, the International Monetary Fund (IMF) has estimated that the aggregate size of money laundering in the world could be somewhere between two to five percent of the world's gross domestic product (GDP). Using 1996 statistics, this would translate into approximately US $590 billion to US $1.5 trillion, which reflects the magnitude of the problem.

In view of the fact, that the goal of the predominant majority of the criminal acts is to generate profits for the individual or the group which carries out the criminal act, the process of the criminal proceeds to disguise their illegal origin becomes essential. It enables the criminal to enjoy the profits derived from crime without jeopardizing their source. Since the activities of organized crime, including drug trafficking, trafficking in illegal firearms, smuggling, prostitution, etc., can generate huge amounts of money, they create an incentive to “legitimize” the ill-gotten gains through money laundering. When criminal activity generates substantial profits, the individuals or groups involved must find a way to control the funds without attracting attention to the underlying criminal activity or the persons involved. Criminals do this by disguising the sources, changing the form or moving the funds to a place where they are less likely to attract attention.

Experience in different countries shows that the general techniques employed to launder money are as follows:

(i) investing dirty money in legitimate business either through shell or fictitious companies or in genuine companies under a false identity;
(ii) acquisition of assets by paying the requisite taxes;
(iii) deposit of money in tax heavens or in banks in non-cooperative countries and remittances back to the host country through normal banking channels;
(iv) use of the underground banking channels for transfer of money;
(v) over invoicing of goods in an apparently normal exports business transaction;
(vi) routing of money through safe tax heaven countries.

Experience further discloses that a money laundering operation basically consists of three phases or stages. The first phase is the “placement”, i.e. where cash enters the financial system. The second phase consists of “layering”, i.e. where the money is routed through a number of transactions so that any attempt to trace the origin of money is lost. The last or the third phase consists of “integration”, i.e. the money is brought back into the economy with the appearance of legitimacy and thus, integrated within the lawful economy leaving no trace of the illegal money to the various law enforcement agencies of the different countries.

II. GLOBAL CONCERN

Realizing the gravity of the problem, the United Nations (UN) adopted the Vienna Convention, 1988 against the Illicit Traffic in Narcotics, Drugs, and Psychotropic substances which, inter alia, incorporated incrimination of money laundering in an international treaty for the first time.

The Financial Action Task Force (FATF) was founded in 1989 by the G7 summit in Paris, to examine methods to combat money laundering. It published its report in 1990, in which the Forty Recommendations were made to combat
the menace of money laundering. The UN saw its convention against Transnational Organized Crime adopted in November 2000 and this was opened for signature by member states in December 2000. It requires member countries to further intensify and fortify their efforts against money laundering.

The above convention suggests a series of measures to combat the evil of money laundering, including attempts to define the definition and scope of the subject incorporated in Article 6 and 7.

III. LEGISLATION

The current situation with regard to money laundering, as it presently exists in the member countries of the participants attending the course, is very briefly summarized as follows:

In Japan, in order to enforce the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was adopted in 1988 at the UN Drug Committee Treaty Conference, and the Forty Recommendations suggested by FATF in 1990, the “Law Concerning Special Provisions for the Narcotic and Psychotropic Control Law, etc., and Other Matters for the Prevention of Activities Encouraging Illicit Conducts and Other Activities Involving Controlled Substances Through International Cooperation” (hereinafter, the Special Narcotics Law) was concluded on October 2, 1991 and enforced from July 1, 1992. Furthermore, the “Law for the Punishment of Organized Crime and the Control of Criminal Earnings” (hereinafter, the Law for the Punishment of Organized Crimes) was concluded on August 12, 1999, and enforced from February 1, 2000, after the Forty Recommendations were made more comprehensive.

This law widens the predicate offenses and provides the provisions for the laundering of illicit proceeds generated from not only drug-related crimes but also other major offenses which have not been covered under the Special Narcotics Law.

The Special Narcotics Law and the Law for the Punishment of Organized Crimes include the following features:

1. Provisions concerning punishments for money laundering and the disposal of illicit proceeds generated from crimes;
2. Confiscation of intangible property such as bank accounts;
3. A system to secure the subject property so as to ensure forfeiture and collection of equivalent value;
4. Cooperation in conducting confiscation trials in foreign countries;
5. Provisions requiring financial institutions to report suspicious transactions, as countermeasures against money laundering of illicit proceeds generated from crimes.

In Malaysia, before the introduction of the Anti-Money Laundering Act 2001, the country did not have any specific law on money laundering. However there are various substantive laws making it an offence for ‘laundering’ of illegally obtained money or assets. One of the most effective legislation is the Dangerous Drug (Forfeiture of Property) Act 1988 (the FOP Act). Drug abuse and drug trafficking is regarded as the most severe and grave crime in Malaysia since 1983. The government of Malaysia felt that individuals or groups of people involved in this criminal activity should not be allowed to enjoy the benefit of their
ill-gotten gains. Although there is no definition or usage of the term “money laundering” under the FOP, but there is a provision which states that it is an offence for any person either by himself or on behalf of another, to commit the act of laundering of illegally obtained property.

One very important legislation which is related to money laundering activities is the Anti-Corruption Act 1997. Under this legislation, officers of the enforcement agency, that is the Anti-Corruption Agency, have been given the powers, either directly or indirectly through the Public Prosecutor or the High Court, to act in relation to any dealing in property (laundering), seizure and forfeiture of property which are regarded as proceeds from corruption offences.

Another country in the Asia region, Indonesia, also pays serious attention to this matter. The Government of the Republic of Indonesia is truly concerned regarding money laundering, as is reflected by its ratification of some of the following important conventions connected with Money Laundering, such as:

1. Ratification of Convention on Psychotropic Substances 1971 (by Law No. 8 Year 1996);
2. Ratification of United Nations Convention Against Illicit Traffic and Psychotropic Substances (by Law No. 7 Year 1997).

The draft of the Anti-Money Laundering Act is still at the discussion stage in the legislature but implicitly already exists in The Criminal Code Article 39, 480 and 481 and within Draft of Criminal Code Revision chapter 601 and 604 which generally puts restriction on anyone who possesses, saves, transfers, invests, pays, buys, deposits suspicious crime-resulted funds and its violation could result in imprisonment and fines.

In Thailand, the Money Laundering Control Act BE 2542 (1999) was introduced with the setting up of the Office of Anti-money Laundering by the Government of Thailand. During the first 9 months of its existence the office managed to confiscate a total of more than 240 million bahts. Under the above Act, financial institutions are required to report every transaction of the amount exceeding 2 million bahts to the Office of Anti-money Laundering for investigation. The office also has the power to gather evidence for the purpose of taking legal proceeding against the offenders of predicate offence, which are:

1. relating to narcotics;
2. relating to sexuality;
3. relating to public fraud;
4. relating to misappropriation or fraud or exertion of an act of violent against property or dishonest conduct;
5. of malfeasance in office or judicial office;
6. relating to extortion or blackmail by claiming an influence of a secret society or criminal association;
7. relating to smuggling under the custom law.

In Nepal, the extent of money laundering is very difficult to estimate. It is an illegal act for which no statistics are available.

In India, money laundering is indulged in both by businessman and corporate business houses to evade taxes as well as by the organized criminal groups to launder dirty money. Money laundering techniques include smuggling, establishment of front companies,
acquisition of commercial and non commercial properties, remittances through Hawala or Hundi. Over invoicing and double invoicing of goods through foreign remittances and through trading in stock and shares.

The Indian “Hawala” or “Hundi” system of transaction can be explained as transfer of money through unofficial and non banking channels. The money so transferred often includes the money derived from criminal activities in violation of the country’s legislation. As a developing nation, India feels seriously concerned because Hawala transactions not only undermine the nation’s economy, but also seriously jeopardizes the country’s security through terrorist and subversive activities which are often funded from the proceeds of illegal drugs and arms trafficking.

It needs to be emphasized, that at present there is no specific money laundering law in operation in India. A bill to enact the money laundering act “The prevention of Money Laundering Bill” has been introduced in Parliament by the Government of India but the same still remains to be enacted as Law. However, at present there is already a set of legislation existing in India intended to deal with the economic offenders. Such laws/legislation are specifically intended to deprive the offenders of the proceeds and benefits deprived from the commission of offences against the laws of the country.

Besides, such legislation also provides for the confiscation or forfeiture of the proceeds or assets of certain crimes. These include:

(i) Criminal Law (Amendment) Ordinance, 1944
(ii) Customs Act, 1962
(iii) Code of Criminal Procedure, 1973
(iv) Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976
(v) Narcotic drugs & Psychotropic Substance Act, 1985
(vi) In addition, Indian Statutes also provide preventive detention of foreign exchange racketeers under the conservation of foreign exchange and prevention of smuggling activities (COFEPOSA) Act, 1974
(vii) And the preventive detention of drug traffickers under the prevention of Illicit traffic in Narcotic drugs and psychotropic substances (PITNDPS), Act 1988.

In Argentina, the new legislation (Law enacted on March 5, 2000) considers money laundering as an autonomous crime. It means that the laundering of assets is not only penalized when it is obtained from the traffic of narcotics, but also includes other illegal activities such as terrorism, traffic of weapons, of human beings or other human organs, crimes against the Public Administration, and such other offences where the Penal Code provides punishment with a minimum of 3 years in jail. The same law includes the obligation on the part of certain people, that the text specifically mentions, of denouncing operations and/or suspicious activities.

In Venezuela, the anti drugs law was enacted and made more comprehensive on September 30, 1993. This law was made to adapt to the current problem relating to drugs and it includes the procedure in cases of money laundering, their prevention, control and inspection of the bank and financial entities by the authorities. With this enactment of the anti-drug law all of those that have benefited from drug trafficking and other crimes are penalized. Besides the
trafficker, it also penalizes the persons that direct the operation, who finance it and those who facilitate the traffic of drugs in any way. The reform was made to article 37 which now penalizes laundering.

The Venezuelan national assembly has also discussed the future enactment of a law that would fight against organized crime. The police, who can carry out operations as hidden agents, can investigate the laundering of money and the traffic of drugs. Equally, it also imposes on banks the obligation of informing the authorities when there is suspicion of an operation of money laundering. The punishment for the crime of money laundering is imprisonment between 15 and 25 years. An anti-corruption law that penalizes the offences relating to public officials has also been provided in Venezuela.

In Peru, the Law only punishes money laundering when it emanates from the illicit trafficking of drugs. When the money relates to other offences like corruption, fraud, kidnapping, robbery, etc. it is not covered by money laundering. Thus, in Peru, the activity of money laundering is confined only to the case where drug money is involved. It is also incorporated by law (ordinance legislative) of April 10, 1992, that banks report any unusual or suspicious transaction above ten thousand dollars to the authorities in each case.

Money laundering in Honduras is only related to drug trafficking. Before 1993 the money laundering law did not exist. It was only mentioned in one article of the drug law. Since 1998 the money laundering law has been enacted, but it only relates to drugs. However, the attorneys that deal with the said crime are working on some reforms in the law. They are trying to establish a money laundering law related also to other crimes such as stolen vehicles, kidnappings, bank robberies, human trafficking etc.

Uganda is a developing country with a low economic base. Because of this criminals finds it easy to invest their proceeds from illegal activities in Uganda. Since the government needs investors to uplift the economy, little scrutiny is done to establish the origin of huge amounts of money. Currently, there is no legislation in place to cater to money laundering. This is a new concept. However, there is an anti-money laundering committee consisting of experts from the Uganda Revenue Authority, police, immigration, commercial banks and Bank of Uganda. The committee is charged with drafting a law on money laundering. In East Africa, a training workshop on combating money laundering was held in Arusha, Tanzania in August 1999 and has led to the creation of a National Anti-Money Laundering Committee, which are affiliates of the Eastern and Southern Africa Anti-Money Laundering Group (E.A.S.A.A.M.L.G.).

IV. INSTITUTION OF STRs/FIUs

As far as Japan is concerned, the Suspicious Transaction Report (STR) system was first introduced into Japanese legislation by the enactment of the Special Narcotics Law. Subsequent to this, the Law for the Punishment of Organized Crimes was enacted in 2000, which introduced a comprehensive STR system. The scope of predicate offenses of money laundering was expanded to almost all organized crimes. Based on the above law, the Japan Financial Intelligence Office (JAFIO) was established in the Financial Agency as
the Japanese Financial Intelligence Unit (FIU).

At present, depository institutions (banks), insurance companies, securities brokers and other non-bank financial institutions are covered in the STR system. However, non-financial institutions or other relevant professionals (so-called “gatekeepers”) are not covered. Compliance by financial institutions is mandatory but no legal sanction is provided for non-disclosure of STRs.

The records of the Narcotics Division of the Malaysia Police Department reveal that the traffickers in Malaysia are mostly individuals or small groups who capitalize on drug trafficking industry for personal gains. Drug proceeds are sometimes concealed within the proximity of their home or invested in other illegal activities such as loan-sharking and book markings.

Taking into consideration the Forty Recommendations of the FATF on money laundering, the government of Malaysia in the middle of the year 2001 introduced the Anti-Money Laundering Act 2001. It is hoped that the law, with 199 serious offences including drug trafficking, corruption, kidnapping, robbery, human trafficking, gambling and fraud, will provide a strong foundation in countering money laundering in or outside Malaysia.

In Indonesia, the Criminal Proceeding Act, 1981 provides that Investigators shall be:

a. an official of the state police of the Republic of Indonesia;
b. a certain official of the civil service who is granted special authority by law.

Referring to this statement, in practice, the police official is an investigator for general crimes such as murder, theft, robbery and so forth. A public prosecutor is also authorized to be the investigator for special crimes such as corruption cases.

In corruption cases, the Attorney General’s Office has successfully handled a lot of corruption cases, and saved a large amount of the state’s assets.

In India, a number of law enforcement agencies (primarily operating under the Ministry of Finance, Government of India) are engaged in collection of intelligence and also investigation of economic offences and frauds, including money laundering. Some of the prominent agencies are as follows:

(i) The Directorate of Revenue Intelligence (DRI)
(ii) The Directorate of Enforcement
(iii) The Economic Intelligence Bureau (EIB)
(iv) The Central Board of Direct Taxes (CBDT)
(v) The Central Board of Excise & Customs (CBEC)

In addition to the above agencies, functioning directly under the Ministry of Finance, the Government of India, the Economic Offences Wing (EOW) of the premier police investigating agency in the country, viz, the Central Bureau of Investigation (CBI) also specializes in handling complex investigations relating to economic and financial frauds, including money laundering.

Argentina contemplates setting up a Commission for dealing with activities relating to money laundering (Unidad de Información Financiera — U.F.I. — Financial Information Unit). U.F.I. forces
certain people and corporations or companies to inform of diverse data that looks suspicious. The promulgation of this Law has proved to be very significant for Argentina, which has incorporated most of the Forty Recommendations of the FATF.

In Venezuela, the penal action is carried out by the District Attorney (D.A.) of the Public Ministry and it is the D.A. who directs the investigation, giving instructions to the Police in relation to the investigation of the crimes. Since the above law is not as yet approved by the National Assembly, Venezuela does not yet have a legislative instrument to combat money laundering and the criminal organizations involved.

V. PROFILE OF MONEY LAUNDERING CASES PROSECUTED IN JAPAN

In Japan, as a result of enacting the Special Narcotics and the Law for The Punishment of Organized Crimes, the prosecution of money laundering cases has developed increasingly. However, it is difficult to evaluate the effectiveness of money laundering measures because there are only about ten cases utilizing those laws as indicated below:

1. Cases of the Special Narcotics Law
   a. In November, 1992, an accused got 7,000,000 yen after handing over stimulant drugs to someone, and deposited this money into an account under an assumed name in a bank in Gifu-city, to disguise the acquisition of illegal profit.
   b. In December, 1995, an accused entrusted an acquaintance to remit to the bank account of the acquaintance in Tokyo 800,000 yen as the proceeds of stimulant drug sales, to disguise the acquisition of illegal profits.
   c. From June, 1995 till October, 1996, an accused, who was the boss of a gang named “Kokuryuukai” got 290,000 yen every day from stimulant traffickers in his sphere of influence or territory. So he received a total of 147,900,000 yen in illegal profits.
   d. From April till June, 1997, an accused got 52,752,500 yen as the proceeds from stimulant drug sales and he remitted the money to a bank account in the United Arab Emirates using the name of his brother to disguise the illegal profit. This case was the first prosecution example in Japan for the act of the overseas remittance of illegal profits.
   e. From October, 1997 till March, 1998, an accused got 31,180,100 yen in proceeds from stimulant drug sales, and he remitted the money under an assumed name to a bank in the Islamic republic of Iran, addressed to his mother, to disguise the acquisition of illegal profits.
   f. From December, 1998 till July, 1999, an accused got 25,068,000 yen as the proceeds for the sale of regulation drugs (i.e. stimulant drugs) and deposited the money into the account in his common-law wife’s name in a bank in Shizuoka Prefecture, to disguise the crime profits.
   g. In July, 1999, the accused let his customer remit to a bank account in Higashiosaka-city, held under a false name 55,000 yen as the proceeds of stimulant drug sales.

2. Cases of the Law for the Punishment of Organized Crimes
   a. An accused got 3,920,000 yen in proceeds after he handed some obscene videos over to someone and deposited the money into an account with a false name which he established at a post office in Osaka-city.
b. An accused let his customer, remit to a bank account held in a false name in Tokyo 5,907,720 yen as the proceeds for an obscene CDR.

c. An accused runs an enterprise of the corporation by using illegal profit. The accused undertook new stock of Taisyo Life Insurance Company (hereinafter “Taisyo”), by using of property that he got through fraud. The accused and Claremont Capital Holding Co. Ltd. (which the accused acted as Representative Director of) acquired the position of stockholder in Taisyo and he ruled over about 66.8% of Taisyo's published stock. Then, the accused used his authority as a stockholder of the company, in a general meeting of the stockholders of the company held on April 3, 2000, with the purpose of influencing the management of Taisyo to appoint him and three others as director of the company.

VI. PROFILE OF MONEY LAUNDERING CASES IN HONDURAS

At the moment Honduras has three big cases of money laundering, the biggest of which is one of a Colombian organized group. Those members came to Honduras to launder money there, three of them Colombians. They began a business of selling home appliances and electrical domestic equipment. The investigators began an investigation of those businesses, because it was strange that these places were not open to the public, people needed to use a bell door to get in. Also, the Colombian police sent the Honduran investigators information about them, because they found out that some drug dealers that were located in the sea on boats had communication with a cell number in Honduras, so they started a very deep investigation. Finally they found the probable cause to present in court, they began to make searches in the business and in their houses. People got arrested and in the search they found about 60 bank account books, check vouchers where they had paid pilots, they had bought boats, and paid the boat captains, nothing related with the domestic electrical appliance business, so the judge ordered the arrest warrants and confiscated about 8 luxury cars. They froze all the bank accounts and also all the houses that they were building with a cost of over 2 million lempiras. When the investigators were doing the investigation they noticed that in some accounts people received a big amount of money, this money was in the bank for 5 days and in the next week all the money was gone, so the money transfer was very often from these banks in Honduras to the other banks, most of them in Miami, New York, Panama and Mexico. The total amount involved runs into several millions of dollars, and with a further investigation they related bank accounts with other accounts in Central, South and North America, even in Spain and Thailand.

VII. CONCLUSION

In summation, it can be safely stated that national strategies are inherently inadequate in responding to the challenges posed by transnational organized crime, including money laundering, since they cross multiple borders, involve multiple jurisdictions and a multiplicity of laws.

The rapid growth in transnational organized crime and the complexity of the investigation requires a truly global response. At present, the measures adopted to counter organized crime are not only predominantly national, but also different from one country to another. It
is, thus, absolutely imperative to increase global cooperation between the world law enforcement agencies and to continue to develop the tools which will help them effectively counter the transnational organized crime, including money laundering.
GROUP 1
PHASE 2

TOOLS FACILITATING THE INVESTIGATION OF ILLICIT DRUG TRAFFICKING

I. INTRODUCTION

The use of traditional investigative methods to combat illicit drug trafficking has proved to be very difficult and ineffective. This state of affairs therefore calls for the use of special investigative tools such as controlled delivery, undercover operations and electronic surveillance (wiretapping, communications interception, etc.) by law enforcement agencies to effectively control illicit drug trafficking.

However, there is controversy surrounding the use of these techniques and thus, to a certain extent, discouragement for the law enforcement agencies to utilize them. Their abuse may affect the rule of law, may lead to infringement of human rights. There is a fear that governments may use them to oppress citizens under the guise of national interest. Their use therefore often sparks off politically sensitive debates.

The biggest question, therefore, is how to use these techniques consistent with the rule of law and respect of human rights. The answer to this cannot be universally obtained and this will depend on the legal system, practice and culture of each country. There is a need therefore, to strike an agreement as to what extent the privacy rights of individuals can be respected and at the same time keeping people safe from the effects of transnational organized crime.

The use of these techniques varies from country to country, for this reason the group had to focus on them individually. However the group has adopted the definition of controlled delivery that is contained in Article 2 of the United Nations Convention Against Transnational Organized Crime, 2000.
The Electronic Surveillance investigative method was the theme of a lot of discussions in the group, since every country has its own methods and devices, but one thing that all the participants are aware of is the fact that criminal investigations are becoming increasingly more difficult as criminal techniques become even more sophisticated. The challenge for criminal investigators is to keep pace with crime modus operandi; by using increasingly sophisticated investigative techniques. One of them that has been extremely successful is the electronic surveillance, including both silent video surveillance and interception of wire, oral, or electronic communications.

Although the concept of undercover operations is the same but the practice is quite different in foreign countries vis-a-vis the concept represented by the group from Japan. In foreign countries, undercover operations mean an investigation involving a series of related undercover activities over a period of time by an undercover employee.

In that vein, this paper seeks to analyze these tools with emphasis on the current situation, problems as well as proposed solutions, in every participant country.

II. CONTROLLED DELIVERY

CD, as an anti-drug trafficking technique, has been divided into 3 categories in our group, namely:

A. Country in which it is stipulated by law; (Japan)
B. Country in which it is in the process of being stipulated by law; (Honduras)
C. Country in which it is not stipulated by law; (Cameroon, Kyrgyzstan and Pakistan)

A. Country in Which Anti-Drug Trafficking Technique of CD is Stipulated by Law

1. Current Situation
   Japan signed the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances on December 20, 1988 at the United Nations Drug Committee Treaty Conference. In order to enforce this treaty in Japan, a special law concerning narcotics was enacted on July 1, 1992. This law enabled law enforcement officers to utilize transnational live/clean CD.


2. Problems and Solutions
   LCD has a risk of losing control and spreading drugs into civil society. On the other hand, CCD involves the risk of failure in arresting the receiver, because exchanging contents may cause a change of the appearance of the drug container. Also, delay of delivery of drugs may make drug traffickers nervous and cautious. That means investigators that do not have enough time. If investigators try to arrest the receivers too fast, they tend to deny realization of the contents. On the other hand, if it is too late, it gives them a chance to conceal the drugs or to run away. In addition, it is important to identity the sender and receiver, to analyze the breakdown of bank accounts used by these traffickers, telephone calls from or to them, etc.

   So it must be encouraged to train staff members and cooperate internationally.
B. Country in Which Anti-Drug Trafficking Technique of CD is Semi-Stipulated by Law

Honduras has adopted a definition of controlled delivery as given in Article 2 of the United Nations Convention Against Organized Crime.

The technique is used for allowing illicit or suspect consignments to pass out of, through or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

1. Current Situation

Honduras uses the investigative technique as a very useful tool against illicit drug trafficking.

Most of the time, this technique involves the Central American countries, such as El Salvador and Nicaragua, but also with the United States, when people from Honduras take some amount of drugs inside the United States, under the supervision of the authorities, to identify all the people involved.

2. Problems

To use this investigative technique, police agencies must have some budget, because investigators have to travel out of the country and with the help of the Police of the destination country make the surveillance and also conduct further investigation.

That is one of the problems that Honduras is facing right now, because this technique is not contemplated in the Honduran Law.

3. Solutions

Honduras had received a lot of help from the U.S. government, more specifically from the Drug Enforcement Administration (DEA), and with their help Honduras has successfully conducted some investigations.

In the new Penal Procedures law this kind of Investigation is included as “special investigative methods” and it will be held under the supervision of the Judge.

C. Countries in Which Anti-Drug Trafficking Technique of CD is Not Stipulated by Law

1. Current Situation

Cameroon, Pakistan and Kyrgyzstan do not have a specific law to deal with controlled delivery and in that sense CD there is not formalized or institutionalized by law. CD is used as a part of the normal police practical work including all other investigation/detection techniques.

All these countries are not destination but transit countries for other nations, e.g. Pakistan is mainly a transit for Afghan opiates and Cameroon is a transit mainly for cocaine from Asian countries, and through Kyrgyzstan opiates from Afghanistan is the main transit drug. In Pakistan, under the law, CD can be used by the Intelligence Bureau (IB) and Inter Services Intelligence (ISI) and this has been sanctioned under an ordinance. But the main mandate of these agencies is the responsibility for the internal and external security of the state and hence they seldom deal with CD cases.

In the case of Pakistan however it is signatory to many bilateral and regional agreements in which it has agreed to support the signatory countries to help in
CD operations if they are through Pakistan territory if requested.

2. Problems and solutions
The problems being faced and the viable solutions for the three countries are as follows:

(i) There is no specialized training imparted to custom and especially police officers which they can implement in the workplace efficiently and effectively. A change in training curriculum including the teaching of these techniques at length including CD is a viable solution for this problem.

(ii) Secondly, the biggest problem confronting the three countries and probably all developing and underdeveloped countries is inadequate finances for affording these latest anti-drug trafficking techniques. The solution to this problem is obviously provision of optimum finances to the pertinent agencies. This will enable them to utilize the money for new training initiatives, purchase/procure the inevitable technology and equipment for CD operations and other latest techniques like electronic surveillance, etc.

(iii) Thirdly, the main problem is that these practices, including CD, have up till now not yet been formalized or institutionalized. By doing so it would become easier, from the legitimacy perspective, for all pertinent agencies to use them without fear or favour as is the case now in Japan.

III. ELECTRONIC SURVEILLANCE

With the exception of wire-tapping, which has been stipulated by law in Japan, Japanese law enforcement officers like their counterparts in Cameroon, Honduras, Kyrgyzstan and Pakistan generally carry out electronic surveillance as part of their practical work in the course of investigations.

A. Cameroon

1. Current Situation
The use of electronic devices to track down or watch or record the activities of criminals may well be described as electronic surveillance. This anti-drug trafficking technique is also used by the law enforcement officers in Cameroon as part of their normal routine duty in the criminal investigation process.

The law enforcement officers may resort to wire-tapping to secretly follow up or monitor unlawful arrangements, between criminals on target telephones. The instant case calls for the indispensable assistance of the Posts and Telecommunications Department. The phone or the location would require to be monitored 24 hours a day, seven days a week and, perhaps even much longer. Equipped with micro cameras, video cameras and micro tape recorders of all sorts, the law enforcement officers equally obtain or record vital information from criminals without alerting them.

2. Problems and Solutions
(i) Wire-tapping improperly used would amount to an unlawful interference with the constitutional protection of an individual’s communications. Similarly, the abusive use of spy cameras would violate the citizen’s constitutional rights to his privacy.

(ii) Lack of adequate trained personnel to conduct electronic surveillance for the process requires manpower intensive operation. Such personnel should have people who can speak
many languages and also have the skills to interpret coded language.

(iii) Lack of adequate finances to train the required personnel and to purchase sophisticated equipment.

(iv) No legislation in force to tightly control the use of this and other tools of anti-drug trafficking to avoid abuse of the techniques and to protect individual privacy, as constitutionally required.

B. Honduras

The police agencies in Honduras, mainly those that investigate illicit drug trafficking, have a series of electronic devices that are indispensable tools for the electronic surveillance, among them we can mention:

1. Tools Used
   (i) Intervention of phone conversations (wire tapping)
   (ii) Micro video cameras (pencils, calculators, sun glasses, wallets, etc.)
   (iii) Wireless microphones in miniature
   (iv) Night vision

2. Problems
   The big problem that the police of Honduras now face is that electronic surveillance is not contemplated in legislation and so for a video or a recording to have probatory validity the judge should authorize it previously.

   In addition, these agencies have scarce equipment, since enough microphones, cameras, etc. are not available. In addition the whole personnel are not trained to use this equipment. Another important thing is that these tiny devises have high costs which the concerned agencies cannot afford within their limited budgets.

   Using these devices implies the investment of time and of human resource and the scarcity of personnel and the great quantity of cases is another problem.

3. Solutions
   Next February, the new penal procedure will come into force which includes the use of this type of equipment when it refers to the special procedures of investigation.

   It is hoped that the government will lend adequate economic support. This would solve in great measure the logistical problems and with the requisite recruitment of personnel in the concerned agencies the problem of lack of human resources is expected to be overcome soon.

C. Japan

1. Tools Used
   In Japan, interception of telephone or other electric communications (wiretapping including e-mail tapping, etc.), video taping and audio tapping using microphones are the main tools of electronic surveillance.

   The Law Concerning Interception of Communications came into effect in August 2000. Before this law was enacted, the interception of electronic communications was conducted on the basis of the interpretation of the Code of Criminal Procedure. By enacting the above law, strict requirements, procedures, etc., for the interception of electronic communications related to the perpetration of offenses have been stipulated. In this law, “communication” means telephone or other electronic communication made in whole or in part through the use of wire between the point of origin and the point of reception, or communication using a switching station between the point of origin and the point of reception. In this law, “interception”
means the reception of live communication between third parties, conducted for the purpose of acquiring its contents without the consent of either party. If one member of a party agrees, investigators can conduct wiretapping or e-mail tapping etc., of course, but it is not based on this law. This law covers particular crimes, such as drug-related offences, firearm-related offenses, smuggling of immigrants in groups, and organized homicide. But there is no actual case carried out that is based on this new law yet as of October 2001.

Video taping and audio tapping using microphones are not governed by a specific law but by interpretation of the Code of Criminal Procedure Law. These methods are often conducted to gather information or to collect evidence.

2. Problems and Solutions
(i) Interception of telephone or other electronic communications
   The new law covers only particular types of crime. As mentioned above, there should be continuous examination on coverage and best practice of this new law. Also, training staff to conduct this new method is important.

(ii) Audio tapping by using micro phones, video tapping
   These methods have to be carried out suitably according to necessity because they may cause an invasion of privacy.

D. Kyrgyzstan

1. Current Situation
   In wire tapping the bugging of rooms and living space takes place.

   These measures are realized in two ways:

   (i) Listening to the crime plan via instruments.
   (ii) Listening is also used for gathering evidence. The difference between these two forms is,
      • Information received by the first method could not be used as evidence in the court.
      • Secondly, by sanction of the district procurator. The information received can be used as evidence in the court. These methods of electronic surveillance help operative units of law enforcement agencies with the technical support of special units.

E. Pakistan

1. Tools Used
   The following tools are used for conducting electronic surveillance in Pakistan.
   (i) Wire tapping or phone bugging
   (ii) Video camera
   (iii) Audio tapping
   (iv) Laser beams for bugging
   (v) Still camera while following the suspects
   (vi) Mobile surveillance of the suspects
   (vii) Electronic bugging by plugs, pens etc.

2. Problems
   (i) Financial constraints
      The problem in the main is inadequate funds for electronic surveillance (ES). All the equipment is costly and sometimes cannot be repurchased when old and obsolete.
   (ii) Labour Intensive
      Wire tapping is quite labour intensive and we have a shortage of operating staff.
   (iii) Video camera and audio aids
      This is again costly equipment and enough of these equipment is not
available. In addition there is always the chance of it being abused.

(iv) Mobile surveillance and still camera
Both of these ES techniques are labour intensive and time consuming. In addition there are not enough incentives for the employees who operated them.

(v) Decoding and language problems
Often the traffickers use coded language or some foreign language. It is very difficult for staff to decode the coded language or understand the foreign languages.

3. Solutions
(i) There should be adequate budget and if possible some reserves also for the ES infrastructure.
(ii) Shortage of strength of staff etc. should be fulfilled by recruitment.
(iii) There must be sufficient motivation/incentives for the staff/employees.
(iv) If abuse of ES is detected, an exemplary punishment should be awarded to deter others and make the work job-oriented and not for fulfillment of personal needs.
(v) Experts in requisite languages are needed who can also translate them into the desired language.
(vi) Staff or employees dealing with decoding should be sent for specialized training in established institutions at home and abroad.

IV. UNDERCOVER OPERATIONS

A. Cameroon

1. Current Situation
Law enforcement officers are known to use trickery and deception to arrest persons involved in a criminal activity. Undercover operations embrace both trickery and deception. This anti-crime control and prevention technique is used in cases involving big organized criminal operations. For example, the technique may be used in drug controlled delivery operations.

Undercover operations are commonly used by the law enforcement officers in Cameroon for a wide variety of offences. Frequently, a civilian agent is used to cover up the criminal activities of the criminal group. In some cases, a trained officer is used as an agent. The agent gets into the organized crime group with the primary intention to study its operations and to furnish all relevant and vital information to the law enforcement department. To do this, he gets to be identified by the members of the crime group as one of theirs; live and behave like them. This role apart, he may be used generally by the law enforcement department as an agent provocateur.

When satisfied that sufficient information has been received from the agent, officers of the law enforcement department would arrest the criminals and would pretend to arrest the agent if, at the time of carrying out the arrest, he was amongst the gang. At the hearing of the case against the criminals, the agent is used as a prosecution witness.

Undercover operations demand a sizeable number of law enforcement officers and are generally time consuming. A complex and sophisticated crime network may take quite a reasonable amount of time to investigate,
using, besides, a large number of officers and agents. Equally, it is worth mentioning the risk to life posed by these operations involving very dangerous crime groups.

2. Problems and Solutions

(i) Inadequate personnel. Undercover operations need more personnel and are time consuming.

(ii) Improperly used undercover operations may assist a criminal design. Here a case built from such operations is likely to collapse on the ground of entrapment and other related defenses.

(iii) Risk to life. Some of these operations involve very high risk to the lives of the officers and their agents, during and, even after the hearing and conviction of the offenders. Hence, they need protection.

(iv) Legislation. There is need for special legislation in this country to define, lay down general procedure of, protection of officers, agents and, the rights of individuals under the constitution.

B. Honduras

1. Current Situation

In Honduras, the undercover operations mean a police agent or investigator getting inside of an organized group to identify the suspects and also getting to know all the illegal activities that the organized group is actually involved in.

In Honduras, the police agencies use this technique, but only in big cases or when it is extremely necessary, because it involves a lot of resources, a lot of time and it is also very dangerous.

2. Problems

One of the biggest problems is that it takes a lot of time, because the undercover agent has to become a member of the group, and he/she needs time to get to know the whole operation and also try to gain the suspects confidence, so most of the time the operation takes weeks and even months.

The undercover agent has to be very well trained with a lot of experience, and having the ability of acting or responding properly in any dangerous situation, that is why police agencies do not have enough agents to do this kind of job. Because after an undercover agent has finished his job, he can not continue doing the same job, so only if the new case is in a different city, far away from the first and in a different organized group, but this is also highly risky.

In addition, another agent has to work from outside and take care of the personal security of the undercover agent.

3. Solution

Police agencies are now training new agents to do this kind of job. Honduras is getting a lot of assistance from neighboring countries, and also from the United States, in training investigators and exchanging, concerned personnel.

C. Japan

1. Current Situation

Japan does not have general provisions concerning undercover operation. However, article 58 of the Narcotics and Psychotropics Control Law provides that a narcotics agent can receive a narcotic drug from any person “under the permission of the Minister of Health, Labor and Welfare”. There is a similar regulation in Article 45 of the Opium Law, and also, Articles 27-3 of the Firearms and Swords Control Law which provides that, under the permission of the Prefectural Public Safety Commission, a
police officer or a Coast Guard officer can receive or borrow guns or their parts, or receive live cartridges of guns from any person. According to judicial precedent, the courts have decided each case of undercover operations whether it was legitimate or not according to the degree of necessity and suitability.

Generally speaking, offering the chance to commit an offense to the person who has already had the intention to commit it may be legal, but that implanting an idea to commit an offense in the mind of an innocent person and inducing him/her to commit the offense may be illegal.

2. Problems and solutions

In order to conduct undercover operations, masterful skills in investigative techniques are required and since the investigator must play an undercover role, there is significant danger involved. Training of investigators is needed.

D. Kyrgyzstan

Undercover operations in the Kyrgyzstan Republic have no legislative basis. Therefore, undercover operations are regulated by secret departments in every law enforcement organization, for example in national security service, that is the ministry of internal affairs. Information acquired through undercover operations is not legal evidence and cannot be used in court.

E. Pakistan

1. Current Situation

The technique's common uses are to collect information about criminal gangs, their methods of operation and their future plans for drug smuggling. Through such operations the law enforcement agencies are able to infiltrate the highest levels of organized groups.

Nevertheless we visualize that the Afghan internal war with the Northern Alliance and the air attacks on Afghanistan by the U.S.A. may increase illegal drug trafficking by organized gangs to a considerable extent. Therefore the Taliban followers involved in this lucrative trade will try to smuggle out their stockpiles of drugs to generate funds for the ongoing internal and external war. Such a large scale of expected smuggling may be difficult to handle by our agent due to resources and other constraints.

2. Problems

(i) Understaffing

Enough staff is not present to comprehensively handle undercover operations so consequently, there is shortage of strength.

(ii) Lack of incentives

Inadequate financial and other incentives which motivates the workers.

(iii) Dangerous for agents and their families

These operations can be fatal if the agent is exposed, due to versatile reasons e.g. lack of proper training etc. and most probably his family would be in danger too.

(iv) Inadequate budget

As with all other techniques insufficient finances is the main and most crucial issue. This hinders the operations from every aspect.

3. Solutions

(i) Recruitment

Adequate recruitment on merit is probably the best solution for understaffing.

(ii) Provision of incentives

Sufficient and attractive benefits
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should be given to the personnel to instill motivation and diligence, which are one of the keys to success.

(iii) Specialized training
The pertinent personnel must be given specialized training in these techniques to enable them to achieve maximum results without being exposed or putting their families at risk. The standardized, recognized and required level of training can be imparted in domestic and overseas institutions.

(iv) Allocation of budget
The allocation of requisite budget for undercover operations, which are quite costly, is the only way to remove the titanic obstacle to smooth, effective and efficient working.

(v) International co-operation
To overcome the problems, for the present, international co-operation with Pakistan in the form of assistance is inevitable. The assistance can be in the form of overseas training of our concerned personnel, provision of requisite equipment, sending experts to transfer skills etc. This assistance can be rendered more effectively by the developed/affluent and also affected countries.

V. GROUP VISION

From the foregoing presentation it is important to note that all three investigative tools pose common problems and require common solutions for the countries represented in the group.

1. Problems
   (i) Lack of adequate trained personnel
   (ii) Inadequate finances to train and equip their personnel
   (iii) Labor intensive and time consuming
   (iv) No existing legislation
   (v) No efficient international cooperation, especially with regard to CD.

2. Solutions
   (i) Countries to train specialized personnel
   (ii) Provision of optimum finances to train and agencies that will provide adequate equipment.
   (iii) Formulation of special legislation to define all terms, lay down general procedure of protection of officers agents, and the rights of individuals.
   (iv) Encourage international cooperation.

VI. CONCLUSION

In conclusion, employment of the new investigative tools is highly necessary to fight against the ever growing threat of TOC. Undercover operations, controlled delivery and electronic surveillance stand out as the most effective investigative tools against TOC and given the fact that where they have been used, they have exhibited a high level of ability to deliver good results. However, like all new innovations, the use of these tools has to overcome a lot of problems, ranging from lack of ineffective legislation, lack of trained manpower, challenges from civil society and admissibility of evidence obtained through their application. Governments and enforcement agencies therefore need to establish proper guidelines and controls on their application by agents to avoid abuse.

We emphasize the relevance and effectiveness of these techniques, we need our states to review domestic arrangements for these techniques and to facilitate international cooperation in these fields, taking account of human rights.
CRIMINALIZATION OF PARTICIPATION IN AN ORGANIZED CRIMINAL GROUP AND CONSPIRACY, IMMUNITY SYSTEM, AND WITNESS AND VICTIM PROTECTION PROGRAMMES

I. INTRODUCTION

Nulla poena sine lege (no person may be punished except in pursuance of a statute which prescribes a penalty)\textsuperscript{1} is a well established criminal law concept which is followed by the majority of the world community. However, to bring the members of organized crime groups to justice is more difficult than one can expect. Organized criminal groups do exist in some countries for a certain period of time, and the authorities in such countries try every effort to cope with them. Efforts have been made by applying the concept of “conspiracy” and/or creating the new offence of “participation in an organized criminal group” in order to get the culprits to justice. Once the suspect has been arrested, the legal proceeding then begins, and, the final stage of criminal proceeding is to prove beyond reasonable doubt that such crimes have been committed by certain defendants.

Against this background, the United Nations Convention against Transnational Organized Crime (hereinafter “TOC Convention”) requires State Parties to ensure that their laws criminalize either conspiracy or participation in an organized criminal group, or both in Article 5 (see appendix). It is basically understood that this provision offers the State Parties two options and comes from the preceding arguments and practices of the European Union.

In addition, organized criminal groups’ activities are not easy to detect. Generally, the witness may be an insider.

or accidentally witness the crime. However, they have the tendency to avoid involvement in any legal proceedings for fear of their safety. Therefore, special tools, namely an Immunity System and Witness and Victim Protection Programmes, carefully constructed to ease this obstacle is indeed important. Hence, this report is the production of efforts of the members of Group 2 to try and explore some difficulties in applying the concept of “conspiracy” and “participation” as well as making these two tools available in the members’ jurisdictions.

II. CRIMINALIZATION OF PARTICIPATION IN AN ORGANIZED CRIMINAL GROUP AND CONSPIRACY

In effectively tackling the threat of transnational organized crime, in particular, criminal justice authorities have a need to intervene as soon as possible in order to prevent crime, break up criminal organizations and apprehend the offenders. It is ideal that they should be able to arrest offenders before an offence has been committed. Otherwise, there is the considerable risk that the offenders will be able to carry out the offence and escape across national borders, thus evading justice.2

In civil law countries, the concepts of attempt and incitement are widely recognized, but conspiracy is not. The general position in civil law countries is that mere planning of an offence, without an overt act to put the plan into operation, is not criminal. For example, mere planning of a robbery, and even such preliminary stages as an examination of the premises, arrangement for a getaway car or the recruiting of assistants, do not constitute criminal conduct. The offenders may be arrested and brought to trial only when they have gone so far.

The concept of conspiracy arose in common law during the 1600s in England, from where it spread to other common law countries. According to English common law, the mere agreement to commit an offence constitutes conspiracy. In addition, several civil law countries have enacted legislation directed at more tightly defined forms of participation or conspiracy in the case of particularly serious offences. Finally, several civil law countries have enacted legislation that criminalizes active participation in an organized criminal group.

It was this joint action which contributed to the definition adopted in the TOC Convention.

A. TOC Convention

Article 5 is one of only four criminalization obligations contained in the TOC Convention adopted at Palermo, Italy. As mentioned above, it requires State Parties to ensure that their laws criminalize either conspiracy or participation in an organized criminal group, or both.

Conspiracy is thus defined as:

- Intentionally 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

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2 Group 2 is much indebted to visiting expert, Dr. Matti Joutsen. He contributed greatly to our discussion by participation in our group discussion as well as giving us lectures and papers.
the participants in furtherance of the agreement or involving an organized criminal group.

Participation is defined as:

- 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,
- Intentionally takes an active part in: Either the criminal activities of the organized criminal group or 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.

B. Analysis of Current Situation

In Laos, Malaysia, Pakistan and Uganda, the concept of conspiracy has been adopted. In addition to that, under the Pakistan Penal Code, participation in an offence in any capacity is criminalized under Section 34, 149, 120 and 120A of the Pakistan Penal Code. Moreover, according to Section 120B of the Malaysia Penal Code, whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for a term of 2 years or upwards, shall be punished in the same manner as if he had abetted such an offence.

In Nepal, neither the concept of conspiracy nor participation has been adopted so far. In Japan, the situation is the same as Nepal in principle, although there are several conspiracy provisions exceptionally as regards some extremely serious offences in the Penal Code and some laws such as Subversive Activities Prevention Act and Explosive Control Act, and only preparation is also punishable regarding some serious offences. In addition, in Japan, Anti Boryokudan Law prohibits designated criminal organization from coercing people to join the Boryokudan and obstructing voluntary withdrawal from membership, or demand money for withdrawal. If a member of designated organization violates the prohibition, the police may issue an order not to do so. They can be punished if they do not obey the order.

In Thailand, the concept of participation has been adopted.

C. Benefits

As expected, the application of the above mentioned concepts has brought lots of benefits as follows:

a. The criminal justice authorities would have the possibility of intervening at an earlier stage of the criminal activity;
b. All people concerned could be charged with conspiracy or participation even if their roles had been marginal;
c. The prosecutor need not prove complicity in each and every act of crime;
d. The concepts of conspiracy and participation allow, in effect, double punishment: one for conspiracy or participation, and one for the offences committed in furtherance of the conspiracy or participation;
e. Legislation referring to conspiracy and organized criminal groups could provide the framework for the use of civil measures in addition to punishment;
f. The citizens could be kept away from criminal acts and organized criminal groups (deterrent effect).

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3 Dr. Matti Joutsen’s lecture (except f)
D. Drawbacks

Through the experience and practice of EU countries, drawbacks are pointed out as follows:

a. The concepts are ambiguous and confusing, in particular if juries are involved. The legal practice has shown that the concepts can be confusing even to trained lawyers;

b. There is a possibility that the concepts might violate the principle of legality, which requires definition of precisely what acts or omissions constitute criminal conduct;

c. This ambiguity raises concerns regarding legal safeguards, such as ensuring that the defendant knows exactly what conduct he or she is charged with having committed;

d. The ambiguity also raises concerns that the concepts will be used to expand the scope of criminal behavior to an unacceptable extent; and

e. The concept of conspiracy has been used, in the view of some, to “convert innocent acts, talk and association into felonies”. The discussion within the European Union regarding the joint action requiring Member States to criminalize participation in an organized criminal group shows that these same qualms exist regarding this latter concept. The concern here is that the concepts may be abused by over-zealous prosecutors.

III. IMMUNITY SYSTEM

Effective investigation and successful prosecution play an important role in the system of criminal justice administration. Evidence is the most important factor to convict the criminals and the court will always seek concrete evidence to convict a criminal which plays a significant role in the court of law. So the testimony of some persons such as police, general witnesses, the victims and sometimes the accused also is essential to prove the charge to other accused or a suspect or a member of a criminal group. In general, immunity refers to the process of exempting or omitting from prosecution of some accused.

A. TOC Convention

Article 26 of the TOC Convention (see annex) is particularly encouraged with the measures to enhance co-operation of the accused with law enforcement authorities. There are various reasons why immunity is suggested. Principally, the statement of a person who is involved in crime is very reliable because of his relationship with his co-accused. If any statement obtained from him has the credibility and materiality, it can always strengthen a case. At the time of investigation, a state witness can reveal the identity of other suspects which leads to further investigation to arrest the criminal, seize and forfeiture of crime proceeds, etc. In such a situation his statement can also assist the investigator for investigation.

B. Analysis of Current Situation

In Pakistan and India (according to the Penal Code), this system has been provided by law in the High Court and Court of Sessions according to the tenure of imprisonment.

In Pakistan, according to Sec. 337 of the Penal Code, in the High Court or in the Court of Sessions, the tender of pardon can be given as to any offence punishable with imprisonment extending to 10 years or any offence punishable under Sec. 211 of the Code with imprisonment extending to 7 years.

4 Dr. Matti Joutsen’s lecture
Likewise, in India, Sec. 306 of the Code of Criminal Procedure 1973 provides for obtaining evidence of an accomplice by tender of pardon subject to his voluntarily making a full disclosure of the facts and circumstances relevant to the offence for which the accomplice and co-accused are being charged with or investigated for. This provision is applicable for an offence punishable with imprisonment of 7 years or more.

Whereas in Japan this system has not been adopted in legislation, in some cases the court has reduced the punishment on the accused by considering his/her willingness to co-operate with the prosecution. Moreover, in Japan, there is a precedent that a confession is not admissible if it was induced by the promise made by the authorities that they would not indict him/her. Thus, because the grant of immunity seems to be inconsistent with this rule, much consideration would be needed to introduce this system in Japan.

In Laos, Malaysia, Nepal, Thailand and Uganda, the immunity system has not been applied. In these countries only the mitigation of punishment for some accused persons can be considered if the accused assists the investigator to investigate the crime.

C. Benefits
Granting immunity from prosecution has actually led to solving many serious crimes. The victim may also benefit from this system if it is properly used. The investigator can investigate the crime easily. Organized criminal groups and organized crime may decrease from this world.

D. Drawbacks
The possibility the criminal can escape from his/her liability is very high in this system. If prosecutors abuse his/her power to grant immunity, it may increase negative perceptions of criminal justice in the general public. It is also violation of equality and rule of law of the country. The citizen may not have confidence in the judiciary and law enforcement authorities of that country.

As for the unjust evasion of criminal responsibility, for example, the federal immunity statute in the U.S. is construed as “use and derivative-use immunity”, that is to say, the federal government must be prohibited from making any use of immunized testimony and its fruits in any later prosecution against him/her, and therefore, as long as all evidence is wholly derived from legitimate independent sources, he/she may be subjected to future prosecution. In particular, in case the offence involved was heinous and some important evidence was found independently after he/she had given immunized testimony, it can be said that he/she deserves to be prosecuted and punished from the viewpoint of the interests of justice. In light of the effectiveness of immunity in obtaining credible testimony, there is some argument that witnesses are less willing to testify if immunity is not complete and he/she might be faced with subsequent prosecution. On the other hand, proponents of immunity say that such immunity can rather encourage the witnesses to provide as much detail as possible in order to make it difficult to prove that prosecutors make no use of that testimony in any subsequent prosecution.

Regarding the possibility of abuse of power, any appropriate procedure should be required. For example, in the U.S., the United States Attorney Manual describes some factors to be considered when granting immunity in order to make sure
it meets the public interest. On the other hand, as mentioned previously, in Pakistan, the role of judges in making such decisions is more active, which might also be advisable for other countries.

### IV. WITNESS AND VICTIM PROTECTION PROGRAMMES

The courts go by evidence on record to establish the guilt of the accused. Because of the violent nature of organized crime/terrorism, witness intimidation is a significant problem as many witnesses are reluctant to testify in open court for fear of reprisal at the hand of criminal groups/terrorists. Cases of threat or criminal intimidation on potential witnesses are often recounted and in some instances, some of them have even been killed by related criminal organized groups/terrorists. In Thailand for example, every year, 20% of all criminal cases are dismissed because the prime witnesses are too afraid to take the stand.

#### A. Need for Reform

It is essential to protect witnesses from the wrath of criminal groups. Hence legal, physical and financial protection should be provided to important witnesses especially in sensitive cases so that they can feel comfortable without any fear in the court. It is not only to prevent threats/violence to the witnesses but also as a guarantee to gain the confidence of witnesses in supporting the prevention and detection of organized crime. Article 25 of TOC Convention (see annex) encourages nations to adopt measures which will guarantee the protection of witnesses from threats, intimidation, corruption or bodily injury in relation to testimony given in cases involving transnational organized crime.

#### B. Analysis of Current Situation

After discussion, Group 2 realized that the Witness Protection Programme could be categorized as:

- Countries with Witness Protection Programmes in their legislation
- Countries with Witness Protection Programmes annexed as a new article in an existing Act
- Countries that are still in the process of drafting the Bill
- Countries that are still considering the implementation of a Witness Protection Programme

The United States started their Federal Witness Security Programme in 1970 which sought to guarantee the safety of witnesses who agreed to testify for the government in organized crime cases. Witnesses are admitted to the programme when they are able to supply significant evidence in important cases and there is a perceived threat to their security. From 1970 to 1998, a total number of 6,818 witnesses with 8,882 of their families were given this protection and US$75,000 per witness per year and US$125,000 per family has been spent. Even though the programme is costly, the result has made it worth the cost. Over 10,000 defendants have been convicted through the testimony of witnesses and it is said that after the enactment of this Act, the authority could secure the conviction of several notorious mafia leaders.

In Brazil, the national programme for the protection of victims and witnesses took effect in August 1999. The persons who may benefit from this programme

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are those without decreed imprisonment and their relatives who live with them. The programme includes the following measures:

• Transferring the residence of the witness;
• Monthly financial aid for each witness;
• Supply of food and clothing;
• Police protection when traveling;
• Helping the witness find a job in the work market;
• Retention of benefits by a public employee who is removed from the service;
• Social, psychological and medical assistance; and
• Change of identity.

Italy has enacted legislation which specifically provides for witnesses protection and relocation.

In the Philippines, the Witness Protection, Security and Benefit Act (Republic Act No. 6981) was enacted on 21 April 1991, with the Department of Justice as the lead implementing agency. As a result of admission into the Witness Protection and Benefit Programme (WPP), which (in addition to the above mentioned benefits) has a substantial budgetary allocation, the witness shall enjoy the following benefits:

• Secure housing facility until he has testified or until the threat, intimidation or harassment disappears or is reduced to a manageable or tolerable level;
• Travel expenses and subsistence allowance during the inquiry;
• Burial benefits, in case of death due to his participation in the WPP; and
• Free education for children, from primary to college level in any State or private school, college or university, if the witness dies or becomes permanently incapacitated to work.

The protection could be extended to any member of the witness' family. However, a witness admitted into the programme shall have the duties and responsibilities, such as, to testify before and provide information to all appropriate law enforcement officials concerning all appropriate proceedings in connection with or arising from the activities involved in the offense charged, to avoid the commission of a crime, to comply with legal obligations and civil judgments against him, etc.

In Japan, the Witness Protection Programme has been embodied in the Code of Criminal Procedure (CCP), Rule of Criminal Procedure, Constitution, Penal Code and Anti-organized Crime Law. For example, exception to bail (a request for bail may be rejected when there are reasonable grounds for suspecting that the defendant may injure the body or damage the property of the witness or his relative, or threaten them as stipulated in Article 89(5) of the CCP; Order for the defendant to leave the courtroom (Article 281-2 of the CCP), Order for the spectator to leave the courtroom (Article 202 of the Rule of Criminal Procedure), Trials conducted privately (Article 82 Clause 2 of the Constitution), Intimidation of a witness (Article 105-2 of the Penal Code, Article 7(3) of the Anti-Organized Crime Law).

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6 Section 8, the Witness Protection, Security and Benefit Act (Republic Act No. 6981)
7 Section 3, the Witness Protection, Security and Benefit Act (Republic Act No. 6981)
8 Section 5, the Witness Protection, Security and Benefit Act (Republic Act No. 6981)
A presiding judge may control any questions asked by persons concerned in the trial, if the questions relate to the dwelling or the office of a witness or his/her relative, where he/she or they are usually staying and there are reasonable grounds for suspecting that they or their property may be damaged (Article 295 Clause 2 of the CCP). However, the information to identify witnesses may be seen as the constitutional rights of the defendants, so he/she can have the full opportunity to examine all the witnesses, so it could be difficult to hide completely all information to identify the witness from the defendant.

Article 157-4 Clause 1(3) of the CCP provides that a court may, if it deems necessary, according to the circumstances of the crime and the witness, examine the witness with a video link system. The method involves taking the witness to another room and examining him by means of audio-visual tools.

Article 157-3 Clause 1 of the CCP provides the court may, where the court believes a witness would be unable to testify fully with the pressures of being before the defendant and according to the circumstances of the crime and the witness, order a screen to be set up between the witness and the defendant to make the witness invisible during the examination. Moreover, Clause 2 of the above article also provides that a court may order a screen to be set up between the witness and the public gallery.

Article 4 of the Law Concerning Measures Accompanied with Criminal Procedure for Protection of Victims provides that a victim can request the court in criminal cases to record the mutual consent between him/her and the defendant in the record of trial in order to obtain compensation.

The Law to Provide Compensation for the Victims of Crime provides that state compensation may be supplied to the victims of crime whose relatives have been killed, or who have suffered serious injuries from a criminal act.

In Thailand, the Witness Protection Bill proposed by the Ministry of Justice is under discussion at the Parliament. Under the draft bill, the protection will be the responsibility of the police to carry out this task until the Witness Protection Office is established. There shall be general and special measures for witness protection. In general cases, the investigator or prosecutor, with the request from the witness, may asked the Witness Protection Office to order the protection for up to 30 days subject to the necessity of the case. However, in an emergency situation, the investigator or prosecutor would be empowered to order the police protection for their witness for up to 5 days at a time. The special measures are designed to apply to cases involving trading in narcotics, women and children. The Minister of Justice may order the use of special measures for witness protection. The measures include relocation of witness residence, changing of witness identity and record, as well as providing living allowances and job training for up to 2 years. Both general and special measures can be extended to the witness's spouse, parent, children and person in close relationship with such witness. Although there is the worry about the shortage of budget, this witness protection programme is inevitably necessary to combat organized crimes. Moreover, to reduce the fear of witnesses in taking the witness stand and having to confront the defendant whom may be an influential person or a member of an organized crime group, the use of video conferencing where a witness testifies in front of the video camera in a room.
separately from the trial room is also introduced. This should make the witness feel more relaxed and comfortable to tell the whole truth. The proposed bill to amend the Thai Criminal Procedure Code for allowing the use of video conferencing is being scrutinized by the Office of the Council of State.

We learned that Nepal is now considering utilizing the Witness Protection Programme. Anyhow there are still many countries that do not have this programme.

C. Benefits
Witness and Victim Protection Programmes will encourage the cooperation of people in the fight against transnational organized crimes, since they are assured that in giving evidence their life, property or that of their family will be safe from the criminal organization in question. The protection can be given during the time of investigation, proceeding or thereafter. Therefore the witness may be either the accused who is granted immunity, the victim or a third party.

D. Drawbacks
Due to the large amount of finances required and human resource constraints to devise or even implement this programme, many countries may fail to adopt it.

It is also difficult to define the scope of the witness protection. It is not clear as when and for how long the witness should be provided with this protection programme. A question also arises as to whether the protection should be limited only to the witness or should be extended to his family. It is also not clear as to how much assistance should be provided.

V. CONCLUSION
All states should be required to ensure that their legislation criminalizes conspiracy and/or participation in an organized criminal group. The definition of participation was drawn to require ‘active participation.’ It was this joint action which contributed to the definition adopted in the TOC Convention in Article 5.

Furthermore, in responding to the threat of transnational crime, criminal justice authorities have felt it necessary to intervene as soon as possible in order to prevent crime, break-up criminal organizations and apprehend offenders before they make good their escape. States parties are also required to carefully choose the best options, keeping in mind their domestic legal and social systems.

Immunity generally refers to the process of exemption from prosecuting a person accused of a crime. It seems that immunity from prosecution has actually led to the solving of many serious crimes in countries such as Pakistan and India. Detailed immunity systems of other countries like Malaysia, Uganda and Thailand were also discussed. In Japan the system is not legislated. The absence or existence of an immunity system depended on a country’s culture, history, national sentiment and their domestic laws.

Regarding witness and victim protection, we identified participant states into 4 categories as above mentioned. It was appreciated that the statement of accomplices has proved useful in prosecution involving organized crime cases, as it helps law enforcement agencies to penetrate such gangs. In response to this, some countries have
found it advantageous to enact legislation to protect witnesses and/or oblige witnesses to testify truthfully, and provide sanctions if they refuse to do so.

It was identified that although some countries currently have no serious problems with transnational organized crime, the state of affairs may change in view of the rapid and continuing spread of it. It is therefore important to establish lines of communication and shared understanding of common goals throughout the world.

These strategies have been endorsed by the TOC Convention since the year 2000. Since the TOC Convention provides and covers all effective countermeasures against transnational organized crime for us, it is imperative to ratify and implement the Convention as soon as possible, taking into due account harmony with the domestic legal system of each country.
Article 5
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;
      (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;
   (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

Article 25
Assistance to and protection of victims

1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented.
and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

Article 26
Measures to enhance cooperation with law enforcement authorities

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in organized criminal groups:
   (a) To supply information useful to competent authorities for investigatory and evidentiary purposes on such matters as:
      (i) The identity, nature, composition, structure, location or activities of organized criminal groups;
      (ii) Links, including international links, with other organized criminal groups;
      (iii) Offences that organized criminal groups have committed or may commit;
   (b) To provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.

4. Protection of such persons shall be as provided for in article 24 of this Convention.

5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.
GROUP 3
PHASE 2

COUNTERMEASURES AGAINST MONEY LAUNDERING

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I. INTRODUCTION

In view of the fact that money laundering is at the center of predominantly all other criminal acts, it becomes an integral part of any transnational organized crime. Hence, any genuine effort to combat transnational organized crime has to necessarily address the serious issue of adopting countermeasures to fight the menace of money laundering.

Since the goal of a large number of criminal acts is to generate a profit for the criminal that carries out the act, the processing of the criminal proceeds through money laundering assumes critical importance, as it enables the criminal to disguise their illegal origin and helps him in enjoying the proceeds of his crime without any threat. Thus, money launderers are continuously looking for new methods and routes for laundering their ill-gotten proceeds from crime. The criminals do this by effectively exploiting the differences between the national anti-money laundering systems and tend to move their networks to countries and financial systems with weak or ineffective countermeasures. Therefore, the possible social and political consequences of money laundering, if left unchecked or dealt with ineffectively, can be very grave and serious for any country.

Most fundamentally, since money laundering is inextricably linked to the underlying criminal activity that generated it, targeting the money laundering aspect of criminal activity and depriving the criminal of his ill-gotten proceeds of crime would automatically mean hitting him where it hurts the most, i.e. where he becomes financially most vulnerable. Without a usable profit, the criminal activity cannot continue.

This, inevitably brings to the fore the need for having an effective and organized system to deal with money
laundering by adopting suitable countermeasures in the legislative systems and law enforcement mechanism of various countries. In a broader sense, some of the countermeasures would include making the act of money laundering a crime; giving the investigative agencies the authority to trace, seize and ultimately confiscate the proceeds derived from criminal activity and building the necessary framework for permitting the agencies involved to exchange information amongst themselves and their counterparts in other countries. It is, therefore, critically important that all countries should develop a national anti-money laundering programme. This should, inter alia, include involving the law enforcement agencies in establishing a financial transaction reporting systems, customer identification system, record keeping system and also a method for verifying compliance.

However, it needs to be emphasized that national strategies by themselves would prove inherently inadequate in responding to the challenges posed by transnational organized criminal groups in their activity relating to money laundering since they cross multiple borders, involve multiple jurisdictions and multiplicity of laws. Hence, the countermeasures to combat money laundering calls for a truly global response making it absolutely imperative for increased global cooperation between the law enforcement agencies of different countries in effectively dealing with the menace of money laundering by the transnational organized criminal groups.

II. THE GLOBAL RESPONSE

Realizing the gravity of the problem, the international comity of nations has tried to come up with a global response. The United Nations adopted the Vienna Convention, 1988 against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which, inter alia, incorporated the incrimination of money laundering activity as a criminal act in an international treaty for the first time.

In response to the mounting concern over money laundering, the Financial Action Task Force On Money Laundering (FATF) was established by the G-7 Summit held in Paris in 1989. The FATF was given the responsibility of examining the money laundering techniques and trends, reviewing the actions which had already been taken at the national and international level and the further measures which were required to be taken to combat money laundering. In April 1990, FATF issued a report containing a set of the Forty Recommendations which provided a detailed plan of action needed to combat money laundering. The Forty Recommendations were further revised and made more comprehensive by the FATF in 1996.

Thus, drafted in 1990 and revised in 1996, the Forty Recommendations of the FATF provide a very detailed and comprehensive blue print for action in the fight against money laundering. The Forty Recommendations cover the criminal justice system and law enforcement, the financial system and its regulation and more importantly the intrinsic need for international cooperation to combat money laundering. The Forty Recommendations of the FATF have come to be recognized as the international standard with regard to anti-money laundering programmes. The Forty Recommendations of the FATF set out the basic framework for anti-money laundering efforts and are designed to be
of universal application. However, it was recognized at the outset, that different countries have diverse legal and financial systems and therefore could not take identical measures. The Recommendations, therefore, only lay down the basic principles for different countries to implement, within their constitutional frameworks and thus allow the countries a degree of flexibility. The measures suggested by the FATF are found to be absolutely essential for the creation of an anti-money laundering framework.

III. THE FORTY RECOMMENDATIONS

The Forty Recommendations of the FATF, apart from the general framework, can be broadly classified under three major heads viz:

A. The existence or creation, within the legal framework of each country, a law criminalizing the act of money laundering, as defined by the Vienna Convention of 1988 on NDPS.

B. The existence or creation or strengthening of the legal and financial systems in different countries, which would provide the law enforcement and investigating agencies effective tools to combat money laundering.

C. Strengthening of the International Cooperation between different countries at all levels, so as to enable an organized and concerted effort of the various law enforcement agencies of the different countries, in successfully combating money laundering.

The gist of some of the very important recommendations, under the above referred three major heads, are enumerated as follows:

A.(i) Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalize money laundering, as set forth in the Vienna Convention. Further, the offence of money laundering should not be merely confined to drug offences but should be extended to all serious offences which could be designated as money laundering predicate offences (R. 4).

(ii) The concept of knowledge relating to money laundering may be inferred from objective factual circumstances (R. 5) and that corporations themselves, and not only their employees, should be subject to criminal liability (R. 6).

B. The further perusal reveals that a predominant majority of the Forty Recommendations of the FATF falls within the ambit of major head (B). The gist of some of the very important recommendations are briefly summarized as follows:

(i) Countries should adopt measures, including legislative ones, to enable their competent enforcement authorities, to confiscate laundered property or the proceeds from the commission of any money laundering offence. This may also include confiscation of property of corresponding value of the offending party (R. 7).

The above recommendation further stipulates, that the measures should include the authority to (1) identify, trace and evaluate property which is subject to confiscation, (2) provide for measures such as freezing and seizing to prevent any dealing, transfer or disposal of such property and (3) take any
further appropriate investigative measures toward this end.

The FATF has made very specific recommendations with regard to the strengthening of the financial systems of different countries. The gist of some of the very useful and important recommendations can be summed up as follows:

(ii) Financial institutions of different countries should not permit opening of and operations in anonymous accounts or accounts in fictitious names. They should be necessarily required by law or regulation to establish the correct customer identity while opening an account, renting safe deposit lockers or while entering into large monetary transactions (R. 10).

(iii) Financial institutions in each country should maintain, at least for a period of five years, all necessary records relating to financial transactions, both domestic and international, so as to enable them to comply swiftly with information requests from the competent authorities. Such records should be sufficient to be used as evidence for prosecution, if required (R. 12).

(iv) Countries should pay special attention to money laundering threats inherent in new or developing technologies that might favour anonymity and take suitable measures, if required, to prevent their use in money laundering schemes (R. 13).

(v) Financial institutions in different countries should pay special attention to all complex and unusually large patterns of transactions which have no apparent lawful purpose. Such unusual transactions should be very closely examined and the findings should be made available to the law enforcement agencies (R. 14). If financial institutions suspect that funds emanate from a criminal activity, they should be required to report promptly their suspicions to the competent authorities (R 15).

(vi) The various functionaries of the financial institutions should be protected from criminal or civil liability for reporting suspicious transactions in good faith (R. 16). The financial institutions and their functionaries should not be allowed to warn their customers for having reported any suspicious transaction to the competent authorities (R. 17). Financial institutions should comply with instructions from the competent authorities (R. 18).

(vii) The financial institutions in different countries should develop programmes against money laundering including:
   a. the development of internal policies, procedures and controls,
   b. an ongoing employee training programme,
   c. an audit system to test the functioning of the actual implementation of the scheme (R 19).

In addition to the above, the FATF has also made certain further recommendations to avoid money laundering and to cope with countries having no or insufficient money laundering laws/measures. Some of the important recommendations in this regard are as follows:
(viii) Financial institutions should give special attention to business transactions with countries having no or insufficient anti-money laundering laws/measures. There should be a very thorough scrutiny and monitoring of such transactions (R. 20 & 21).

(ix) Countries should try to implement suitable measures to detect and monitor physical transborder transaction of cash and bearer negotiable instruments (R. 22). They should try to implement a system of reporting all domestic or international currency transactions above a specified or fixed amount to a national central agency having a computerized data base. Such information should be made available to the competent law enforcement agencies of each country as and when required (R. 23). Countries should try to develop safe money management techniques including use of checks, payment cards, etc. to replace cash transactions or transfer of money (R. 24). They should ensure that the money launderers are not able to abuse 'shell corporations' and strengthen their systems to prevent any such unlawful misuse (R. 25).

(x) The competent authorities in different countries should ensure that adequate laws and regulations are in existence to provide safeguards against money laundering. They should also ensure that the enforcement authorities in each country have a very high level of co-operation and co-ordination amongst themselves in combating money laundering activity (R. 26). They should ensure sufficient safeguards to protect taking over of control or acquisition of any financial institutions by criminals or their associates (R. 29).

C. The FATF has very heavily emphasized the strengthening of international cooperation between the different countries with a view to effectively deal with the criminals indulging in money laundering activities. Some of the very important recommendations in this regard are enumerated as under:

(xi) The first part of the 'Recommendation' pertains to greater and increased level of exchange of information, both general and those relating to suspicious transactions. It states that countries should have a system of recording international cash flows, both inflows and outflows, in all currencies so that an estimate could be made with regard to movement of money which should be made available to the International Monetary Fund (IMF) and the Bank for International Settlements to facilitate international studies (R. 30). Further, the 'INTERPOL' and the 'World Customs Organization' should be given the responsibility for gathering and disseminating such information to the competent authorities indicating the latest developments in money laundering and money laundering techniques. The above exercise should also be done by the Central Banks and competent authorities in
different countries domestically (R. 31). Countries should further ensure that there is a system of a spontaneous or “upon request” exchange of information relating to suspicious transactions, persons and corporations involved between the different countries. This international exchange of information should be in conformity with the national and international provisions on privacy and data protection (R. 32).

The second part of ‘Recommendations’ emphasizes on other forms of co-operation at international level including those relating to confiscation, mutual assistance and extradition. The FATF has suggested that differences in the laws and the understanding of the money laundering definition and activity in various countries should not prove to be a hindrance or obstacle in providing each other with mutual legal assistance (R. 33). International co-operation should be further strengthened by bilateral and multi-lateral agreements and arrangements with the intent to facilitate maximum mutual assistance between different countries (R. 34).

Further, countries should try to ratify and implement relevant international conventions on money laundering including the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (R. 35).

(xii) The concluding part of the Forty Recommendations pertaining to enhancing international co-operation between different countries suggest some of the following important measures:

There should be increased co-operation, while conducting investigations between different countries including usage of the effective technique of controlled delivery related to assets known or suspected to be the proceeds of crime (R. 36). There should be procedures for providing mutual assistance in criminal matters, including production of records by financial institutions, the search and seizure of persons and premises for obtaining evidence in money laundering investigations and prosecutions (R. 37). An authority to take immediate action on requests from foreign countries to identify, freeze, seize and confiscate proceeds of crime or the underlying crime behind the money laundering activity (R. 38).

The FATF further suggested that conflicts relating to jurisdiction should be avoided and the accused should be prosecuted in the best venue, in the interest of justice, if more than one country is involved. Further, there should also be arrangements for coordinating seizure and confiscation proceedings, including sharing of confiscated assets (R. 39). It lastly suggested that different countries should have an arrangement for extradition, where possible, of individuals charged with a money laundering offence. All countries should recognize money laundering as an extraditable
offence and should try to simplify their legal framework relating to extradition proceedings. (R. 40).

IV. NON CO-OPERATIVE COUNTRIES AND TERRITORIES

The FATF continued to further review the Forty Recommendations from time to time with regard to their effectiveness in dealing with the crime relating to money laundering and also the implementation by the various countries of the recommendations made more comprehensive in 1996. On 22 June 2001, the FATF published its Twelfth Annual Report which outlines its main achievements, including the significant progress made in relation to work on Non Co-operative Countries and Territories (NCCTs). The FATF has revised and updated its list of NCCTs which now includes the following countries/territories; Cook Islands, Dominica, Egypt, Guatemala, Hungary, Indonesia, Israel, Lebanon, Marshall Islands, Myanmar, Nauru, Nigeria, Niue, the Philippines, 1 Russia, St. Kitts and Nevis and St. Vincent and the Grenadines. The FATF has suggested that all countries should be especially vigilant in their financial dealings/transactions with the above mentioned ‘NCCTs’ and if necessary, take additional countermeasures.

V. THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

The United Nations Convention against Transnational Organized Crime (TOC) 2000 has effectively combined many of the anti-money laundering mechanisms explored at the international level into one comprehensive legal instrument. The convention on TOC addresses a number of issues, raised through several international initiatives, which in many instances were earlier not legally binding, into an international legal instrument having force. The convention has recognized that a considerable amount of valuable work related to the fight against money laundering has been undertaken by a number of organizations and has suggested that countries should seek guidance from such initiatives.

The UN Convention on TOC borrows from the 1998 General Assembly Political Declaration and extends the definition of money laundering to include money derived from all serious crimes which are defined as those offences which are punishable by a maximum sentence of at least four years or more.

In its focus on issues more directly related to financial institutions, the convention requires member countries to establish comprehensive regulatory and supervisory regimes for banks and also non-banking financial institutions. It requires that such regimes should specifically address the issue of customer identification, record keeping and suspicious transaction reporting. It stresses the importance of the exchange of information at the national and international levels and in that context highlights the role of Financial Intelligence Units (FIU) for the purpose of collecting, analyzing and disseminating information. It also highlights the need for co-operation amongst the law enforcement, judicial and financial regulatory authorities of different countries.

1 It needs to be emphasized that the Philippines has since enacted the Anti-Money Laundering Act on 29 September 2001.
For a fuller and more comprehensive understanding of the issue relating to money laundering, as adopted by the UN Convention on TOC, 2000, the complete reading of Article 6 and Article 7 and also articles 12, 13, and 14 is deemed imperative.

VI. SOME COUNTERMEASURES AGAINST MONEY LAUNDERING

The workshop, after having deliberated at length and in detail, highlight three subjects which are regarded to be very important in strengthening the implementation of the Forty Recommendations.

A. Knowing Your Customers

Money laundering is conducted by depositing proceeds of crime in financial institutions, hiding such proceeds of crime, and disguising them as if they originated from legitimate economic activity.

In order to detect money laundering in the most effective way, it is important to obtain illegal proceeds at an early stage. Therefore, the Forty Recommendations prescribe countermeasures, including identification of the person at the time of the opening of his or her bank account.

It was discussed, however, that the scope of the identity of the customer by the bank and other financial institutions should not be expanded. It is prescribed under law in most of the participant’s countries that financial institutions identify the person by such means as his or her ID card at the time of the opening of his or her bank account. It was pointed out while it is effective to extend the scope of obligation for identification to the areas such as occupation, original capital and deposits, it may impose excessive burdens on the financial institutions.

Most of the participants, however, opined that the financial institutions obligations should be extended in order to control money laundering crime. It was discussed whether or not sanctions be imposed upon such financial institutions if and when they fail to meet the obligations on their part in order to ensure the practical effect of such obligations. On this point, some argued that it is not reasonable to impose sanctions upon the financial institutions. Most of the participants argued that some countries already have such sanctions and that it is useful to have provisions on sanction in order to achieve the most effective control over money laundering.

Another topic to keep in mind is that the crime of laundering assets is born as consequence of the seizure of earnings. The profits or instruments and the economic benefit must be confiscated. And this is the key to criminal politics on money laundering. We have to attack their economic interests, their results, and their earnings. The important thing for criminal organizations is not the crime itself but the earnings that they generate. Here, again we meet with another inconvenience from the legislative point of view.

In relation to the effective normative frame, and referring that is to say to the matter that concerns us, the financial system, diverse legislation is necessary for the identification of clients.

Also another regulation exists and it refers to the obligation of taking “accounting books” where the total operations are registered and banks may preserve the bank documentation for 10 years from the date of its registration.

Additionally other regulations are necessary to highlight, such as:
• Register payments of checks and make it an obligation to maintain registration on determined operations;
• Enforce financial entities to inform about certain transactions where specifically it is required for the “Prevention of money laundering coming from illicit activities”;
• Regulations that include the Agencies and Offices of Change;
• To designate, in each entity, a responsible official for the specific topic of money laundering.

In relation to future perspectives, we should point out that the crime of money laundering should be considered as an international crime. It is necessary to have different tools that should accord with those that have already been implemented in other countries.

However, such laws must include an obligation on certain people to denounce operations and/or suspicious activities.

B. Asset Forfeiture System

An asset forfeiture system is a veritable tool for law enforcement and judicial criminal process to deprive criminals of illegally acquired proceeds, and plough back such proceeds to the community for the greater good of society.

The legal provisions regarding an asset forfeiture system differ from country to country. Generally they have this system in a criminal proceeding act. But especially in countries like Venezuela and Argentina, they have a forfeiture system in their Money Laundering Act, the same as in Malaysia relating to the Dangerous Drugs (Forfeiture of Property) Act which was enacted in 1988.

In Indonesia, the Anti Corruption Act, 1971 (amended in 1999) deals with the proceeds of crime. Such goods (from the proceeds of crime) can also be confiscated in the interests of the investigation.

The Japanese assets forfeiture system for organized crime is embedded in the Organized Crime Punishment Law, 1999. In this law, the system of confiscation and collection of equivalent value is provided, which is helpful for the asset forfeiture system. There is also provision for assets illicitly received in relation to property obtained by the parties during engagement in drug-related offences, if the value is deemed unreasonably large then such property or equivalent thereof is liable to be confiscated.

However, it is very difficult to confiscate effectively even for the countries which have a special forfeiture system against money laundering. In other words, one of the most serious problems that countries deal with, in the confiscation procedure, is where the 3rd party is disguised as bona fide to avoid seizure by the criminals.

However, it is very difficult to confiscate effectively even for the countries which have a special forfeiture system against money laundering. In other words, one of the most serious problems that countries deal with, in the confiscation procedure, is where the 3rd party is disguised as bona fide to avoid seizure by the criminals.

It is hard to prove that a 3rd party has received illicit proceeds, knowing it was the product from crime. As a result, criminals keep their illicit proceeds. We should make a 3rd party prove he/she is bona fide.

Indonesia introduced this issue under the Anti-Corruption Law, 1999 about burden of proof. This article makes the defendant prove his innocence and to show that he is not conducting any corruption. This article contradicts the burden of proof regulation in the Criminal Procedure Code, which states that the burden of proof is in the prosecutor’s hand. It is the prosecutor’s duty to prove whether the defendant is guilty or not. The Anti-Corruption Law reversed this burden of proof in limited
circumstances, because the prosecutor still has to prove his indictment.

Thus, the transfer of the burden of proof can be an effective weapon for the law enforcement agent, but at the same time can also impose excessive burdens on a 3rd party. In case the money launderer has transferred the proceeds of crime to the 3rd party, the 3rd party receiver must prove that he/she has not known of the source of the money. In this sense, to prevent the burden of proof from being excessive, the scope and extent of such a burden should be adequately considered.

C. Gatekeepers

The process of laundering illegal money normally goes through three different stages, that’s ‘investment’, ‘layering’ and ‘integration’. Naturally these three stages are used by the launderers as a means to circumvent money laundering countermeasures through more complex schemes. This increase in complexity means that those individuals desiring to launder criminal proceeds must turn to the expertise of legal professionals, accountants, financial consultants, and other professionals to aid them in the movement of such proceeds. The types of assistance that these professionals provide are the gateway through which the launderers must pass to achieve the above stages. Thus the legal and accounting professionals serve as sort of ‘gatekeepers’ since they have the ability to furnish access (knowingly or unwittingly) to the various tools that might help the criminal move or conceal the funds.

The functions that are most useful to the potential launderers include:

- Creation of corporate vehicles or other complex legal arrangement (trusts, for example). Such constructions may serve to confuse the links between the proceeds of a crime and the perpetrator;
- Buying or selling of property. Property transfer served as either the funds (layering stages) or else they represent the final investment of these proceeds after having passed through the laundering process (integration stage);
- Performing financial transactions. Sometimes these professionals may carry out various financial operations on behalf of the launderers (for example, cash deposits or withdrawals on accounts, retail foreign exchange operations, issuing and cashing cheques, purchase and sale of stocks, sending and receiving international fund transfers, etc.);
- Financial and tax advice. A criminal with a large amount of money to invest may pose as an individual hoping to minimize his/her tax liabilities or desiring to place assets out of reach in order to avoid future liabilities.

In some of these functions, the potential launderer is obviously not only relying on the expertise of these professionals but is also using them and their professional status to minimize suspicion surrounding their criminal activities. In view of the vast services these professionals provide, these so called ‘gatekeepers’ would have access to important and useful information that could be used to implicate the launderer of an offence of money laundering. However to obtain such incriminating information from the gatekeepers is not an easy task due to the privilege of confidentiality between the ‘gatekeeper’ and their clients, in particular the legal
profession. This traditional professional confidentiality is now extended to other non-advocacy 'gatekeeper' functions.

One solution to overcome the above problem is to include these professional gatekeepers under the same anti-money laundering obligations as financial intermediaries when they perform their professional functions. In other words, these professional gatekeepers are required to identify the client with which they are dealing and to channel any suspicious transaction reports (STR) to the relevant authority/financial intelligence unit (FIU) or to face the penalties which come with failing to do so.

**VII. CONCLUSION**

It may, thus, be seen that the problem of money laundering is being seriously viewed by the international community with the concern it rightly deserves. Subsequent to the September 11 2001 terrorist attacks on the World Trade Center and the Pentagon in the USA, the issue of money laundering has suddenly assumed altogether a new dimension in terms of the funding of terrorist organizations all over the world and the predominant use of money laundering by terrorist criminal organizations in funding their activities. However, the global response to the challenge posed has been overwhelming, as is evident by the media coverage (CNN: October 23, 2001) where it has been reported that more than 140 countries from all parts of the world are co-operating in tracking down funds of criminal organizations and more especially terrorist funds which are suspected to be involved in money laundering activity at different stages in various countries. It is, indeed, very heartening to note, that out of the above 140 countries, seventy countries have actually gone ahead and frozen certain accounts in banks and financial institutions, which were believed to be involved in suspicious financial transactions. The intent behind the above exercise is to chase the ‘money trail’ used by the criminals/terrorists and after identifying such suspicious accounts, freeze, seize and finally confiscate the funds/assets involved so that organized criminal gangs/terrorist organizations are finally starved of funds.

It needs to be emphasized, however, that moving forward in the twenty first century is going to pose new threats and challenges to the law enforcement authorities in different countries with regard to combating organized crime, including money laundering. A case in point would be the financial frauds which can now easily be committed over the Internet. Certain instances of such financial frauds have already come to notice and preventive action needs to be taken as a priority.

The workshop, after having deliberated at length and in detail, is of the considered view that new challenges posed by the money launderers calls for new initiatives, techniques and tools to combat the menace of money laundering. To this end, the new techniques and tools would necessarily have to include ‘controlled delivery’, ‘electronic surveillance’ including ‘wire tapping’, whenever necessary, and also ‘undercover operations’. It is the considered view of the workshop, that the domestic laws of different countries should provide for the usage of the above modern investigation techniques and tools, with the intent of effective enforcement of money laundering laws. However, the above specialized techniques are not meant to totally replace but only to strengthen and
supplement the existing investigation techniques and tools.

The workshop is also of the considered view that there should also be a provision in the domestic laws of each country for prosecution of the so-called “gatekeepers” i.e. the legal professionals, accountants, financial consultants and other professionals who provide the requisite expertise, without which it would not be possible for the organized criminal groups to invest large sums of money without getting detected. Such professionals indulge in money laundering activity by way of providing professional accounting and legal advice to the criminal so as to enable him to conceal the origin of the illegal proceeds of crime. In the view of the workshop, such professionals also need to be simultaneously prosecuted with the criminal, in the same manner, for abetment of the offence of money laundering.

The workshop is also unanimously of the view that all the investigating and intelligence agencies within each country need to co-operate and interact more closely in the fight against money laundering. It is also felt desirable that for successfully combating the menace of money laundering, all investigating and intelligence agencies in different countries need to necessarily adopt a very pro-active attitude towards the collection of intelligence relating to money laundering, i.e. instead of just reacting, they need to actively act on gathering intelligence on the subject.

Lastly, with regard to international co-operation, there is total unanimity that it would be in the best interests of all countries to strengthen and enhance international cooperation at all levels, i.e. at the regional, inter-regional and international levels by way of bilateral, multi-lateral and international treaties providing for mutual legal assistance and extradition, where necessary.

In view of the workshop, there are still a lot of genuine impediments and difficulties being experienced by many countries in the implementation of the Forty Recommendations of the FATF and the TOC UN Convention, 2000. However, it is the genuine belief of the workshop that all such obstacles and hindrances could be, over a period of time, removed backed by the all important political will of the leadership of such countries.