

SUMMARY FINDINGS AND CONCLUSIONS

Second Meeting of Experts to Develop a Digest of Organized Crime Cases

28 November – 02 December 2011, Cartagena, Colombia

1. The second meeting of experts was held in Cartagena from the 28th of November to the 2nd of December 2011 at the Training Centre of the Spanish Cooperation Agency AECI (Centro de Formación Cartagena de la Cooperación Española – AECID)¹. Forty experts from eighteen countries and international organizations² - all having direct experience in investigation and prosecution of organized crime - attended the meeting. The experts presented, and commented on, new cases; exchanged views and clarified questions related to cases already submitted; discussed the adopted substantive structure of the Digest and identified possible gaps; considered the approach adopted for the development of the first Digest's draft.

Session 1: Briefing on the current status of the elaboration of a Digest

Characterization of the Digest and the work done so far

2. Experts confirmed their agreement on nature, content and purpose of the Digest: a compilation, organized by substantive issues, of lessons learned and demonstrated by the collected cases, to help national authorities in the criminal justice response to organized crime and in the implementation of the Palermo Convention. Experts have highlighted that, in order to extract lessons from the cases, analysis of failures are as useful as of successes and that, taking into account the differences existing among legal and factual frameworks of the various countries, the Digest should not present *good practices* in terms of universally valid recommendations, rather as possible solutions to be evaluated in the light of the specific national circumstances. It has also been noted that the Digest will not be a universally based instrument, as not every country has joined in the initiative, and the case collection is limited to what presented by the experts in their own personal capacity. It was confirmed that the Digest will consider experiences and measures even if not related to the Palermo Convention, and it can include cases of non transnational offences.

3. At the time of the first meeting in Rome, Italy, May 2011, around eighty cases were received. The total number of cases analysed amounts now to one hundred and forty. In preparation of the second meeting questions have also been sent by UNODC to the experts, to gather more detailed information on some of the received cases and solicit their opinion on problematic concepts that will be covered by the Digest.

¹ The meeting was held in English, French, Spanish and Italian.

² Argentina, Colombia, El Salvador, France, Germany, Hungary, Italy, Jamaica, Kenya, Mexico, Philippines, Romania, South Africa, Spain, Switzerland, United Kingdom and Venezuela and the International Criminal Police Organization - ICPO INTERPOL.



Needed knowledge of national legislations

4. The UNODC representatives observed that the cases show that the Palermo Convention has had so far a considerable impact as a criminal policy instrument, and many countries have adopted legislative and other measures in line with the basic approach of that instrument to the various criminal justice phases. On the contrary, the cases do not clearly indicate when and how much that convention was utilized as direct legal basis for international cooperation, in particular mutual legal assistance and extradition. It was agreed by the participants that a more detailed description of the legal foundation of the measures described in the cases is needed; more in general, the UNODC representatives requested the experts to kindly provide the texts of national legal provisions that they consider most relevant to the presented cases and, where they exist, the texts of national laws on organized crime.

Chapter on Substantive Criminal Law

5. The experts have agreed on inclusion of a first chapter on substantive criminal law and on the scope of application of national laws concerning organized crime. The Colombian expert proposed to avoid restricting the document to criminal law issues and proposed the inclusion of public security matters. It was suggested these matters to be addressed in relation to the chapter on prevention.

Session 2: Presentation of new cases

6. The expert of South Africa presented the case of a person accused of illicit drug production, who was finally acquitted for reason of procedural irregularities, but whose house was forfeited in a distinct civil forfeiture proceeding, being it considered instrumental to the drug production. The relationship between criminal confiscation and civil forfeiture proceedings was clarified. Some experts categorised this case as extremely important: an instance of useful non conviction-based confiscation. Others noted that the different standards of evidence requested in civil proceedings, in comparison to those of criminal proceedings, justify the recourse to civil forfeiture. Participants recognized the need to research for other cases on the subject.

7. The case presented by the Kenyan expert concerns an act of piracy (another offence, committed in an organized crime fashion, to be added to the list of the Digest). The pirates were arrested on high sea by USA police forces and then judged in Kenya as provided for by international MOUs. The ship on which the arrest occurred was flagging a flag of a third country. The case was considered very interesting because it illustrates many subjects of general relevance. Among the others, the problem of extraterritorial jurisdiction and potential conflict of interest where more than a State are involved in the case or intervene in the criminal investigations and proceedings; the need of assuring that international agreements or arrangements on the exercise of jurisdiction are such to be considered valid and used by the acting national courts; the difficulties encountered when the first stage investigations and the arrest have been executed by foreign law enforcement agents not in accordance with the rules of the country of trial. The representative of Interpol introduced their 'Piracy' programme. Experts concluded that these issues should be analysed in the Digest, possibly through the collection of new similar cases.

8. The Venezuelan expert presented cases of drug trafficking and money laundering, where the authorities have successfully identified and confiscated a variety of assets. She emphasized the problematic issue of the management of seized and confiscated assets, with particular regards to the management of livestock and the measures taken in this regard by Venezuela, where a specialized administrative entity was established. Some experts intervened explained the pros and cons of the management system in their country. The possibility of selling seized, not yet confiscated, assets was mentioned, as a way to avoid the assets perishing or losing value. The question was also mentioned of how to clarify the grey zone existing between legal and illegal activities carried on by criminals: if supported by cases, the Digest could also elaborate on whether and how criminal law, or alternative measures (including regulatory measures), can effectively intervene to stop the corrupting penetration of legal business by organized criminal groups.

9. The Colombian experts introduced several cases. The first one was on transnational human trafficking, where the organized criminal group was successfully identified through the denouncement of one of the victims. The discussion focused on the need to strengthen the national legislation with regard to extradition: as there was no bilateral agreement with the country of the victim's destination some experts suggested the advantageous application of the Palermo Convention as legal basis for extradition requests in the absence of extradition treaty or extradition based on domestic legislation. The second presentation was on a case of drug traffic bound for Central America and Europe, which thoroughly illustrates many investigative techniques used to trace the movement of the head of the cartel, including international cooperation mechanisms and agreements adopted for a faster and successful exchange of information. These descriptions were considered relevant and worthy of inclusion in the Digest.

10. The case presented by the Swiss expert shows a criminal organization composed of a worldwide network of financial enterprises and other companies, dedicated to the laundering of proceeds of crime. This case revealed the importance of organized crime issues to Switzerland authorities and served as an example for the criminal prosecution of international crimes. A list of specific difficulties was presented by the expert, which will be very useful for the drafting of the Digest. In this connection, the experts discussed the use and regulation of SIM cards in Switzerland and other countries, as well as mechanisms used to identify the card's owner, including the voice sample analysis. It was concluded that the experts should search for new cases on the matter.

Session 3: Discussions on identified good practices emerging from the submitted cases

(A) National Laws and Concepts of Organized Crime

Scope of application of national laws on organized crime

10. The UNODC representatives noted that the collected cases include a wide range of different criminal organizations, as well of offences committed by them. Consequently they assumed that national laws on organized crime are more effective when their scope is equally wide or sufficiently flexible. The experts discussed this “fluid” concept of organized crime and concluded positively towards the possibility for the Digest to comment, on the basis of relevant cases, on the different ways used to establish that scope in domestic laws. Such analysis should not lead to comparison between

national systems, rather should be used to explain the functionality of the criteria used in order to cover an adequate area of organizational typologies of criminal conduct and offences. In this latter regard it was emphasized the importance of developing flexible legislation in order to comprise all forms of manifestation of organized crime, including so called “emerging” or new crimes: collected cases show how sometimes present national legislation do not permit so. It was also underlined how the implementation of legal provisions on organized crime largely depends on the interpretation given by the judges.

Criminalization of participation in an organized criminal group and the “four” years problem

11. Almost all States Parties to the Palermo Convention have in their law the offence of participation in an organized criminal group in line with art.5 (which includes conspiracy as an alternative). The experts discussed such criminalization in relation to the cases where the participation is not a separate charge but only an aggravating circumstance. The UNODC representatives suggested that the experts should provide the texts of their laws criminalizing the participation offence. The Canadian cases were mentioned since that national law amply permits the prosecution of persons that act for the benefit of a criminal group even if they are not members of it. On another point, it was proposed for the Digest to comment on the problem of the “serious crimes” in the Palermo Convention (for that instrument crimes are “serious”, and thus covered by it, when punishable by four years imprisonment), and, if so indicated by collected cases, suggest that, when dealing with the criminalization of “emerging” crimes, national legislators should respect that punishment threshold so enabling the use of the Palermo Convention as a basis for international cooperation.

Transnationality and criminal jurisdiction

12. It was noted that, in spite of the frequent and sometimes complex intermingling of various national criminal jurisdictions, due to the transnational nature of the offences, the collected cases do not indicated existing situations of positive or negative conflict of jurisdiction (the Kenyan piracy case being an exception under some regards). Therefore, there was agreement on the limited scope that such issue will have in the Digest. However, it was underlined that cases show that the jurisdiction aspect is closely linked to that of international cooperation: for instance, if upon a foreign request of mutual assistance a person is interrogated as witness, then he/she cannot be prosecuted in the country which has granted the assistance. Equally delicate is the relation between exercise of jurisdiction and extradition. There was, therefore, agreement on the appropriateness of agreements, to be adopted as soon as possible, on the exercise of jurisdiction in all cases where the international cooperation takes special incisive forms as those (controlled delivery, joint investigative teams) that lead to, so to say, a co-sharing of the investigations. The Digest will reflect these aspects and the UNODC requested the texts of agreements on the establishment of joint investigative teams, if they are not confidential.

Liability of legal persons

13. UNODC noted that the presented cases do not indicate prosecution (or application of civil or administrative sanction) for such liability, in spite of the mandatory nature of the Palermo Convention norms on this matter. The experts stressed that this is a new subject in many jurisdictions, where the



legislation has not been consistently developed. Brazil and Spain are examples of countries with convictions under this subject, but cases are yet to be submitted. The other experts also agreed on a thorough research for the sharing of cases on the matter. The Italian expert went up to arguing that liability of legal persons is the future of the fight against organized crime, especially in the area of environmental crimes.

(B) Investigation and Prosecution

Proactive approach

14. The experts debated the possibility of the Digest to pursue a deeper understanding of “proactive approach”, frequently mentioned in the presentations as an element fundamentally characterizing the cases. The Palermo Convention should be used as a basis for a general proactive approach on organized crime and for a subsidiary definition on proactive investigations. The experts also considered various types of action (intelligence-led investigations, special investigative techniques, etc.) relevant to that approach. It was accentuated by some of the participants that this form of investigation does not so much consist of the law enforcement agencies involved or the investigative means used, as of the attitude, confirmed by consistent practice, to programme and actuate the criminal law intervention independently by the reaction to a single episode of criminal behaviour. The practice in Canada of so-called collateral investigations was also mentioned in this connection.

Institutional setting

15. Since cases show a multitude of different institutional settings, the experts discussed at length on various aspects of the organizational structure of law enforcement and prosecutorial authorities. The two aspects of specialization and centralization have been analyzed, including two problematic issues: which level – i.e. what category of crime (organized crime vis-à-vis more restricted categories such as drug trafficking, cybercrime, trafficking in persons, etc.) – determines the special competence and jurisdiction of a specialized office or unit; and whether centralization of information is a self-standing, useful means, or should be accompanied by exclusive jurisdiction for the operations. However, in this latter regard the need of a central database for the unification of information was not denied, together - as well - with a certain resistance in the unification of agencies’ information, due to a lack of cooperation and commitment among them. It was agreed that the Digest can elaborate on this points, but more information are needed on the national specialized entities that are mentioned in the presentations of cases but frequently not described.

Special investigative techniques

16. In this area the discussion was very rich, touching upon both aspects, the legal requirements to adopt such techniques and the practical features they present. The observations were also frequently centred on the “transnational” use of such techniques, where two or more countries are involved in the law enforcement activity. Particular attention was paid to controlled delivery (and border surveillance) and undercover operations (and informants). It was also highlighted that the Palermo Convention, article 20, does not contained detailed rules governing these techniques and

appropriately calls for bilateral and regional agreements: it was noted that such agreements can only in part be replaced by case-by-case arrangements made, for instance, by liaison officers. Experts were encouraged to submit cases illustrating the discussed points, or to elaborate on the already presented cases, in view of an ample analysis of good practices in the Digest.

(C) International Law Enforcement and Judicial Cooperation

Law enforcement cooperation

17. The discussion touched upon many aspects of law enforcement cooperation. The Italian expert made a presentation on the way international police activity is organized at national level, including the centralization of that activity in a single office for all the police agencies of the country. UNODC representatives proposed to consider art.27 of the Palermo Convention as a guiding text in analysing the various forms that such cooperation can take, including the sharing of enquires and knowledge on general features of criminal phenomena. In addition that article may work as direct legal basis for the exercise of cooperation. The experts focused, *inter alia*, on the nature of l. e. cooperation, underlining both the advantages of its informal nature, in comparison to the necessarily formal judicial cooperation, as well as the need to reinforce it by bilateral or regional agreements which could fix stable frameworks so facilitating the coordination of action in specific cases. Ad hoc MOU, in relation to a single case, and arrangements among l. e. agencies not amounting to governmental agreements were also mentioned. The important contribution of Interpol at global level and of regional existing offices (e.g., Europol and Eurojust for the European Union area) was also stressed as a fundamental structural component. The availability and the role of liaison officers and the problematic issue of confidentiality were equally considered. It was agreed that the Digest will extensively elaborate on these elements, on the basis of the available cases, and the experts have been requested to provide the text of l. e. cooperation agreements.

Judicial cooperation

18. The ample discussion on judicial cooperation was supported by the oral presentation of two new cases from Jamaica and Romania and a presentation by the representative of Interpol. UNODC noted that a minimum of 50% of the cases include recourse to judicial cooperation, and the Digest will deal with it extensively, especially if supported by additional comments from the part of the experts (the specific characteristic of the used legal procedures are not always described, while difficulties are sometimes indicated in generic terms, for instance: delay or incompleteness of the answers to MLA requests). The experts discussed the role of the Palermo Convention as a modern instrument in judicial cooperation alternative to other legal instruments. The importance of regional bodies in facilitating cooperation and the value of the creation of specific legislation such as Mutual Legal Assistance Acts were reinforced. It was also pointed out that even the most formal rogatory letters might be fruitfully prepared by previous informal activities and could be facilitated by standard and systematic means, as well as by institutional intervention like the exchange of liaison judge/prosecutor. Experts also emphasized the peculiar difficulties encountered when assistance is requested to more than two countries, because timing and modalities of the answers are always were difficult to combine. In conclusion, it was concluded that the Digest will elaborate on several methods that could be used to speed and facilitate mutual legal assistance, as demonstrated by cases.

(D) Confiscation of Proceeds of Crime

19. The meeting considered various aspects of confiscation. There was agreement on the high functional value of confiscation in relation of a criminal policy centred on the dismantling of the organized criminal groups. The experts examined the possibility for the Digest to analyze distinct legislative frameworks as experienced in the cases submitted. The various types of confiscation could be identified in relation to the offences, or to the range of the subjected assets (e.g., confiscation of proceeds versus *extended* confiscation) or to the procedure adopted (e.g., criminal confiscation versus non-conviction-based confiscation). Naturally, the experts paid attention to the issue of provisional measures such as freezing and seizure, as well as to the complex area of financial investigations. In this latter regard the relation between those investigations and the investigations to ascertain the criminal liability of persons was examined: some experts were clearly in favour of starting financial investigations as soon as possible, as an integral part of the investigative process in organized crime cases; others underlined that the law should leave the possibility to expand financial investigations beyond the time of ordinary investigations, given their complexity. Participants also commented upon the offence of illicit enrichment.

20. The UNODC representatives reported that the collected cases are not sufficiently illustrative of another important side of confiscation: the management of seized and confiscated assets. Some experts explained new institutional solutions given to this matter in the national systems. The Digest could elaborate on this point if supported by presentation of new cases.

21. With regard to international cooperation for the purpose of confiscation, the discussion revolved around two issues. First: which type of international agreement can constitute the basis for the execution of confiscation upon a foreign request. Beside criminal law conventions which contained specific provisions to that purpose, the recourse to general mutual legal assistance treaties as been indicated by more than an expert. Second: the above mentioned varied typology of confiscation measures may create difficulties in international cooperation; in addition – while the debate discovered a tendency of national legislations to broaden the scope of application of confiscation (*extended* confiscation being a clear manifestation of such tendency) - still a formal restriction is faced at the international level, where the Palermo Convention and other treaties provide only for cooperation in confiscation of instrumentalities and proceeds of crime (following a conviction). On this point the Digest will contained indication of practices and lessons learned, as supported by the cases. Experts have been invited to send additional cases and more detailed information.

(E) Miscellaneous:

Human trafficking

22. The main topic of the discussion regarded the role of victims in criminal proceedings. The use of *cultural mediators* was described, as a form of assistance to victims, formally classified as an assistant agent to law enforcement and prosecution. Other experts elaborated on the implementation of victim identification programs, including through the use of wiretapping and other special investigative techniques. The immunity of victims for illegal acts during the period of captivity was also underlined. Experts agreed on the submission of national legislations.

Smuggling of migrants

23. Emerging patterns of smuggling, such as obtaining visas through bogus marriage with a local citizen or recognizing the paternity bond of a foreigner, were discussed.

Firearms trafficking

24. The legislation regarding control on the traffic of firearms was analyzed, as well as the harmonization of national legal measures by the international community in order to create a unique system of punishment for those illicit acts. One of the main issues addressed was the tracing of firearms, with particular regard to the relation between marking, registration and the request of international cooperation. Finally, new techniques on profiling were also considered.

Prevention

25. Under this subject the measures indicated in Article 31 of the Palermo Convention were considered. The Italian expert examined prevention methods to avoid organized criminal groups penetrating the public administration and legal business: he presented the example of ‘Anti-Mafia Certificate’ as a regulatory measure for the establishment of new companies. The Colombian expert described the procedure of financial analysis of the accused, performed through the National Prosecutorial Office. UNODC representatives specified the connection existing between regulatory framework of the production/ trade of firearms and the criminalization of illicit trafficking.

Session 4: the Digest as a living document

Target audience

26. Experts suggested a stronger contact with the academic universe, including law schools. Another point discussed was the financial resources needed to maintain this project updated.

Human trafficking database

27. The expert of UNODC described the case law database instituted under the GIFT programme of the United Nations as a global instrument on human trafficking cases, covering several jurisdictions with the aim of increasing the number of prosecutions and convictions related to the crime of human trafficking, through the collection and dissemination of qualitative information, as well as effective implementation of the trafficking in persons protocol.

Session 5: The work ahead

28. The deadline for the final submission of cases was scheduled for the 15th of January 2012. Requests to single experts of clarification and detailed information are not excluded. The first entire draft will be ready for the end of March 2012. Single chapters of it will be sent to the experts once they are completed. The Colombian and Mexican experts offered to provide in-kind support for the translation of the draft into Spanish language. The final draft will be available for discussion at the Third Expert Group Meeting to be held in Palermo, Italy, May 2012 (second part of the month, days to be established).