



**UNODC**

United Nations Office on Drugs and Crime

# Digest of **organized crime** cases

A compilation of cases  
with commentaries and  
lessons learned

Prepared in cooperation with  
The Government of Colombia  
The Government of Italy  
INTERPOL



UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

# **DIGEST OF ORGANIZED CRIME CASES**

A compilation of cases  
with commentaries  
and lessons learned



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#### **Interpol**

Mr. Ronald K. Noble, Secretary General

Mr. Gianni Baldi, Assistant Director, Drug Control and Criminal Organizations Sub-Directorate.

## **Experts**

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# PREFACE

## **Director-General/Executive Director United Nations Office on Drugs and Crime**

Over the past twenty years, the international community has been increasingly concerned about the threats posed by transnational organized crime. The United Nations Convention against Transnational Organized Crime (Palermo Convention) represents a first decisive response to these threats and provides a unique set of legal tools and a framework for concerted criminal policy.

The sharing of the knowledge of practitioners is an effective tool that supports the implementation of the Palermo Convention, and in general, the criminal justice response to organized crime. With this in mind, the United Nations Office on Drugs and Crime (UNODC), in cooperation with the Governments of Colombia and Italy and the International Criminal Police Organization (INTERPOL), decided to seek the help of criminal justice experts—including law enforcement officials, prosecutors and judges—to share their experiences and insights on how to deal with organized crime.

Over the last 18 months, UNODC and its partners, the governments of Colombia and Italy, and the International Criminal Police Organization (ICPO-INTERPOL), have worked closely with approximately 50 experts from 27 countries, who submitted and discussed their cases during three expert group meetings. The result is the *Digest of Organized Crime Cases – A Compilation of Cases with Commentaries and Lessons Learned*. Its purpose is to provide policymakers and criminal justice practitioners with an analysis of concrete cases and related good practices. The *Digest* explains all relevant stages of the criminal justice response, including legislation, investigation, prosecution and adjudication, as well as international cooperation. By using illustrative cases, the *Digest* lays out the successes and the difficulties encountered by the practitioners, and so reflects the state-of-the-art in efforts to combat organized crime globally.

The *Digest* confirms that the criminal policy, underlined by the Palermo Convention to dismantle the criminal organizations and bring their leaders to justice, is present in the national laws and practices of many countries. This policy is being successfully applied to a wide range of criminal offences, including new and emerging forms of crime. The *Digest* demonstrates that the Convention continues to be an essential tool for the implementation of this policy at all levels of the criminal justice system. The cases also testify to the increasing relevance of international law enforcement and judicial cooperation as essential pillars for the implementation of this policy.

I am confident that the *Digest* will inspire policymakers and practitioners when confronting organized crime. This work has also fostered a culture of open exchanges of experiences among experts, which must continue in order to help Member States understand the changing nature of organized crime. It is my hope that the *Digest* initiative will promote an active dialogue and develop, with the support of UNODC and its partners, into a truly “living tool”.

*Yury Fedotov*  
Director-General/Executive Director  
United Nations Office on Drugs and Crime

# PREFACE

## **Minister of Foreign Affairs, Minister of Interior, Minister of Justice, Italy**

Transnational organized crime is one of the most dangerous scourges that affect the world in the 21st century. It undermines the foundations of our societies and poses a serious obstacle to their development. By distorting competition in world markets, by taking advantage of failed states or contested spaces, and, in some cases, by establishing nefarious partnerships of convenience with other destabilizing factors such as terrorism and maritime piracy, criminal networks may even threaten world peace and security.

The misuse of technologies gives rise to new illegal activities such as cybercrime and identity fraud. Trafficking in drugs, arms or in human beings is complemented—inter alia—by counterfeiting of products and medicines, trafficking in cultural property and environmental crime. Criminal organizations have developed the ability to adapt promptly their areas of intervention to the fluctuations of demand and to infiltrate insidiously legal businesses and financial circuits beyond national borders. They operate on a global scale accumulating huge illegal assets and reinvesting them in different countries, including through money-laundering. Curbing the financial power of criminal organizations would indeed affect their *raison d'être*.

The nature and extent reached by transnational organized crime require collective responses, on the basis of the principle of shared responsibility. A comprehensive and effective response may be delivered by the full and universal implementation of the United Nations Convention Against Transnational Organized Crime, signed in Palermo in 2000. Its open-ended nature makes its provisions applicable to an indefinite range of crimes, therefore embedding the potential for a lasting effectiveness also against future new challenges. Twenty years after the murder of judges Giovanni Falcone and Paolo Borsellino, whose ideas and proposals largely inspired the Convention, we are honoured to declare that this landmark legal achievement of the International Community has contributed to turn Palermo into a global symbol of the common struggle against all kinds of mafias.

This *Digest* is meant to promote the effectiveness of the Palermo Convention and of its Protocols by illustrating good practices related to its actual employment against organized crime in concrete cases. Developed by the United Nations Office on Drugs and Crime (UNODC), in cooperation with the governments of Colombia and Italy, and the International Criminal Police Organization (ICPO-INTERPOL), and written with the support of leading experts designated by 27 States Parties to the Palermo Convention, this *Digest* has been conceived as a practical tool to the benefit of all their brave colleagues who are engaged, worldwide, in the investigation and prosecution of transnational organized crime.

Italy is very proud to have promoted, supported and co-financed this multidisciplinary tool that collects different national experiences, disseminates shared investigative and prosecutorial procedures and may contribute, in the long run, to the harmonization of different national legislations. We are confident that this *Digest* will also be used as a training instrument by law enforcement and judiciary academies in more than a continent, and we believe that future updates will preserve the aim and spirit of this living and ready-to-use document.

No single jurisdiction can break the economic and corruptive power of transnational criminal networks. But, working together, willing and committed States have the tools to win the struggle. We have on our side the law and the support of our societies: that's where our power comes from, and that's why our power is stronger than crime.

*Giulio Terzi di Sant'Agata*  
Minister of Foreign Affairs, Italy

*Annamaria Cancellieri*  
Minister of Interior, Italy

*Paola Severino Di Benedetto*  
Minister of Justice, Italy

# PREFACE

## Minister of Foreign Affairs, Chief of Police Republic of Colombia

Crime has found international illicit enrichment opportunities using various means and routes, through phenomena such as drug trafficking, money-laundering, counterfeiting currency, people smuggling and human trafficking, trafficking in cultural heritage, crimes against the environment, among other criminal activities which organized crime have exploited and which have led to a deterioration of the security environment.

The entry into force in 29 September 2003 of the Palermo Convention gave birth to the most important global instrument to promote cooperation and prevent and combat international crime, effectively. Through this mechanism, States Parties have set forth a commitment to identify the globalizing processes, which international crime networks have taken advantage of to find shelter from law enforcement, and to attack head-on transnational crime in all its different manifestations.

Since then, the participating nations have developed the competencies necessary to prevent, investigate and suppress criminal activities that affect their national territories and that cross their borders, under the multi-lateral cooperation principle, to fight these phenomena that affect us all.

Following the initiative of the Governments of Italy and Colombia, the United Nations Office on Drugs and Crime, and the International Criminal Police Organization ICPO—INTERPOL, this *Digest of Organized Crime Cases* was developed with the participation of 27 nations, whose intent is becoming a reference tool that enables the strengthening of state practices in counteracting the impact of transnational organized crime.

This document assesses current threats and new possible trends that may arise as a result of the evolution of law enforcement institutions and their capability to actually fight crime. The “best practices” mentioned herein and the case studies shall serve as triggers for new cooperation venues and for definitions of joint priorities, which shall enable the optimization of existing agreements and mechanisms.

The participating nations that contributed to creating this Compendium back the multilateral commitment to fight crime and protect their territories as well as their residents, under secure conditions and under the rule of law.

*Ms. María Ángela Holguín*  
Minister of Foreign Affairs  
Republic of Colombia

*Mayor General*  
*Jose Roberto LEÓN RIAÑO*  
General Director, National Police, Republic of Colombia  
President, American Police Community—AMERIPOL

# PREFACE

## Secretary General of INTERPOL

Proposed by Italy as an initiative following the recommendation of the Conference of the Parties to the Palermo Convention in 2010, the *Digest of Organized Crime Cases* tells the story, full of obstacles and as yet unfinished, of international cooperation that works. It dives deep into the complexities of international law enforcement cooperation and multi-jurisdictional investigations against criminal groups active in all regions of the world. The analysis spans more than 200 cases and national legislation submitted through the dedicated hard work of 52 experts from 27 countries worldwide, also drawing its unique wealth of policing lessons and good practice from the input of the UNODC and INTERPOL.

One of the *Digest's* two partner countries, Italy, contributes numerous exemplary cases from its relentless, decades-long battle with the Mafia, in particular demonstrating the country's successes in illegal asset tracing and recovery. Colombia, the other partner country, has provided several textbook cases drawn from its own combat against illegal armed groups involved in transnational illicit trafficking of drugs, arms and other commodities, as well as money-laundering, kidnapping, extortion and murder.

INTERPOL's own contribution underlines the essential role that global law enforcement cooperation tools and mechanisms play in defeating transnational organized crime. It is reflected in the instrumental use of INTERPOL's secure global police communications system (I-24/7), colour-coded notices, and criminal databases to help identify, prosecute and prevent transnational crime. INTERPOL "channels" contributing to fighting transnational organized crime also include regional cooperation initiatives coordinated from the Organization's seven regional bureaus around the world. Global policing tools and services that INTERPOL provides to its 190 member countries effectively contribute to the implementation of the Palermo Convention in every country in the world.

This piece of work is not only a tribute to international law enforcement cooperation, it is first and foremost, a toolbox for police officers, prosecutors, policymakers and legislators worldwide engaged in fighting transnational organized crime. The techniques, tactics and strategies it presents offer learning opportunities at every stage, of what might (or might not) work in different environments, circumstances or complexities of the battle against organized crime.

Additionally, the *Digest* is also a tool for understanding new and emerging forms of organized crime. Certain specific offences, ranging from modern-day maritime piracy to illicit trade in cultural property and environmental crime, are analysed from the multidimensional perspectives needed to confront and stop the networks that thrive on these crimes.

This *Digest* is an inspiration as it demonstrates that joining forces across borders can defeat those who build borderless criminal schemes depriving law-abiding citizens of their security, property and peace.

The pages to follow contain knowledge of immense value for the numerous men and women across the globe who are working tirelessly to combat transnational organized crime.

*Ronald K. Noble*  
Secretary General  
INTERPOL

## SUMMARY

The first chapter of the *Digest* is devoted to subjects of substantive criminal law. The analysis of the cases provided by the experts has allowed elaboration on the scope of application of the national laws against organized crime; on the offence of participation in an organized criminal group; on the liability of legal persons; and on the extension of national criminal jurisdictions.

Many of the cases presented in the *Digest* relate to new or emerging organized crime offences, including cybercrime, environmental crime and crimes against cultural property. Similarly, the cases reveal a diverse array of organizational typologies of organized crime. The organized criminal groups involved in the commission of such offences range from groups formed on an ethnic and/or hierarchical basis to those with a looser and more flexible structure, from territorially based groups to business-centred ones. Furthermore, the links among various actors performing distinct roles also reveal diverse possibilities, with one group conducting the entire action, or a combination of numerous cells managed by a single coordinator, or a network of autonomous entities acting together on a transactional basis.

The same cases confirm that investigative and prosecutorial methods adopted for more traditional offences or organizational typologies are also appropriate in proceedings related to these new offences or networking systems. Thus, the first lesson learned on this topic is that domestic laws against organized crime should ideally have a broad or flexible scope of application, so as to avoid the risk of rigidity and also permit the use of reinforced legal tools against new features of organized crime. The open-ended scope of application of the Convention, which applies to all “serious crimes” (when transnational and committed with the involvement of an organized criminal group), and the broad definition of “organized criminal group” have been used as guiding concepts in this regard.

In addition, those cases offer abundant material to illustrate how the basic criminal policy contained in the Convention—namely, that the criminal justice response to organized crime offences should be aimed at dismantling the criminal groups—is concretely applied in different countries.

The cases also underscore the importance of the correct criminalization of the offence of participation in an organized criminal group, as prescribed by article 5 of the Palermo Convention. In addition, to the presentation of cases, the experts provided legislative texts and explanations of their national criminalization provisions. The *Digest* posits that the divergent legislative paths of common-law countries, which usually adopt the conspiracy form of the offence, and civil-law countries, which usually adopt the association form, are not necessarily an impediment to an effective global response to organized crime. In addition, the positive results of several cases further support the advantages of the cumulative approach suggested in the Palermo Convention, which consist in having both forms of offences, where this is not prohibited by the fundamental principles of the national legal system.

The *Digest* concludes that it is necessary to reflect on the importance of criminalizing conspiracy and criminal association, and on the need for a policy of dismantling the organized criminal group, and on whether

there is a need to better tailor those offences to the characteristics of organized crime in each country and at the transnational level. The conspiracy/association offences are essential to expanding the scope of investigations and prosecution to the widest possible circle of facts and offenders.

Few cases were provided on the difficult topic of the liability of legal persons. It is difficult to draw specific conclusions on whether the dearth of cases is due to the fact that this measure is rarely used or that it is irrelevant to the fight against organized crime. However, some experts have noted that measures on the liability of legal persons remain difficult to introduce and/or apply in legal systems where they are not already customary. It appears that an in-depth, comprehensive study would be useful, focusing in particular on the identification of all the criminal aspects of organized crime where a provision on such liability appears necessary or appropriate.

Cases show that organized crime offences are at present characterized by transnationality, which complicates efforts to counter them. It is therefore necessary to develop legal means, practices and, more generally, a culture of effective international cooperation among law enforcement and judicial activities.

Cases illustrate the status quo of international cooperation and demonstrate, inter alia, that cooperation frequently involves the continuous coordination of activities, including entire stages of law enforcement or prosecutorial action. In this regard, some experts note that the lack of coordination in the exercise of jurisdiction may lead to conflicts, while the majority of experts support the opposite view that the parallel exercise of criminal jurisdiction by more than one country could substantially contribute to investigations and prosecutions and, in particular, allow for improved coordination and synergy of law enforcement activities by the countries involved.

Chapter II of the *Digest* pays special attention to investigations and prosecutions, which are significant elements of the criminal process. The experts emphasize some fundamental methodological aspects, whose importance in addressing organized crime is well evidenced by specific instances, such as, in particular, the need for a proactive approach and for specialized law enforcement agents and prosecutors.

Two elements are of particular importance in a proactive approach, the first of which is the intelligence-led nature of criminal investigations. Gathering and analysing information on the history, composition, means, objectives and *modi operandi* of criminal groups, as well as on illicit networks and markets, are essential components of any investigation and are usually also important triggering factors. The second element, which has proved to be highly successful, consists in expanding the investigation and covering the entire structure and criminal conduct of groups or networks, irrespective of how small the case was at the start, with the ultimate objective of preventing future offences. This preventive aspect is an important component of proactive criminal investigations.

Another lesson learned is that investigative and prosecutorial agencies should adopt a holistic approach to covering the greatest number of persons involved in, and the broadest forms of criminal conduct perpetrated by, criminal groups. In this way, the criminal justice response can serve as an effective part of a strategy aimed at dismantling the organization and preventing future offences. This strategy requires, inter alia, accurate planning of operations and functional relationships among all the actors involved.

Consideration has been given to various organizational arrangements, such as the creation of offices or units specifically tasked with the investigation and prosecution of organized crime. The purposes of such entities are to: (a) gather, manage and effectively use knowledge about criminal phenomena; (b) develop specific expertise in criminal policies and related methods to counter organized crime; (c) build capacity in the application of

specialized investigative and prosecutorial legal tools; (d) coordinate or consolidate investigations and prosecutions so to avoid possible overlaps of initiatives; and (e) optimize the results of prosecutorial efforts against single criminal groups or networks.

The *Digest* discusses, then, matters related to the use of special investigative techniques, in particular those mentioned in article 20 of the Organized Crime Convention, namely, controlled deliveries, surveillance and undercover operations. The lesson learned is that, while practitioners should continue making the best use of traditional means of investigation and evidence, the above mentioned special techniques are frequently indispensable for the successful investigation of organized crime. They are linked to the successes achieved in the most serious investigations presented by the experts. Special techniques such as interception of communications or controlled deliveries focus on the interaction between offenders. They are of particular added value when dealing with a criminal organization, as they lead to the discovery of the structure and the conduct of such organizations.

In presenting the cases, the experts emphasized that such special techniques require detailed regulation at the domestic level, which is still absent in some countries. In addition, they pointed out that the lack of harmonization among domestic laws frequently creates difficulties in international cooperation. That is demonstrated by cases in which the results of such techniques could not be used in the court of the requesting country for reasons related to formal or substantial infringement of legal requirements. Therefore, the operative conclusion of the *Digest* in this regard is that the use of special investigative techniques remains an area where much more capacity-building, as well as legislative assistance, is needed.

Finally, incisive and detailed description of some legal national frameworks, provided by the experts, is included in this chapter to cover two important thematic areas: the identification of persons and the protection of witnesses and collaborators. The identification is explained as both the process of attributing personal data to a person and the process of connecting a person to a crime, scene or story, or to previous cases. The protection of witnesses and collaborators is to be illustrated by the presentation of a national programme of “special protection”, which includes measures such as the relocation of protected persons, change of identity, social assistance and reintegration. The cases under study reiterate that the effects of protection programmes are maximized when there is a multipronged approach, which starts with the application of temporary and longer-term police measures and the application of ad hoc evidentiary rules during court testimony, such as the utilization of videoconferences.

Chapter III addresses the issue of international cooperation. The collected cases offer a rich and varied perspective of international cooperation, at both the law enforcement and judicial levels. They confirm that, in those situations where cooperation can be granted only if a legal provision exists that so permits, such as for extradition and mutual legal assistance, domestic legislation and bilateral or regional agreements are the prevailing legal basis used by States. In line with paragraph 7 of article 18 of the Palermo Convention, the application of the norms contained in that article should be strongly encouraged, especially where they facilitate cooperation, as an alternative to those of bilateral or regional treaties and of domestic laws. Several cases support the conclusion that the use of the Convention should be promoted as an important factor in the development of globally aligned practices of cooperation. In cases where several countries are requested to provide cooperation, the possibility of all of them using the Convention as a single legal basis should be explored, with the aim of facilitating a more homogeneous and coordinated approach to international legal assistance.

The proactive and holistic approach to investigations also has a considerable impact on international law enforcement cooperation. The *Digest* underlines the need to use such cooperation as early as possible in the process. In line with article 27 of the Convention, this should include the exchange of intelligence information and be based on mechanisms such as “spontaneous” information exchanges, which enable investigators to

identify offences at an early stage and relay them to their counterparts. The lesson learned is that law enforcement agencies should make contact as early as possible with their counterparts in other jurisdictions in order to ensure the coordination of investigative action.

In the case of transnational organized crime offences, cooperation at the law enforcement and prosecution levels is rarely confined to single, limited acts of assistance, but rather consists of a series of continuous and interlinked activities carried out by two or more countries. This implies coordination of investigative initiatives, including their programming, timing and distribution, and the development of the new concept of co-management of investigation and prosecution. In the cases analysed, such characterizations appear to be connected to the transnational nature of organized crime and are essential to policies aimed at dismantling criminal organizations.

Moreover, the concept of prolonged coordination of investigative and prosecutorial activities entails the creation of cooperative institutions. The cases provided by experts have shown that an international law enforcement system, as described above, which allows for a continuous and expanded exchange of intelligence and significant coordination during investigative activities, greatly benefits from a permanently established structure, at either the bilateral or the international level, to assist in specific investigations and to ensure a permanent channel of communication. The *Digest* expands on these structures and provides further clarifications, based on legislative models introduced by the experts. Some of the most common possibilities include posting liaison officers, the creation of “joint law enforcement offices” and consideration of the experience gained by the European Union with the European Police Office (Europol) and Eurojust.

In view of the provisions contained in article 19 of the Palermo Convention, the *Digest* particularly focuses on the issue of joint investigative teams. Several cases have demonstrated that the establishment of such teams has been useful in the investigation of complex transnational offences. On the basis of the cases and the information available on the normative national or regional frameworks, the lesson learned is that a joint investigative team can be an effective tool for concerted law enforcement and prosecutorial actions. The establishment of such teams means that a formal mutual legal assistance request is not required, making it possible to maximize coordination, unify operational efforts in a single body and take measures quickly. Nonetheless, because of the combination of powers stemming from two or more separate justice systems, and of the many legal issues that arise from joint investigative team operations, their establishment should be rooted in a set of substantive general norms and well-defined regulations, agreed upon bilaterally or regionally, and not simply arise from the contingent and immediate needs of a specific case. Countries with a special interest in the creation of joint teams should undertake joint preparations and pilot activities.

In addition, cases indicate that, if the circumstances do not allow the establishment of joint investigative teams, States should still consider establishing other procedures to ensure continuous coordination of their investigations and use their autonomous, parallel activities to increase the effectiveness of the investigations and expand the range of objectives. When establishing the coordination mechanism, States should also consider the participation of prosecutorial and judicial authorities, subject to their national legislation, in order to strengthen the operative capacity of the coordinated entities involved.

Cases attest to the global and frequent use of mechanisms of cooperation provided by INTERPOL. The *Digest* contains information on the nature of INTERPOL databases and information systems, including the “notices and diffusions” system, as well as on other types of programmes and services, and underscores the role of INTERPOL in promoting the international networking of national police forces.

The importance of mutual legal assistance and extradition is underscored by the fact that these forms of international cooperation are present in almost half of the cases presented. The experts have expressed regret that customary difficulties encountered in this area of international cooperation, such as late or incomplete answers to requests for assistance and discrepancies in the procedural laws of the countries involved, persist and could lead to evidentiary results that cannot be introduced at trials in the requesting States. The lesson expressed in the *Digest* is that prosecutorial and judicial authorities should work, to the greatest extent possible, in an environment of mutual trust. They should allocate operational resources to the development of informal, direct contact to prepare for the formal procedures of mutual legal assistance. The use of specialized central authorities, the establishment of international networks of prosecutorial and judicial authorities and the use of meetings with foreign officials, either of a general nature or in the context of single cases, can also be important facilitating factors.

The limited instances of extradition cited in cases demonstrate that, if norms regulating the essential aspects of the extradition procedures exist in the domestic laws of the two countries involved, then article 16 of the Convention can be successfully used as a legal basis in cases where the legal system of the requested State requires an extradition treaty for extradition to be granted.

Chapter IV of the *Digest* deals with the confiscation of proceeds of crime, a measure that, over the years, has acquired a prominent role among the legal means adopted for the suppression of organized crime. The strongest argument for confiscation is that depriving the offender of the benefits of crime is both an appropriate punishment and an effective prevention tool. Confiscation is a strong deterrent for profit-minded criminals, as well as an efficient mechanism to remove financial and other material resources that could be used to continue criminal activities. Moreover, confiscation impedes illicitly acquired assets from being reinvested into the legitimate economy. The deterrent function of confiscation is, to a great degree, in keeping with the policy of dismantling criminal groups.

The importance of confiscation has been emphasized in the cases submitted for the *Digest*, with several cases reflecting the confiscation or seizure of significant amounts of proceeds and instrumentalities. They also illustrate the attention paid to confiscation by law enforcement and judicial authorities. In addition, recent developments in many national laws reflect an expansion of the powers to confiscate proceeds of crime in order to reduce the potential activities of organized crime structures.

Several of the cases included in the *Digest* refer to extended confiscation or other types of non-conviction-based confiscation. These are confiscations or forfeitures that do not require a criminal conviction or cover not only the proceeds of the specific offence for which a conviction is obtained, but also all the other assets under the control of the offender that are proved, or assumed, to have been directly or indirectly obtained through previous criminal activities. The *Digest* provides examples of these advanced types of confiscation and concludes that confiscation should be considered a fundamental component of the criminal justice response to organized crime. Therefore, investigators and prosecutors should make financial investigations and measures to prevent the disposal of assets by criminals an integral part of their action, in addition to establishing the criminal liability of the offenders. Financial investigations and preventive measures should thus be integrated, at the outset, into the planned activity of the law enforcement and prosecutorial authorities. In cases where extended confiscation is possible, they should cover all the assets attributed to the alleged offenders.

The cases make the need for specialization particularly evident, and law enforcement agencies and prosecutorial offices should ensure that officers and prosecutors who are specialized in confiscation proceedings participate in the most complex cases, possibly from an early stage, in order to contribute their knowledge and experience to the planning and development of initiatives for confiscation.

The *Digest* notes that the variety of domestic confiscation mechanisms and extended confiscation lead to uncertainty in the granting of effective assistance, particularly when confiscation is ordered in the requesting State. In-depth research on and analysis of this issue would be of interest to practitioners interested in pursuing the confiscation of assets of offenders located abroad. In this connection, the United Nations Convention against Corruption states that, in order to facilitate international mutual assistance in the execution of foreign orders of confiscation, specific procedures should be studied separately from the domestic proceedings of confiscation. In accordance with article 55, paragraph 1, of that Convention, such procedures may consist of recognizing and giving effect to the original order of confiscation issued by a court of the requesting State.

As already indicated, the themes of the *Digest* reflect the various stages of the criminal justice response, rather than the specific categories of offences. However, the cases provide adequate starting points for observations on some of the specific features related to single categories of crime. Therefore an additional chapter V was added, which contains a miscellanea of issues specifically concerning offences related to firearms, money-laundering, maritime piracy, cultural property and environmental crime.

Similarly, chapter VI touches upon various aspects of organized crime prevention that could not easily fit within a scheme centred on the functioning of criminal justice. The cases provided and the interventions made by experts at the meetings have contributed a series of indications on prevention measures ad hoc tailored to organized crime, which are comparable to those contained in article 31 of the Palermo Convention, most of which are consequential to a criminal conviction.



# INTRODUCTION

## The Initiative

1. In resolution 64/179,<sup>1</sup> the General Assembly reaffirmed the urgent need to strengthen international cooperation and technical assistance in promoting and facilitating the ratification and implementation of the United Nations Convention against Transnational Organized Crime (UNTOC), and encouraged Member States to ensure, inter alia, the consideration and dissemination of existing manuals and handbooks developed and published by the United Nations Office on Drugs and Crime (UNODC).
2. The Conference of the Parties to the Convention (COP) further endorsed that recommendation at its fifth session held in Vienna in October 2010, and in its resolution 5/1, *Ensuring effective implementation of the Organized Crime Convention and its Protocols*, requested UNODC to “continue to work with States to address threats posed by transnational organized crime, particularly with regard to various forms of crime, and to develop technical assistance tools with a high degree of added value, such as Digests of relevant case law and legal commentaries”.
3. Against this background, and with a view to celebrating the tenth anniversary of the United Nations Convention against Transnational Organized Crime (also known as the Palermo Convention),<sup>2</sup> UNODC, the Governments of Italy and Colombia and the International Criminal Police Organization (INTERPOL) decided in 2010 to jointly develop a *Digest of Organized Crime Cases* to provide States with a compilation of cases on organized crime accompanied by expert commentary and related good practices. The *Digest* was developed in the course of 2011-2012. A total of 27 countries supported the initiative by designating one or more experts and facilitating their participation in the meetings.

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<sup>1</sup>A/RES/64179, *Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in particular its technical cooperation capacity*.

<sup>2</sup>The General Assembly used “Palermo Convention” in resolution 54/129. No other name or abbreviation for this convention has been used or supported in official United Nations documents.

4. The *Digest* is intended to complement and reinforce the existing technical assistance tools produced by UNODC to strengthen the capacities of States to prevent, investigate and prosecute transnational organized crime and the related legislative processes. Among others, such tools include legislative guides to UNTOC and its Protocols, model treaties and laws, tailor-made legal publications for practitioners, an online directory of competent national authorities, an online legal library and the Mutual Legal Assistance Request Writer Tool.<sup>3</sup>

## **Nature and purpose of the *Digest***

5. The *Digest* compiles and analyses organized crime cases from different countries with the objective of providing practitioners with a set of “lessons learned” about problematic aspects of the criminal justice response to organized crime, which will also facilitate implementation of the Palermo Convention and its Protocols. The *Digest* covers both challenges and solutions to dealing with criminalization, investigation, prosecution and adjudication of offences committed with the involvement of an organized criminal group, and includes examples of international law enforcement and judicial cooperation. Moreover, because it is not limited to traditional forms of crime, the *Digest* may increase the practical knowledge of criminal justice practitioners about new and emerging forms of organized crime.

## **The cases and their relationship to the Palermo Convention**

6. The *Digest* is based on an analysis of more than 200 cases and national legislation submitted by experts. It presents a snapshot of the criminal justice response to organized crime, including its dynamic nature, at a given time and in given parts of the world, but does not pretend to provide an exhaustive analysis of all forms of organized crime or responses to it. Moreover, the *Digest* only refers to practices directly demonstrated by the cases presented, discussed and commented on by the participating experts.

7. The collected cases and related commentaries are not necessarily linked to the implementation of the Palermo Convention, nor are they limited to transnational crime since good practices can also be derived from experiences with domestic criminal conduct and legal frameworks. However, taking into account that facilitating the implementation of the Convention and its Protocols is also one of the purposes of the *Digest*, and bearing in mind their central role as global standard-setting instruments, their provisions have served as guidelines for identifying themes and issues, as well as terms of comparison for practices that the cases demonstrate. Although some submitted cases have not been concluded by a definite judgment, they were not excluded, but any possible good practice emerging from those cases may require a definitive judicial decision to establish their validity.

## **Target readers**

8. The *Digest* is directed to a wide range of readers. It is intended to serve as a reference point for law enforcement officials, prosecutors and judicial officials to help them address the many challenges posed by organized crime. Because many of the lessons learned refer to the adoption of new legal tools, or to loopholes or defects in existing legislation, the *Digest* will also be useful to authorities responsible for national criminal policy against organized crime as well as to legislators and other proponents of legislative reform,

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<sup>3</sup>Listing all the existing specialized technical assistance and legal tools, manuals and handbooks developed by UNODC in the area relevant to the *Digest* would be too long. Most of these tools are available and accessible through UNODC’s webpage ([www.unodc.org](http://www.unodc.org)).

## Methodology

9. It would have been impossible to produce the *Digest* without the participation and support of national experts from selected countries, who in their personal capacity shared their experience and knowledge and provided UNODC with cases and inputs. Due consideration was given to ensuring a balanced geographical distribution, as well as to capturing the most representative experiences in the fight against various forms of organized crime. In total, 52 experts from 27 different countries participated in the exercise and/or provided cases and comments.<sup>4</sup>

10. Participating experts were asked to use a standardized template to present the cases. Often they supplied additional documents, either at their own initiative or upon request of the *Digest's* drafters. UNODC also sent the experts a short general questionnaire plus questions concerning specific cases. In addition, UNODC made use of existing information about national legal systems and laws on organized crime that Member States provided through the various reporting cycles established by the Conference of the Parties.<sup>5</sup>

11. Three meetings of experts were critical to the development of the *Digest*. These took place in Rome, Italy (23-26 May 2011), Cartagena, Colombia (28 November-2 December 2011), and Palermo, Italy (11-14 June 2012).

- At the first meeting, the experts presented some cases and discussed and agreed upon the methodology for drafting the *Digest*, its preliminary structure and specific thematic areas to cover. In particular, it was agreed that the *Digest* would not be a mere compilation of criminological, investigative and judicial stories. Instead, it would be a critical analysis of specific challenges and solutions in dealing with organized crime, and the materials and commentaries included would be organized by substantive themes and issues.
- At the second meeting, a broad discussion enabled the experts to elaborate on their concrete experiences and to describe specific aspects of individual cases were of particular relevance and what approaches to those cases they had found to be effective or ineffective (e.g., an investigative technique or a prosecutorial method). The group discussion of cases, reinforced by presentations on the relevant national normative and institutional contexts, greatly facilitated collective understanding of the cases. Several experts suggested that the *Digest* should be considered an ongoing “work in progress” and raised the possibility of circulating the *Digest* online and periodically updating it with new cases and commentaries.
- At the third meeting, the experts considered the draft of the *Digest*. They agreed on the general structure and content of the first four chapters and proposed some additions and modifications. They also agreed to the addition of a new fifth chapter on the features of specific offences and a final sixth chapter on general issues concerning prevention. These two chapters were subsequently drafted and included. The experts also reaffirmed their interest and support in making the *Digest* a “living” document that can be updated and further developed online.

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<sup>4</sup>Albania, Argentina, Brazil, Canada, Colombia, El Salvador, France, Germany, Hungary, Italy, Jamaica, Kenya, Mexico, Morocco, Nigeria, Philippines, Portugal, Romania, the Russian Federation, Serbia, South Africa, Spain, Switzerland, Ukraine, the United Kingdom, the United States and Venezuela (Bolivarian Republic of).

<sup>5</sup>This refers to the questionnaires and related information that Member States provided to the Secretariat in the first and second reporting cycles on the implementation of the Palermo Convention and its three Protocols carried out between 2004 and 2008, through the interim self-assessment checklist disseminated in 2008, and in the context of the UNODC-developed pilot project to review implementation by a limited number of countries in 2009-2010 and to test possible review mechanisms for the implementation of these instruments.

## Structure and content of the *Digest*

12. The *Digest* takes a thematic approach, focusing on different aspects of the criminal justice response (criminalization, investigation, prosecution, etc.) for all relevant types of offences rather than on specific categories of criminal conduct. This approach is based on the assumption that many of the lessons learned from the cases apply to all offences, or at least to a wide range of offences, in which criminal groups engage. However, in some instances the *Digest* also addresses special features of particular forms of crime.

13. The *Digest* is divided into six chapters: I. Organized crime: its nature and criminalization; II. Investigation and prosecution; III. International law enforcement and judicial cooperation; IV. Measures related to proceeds of crime; V. Features of specific offences; and VI. Prevention. Each chapter is divided into subchapters. Text boxes highlight the details of specific cases, applicable convention provisions, national laws or model laws, as well as general conclusions and lessons learned.

14. The *Digest* uses a very simple nomenclature for the featured cases: the first three letters of the name of the country followed by a number (e.g., ALB 1). This enables the cases to be easily found on the CD-ROM included with the *Digest*. A list of the cases with synthetic references to their content and relevant aspects is included in an annex. Cases referred to in the *Digest* are not always the only ones that concern the topics the *Digest* addresses; sometimes only the most relevant cases or those considered the best examples, are cited.

15. The development of the *Digest* generated a significant amount of supplementary material. Many of the more than 200 cases (many of which are summarized in a standardized format) are accompanied by judicial decisions and other explanatory documents. In addition, many national laws and regulations, as well as comparative research, helped in the analysis of cases and in understanding their underlying legal systems. Most of these materials are available on the CD-ROM that contains the cases; they can also be accessed through the UNODC Knowledge Management Portal.



# I. ORGANIZED CRIME: ITS NATURE AND CRIMINALIZATION

## A. POLICIES AGAINST ORGANIZED CRIME. ORGANIZED CRIME OFFENCES

*Summary: Criminal policies on organized crime; organized crime as a multifaceted, dynamic form of criminality; types of organized crime offences, including new and emerging offences; the open-ended scope of application of the Palermo Convention; the scope of application of national laws against organized crime; the risk of rigidity in systems based on a list of offences.*

16. The Palermo Convention does not explicitly formulate a general criminal policy against organized crime, but the overall analysis of its provisions clearly permits the identification of a basic underlying theory: independent of concrete manifestations of criminal conduct, the criminal organization<sup>6</sup> itself should be the target of the criminal justice system, and all efforts should be geared towards the dismantling of the entities that make up that organization.<sup>7</sup> This theory should then be strategically reflected in all aspects of criminal law and the criminal justice system. For example, in relation to criminalization, the theory indicates the special importance of the offence of participation in an organized criminal group. In the sphere of criminal proceedings, this leads to the specific strategy of expanding investigation and prosecution to cover the widest possible range of offenders and criminal acts attributable to a certain criminal group. Concerning measures related to illicit profits, the theory reinforces mechanisms of confiscation with the aim, inter alia, of depriving criminal groups of assets that can further criminal activities. Likewise, article 31 of the Convention, in prescribing

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<sup>6</sup>To the extent the context allows, the term “organization” is used in the *Digest* to indicate a systematic arrangement of elements, not an existing body or entity or a combination of entities such as an organized criminal group or network.

<sup>7</sup>General Assembly resolution 55/25 (15 November 2000) adopting the Convention does not contain an explicit formulation of a general criminal policy. Obviously, the basic philosophy of the Convention did not develop in a vacuum; it arose out of extensive international debate and the adoption of collateral international instruments and soft laws, including within the United Nations. The analysis of all these factors is beyond the scope of this *Digest*. Among the United Nations instruments, the following is particularly relevant: General Assembly resolution 49/159 (23 December 1994), containing the adoption of the Political Declaration and the Global Action Plan prepared by the United Nations World Ministerial Conference on Organized Transnational Crime held in Naples, Italy (November 1994).

prevention measures, focuses on regulations and administrative practices that not only make it harder to commit certain crimes, but also, and primarily, hinder criminal groups from developing economic activities, including the infiltration and subsequent corruption of legal markets and economies. Such policy evidently applies to any type of criminal organization, or at least to any serious manifestation of organized crime. Thus the legal tools and operative methods created by this policy should apply in theory to any type of criminality generally recognizable as organized crime. However, this *Digest* does not attempt to produce a general definition of organized crime. Instead, the collected cases and expert commentaries permit some elaboration on how the notion of organized crime is conceived and applied in different domestic laws and practices. This subsection and the one following analyse how the scope of application of national laws against organized crime is identified. The perspectives on organized crime found in the *Digest's* cases reveal a high degree of diversity and novelty, which in a sense overrides the possibility of identifying any stable and/or consistent archetypes. Two dynamics operate in this field:

- New types of criminal conduct that are, or by their nature, must be carried out in an organized crime fashion; and
- Multiple and diverse organizational patterns exist, and they can evolve rapidly.

17. The first dynamic is combined with the assumption that criminal groups are opportunistic: criminal groups easily move from one crime to another to gain operational convenience or greater benefit. Criminal programmes developed by structured criminal groups always envisage a “next step” to preserve continuity, ensure success and achieve the ultimate goal of profit. Significantly, in national legal systems where criminal law measures against organized crime are centred on the offence of “criminal association,”<sup>8</sup> case law and doctrine often underscore that the groups’ criminal programmes are indeterminate, which is necessary—in most cases—for a group to fit the description of the “association” offence.

18. In addition to the above, sometimes traditional categories of offences acquire a specific new characterization (e.g., if offenders adopt a different modus operandi) that turns them in something new, in operational terms, for law enforcement and prosecutorial authorities.

19. Similarly, crimes already characterized by the involvement of criminal groups that have not previously received special attention because of their limited gravity and impact on security may acquire new importance for various reasons (e.g., larger dimension, involvement of very dangerous organized groups, production of huge profits), and solicit a law enforcement reaction that is as strong as that applied to other traditional serious organized crimes. A significant example of this latter category is ITA 15, a case in which counterfeit industrial products (e.g., electric generators, chainsaws, drill hammers) were trafficked from China to Italy and distributed all over Europe bearing counterfeit labels of well-known companies via door-to-door vendors in rural areas. The Italian expert commented that the seriousness of the illicit market for counterfeit goods, and the dangerousness of the criminals who participate in it have been recognized in recent years, eliciting a higher level of operational engagement by law enforcement agencies. The *Eurojust Report 2010*<sup>9</sup> notes that in this particular case, one of the main concerns was “to raise awareness on the connections between apparently low-priority crimes (counterfeiting) and organised crime cartels linked to the Camorra.” This concern was well

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<sup>8</sup>The offence of participation in an organized criminal group, prescribed by art. 5 of the Palermo Convention, exists in national criminal laws as conspiracy or as what is called here “criminal association,” which is described in art. 5, para. 1(a)(ii). For a more detailed consideration of this alternative in criminalization, see paras. 56-64.

<sup>9</sup>Council of the European Union, *Eurojust Report 2010*, p. 34. On the nature of Eurojust and its functions within the European Union, see chap. 3.

justified; the report notes that: “As a result of the action, 67 suspects were arrested, 143 warehouses were searched, more than 800 tons of counterfeit products were seized (valued at €12 million), assets exceeding €16 million were recovered, and new investigative leads pointing to yet another country were identified.”

20. At the same time, forms of organized crime that have always been considered extremely serious crimes, such as maritime piracy, may receive renewed attention from the international community because of new circumstances, triggering discussions on how legal measures conceived for other categories of organized crime, including the Palermo Convention, can be appropriately applied to them. For example, the case KEN 1 concerning maritime piracy off the coast of Somalia underscores the importance of international cooperation as prescribed in the Palermo Convention in the fight against piracy.<sup>10</sup>

21. The cases in the *Digest* concern two basic categories of offences: offences that are structurally instrumental to the existence of organized criminal groups (such as participation in the group, corruption and money-laundering); and a diverse array of “final offences”<sup>11</sup> that produce direct material benefit (drug trafficking, trafficking in firearms, human trafficking, smuggling of migrants, trafficking and smuggling of goods, counterfeiting, cybercrime, forgery, fraud, trafficking in cultural property, maritime piracy, environmental crimes, tax evasion, financial crimes and other crimes against the public administration).

22. Some of these crime categories have only recently entered the international discourse on organized crime. At its sessions in 2008 and 2010, the Conference of Parties to the United Nations Convention against Transnational Organized Crime considered the involvement of criminal groups in new forms of crime as an issue that needs to be dealt with carefully.<sup>12</sup> The most frequently discussed of these new forms of organized crime include cybercrime, trafficking in cultural property, trafficking in natural resources, offences related to counterfeit medicines, maritime piracy and trafficking in human organs.<sup>13</sup>

23. Of these categories of crime—often referred to as “new and emerging organized crimes”—environmental crime, cybercrime and trafficking in cultural property are illustrated by more than one case.<sup>14</sup>

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<sup>10</sup>For further details of the case, see chapter V, section A.

<sup>11</sup>The term “final offences” does not have a precise definition, but will be used (unless the context indicates otherwise) to indicate offences whose commission constitutes the aim of the organized criminal groups for the purpose of obtaining a direct benefit. Criminal law experts also use the term “predicate offences” to indicate all the offences committed by criminal groups other than participation in an organized criminal group; this definition includes corruption and money-laundering, which are illicit means that enable the commission of final offences and/or the preservation of illicit gains. In this regard, it should be remembered that when the Palermo Convention was being drafted, the decision to establish an obligation to criminalize corruption, money-laundering and obstruction of justice in addition to participation in an organized criminal group was motivated not so much by the intrinsic seriousness of those offences as by their instrumental function in the criminal programme of organized crime groups, regardless of the type of illicit conduct they engage in.

<sup>12</sup>See the decisions taken by the Conference of Parties in: CTOC/COP/2008/19 (in particular, decision 4/2) and CTOC/COP/2010/17 (in particular, decisions 5/1 and 5/6).

<sup>13</sup>For trafficking in cultural property, see in particular decision 5/7 of the Conference of the Parties in CTOC/COP/2010/17, p. 41.

<sup>14</sup>It should not be forgotten that illicit trafficking in endangered species of wild flora and fauna and offences against cultural heritage have already been identified in the final preamble paragraph of General Assembly resolution 55/25 as crimes against which the Palermo Convention will be an effective tool, providing the necessary legal framework for international cooperation.

## ENVIRONMENTAL CRIMES

Out of 27 countries participating in the *Digest*, only two, Brazil and Spain, provided cases on environmental organized crime. This must not be interpreted as a lack of awareness of this kind of crime, and it is not necessarily an indication of defective criminalization. However, in general, the criminal penalties for environmental crimes are relatively low, with the risk that important offences are excluded from the categories of organized or serious crimes for which reinforced legal tools and law enforcement resources are usually provided.

The four environmental organized crime cases submitted by Brazil and Spain involved an organized criminal group dedicated to the illegal extraction, trade and export of fragments of coral reefs; two groups hunting and trading endangered animal species; and one group trafficking in rare timber extracted from protected forests for domestic and international markets. The Brazilian expert noted that environmental crimes are a significant new form of organized criminal activity alongside the traditional activities of drug trafficking. The criminal conduct in the four cases adheres to the same structure as in traditional organized crime cases, including a “business model” and the use of modern technologies. The groups’ high level of organization requires law enforcement agencies to dedicate significant time and human, financial and technological resources to combating their criminal activities.

## TRAFFICKING IN CULTURAL PROPERTY

Cultural property is part of the common heritage of humankind and a unique and important testimony of the culture and identity of peoples. Its illicit trafficking results in the removal, loss and destruction of irreplaceable items. In 2008, the United Nations Economic and Social Council (ECOSOC) recognized the necessity of protecting cultural property with a series of actions in the international arena, including international cooperation to prevent and combat all aspects of trafficking.<sup>15</sup>

In the cultural property cases presented in this *Digest*, the criminal activity follows the classic patterns of a business-like criminal association but with differences at the level of operational logistics. According to the Italian experts, this type of trafficking often takes advantage of legitimate market mechanisms, such as auctions and Internet sales. Legitimate established entities such as art dealers and museums are frequently involved. The case ITA 2 is an excellent example of this kind of scenario: an organized criminal group created a network of foreign companies used as shell entities to conceal the origin of ancient coins from illegal excavations and transfer abroad huge quantities of these coins without legal authorization. Investigations disclosed the criminals’ intent to use the shell companies and forged documents to avoid detection of their illicit activity.

The cases ITA 1, ITA 9 and ITA 13 describe an increase of illicit activities involving several criminal groups operating at the international level. These groups mainly attempted to hide the illicit origin of archaeological artefacts so they could be sold on the common legal market. These crimes significantly depleted Italy’s national historical and archaeological heritage.

## CYBERCRIME

Cybercrime is particularly complex because of the ambiguous, borderless nature of cyberspace. Cybercrime offences take advantage of the capabilities and opportunities provided by the Internet, which augment the range, speed and ease of conducting transactions and also lower many of the associated costs and the risk of detection. Cybercrime includes not only offences utilizing the “disruptive” methods of the hacking community and related possibilities for extortion, but also fraud, theft, pervasive pornography, paedophile rings, drug trafficking and other traditional forms of trafficking. Criminal organizations are ready to exploit new technologies to commit ordinary crimes.

<sup>15</sup>ECOSOC resolution 2008/23.

The Romanian expert presented an interesting cybercrime case (ROM 4) involving these technological cyber-variations of ordinary crimes—in this case, credit card theft. Within the organized crime group, one layer of criminals acquired or built skimming devices; a second was responsible for money transfer and administrative tasks; a third layer was in charge of acquiring and verifying credit card data obtained through “phishing” techniques. Finally, once the credit card data was obtained and verified, it was forwarded to other members of the group for illicit use.

In the case ITA 22, so-called “trojan horses” were used to send thousands of emails to employees of the public administration to obtain credentials to access restricted database records. This data was then sent to a server in Malaysia, from which it could be used or sold. It is noteworthy that this scheme targeted the public administration, adding concerns about the security of government data to general worries about phishing and data theft.

24. Important new features of these “emerging” crimes might call for the adoption of specific interventions. For instance, criminal offences against cultural property and protected species might suggest the need for preventive administrative regulations governing their licit international markets, or as the expert who presented these cases suggested, the development of closer cooperation with civil society, especially the final buyers. Other preventive measures might include promoting responsible trade, encouraging specific professions often associated with these offences to adopt codes of conduct or to establish higher levels of due diligence. More generally, in the area of environmental protection many experts believe that international criminal law tools are not adequately developed, and in the area of cybercrime, there is an obvious need for special investigative techniques and professional skills. However, the peculiarities of these crimes and the ad hoc prospects of counteracting them do not necessarily impose an absolute separation from other categories of organized crime. To the contrary, these cases support this first “lesson learned”:

### LESSON LEARNED

**Despite the special features of particular emerging crimes, the cases confirm that investigative and prosecutorial methods used against more traditional forms of organized crime offences can also be appropriately and productively applied to “new” offences when they are committed in an organized form.**

25. For example, the Brazilian cases on environmental crime and the Romanian case on cybercrime demonstrate how the charge of participation in an organized criminal group is useful (even if not always necessary) to facilitate the arrest and prosecution of a large number of alleged offenders. In a way, this reaffirms the goal of dismantling the entire criminal network involved in those offences with the larger aim of eliminating an entire class of criminal conduct in a given country. In all of these cases, the special investigative technique of telephone tapping and other forms of electronic surveillance were used, and advanced modalities of international cooperation (both law enforcement and judicial) were exploited.

26. Therefore, it is worth noting which categories of offences are and are not included in the scope of application of domestic laws on organized crime. This issue is separate from the question of whether and how national laws criminalize participation in an organized criminal group because national legislation may determine that reinforced measures against organized crime apply independently of this charge and thus the range of possible cases will be determined by a separately described concept of organized crime. In this connection, it is particularly interesting to note that in considering the prosecutorial operational aspects of this issue at the final expert meeting, the expert from Canada recognized a common mistake lawyers and investigators make when

they “fixate only on the charge aspect and not enough on the tools that may be available to organized crime investigators within their statutes. In some cases, they can investigate a crime with the advantages of ‘organized crime’ tools without necessarily charging the offence at the end.”

27. The analysis of the scope of application should start from the Palermo Convention. Contrary to all the other universal criminal law treaties, which address a single offence or a limited set of offences pertaining to a unitary criminal phenomenon, the Palermo Convention’s provisions on prevention, investigation and prosecution apply not only to the offences fully described in articles 5, 6, 8 and 23, but also to a series of unspecified offences classified as “serious crime”. The Convention defines “serious crime” as any “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.<sup>16</sup> The nature of the offences in this open-ended category is not identified and they can have any content; as long as the criminal conduct involves an organized criminal group and is transnational in nature, these crimes fall within the scope of application of the Convention. Moreover, involvement of an organized crime group is not required as a typical modality of the offences in question; it can also only occasionally accompany the commission of an offence that is not usually characterized by it. Thus, one may conclude that the international community considered any serious offence involving participation of an organized crime group particularly dangerous and deserving of specialized criminal policies and reinforced criminal justice measures.

28. In this connection, it must be stressed that the inclusion of “serious crimes” as defined within the scope of application of the Palermo Convention does not imply the obligation of national laws to create a self-standing category of offences. National laws need not respect the stipulations of the definition whenever they establish an offence that they consider serious. Moreover, the Convention does not dictate that the “organized crime” regime founded on the basis of the Convention must apply to any serious offence unless that offence is also transnational and characterized by the involvement of an organized criminal group. The reference to serious crimes should be interpreted in light of the functional value that it had when the instrument was negotiated: as a way to avoid a list of specific offences, which would have limited the Convention’s scope with uncertain implications for the future.

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■ *The United Nations conceived the Palermo Convention as a means to strengthen national capacities and global cooperation against crimes of any description in which criminal groups engage or will engage. The criminological pivot of the Convention is the concept of the organized criminal group per se, rather than defined criminal behaviours or discrete interests to be protected.*

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29. This fundamental aspect of the Palermo Convention resulted from a precise, agreed-upon deliberation following extensive discussion. Mr. Dimitri Vlassis, secretary of the committee that drafted the text of the instrument, described the then prevailing view: “the convention will achieve its goals if it is guided by an awareness that organized crime can be best attacked if the focus is not so much on the activities organized crime is engaged in at any given time but on its structures and operations. According to the proponents of this view, trying to cover in the convention all possible activities in which organized criminal groups are engaged, or may be engaged in the future, is an exercise in futility. Even if the text is as comprehensive as can be, the instrument will be

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<sup>16</sup> Art. 2(b) of the Convention.

limited already when finalized and signed. The convention should attack and seek to destroy criminal organizations, regardless of their activities.”<sup>17</sup>

30. An analysis of national laws against organized crime adopted both before and after the entry into force of the Convention indicates that they conform to the approach described above only to certain degree, and sometimes they do not conform at all. This analysis is complicated by the fact that some national legal systems concentrate the complete regime of special norms against organized crime in a single set of legal provisions with a single scope of application; in other systems, the relevant norms are spread throughout various pieces of legislation that may have different scopes of application, each in relation to a different set of legal measures, despite the fact that all the measures appear equally applicable to any manifestation of organized crime.<sup>18</sup> Furthermore, measures that are highly relevant to organized crime such as, for instance, electronic surveillance also have very general uses and functions in criminal investigations and proceedings; therefore they resist being regulated solely—or separately—in an organized crime statute and frequently have their own specific scope of application. In the following paragraphs, the term “laws against organized crime” refers to legislative interventions aimed at establishing (in a more or less systematic and integrated way) measures purpose-built for organized crime.

31. In national laws against organized crime, the application of prevention and criminal justice measures is often limited to certain forms or categories of offences. Such domestic laws frequently list specific offences that “constitute” organized crime and thus identify the scope of application of the new norms. Moreover, the “list system” is also used when specialized measures correspond to those imposed or suggested by the Palermo Convention—measures that, in light of the above-mentioned strategy of the Convention, must be considered applicable to any crime committed with the involvement of a criminal group.

32. In describing their cases, the experts presented a diverse array of domestic laws. For example, a Salvadoran law<sup>19</sup> covering norms for specialized courts competent for organized crime offences recognizes as organized crime any form of crime that “originates” from a criminal group, without any distinction. A Brazilian law<sup>20</sup> similarly covers any criminal conduct by any type of criminal group in a legislative context concerning fundamental investigative techniques (e.g., controlled delivery, financial information, electronic surveillance, undercover operation, removal of bank secrecy), the institution of specialized units, sentencing and penitentiary treatment. These two examples fully embrace the theory of an open-ended scope of application.

33. Similar solutions can be found in other national laws, albeit conceived differently. For instance, the Prevention of Organised Crime Act of South Africa<sup>21</sup> is centred on a list of offences that, inter alia, determines the application of important procedures, such as the forfeiture in rem of instrumentalities of an offence

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<sup>17</sup>“Drafting the United Nations Convention against Transnational Organized Crime,” in *Combating Transnational Crime: Concepts, Activities and Responses*, Phil Williams and Dimitri Vlassis, eds. (London, ISPAC, Frank Cass, 2001).

<sup>18</sup>An example is the European legislation in which the Framework Decision on the Fight against Organised Crime (2008/841/JHA, 24 October 2008) identifies a specific scope of application for measures such as the reduction of, or exemption from, penalties for cooperative offenders, liability of legal persons and international coordination of the exercise of criminal jurisdictions. Other measures (e.g., those concerning international assistance in the arrest of alleged offenders or mutual legal assistance, or those related to assets recovery) are confined within other scopes, which can be broader or narrower and can also be determined by different classes of criteria. In the Framework Decision, the scope is determined by the presence of the crime of conspiracy or the offence of participation in an organized criminal group, combined with the seriousness of the “final offence”; elsewhere it is determined by a list of offences.

<sup>19</sup>Law against Organized Crime and Crimes of Complex Perpetration (2007), art. 1.

<sup>20</sup>Law No. 9034 (3 May 1995), amended, art. 1.

<sup>21</sup>Prevention of Organised Crime Act No. 121, 1998, amended, schedule 2.

and (through the Witness Protection Act<sup>22</sup>) witness protection measures. However, that list includes “any offence the punishment wherefore may be a period of imprisonment exceeding one year without the option of a fine”; and the Witness Protection Act expands its own list to include “any other offence which the Minister has determined by regulation” and to “any other offence in respect of which it is alleged that the offence was committed by (a) a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy”. Similarly, the definition of “serious and organized crime” in the Australian Crime Commission Act<sup>23</sup> is based on a list of offences that includes “matters of the same general nature as one or more of the matters listed above, and that (a) is punishable by imprisonment for a period of 3 years or more ...”. Clauses of this kind align those laws in practice to the “open-ended scope” theory.

34. At the other end of the spectrum are national laws that use a list whose exclusive nature is without exceptions. The Federal Law of Mexico against Organized Crime<sup>24</sup> uses a list of six limited groups of crimes to describe the scope of application of an organic system of criminal justice rules against organized crime. In Venezuela, the scope of the *Ley Organica contra la Delinquencia Organizada*<sup>25</sup> is defined by an expanded list that comprises specific offences together with very broad categories such as fraud, environmental crimes, financial crimes, corruption and other crimes against public properties. Notably, in the Mexican and Venezuelan laws—as well as in the laws of other countries—the same list is a constituent element of the offence of participation in an organized criminal group: such participation is an offence only if the participant (and/or the group) engages in one of the listed offences.

35. A list of offences is also the keystone of French and Italian legislation on organized crime. In the French law<sup>26</sup> the list is exclusive; it includes the offence of *association de malfaiteurs* (i.e., any group formed for the preparation of one or more offences punishable by a minimum of five years of imprisonment) only for cases in which the purpose of the association is the commission of another offence included in the list. By contrast, in the Italian system,<sup>27</sup> the offence of “mafia-type criminal association” is included regardless of the offences committed by the association. Thus the limited nature of the list is partially balanced by prosecuting the crime of association: whenever a person is investigated for or charged with participation in a mafia-type association involved in non-listed offences, most or some of the special procedures and measures designed for the listed offences still apply. Moreover, the Italian list encompasses any offence committed for the benefit of, or using the means offered by, a mafia-type association. This legal mechanism allows the special norms to apply to undefined categories of offences when there is no charge of participation in a mafia group but there is proven involvement by this kind of criminal association.

36. The frequent adoption of the “list system” has many possible explanations, but first and foremost is the fact that the criminological characterization of the listed offences enables measures to be tailored to the precise nature of organized crime in a certain country at a certain time, and provides additional justifications for the

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<sup>22</sup> Act No. 19523, 1998, schedule.

<sup>23</sup> Australian Crime Commission Act No. 41, 1984, amended, part I, section 4.

<sup>24</sup> Law against Organized Crime, 7 November 1996, current text, last amendment, 23.1.2009, art. 2.

<sup>25</sup> Act against Organized Crime, *Official Gazette* No. 5.789, 26 October 26 2005, art. 2.

<sup>26</sup> Law No. 2004-204 (9 March 2004) describing the adaptation of the justice system to evolutionary aspects in criminality (known as *loi Perben II*). This law introduces into the Code of Criminal Procedure a new title XXV, which includes art. 706-73 containing the list of offences.

<sup>27</sup> See art. 51, para. 3-bis, Code of Criminal Procedure (plus many other laws which refer to that article or establish a similar list of offences).

introduction of new rules. However, the “list system” suffers the serious disadvantage of rigidity, requiring time-consuming and complex legal, and sometimes also institutional, adjustments when organized groups get involved in non-listed crimes or when new crimes arise that are either by their nature or de facto committed by criminal groups. This rigidity can also pose difficulties in dealing with transnational crimes since a restricted scope of application may impede international legal assistance.<sup>28</sup>

37. Bearing in mind the dynamic nature of organized crime and the risks entailed by a too rigid scope of application, an initial conclusion can be drawn:

### LESSON LEARNED

**When adopting countermeasures to organized crime offences, the model of the Palermo Convention and the option of avoiding a defined list of offences should be carefully considered. If legal principles or other reasons prevent domestic law from replicating the Palermo Convention’s method (i.e., encompassing all serious offences involving an organized criminal group), legislators should consider adopting an expanded list of offences, paying particular attention to new or emerging crimes whose nature requires, or is likely to induce, the use of organized schemes and thus may imply the involvement of organized criminal groups.<sup>29</sup>**

## B. PATTERNS OF CRIMINAL ORGANIZATION

*Summary: Organizational patterns: traditional and new typologies; mixed models; connections with terrorist and military organizations; cell-based organizations and networks; policies and methods valid for all typologies; advantages of a broad scope of application in domestic laws; rationale based on the existence of an organized group as a factor of seriousness.*

38. As already noted, the cases in this *Digest* present both a diverse variety of crimes committed by criminal groups and a heterogeneous array of organizational structures, which range from ethnic and/or hierarchical groups to more random and less defined formations, from territory-based groups to business-centred ones. In some cases, a single aspect predominates and helps to characterize the organizational structure. This is true, for example, of family-based or mafia-type associations.

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<sup>28</sup>These difficulties are not necessarily connected to the dual criminality rule: it can happen that the offence is also criminalized in the legal system of the country whose assistance is requested, but because the offence falls outside the scope of application of the special measures against organized crime, the requested measure (e.g., controlled delivery) cannot be executed.

<sup>29</sup>One point deserves clarification: domestic laws on organized crime have been analysed regardless of the mandatory nature of article 3 of the Convention establishing its scope of application. Domestic laws may include measures not covered by the Convention; thus the establishment of a non-rigid or expanded scope is only suggested as a good legislative practice and not a prescribed obligation. Whether the domestic laws of States Parties to the Palermo Convention are bound to a scope of application that includes all serious crimes when those laws deal with legal tools covered by the Convention is a separate question.

## FAMILY TIES

In the case RUS 1, international trafficking in ephedrine coordinated by a former Soviet citizen resident in South Africa was exclusively managed by his relatives and in-laws in Russia. The expert noted that the “family ties between the members [of the group], besides increasing the cohesion of the organization, also aided the conspiracy” by helping to conceal the true contents of parcels arriving from abroad.

A strong family connection is also present in SWI 1, a drug trafficking case in which the entire operation was managed by four people, three of whom were members of a single nuclear family; and in COL 13, a case in which an entire family (both parents and two sons) was sentenced for drug trafficking, though the judge established that the accused were directly linked to the Cali cartel network (“*vinculado de forma directa con la red del cartel de Cali*”).

In MEX 3, Mexican investigators recognized that the first stages of human trafficking of children for the purpose of forced labour (e.g., recruitment and transfer abroad) are usually conducted by small, isolated groups, often comprising relatives or friends of the child’s family. In another human trafficking case involving children, ROM 1, the family ties were of a different type, as the traffickers were the children’s own parents.

## MAFIA-TYPE ORGANIZATION

A typical mafia-type organization appears in SPA 6, a case of trafficking in drugs and firearms in which the top level of management was composed of a single family and the solidarity among the group’s members was reinforced by their common ethnicity.

In ITA 16, a case of monetary counterfeiting, the criminal business was entirely run by *Camorra* “families”. The cases ITA 14 and ITA 15 are similar, with Chinese and *Camorra* “families” involved in trafficking counterfeit goods produced in China or the South-East Asia for sale in European Union Member States.

A mafia-type organization is also implicated in USA 2, in which groups and individuals from the same ethnic group formed a huge network of smugglers of illicit goods from Asia to the United States.

39. The Canadian experts presented a series of cases involving the Hells Angels Motorcycle Club, whose character as an organized criminal group was debated at length in Canadian judicial cases and is now firmly recognized by case law. The definition of this gang-type criminal organization used in one of the cases is included in the box below.

## GANG-TYPE CRIMINAL GROUP

The Hells Angels Motorcycle Club is a highly structured group that is deliberately organized to facilitate the commission of crimes by its members. The members belong to individual chapters or “charters,” and must abide by the rules set by the Hells Angels. The rules create an environment in which Hells Angels members can carry out criminal activity without detection by the police. For example, membership is tightly controlled so that only trusted individuals can join. Potential members are carefully screened and only permitted to become “full-patch” members after having being systematically involved in crime during a probation period of one to two years. Photographs of members are distributed to all chapters in Canada to avoid infiltration by undercover police officers.

No person who has ever been in law enforcement, or who has ever taken steps to become a police officer or prison guard, is permitted to be a member. Members must abide by a strict “no snitching” rule, which even prevents them from reporting to the police that they have been a victim of a crime. Members assist each other in criminal activities. They also know that if a dispute or conflict arises among themselves, other members will step in to mediate or arbitrate the dispute.

40. In other cases, characteristics of a certain known structure (e.g., ethnic association and hierarchy) appear in combination with features common to other models (e.g., business/market-based organizations). In addition, individual persons or legal entities that do not participate in a specific, well-defined criminal group may sporadically or systematically aid, abet or provide counsel to that group and thereby contribute to the commission of distinct offences. Therefore, the overall human component of some criminal activity may involve more than just the membership of the organized criminal group.

### **“MIXED” MODELS AND PARTICIPATION OF NON-MEMBERS**

In ITA 21, a case in which a criminal group was investigated for drug trafficking (Latin American cocaine was transported to Europe and sold to local criminal organizations for further distribution), the group members belonged to the same nationality, but this ethnic character was not significantly linked to a territory. The expert pointed out that both the “managers” who were in charge of commercial arrangements and supervised operations and the “cells” that took care of logistics (whose members were part of a strict hierarchy) were extremely mobile and never tried to control a specific territory. They established provisional bases in locations where the business could be run comfortably, and quickly relocated and disappeared when necessary.

In SPA 1, drug traffickers used existing companies that normally engaged in the licit export-import of goods to participate in the illicit drug trade with knowledge and intention. Similarly, Italian cases of trafficking in cultural property (see ITA 1 and ITA 3) highlight the fundamental role that art experts, museums and art dealers play in the criminal scheme.

In addition, SAF 1, a case of trafficking in precious metals, shows how an ongoing criminal scheme may involve occasional participants in an established organized criminal group.

41. Cases in which criminal groups involved in ordinary crimes are also terrorist groups and/or paramilitary groups illustrate another combination of extrinsic patterns.

### **LINKS BETWEEN ORDINARY CRIMES AND TERRORISM/GUERRILLA/ PARAMILITARY GROUPS**

Several of the cases introduced by the Colombian experts concern investigations of illegal armed groups that the Colombian authorities consider terrorist groups, the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, or FARC) and the National Liberation Army (*Ejército de Liberación Nacional*, or ELN), or the investigation of persons financing or backing these guerrilla groups. The investigated offenders were involved in transnational illicit trafficking of drugs, arms or other commodities, as well as money-laundering, kidnapping, extortion, murder and other ordinary crimes, and all these crimes were committed to support the activities of these groups.

In general, the Colombian cases provide a good basis for studying the legal and practical aspects of links between terrorism and ordinary crime, particularly aspects of international cooperation between law enforcement and judicial authorities. COL 1 was the first case of extradition from Colombia of criminals belonging to a network that systematically supported terrorist activities. In COL 5, the expert underlined that Colombia cooperated with Venezuela in the same way and just as effectively as it did with other countries. Similarly, COL 6 and COL 7 present interesting examples of law enforcement and judicial cooperation in the investigation and prosecution of terrorist and non-terrorist offences.

In this regard, it must be recalled that in adopting the Palermo Convention, the General Assembly called upon all States “to recognize the links between transnational organized criminal activities and acts of terrorism, taking into account the relevant General Assembly resolutions, and to apply the United Nations Convention against Transnational Organized Crime in combating all forms of criminal activity, as provided therein”.<sup>30</sup>

Thus in ITA 21, Serbian mafia-type groups involved in large-scale drug trafficking were considered particularly dangerous and efficient because their members previously belonged to military or paramilitary groups with extensive military or guerrilla experience. The expert emphasized that undoubtedly “the strength of these groups is ... in the mentality of all members, who behave like members of a task force. Indeed, quite a number of them have been active members of special units, such as ‘The Arkan Tigers’, or of intelligence agencies, where they have acquired experience in tactics, behavioural means and operational systems. That is clear when we consider the counter-measures they take to avoid shadowing, the sophisticated systems used to protect their bases, the use of an arsenal more typical of commandos than of traffickers. In particular, their warrior-like mental attitude reduces the risk of making mistakes, protects the cells and enables them to react promptly in case of danger.”

42. Furthermore, when complex criminal activities (e.g., in transnational trafficking) require the integration of distinct roles, the various actors can be linked in a variety of configurations. For example, the entire action may be carried out by one gang, or by a combination of several cells that are more or less independent but managed by a single coordinator, or by a network of autonomous entities acting together simply on a transactional basis. In general, the need for a wide range of functions to carry out a complex crime does not necessarily require a criminal group to have a complicated structure.

## CELLS AND COMPLEX NETWORKS

A complex criminal organization is described in SPA 2, a case involving trafficking cocaine to Spain and other European countries that resulted in the prosecution of 52 individuals. It can be inferred from the expert’s description of the case that the division of labour among various subgroups responsible for different logistical elements (ranging from contact with the Colombian sellers, to transatlantic transport and distribution within Europe, to financial and administrative arrangements) did not jeopardize the cohesion of the overall group. Strong control by the group’s chiefs was the main reason for this.

In HUN 1, a case involving copyright violations committed via the Internet, the expert noted that the various cells that conducted the illicit business were allowed to compete with each other in searching for new clients/victims; this, however, was not an indication that the cells were autonomous, but simply a technical modality of the operation planned by the lone coordinator of the whole organization, who enforced strict hierarchical control over all executive levels.

In ITA 18, a case involving the mass production, distribution and expenditure of fake euro notes, 174 persons were prosecuted for the offences of participation in criminal associations and counterfeiting currency. The case was presented as one “of a real network of criminal associations ... [in which] several criminal groups, while not having mafia-like characteristics, commit crimes ... showing a continuous involvement in the distribution of counterfeit currency ... by progressively parcelling it out to criminal groups lower down, until achieving a capillary

<sup>30</sup>Res. 55/25, op. para. 6. This *Digest* does not deal with terrorism cases per se; instead, see *Digest of Terrorist Cases* (Vienna, UNODC, 2010). Whether the Palermo Convention is applicable to criminal investigations and proceedings for terrorist offences is still under discussion. The sticking point is the requirement in the definition of “organized criminal group” in art. 2(a) of the aim of obtaining material benefit. General Assembly resolution 55/25, particularly the paragraph referred to above, can be interpreted as excluding that applicability.

distribution of the single spending in Italy and throughout Europe”. In addition, “there is interdependence between those who produce and those who utter, since ... both activities are essential to carry out the illegal activities and to achieve the common objective of acquiring financial gains.” Interestingly, the expert concluded by emphasizing that, “except for the organizers and promoters ... who engage exclusively in the illegal activity of banknote counterfeiting, the criminal groups of the underlying distribution chain are involved in the commission of several types of crimes, among which also the uttering of counterfeit banknotes” and that “investigation has amply demonstrated ... that the activity of Euro counterfeiting implies the existence of large associations ... the uttering of counterfeit currency cannot be considered as being the occasional event of a fraud committed ‘by trick and deceit’ at the expense of unsuspecting and ‘absent-minded’ persons, but must be assessed in the framework of a stable and associative structure that looks upon the final spending of counterfeit banknotes as its reason for being”.

In another Italian case (ITA 10), involving the trafficking of young Nigerian women to Europe, the judges established the existence of a single criminal organization covering the entire trafficking process and subsequent exploitation of the women. The “madam” who managed the prostitution of the Nigerian women in Italy was sentenced as the head of a mafia-type criminal association that included the recruiters and the people responsible for the various stages of the girls’ journey to the final destination in Italy. The judges concluded that because the madam would order the girls from the same recruiters, and that more generally an established routine existed among those involved in the various aspects of the trafficking operation, this justified including all these entities in a single organized criminal group. However, the judges did not exclude that the recruiters and transporters could also work independently of the madam and thus could also be considered autonomous entities.

43. These cases demonstrate that often a criminal network is made up of organized criminal groups rather than individuals. If the network itself is understood as an organization, the intermingling of various parts of its organizational structures may cause confusion in knowledge sharing among law enforcement and criminal justice practitioners. In this regard, many other cases are equally interesting, but it should be noted that cases from common law countries are less complicated, probably because offences related to participation in an organized criminal group (other than conspiracy) are either absent or play only a reduced role.

44. Creating a precise taxonomy of organized crime is a very difficult, if not impossible, task. Because of the great variety, nuances and flexibility of organized crime, even the most up-to-the-minute classification proposals risk being insufficiently descriptive or comprehensive.<sup>31</sup> A number of factors conspire in the rapid obsolescence of typologies of organized crime, including its transnational nature, which creates organizational complexity; new “final offences” that affect structural aspects of criminal groups; and the rapid evolution of illicit markets. This leads to an elementary call for caution:

### LESSON LEARNED

**In any aspects of the criminal justice response to organized crime where intelligence about criminal structures and the modus operandi of criminals is of fundamental importance, generalized models should be used very cautiously.**

<sup>31</sup>For an interesting summary of factors to consider in classifying various types of networks engaged in illicit trafficking, especially human trafficking, see Phil Williams, “Combating Human Trafficking: Improving Governance Institutions, Mechanism and Strategies” in *Strategies against Human Trafficking: The Role of the Security Sector*, Cornelius Friesendorf, ed. (Vienna and Geneva, National Defence Academy and Austrian Ministry of Defence and Sports in cooperation with the Geneva Centre for the Democratic Control of Armed Forces, 2009). Williams divides the networks into five types: flux, broker, chain, mesh, hub and core networks.

45. The cases in this *Digest* allow us to verify whether general measures on criminalization, investigation and prosecution exist, and if so, whether they have been applied appropriately to all the different varieties of criminal organizations that appear in these cases. In this connection, leaving aside issues related to criminalization, an analysis of the cases shows that what matters is the presence of a certain degree of organization, and different types of organization do not produce that many differences in the use and effects of these general measures. In fact,

### LESSON LEARNED

**General criminal policies (e.g., going after the property and financial assets of criminals to disrupt their criminal capacity; rewarding and protecting cooperative witnesses and offenders; using mechanisms that assure adequate collection and exchange of information) may be valid regardless of the type of criminal organization. For example, they may be used effectively against either a mafia-type group or a diffuse network of criminals who work together only occasionally. In addition, “special” investigative methods (e.g., interception of communication, surveillance, undercover operations, etc.) have been used consistently and without distinction, achieving good results in many cases involving a variety of organizational features.**

46. Naturally, the concrete aspects of investigative and prosecutorial actions depend on the specifics of individual cases, and different organizational structures may sometimes require different techniques in the application of a particular method or policy. But at the more general level that is typically encountered in national laws, it appears that the same policies and measures could effectively cover a wide range of organizational patterns.

47. Thus the question once again arises: how broad is the scope of application of national laws against organized crime, and how flexible should it be?

48. In this regard, the Palermo Convention provides a paradigm of a very broad scope since it applies to all cases involving an organized criminal group of at least three persons, and the definition of that group is very loose. There is no doubt that this definition includes groups that act with the intent of committing even a single offence and that lack formally defined roles for its members, continuity of membership and a developed structure. The only requirement is that the group must exist for a period of time and not be randomly formed for the immediate commission of an offence.

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## ■ UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (ARTICLE 2. USE OF TERMS)

### Definition of organized criminal group

*(a) “Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;*

(...)

(c) “Structured group” shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

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49. Many domestic laws (including laws based on an exclusive list of “final offences”) adopt a flexible concept of criminal organization, while others focus on distinct and sometimes very limited organizational types. The Italian law, for instance, falls into the second category since it focuses on the mafia-type criminal association despite the fact that the national criminal code also provides for a general, and not strictly characterized, offence of criminal association.<sup>32</sup> The law of South Africa<sup>33</sup> adopts a definition of “criminal gang” that requires the group, organization or association to have an identifiable name or identifying sign or symbol, which substantially restricts the scope of application of the law.

50. The French law, by contrast, demonstrates the recent propensity of legislators to expand the scope of application. In 2004, the concept of *bande organisée* was introduced in the French criminal code to identify any group of persons formed or intended to be formed for the preparation of one or more offences.<sup>34</sup> This notion, which does not constitute an offence per se, is less detailed and consequently more comprehensive than the existing concept of *association de malfaiteurs*. It is used to qualify some of the listed offences to which measures against organized crime apply. The Brazilian law covers the activities of the criminal “quadilha, gang, organization or association of any type”; this list clearly demonstrates the intention not to exclude any organizational pattern. The United States expert noted that the Racketeer Influenced and Corrupt Organizations (RICO) Act of 1970<sup>35</sup> was originally intended to target Italian-American mafia-type groups, but proved sufficiently flexible to be used effectively against other types of criminal organizations committing new types of crime. Thus many recent domestic laws follow the model of the Palermo Convention exactly or approximately, sometimes departing from it only to further expand its already broad scope.

### CANADIAN LAW: DEFINITION OF CRIMINAL ORGANIZATION

The Canadian definition of criminal organization could be interpreted as an innocuous deviation from the definition found in the Palermo Convention. Article 467.1 of the Canadian Criminal Code defines a “criminal organization” as “a group, however organized, that (a) is composed of three or more persons inside or outside Canada; and (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group. It does not include a group of persons that forms randomly for the immediate commission of a single offence.”

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<sup>32</sup>Art. 416 of the Italian Penal Code.

<sup>33</sup>Prevention of Organised Crime Act, No. 121 (1998), amended.

<sup>34</sup>Law No. 2004-204 (9 March 2004).

<sup>35</sup>Racketeer Influenced and Corrupt Organizations Act, codified as chapter 96 of Title 18 of the United States Code.

The Canadian divergence results from the omission of the “structured” element that is present in the Convention. On the one hand, this omission can be interpreted as not necessarily contradicting the Convention’s definition, especially given that the term “structured group” is defined in the Convention only by negative concepts (see article 2(c)). Moreover, this omission simplifies the concept of organized group. On the other hand, despite the “negative” definition of article 2(c), it remains questionable whether not requiring even the most elementary structure still permits an entity to be identified as a “group”.

51. In the European Union legislation, article 1 of the 2008 Framework Decision on organized crime (with which Member States had to comply by 11 May 2010) adopted a definition of the term “criminal organization” very much in line with that of “organized criminal group” in the Palermo Convention; the term is subsequently used (article 2) as a basic component of the description of the offence of “participation in a criminal organization”, which determines the scope of application of the special measures prescribed in the following provisions of the Decision.<sup>36</sup>

52. Bearing in mind the various approaches taken in the legal systems mentioned above and the range of organizational modalities evident in the collected cases, a general recommendation can be made about the necessity of avoiding a too limited or too rigid scope of application in relation to the organizational aspects of organized crime:

#### **LESSON LEARNED**

**When preparing national legislation, in compliance with the principle of legality and the requirement for precision in criminal law, possible ways should be studied to cover all organizational patterns used by criminal groups and individual criminals to which the new norms may properly applied.**

**The law’s scope of application should not be limited to the more traditional types of criminal organization.**

**To that end, the definition of “organized criminal group” found in the Palermo Convention should be considered.<sup>37</sup>**

53. Both the content of measures and the scope of their application should be determined on the basis of a consistent rationale. In systems that do not focus on the nature of “final offences” (as in the Convention), the existence of an organized group should be the underlying rationale that determines the seriousness of the crime and the relative difficulty in counteracting it. In the Convention, this basic element is present in the requirement for the “involvement of an organized criminal group,” including a group established for the

<sup>36</sup>Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime. See n. 18.

<sup>37</sup>In the Convention, the system of “serious crime” and the definition of “organized criminal group” are not the only signals of the unlimited variations of organized crime: under art. 28.1, for example, States Parties are requested to analyse organized crime trends and operational circumstances, including professional groups and technologies utilized.

commission of a single crime. However, it is not always easy to establish whether that requisite is met—i.e., whether an organized group really exists—when a single offence is committed, which instead resembles the traditional, well-defined legal institution of an “offence committed with the intentional participation of more than one person”. As brilliantly phrased in a commentary on the Convention, there is a need to distinguish organized crime from “crimes that are organized”.<sup>38</sup> Some of the cases studied here fall into a grey area and could be considered simply “crimes that are organized” rather than organized crime.

54. For instance, in UKG 1, a case in which six people were convicted of conspiracy to commit a single act of drug trafficking, the expert felt the need to specify that, “whilst within the United Kingdom we would describe this network as being an ‘Organized Criminal Network’ (OCN), the members were career criminals who would generally work independently, or as members of a fluid OCN. They would have no particular allegiance to a specific crime group or family.” This case demonstrates that an elaborate organizational scheme can exist without a real criminal group; the necessary explanation of the expert insinuates that, in categorizing and naming criminal conduct, the criminological observation of the practitioners may interact in a problematic way with the legal (or somehow official) definitions used in the criminal law system of a country.

55. Finally, it should be noted that in some countries, domestic laws against organized crime apply to serious offences even if they are not accompanied by any organizational modality. The French list, for example, includes not only offences committed by a *bande organisée*, but also crimes without any distinctive features of organization—the law applies to such crimes even when they are committed by a single person in a non-organized way. Most of these offences are still quite typical of organized crime (e.g., human trafficking, terrorism, drug trafficking), but others are not necessarily (e.g., exploitation of prostitution and extortion). The law of El Salvador treats organized crime and a newly created class, “offences with complex execution” (*delito de ejecución compleja*) in the same way (the latter include homicide, extortion and kidnapping in certain circumstances). In Venezuelan law, an innovative legal definition establishes that an offence must be considered an organized crime when it is committed by a single person using technological, cybernetic, electronic, digital or other modern means that enhance human capacity so as to permit an individual to act “as a criminal organization”. The expression “serious and organized crime,” which appears in various domestic laws, is indicative of the same tendency towards an expanded scope of application that goes beyond what is defined by the rationale.

### C. PARTICIPATION IN AN ORGANIZED CRIMINAL GROUP

**Summary:** *The offence of participation in an organized criminal group as a component of the criminal policy of “dismantling the criminal groups”; article 5 of the Palermo Convention: conspiracy vis-à-vis “association” offence; the solution of the cumulative approach; the association offence in civil law countries; cases where the conspiracy or association offence is not charged; the need for appropriate criminalization and extensive prosecution of the offence.*

56. The core aim of the Palermo Convention’s criminal policy is “dismantling organized criminal groups”, and it is reflected in every sector, including prevention, investigation and prosecution. The offence of participation in an organized criminal group as foreseen in article 5 of the Convention can be considered a reflection of that same policy applied to criminalization. Criminal offences such as conspiracy and criminal association existed in many legal systems long before that policy was affirmed at the international level, but they took on primary importance when the underlying criminal structure was declared one of the main targets of law

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<sup>38</sup>Francesco Calderoni, *Organized Crime Legislation in the European Union* (Berlin and Heidelberg, Springer, 2010), p. 42; and James O. Finckenauer, “Problems of definition: What is organized crime?” *Trends in Organized Crime*, vol. 8, No. 3 (2005), pp. 77-78.

enforcement. Whatever its specific form in domestic criminal laws, the offence of article 5 advances the criminal justice response well beyond the material commission of (or the attempt to commit) the eventual offences damaging specific protected interests, and it “proscribes lesser participation in criminal groups”.<sup>39</sup> In addition, the expanded criminal liability targets not only the heads of a criminal organization, who plan, coordinate and manage, but do not always participate in, the material commission of “final offences”; but also persons participating in non-criminal activities that nevertheless contribute to the criminal capacity of a group.<sup>40</sup>

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## ■ 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.*

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57. This criminal policy can be translated into either the offence of association to commit crimes, which is typical of civil law countries, or the offence of conspiracy, which is typical of common law countries.<sup>41</sup> The differences are material; although article 5 of the Palermo Convention allows the adoption of either or both models, it is itself clear evidence of the impossibility of reconciling the two legal traditions by combining them into a single form of crime. The experience of the European Union that, while trying to harmonize the criminal

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<sup>39</sup>UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York, United Nations, 2004), p. 21, para. 41.

<sup>40</sup>This final aspect presupposes the existence of a group and it is not in evidence when the offence is conspiracy.

<sup>41</sup>In this connection, the division between civil law countries and common law countries is only an approximation since there are national legal systems in each group that include the offence typical of the other group.

law of its Member States, has decided (in the Framework Decision of 2008<sup>42</sup>) not to create a single type of offence supports the idea that, at least for the time being, the alignment of the two systems of law is not an item to be put on the agenda of regional or international organizations.

58. The common law countries widely considered the “dual criminalization” (conspiracy plus association), both before and after the entry into force of the Convention. Already in 1970, the RICO statute introduced a type of conspiracy into the United States legal system that experts legitimately consider meets the description of the “association” offence in article 5 of the Convention.<sup>43</sup> RICO violations were charged in USA 2, a case in which a massive international smuggling ring trafficking in illicit drugs, firearms and counterfeit currency was dismantled thanks to incriminating evidence gained through undercover operations. The United States expert expressed the view that criminalization of “association/conspiracy” is essential to the successful prosecution of organized crime offences, for the specific reason that “without a theory of vicarious group liability it would be impossible to overcome the secrecy, layering and hierarchical defences utilized by sophisticated organized criminal groups”. The Jamaican expert announced that her country “had taken the bold step toward enacting the Anti-Gang Legislation where the participation in a criminal organization will be a criminal offence”.

## DUAL CRIMINALIZATION: CONSPIRACY PLUS ASSOCIATION OFFENCES

### SOUTH AFRICAN CASES

In South Africa, the Prevention of Organised Crime Act<sup>44</sup> has added two association offences (racketeering and gang-related crime) to the traditional conspiracy offence. Racketeering was charged in SAF 1, a case in which nine people were involved in theft, fraud and money-laundering connected to international trafficking in unwrought precious metals. The South African expert emphasized that the racketeering offence was at that time still fairly new, with little case law to support the charge, creating numerous procedural problems.

However, in another case, SAF 2, the expert considered the decision by prosecutors not to charge that offence to be a fundamental mistake, which unjustifiably slanted the results of the proceedings in favour of the offender. In general comments on the offence of article 5 of the Convention, the expert noted that the traditional crime of conspiracy based on the “common purpose” doctrine is “still alive and well” in South Africa. This might be interpreted as an indication that it is difficult to have a correct and functional relationship between the two models, and that a criminal justice system that includes both offences needs time and a certain amount of experience to achieve equilibrium and effectiveness in their combined or separate application. Nonetheless, the same expert put forward the hypothesis that criminalization of association can help, particularly “where one or more acts of association is conducted abroad”, whereas “where all acts happen in South Africa only, then common law dealing with common purpose and accomplices ... adequately deal with the position”<sup>45</sup>.

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<sup>42</sup>See also n. 18.

<sup>43</sup>See the United States answers to the *Questionnaire on the implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto*, UNODC Informal Papers (28 July 2004).

<sup>44</sup>See n. 21.

<sup>45</sup>A general study carried out in the common law countries on the possibility and related advantages of combining at the national level conspiracy and association offences would be of considerable interest. It would likely be more difficult to combine them in civil law countries, where criminalization of conspiracy not followed by the offence whose commission was its object would run counter to the fundamental legal principles of many national legal systems.

## CANADIAN CASES

Of equal interest is the legislative development in Canada whereby “criminal law combines the common law tradition’s reliance on conspiracy ... with offences relative to criminal association”.<sup>46</sup> These offences were introduced or modified in 2001.<sup>47</sup> In many respects they correspond at least in part to the association offence of the Convention, and they include a number of interesting solutions to problems that the same type of offences often present in other countries.

In CAN 8, a case in which three people were found guilty of unlawful possession and sale of tobacco products, the Court of Quebec underlined that the 2001 amendments were intended to provide a more flexible definition of criminal organization so that it would cover not only known criminal groups but any group of three or more people who come together to commit crimes. The Court also noted that there is no such thing as a type of crime normally committed by criminal organizations, and the criminal conduct targeted by the 2001 legislative reform does not lend itself to the particularization of a closed list of offences. Thus we can conclude that Canada has fully applied, to the establishment of offences, those concepts of expansion and flexibility that civil law countries have adopted in defining the scope of application of special measures

In CAN 5, a case involving four offenders charged with many counts related to credit card fraud (in particular, buying, selling and possessing devices intended for use in forging credit cards, and trafficking in credit card data), the criminal activity was carried out through a company that also engaged in legitimate business and where one of the accused was employed. As the decision of the Ontario Superior Court of Justice illustrates, this case is particularly interesting because of the judicial methods used and the resolutions taken to: (a) distinguish illegal from legal activities and prevent the latter from serving as an unjustifiable protection for the offenders; (b) recognize the liability of the employee as a member of the criminal group even though his only material benefit was his regular salary; and (c) separate the position of one of the other individuals accused, who was not considered to have acted for the benefit of the organized group even though he conspired with members of the group on some occasions.

In the famous Lindsay case, CAN 1, the criminal offences introduced in 2001 were applied to establish the criminal liability of two members of the Hells Angels Motorcycle Club who committed extortion in association with that club, which was recognized as a criminal association. One aspect of major interest in these and other Canadian cases is the fact that, out of three “organized crime” offences, two are not based on the concept of membership in the criminal group, applying equally to both members and non-members of the group. This approach may be considered as corresponding to the notion of “involvement” in an organized criminal group found in the Palermo Convention; it also clarifies the position of those who substantially contribute to, or take profit from, criminal activities of a group but remain outside its fixed structure. More generally, the Canadian expert explained that the role of the “membership” concept was reduced, if not abolished, in Canadian law because of a series of difficulties encountered in prosecuting organized crime offences under the previous law, which was centred on that concept.

Meanwhile, the Canadian “association” offences all focus on the commission of a crime (of a “final” or instrumental nature), and thus do not cover the instance of a person participating in non-criminal activities of the group as envisaged in article 5, paragraph 1(a), section ii(b) of the Palermo Convention.

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<sup>46</sup>See UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, p. 28.

<sup>47</sup>Section 467.1 of the Criminal Code defines “criminal organization” (see n. 27). Sections 467.11-13 define the offences of criminal gang activity in increasing degree of seriousness: participation in the activities of a criminal organization (467.11); commission of an offence for the benefit of, at the direction of or in association with a criminal organization (467.12); and instruction of a person to commit an offence for the benefit of, at the direction of or in association with a criminal organization (467.13).

59. The introduction of criminal association offences into the laws of the above-mentioned countries testifies to their resolve to effectively use criminal law tools against the criminal groups themselves and not only in reaction to individual offences committed by them. In this connection, the position of countries that traditionally do not have a theory of criminal association or conspiracy (e.g., Japan)—a situation not reflected in any of the cases collected in the *Digest*—would be worthy of study.

60. At the same time, it would be useful to conduct an in-depth analysis of the role of paragraph 2 of article 5 of the Convention, which specifically provides for, in the context of the criminalization of participation in an organized criminal group, the criminalization of “organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group”.

61. In the civil law countries, in the last 20 years and especially after the entry into force of the Convention, criminal association offences have been extensively reformed, reinforced or, in some cases, newly introduced. In discussing cases, experts from the civil law tradition agreed to consider establishing those offences as a fundamental element of the legal tools needed to fight organized crime. Swiss case law related to the offence of criminal association (introduced in the Swiss code in 1993) is particularly relevant, as illustrated by the case SWI 1. In this case, one of the offenders was convicted of some individual instances of drug trafficking; he was also recognized as the leader of a massive, European-wide drug trafficking network involved in additional trafficking episodes: despite the fact that he was not prosecuted for these latter instances, he was still convicted for participation in the criminal association that had committed them. However, none of the cases collected here concerns prosecution or conviction for the sole offence of participation in an organized criminal group not accompanied by either a “final offence” or a predicate offence.

62. Some of the analysed cases lack the “association crime” aspect even though their factual circumstances would lead one to expect it. For instance, in MEX 1, a case of human trafficking involving three or more persons and criminal activity that might be suspected of recurrence, the offence of criminal organization, which the Mexican Law against organized crime<sup>48</sup> also applies to human trafficking, was not charged. In several drug trafficking cases in the Philippines, such as PHI 10, in which four people were accused, and PHI 11 and PHI 12, in which only one person was accused but with allegations of participation in known organized groups, neither conspiracy nor association offences were charged. In other Philippine cases related to human trafficking, the organized crime dimension was present only as an aggravating circumstance, and the investigation apparently did not lead to the expansion of the prosecution to cover a wider circle of facts or other people who were potentially involved. In SPA 2, a drug trafficking case involving a well-structured international network of 52 people with a powerful leader, a separate charge of an “association” offence was hindered because the offenders were accused of drug trafficking with the aggravating circumstance of belonging to an international organization. Apparently this did not inconvenience the prosecution or judicial proceedings, and the Spanish expert did not report any difficulties in the investigation.

63. In COL 13, drug traffickers paid a family for months to use its telephone to make international calls to organize the international transport of the drugs. Despite the evident material contribution to carrying out the drug trafficking offences, no members of the family were prosecuted. The expert stated that it was not possible to precisely establish which offence to charge, and the mere fact that the international calls were made from the family’s telephone was not considered sufficient to charge them with criminal association. This case demonstrates how difficult it is to identify the real nature of the offence in article 5, paragraph 1(a), section ii (b) of the Palermo Convention.

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<sup>48</sup>See n. 24.

64. Naturally, the case presentations only tell us what occurred and do not dwell on hypothetical missed elements. In the cases mentioned above, there were good reasons (legal or related to prosecutorial policies) to adopt a limited prosecution. In general, however, attention should be paid to the risk that not having a sufficiently comprehensive offence of criminal association or conspiracy in the substantive criminal law—or having it but not using it for incrimination—may narrow the perspectives of law enforcement and judicial action, restricting the criminal conduct that is investigated and prosecuted in individual cases. The experts also voiced strong support for appropriate criminalization of conspiracy and criminal association in their discussions. Given that this expert opinion integrates well with the positive experience of the “dual approach” adopted by some common law countries, and the central role that the Palermo Convention attributes to that criminalization, another conclusion can be drawn:

### LESSON LEARNED

**In developing domestic legislation, legislators should consider the central role that criminalization of conspiracy and criminal association play in the criminal justice system, as well as in the policy of dismantling organized criminal groups. They should also consider what types of interventions are needed to better tailor those offences to the present character of organized crime at both the domestic and transnational level.**

**Conspiracy and association offences provide an essential legal basis for law enforcement agencies and prosecutors to expand the investigation and prosecution to cover the widest possible circle of facts and offenders.**

**Therefore, the establishment of both, conspiracy and criminal association offences, suggested by the Palermo Convention should also be taken into consideration.**

## D. LIABILITY OF LEGAL PERSONS

**Summary:** *Obligation to establish the liability of legal persons under the Palermo Convention; shell companies and companies with legal activities; examples of legal frameworks.*

65. The Legislative Guide for implementing the Palermo Convention<sup>49</sup> explains the reasons for creating the liability of legal persons and its specific relevance to organized crime. It also highlights recent developments in international legal instruments in this field. As evidenced by many of the cases submitted for the *Digest of Organized Crime Cases* and confirmed by the expert commentaries at the meetings, the use of companies plays an important role in serious and sophisticated crimes. These crimes are materially committed by the companies or under their cover; in the latter instance, companies may be particularly useful for hiding clients and transactions and for preserving ownership or possession of the proceeds from crime.

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<sup>49</sup>UNODC, *Legislative Guides*, p. 116.

66. In accordance with article 10 of the Palermo Convention, States shall establish the liability of legal persons for offences covered by the Convention. The liability can be civil, administrative or criminal and the sanctions must be “effective, proportionate and dissuasive”. The provision is also mandatory for those Parties where legal entities are not responsible for illicit conduct under customary criminal law. However, the abilities to choose among criminal and non-criminal sanctions, to freely determine the criteria on the basis of which such liability will be established (especially criteria related to the role and liability of the acting persons) and more generally, to adapt the measures to the principles of the national legal system (also recognized by article 10)—all allow sufficient flexibility in reforming legal systems where the measure is not an essential component of national legal traditions.

67. Although only a few of the cases studied in the *Digest* deal with this issue, one should not assume this means that the mandatory provision of the Convention is not being applied. An in-depth international review is needed to reach any conclusion in this regard. However, the cases suggest an interesting line of research based on the distinction between, on the one hand, situations where legal entities are used in the commission of crimes as cover for illicit conduct or as instrumentalities created purposely for this function (“shell companies”), and on the other hand, situations where “real” companies, usually performing legal activities, participate in the commission of crimes.

68. With regard to the former situation, it must be stressed that shell companies not only seem to be difficult to be found liable, but they are also difficult to consider as entities subject to penalties (fines) or confiscation. Moreover, as shown in ITA 6, the implicated companies themselves may or shall be treated as assets to be seized and confiscated rather than as responsible entities. Shell companies appear in a number of the presented cases, including, for example, ALB 1, BRA 2, BRA 6, BRA 14, FRA 1, ITA 14 and SER 3.

69. However, in the previously mentioned cases ITA 1 and 3, in which museums and art galleries were involved in traffic in cultural property, as well as in SPA 1 and ROM 6, the role of legal entities with well-established legitimate activities (and whose managers intentionally engage in illicit conduct for their own benefit or for that of the companies) perfectly corresponds to the most common paradigm in domestic laws that have introduced the liability of legal persons, including criminal liability.

## NATIONAL SYSTEMS OF LIABILITY OF LEGAL PERSONS

Countries have adopted several approaches to imposing criminal liability. Under United States law, corporations are “legal persons” capable of committing crimes and can be held criminally liable for their illicit activities. Under the doctrine of vicarious liability, or *respondent superior*, supported by longstanding case law, the offences of employees, directors, officers, directors and agents are imputed to the corporation when the offence is committed in the course of their duties or for the benefit of the corporation.

France provides a good example of how the liability of legal persons can be established within civil law systems. Since 1994, liability of legal persons exists in the French criminal code as a general rule for any offence committed “on their account by their organs or representatives”. The effectiveness of this measure has been assessed by academics, but also by the Ministry of Justice in a 2008 statistical report on the convictions of legal persons in France between 1994 and 2005. The report confirms that the number of convictions against legal persons grew at an impressive rate between 1994 and 2005, and that between 2002 and 2005, a total of 2,340 legal persons were convicted of crimes. These figures, however, are not limited or related to organized crime.

In Serbia, Law No. 97 on Liability of Legal Persons for Criminal Offences (27 October 2008) states that any legal person can be liable for criminal offences established in the penal code or in other laws; the only exception is public officials if the offence was committed in the execution of public functions. Liability extends to offences committed outside Serbia if the offence is against the Republic of Serbia, its citizens or its legal entities. The offence must be committed by the person responsible for the entity, or a person subordinated to that person if there was lack of control. The offence must be committed for the benefit of the legal person. The main sanction is of a penal nature: a fine or termination of business. Other sanctions include suspension of business for one to three years and various “security” measures. Law No. 97 also prescribes specific rules for the criminal proceedings as well as for the execution of the judicial decisions.

70. POR 2 demonstrates that Portugal has come a long way to reach the present situation where the liability of legal persons is not controversial and this form of liability has been extended to the Criminal Code itself. POR 2 concerns a 1991 case in which a company was found guilty of offences related to adulteration of food and medicines. For the first time ever, the admissibility of the liability was challenged before the Constitutional Court. In allowing this kind of liability to stand, the Court declared that, “the criminal liability of legal persons is based ... upon the absolute need of using repressive means, which are specific of the criminal law, in the fight against the collective forms of delinquency ...”. As to the relation between the liability of legal persons and that of their representative, the Court stated its conviction that “legal persons are the entities that commit the bigger and more serious violation of values ... the mere sanctioning of their organs or representatives without the corresponding sanctioning of the legal person itself would lead to a preferential treatment of the latter compared to the former”. POR 3 is the first case in Portugal to recognize the liability of a legal person for the crime of corruption.

71. In ROM 6, a case involving transnational trafficking of cocaine from Colombia and heroin from Turkey, a truck belonging to an international transport company carried some of the drugs to Western Europe. The company was ultimately sentenced to pay a fine, and its owner and other traffickers were also convicted. The expert pointed out that “it was the first Romanian case of a legal entity prosecuted for supporting an organized criminal group in trafficking in high risk drugs.”

## E. TRANSNATIONAL OFFENCES AND JURISDICTION

*Summary: The predominant transnational nature of organized crime; concurrent exercise of national jurisdictions: positive and negative aspects; limited role of the Palermo Convention; adjusting legal criteria to the exigencies imposed by the transnational nature of organized crime.*

72. Not more than 20 cases of the 200 in the *Digest* concern purely domestic offences. Although this figure has no statistical value, it is worth noting that the experts primarily presented cases of transnational offences even though it was agreed that a collection of “good practices” could also benefit from experiences in mere domestic proceedings. This also supports the common assumption that today organized crime offences are largely transnational in nature,<sup>50</sup> which complicates efforts to counter them. Their transnational nature is a key

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<sup>50</sup>In this *Digest*, in line with the Convention, the transnational nature of organized crime is only intended as a possible circumstance or modality of offences, even occurring occasionally. The term is not used to define a separate category of crime, nor is used as an attribute of other criminal law matters, like “offender” or “investigation”. For example, a criminal proceeding characterized by extradition or other procedure of cooperation among States is “international,” not “transnational”.

reason for developing the legal means, practices and culture to support international cooperation in law enforcement and judicial actions. The cases abundantly illustrate the current status of international cooperation, and chapter III focuses on this aspect of investigations and proceedings.

73. By means of introduction, it is worth noting that when complex transnational offences fall under the jurisdiction of more than one country, cooperation is not limited to international assistance in relation to single acts, but comprehends continuous or reiterated coordination of activity, including of entire phases of law enforcement or prosecutorial action. This tendency corresponds to clear practical needs as well as to the obligation of States Parties to the Convention (under article 15.5) to consult with one another and coordinate their actions when they are investigating, prosecuting or conducting judicial proceedings for the same criminal conduct. Coordination can be still classified as a progressive step of cooperation and a part of the traditional notion of law enforcement and judicial assistance. In some of its extreme manifestations it can turn into co-management of an entire investigative and prosecutorial process.

74. However, there are situations where coordination impinges on the exercise of jurisdiction itself and determines its distribution among countries. This can occur through the application of formal mechanisms. In RUS 4 and RUS 5, two cases in which international organized criminal groups engaged in significant illicit drug production and trafficking, intense and fruitful international cooperation during the investigation stage was complemented by the use of “transfer of proceedings” procedures provided for by the Code of Criminal Procedure of the Russian Federation. The “transfer” allowed the trials of non-Russian members of the criminal group, already investigated in Russia, to be moved to their country of origin. In ITA 10, a case of human trafficking from Nigeria to Europe in which Italy and the Netherlands closely cooperated in the prosecution of about 50 persons, the division of the exercise of jurisdiction was based on an arrangement facilitated by the EU legal framework for legal cooperation in criminal matters.<sup>51</sup> The expert who presented this case recalled that ultimately Italy did not request extradition of one of the alleged offenders from the Netherlands because the authorities of the two countries agreed that he would be tried in the Netherlands.

### UNIVERSAL JURISDICTION FOR MARITIME PIRACY OFFENCES

Kenyan maritime piracy cases provide an interesting example of jurisdiction exercised on the basis of an international agreement. In KEN 2, for example, 10 non-Kenyan nationals suspected of having committed acts of piracy against a vessel flying the Indian flag were arrested on that ship by United States Navy officers in international waters off the Somali coast, and then prosecuted and convicted in Kenya. Since maritime piracy is a crime of universal jurisdiction, Kenya agreed to exercise its criminal jurisdiction following an agreement with several countries and international organizations<sup>52</sup> on the transfer to Kenya of suspected pirates for prosecution there.

The agreement (now expired) was one of the international initiatives to address the increasingly serious impact of maritime piracy committed off Somalia, and specifically to address the problem of finding countries in the region ready to prosecute the alleged pirates, given the present capacity limitations of Somalia’s criminal justice systems.

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<sup>51</sup> At present, the issue of coordinating the exercise of jurisdiction among Member States in cases of transnational offences is very much under discussion in the EU in connection to the coordination of investigation and the reinforcement of the functions of institutions such as Eurojust.

<sup>52</sup> MOU/Exchange of Letters with United Kingdom, European Union, United States, Canada, China, Denmark, EUNAV for respectively the transfer and prosecution of suspected pirates captured in the international waters off the Coast of Somalia.

75. However, with the exception of those four above-mentioned cases and save what we will observe in relation to “Joint Investigation Teams” there is no arrangement of any type for the exercise of jurisdiction in the other cases. Thus it can be concluded that in practice, neither the mechanism of transfer of proceedings suggested by the Palermo Convention (article 21) nor other procedures that could concentrate the prosecution when several jurisdictions are involved have been widely applied.

76. In some cases, the consequences of not concentrating prosecution is worth considering. In KEN 1, a case in which a criminal organization was involved in shipping a large quantity of cocaine from Kenya to the Netherlands, two Dutch brothers living in Kenya who played a leading role in the organization were among those prosecuted; despite considerable investigative and prosecutorial cooperation, the extradition of one of the two brothers was not granted to Kenya, and the brothers were tried separately in the two countries. In NIG 1, a case involving cybercriminals and advance-fee fraudsters based in Nigeria, the United Kingdom and Spain, the expert emphasized that United States authorities facilitated the appearance of a victim of a massive fraud as a witness at the trial in Lagos, but noted that at the same time this individual was being prosecuted in the United States for the same episode of fraud. In evaluating the relevance of the case, the expert stressed that one of the successful results of the Nigerian trial was that it demonstrated that this person was a victim, saving him “from 20 years imprisonment, as most countries still treat fraud victims as accomplices”.

77. However, the experts expressed firm satisfaction with the results of international cooperation in cases where several cooperating countries exercised criminal jurisdiction at the same time. Moreover, the experts commented that parallel criminal proceedings for the same offences not only mutually reinforce the coordination and effectiveness of national prosecutions, but also facilitate granting requests for basic assistance in relation to individual law enforcement or prosecutorial activities. In SER 1, a drug trafficking case of immense transnational dimensions involving numerous arrests and drug seizures in various countries on three continents, an enormous amount of international cooperation was applied to all stages of the process, but there was no need to resort to coordination measures in the exercise of national jurisdictions. International cooperation made it possible to cover all aspects of the organized crime activities in all the affected countries. The expert noted that large criminal groups can be dissolved only if proceedings are carried out simultaneously in all affected countries, otherwise loopholes in law enforcement and judicial interventions allow subgroups to maintain or revitalize the illicit network. The central role in SER 1 was played by Serbia, the country where the leaders and coordinators of the entire network were arrested. Remarkably, no drugs were seized in Serbia, which justifies the term “mobile organized crime” that has recently been adopted by some experts to indicate networks and criminal groups whose criminal conduct cannot be associated with specific territories, but only with transnational illicit business. The Serbian expert emphasized this last point at the end of her commentary on the case: “the organizer of the criminal group was a Serbian citizen, performing his activities and managing the whole business of the organized criminal group from the territory of Serbia. In this context, it was a real challenge for the Serbian law enforcement authorities to initiate, develop and finalize the whole case since the main seizures and other investigative activities were carried out on the territory of other countries.”

78. Another point concerning jurisdiction is that even though the main target of the Palermo Convention is transnational crime, the Convention itself does not create any obligation to overcome the limits of the territoriality principle,<sup>53</sup> and in some instances the lack of extraterritorial jurisdiction may be a concrete obstacle to the development of the investigation and prosecution needed to cover aspects of the criminal activity scattered across a series of countries. In cases of human trafficking from the Philippines to nearby countries (e.g., PHI 13), the expert indicated that the Philippine legal system was still not prepared to deal with the transnational

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<sup>53</sup>The only exception is provided by article 15.4 of the Convention, which obliges the Parties to establish extraterritorial jurisdiction in connection to the application of the *aut dedere aut judicare* (“extradite or prosecute”) rule of article 16.

dimension of the crime, in part because the principle of territoriality prevented the courts from gaining jurisdiction over individuals involved in the trafficking offence outside the national territory. The concrete result was that only recruiters and traffickers operating in the country of origin were investigated. In this connection, the Canadian expert announced at the final expert meeting that a new bill extending Canada's criminal jurisdiction to the offences of trafficking in persons committed outside Canada by a Canadian citizen or a permanent resident would soon become law.

79. In another case, SPA 3, the Spanish authorities intercepted in international waters a ship suspected of transporting foreign migrants to be smuggled into Spain and prosecuted the foreign smugglers. In this case, Spanish criminal jurisdiction was recognized on the basis of a very complex construction of the provisions of the Palermo Convention and its Protocol against the smuggling of migrants.<sup>54</sup>

80. The transnational nature of the offence may also create problems in the distribution of investigative and prosecutorial functions among the domestic authorities of a given country. This occurs, for example, when transnational trafficking requires law enforcement authorities on the borders crossed by the traffickers to conduct most of the investigations, but jurisdiction and subsequent investigative activities are assigned to authorities of other locations on the basis of various criteria. An interesting example of this situation is the case ITA 7 involving the smuggling of cigarettes from Ukraine to Italy; the smuggling operation was directed by individuals resident in Poland and managed by a criminal association with people operating both in Italy and abroad (including couriers entering Italy). The expert pointed out that the tendency of Italian courts is to recognize the jurisdiction of the Italian authorities located where the leaders are resident, or if they are unknown or resident abroad, or where the illegal consignments are delivered, or where members of the criminal organization reside for the purpose of receiving and distributing the smuggled goods. In the expert's estimation, this causes difficulties for law enforcement agents in the border area, and more generally, it provides another reason to examine whether, within domestic systems, sufficient consideration has so far been given to the necessity of adjusting legal criteria to the exigencies imposed by the transnational nature of organized crime.

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<sup>54</sup>In contrast to the 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which provides a specific rule on criminal jurisdiction in the case of interception of suspected vessels on the high seas, the Palermo Convention and the Protocol against the smuggling of migrants, while they include a very similar rule for intervention in international waters, they do not include any special norm on the establishment of criminal jurisdiction in relation to offences committed outside the national territory.





## II. INVESTIGATION AND PROSECUTION

### A. INVESTIGATIVE AND PROSECUTORIAL APPROACHES TO ORGANIZED CRIME

*Summary: Proactive approach: intelligence-led investigations; holistic approach and prevention effects; the planning stage of investigation; extended investigation and the criminal policy of dismantling the criminal group.*

81. At the investigation and prosecution stage all the relevant information on the criminal activities is gathered and synthesized in a systematic coherent manner to reach a final verdict. Whether a given case will remain a simple isolated case or whether it has the potential to develop into a complex, transnational investigation is determined during this phase. Also in this stage, practitioners must ensure that the overarching criminal policy to pursue and dismantle the entire criminal organization or network and to deprive it of its illicit assets to prevent future criminal activities by the group is effectively implemented. Thus it is crucial to adopt an appropriate investigative approach and strategy and follow a structured investigation plan to search for and collect all relevant evidence and establish the necessary connections among persons and facts.

82. The investigation and prosecution of organized crime have a distinctive character. First, they often involve particularly complex and prolonged activities because of the sheer quantity of criminal activity involved. Second, they often require specialized practitioners and the use of special investigative techniques and prosecutorial methods. The experts contributing to the *Digest*, who all have extensive practical experience with organized crime cases, agreed that this kind of specialization is essential to effectiveness, and that a proactive approach is indispensable in combating organized crime.

83. The experts discussed the different meanings associated with the concept of proactive (as opposed to reactive) investigation. In general terms, they agreed that the proactive approach implies that the criminal justice response is only one component of the fight against organized crime and it is necessarily complemented by preventive measures. Another outcome of the proactive approach is the establishment of offences that extend the purview of incrimination (conspiracy, criminal association). However, the proactive approach has an impact within the narrower frame of investigative and prosecutorial activity itself, where it determines the selection

of precise patterns. As the French expert underscored, a proactive approach does not necessarily correspond to an exclusive typology of investigative measures, but instead to a shared professional attitude towards taking initiative instead of reacting to events. At the same time, proactive initiatives require specific practices and legal tools, the frequent use of which is amply demonstrated in the collected cases.

84. Two general aspects have been identified in the proactive approach. The first consists in the law enforcement initiatives being intelligence-led: the collection and analysis of information on the history (if any), composition, means, objectives and modus operandi of criminal groups, as well as on illicit networks and markets, are indispensable components of investigations and also are frequently their trigger. The United States expert said that in proactive, investigations, intelligence operates on two levels: in the development of a strategic concept about “what kinds of activities or person pose a social threat and deserve more law-enforcement attention than would result from normal reactive policing based upon complaints or routine patrol observations”; and in “assembling existing information and gathering, analyzing and exploiting new information about the target activity or person, leading to direct enforcement actions or to development of information sources to permit future enforcement action of high value”.<sup>55</sup> This aspect appears in numerous cases, including, for example, three Mexican cases involving human trafficking and child pornography (MEX 1, 2 and 3), where the expert underscored that the competent investigative authority “implemented proactive techniques of investigations ... which contributed as source of confidential information complementary to the information on the criminal activity presently carried on ... so permitting a better planning and controlling of the operations”.<sup>56</sup>

85. As many of the cases in the *Digest* demonstrate, the second typical aspect is that, an investigation, regardless of its origins (e.g., in reaction to a single and limited episode of crime), is purposely developed into an extended inquiry, potentially concerning the entire structure and criminal conduct of groups or networks, and aimed at preventing possible future offences. Investigative techniques such as surveillance of communications, undercover operations and controlled delivery are also motivated by this expansion of matters under investigation.

## CASES OF EXTENDED INVESTIGATION

The expansion of investigation is illustrated, inter alia, by HUN 1 and HUN 3. In HUN 1, a large number of individuals and legal entities, all densely organized in a single criminal group, engaged in cyberfraud. The Hungarian expert emphasized that wiretapping some of the suspects allowed information to be gathered on other members of the organization and about other crimes. In HUN 3, an important case involving the smuggling of Vietnamese migrants into Europe, the expert suggested that the general information gathered in the intelligence phase (essentially by wiretapping) and the holistic approach taken by investigating the entire phenomenon of Vietnamese immigration, enabled Hungarian law enforcement authorities to prevent future crimes, especially by sharing experience with consular authorities and helping to eliminate loopholes in migration control procedures.

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<sup>55</sup>This perfectly corresponds to the roles attributed to criminal intelligence in the 2010 UNODC Concept Note, “The Use of Criminal Intelligence and Special Investigative Techniques in the Fight against Transnational Organized Crime”, according to which intelligence also works for “strategic decision-making (such as allocating resource level against a particular problem)”. See p. 3.

<sup>56</sup>The expert stated that, in applying these investigative techniques, the Mexican authorities followed suggestions in the *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (Vienna, UNODC, 2009), and the *Manual sobre la investigación del delito de trata de personas. Guía de Autoaprendizaje* (San Jose, Costa Rica, ILANUD, 2010). In the latter publication, the proactive approach, considered specifically in relation to human trafficking offences, is presented as a way for law enforcement agencies to initiate and advance the investigation independent of a complaint and cooperation of the trafficked victims.

The combined goals of suppression and prevention are well illustrated by SER 3, a case involving a criminal group with a pyramidal hierarchical structure whose 27 members operated in Serbia, Croatia, Montenegro and Bosnia and Herzegovina. Through a coordinated investigation, the case was prosecuted and the members convicted in Serbia and in Bosnia. The Serbian prosecution has so far led to the conviction of six members of the group for criminal association, drug trafficking, extortion, possession of firearms and other minor offences. According to the Serbian expert, “proactive investigation using conventional police measures and special investigative techniques (optical supervision and surveillance of phone and other communications) was carried out in this case” and “the Serbian police intensively worked on collecting the intelligence on the organized criminal group, which was suspected of preparation of several criminal offences—robbery, extortion, kidnapping, murder and drug trafficking”. As a result of “the prompt and coordinated action of law enforcement agencies from Serbia and Bosnia and Herzegovina these criminal offences were prevented”.

In UKG 3, the investigation of a very large operation trafficking in drug-cutting substances was initially viewed by some as a useful tool for gathering intelligence on and identifying high-level drug dealers, but as the investigation progressed and the enormity of the criminal enterprise became apparent, the focus shifted towards prosecuting those involved in trafficking the drug-cutting substances themselves with the goal of target hardening the United Kingdom against this trade.

The offenders were ultimately charged with conspiracy to supply illicit drugs by trafficking per se licit substances, but in his evaluation of the case, the expert emphasized the preventive aspects: legitimate chemical producers and suppliers who cooperated with the investigating team all introduced serious target hardening into their sales process and implemented a “know your customer” policy; in addition, the United Kingdom Border Agency seriously tightened regulations for the importation of a number of chemicals, limiting the amount allowed into the country.

In presenting SAF 1, the expert pointed out elements of the investigation process that clearly correspond to the same proactive and holistic strategy, with a large role for intelligence. He considered the investigation part of a comprehensive project to “identify and target syndicates involved in the illicit dealing and export of PGMs (precious group metals); to gather the necessary intelligence against targeted role players, investigate their activities, prosecute the syndicate’s enterprise and ensure recovery processes by means of asset forfeiture. This will include the establishing of an assay facility to assist the syndicates with the analysis of stolen PGMs, the buying-up of the illicit PGM product from identified targets in undercover operations, the selling of the illicit PGM product to the principle targets, and eventually acting as transporter of the illicit product for the targeted exporter to freeing destination in order to then identify the foreign dealer and the off-shore accounts utilized by the syndicates, for purpose of recovery at a later stage.” Without a doubt this is a truly proactive programme of action.

The case USA 6, involving a suicide committed by an overdose of sleeping pills, grew into the prosecution of a significant structure comprising Internet facilitation companies (IFCs), doctors and pharmacists involved in the illicit dispensation of medications ordered over the Internet. The investigations led to arrest warrants for doctors who had issued prescriptions without medical records or physical examination of the patients, for the pharmacists who dispensed the drugs and for the managers and the heads of the IFCs; it also resulted in the freezing of several million dollars in ill-gotten gains of one of the IFCs. The decisive moment for the expansion of the investigation was when the pharmacist who provided the drugs to the suicide victim decided to cooperate with law enforcement and the detectives devised a plan to utilize him in an undercover operation.

In this connection, the United States expert noted: “Some key suspects will generally have to be ‘flipped’ as informants ... as they can provide crucial evidence and testimony ... You may have to ‘give up’ one of your key targets to take down four or five medium size targets. The pharmacist in this case was extremely important as ... the ‘lynch pin’ that tied the case together between the IFCs and the doctors.”

86. Naturally, this kind of long-term investigation presupposes an adequate preparatory phase involving detailed planning and careful analysis of the means available. From SAF 1 a planning scheme can be derived

that in its general outline is representative of the investigations in many of the collected cases, and which would have helped in the initial structuring of others:

## PHASING INVESTIGATION: A MODEL

### Phase 1. Preparation:

- Gaining an understanding of the operating environment and legislative/regulatory framework where applicable;
- Assessing the identified priority areas for investigation;
- Obtaining and analysing relevant information and intelligence in order to identify further priority areas and targets to include in a motivation for authorizations;
- Designing the relevant strategy for gathering court directed intelligence, investigation, prosecution and asset recovery;
- Assessing findings to establish whether sufficient information exists to justify the issuing of an authority to investigate;
- Drafting a motivation for the necessary authority to investigate;
- Identifying relevant resources (multidisciplinary), public private partnerships and stake holders;
- Finalizing governance, oversight and reporting structures;
- Establishing operational budget;
- Preparing a report on findings and recommendations.

### Phase 2. Authorized investigation. During this phase the investigation focuses on:

- Conducting the detailed investigation of the identified priority areas through infiltration/penetration and undercover process;
- Applying infiltration strategy (safe house and undercover agents);
- Preparing case files and evidential record;
- Determining the appropriate remedial action and obtaining the necessary authority for arrest, search and seizure;
- Finalizing indictments;
- Obtaining necessary authorities to execute nationally and internationally mutual legal assistance (MLA) requests;
- Executing arrest nationally;
- Conducting search and seizure nationally and internationally;
- Freezing and recovery of assets;
- Reporting on findings and recommendations.

### Phase 3. Remedial action and project close-out. During this phase the team focuses on:

- Preparing case files for prosecution;
- Preparing additional mutual legal assistance requests for gathering of information and evidence internationally;
- Instituting appropriate legal/criminal action, including the criminal prosecution and recovery of proceeds of crime, in appropriate instances;
- Preparing a final report on findings and recommendations.

87. In connection with several human trafficking investigations, the Philippine experts underlined the need for the agencies involved to put more time into planning the entire operation. They also pointed out the need for constant and proper integration of law enforcement and prosecutorial functions when planning and executing complex investigative actions: “Philippine prosecutors, by their quasi judicial functions, are prevented to be involved during the investigation of the case. With the newness of our law on trafficking in persons, the involvement of the prosecutor during the investigative stage is crucial so as to guide the police ... .” It is worth comparing this comment with what the expert from the United Kingdom said about UKG 3, a case with numerous aspects that were both novel and problematic: “Given the United Kingdom legal system, the Crown Prosecution Service (CPS) do not direct the investigation, but they do work closely with the investigative team especially on complex investigations” and “once the investigation was underway advice was sought from the CPS as to the most likely and appropriate offences to be considered. This influenced the direction of the enquiry and established without doubt the extent of evidence, which would be required. Continued liaison with the CPS was most beneficial.”

88. The investigation and prosecution of organized crime are also especially complex because they may need to follow several parallel investigation lines, including beyond national borders. The structured organization of available means and resources is of vital importance to the success of these types of investigation. For ITA 18, a case involving more than 170 suspects participating in a complex structure made up of 11 criminal associations linked together to commit crimes related to banknote and document counterfeiting, with branches spread throughout Italy and other European countries, the history of the investigation, which ran from November 2005 to January 2009, is summarized below:

## **EXTENDED INVESTIGATION PLAN ON A COMPLEX NETWORK (an Italian case of currency counterfeiting)**

### **Preliminary analysis**

- Stage 1. Acquisition of counterfeit samples;
- Stage 2. Examination of counterfeits;
- Stage 3. Check in the CMS (Counterfeit Monitoring System);
- Stage 4. Check in law enforcement databases.

### **Central stage**

- Stage 5. Surveillance of suspects;
- Stage 6. Criminal offence notice to the judicial authority;
- Stage 7. Telephone tapping, shadowing, etc.;
- Stage 8. Confirming results (arrests and seizures);
- Stage 9. Identification of all members belonging to the criminal organization;
- Stage 10. Dismantling of production sites.

### **Final stage**

- Stage 11. Dismantling of the whole criminal organization;
- Stage 12. Execution of arrest warrants.

**Continuation of the investigation, final dismantling of the criminal organization:**

- Identification of other production sites;
- Seizure of films;
- Arrest of the heads of the criminal organization.

**Prevention of the re-establishment of the criminal groups:**

- Measures affecting illicit property;
- Seizure of assets.

89. Despite some specific aspects related to the particular crime involved, this latter scheme also confirms the method of progressively expanding the investigation that has already been noted as a general operational characteristic of the policy of “dismantling the criminal group”. The complex network described in this case and the expert’s commentary lead to some important general conclusions and highlight several good practices that are also relevant to other types of organized crime cases. ITA 18 is not only a very interesting example for understanding the more peculiar features of counterfeiting currency, but also illustrates how a general anti-organized crime strategy aimed at the complete dismantling of the criminal group or network can be applied in practice in the investigation and prosecution strategy of a single case.

90. The most salient passages of the expert’s commentary on ITA 18 include:

- The first illegal transactions of counterfeit currency between the individuals under surveillance will help decrypt the language used in the negotiations, and identify the places and modes of exchange, the individuals and their lifestyle.
- Gradually going up along the distribution chain, ... it will be possible to carry out investigations into the individuals managing increasingly higher distribution levels and also to identify and seize the warehouse of counterfeit banknotes and subsequently to break into the illegal print shop.
- The time span of the investigative development and evidence collection ... clearly depends ... on the structure of the criminal group identified. The experience gained ... has shown that people caught in flagrante delicto during law enforcement verification activities, especially in the Campania territory [Italy], are immediately replaced in the illegal activity by others ... A kind of criminal solidarity ... so that people close to the person arrested (usually family members), during his/her detention, are almost automatically involved in the activity of the criminal group in order to ensure the criminal structure to continue to be operational.
- This interchange of people makes it necessary to draw up a final criminal offence notice ... containing a request for the issuance of arrest warrants against all members of the organization thereby avoiding the immediate re-establishment of the criminal activity.
- Following the execution of precautionary measures granted by the Court, the activity strictly connected with the [original] investigation can be considered completed; however, it is necessary to continue the investigation to identify the general managers and financiers of the whole criminal activity. They are the ones who, on the one hand, will take care of the arrested persons ... by supplying lawyers of choice and financial support to the families, and, on the other hand, will try to set up new illegal print shops with the aim of ensuring the continuation of the criminal activity.

91. The methodological lesson here is that the process of gradually moving investigations from the low level of the final retailer up to producers and financiers in order to disclose the entire human and material structure of the criminal organization can be profitably used against trafficking of any illicit commodities (this objective also provides the main rationale for recommended investigative techniques such as controlled delivery). The policy observation agreed on by the experts is that efforts to dismantle criminal organizations and/or annihilate an entire set of criminal patterns are of a fundamental strategic value in the fight against organized crime. The validity of this observation is reinforced by the comments of those experts who have personal experience with difficult prosecutions of serious organized crime offences yet do not seek simplification and shortcuts in the investigative stage. On the contrary, they believe that positive changes in their practice and successful prosecution can arise from “more extensive case build-up,” to use the words of the Philippine expert in PHI 8 and other cases of human trafficking. This leads to the following general conclusion:

### LESSON LEARNED

**When dealing with organized crime cases, investigative and prosecutorial agencies should adopt a holistic and proactive approach to cover the largest number of persons involved and the widest possible range of criminal activity carried out by criminal groups. This enables the criminal justice response to be an effective part of a strategy aimed at dismantling the organization and preventing future offences. This requires, inter alia, careful planning of operations and a functional relationship among all the participants.**

**The legal framework, economic means and professional culture and expertise of the practitioners should adapt to this approach as much as possible.**

92. It should be noted that the Palermo Convention not only suggests or imposes specific criminal policies, but also stresses the importance of constantly evaluating their impact. Pursuant to article 28, paragraph 3, States Parties shall consider monitoring their “policies and actual measures to combat organized crime and making assessments of their effectiveness and efficiency”; although this is a generic provision, it is significant because it is mandatory and norms of this kind are not very common in international criminal law treaties.

## B. INSTITUTIONAL SETTING: SPECIALIZED ENTITIES FOR ORGANIZED CRIME

*Summary: Specialization as a factor of effectiveness; functions of specialized offices or units; various types of specialization: police/prosecutors, centralization/decentralization, suppression/prevention, organized crime/other crimes; relation to non-law enforcement entities.*

93. The adaptation of national legal frameworks to the strategy mentioned above may also encompass, along with appropriate criminalization and investigative tools, organizational arrangements such as the creation of offices or units specifically charged with organized crime-related activities. The cases presented in this *Digest* demonstrate that these kinds of arrangements have been considered necessary and have been adopted: almost all the cases highlight special/specialized entities as active participants in the investigation and prosecution of organized crime cases. Although the Palermo Convention and its Protocols include several provisions on the need to provide adequate training to personnel, including through international cooperation, they do not

explicitly address the establishment of these special/specialized entities. This is probably because decisions on the organization and distribution of public functions are usually considered to belong to the realm of domestic law.<sup>57</sup> Because the case presentations only mention the special entities in passing or only provide a brief description of their operational functions, an in-depth comparative study on the nature and aims of different national solutions could be useful to demonstrate both potential and tested models for countries that intend to reform this aspect of their system.<sup>58</sup>

94. It can be concluded from the available cases that special entities are usually created for one or more of the following purposes: facilitation of gathering, managing and effectively using information about the criminal activity of concern; development of specific expertise in criminal policies and related methods against organized crime; creation of enhanced capability in the use of specialized investigative and prosecutorial legal tools; coordination or unification of investigations and prosecutions to avoid possible clashing initiatives and maximize the results of prosecutorial efforts against specific criminal groups or networks.

95. In commenting on the Mexican human trafficking cases, the Mexican expert also stressed that the establishment of specialized entities facilitated the creation of multidisciplinary working groups and the general exchange of professional experiences and lessons learned among practitioners. The expert from El Salvador emphasized that special entities can also react more effectively to pressure applied to investigators and prosecutors by criminal groups; he also stressed that the creation of specialized units at the central level within the Salvadoran prosecution service (*Fiscalía General*) required complex studies and a detailed proposal to determine the criteria for assigning cases to these units instead of ordinary offices.

96. However, these reasons and considerations are not sufficient to determine a single organizational model. Different solutions are possible, as the cases also demonstrate. The variations can be roughly identified on the basis of the following elements:

- Whether special/specialized entities are only established for the police or also for the prosecutors.
- The level at which the specialization is determined:

The prosecution of USA 1 was conducted by one of the Strike Force Offices, which the United States expert explained, “contain prosecutors dedicated exclusively to the investigation and prosecution of organized crime” in general, while the police agencies achieve a more specific level of specialization (this case was handled by a Eurasian Organized Crime Squad). In SPA 1, the Spanish expert emphasized the importance of having specialized police units for drug trafficking involving shipping containers, highlighting that the level of required expertise might not be targeted to a category of offences or a type of criminal organization, but—at a lower level—to a specific mode of criminal conduct.

- Whether the specialized functions are exclusive and whether they are centralized in a single national office:  
Regarding centralization, the Italian system for handling offences committed with the involvement of mafia-type criminal organizations is a distinctive one, because the prosecutorial activity is only partially centralized. The prosecutions are carried out by regional prosecutors’ offices (in total fewer than 30); the National Anti-Mafia Directorate (DNA) directly supports the prosecutorial activities of the regional offices and also collects and manages general information and documentation on all the proceedings, thus serving as a centralized intelligence and operational focal point.

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<sup>57</sup>The only relevant exception is article 18, paragraph 13 of the Convention, which obliges the Parties to establish a central authority to receive the request of mutual legal assistance: exceptions are justified by the function of international cooperation performed by that ad hoc office.

<sup>58</sup>A collection of synthetic notes presenting the main features of national special/specialized entities can be found on the CD-ROM included with this publication.

- Whether the special/specialized entities are only for criminal justice-related activities or are also responsible for prevention activities.
- Finally, whether special/specialized entities are established to deal with organized crime or specific offences:

In the first instance, the entities can be competent for organized crime in general (in line with a generous concept of organized crime), or they can be created to respond to specific forms of organized crime that are considered particularly dangerous in a certain country at a certain time (e.g., the exclusive jurisdiction of Italian prosecutors for organized crime basically concerns only mafia-type organized crime). The second alternative is illustrated by numerous examples of entities with exclusive competence for specific offences, such as drug offences, human trafficking, illegal migration, etc. Specialized functions related to single categories of offences (regardless of whether they are originally justified by specific historical circumstances, such as the establishment of a Special Prosecutor Unit for Piracy in the Kenyan cases) might retain their value even if other official entities exist for organized crime in general.

In some of the collected cases, organized crime-related offices cooperated with offence-specific specialized units. This was the case, for instance, when cybercrime or environmental crime units provided essential expertise to investigations carried out by specialized anti-organized crime law enforcement authorities (see the Serbian and Brazilian cases, respectively). In SPA 6, the expert underscored the need for specialization in money-laundering offences, and more generally in financial investigations. The Jamaican expert pointed out that in her country, the Organized Crime Investigations Division (which has the mandate to investigate all criminal matters of an organized nature, including cybercrime, financial crimes, fraud, electronic fraud, extortion, human trafficking and kidnapping) regularly collaborates with the Transnational Crimes and Narcotics Division and with the Financial Investigations Division.

Other cases, particularly in relation to human trafficking, raise the question of whether the exclusive jurisdiction of entities specialized in a single category of offence would not, in some circumstances, serve as a *de facto* limit on the holistic investigation method dictated by the policy of disrupting the criminal group. Similarly, some doubts arise with regard to the co-presence of various entities specialized in single categories of crimes and others competent for organized crime in general, and whether this circumstance might confine the action of the latter to limited forms of organized crime, thus contradicting the aim of using specialized methods of investigation for an expanded area of organized crime typologies. In total, the cases seem to indicate that the dialectic between specialization (a single type of “final” offence) and lesser specialization (organized crime in general) is extremely complex and difficult to resolve, and any solution depends on the characteristics of each national criminal justice system.

97. Another important dimension that emerges from the cases is the relevance of inter-institutional coordination, as well as cooperation and coordination between investigative and prosecutorial authorities and authorities outside of law enforcement. In MEX 1, a case involving trafficking in persons, the expert stressed the importance of cooperation with the National Migration Institute. Both BRA 6 and HUN 2 clearly indicate the importance of cooperation with the tax authorities, especially in investigations of the finances of alleged offenders. In addition, the Philippine human trafficking cases offer an interesting organizational experiment: the establishment of an extended “focal group” comprising law enforcement authorities, other administrative authorities and non-governmental organizations, which handles cases from their initial profiling to investigation and provides assistance and protection to the victims. The cases PHI 1 and PHI 4 highlight the role of non-governmental organizations in particular in supporting victims as an essential component of successful proceedings.

## C. SPECIAL INVESTIGATIVE TECHNIQUES

*Summary: Successful use of special techniques; respect for human rights; insufficient regulation in some countries; surveillance, undercover operations, controlled delivery.*

98. Article 20 of the Palermo Convention obliges the Parties to “take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations” in national proceedings as well as in the context of international cooperation. Cases where these techniques have not been used are very few: phone-tapping is almost always used, frequently in combination with undercover operations and controlled delivery. Indeed, in some of the cases the experts referred to wiretapping as a traditional means of investigation. Thus these types of investigative action are called “special” not because they are exceptional or rare, but for other reasons.

99. What qualifies these investigative techniques as special is the fact that their use is often costly and complicated, requiring specialized expertise and, sometimes, advanced technological knowledge and instruments; their use may in some cases pose ethical problems, while in others it may endanger the operators; and most important, the use of these special investigative techniques may infringe on fundamental individual rights (e.g., the right to privacy). In principle, therefore, these techniques should only be used when there is no reasonable alternative to obtain information or evidence. However, despite this problematic scenario, a clear and indisputable conclusion can be drawn:

### LESSON LEARNED

**Special investigative techniques are often irreplaceable in the investigation and prosecution of organized crime. They are at the root of the successful results achieved in the most serious and complicated investigations illustrated by the cases.**

100. Especially in criminal proceedings for human trafficking offences, special investigative techniques, such as telephone interceptions and other forms of surveillance, have sometimes only served as a supporting source of evidence, corroborating witnesses’ statements or other pieces of evidence. In other significant cases, however, surveillance, undercover agents and controlled delivery have provided the fundamental information on entire international networks, the composition and modus operandi of criminal groups, identification of individual offenders, preparation of future offences, etc.—and thus were essential to the intelligence-led, proactive investigative approach that probably would not have been possible to adopt with only more basic techniques.

101. However, because of their problematic nature, special investigative techniques require detailed domestic regulation, which is still lacking in some countries. This is true of Nigeria, the expert observed, lamenting the detrimental impact on the investigation in NIG 1 of the lack of a law on telephone interception. Moreover, as the expert from Kenya underscored, if a country has no law on special investigative techniques, evidence gathered through special techniques legally adopted by the cooperating authorities of another country cannot be used.

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## ■ ARTICLE 20. SPECIAL INVESTIGATIVE TECHNIQUES

1. *If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the condition prescribed by its domestic law, take the necessary measure to allow for the appropriate use of controlled delivery, and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime.*

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102. By attaching a series of requirements and conditions to the obligation to establish these techniques, the very language of article 20 of the Palermo Convention indirectly reveals the need for careful and thorough regulation: “If permitted by the basic principles of its domestic law,” “within its possibilities and under the conditions prescribed by its domestic law,” etc. It also shows that the negotiators of the Convention acknowledged how difficult it would have been to attempt to introduce any specific international norms on the use of the techniques, even of a very general nature. At the same time, the absence of any minimum level of harmonization among domestic laws may create difficulties for international cooperation: for example, in the presentation on UKG 1, the expert regretted that although Trinidad, Guyana and Granada were able to cooperate in surveillance, any evidence they gathered would not be admissible in court because it was only reported in a written summary to the police superior, with no logs or recordings to back it up. In discussing UKG 2, another drug trafficking case, the same expert noted that information gathered from a type of telephone interception carried out legally in the Netherlands but not allowed in the United Kingdom provided valuable assistance in the United Kingdom prosecution, and that “the ability to disclose this material as part of the case undoubtedly contributed significantly to the guilty plea”.

103. From its privileged perspective on the functioning of the Convention, UNODC noted: “In the ten years since the signing of the UNTOC Convention, the use of special investigative techniques has remained an area where much more capacity building, as well as legislative assistance, is needed.”<sup>59</sup>

104. Special techniques such as interception of communication or controlled delivery focus on the relationship between offenders; thus they are particularly valuable when dealing with a criminal organization since they can help uncover its structure along with its criminal conduct. However, because the use and value of special techniques are shaped by the distinctive features of national legal systems, extracting general “good practices” from the cases in this *Digest* would be an uncertain exercise. Therefore, the following boxes contain only fragmentary comments on some characteristics of these techniques.

### SURVEILLANCE

The Palermo Convention refers to “electronic and other forms of surveillance,” which includes all types of surveillance other than controlled deliveries or undercover operations. The term “surveillance” therefore covers traditional modalities of police action (e.g., shadowing), as well as the use of modern electronic technologies (interception of e-mails, telephones and other electronic messaging; listening and tracking devices; video devices). The object of such surveillance can be the communication, movements or other behaviours of the person under investigation.

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<sup>59</sup>UNODC, “The Use of Criminal Intelligence and Special Investigative Techniques in the Fight against Transnational Organized Crime” (2010), p. 3.

Taking into account this broad concept of surveillance, one expert has observed that surveillance per se does not generally require the authorization of a magistrate. When an individual is suspected of involvement in a crime, police can keep a close watch on all his movements, actions and contacts.

And indeed, some of these surveillance activities can be carried out using traditional methods such as shadowing or observation (including with a high-powered telephoto lens) that do not require authorization. However, for surveillance methods that are considered more invasive, precise legal requirements are usually prescribed, sometimes entailing a complex authorization mechanism. Between these two extremes there are a series of surveillance techniques that require prosecutorial/judicial control in some countries but not in others. For example, “electronic tailing” using sophisticated GPS technology does not need authorization in many countries, yet the United States Supreme Court decided that according to United States law, in using GPS to monitor a car’s movements for four weeks, the police had performed a search that should have not been done without a valid search warrant.<sup>60</sup>

To identify and track individuals, investigators also use video surveillance when the layout or accessibility of the suspect’s location prevents the use of traditional surveillance techniques, or when the suspect operates in high-crime areas.

With regard to telephone interception, the Brazilian expert stressed the difficulties that frequent delays in granting judicial authorization created in BRA 8 and BRA 9. In CAN 10, the decision of the Supreme Court of British Columbia is instructive, highlighting how many detailed aspects must be taken into consideration in evaluating whether the requirements of the domestic law are fulfilled when granting permission for telephone interception.

In SWI 1, a drug trafficking case in which other evidentiary tools were considered unsatisfactory in proving that the same criminal group initiated various episodes of illicit conduct, the Swiss expert concluded that telephone surveillance could still reveal communication among members of the organization, and thus secure conviction for the offence of participation in an organized criminal group.

The Italian experts raised a problematic “technical” aspect of telephone interception: interpretation. They noted that when wiretapping is used in investigations of transnational organizations, it is often difficult to find interpreters of a foreign language, and even more challenging to find interpreters who understand dialects used in small communities. Even when qualified interpreters are found, they may be reluctant to provide interpretation for fear of possible retaliation by fellow nationals under investigation. The trustworthiness of the interpreters is also a concern.

## UNDERCOVER OPERATIONS

As is the case with “surveillance,” the Palermo Convention does not define “undercover operation”. The term usually indicates operations—distinct from surveillance and controlled delivery—involving the infiltration of an individual into an organized criminal group or illicit network to participate in its general criminal activity or in a specific illicit business. The infiltrator plays an appropriate role in order to discover and report on crimes committed and planned, as well as on the structure and membership of the organization.

In presenting ITA 19, an important drug trafficking case, the expert explained the main features of the Italian legal system governing undercover operations and the main line of its development. Italian undercover operations evolved from a limited institution consisting in simple simulated purchases of drug substances into a complex method used in cases involving practically all serious offences and with different subjects serving as undercover agents in a variety of roles. For example, foreign law enforcement agents can go undercover in Italian investigations, receiving the same protection as domestic officers. Individuals who support the criminal activity of the undercover agent without having a direct role in the commission of an offence (e.g., the owner of an apartment or a car, a chemistry expert who analyses drug substances, etc.) can also receive protection.

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<sup>60</sup> *United States v. Jones*, see <http://supreme.justia.com/cases/federal/us/565/10-1259>.

Significantly, Italy implemented an important legal reform of undercover operations when it ratified the Palermo Convention. The basic rules for undercover operations are now contained in the ratification law together with all the other measures adopted to implement the Convention.<sup>61</sup>

The substantive pillars of the systems are:

- (a) Undercover agents are immune from criminal liability: if undercover operations are properly authorized and documented, a discriminating circumstance benefits the undercover agent;
- (b) Action by an undercover agent shall not constitute instigation;
- (c) Undercover agents are protected in various ways during the operation and at trial, where the agent's name and physical appearance remain secret.

Other cases provide examples of national legal systems that expressly allow the creation of legal entities to simulate business activities as part of an undercover operation. A separate section of the Serbian Law containing Special Provisions on Procedure for criminal offences of Organized Crime, Corruption and other exceptionally aggravated criminal offences specifically regulates "Rendering Simulated Business Services and Rendering of Simulated Legal Services". In SAF 1, a case of illicit trafficking in precious metal products (PGM), the experts said that the undercover operation encompassed the following activities: "the establishing of an assay facility to assist the syndicates with the analysis of stolen PGMs, the buying-up of the illicit PGM product from identified targets in undercover operations, the selling of the illicit PGM product to the principle targets, and eventually acting as transporter of the illicit product for the targeted exporter to foreign destinations to then identify the foreign dealer and to identify the off-shore accounts utilized by the syndicates, for purposes of recovery at a later stage."

In SPA 5, a case involving drug trafficking from the United States to Spain, controlled delivery and undercover agents were used in both countries. The case presentation showed that the drugs were transported entirely under the supervision of the infiltrated agents. Nonetheless, only two medium-level traffickers were arrested, while the top levels of the criminal groups, which were the target of the investigation, were not penetrated. The expert surmised that it became necessary to arrest the two traffickers to protect both the American and Spanish undercover agents, which made impossible the arrests of higher-ups planned for after delivery of the drugs.

The case USA 2 is an excellent example of the massive use of undercover operations in complex investigations targeting an entire transnational illicit network of dangerous criminals. In this case, two investigative operations led to the conviction of more than 80 people conspiring in the United States, Canada, China and Taiwan Province of China to traffic in drugs, arms, counterfeit currency, tobacco and other goods. The expert stated that "the undercover operations, which occurred simultaneously on both United States coasts, were integral to the success of this organized crime investigation and prosecution ... they were the only effective means to infiltrate the criminal conspiracy and identify a broad array of culpable parties. The eight-year investigation began when FBI undercover agents, posing as underworld criminals, helped make sure that shipping containers full of counterfeit cigarettes made it past United States Customs officers undetected. Over time, as undercover agents won the smugglers' trust, they were asked to facilitate other illegal shipments ... ."

Furthermore, "[t]he investigation was a long term, complex undercover investigation. Several undercover federal agents dealt directly and repeatedly with targeted criminals in locations within the United States and abroad. Most of their conversations were recorded. Many were also surveilled. Since smuggling was the core criminal offence, controlled deliveries were also useful investigative tools ... The evidence obtained through the undercover operation provided the bulk of incriminating evidence."

The experts discussed at length various aspects of undercover operations, including who could serve as an undercover agent. Whereas some countries only allow domestic law enforcement officers to go undercover, other countries permit third parties to do so. The practical consequences and the impact of these different

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<sup>61</sup>Law No. 146, art. 9 (16 March 2006). The provisions of this law were modified by Law No. 136 (13 August 2010), which expanded both the categories of offences in which the technique can be used and the range of law enforcement agencies that can be authorized to use them.

approaches must not be underestimated, as they raise important questions related to, inter alia, the physical security of officers who work undercover in more than one operation over a period of time, as well as the security of their identity.

## CONTROLLED DELIVERY

The Palermo Convention defines controlled delivery as the “technique of 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”.

Among the various special investigative techniques, controlled delivery has the longest history of international law, probably because it was initially developed to combat transnational drug trafficking. Already in 1988, article 11 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances included norms regulating the use of controlled delivery at the international level.

The *Digest's* cases illustrate many situations where controlled delivery was used, frequently in connection with undercover operations and always in a context of transnational offences and international investigations. ALB 1, a case involving cocaine trafficking from South America to Albania, offers a linear example of controlled delivery. It started in a transit country, the Netherlands, where a shipping container containing the drug was discovered. The Dutch authorities contacted the Albanian prosecutors and promptly agreed on the modalities of the controlled delivery, which led to the arrest of two of the organizers in Albania. The readiness of the Dutch authorities to immediately inform the destination country and participate in the operation deserves credit for the launch of a successful operation.

In ITA 6, a case of trafficking in forged artworks attributed to important modern artists such as Miró, Lichtenstein, Picasso and others, the international controlled delivery had to be arranged very quickly between Italian and United States law enforcement agencies. Italian police officers observed two people in a parking lot at the Rome airport signing “Miró” on lithographs immediately destined for the United States. Having received authorization by telephone, the officers did not make the otherwise mandatory seizure of the artworks, but instead managed to coordinate a controlled delivery operation with the FBI. Allowed to pass through United States Customs, the fake lithographs were delivered to art galleries on the West Coast, where one was the object of a simulated purchase and all the others were seized.

In KEN 1, a drug trafficking case involving extensive international cooperation among law enforcement agencies in Kenya, the Netherlands and the United Kingdom, the latter two countries utilized controlled delivery. As noted earlier, the Kenyan expert lamented the fact that the “lack of clear provisions on modern investigation techniques hampered the use of some of the evidence obtained in the Netherlands using such methods”.

Most of the Russian drug trafficking cases (RUS 1 to 6) also demonstrate a wider use of international controlled delivery.

In cases of cross-border controlled delivery, it is essential to maintain continuous communication between the competent authorities of the cooperating countries to ensure that both sides are fully informed and aware of each other's movements. Gaps in communication can be detrimental to the operation and may even lead to counterproductive results, such as loss of the delivered items.

105. Special investigative techniques play a fundamental role in counteracting organized crime, but to properly introduce them into domestic legal systems requires national legislators to make a host of difficult decisions. In this regard, international technical assistance in establishing both fundamental substantive principles and detailed legal requirements and technical mechanisms for each investigative method can be extremely helpful

to many countries. The Hungarian expert pointed out a remarkable example of the hazards of controlled delivery that is still under study and discussion in the European Union: whether “controlled delivery of persons”—i.e., controlled transport of smuggled migrants or trafficked persons—should be absolutely forbidden or allowable within certain limits.

106. In relation to special investigative techniques and other investigative activities intrinsically invasive, the Canadian expert explained the system of “general warrants”.<sup>62</sup> General warrants are judicial authorizations permitting the use of investigative techniques that infringe on privacy interests but are not specifically covered (or even contemplated) by other statutory search provisions. They are most often used in the course of ongoing investigations so the police may act without revealing the true nature of their investigation to persons of interest. General warrants permit, among other things, covert entries into dwellings and other real property, staged “thefts” or breaking and entering, and video surveillance.

107. For instance, in a Canadian investigation of illicit drug production, a general warrant authorized the police to make numerous covert entries into a drug laboratory for a period of 59 days. The warrant was necessary both to gather evidence and to ensure the safety of the public (i.e., to ensure that the laboratory was not on the verge of exploding and/or contaminating the surrounding area). While an ordinary search warrant could have achieved some of these same objectives, only a general warrant authorizing repeated secret entries would allow the police to observe and document the production process, identify accomplices, and so on. Given its many advantages, the general warrant assures a considerable degree of flexibility in the management of investigative operations, which the police can better adapt to the concrete and evolving circumstances of cases. In addition, because the general warrant authorizes the possibility of repeated actions, the cumbersome and lengthy process of requesting and obtaining separate authorizations for each investigative activity can be avoided.

108. Finally, there is the complicated question of whether the development of bilateral or multilateral agreements, as suggested in paragraph 2 of article 20 of the Palermo Convention, would facilitate the use of special investigative techniques in the context of international cooperation. The *Digest’s* cases do not indicate the existence of such agreements, nor do they suggest specific areas where such agreements should intervene. On the contrary, article 20, paragraph 3, which addresses situations in which a general agreement on controlled delivery does not exist and countries make case-by-case decisions, mentions “financial arrangements” and “understandings with respect to the exercise of jurisdiction by the States Parties concerned” as two possible issues to regulate.

## D. OTHER INVESTIGATIVE TECHNIQUES

**Summary:** *Special cases: searching discarded trash and “undercover information about a crime”; identification of offenders and possessors of SIM cards; protection of witnesses.*

109. Many other investigative techniques can produce results that are just as fruitful as those considered above. In USA 1, the case in which Pavlo Lazarenko, former Prime Minister of Ukraine, was convicted of money-laundering, wire fraud and extortion, decisive evidence was gathered by searching the discarded trash from the office of an accomplice over a period of months. Under United States law, no search warrant is required for this activity as long as there is no physical entry of property owned or controlled by the person discarding the trash. The theory is that, by placing documents, correspondence, etc., in a rubbish bin beyond

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<sup>62</sup>Criminal Code of Canada, section 487.01.

one's property and control, the owner has abandoned the property and cannot object to its examination. These covert searches produced essential investigative leads that helped to secure the cooperation and testimony of Lazarenko's associate (who agreed to a plea bargain and reduced sentence), which in turn enabled Lazarenko's prosecution. This case is an excellent example of how traditional and innovative methods can effectively combine in a single investigation.

110. A peculiar example is ITA 3, in which the investigators of an important case of transnational trafficking in cultural property found themselves in a situation where they could not avoid seizing some fake paintings that they would have preferred to leave on the market to help them uncover higher levels of the illicit network. The seizure was executed with the prosecutors' authorization, but the offences listed in the warrant were adjusted so they would not reveal knowledge of the forgery to the traffickers, who did not suspect the main focus of the investigation. The expert called this procedure "undercover information about a crime".

111. An important, and often problematic, element of an investigation of transnational crimes is the precise identification of the offenders. The Italian experts, in discussing several of their cases, underlined this dimension, emphasizing that identification can become a serious obstacle if the laws of the alleged offender's country of origin make it easy to change a personal name (or more generally, to change one's identity) and to acquire new documents. International channels of police cooperation can help to establish whether identity documents issued by another country are genuine, but the experts emphasized that this is not always an easy task. One possible identification scheme suggested by Italian law and practice is described in the box below. Identification is meant as the investigative activity needed both to attribute personal data to an individual person, and to connect a person to the crime scene or narrative, or to previous cases.

### **IDENTIFICATION OF OFFENDERS IN THE ITALIAN SYSTEM**

The Italian Penal Code provides for the punishment of individuals who refuse to provide information about their own identity. The identification of a person under investigation and of a person who is in a position to "report on circumstances relevant to the construction of facts" is a typical mandatory criminal police activity regulated by the Code of Criminal Procedure.

A suspected person must be identified through his/her documents and when necessary, by taking his/her fingerprints, photographs and anthropometric details as well as through other types of enquiries. An important aspect of the process is the so-called police detention for identification purposes: if a person under investigation or a potential witness either refuses to produce identity documents or produces identity documents which it is reasonable to believe are falsified, police officers can take the individual to their offices and keep him/her there long enough to make an identification, but in no case for more than 12 hours. The judicial authority is immediately notified that the individual has been detained, and can order the release of the person.

Taking fingerprints allows the police to determine whether the person has already been fingerprinted and to compare the fingerprints with those taken at the crime scene. The fingerprints are immediately fed into a national databank accessible to all domestic police forces. In general, police databases are a major resource for criminal police officers, providing them with important data for the identification of offenders.

DNA profiles from hair, sweat, blood, bodily fluids and epithelial cells provide a reliable means of identification. The presence of DNA at the crime scene is an important element in investigations: it can be compared with the suspect's DNA profile (if available), it can be used to search for the person to whom it belongs, and it can be used to exclude other suspects. In some cases, Italian legislation allows the compulsory collection of DNA samples; previous authorization by the judicial authority is required.

Facial composites and physiognomic comparisons can facilitate an identification when an eyewitness makes a statement describing the suspect's facial features or other distinctive features (e.g., scars, tattoos, missing limbs). A physiognomic comparison between subjects filmed by video cameras during a criminal action and persons under investigation can be similarly useful.

112. At their meeting in Cartagena, the experts also touched on the problem of identification of persons in conjunction with telephone interception. Differences in national legislation and the cumbersome aspects of international assistance were mentioned. The necessity of submitting requests for rogatory commissions to authorize requests for information about the identity of subscribers and users of telephone numbers is often cited. As can be readily understood, this request inevitably conflicts with the strict time limits on operations to identify offenders as well as with the adoption of restrictive measures. Discrepancies have also been noted with regard to the obligation to identify SIM card purchasers; in some States, card sellers are under no such obligation. Discrepancies also exist among national laws concerning voice recordings made without the consent of the person concerned.

## E. PROTECTION OF WITNESSES

*Summary: The central role of witnesses; the Palermo Convention's provisions concerning witnesses; the Italian witness protection system and its shortcomings; identity change.*

113. Article 26 of the Palermo Convention underscores the importance of cooperative offenders, plea agreements, mitigation of penalties and immunity from prosecution. The case presentations often referred to these issues, but did not elaborate on them. However, at the first meeting several experts pointed out the extremely significant role of the witness protection system in their national experiences. This system covers both witnesses to crimes and so-called collaborators of justice—i.e., individuals involved in or associated with criminal organizations who decide to cooperate with the prosecution in order to secure leniency in their own prosecution. Oral testimony is still the cornerstone of any evidentiary construct in proceedings related to mafia groups or other types of criminal organizations, so the possibility of being protected from intimidation and retaliation can be a decisive stimulus to cooperate for many accused persons or witnesses.

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### ■ ARTICLE 24. PROTECTION OF WITNESSES

1. *Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.*

2. *The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*

(a) *Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate,*

*non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;*

*(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.*

*3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.*

*4. The provisions of this article shall also apply to victims insofar as they are witnesses.*

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114. The Palermo Convention mandates that Parties shall give effective protection to witnesses (article 24, paragraph 1) but leaves it to domestic laws and regulations to determine the concrete protection measures and procedures (article 24, paragraph 2). The Convention implicitly acknowledges that special protection measures are costly and in some circumstances difficult to implement, by specifying that the obligation to adopt them stays “within the means” of the State Party concerned. The United Nations has assisted States in developing or strengthening witness protection laws and establishing witness protection programmes. In 2008, UNODC published a manual of good practices in witness protection that compares national witness protection systems and highlights the fundamental practical difficulties, legal conditions, requirements and effects on proceedings and persons entailed by a protection system and its implementation in concrete cases.<sup>63</sup>

115. At the first meeting, the Italian experts provided an introduction to their national witness protection system, which is described in the box below. The Italian system is in line with the Convention and in agreement with one of the conclusions in the UNODC guide to good practices: “the effects of witness protection programmes are maximized when there is a multipronged approach, starting with the application of temporary police measures [reflected in the Italian scheme] [and] continuing with the use of evidentiary rules during court testimony.” This latter aspect, which includes, for example, permitting testimony via videoconferencing, is not demonstrated by the cases studied in this *Digest*.<sup>64</sup>

## PROTECTION OF WITNESSES AND COLLABORATORS OF JUSTICE

### The Italian system

If standard measures of protection for collaborators of justice and witnesses (e.g., home/workplace surveillance and escorts) are inadequate and the individual is at risk of serious endangerment, a programme of special measures can be implemented.

A “collaborator of justice” is someone facing criminal charges who agrees to cooperate by giving testimony on mafia-type criminal association offences or other offences listed in the law. A “witness” is any victim of a serious

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<sup>63</sup>*Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime* (Vienna, UNODC, 2008).

<sup>64</sup>Article 24, paragraph 2(b) of the Convention establishes that witness protection measures may include, “without prejudice to the rights of the defendant, including the right to due process: ... providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communication technology such as video links or other adequate means”.

crime or any person who has witnessed a crime and testifies at trial, thus exposing himself/herself to serious and imminent danger (e.g., witnesses of criminal acts that occurred in their home or immediate environment, such as relatives of members of criminal groups; entrepreneurs and traders victimized by a racket). A witness can be put under protection regardless the type of crime.

The cooperation must be trustworthy. Within 180 days from the time the person has expressed willingness to cooperate, s/he must supply critical information, in particular all information he or she possesses that can help to reconstruct criminal acts and circumstances and to locate and arrest the perpetrators.

The protection programme is determined by a Central Commission (the Deputy Minister of the Interior, two judges and five police officers) upon request of a public prosecutor, for a period of 6 to 60 months. A temporary plan can be adopted as soon as the intention to cooperate is expressed. The special protection measures can be extended to persons living permanently with the collaborator or witness, or persons at risk because of their relationships with the collaborator or witness.

The protection system is based on the principle of "camouflage", i.e., the achievement of complete anonymity. The subjects relocate to a new, secure place of residence and are given a provisional identity document valid during the protection term only. In particularly sensitive cases, regulations also provide for a permanent change of identity.

Assistance measures can also be prescribed to facilitate social reintegration and provide material support (accommodation, transfer fees, health care, legal and psychological assistance, and allowances for those who are unable to work).

The Central Protection Service and 19 local operational units are responsible for the implementation of the programme through, inter alia, direct assistance to the protected persons; contacts with agencies to facilitate their human relationships (school, health, work, etc.); and assistance to the local police in ensuring the safety of the protected persons.

The protected persons commit themselves to: observing security rules and cooperating actively in carrying out the protection measures; being questioned, examined or being available for any acts to be carried out; not disclosing facts of the proceedings to anyone other than law enforcement and judicial authorities and their defending counsel; and not contacting any person involved in criminal activities. Collaborators of justice, but not witnesses, shall specify all personal properties and assets at their disposal, directly or indirectly, which will be seized.

The programme is terminated when the conditions that called for it no longer exist, or because of non-compliance with the obligations, perpetration of offences, unauthorized return to the place of origin or revealing the new identity or place of residence. The protected person can also quit the programme with a written renunciation.

The programme may include measures to facilitate social reintegration when the cooperation is completed. For collaborators of justice, these measures include a monetary allowance for two to five years, plus a lump sum for accommodation. For witnesses, these measures cover a period up to 10 years and guarantee the person's standard of living prior to admission to the programme. Witnesses receive a sum of money as a reimbursement for lost income, can obtain secured loans and sell their real estate to public revenue bodies at market price; and if they are civil servants, they preserve their job on paid leave.

116. In the Italian experience, the national protection system has some shortcomings, which the Italian experts pointed out to show how difficult it is to achieve efficiency in this area. At the international level, the main concern is the lack of a shared legal framework, which prevents the relocation of witnesses and collaborators to other countries unless the relevant countries sign a bilateral agreement. Another concern regarding international cooperation is the limited use of technologies such as videoconferencing; increased use of videoconferencing to examine persons under special protection measures would be highly desirable not only to preserve an adequate level of security, but also to reduce or eliminate travel costs for protected persons and their escorts.

117. Another serious problem in the Italian experience concerns the granting of a new permanent identity to foreign nationals since it first requires granting Italian citizenship. Some problems also arise from the provisional new legal identity granted for the term of cooperation. Though it has an important function in concealing the individual's true identity, thus increasing safety, the new identity document creates many problems for the individual's future social reintegration. Indeed, when the document is returned to the competent authorities at the end of the programme, if the holder intends to stay in the place where he or she has been living under protection (the so-called "safe area"), he or she will have to use the old identity, which will create practical difficulties and confusion in the social environment. Another problem arises from the fact that non-EU citizens require a residence permit to stay in Italy. At present they are given residence permits for humanitarian reasons, but a proposal to change the regulation has been put forward that would create an ad hoc residence permit for witnesses and collaborators.

118. In several countries, in the past, the need to provide adequate protection to the judiciary had led to the introduction of so-called "faceless judges and prosecutors". These measures, however, have been gradually abandoned on the ground of human rights and due process considerations.



### III. INTERNATIONAL LAW ENFORCEMENT AND JUDICIAL COOPERATION

#### A. THE INTERNATIONAL LEGAL BASIS

**Summary:** *The double purpose of the Palermo Convention; reciprocity and bilateral instruments as the basis for international cooperation; the use of the Palermo Convention to globally align cooperation practices; international cooperation on non-transnational offences.*

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##### ■ ARTICLE 1. STATEMENT OF PURPOSE

*The purpose of the Convention is to promote cooperation to prevent and combat transnational organized crime more effectively.*

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119. Article 1 of the Palermo Convention states that the fundamental purpose of the instrument is to promote cooperation to prevent and combat transnational organized crime more effectively. This statement of purpose shall be construed as having a double meaning: it refers to the rules of the Convention on operational collaboration of law enforcement and judicial authorities, but it also refers to those norms of the Convention aimed at reinforcing domestic prosecution and prevention.<sup>65</sup> For this latter purpose, the Convention is a tool to enlarge the number of States that take effective measures against organized crime (in line with the Convention's obligations and suggestions) in all possible sectors of intervention, not only in the area of international cooperation.

120. The cases in this *Digest*, as well as the comments of the experts at the meetings, confirm that in recent years many countries have shared the philosophy on which the Palermo Convention is based, and have

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<sup>65</sup>The Convention also includes provisions on international technical assistance as a means to strengthen domestic systems.

frequently reacted to its call by introducing important reforms of their national legal systems. It is against this general background of compliance with the general aim of the Convention that the second, more specific dimension of article 1—the operations of law enforcement and judicial entities in an international context—is here analysed in light of the presented cases.

121. In this connection, it must be acknowledged that the existence of a solid legal basis is not in itself sufficient for the effective development of international assistance practices. What is also needed, to cite an expert who spoke at the second meeting, is “a modern professional culture of international cooperation,” meaning the inclination to expand both the analysis and the investigative approach of a case to cover its transnational dimensions and to devote operational resources to coordination with foreign authorities. Some cases demonstrate that the lack of this kind of professional attitude and objective resources not only damages the quality of the response when assistance is requested by another country, but also creates a limited inclination towards requesting cooperation. The South African expert provided a representative description of these shortcomings in his presentation on law enforcement cooperation at the first expert meeting, in which he highlighted difficulties that do not originate from deficiencies in legal systems but instead from domestic criminal policy and general strategic attitudes: (a) lack of willingness to get involved in a crime that occurred in another country (“your crime is not my crime”); (b) lack of understanding of local criminal phenomena (e.g., trafficking in precious metals or endangered species); (c) insufficient crime awareness; (d) non-compliance with international legal instruments; and (e) conflicting perceptions of priority issues at the global and regional level. In subsequent discussions the experts agreed that developing global and regional technical assistance programmes focused on the promotion of international cooperation and establishing coordinating bodies could also help to overcome these general drawbacks.

122. Many provisions of the Palermo Convention concern law enforcement and judicial cooperation: the fight against money-laundering (article 7); cooperation for purposes of confiscation (article 13); extradition (article 16); transfer of sentenced persons (article 17); mutual legal assistance (article 18); joint investigations (article 19); special investigative techniques (article 20); transfer of proceedings (article 21); and various forms of law enforcement cooperation (article 27). The Convention’s three Protocols also contain some provisions on mutual assistance and administrative and law enforcement cooperation in relation to particular aspects of the crimes they address.

123. Obviously, the legal framework for international cooperation goes well beyond the provisions of the Palermo Convention. An analysis of the cases collected in this *Digest* leads to the conclusion that in situations where the granting of cooperation is subject to the existence of a legal provision that permits it (e.g., for extradition and, usually, for mutual legal assistance), domestic legislation (whether accompanied or not by an assurance of reciprocity) and bilateral or regional agreements are the prevailing legal basis.

124. This is in line with the “substitutive/supplementary” nature of the Convention,<sup>66</sup> and it may indicate that practitioners still tend to favour domestic laws and bilateral or regional arrangements over international treaties. There are many possible reasons for this: because these laws and arrangements are tailored to respond to precise needs of the countries involved; because they often allow continued use of a time-honoured modus

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<sup>66</sup>The function of the Palermo Convention as at least a partial alternative to bilateral and regional legal instruments for mutual legal assistance is clearly stated in article 18, paragraph 7: “Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty apply unless the States Parties agree to apply paragraphs 9 to 29 in lieu thereof. States Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.” Similarly, in the field of law enforcement cooperation, article 27, paragraph 2 establishes that “States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies ... In the absence of such agreements or arrangements ... The Parties may consider this Convention as the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention.”

operands; or because they better correspond to the specificities of the national legal systems and, in particular, satisfy special procedural requirements. Yet it must also be noted that the cases do not support—but also do not dismiss—the hypothesis that in the area of judicial cooperation, national authorities may not be fully aware of the potential of multilateral criminal law conventions or may tend to ignore them. For example, in relation to ROM 2, a case of transnational cyberfraud, the Romanian expert pointed out that one country that was requested to provide assistance asked for assurance of reciprocity, which was unnecessary since both countries were Parties to the Palermo Convention.

125. Thus, considering that article 18 of the Convention provides for complete regulation of mutual assistance (which in some cases can result even more favourable than bilateral treaties), the previous conclusion is complemented by the following recommendation:

### LESSON LEARNED

**Using the provisions of article 18 of the Palermo Convention should be encouraged in the area of mutual legal assistance. These provisions provide a complete and modern legal regime that may foster more effective assistance in criminal proceedings that fall within the Convention’s scope of application. In line with article 18, paragraph 7, the application of norms of the Convention should be promoted when they facilitate cooperation, as an alternative to norms found in bilateral or regional treaties and domestic laws.**

126. In ROM 2, the Romanian prosecuting authorities requested formal mutual assistance (information, material evidence, documents, statements of witnesses) from more than 20 countries, of which only two were not parties to the Palermo Convention. They requested assistance on the basis of “reciprocity”, bilateral agreements and the Palermo Convention. The expert concluded that “the most challenging issue with regard to the international judicial cooperation is to coordinate all these when different legal instruments are applicable, different channels and means of communication can be applied and different time responses are required depending on the procedures each country has”.

127. This comment provides a good starting point for considering an aspect of the Palermo Convention that perhaps has not received sufficient attention. Besides offering a legal basis for cooperation in situations where no other basis is available and providing procedures that in some circumstances facilitate cooperation more than other existing agreements, the Convention may also serve as a tool to advance more uniform cooperation practices globally. In cases such as ROM 2, where the coordination of multiple sources of assistance is essential, the Convention’s general application by all potential requested countries would be in itself a tremendous spur to effective cooperation.<sup>67</sup> Despite evident differences between intraregional cooperation and worldwide cooperation, there are still reasons to believe that at the global level, countries may take advantage of the Palermo Convention as regions have done with regional instruments.

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<sup>67</sup>The provisions on mutual legal assistance in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the United Nations Convention against Corruption are very similar to those in the Palermo Convention and could also contribute to the creation of consistent mutual legal assistance practices for all types of transnational crimes.

128. The important role of the European Convention on Mutual Legal Assistance of 1959, for example, is abundantly emphasized in the Russian cases, and in Europe, where this instrument has been widely used for decades also within the European Union, it is commonly held that it shaped the practice of mutual assistance within the region by establishing fundamental legal concepts and standards that now constitute a common culture of mutual legal assistance and also contributed to the formation of related domestic systems. Therefore, without denying the value and possible advantages offered by bilateral and regional instruments, the recommendation implicit in the Romanian expert's commentary should be carefully weighed as supporting the following conclusion:

### LESSON LEARNED

**The Palermo Convention as a legal basis for law enforcement and judicial cooperation should also be promoted as an important factor in the development of globally aligned practices of cooperation.**

**In cases where several countries are requested to provide cooperation, the possibility should be explored of using the Palermo Convention as the sole legal basis valid for all of them, with the aim of facilitating greater homogeneity and coordination in granting assistance.**

129. Offences that are not transnational can also require international criminal justice cooperation, which reinforces the utility of the Palermo Convention as a tool for aligning these practices. Often in cases involving solely domestic offences, national authorities are in a position to request assistance because the investigation uncovers international elements (e.g., the alleged offender or items and sources of evidence are located abroad).

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## ■ ARTICLE 16. EXTRADITION AND ARTICLE 18. MUTUAL LEGAL ASSISTANCE

### The broad scope of application

#### *Article 16, paragraph 1*

*This article shall apply to the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 (a) or (b) involves an organized crime group and the person who is the subject of the request for extradition is located in the territory of the requested State Party ...*

#### *Article 18, paragraph 1*

*States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention as provided for in article 3 (...) where the requesting State Party has reasonable grounds to suspect that the offence referred to in article 3, paragraph 1 (a) or (b) is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party and that the offence involves an organized criminal group.*

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130. While in the area of law enforcement cooperation article 27 of the Palermo Convention does not allow exceptions to its scope of application, which remains limited to transnational offences, the provisions on judicial cooperation don't limit the application of the Convention to the strict bounds of "Transnationality". Article 16 autonomously fixes the scope of application for extradition, avoiding any reference to the transnational nature of the offences for which extradition is requested. For mutual legal assistance article 18 still requires the transnational nature if the offence is still required, but its concept is expanded well beyond the one used in article 3 to define the general scope of the Convention.

## B. LAW ENFORCEMENT COOPERATION

*Summary: Exchange of intelligence on organized crime and related bilateral agreements; the role of early cooperation and spontaneous information sharing; the necessity of continuous coordination of investigations carried on by multiple countries; direct, informal cooperation.*

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### ■ ARTICLE 27. LAW ENFORCEMENT COOPERATION

*States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention.*

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131. As already noted, many of the cases in this *Digest* are characterized by intelligence gathering and expanding the investigation beyond individual "final offences". These two features also have a considerable impact on the modalities of international cooperation, especially in relation to transnational offences. The cases provide a dual picture on intelligence sharing: while there are interesting and significant examples of cooperation in gathering and exchanging information on already identified criminal groups and offences, there is no indication in the cases of cooperation in conducting inquiries and exchanging information of a more general and a priori nature that article 27 of the Palermo Convention addresses. Indeed, article 27, and in particular paragraph 1, prescribes cooperation at a very early stage when available information may only indicate the suspicion of criminal conduct (paragraph 1(e) deals with the general modus operandi of criminal groups), and cooperation for the preliminary identification of offences (paragraph 1(f)).

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### ■ ARTICLE 27. LAW ENFORCEMENT COOPERATION

*1. ... Each State Party shall, in particular, adopt effective measures:*

- (a) To enhance and where necessary establish channels of communication ...*
- (b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention ...*
- (c) To provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes.*
- (d) To facilitate effective coordination ... and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;*

*(e) To exchange information with other States Parties on specific means and methods used by organized criminal groups ...*

*(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.*

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132. The lack of information on this specific aspect of law enforcement cooperation may be a result of the nature of the collected cases, which cover investigation and prosecution of offences but not the entire range of international activities of law enforcement agencies. In addition, as the Serbian expert noted (with particular regard to subparagraphs (e) and (f) of article 21, paragraph 1), the lack of information might also simply reflect that cooperation against transnational crime has reached a stage where it is considered a fully integrated part of routine working practice. In any case, another kind of analysis would be needed to determine how the above-mentioned prescription of the Convention has been implemented, starting with the study of bilateral or regional agreements on law enforcement cooperation (which traditionally also cover criminal intelligence sharing) and their implementation.

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## ■ ARTICLE 27. LAW ENFORCEMENT COOPERATION

*2. ... States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies ... In the absence of such agreements or arrangements ... the Parties may consider this Convention as the basis for mutual law enforcement cooperation ...*

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133. Article 27, paragraph 2 of the Convention also obliges States Parties to consider entering into bilateral or multilateral agreements on direct cooperation between their law enforcement agencies. The Swiss expert provided the text of a bilateral agreement between Switzerland and Germany. Largely inspired by the Schengen agreements in force among some of the European Union Member States, this bilateral agreement focuses on cooperation at the border and transfrontier criminal activities; nevertheless, its range of obligations is very broad and covers cooperation for preventive purposes.<sup>68</sup> It is very likely that this kind of agreement helps law enforcement agencies to establish routine exchange of information on the general nature of criminal phenomena and early alerts on specific episodes of criminal activity. The selected extracts from the agreement in the box below illustrate its far-reaching scope.

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<sup>68</sup>Agreement between the Swiss Confederation and the Federal Republic of Germany on Police and Judicial Border Cooperation (Agreement between Switzerland and Germany on Police).

## EXAMPLES OF THE SCOPE OF APPLICATION OF THE SWISS-GERMAN CROSS-BORDER POLICE COOPERATION AGREEMENT

### Article 1. Common interests in security matters

The contracting States shall inform each other about the relevant aspects of their strategy for the fight against criminality, as well as on major initiatives in the police sector that might affect the other contracting State interest. In the development of law enforcement strategies and the application of police measures, the common interests of the parties when dealing with security issues shall be taken into account. Where one contracting State considers that the other contracting State should take certain steps to ensure the security policy, it may submit a proposal to this effect.

### Article 2. Joint security analysis

The contracting States shall endeavour to reach a level of information as uniform as possible regarding the state of police security. For this purpose, they shall, periodically and whenever circumstances require, exchange points on the situation established according to specific criteria and conduct joint analysis, at least once a year, on the relevant aspects of the security situation.

### Article 3. Threat prevention and the fight against crime

The contracting States shall strengthen their cooperation in the prevention of threats to security or public order as well as in the fight against crime, while safeguarding the security interests of the other contracting State. This cooperation takes place within the limits of domestic law, to the extent that this Agreement does not provide otherwise. In the fight against crime, international cooperation between national central units, notably planned within the International Criminal Police Organization (INTERPOL), is supplemented by the following provisions.

### Article 11. Spontaneous communication of information

In special cases, the police authorities of the contracting States shall spontaneously exchange information that appears to be necessary to help the user to prevent concrete threats to security and public order or suppress offences.

134. The Italian experts provided another example of exchange of general intelligence, introducing the model of an agreement that Italy has entered into with a considerable number of countries. In this agreement, the law enforcement agencies of the two States agree not only to conduct, when appropriate, coordinated activities to prevent and suppress organized crime, but also to encourage a general exchange of information “of technical and operative nature” on the criminal phenomena of interest.

## EXTRACTS FROM ITALIAN MODEL BILATERAL COOPERATION AGREEMENTS

The text of the model precisely dictates:

The Parties, in conformity with their national legislation and consistent with international law, undertake to facilitate the exchange of technical and operational information, on the relevant criminal phenomena, and conduct joint activities to prevent and combat organized crime.

And to this end,

The parties shall ensure the systematic and detailed exchange of information, upon request or by its own initiative, related to the relevant criminal phenomena.

#### **Establishment of a Working Group**

Another Italian model agreement creates a permanent Working Group for both intelligence exchange and operational cooperation; its provisions specify:

Both parties, in conformity with their national legislation and international law in force, undertake to set up an Italo-XXX Working Group pursuing the following objectives:

1. The analysis and exchange of information, including operational, of mutual interest on criminological phenomena, the agents involved, their modus operandi and structure, which are of common interest. The results will facilitate the development of a mapping, including computer-based, of criminal organizations operating in both countries;
2. The development of informational-operational measures, which aim to identify and locate the assets of illicit origin, also through the establishment of joint investigative mechanisms; and the acquisition of a deeper understanding of their system of law in matter of seizure and confiscation of criminal proceeds, in order to identify the best legal instruments to attack the illegal assets.

135. The Serbian expert described the range of areas in which international information exchange can occur in relation to a case that required very intensive international cooperation: “Law enforcement agencies in operation (police, prosecution, judiciary) intensively developed professional contacts and cooperation between the members of their services and foreign partners, in order to efficiently update their know-how, as well as to encourage the exchange of information and data on their respective legislation, including in particular the exchange of laws and other legal acts, analytical materials, statistics and reports on organized crime and laundering of money derived from offences committed by organized criminal groups.”

136. In ELS 1, the Salvadorean expert explained that “the case started as a result of exchange of intelligence information between the agencies for drug control of El Salvador, Nicaragua and Costa Rica, following occasional confiscations of drug substances carried out by the authorities of the last two countries in the period 2004 to 2008. After having combined all information and intelligence, the investigative activity started against the organization, which included formal judicial action in all three countries.” The prosecution and proceedings were carried out in El Salvador, which was the homeland of the main organizers of the trafficking operation and the heads of the criminal organized group. In BRA 5, a transnational cybercrime case involving Brazil, the Netherlands and the United States, the investigation was triggered by intelligence gathered in the United States, which ultimately did not participate in the prosecution of the offences. The Italian investigation of ITA 17, a case involving the discovery of counterfeit euro notes in Poland, Spain and Italy, was initiated in response to general information obtained “in the framework of international cooperation”; all three countries cooperated in the prosecutorial and judicial stages.

137. In other cases (e.g., BRA 10), investigations were triggered by requests for mutual legal assistance that led the requested authorities to discover related offences that had been committed within their jurisdiction. In UKG 2, the sequence of intelligence sharing and investigative cooperation was very complex: in 2005, the United Kingdom police began to investigate the activities of a number of career criminals involved in the importation and distribution of cocaine, and they identified links to Spain and Holland. As a result, “good

intelligence sharing protocols were established with Dutch and Spanish law enforcement”; in 2007, the Dutch police received intelligence that enabled a series of arrests in the United Kingdom and the start of disclosed investigation and prosecution, during which evidence gathered by the Dutch authorities also proved useful. In SER 1 the expert noted that: “After careful and detailed analysis of relevant facts and available intelligence, a police file was opened; results of the analysis were compared with the facts and findings from the intelligence sources in various countries.”

138. On the whole, the cases show that many international sources of information and initiatives can trigger an investigation, and foreign intelligence can play various roles. The case BRA 13, involving illicit trafficking of endangered species, also indicates that sharing information for the purpose of criminal investigation can originate in a prior non-criminal context. The Brazilian expert emphasized that in this case the international cooperation, which was essential to the successful investigation, occurred among Member States of the Convention on International Trade of Endangered Species of Wild Flora and Fauna (CITES) and initially consisted of a common effort to identify and profile the criminal conduct under investigation. In this regard, it should be noted that CITES is a normative scheme for international regulation of licit traffic that provides few criminal law measures and tools. It would be interesting to study whether international regulatory regimes for licit traffic (e.g., in drugs or firearms) provide an institutional environment and practical opportunities for international intelligence sharing for the suppression of related illicit trafficking, and if so, how strong they are.

139. In the Nigerian cases, the expert highly valued “the swift sharing open-source non-confidential information between international law enforcement” as an effective way to initiate an investigation and international cooperation. In this connection, it should be noted that the Palermo Convention does not include a specific norm on “spontaneous information” in the provisions on law enforcement cooperation, though it is included in the Swiss-German agreement referred to above and in some multilateral instruments of criminal law.<sup>69</sup> However, the entire set of cooperative mechanisms in article 27 can also trigger an investigation in a foreign country, particularly the obligation under paragraph 1(f) to exchange information and coordinate administrative measures for the purpose of early identification of offences. Furthermore, article 18, paragraphs 4 and 5 of the Convention, which deals with mutual legal assistance, foresee a “spontaneous information” mechanism as a non-mandatory measure and regulate its effects in detail. It should not be excluded that these provisions could also be used as a legal basis by law enforcement agencies. At the meeting in Rome, the group of experts agreed on the relevance of spontaneous information exchange and noted that above all it concerns law enforcement agencies and prosecutors: their direct contacts may lead to the wider use of early alert for offences concerning other jurisdictions. At that same meeting the Italian expert stressed that in cases of trafficking in cultural property, for example, the exchange of information among law enforcement agencies often represented the “first level of dialogue” with a foreign State, and emphasized how critically important this was in the field of cultural property offences where there are no specialized mechanisms in place to promote international operational assistance.<sup>70</sup>

140. What is certain, in light of the cases studied in this *Digest*, is that in dealing with transnational organized crime, law enforcement cooperation should start at an early stage. Hypothetically, in cases such as ALB 1, an exemplary instance of international controlled delivery in drug trafficking, or ROM 1, where intelligence gathered internationally permitted the construction of a chart detailing the links of a human trafficking network operating in Spain, France, the United Kingdom and Italy, the investigations would not have been so

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<sup>69</sup>See, for instance, article 10 of the 1990 Council of Europe Convention on the laundering, tracing, seizure and confiscation of the proceeds of crime.

<sup>70</sup>See, however, the new mechanism created by INTERPOL discussed in chapter V.

successful, or would not have been initiated at all, if foreign authorities did not promptly involve the most interested countries in the response to the suspected criminal conduct. Thus, we may conclude:

### LESSON LEARNED

**When dealing with transnational organized crime, law enforcement agencies should make contact as soon as possible with the other jurisdictions involved. If communication is initiated during the earliest phases of law enforcement intervention (e.g., before establishing the definitive investigative programme) this will greatly facilitate the following coordination of investigative action.**

141. The expert presentations clearly demonstrated that in transnational organized crime cases, cooperation at the levels of law enforcement and prosecution is seldom confined to the provision of assistance in relation to single limited acts; rather it consists of a series of continuous and interlinked activities conducted in complex combinations by two or more countries. This implies coordination of the investigative initiatives, including their programming, timing and division of labour. This kind of cooperation is often supported by more or less formal structures that provide a framework that facilitates coordination. As previously mentioned, the establishment of joint investigative teams emerges as the highest level of institutional measures in investigative cooperation, but, even in their absence, the transnational nature of organized crime offences is driving—at least in the most complex cases—the novel concept of co-management of investigation and prosecution. This notion is a direct and unavoidable consequence of the nature of transnational crime, especially with regard to international trafficking (of any type of commodity sort) involving the commission of linked offences on multiple national territories by individuals and groups performing distinct but functionally connected roles.

142. In presenting SER 1, a drug trafficking case in which five persons were prosecuted in Serbia and 47 in other countries, the Serbian expert reflected that “it is not enough to coordinate activities of bodies from different states, but it is necessary to have the same entities planning and implementing those activities during the whole process—the same representatives of police, prosecutor’s office and courts. Such a methodology is only possible ... if the joint investigations are conducted targeting the overall criminal organization and its criminal activities in the territories of all the involved countries. Criminal proceedings of large proportions most often have to be conducted simultaneously in all the involved territories. It seems that large criminal groups can be dissolved in this manner only. Otherwise, there is a danger that specific subgroups of the organization, which fail to be covered by the proceedings ... continue their operations, renew the network and revitalize the entire organization very soon.” This observation highlights that the complexity of international cooperation against organized crime and the “prolonged coordination” it requires stem from the transnational nature of organized crime, and that this complexity and long-term dimension are both critical to the criminal policy of dismantling the criminal organization.

## A CASE OF COMPLEX COORDINATION

The case ITA 8 provides a good example of complex coordination in the investigation of a transnational criminal case. In this case, a powerful network of Serbian, Croatian, Albanian and Montenegrin citizens resident in various European and Latin American countries was trafficking cocaine and heroin to European destinations. The main organizers were based in Northern and Central Europe, Albania and South America, while other members operated in Europe, moving around frequently and supported by local cells. Local operations and communications among local cells were always “filtered” by the main organizers.

The prosecuting countries were Croatia, Germany, Italy, Luxemburg and the Netherlands; Austria, Belgium and Slovenia cooperated in the investigation. The investigation started in Germany and Italy, while the other countries joined in it as the scale of the trafficking and the number of people and territories involved were discovered. Because of the participation of Croatia and Slovenia, European Union mechanisms of law enforcement cooperation could only be partially used.

Based on the case presentation and its supplementary documents, it is clear that international coordination centred on a significant number of meetings of prosecutors and law enforcement officials, and that these meetings had a dual purpose: information exchange to help develop the investigations, and joint programming of the operations. For the European Union members, the legal bases included EU legal instruments (article 39 of the Schengen Agreement was specifically mentioned), the Palermo Convention and several Council of Europe conventions. The expert who presented the case stated that “soft law” instruments (i.e., arrangements) were used with non-EU countries. For example, the Italian Anti-Mafia National Directorate and the Croatian Ministry of Interior adopted a special arrangement for cooperation in the area of confiscation since at that time Croatia was not a party to the Palermo Convention.

The Italian criminal proceedings ultimately resulted in the conviction of 22 persons, who were sentenced to imprisonment from one to 20 years, and the confiscation of assets worth more than 8 million euros.

The expert significantly concluded that all authorities participating in the investigation realized that full coordination of the various national law enforcement operations was a necessary requirement and that law enforcement cooperation in cases of complex transnational crimes is successful only if such coordination is carried out in an effective way.

143. Article 27, paragraph 1(a) of the Palermo Convention provides for channels of communication between law enforcement authorities, agencies and services “in order to facilitate the secure and rapid exchange of information”; article 27, paragraph 2 envisions agreements and arrangements “on direct cooperation between ... law enforcement agencies”. Both provisions emphasize that this prospective cooperation would reduce formalities to a minimum and that the assistance of foreign colleagues would be at hand. The majority of cases studied in this *Digest* have these characteristics, which the experts consider important success factors in the investigations. Defined more precisely, direct and informal cooperation means direct contact between law enforcement officers (or between prosecutors) with no intervention by judicial, diplomatic or high-level governmental authorities. The cases ALB 1 and BRA 3, for example, underscore the importance of this kind of contact, and it is implicitly recognized in all the cases where liaison officers or other international police institutions operated. In BRA 3, the expert stated that, “the existence of formal channels of international cooperation, including those of treaties on mutual legal assistance, does not exclude the need and the relevance of the direct cooperation between police entities, in particular at the starting of the investigation, to obtain the best results.”

## C. INSTITUTIONAL ASPECTS

**Summary:** *The role of liaison officers; the multiple functions of law enforcement bilateral bodies and arrangements; regional bodies: the offices of the European Union.*

144. Institutional specialization, which was first considered with regard to domestic investigation and prosecution, is also relevant to international law enforcement cooperation. There are numerous reasons why international police-to-police assistance should be as rapid and informal as possible, and directly available to the widest possible range of national law enforcement agencies and units. At the same time, a certain degree of specialization can help achieve the most productive use of the mechanisms of international cooperation; this can lead to the centralization of activities related to international investigation in special offices or units.

145. This ambiguous dialectic is illustrated, for example, by INTERPOL's operations at the national level: on the one hand, the National Central Bureaus of INTERPOL tend to serve as a de facto central node for some international investigative activities; on the other hand, at least in certain areas, INTERPOL itself encourages other national offices to directly contact and use its service. In the Italian cases, established direct channels of communication between law enforcement agencies of different countries were frequently mentioned as a factor facilitating international cooperation. However, this does not exclude the possibility that an individual national office could be responsible for some basic functions of cooperation in international investigations. For instance, at the second expert meeting the Italian experts explained the clear advantages of having a single national "International Operations Room" to carry out at least some of the activities needed to connect to, and coordinate with, foreign and international entities.

146. Moreover, the cases collected in the *Digest* demonstrate that institutional arrangements at the international level affect the effectiveness of cooperation even more than those at the national level. An international law enforcement system, strongly characterized by continuous and extensive exchange of intelligence and prolonged coordination or co-sharing of investigative activities, can only benefit from a permanent structure, at both the bilateral and multilateral level, to both assist specific investigations and assure a permanent channel of communication.

147. In this connection, establishing liaison officers is one of the first and important good practices. In article 27, paragraph 1(d) of the Palermo Convention, posting liaison officers is considered a special form of exchange of personnel and other experts; many of the cases studied here consider them an essential success factor in international investigations.

148. In ITA 21, a case involving law enforcement cooperation between Italy and Serbia to counteract drug trafficking offences, the Italian expert described the efforts of the liaison officers deployed in Serbia as exceptional, facilitating information exchange with local authorities that were often decisive to intercepting and stopping individual deliveries and always guaranteeing perfect synchronization of operations in the two countries. According to the expert, it was "as if there was a shared investigative unit". Similarly in UKG 1, the expert stated that it would have been impossible to present evidence of conspiracy incriminating subjects located both within the United Kingdom and abroad without the assistance of drug liaison officers. In HUN 1, another drug trafficking case in which differences in the legal systems of the two cooperating countries substantially affected the capacity for mutual assistance, the expert said that information exchange through police liaison officers was nevertheless possible and useful, in particular for ensuring a rapid response in the first preparatory phase of the investigation and for providing data to liaison officers of other countries to identify other perpetrators, and thus successfully expanding the investigation to cover wider rings of the organization's membership. In another drug trafficking case, SPA 1, Spanish liaison officers posted in South American countries carried

out the entire exchange of operational information. Finally, the case NIG 1 suggests that legal attachés at consulates or embassies may also play a productive role in the development of an investigation, at least as providers of open source information and facilitators of mutual legal assistance.

149. In the cases collected in this *Digest*, liaison officers are most often mentioned in cases involving drug offences. Considering the seriousness and pervasiveness of other transnational organized crime offences (as the *Digest* testifies), perhaps it would be useful to reflect on whether the functions of liaison officers are too limited given the array of criminal matters they deal with.

150. At the bilateral level, law enforcement structures that are more complex than liaison officers can be created by agreements or arrangements. They need not amount to the establishment of an international police office, but they can enable officers from the two States to cooperate closely on a permanent basis. Their main purpose is to facilitate logistical cooperation: although each State's officers continue to operate within the powers and functions their national law confers and under the direction of their superiors, they may be required to contribute to the investigative needs of colleagues in the other State through information exchange and joint analysis, and to support their activities more generally. They can also participate in field operations to the extent that the law enforcement agreement in force between the two countries permits. The box below shows how article 23 of the German-Swiss Agreement for police cooperation described earlier shapes this type of arrangement:

#### **A MODEL FOR JOINT LAW ENFORCEMENT CENTRES (*CENTRES COMMUNS*)**

Joint centres for information exchange and support of police authorities of both contracting States may be established on the territory of one or the other contracting State, in the border areas in accordance with article 4, paragraph 7.

In the joint centres, officials of the police authorities of both contracting States shall work jointly, within their respective jurisdictions, on the exchange, analysis and transmission of information in cases concerning border areas—without prejudice to the service relationships and exchange of information through the national headquarters—and shall also support the coordination of cross-border cooperation under this Agreement.

The support function may also include the preparation and the active support of the delivery of foreigners on the basis of existing conventions between contracting States.

The autonomous execution of field missions is not within the attribution of the joint centres. The officials working in the joint centres are subject to the disciplinary authority and instructions from their respective national authorities.

In the joint centres, officials of the police authorities may also perform, to the benefit and on behalf of their authorities of origin, other non-operational activities outside the scope of paragraphs 1 to 3.

The number and location of joint centres, as well as the modalities of cooperation and the equitable distribution of costs are regulated in a separate agreement.

Officials of the police authorities may be associated with joint centres of the contracting States to ensure its operation with a neighbouring State in common border areas, if and insofar as the neighbouring State consents to such an association. The terms of collaboration and distribution costs are settled between all the States involved.

151. The cases richly illustrate good practices in relation to bilateral mechanisms, but even more so to multi-lateral bodies: INTERPOL at the global level (see the following section), and the European Union and other

institutions at the regional or subregional level. In the European Union, Europol is the office for police cooperation and Eurojust is a centre where prosecutors and investigative judges of the Member States coordinate prosecutorial actions.<sup>71</sup> These two organizations have played an important role in very complex European investigations. For example, in SPA 4, a case involving smuggling of migrants and trafficking in persons, the Spanish investigators knew through Europol that other European countries were also investigating the same organized criminal group; subsequent meetings within Eurojust facilitated the coordination of these investigations, including setting a date for simultaneous arrests of the alleged offenders. The expert who presented this case underlined the importance of this second aspect of centralized coordination as an effective means to avoid duplication of, and conflicts among, law enforcement initiatives of the various countries involved. It is also worth noting that there is probably no other communication system for receiving and disseminating information on active, interconnected investigations that is more effective than a stable regional central body such as Europol.

### THE COORDINATION ROLE OF REGIONAL/SUBREGIONAL BODIES: EUROPOL AND EUROJUST

One excellent example of international cooperation is the case HUN 3, in which a massive migrant smuggling scheme involved many European countries (Hungary was the country of entry; Germany, Slovakia, the Czech Republic and Austria were transit countries; and France and the United Kingdom were the destination countries).

The expert who presented the case observed that Europol and Eurojust held numerous operational meetings, and that this operational coordination enabled the execution of arrests and other actions on six “common action days”. The presence of prosecutors at the meetings helped to determine the direction of the investigations in the various countries as well as the distribution of prosecutions so as to avoid *ne bis in idem*. The meeting of prosecutors also facilitated and hastened subsequent mutual legal assistance. All told, the coordination of multiple national activities fostered a system of genuine co-management of the case.

The role of Eurojust in avoiding *ne bis in idem* problems is highlighted in other cases as well.

The expert also emphasized Europol’s role as an effective mechanism for exchange of intelligence. In particular, he recalled that Europol’s Comprehensive Operational and Strategic Planning for the Police—a multilateral law enforcement instrument—is intended to ensure that competent authorities of the EU Member States make use of Europol’s analytical support, especially the tool called Analytical Work Files (AWF). A new version of AWF was recently launched to collect real-time information on the results of investigation in a given case.

The capacity of a subregional institution to serve as a centre for intelligence collection and dissemination also features in another case of migrant smuggling, ITA 20. In this case, Europol and Eurojust supported interregional cooperation. The expert pointed out that, on the one hand, the Italian investigation benefited from analysis carried out by the Europol Target Group STORM, which studies the same phenomenon evidenced in this case—the smuggling of Afghani, Kurdish, Iraqi and Pakistani migrants into various European countries via Greece. On the other hand, the results of the Italian investigation were merged into that analysis and, through the Target Group, they were subsequently used in a French prosecution that was conceived as a continuation of the Italian one.

These two aspects are also reflected in ITA 15, where the expert summed up the role of Europol as follows: “The cooperation channels used were basically Interpol and Europol, which, through cross-match reports based on the AWF COPY, have provided in real time support to the investigative agencies of the involved EU States ... There have also been innovative investigation techniques: the seconding of Italian judicial police abroad to

<sup>71</sup>On the institution of Europol and Eurojust, see, respectively, European Union Council decision 2009/371/GAI and European Union Council decision 2002/187/GAI, and related legislative acts of the Union.

immediately examine documentation seized during the blitzes carried out in the other countries was a particularly effective measure, as well as the use of Europol's mobile office for the immediate processing of bulk data. "

In ROM 1, the expert emphasized the role of Europol and Eurojust in coordinating the establishment of the first joint investigation team created in Europe in a trafficking in persons case.<sup>72</sup>

152. Multilateral law enforcement bodies exist in other regions, and while in some cases they might not have the same operational capacity as the EU institutions, they can nevertheless contribute substantially to the establishment of common criminal policy, strategy and intelligence, as well as facilitate cooperation procedures. For example, in the box below, the South African expert describes the Southern African Regional Police Chief Cooperation Organisation and explains its functional integration with INTERPOL.

## REGIONAL POLICE ORGANIZATIONS

The Southern African Regional Police Chief Cooperation Organisation (SARPCCO) is an official forum comprising all the police chiefs from Southern Africa. SARPCCO was established in 1995 ... The member countries of SARPCCO are Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

A Secretariat, comprising officers from the member countries, has been formed as the permanent administrative and technical body through which SARPCCO is operating ... INTERPOL provides the means of effective communication between the member countries as well as performing all administrative tasks originating from the operation of SARPCCO. Overall, SARPCCO is the primary operational mechanism in Southern Africa for the prevention and fighting of cross-border crime, including the trafficking of weapons. Since its foundation, SARPCCO has become an important asset in the regionalization of the International Criminal Police Organization—INTERPOL, by becoming its de facto subregional operational arm ... The INTERPOL Sub-Regional Bureau in Harare for Southern Africa is also the designated Secretariat for SARPCCO.

The objectives of SARPCCO ... are subject to the provisions of domestic laws and include the following:

- To promote, strengthen and perpetuate cooperation and foster joint strategies for the management of all forms of cross-border and related crimes with regional implications;
- To prepare and disseminate relevant information on criminal activities as may be necessary to benefit members to contain crime in the region;
- To carry out regular reviews of joint crime management strategies in view of changing national and regional needs and priorities;
- To ensure efficient operation and management of criminal records and efficient joint monitoring of cross-border crime taking full advantage of the relevant facilities available through INTERPOL;
- To make relevant recommendations to governments of member countries in relation to matters affecting effective policing in the Southern African region;
- To formulate systematic regional training policies and strategies taking into account the need and performance requirements of the regional police services/forces; and

<sup>72</sup>See subsection E on joint investigative teams.

- To carry out any such relevant and appropriate acts and strategies for purposes of promoting regional police cooperation and collaboration as regional circumstances dictate.<sup>73</sup>

## D. INTERPOL

**Summary:** *INTERPOL's major presence in international cases; its role in networking law enforcement agencies; operational support; intelligence sharing and databases; special programmes.*

153. The International Criminal Police Organization, INTERPOL with 190 member countries, engages in law enforcement activities on a quasi-universal level. INTERPOL provides valuable assistance and services to national law enforcement agencies in accordance with the purposes and modalities specified by its statutory mission. It should not be considered an alternative to bilateral or regional bodies: its activities complement those of such bodies where they exist, and expand them at the global level. Where bilateral or regional bodies do not exist, INTERPOL's assistance encompasses basic functions of international cooperation needed by national law enforcement agencies.

154. The number of cases that mention INTERPOL is very high; most often, national law enforcement agents used INTERPOL's databanks. However, other cases demonstrate that INTERPOL, and particularly its National Central Bureaus (NCBs), are an important tool for international networking among police forces. The reliability of INTERPOL channels for international communications is illustrated in many of the cases presented by experts from Albania, Hungary, Italy, Mexico, Morocco and Romania.<sup>74</sup> When the experts implicitly indicate that INTERPOL has been used as a channel for international cooperation, it should not be assumed that this is limited to the use of its secure communication technologies (I-24/7, INTERPOL's secure global police communications system), but also includes INTERPOL expertise on procedures to use and the specific foreign units or agencies that must be contacted to ensure effective cooperation. In addition to its capacity to facilitate, on an ad hoc basis, international interaction among law enforcement agents, INTERPOL has also created an international network of contact officers, as the INTERPOL representative pointed out at the second expert meeting: "An effective and successful fight against criminality can be carried out at its best by community of officers that are used to work together, who know and trust each other, who are aware of what they are talking about ... who have a reliable common background of the issue."

155. The INTERPOL expert also explained that the assistance the organization provides is not limited to communication and networking, but instead encompasses an open-ended series of support services including, on a case-by-case basis, coordination of the development of international investigations. He highlighted the ad hoc assistance that Incident Response Teams (IRTs) provide. Upon request by an interested country, INTERPOL sends in a team to provide on-the-spot assistance, especially for the international aspects of the investigation. These multidisciplinary operational teams provide immediate, qualified assistance to support countries facing

<sup>73</sup>In Africa, other regional police organizations include: the West African Police Chiefs Committee (WAPCCO), the Central African Police Chiefs Committee (CAPCCO) and the East African Police Chiefs Cooperation Organization (EAPCCO). Regional police organizations in other regions include: the Association of South-East Asian Nations Chiefs of Police (ASEANAPOL), the Comisión de Jefes de Policía de Centro América y el Caribe (CJPCAC), the South Pacific Chiefs of Police Conference (SPCPC) and the Association of Caribbean Commissioners of Police (ACCP). INTERPOL Regional Bureaus serve all the African organizations in the same way as SARPCCO.

<sup>74</sup>Communications between the NCBs and the INTERPOL General Secretariat are facilitated by the Command and Coordination Center within the General Secretariat, which serves as the first point of contact for any member country facing a crisis situation or requiring urgent operational assistance.

major investigations. In the field of drug trafficking, for instance, INTERPOL recently deployed four IRTs to help in cases in West Africa involving massive seizures of illicit substances. Another IRT was sent to South Africa in connection with the release of the ship *Irene*, which pirates had hijacked off the Somali coast.

156. INTERPOL also provides criminal intelligence. It gathers detailed, individualized data on known criminals, victims of certain crimes and criminal evidence and makes this information available to law enforcement officers for use in international foreign investigations. The following box contains a comprehensive list of current INTERPOL databases:

### MAIN INTERPOL DATABASES

*Nominal data* – contains more than 162,525 records on known international criminals, missing persons and dead bodies, including their photographs, fingerprints, criminal histories, etc.

*DNA profiles* – these are numerically coded sets of genetic markers unique to every individual that can be used to help solve crimes and identify missing persons and unidentified bodies.

*Fingerprints* – an automated fingerprint identification system containing almost 151,500 sets of fingerprints and more than 5,000 crime scene prints submitted by member countries either electronically or by mail.

*Stolen and lost travel documents* – holds information on more than 31 million travel documents reported lost or stolen by 161 countries. This database enables INTERPOL NCBs and other authorized entities, such as immigration and border control officers, to determine the validity of a suspect travel document within seconds.

*Stolen administrative documents* – contains information on almost 440,000 official documents that identify objects (e.g., vehicle registration documents and import/export clearance certificates).

*Stolen motor vehicles* – provides extensive identification details on approximately 7.1 million vehicles reported stolen around the world. In 2011, more than 42,000 stolen vehicles were identified using the database.

*Stolen works of art* – allows member countries to research records on more than 38,000 pieces of artwork and cultural heritage reported stolen by 125 participating countries.

*Fusion task force* – a database of nearly 11,600 persons suspected of being linked to terrorist activities. Some 105 member countries currently contribute information.

*Firearms* – the INTERPOL Firearms Reference Table allows investigators to properly identify a firearm used in a crime. It contains more than 250,000 firearm references and 57,000 high-quality images. The INTERPOL Ballistic Information Network is a platform for the international sharing and comparison of ballistics data, holding more than 100,000 records from eight participating countries.

*Child sexual exploitation images* – to date, thousands of victims and offenders could be identified by investigators through the use of the INTERPOL International Child Sexual Exploitation (ICSE) image database. Hundreds of investigators have been trained in the use of the application, and many countries have specialized units connected to the database.

157. Many of the *Digest's* cases highlight the operational importance of these databases, which enable the global law enforcement community to connect seemingly unrelated pieces of data to help them investigate, solve and prevent crimes. All the databases except the database of child sexual exploitation images are accessible through the I-24/7 Dashboard, a restricted-access Internet portal. Many countries have extended access to the databases beyond their National Central Bureaus to frontline law enforcement officers, such as border

guards, allowing them to search the databases on wanted persons (nominal data), stolen and lost travel documents and stolen motor vehicles. These solutions allow an officer to submit a query simultaneously to a national database and an INTERPOL database and receive responses from both within seconds. In the United Kingdom, for example, 43 County Police Offices have a direct connection to the INTERPOL databases. The following case, introduced by the INTERPOL expert, shows how productive the combined use of various INTERPOL databases and information systems can be:

### **EXPLOITING INTERPOL DATABASES AND INFORMATION SYSTEMS**

By running automatic checks on INTERPOL's databases via a remote connection to I-24/7, officers at Tivat airport in Montenegro were able to identify and apprehend a dangerous criminal. A routine check against INTERPOL's database of stolen and lost travel documents showed the passenger was travelling on an invalid document. Further checks revealed the individual's true identity as well as the fact that he was the subject of a "red notice" issued by the NCB in Moscow, wanted for serious crimes including murder, and considered the leader of a criminal group. Apprehended in October 2009, the individual was extradited to Russia in May 2010.

158. The databases of DNA profiles and fingerprints also illustrate how useful and far-reaching the INTERPOL databanks are. Police agencies of member countries can submit DNA profiles from offenders, crime scenes, missing persons and unidentified bodies to the database of DNA profiles, which is known as the DNA Gateway. Established in 2002, by 2011 it contained more than 117,000 DNA profiles contributed by 61 member countries. Participating countries access the DNA Gateway via Interpol's I-24/7. Access to the database can be extended beyond the National Central Bureaus of member countries to forensic centres and laboratories. The system does not keep any nominal data linking a DNA profile to any individual: a DNA profile is simply a list of numbers based on the pattern of an individual's DNA, producing a numerical code that can be used to differentiate individuals. The profile does not contain information about a person's physical or psychological characteristics, diseases or predisposition to diseases. Member countries that use the DNA Gateway retain ownership of their profile data and control its submission, access by other countries and destruction in accordance with their national laws.

159. The information in the fingerprint database can be uploaded and viewed by authorized users in member countries via a user-friendly automatic fingerprint identification system (AFIS). Records are saved and exchanged in the format set by the National Institute of Standards and Technology (NIST). In 2009, the heads of the National Central Bureaus voted unanimously to develop the system to include fingerprints from unsolved crimes as well as fingerprint profiles taken from offenders who are citizens of other countries. In 2010, a new AFIS was adopted that is capable of searching and filing palm prints and latent palm marks. Automated ten-print verification has been introduced, along with a high-volume search facility that allows running many more searches than previously with a 10-minute reply time and a per-day total of more than 1,000 comparisons against the INTERPOL fingerprint database. In 2011, INTERPOL made more than 1,800 identifications as a result of increased data sharing and comparison by member countries.

160. INTERPOL's system of notices and diffusions is a well-known mechanism to assist national law enforcement agencies with concrete aspects of specific investigations. These international alerts are used by police to communicate information about crimes, criminals and threats to their counterparts around the world; INTERPOL circulates them on its secure websites to member countries at the request of a NCB or an

authorized international entity. The information disseminated via notices or diffusions concerns individuals wanted for serious crimes, missing persons, unidentified bodies, possible threats, prison escapes and criminals' modus operandi. They contain two main types of information: identity details (physical description, photograph, fingerprints, identity document numbers, etc.), and judicial information (offence with which the person is charged; references to the laws under which the charge is made or conviction was decided; references to the arrest warrant or court sentence, etc.). Notices and diffusions can also be used by the United Nations Security Council, the International Criminal Court and international criminal tribunals.<sup>75</sup>

## INTERPOL NOTICES AND DIFFUSIONS

*Red Notice* – to seek the location and arrest of a person wanted by a national jurisdiction or an international tribunal with a view to his/her extradition. The legal basis for a Red Notice is an arrest warrant or court order issued by judicial authorities in a country. Many of INTERPOL's member countries consider a Red Notice to be a valid request for provisional arrest. Furthermore, INTERPOL is an official channel for transmitting requests for provisional arrest in a number of bilateral and multilateral extradition treaties, including the European Convention on Extradition and the Economic Community of West African States (ECOWAS) Convention on Extradition and the United Nations Model Treaty on Extradition.

*Blue Notice* – to locate, identify or obtain information on a person of interest in a criminal investigation.

*Green Notice* – to warn about a person's criminal activities if that person is considered to be a possible threat to public safety.

*Yellow Notice* – to locate a missing person or to identify a person unable to identify himself/herself.

*Black Notice* – to seek information on unidentified bodies.

*Orange Notice* – to warn of an event, a person, an object or a process representing an imminent threat and danger to persons or property.

*United Nations Security Council Special Notice* – to inform INTERPOL's members that an individual or an entity is subject to United Nations sanctions.

*Purple Notice* – to provide information on modus operandi, procedures, objects, devices or hiding places used by criminals.

*Diffusions* are informal alerts issued for the same purposes as notices but sent directly by a member country or an international entity to the countries of their choice. Diffusions are also recorded in the INTERPOL databases.

161. In addition, INTERPOL has set up a series of dedicated projects concerning specific criminal phenomena on the basis of agreements with interested countries. The core functions of these projects are the collection, compilation and analysis of data on specific subjects, and the crosschecking of national information with data already available to INTERPOL. These projects are established on the basis of a common strategy agreed upon by the law enforcement agencies of participating countries, including the scope of the investigation, detailed objectives, possible developments and timeframe. At present there are projects on drug trafficking, environmental crime, firearms, intellectual property crime, maritime piracy, pharmaceutical crime and terrorist crimes, among others. Several of these projects will be considered in the following chapter.

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<sup>75</sup>The General Secretariat published approximately 26,500 notices and diffusions in 2011. There were 40,836 notices and 48,310 diffusions in circulation at the end of 2011, and 7,958 people were arrested on the basis of a notice or diffusion during 2011.

## E. JOINT INVESTIGATIVE TEAMS

**Summary:** *The limited provisions of the Palermo Convention; the experience of the European Union; the need for a complex set of rules; model bilateral agreement; agreement on the consequential exercise of criminal jurisdiction; joint investigations without a joint team; advantages of “parallel” prosecutions in two or more countries.*

162. Article 19 of the Palermo Convention obliges States Parties to consider adopting general agreements to establish joint investigative bodies. The Convention does not describe the main characteristics of these bodies; globally valid theories are still to be developed. In comparison with the more limited measures of cooperation provided for by article 27 of the Convention, and based on existing regional experience (in Europe), it seems reasonable to assume that the concept of a joint investigative body exceeds the coordination of investigative actions (including, as already noted, the concerted management of entire investigative programmes) to encompass the co-sharing of investigative powers. In this conception, establishing a joint investigative team transforms bilateral and multilateral coordinated investigations into a single, common investigation. A joint team implies the creation of a new official legal entity, the team itself, with its own investigative functions and investigative powers (even if these powers are to be exercised in a nonexclusive way, leaving intact the rights of national law enforcement agencies and prosecutorial offices, and in full respect of national rules governing investigation and prosecution).

163. The cases that illustrate joint investigative teams refer only to Member States of the European Union and do not indicate whether or how much these tools have been used in other regions and subregions. Therefore it is a mere hypothesis that joint investigation teams are used more widely in the EU than in other territories, and that this wider use is due to two causes: the European Union’s intensive legislative effort to produce its own set of rules governing such teams,<sup>76</sup> and the institutional context of the Union. The first has been a push factor for implementation even though Member States have no specific obligation to adopt the mechanism in concrete cases. As to the second cause, special attention must be paid to the active presence of Europol and Eurojust, which the cases show have been deeply involved in the establishment and operation of joint teams.

164. The EU Convention on mutual legal assistance contains only a basic set of norms, which corresponds to the suggestion in article 19 of the Palermo Convention on the establishment of a general agreement among interested States. However, the EU Convention prescribes, as necessary, a subsequent ad hoc mutual agreement of the States concerned in each concrete case. Thus the alternative suggested by the Palermo Convention (general agreement versus case-by-case agreement) is transformed into compulsory dual agreements. This reinforces the perception that the establishment of joint investigation teams requires a developed framework of norms; it is facilitated by the existence of regional structures with operational capacity as well as strong commitment to cooperation by all the parties supported by complete mutual trust and mature experience in coordinated investigations. Not all of these conditions are always met. The provisions of the EU Convention reproduced in the box below provide an idea of the main issues that a regional agreement would regulate:

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<sup>76</sup>Before the entry into force of the Palermo Convention, the European Union adopted the 2000 Convention on Mutual Assistance in Criminal Matters, which entered into force in 2005; article 13 deals with joint investigation teams, setting rules for their establishment and various aspects of their operations. Other legislative and “soft law” interventions were subsequently made, including the Council Resolution on a Model Agreement for Setting up a Joint Investigation Team (26 February 2010).

## EU CONVENTION ON MUTUAL LEGAL ASSISTANCE

### Article 13. Joint investigation teams

1. By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. The composition of the team shall be set out in the agreement. A joint investigation team may, in particular, be set up where:

(a) A Member State's investigations into criminal offences require difficult and demanding investigations having links with other Member States;

(b) A number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate coordinated, concerted action in the Member States involved. A request for the setting up of a joint investigation team may be made by any of the Member States concerned. The team shall be set up in one of the Member States in which the investigations are expected to be carried out.

2. In addition to the information referred to in the relevant provisions of Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, requests for the setting up of a joint investigation team shall include proposals for the composition of the team.

3. A joint investigation team shall operate in the territory of the Member States setting up the team under the following general conditions:

(a) The leader of the team shall be a representative of the competent authority participating in criminal investigations from the Member State in which the team operates. The leader of the team shall act within the limits of his or her competence under national law;

(b) The team shall carry out its operations in accordance with the law of the Member State in which it operates. The members of the team shall carry out their tasks under the leadership of the person referred to in subparagraph (a), taking into account the conditions set by their own authorities in the agreement on setting up the team;

(c) The Member State in which the team operates shall make the necessary organisational arrangements for it to do so.

4. In this Article, members of the joint investigation team from Member States other than the Member State in which the team operates are referred to as being 'seconded' to the team.

5. Seconded members of the joint investigation team shall be entitled to be present when investigative measures are taken in the Member State of operation. However, the leader of the team may, for particular reasons, in accordance with the law of the Member State where the team operates, decide otherwise.

6. Seconded members of the joint investigation team may, in accordance with the law of the Member State where the team operates, be entrusted by the leader of the team with the task of taking certain investigative measures where this has been approved by the competent authorities of the Member State of operation and the seconding Member State.

7. Where the joint investigation team needs investigative measures to be taken in one of the Member States setting up the team, members seconded to the team by that Member State may request their own competent authorities to take those measures. Those measures shall be considered in that Member State under the conditions which would apply if they were requested in a national investigation.

8. Where the joint investigation team needs assistance from a Member State other than those which have set up the team, or from a third State, the request for assistance may be made by the competent authorities of the State of operations to the competent authorities of the other State concerned in accordance with the relevant instruments or arrangements.

9. A member of the joint investigation team may, in accordance with his or her national law and within the limits of his or her competence, provide the team with information available in the Member State which has seconded him or her for the purpose of the criminal investigations conducted by the team.

10. Information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the Member States concerned may be used for the following purposes:

(a) For the purposes for which the team has been set up;

(b) Subject to the prior consent of the Member State where the information became available, for detecting, investigation and prosecuting other criminal offences. Such consent may be withheld only in cases where such use would endanger criminal investigations in the Member State concerned or in respect of which that Member State could refuse mutual assistance;

(c) For preventing an immediate and serious threat to public security, and without prejudice to subparagraph (b) if subsequently a criminal investigation is opened;

(d) For other purposes to the extent that this is agreed between Member States setting up the team.

11. This Article shall be without prejudice to any other existing provisions or arrangements on the setting up or operation of joint investigation teams.

12. To the extent that the laws of the Member States concerned or the provisions of any legal instrument applicable between them permit, arrangements may be agreed for persons other than representatives of the competent authorities of the Member States setting up the joint investigation team to take part in the activities of the team. Such persons may, for example, include officials of bodies set up pursuant to the Treaty on European Union. The rights conferred upon the members or seconded members of the team by virtue of this Article shall not apply to these persons unless the agreement expressly states otherwise.

165. Joint investigative teams also require a considerable amount of technical support and intensive efforts to help national authorities get accustomed to the idea of using them. The following passages from the *Eurojust Report 2010* describe Eurojust's extensive efforts and regular training activities to familiarize practitioners:

During 2010, Eurojust continued to support Joint Investigative Teams (JITs) and encouraged their setting up by providing information and advice to practitioners ... Eurojust National Members participated in 20 JITs, acting either on behalf of Eurojust or in their capacity as national competent authorities, in relation to crime types involving, inter alia, fraud, corruption, car theft, drug trafficking and THB [trafficking in human beings]. In addition, Eurojust received 11 notifications from Member States regarding the setting up of JITs ... Eurojust continues to support and encourage enhanced judicial training in the use of JITs within and outside the European Union. Eurojust participated in the Europol internal training programme on JITs ... In December 2010, Eurojust and Europol jointly organised the sixth annual meeting of the network of national experts on JITs at Europol, attended by experts and practitioners from 22 Member States ... Topics ranging from the practicalities of several national systems in setting up JITs, the support given to JITs, JITs with third States and future trends in JITs were presented. Two workshops were held, one on "profile requirements for the successful JIT expert at national level, identifying role and mission" and the other a solution-oriented discussion on commonly encountered issues during the setting up, running and conclusion of JITs, as identified by practitioners.<sup>77</sup>

166. In ROM 1, which has already been identified as a case involving a joint investigative team originated by and operated under the direct coordination of Europol and Eurojust, the Romanian expert described the establishment of the agreement and the investigative activities of the team members as follows: "On 1 September 2008, a

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<sup>77</sup>Council of the European Union, *Eurojust Report 2010*, p. 36.

Romanian delegation of prosecutors and Project Reflex officers travelled to Europol HQ in The Hague, where they signed with their British counterparts the Agreement on setting up the first joint investigation team in this case of THB in Europe ... Also under discussion was the sending of two Romanian police officers to the United Kingdom to carry out specific activities. A decision was made to assimilate these two officers to the London Metropolitan Police Service for a year, without the possibility to impose coercive measures in the host country ... the Romanian officers carried out operational activities like investigations, data base checks, taking down testimonies and making use of special procedure forms ruled both by Romanian and British law. The agreement allowed Romanian prosecutors and police officers to travel to the UK for hearing several exploited minors and their parents. Also, British authorities exchanged intelligence on the criminal records of minors exploited in the UK detailing the type of offences committed, the date of the offences, accomplices and, in several instances, even false identities assumed in front of the British authorities.” In ROM 1, the joint team operated in a single country. By contrast, in FRA 1, which involved France’s first joint investigation team in a drug trafficking case, the expert underscored that the investigations were carried out on both French and Spanish territory.

167. Both cases show how the establishment of the joint team created full coordination and expanded and sped up the investigation. The French case also demonstrates one of the most beneficial aspects of joint teams acting under the EU norms: the simplification of activities that would otherwise be governed by the more cumbersome rules of mutual assistance. Article 13, paragraph 7 of the EU Convention on mutual assistance confers on the officer of State A, who is a member of a team operating in State B, the right to ask his/her own national authorities to authorize or perform a certain measure needed for the investigation of the team in State B, without a letter rogatory or formal request for mutual assistance. The French case also shows that the members of a joint team can be law enforcement officers as well as prosecutors or members of the judiciary (e.g., prosecutors where they have the status of judicial officials, or investigative judges). In his conclusions, the French expert stressed that the “J.I.T. is a more flexible process in a criminal case, than international rogatory proceedings. The two Justice representatives need to communicate in real time, exactly like caseworkers.”

168. The Spanish experts underlined in their comments how essential it is in this advanced form of cooperation, which is still quite new, to keep the practitioners well informed on the legal bases and requirements for the creation of a joint investigative team; to explain to them the proper criteria for determining whether in a certain case such a team may be useful; to remove any misunderstandings about how the team works and to explain its advantages. They also provided the text of a bilateral agreement for the establishment of a joint team by two EU member States that adheres to the model adopted by the Council of the Union. The extract from this bilateral agreement in the box below, if read together with article 13 of the European Convention on Mutual Legal Assistance (2000), might provide an idea of the norms and regulations that are necessary to establish a joint team.

## **AGREEMENT ON THE ESTABLISHMENT OF A JOINT INVESTIGATION TEAM**

### *1. Parties to the Agreement*

...

### *2. Purpose of the JIT*

The purpose of the JIT is to facilitate the actions of a joint prosecutorial investigation by carrying out the related operations in the following way ...

The specific objectives of this JIT are to:

- Establish the location of printing works and illegal warehouses in the territory of ... for the production of counterfeit euros, with special attention to counterfeit notes with a nominal value of 50, 100 and 200 euros;
- Establish the storage locations of counterfeit euro notes, with special attention to counterfeit notes with a nominal value of 50, 100 and 200 euros and to seize them;
- Identify the means by which the previously mentioned counterfeit banknotes are being exported from ... to other Member States of the European Union, in particular to ...;
- Identify and stop the perpetrators of the offences described and their accomplices, who operate mainly, but not exclusively, in the territory of ... in ...;
- Establish the location and dismantle printing works used for the production and the storage sites for counterfeit identity documents: identity documents, international passports and driver's licences;
- Follow the movement of counterfeit documents, mainly but not exclusively from ... to ...;
- Identify and stop the perpetrators of offences related to counterfeit documents and their accomplices, who operate mainly, but not exclusively, in the territory of ... in ...;
- Establish and dismantle the production sites of counterfeit means of electronic payment, as well as their seizure;
- Follow the movement of counterfeit means of payment, ...;
- Identify and stop the perpetrators of the crime of "production of counterfeit means of payment" and their accomplices, ...;

The JIT will develop an operational action plan that will define the means to accomplish the objectives established in the Agreement.

The Parties that form the JIT can redefine the common agreement in accordance with the specific aim and the area of application of the JIT.

### *3. Period covered by the Agreement*

The Agreement will enter into force on the day of signature of the last Party and is valid for a period of 6 months, which may be extended by mutual consent ...

The expiration date stated in this Agreement may be extended by mutual consent of the ...

### *4. Member States in which the JIT will operate*

The JIT will operate in the Member States designated hereafter:

- ... and - ... ;

In accordance with article 13(3)(b) of the Convention and article 1(3)(b) of the Framework Decision, the team shall carry out its operations in accordance with the law of the Member State in which it operates at any given time. Should the JIT move its operational basis to another Member State, the law of this Member State shall then apply.

### *5. JIT leaders*

The parties have designated the following person, who shall be a representative of the competent authorities in the Member States where the team is operating, as the leader of the JIT and under whose leadership the members of the JIT must carry out their tasks in the Member State to which he belongs:

### *6. Members of the JIT*

In addition to the persons referred to in article 5, the following persons shall be members of the JIT:

6.1 Judicial Authorities: ...;

6.2 Police Authorities: ...;

## *7. Participation of Eurojust and Europol in the JIT*

The provisions on participants of Eurojust and Europol in the JIT are dealt with in the relevant appendix to this Agreement.

## *8. General conditions of the Agreement*

In general, the conditions laid down in article 13 of the Convention and the Framework Decision shall apply as implemented by each Member State in which the JIT operates.

## *9. Evidence*

The Parties entrust the leader of the JIT with the task of giving advice on obtaining evidence. His or her role includes providing guidance to members of the JIT on aspects and procedures to be taken into account in gathering evidence.

## *10. Internal evaluation*

At least every six months, the JIT leaders shall evaluate progress achieved towards the general purpose of the JIT, while determining and addressing any problems identified. After the operation of the JIT ends, the Parties may, where appropriate, arrange a meeting to evaluate the performance of the JIT. The JIT may draw up a report on the operation, which may show how the operational action plan was implemented and which results were achieved.

## *11. Specific arrangements of the Agreement*

The following special arrangements may apply to this Agreement:

11.1 All information legitimately obtained in the territory of any of the Member States in which the JIT operates will be considered as evidence.

11.2 Conditions in which the JIT may ask for judicial assistance with regard to the Convention and other international treaties: requests for judicial assistance will be sent to other States that are not Parties to this Agreement, if necessary.

11.3 In case one of the Parties to the Agreement needs to send a request for judicial mutual assistance to a third State, the requesting State who is a Party to the Agreement will ask the requested State for authorization over the obtained evidence resulting from the operation, to be shared with the other Party to the Agreement of the JIT.

11.4 ... National legislation and the European Union Treaties on protection of personal data and protection of classified information will apply, as well as the Agreement between ... and ... on mutual assistance ...

11.5 ... The members on secondment will not be authorized to take/use weapons in the territory of the State where the operation takes place, unless agreed otherwise.

## *12. Organizational arrangements*

12.1 ... The host State will assume all expenses related to meals, accommodations, insurances, international travel and written translation of the respective members of the JIT.

Evidence will be translated by the host country.

12.2 Technical team: The operational basis of the JIT as indicated in article 4 of the Agreement may be found in ... and in ... The Member State on whose territory the investigation measures are carried out will be responsible for providing the necessary technical equipment (offices, telecommunications, specific equipment, etc.) so that the members of the JIT can carry out the tasks assigned.

12.3 ... The official languages of the JIT are ..., ... and ...,

12.4 ... The investigation is subject to professional confidentiality regarding all measures and actions undertaken in ... and in ... and regarding the Reports concerning the actions taken, unless the Parties agree differently.

169. In spite of this detailed set of provisions, also within the legal framework of the European Union, one important aspect of the joint investigative team mechanism risks remaining unregulated: the impact of its establishment and operations on the distribution and exercise of criminal jurisdiction. In relation to the case FRA 1, the French expert explained that since 2004, France has entered into more than 50 agreements on joint investigations, mostly in the areas of terrorism and organized crime, and that in the French experience, the joint teams “cover two judicial proceedings carried on in the two countries concerned with the activities of the same organized criminal group. [Neither] one nor the other proceedings is intended to overcome the proceedings in the other State. In fact, the two States simultaneously exercise their criminal jurisdiction. In developing their prosecutions, after the arrest of the alleged offenders, each State bound by a joint investigation agreement is usually inclined to judge the persons arrested in its territory. Thus, the proper administration of justice may require that one of the two States relinquishes the criminal offences to the other with the aim of having a single judgement, given in only one of the two jurisdictions. This strategy can be established in a previous agreement or at the time when the joint investigation agreement is signed.”

170. However, no examples of agreements of that type were submitted for the Digest except the South Africa–United Kingdom Memorandum referred to in paragraph 172. In another French case (FRA2), the expert expressed disappointment over the difficulties encountered because the court of the other country participating in the joint investigative team judged two offenders without first alerting the French magistrate of the investigative team. Within the legal framework of the European Union, none of the applicable legal instruments (Palermo Convention, EU Convention on Mutual Legal Assistance, EU Model Agreement for the establishment of a Joint Investigation Team) touches upon this delicate issue.

171. Taking into account the enormous potential of the joint investigation team mechanism and the above observations on the complexity of the legal and institutional conditions necessary to implement it, the following lesson can be drawn (being aware—as in any other case—of the limited circumstances of the studied cases and thus the uncertain paradigmatic value of this lesson):<sup>78</sup>

### LESSON LEARNED

**A joint investigative team can be an effective tool for concerting law enforcement and prosecutorial actions against organized crime offences involving two or more countries. Its establishment permits maximal coordination among those countries, uniting operational efforts in a single body; it also facilitates the execution of measures by superseding the requirements of mutual legal assistance procedures.**

**However, the problematic combination of powers stemming from two or more separate justice systems and the numerous legal issues that can arise from a joint team’s operations suggest that the team’s establishment should not simply be a response to the immediate needs of a concrete case, but should be inspired by, and framed in, a set of substantive general norms and highly detailed regulations agreed upon bilaterally or regionally.**

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<sup>78</sup>An initial expansion of the field under study could include, for example, consideration of the United States–Canadian integrated law enforcement pilot projects and related initiatives developed out of the Integrated Border Enforcement Teams formed in 2001.

**Countries with a special interest in the creation of joint teams should undertake common preparations and pilot initiatives.**

172. The careful preparatory work needed to establish a joint investigative unit is well illustrated by the Memorandum of Understanding that the South African and United Kingdom police authorities signed in SAF 1.<sup>79</sup> The Memorandum, which was adopted while the Parties were in the process of establishing a “joint operational agreement,” already specifies in considerable detail not only the areas of investigation in which South Africa sought the assistance of the United Kingdom Central Prosecuting Authority, but also the purposes, strategic aims and tactics that would be pursued, including the country where the anticipated prosecutions would take place.

173. A real joint team does not replace the agencies and offices of the participating States, but complements them as a new entity that partially replaces them in the investigation. However, there are several examples in the cases of joint investigations that did not create a new entity but simply involved parallel, coordinated investigations with a common goal. Article 19 of the Palermo Convention, both in its title and where it addresses case-by-case agreements, refers to joint investigations, not to joint teams, and can be understood as encouraging the Parties to establish a new entity only on the basis of general agreements, and to resort to the lesser measure of coordinated investigations when such agreements do not exist.<sup>80</sup> As pointed out in the paragraphs on “transnationality” and the concurrence of criminal jurisdiction, the cases amply illustrate this kind of joint investigation and testify to the high level of effectiveness it can achieve.

174. In ITA 11, a case of “carousel” frauds and related money-laundering that resulted in the confiscation of assets valued at 38 million euros, and ITA 15, a case of trafficking in counterfeit products, the Italian experts underlined the results achieved through coordination of law enforcement activities. The coordination in ITA 11, which was mainly arranged by the United Kingdom and Italian investigators with the participation of other European countries, was recognized as very productive because the speedy exchange of information and investigative results facilitated the smooth development of the investigation and also the significant enlargement of the prosecution with charges for additional, newly discovered crimes; it also enabled perfectly coordinated management of the “common action day”, resulting in numerous arrests and seizures. All this was possible, the expert said, thanks in part to the readiness of the authorities of the participating countries to organize and take part in a number of international meetings and to provide direct assistance to foreign colleagues. In the second case, the expert advised that “joint investigative units would have added, in such an investigation, more organic structure to the solutions adopted. Nonetheless, in various phases, operators of the member States created ‘de facto’ mixed units sharing common knowledge originating from particularly delicate activities such as wire or aerial tapping.”

175. By contrast, in ITA 10, a case of human trafficking from Nigeria to Europe, the expert considered the added value of parallel criminal prosecutions and proceedings in Italy, Nigeria and the Netherlands to be greater than that of coordinated investigations involving those three countries. Parallel prosecutions allowed

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<sup>79</sup>The text of the Memorandum can be found on the CD-ROM included with this publication.

<sup>80</sup>The interpretation of article 19 is further complicated because of its vague wording: the general agreements would establish bodies, a term that can mean a permanent structure instead of a team designed to investigate a single case. For this construction see the draft report *Informal Expert Working Group on Joint Investigations: Conclusions and Recommendations* (CTOC/COP/2008/CRP5) considered by the Conference of the Parties to the Palermo Convention at its eighth session. This report presents joint investigative teams and parallel/coordinated investigations as two distinct and alternative models of joint investigations, without any gradation.

all the components of the illicit traffic to be dealt with effectively, which had a serious impact on the operational cells of the entire network—a result that could not have been achieved by concentrating the prosecutions in a single country and using mutual legal assistance mechanisms. In this perspective, joint investigations work together to increase the efficiency of the investigations and support the criminal policy of expanding investigations to dismantle the entire criminal group or network.

176. In conclusion, joint investigative teams are generally the best option (though difficult to establish in some circumstances), but the usefulness of ordinary joint investigations should not be understated. In addition, joint investigations can be structured according to a variety of different models concerning, for example, the level of involvement of the prosecutorial and judicial authorities in the coordinating mechanism, or the degree to which the mechanism depends on the preexistence of a general intelligence sharing structure between the participating countries. This prompts another conclusion:

### LESSON LEARNED

**In cases of organized crime offences concerning several countries, if circumstances do not allow for the establishment of joint investigative teams, the countries should consider agreeing to procedures for continuous, concerted coordination of their investigations, utilizing autonomous but parallel prosecutions to increase the overall effectiveness of the investigations and expand the range of objectives to target.**

**When establishing the coordination mechanism, countries should take into account the characteristics of the case and give favourable consideration to the participation of prosecutorial and judicial authorities, as permitted by law, to strengthen the operational capacity of the coordinated entities involved.**

## F. MUTUAL LEGAL ASSISTANCE AND EXTRADITION

*Summary: Relevance of mutual legal assistance and use of the Palermo Convention's provisions; combining law enforcement cooperation and mutual legal assistance; solutions for traditional difficulties: direct contact, mutual trust, informal preparation, meetings, networks of judicial authorities; dual criminality; the Palermo Convention as a basis for extradition.*

177. Almost half of the *Digest's* cases involve mutual legal assistance and extradition: the relevance of these forms of international cooperation in proceedings for transnational organized crime offences is indisputable. The capacity to apply the norms of the Palermo Convention to cases of non-transnational offences increases the importance of that instrument in this specific field has already been emphasized earlier. Some of the case presentations expressly recognized the cooperative efforts made by authorities of other countries, underscoring that the results achieved were essential to the positive conclusion of the prosecutions. As to the difficulties posed by these forms of international cooperation, the cases do not diverge from the usual analysis. With mutual legal assistance, the traditional problem of a late or incomplete response to requests for assistance tops the list of concerns, as demonstrated in several cases.

178. Discrepancies in the procedural law of the countries involved create other common difficulties in mutual legal assistance. Differences in the stages of the proceedings is one example: certain investigative activities for which assistance is needed may be part of the undisclosed stage of the police investigation in the potential requesting country, while in the potential requested country they are conducted under judicial control and thus require letters rogatory. In HUN 2, a case in which many other dimensions of international cooperation achieved satisfactory results, the Hungarian expert presented an example of this problem: it was impossible to organize a controlled delivery operation because Dutch law requires a formal request of mutual assistance while in Hungarian law the operation was considered as having a pure law enforcement character (the Hungarian prosecutor's office is involved only if an undercover agent participates in the controlled delivery operation).

179. At the first expert meeting, several participants suggested that the current practice of mutual assistance focuses too much on the legal requirements of the requested State and not enough on those of the requesting State. They thought the opposite should be the case so that the results of the granted assistance could be used in the proceedings of the requesting State. This observation touches upon the limits of the international norms, which cannot be considered particularly "progressive" in this regard. Article 18, paragraph 17 of the Palermo Convention reiterates the principle that the execution of a request for assistance shall be in accordance with the domestic law of the requested State and that the procedures specified in the request would be followed only "to the extent not contrary to the domestic law of the requested Party and where possible". The criticisms raised at the first expert meeting implicitly called for the future development of such principles. Thus, practitioners and legislators could consider proposing changes in this area. It would be useful to conduct an international study on the possibility of adopting a more favourable standard, such as, for example, that the requested procedures should be followed to the extent not contrary to fundamental principles or basic rules of the legal system of the requested State. The creation of such a standard would prompt the authorities of the requested State to adopt new, generous procedures that are new for them and not in line with non-fundamental rules of their domestic system.

180. The cases and, especially, the discussions at the expert meetings, indicated possible solutions to these difficulties. The Palermo Convention, like many other international criminal law instruments, generally does not precisely differentiate between "mutual legal assistance" and "law enforcement cooperation". Article 18 of the Convention, in describing the mutual legal assistance, adopts a general concept of assistance that covers not only judicial proceedings but also investigations and prosecutions. The unavoidable judicial nature of some of the activities needed to satisfy requests for mutual assistance is not a sufficient reason to believe that the term "judicial cooperation" would clarify the distinction. There are at least two reasons for this: there may be mutual assistance activities of a non-judicial nature; and although prosecution functions are involved in mutual assistance, prosecutors are not judicial authorities in most national systems. Therefore, for the purpose of interpreting and implementing the Palermo Convention, any specific definition of a substantive nature should be avoided and mutual legal assistance should be understood as those activities listed in article 18, paragraph 3 when the procedures established in the same article are applied.

181. From the perspective of this non-definitional description, mutual legal assistance and law enforcement assistance are functionally combined and, within certain limited circumstances and up to the extent permitted by law, are both available. Some of the actions listed in article 18, paragraph 3 of the Convention can be validly implemented through informal direct contact between law enforcement agents under certain conditions and for certain procedural uses (see, for example, subparagraph (e): "Providing information ... and expert evaluations"). Moreover, this functional combination can avoid the formalities of mutual assistance for the immediate needs and purposes of the preliminary investigation stage. As the Italian expert emphasized in relation to ITA 1, one of the cases involving trafficking in cultural property, this can speed up investigations; requesting

and obtaining informal cooperation from a foreign law enforcement agency via email, fax or even telephone can later be followed up with formal requests for mutual assistance.

182. At the first expert meeting, the Spanish expert made a presentation on mechanisms to facilitate judicial cooperation. He focused on two facilitating mechanisms that are particularly useful to countries with significant, ongoing cooperation, as well as to investigative and prosecutorial entities established for single investigation cases: the organization of regular meetings between the central authorities; and judicial networks. The Spanish expert mentioned the European Judicial Network created in 1998, which played a longstanding intermediary role between authorities of EU Member States involved in mutual assistance practices; and the units of the Ibero-American Legal Assistance Network (IberRed) dealing with criminal justice cooperation among practitioners in Spanish-speaking countries.

183. The experts also emphasized that the formal nature of mutual legal assistance does not preclude exploiting informal relationships with foreign authorities. Creating an environment of mutual trust, including trust based on personal experience and a history of previous cooperation, may help produce effective mutual assistance. A formal mutual assistance procedure can also be informally prepared by the authorities of the countries involved. The Spanish expert stressed the importance of establishing direct contacts between judicial authorities to facilitate the submission and execution of requests for cooperation and avoid refusal based on misunderstandings (e.g., misunderstanding the formal requirements of the requesting State). In SAF 1, the South African expert illustrated the advantages of holding a “pre-meeting” with the foreign authorities that could provide assistance to explain the reasons, modalities, timing and concrete goals of the requested assistance. In this context, the establishment of a national central authority to receive and respond to mutual legal assistance requests (as prescribed by article 18, paragraph 13 of the Palermo Convention) should be seen as a way not only to create and benefit from domestic specialization in handling mutual assistance, but also to establish an international community of entities with repeated, common experience that is thus well versed in how to comply with the exigencies of the other members.

184. Taking into account all these measures, and without repeating what has already been said about law enforcement cooperation, the following conclusion can be drawn:

### **LESSON LEARNED**

**Providing mutual legal assistance is difficult and complicated because a multiplicity of legal requirements must be respected and two or more national justice systems, often with very different characteristics, must be effectively merged.**

**Therefore, prosecutorial and judicial authorities should work as much as possible in an environment of mutual trust and devote operational resources to informal, direct requests for assistance in anticipation and preparation of the formal procedures of mutual assistance.**

**Specialized central authorities, international networks of prosecutorial and judicial authorities and meetings with foreign officials (both general meetings and ad hoc meetings in the context of individual cases) can all play an important role in facilitating mutual legal assistance.**

185. These supplementary methods, however, cannot overcome constraints that are intrinsic to the legal requirements of mutual legal assistance and extradition, such as the requirement of dual criminality (i.e., the investigated or prosecuted activity is a criminal offence in both countries). Under the Palermo Convention, the requirement for extradition is absolute (article 16, paragraph 1), while for mutual legal assistance, the requested State has the discretion to grant assistance regardless of whether the conduct would constitute an offence under its domestic law (article 18, paragraph 9). This flexible regulation is often reproduced in domestic laws and bilateral and regional treaties covering all or some forms of mutual assistance: sometimes fulfilling the requirement is prescribed only if granting assistance entails coercive or invasive measures. Thus national policies and practices are in this regard quite diverse.

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## ■ ARTICLE 18. MUTUAL LEGAL ASSISTANCE

### *Flexible dual criminality regulation*

*9. States Parties may decline to render mutual legal assistance pursuant to this article on the ground of absence of dual criminality. However, the requested State Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested State Party.*

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186. Dual criminality is thus especially problematic in the area of crime covered by the Palermo Convention because some aspects of the international norms can lead to different conclusions. The first such aspect concerns the undefined scope of application of the Convention. As already noted in chapter I, the Convention applies, inter alia, to the open-ended class of serious crime, which includes offences that the Parties are free to criminalize or not. Therefore, the Convention does not assure dual criminality for this class of offences. In presenting SAF 1, a case of illicit traffic in unwrought precious metals, the South African expert repeatedly emphasized that one of the main problems in international cooperation is that conduct that constitutes serious crime in one country might not even be criminalized in other countries that should furnish legal assistance. Nonetheless, this observation relates not only to the legal provisions regulating international cooperation in the criminal field, but also, and mainly, to the international community's general policy of criminalization. Exploiting the flexibility of States on the dual criminality requirement could be a solution for mutual assistance, but not for extradition. For both—and by necessity for extradition—universal criminalization of specific conduct via an ad hoc international criminal law treaty remains the chief way out (a cumbersome one, however).

187. The second problematic aspect is linked to the obligations to criminalize imposed by the Palermo Convention. The Convention obliges criminalization of four basic offences (participation in an organized criminal group, corruption, money-laundering and obstruction of justice) and its three Protocols require the criminalization of additional specific conducts. Both the Convention and its Protocols provide very detailed descriptions of the conduct to be criminalized. This ensures the global harmonization of national criminalizing provisions and avoids the risk that dual criminality will not cover this extensive and important range of criminal offences (though the Parties can modify individual terms of the international descriptions or their general

structure when they establish the offences in their domestic law).<sup>81</sup> This highly advantageous aspect of the Convention and its Protocols was well illustrated in the Romanian expert's commentary on ROM 3, a case involving tax evasion, forgery of documents and money-laundering in which one of the offenders was extradited on the basis of the Palermo Convention: "The case is relevant as it brings together substantial provisions from the Convention but also provisions related to the international judicial cooperation, namely extradition. The fact that the Convention aimed at harmonizing the substantial law provisions of the State Parties with regard to certain type of offences, allows from the very beginning—at least in the case of money-laundering, the offence under discussion here—to assume that the condition of double criminality, essential in extradition procedures, is accomplished."

188. Considering extradition alone, the *Digest* cases suggest that it is much less common than mutual legal assistance; nevertheless, extradition does appear in several of the cases. The case BRA 1 and many of the Colombian cases provide examples of extradition of Colombian citizens to other countries, in particular to the United States, demonstrating that, under certain circumstances, the option to extradite citizens corresponds to concrete interests of the criminal justice system. The proceedings described in LIT 1 show how a defendant, who was charged with the offences of human trafficking and participation in an organized criminal group, can be extradited to a country on the basis of evidence that a criminal group, and not necessarily the defendant, was actively involved in the commission of offences in that country. The Court of the United Kingdom, which had to decide on the extradition, established that the defendant was a member of an organized criminal group, and because of this personal status, he was alleged responsible for all of the group's activities to recruit women in Lithuania, whom he then exploited for prostitution in the United Kingdom; thus he could have been extradited to Lithuania.

189. The case LIT 1 is an interesting starting point for evaluating the role that the charge of conspiracy or participation in a criminal association may play in extradition proceedings. Unfortunately, the *Digest's* cases do not provide other examples, which leaves open an important question about the interpretation of article 5 of the Convention. Are the the Palermo Convention norms that prescribe the criminalization of conspiracy and participation in a criminal association (which fall under a single rubric in article 5—participation in an organized criminal group) sufficient to resolve dual criminality problems in relation to those types of offences? Can the provisions of article 5 be construed as sufficient legal grounds to maintain that dual criminality exists when extradition is requested for one of those two offences but the requested country has only criminalized the other crime? Despite the criminalization of both offences being grounded in the same criminal policy and justified by the same legislative rationale, the relevant differences in their definitions speak in favour of the prudent conclusion that dual criminality is not assured, thus diminishing the positive impact of the Convention's criminalization on the dual criminality issue.

190. In KEN 1, a case in which Kenya and the Netherlands developed significant practical experience in cooperation, the expert noted that it was impossible to secure extradition of one of the offenders because the two countries were not bound by an extradition treaty. Evidently inspired by that negative experience, the expert concluded that "the use of treaties in extradition should be done away with because the procedure is quite lengthy". However, this extreme conclusion could have been moderated by taking into consideration that multilateral treaties on criminal law can be helpful in extradition procedures. The case does not explain why

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<sup>81</sup>Article 11, paragraph 6 of the Palermo Convention, in line with very similar or identical provisions in many other international criminal law treaties, specifies: "Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention ... is reserved to the domestic law of a State Party ...". This provision is usually interpreted as meaning that the description in the Convention need not necessarily be reproduced verbatim in the domestic law: to fulfil the obligation to criminalize, it suffices that all the conduct covered in the Convention's description are criminal offences in the legal system of the State Party.

the Palermo Convention's extradition provisions were not used as the legal basis for extradition since it seems that both Kenya and the Netherlands could have accepted that, given the declarations the two Parties made about article 16 (Extradition) of the Convention.<sup>82</sup>

191. In fact, article 16 of the Convention (in contrast to article 18 on mutual legal assistance) does not provide the entire legal regime needed to carry out an extradition: additional rules in domestic laws or in bilateral or regional extradition treaties are required.

### **LESSON LEARNED**

**If the necessary norms exist in the domestic laws of two countries to regulate the essential elements of extradition procedures, the Palermo Convention can be productively applied as the conventional legal basis in cases where the legal system of the requested State requires an extradition treaty to grant extradition.**

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<sup>82</sup> Article 16, paragraph 4: "If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies." See also article 16, paragraph 5 on the declaration on extradition required at the time of ratification.





## IV. MEASURES RELATED TO PROCEEDS OF CRIME

### A. POLICY AND LEGAL BASIS

*Summary: Value and purposes of confiscation against organized crime; the norms of the United Nations criminal law conventions; variety of domestic confiscation schemes; criminalization of money-laundering.*

192. In criminal law theory and judicial practice of recent decades, confiscation of the proceeds of crime has acquired a prominent role among measures for the suppression of serious crimes, in particular organized crime.<sup>83</sup> The most common and strong argument in favour of confiscation is that depriving the offender of the profits of criminal activity is not only an appropriate punishment but also an effective prevention tool. Confiscation is a strong deterrent to profit-motivated criminality and an efficient mechanism to remove from the hands of habitual offenders financial and other material resources that they could use to continue committing crimes. Moreover, confiscation prevents offenders from reinvesting illicitly acquired assets, thus significantly helping in the fight against the penetration of organized crime into licit business.

193. Clearly, the preventive function of confiscation (including, in this specific connection, confiscation of the instrumentalities of crime) is in sync with the policy of “dismantling the organized criminal group”. As several experts pointed out, the deprivation of assets usually harms the organization as a whole, even when the assets belong to individual members of the group. In this regard, if the criminal group is stable and business-like in conducting its illicit activities, it is possible that its members consider assets directly acquired through the commission of offences as a common reserve of resources to advance their illicit (and licit) activity.

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<sup>83</sup>Unless otherwise specified in the text, we use the term “confiscation” to mean the permanent deprivation of property (of any type and description) ordered by an authority. See article 2 of the Palermo Convention: “For the purpose of this Convention: ... (g) “Confiscation”, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority.” As explained in the following subchapters, confiscation can be either a criminal law penalty or measure, or a civil law measure.

194. The importance of confiscation is well illustrated in the *Digest's* cases. In fact, several cases involve the confiscation (or seizure, if the case was not yet concluded) of an impressive quantity of proceeds and instrumentalities. The presentations highlight the attention law enforcement agencies and prosecutorial and judicial authorities pay to this dimension of investigations and proceedings.

## CONFISCATION CASES

In BRA 1, a massive case of drug trafficking which has not yet received a definitive judgment, the seizure of almost US\$ 5 million in cash, diamonds, luxury apartments and 12 farms was complemented by the seizure of 22 airplanes and dozens of cars. The latter seizures highlight the destructive impact that confiscation can have on the operational means of a criminal organized group or network.

In another transnational drug trafficking case, ITA 6, assets preserved included insurance policies and bank accounts worth 10 million euros; four companies; 50 cars, trucks and boats; and 12 houses and other properties, including one outside Italy. In explaining the case's main characteristics, the expert emphasized that it provided a good example of how satisfactory results can be achieved in "attacking" the illicit proceeds of crime when gathering evidence on criminal conduct and tracing the illicit wealth of the alleged offenders are both integrated into investigations from the outset.

Another impressive case of confiscation is USA 2, in which eight years of investigation and proceedings concluded with the sentencing of more than 80 co-conspirators from Canada, China, Taiwan Province and the United States for trafficking drugs, tobacco products and arms, currency counterfeiting and money-laundering. Criminal forfeitures were ordered and the smugglers were forced to forfeit a total of US\$ 24 million as well as cars, jewelry and real estate.

These are three significant examples of confiscation of the proceeds of crime. But we must not overlook the extremely high value of the commodities being trafficked, which are usually confiscated as contraband per se. In SPA 1, the sizable seizure of proceeds (4 million euros, five boats and various luxury cars) was preceded by the confiscation of 3,400 kilos of cocaine. In USA 2, criminal forfeitures included drugs and counterfeit cigarettes and currency valued at more than US\$ 44 million. In two Brazilian cases of environmental crime (BRA 12 and 13), 300 protected wild animals and tons of jacaranda wood were seized.

195. The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was the first multilateral instrument containing an organic set of international norms on confiscation of the proceeds of crime and closely related matters, such as tracing, freezing, seizure and related international cooperation. This Convention was also the first to mandate the criminalization of money-laundering. The Palermo Convention includes almost identical norms plus provisions on international cooperation (of an administrative nature) that essentially target the discovery of money-laundering. The United Nations Convention against Corruption adds to this other measures of international cooperation; inter alia, it establishes innovative rules on the return of confiscated assets to the State of origin.

196. The international norms do not impose a single model for confiscation. They prescribe a short set of substantive principles and a very limited number of procedural rules;<sup>84</sup> the law enforcement and judicial machinery needed for confiscation and the provisions governing substantive limits and requirements are left to the legal traditions or autonomous legislative initiatives of individual States or regions to determine. The Palermo Convention requires each national legal system to pursue and order the confiscation of proceeds

<sup>84</sup>For the Palermo Convention, see article 12.

obtained through, and instrumentalities used in, the commission of crime, and measures to preserve the assets (e.g., seizure, freezing) shall also be available. The Convention also broadly identifies the categories of assets subject to confiscation, which include properties into which illicit assets have been converted or transformed and their “products”, as well as illicit assets that are intermingled with licit ones. Finally, many passages also implicitly suggest that the goals of the Convention in prescribing confiscation are those noted at the beginning of this chapter, including the prevention function (article 12, paragraphs 1 to 9).

197. A great variety of confiscation schemes can be found in national legal systems. For example, confiscation proceedings can fall under criminal law or civil law; in making confiscations, the authorities can act against the offenders or against the asset itself; confiscation can be strictly connected to the proceeds of individual offences, or it can include all illicitly acquired wealth; confiscation can hinge on a criminal conviction or occur independent of it.

198. The variety of domestic confiscation procedures is only partially demonstrated by the *Digest's* cases, since their presentations often describe only the assets seized or confiscated without identifying the principles and procedures applied. However, there is no doubt that most recent developments in national legislation have expanded the power to confiscate, with the prevention function providing the foundation for this expansion as dictated by the policy of reducing the potential for action of organized crime structures. The freedom that the Conventions left to domestic legislation might have helped this development: while national confiscation laws are usually aligned with international norms, they do not always derive from them completely, and sometimes they are more advanced.

199. In almost half of the cases involving the seizure and confiscation of the proceeds of crime, money-laundering has also been investigated and/or charged. Indeed, the accumulation of large amounts of proceeds inevitably implies the involvement of money-laundering, so any comprehensive organized crime investigation will inevitably include a parallel financial investigation on related money-laundering activities. The criminalization of these practices provides an indispensable basis for properly developing investigations of suspected illicit wealth of offenders. In this regard, the Spanish expert asserted that every country should have specialized police, prosecutorial and judicial bodies or units trained to deal with both money-laundering and organized crime.<sup>85</sup> Indeed, money-laundering operations are often extremely complex and require investigators to have a certain level of technical expertise and prolonged experience in the field to enable them to penetrate extremely intricate financial operations and “cover-up” schemes. The cases featured in the box below describe both a complicated and an extremely simple example of money-laundering.

### **MONEY-LAUNDERING CASES**

In ITA 11, a series of fake purchases of international telephone services valued at more than 2 billion euros enabled the offenders to acquire 370 million euros (the value of the VAT that was not paid on the phony transactions). This amount was introduced into the legal financial system by depositing the money in Austrian, Italian and United Kingdom bank accounts held by off-shore companies. These deposits were backed up by fake trade documentation to conceal the illicit origin of the money. The funds were further disguised through transfers among the off-shore companies, and then the money was deposited in banks in Cyprus, Hong Kong SAR, the Seychelles, Singapore, Switzerland and the United Arab Emirates. Ultimately, the funds were recovered from banks in Luxembourg, San Marino, Switzerland and the United Kingdom and returned to Italy, where they were invested

<sup>85</sup>On the combination of various specializations of law enforcement and prosecutorial authorities, see chapter II, section B.

in real estate, luxury cars and boats, jewels and jewellery. The funds returned to Italy mainly via ordinary banking channels for transferring money, though the expert noted that a limited portion was transported by the traditional system of carrying cash across the border.

In VEN 1, seven individuals returning to Venezuela (Bolivarian Republic of) from Germany were arrested at the airport carrying a total of more than 600,000 euros, whose licit origin they were not able to demonstrate. They were convicted of money-laundering and criminal association, and the money was confiscated on the assumption that it was proceeds of crime.

This case shows how incisive the criminalization of money-laundering can be if the description of the criminal conduct also covers the mere possession of the proceeds<sup>86</sup> and the predicate offence can be assumed without needing to prove it. In this connection, the expert stated: “One of the positive aspects arising from this case is the establishment of a precedent allowing the conviction of a group of people for the crime of money-laundering as an autonomous and independent offence, in the sense that it did not require the official recognition of the predicate crime; in this case, the illicit origin of the funds was indirectly verified through circumstantial evidence of criminal activity linked to drug trafficking, which allowed the assumption that the money was of unlawful origin.”

200. In commenting on SPA 6, the Spanish expert asserted that it would be useful to reinforce the basis for the criminalization of money-laundering by introducing or expanding the complementary offence of “illicit enrichment”. At the expert meetings, the Italian and Portuguese experts noted that this type of offence had been introduced into their national systems of criminal law, but it was subsequently invalidated by their Constitutional Courts.

## **B. EXTENDED CONFISCATION. FORFEITURE IN REM. NON-CONVICTION-BASED CONFISCATION**

*Summary: Extended confiscation; forfeiture in rem; other forms of non-conviction-based confiscation.*

201. Despite the broad definition of proceeds that are subject to confiscation and the possibility to confiscate “property the value of which corresponds to that of such proceeds”, the concept of confiscation in the Palermo Convention is still fundamentally linked to assets derived from individual confirmed offences. In this sense, confiscation conforms to the notion common in many national legal systems of a deprivation order issued by a judge concerning the proceeds of a specific offence that he or she adjudicated.

202. The need to combat the acquisition of illicit resources more effectively, combined with an awareness of the new capability of law enforcement to reliably trace the illicit assets of organized crime offenders, has motivated many national legislatures to introduce a new type of confiscation: extended confiscation. Extended

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<sup>86</sup>The offence of money-laundering introduced in Venezuelan criminal law by article 4 of the Act against Organized Crime (2006) includes, inter alia, the following hypothesis: “Whoever individually or by influence of another person owns or possesses money, goods, assets, or benefits whose origin derives, directly or indirectly, from illicit activities, will be punished by imprisonment of eight to twelve years and a fine equivalent to the increase in equity value illicitly obtained.” Under the Palermo Convention, the “acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime” shall be established as a criminal offence (laundering of proceeds) “subject to the basic concepts” of the domestic legal system (art. 6, para.1(b)(i)).

confiscation is the power to confiscate not only the proceeds of the offence for which an individual is convicted, but also other assets under his/her control that are proved, or assumed, to have been directly or indirectly produced by criminal activities. A conviction is a necessary precondition, and usually the law prescribes that it should be a conviction for organized crime offences or closely related crimes.

203. In SWI 1, a drug trafficking case involving a family-based organized criminal group possessing properties mainly in the country of origin, the expert highlighted article 72 of the Swiss Criminal Code, which states that in all proceedings where the offence of “criminal organisation” (article 260 of the Code) is confirmed, “[t]he court shall order the forfeiture of all assets that are subject to the power of disposal of a criminal organisation. In the case of the assets of a person who participates in or supports a criminal organisation, it is presumed that the assets are subject to the power of disposal of the organisation until the contrary is proven.” It is likely that not all the assets of a criminal group are proceeds of the offences covered in the given proceedings; some may have been previously or differently acquired. Thus, the Swiss provision establishes a type of confiscation that in certain aspects can be considered extended confiscation as defined in the previous paragraph. However, in Swiss law it is irrelevant whether the origin of the assets is licit or illicit; it is enough that they belong to the criminal group. In Swiss case law and doctrine it is clear that the rationale for this type of confiscation does not rely on the assumption that any of the group’s assets derive from illicit activities.

204. The case SER 5, involving drug trafficking and other serious forms of crime, showcases the 2009 Serbian law on the recovery of proceeds from crime: five apartments and six vehicles were seized on the basis of that law and a motion for confiscation probably will be filed upon final judgment. The law applies to proceedings of “organized crime” and other loosely defined categories of crime; article 3 establishes that “proceeds of crime are deemed as property of an accused, a cooperating witness or a deceased, which is manifestly disproportional to their legitimate income”. The court cannot order the confiscation if the proceedings end with a dismissal of charges or an acquittal. Therefore, this is an example of conviction-based extended confiscation. The Serbian expert stressed that “[t]he important novelty of this law ... is that it transfers the burden of proof on the origin of property assumed to be the result of criminal acts, from the prosecutor to its owner” and in greater detail, that “the public prosecutor has to present to the court the proof on the assets of the offender, on the lawful income of the offender and on the manifest disproportion between the assets and the lawful income of the offender, while, as a reverse burden of proof, the offender shall rebut the prosecutor’s claims. This can be defined as a mitigated burden of proof for the prosecutor.”

205. The reversal of the burden of proof is always a potential problem when dealing with extended confiscation. Doubts about the infringement of constitutional principles are frequently raised within the framework of many national legal systems. In addition, extended confiscation applies to assets accumulated through a presumed—and often lengthy—criminal history that is not the main focus of the criminal proceedings, and evidence about this history is not supposed to contribute to judging the criminal liability of the offender. Thus, the concept itself of extended confiscation implies special systems of proof, or a shift in the focus of what needs to be proved. The Italian and the Portuguese experiences are worth noting in this regard.

## TWO CASES OF EXTENDED CONFISCATION

Italy has a complex and richly developed legal system in the field of confiscation, and many forms of confiscation are available to its courts. Article 12-sexies of Law No. 356 (1992) provides a typical example of extended confiscation. This confiscation mechanism is explained in ITA 14, a case involving trafficking in counterfeit products and

money-laundering in which seizures of real estate and money were so extensive that, if confirmed, they may lead to confiscations totalling hundreds of millions of euros.

This confiscation system, which has survived a series of reviews by the Supreme Court and the Constitutional Court, requires a conviction for one of the offences on a list including all the most common organized crime offences plus others with strong characteristics of “economic crime”. Even at an early stage of the investigation, the prosecutor may collect information and evidence on assets at the disposal of the accused person. If the person is convicted, the prosecutor may then request extended confiscation.

The prosecutor has to prove that the assets are disproportionate to the legal sources of income of the convicted person; to avoid confiscation, the convicted individual must prove the licit “origin” of the property, including the licit origin of the means by which it was acquired. Thus, in contrast to the Swiss system of confiscation, in which the origin (criminal/noncriminal) of the assets has no relevance at all, in this Italian confiscation mechanism, the origin of the assets still forms part of the evidentiary contest, which focuses on the dichotomy “proved disproportion to the licit income sources/proved licit origin”.

In POR 1, a drug trafficking case, the regime of extended confiscation established by Law No. 5/11 (January 2002) was applied. The expert noted that the law permitted the confiscation of assets whose origin as either profits of the crime for which the defendant was sentenced or of other similar offences was not proved but only assumed on the basis of an accretion of facts that reasonably indicated their unlawful origin.

It is also interesting to note that this law was not mentioned when the prosecutor charged the offender, but was applied ex officio by the Court.

206. These cases indicate other problematic features of extended confiscation beyond the reversal of the burden of proof: the difficulty of connecting extended confiscation to the criminal proceedings that frame it, and to the criminal conviction as a necessary precondition. The Serbian law seems to permit, and perhaps to prescribe, full integration of the procedural activities concerning both criminal liability and confiscation. In some of the cases, however, the financial investigations needed for extended confiscation were initiated only after a conviction was secured. In the Italian system, parallel investigations for the two purposes, as well as asset preservation measures, are permitted from the very beginning of the case, but a confiscation order can also be issued in a separate procedure well after the conviction before the judge who presides over the execution of penalties. In commenting on POR 1, the Portuguese expert noted in positive terms that extended confiscation was possible even though the prosecutor did not take the initiative to apply the special regime, but recommended a different practice: “to establish in the accusation the amount to be confiscated and to indicate the corresponding legal provision”. All of these comments lead to the following conclusion:

### LESSONS LEARNED

**Confiscation of the proceeds and instrumentalities of crime is not a punishment of secondary importance; instead, it should be considered a fundamental component of the criminal justice response to organized crime. Investigators and prosecutors thus should consider financial investigation and asset preservation measures as integral and important parts of their actions in addition to establishing criminal liability. To the extent permitted by domestic law, financial investigation and preservation measures should**

**be integrated from the outset in the planned action of law enforcement and prosecutorial authorities; in cases where extended confiscation is possible, they should cover all assets at the disposal of the alleged offenders.**

207. In addition to confiscations that are ordered in criminal proceedings, there are other types of confiscation that are related to the commission of crimes but autonomous from criminal proceedings and do not depend on a criminal conviction.

208. In common law countries, the civil forfeiture that is usually available includes “forfeiture in rem,” a form of forfeiture in which the action is brought against the assets themselves in civil proceedings, with the goal of forfeiting them to the government. The assets must be proceeds or instrumentalities of crime, but this can be proved using evidentiary standards valid for civil proceedings, which are lower than those in criminal proceedings. Civil forfeiture is possible when criminal proceedings for the same offence are under way, or after they have been concluded by a dismissal or acquittal. The Jamaican expert noted that in JAM 1, a case involving lottery scams, the forfeiture of the criminal proceeds was a significant deterrent, demonstrating to the criminal world that the civil component of the law against organized crime also functioned effectively. The South African case SAF 4 described in the box below is an extreme example of the autonomy and independence of civil forfeiture (in rem) from criminal proceedings.

### **THE PROPHET CASE: IN REM FORFEITURE IN SOUTH AFRICA**

In SAF 4, three individuals were charged with manufacturing methamphetamine in contravention of the Drugs Act, including Mr. Simon Prophet, who was accused of operating a drug manufacturing laboratory in his residence. The State simultaneously brought civil forfeiture proceedings against the property, which Mr. Prophet, who owned the property, opposed.<sup>87</sup>

Mr. Prophet was acquitted of the criminal charge on the basis of technical legal problems with a search and seizure warrant that led to the discovery of the laboratory. However, the request for civil forfeiture was successful and the court ordered the property to be forfeited to the State on the grounds that it was used to manufacture drugs.

Mr. Prophet initially brought a request to stay the civil forfeiture proceedings pending the outcome of his criminal case. He contended that the civil proceedings would violate his right to remain silent. This application was dismissed because the court found that the decision to oppose forfeiture of his property did not compel him to speak in violation of his right to remain silent: Mr. Prophet could choose to defend himself against the forfeiture request or to remain silent. The court held that it was not required to protect him from the consequences of exercising this difficult choice.

After his acquittal in the criminal case, Mr. Prophet argued that the forfeiture was unfair because the criminal court had not been satisfied that the crimes he was accused of were in fact committed. The appeals court found that the State had proved on a civil standard that the property was used to manufacture methamphetamine and that the findings of the criminal court were irrelevant to the forfeiture proceedings.

<sup>87</sup>Civil forfeiture is provided for by article 48, paragraph 1 of the Prevention of Organised Crime Act, No. 121 (1998).

Mr. Prophet then appealed to the Constitutional Court asking it to declare the forfeiture order an unfair violation of his fair trial rights, his right to property and his right to a stay of the civil forfeiture proceedings pending the criminal ones. He was unsuccessful in his constitutional challenges.

In commenting on this case, the South African expert underscored the following: "It was the first case in which the court found that property could be forfeited to the State on the basis that it is either proceeds or an instrumentality of crime, even if the accused persons in the related criminal trial were acquitted. In other words the crime had not been established beyond reasonable doubt but forfeiture on the civil standard of a balance of probabilities was nevertheless granted. The court also made findings about the importance of civil asset forfeiture in dealing with organized crime, especially as conventional criminal penalties are often inadequate in dealing with organized crime."

However, given the expert's comments, it should be noted that even though a technical infringement related to the search warrant resulted in an acquittal in the criminal trial, the evidence of manufacturing was nevertheless compelling: the court hearing the civil forfeiture was clearly satisfied that the drugs were being manufactured at the property.

Furthermore, to prove that the forfeiture of the property would not violate the constitutional protection of the right to property, evidence was presented demonstrating the extent of the drug problem in the area where the laboratory operated. On the basis of this evidence, the court held that it would not be disproportionate to deprive Mr. Prophet of his property if this deprivation was weighed against the devastating social consequence of drug abuse. Therefore, the case can also be considered significant because it emphasizes the importance of extraordinary measures like civil asset forfeiture to combat organized crime and drug dealing.

The autonomy of civil forfeiture from the criminal proceedings, however, is not always complete and absolute, as shown by the Lazarenko case (USA 1), which was the first United States prosecution of a former foreign head of State for money-laundering, and which could have resulted in a significant forfeiture if it had been handled differently. The prosecutors made errors in attempting to secure confiscation, which were recognized by the judicial authorities. Lazarenko's money-laundering activity had been known since 1999, but a complaint for civil forfeiture was only filed in 2005, and it was dismissed because the five-year civil statute of limitations had expired. Later, a criminal forfeiture was ordered but then reversed by the Court of Appeal, which held that the criminal forfeiture was barred by the principle of *res judicata* since the rejection of the civil forfeiture was a final decision on the merits of the same claim. According to the United States expert, in the legal opinion of the judicial authorities, if the prosecutors had pursued civil forfeiture more promptly and requested the proceedings to be delayed until after conclusion of the criminal trial, they could have avoided the *res judicata* problem. The United States expert concluded that an "important lesson can be learned from the failure of prosecution efforts to forfeit funds ... Lack of familiarity with forfeiture law is common among federal prosecutors and may have contributed to the unsuccessful and untimely attempt to forfeit ... Since not every prosecutor can be made expert in the complexities of civil and criminal forfeiture, it is considered advisable to have a specialized forfeiture attorney actively involved in cases of this magnitude from their inception."

209. In more general terms, the advantages of having a variety of confiscation systems should be accompanied by an awareness that some of these systems are quite complex and involve legal and technical intricacies, and that the relationships between different types of proceedings may also be problematic. Thus we may conclude the following:

## LESSON LEARNED

**Law enforcement agencies and prosecutorial offices should ensure that some officers and prosecutors specialize in confiscation proceedings and participate in the most complex cases, possibly from an early stage, to contribute their knowledge and experience to the planning and development of confiscation initiatives.**

**Particular attention should be paid to the combination or alternative use of the various forms of confiscation available.**

210. Non-conviction-based confiscation<sup>88</sup> is not necessarily of a civil nature; it can occur in criminal proceedings under special circumstances. One example is provided by the recent proposal by the European Commission for a directive that would, if adopted, extend the powers of confiscation of EU Member States and introduce a specific form of non-conviction-based confiscation in addition to conviction-based confiscation and extended confiscation. Article 5 of that proposal (Non-conviction based confiscation) prescribes that “Each Member State shall take the necessary measures to enable it to confiscate proceeds and instrumentalities without a criminal conviction, following proceedings which could, if the suspected or accused person had been able to stand trial, have led to a criminal conviction, where: (a) the death or permanent illness of the suspected or accused person prevents any further prosecution; or (b) the illness or flight from prosecution or sentencing of the suspected or accused person prevents effective prosecution within a reasonable time, and poses the serious risk that it could be barred by statutory limitations.”<sup>89</sup>

211. At the first meeting in Rome, the Italian experts presented a model of confiscation established in 1965 that in Italian legal terminology is called a “patrimonial prevention measure”.<sup>90</sup> Independent of any conviction, this type of confiscation is ordered by a court against a person suspected of being a member of a mafia-type organized criminal group or suspected of having committed certain serious crimes listed in the law. The assets subject to confiscation are all those at the disposal of the individual, unless the individual can prove their licit origin. In the Italian experience, proceedings for this type of confiscation are frequently carried on in parallel to criminal proceedings for organized crime offences. A similar type of confiscation can be found in Albanian criminal law.<sup>91</sup>

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<sup>88</sup>“Non-conviction-based confiscation” can be considered an ambiguous wording, because extended confiscation, though it depends on the existence of a conviction, is not based on it since the assets subject to confiscation and their illicit origin can be unrelated to the offence in the conviction decision. It seems best to view extended confiscation and non-conviction-based confiscation as independent, unconnected concepts.

<sup>89</sup>Article 5 of the *Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union* (12 March 2012), doc.COM (2012) 85, final, of the European Commission. The European Union Council Framework decision on *Confiscation of Crime-related Proceeds, Instrumentalities and Property*, 2005/212/HA (24 February 2005), already obliges Member States to introduce in their systems the conviction-based extended confiscation.

<sup>90</sup>A complete new regulation of this confiscation was adopted by Legislative Decree No. 159 of 6 September 2011, *Code of the Anti-mafia Laws and Prevention Measures*, which entered into force on 23 November 2011.

<sup>91</sup>Law No. 10192, *Preventing and Combating Organized Crime and Trafficking through preventive measures against property* (3 December 2009).

## C. INTERNATIONAL COOPERATION IN THE EXECUTION OF CONFISCATION

*Summary: Limits of the international norms; difficulties created by discrepancies between national confiscation systems; advantages of procedures specifically designed for international mutual assistance: recognition of the foreign orders of confiscation.*

212. Effective international cooperation for the purposes of confiscation is essential to the fight against organized crime. Moving and concealing abroad assets directly or indirectly obtained from criminal offences is obviously, a very common method of preserving illicitly acquired wealth. Organized crime often has a transnational nature, but its perpetrators frequently add an extra transnational dimension to the criminal conduct by involving several countries in laundering and in the final allocation of assets. If the property to be confiscated is found in another country, discrepancies between the national confiscation systems could cause difficulties in carrying out the confiscation in addition to the traditional hindrances of international investigations on financial and property matters.

213. Under the Palermo Convention (article 13, paragraph 3), the norms governing mutual legal assistance (article 18) also govern various aspects of international cooperation for confiscation. For those not regulated by article 18, two issues theoretically appear to clash with the goal of ample and efficient cooperation. First, the obligation to confiscate upon request of another State may encounter limits imposed by the domestic law of the requested State.<sup>92</sup> For example, permitting confiscation of the proceeds of only certain types of crime could be one such limit. Second, the confiscation procedure to be followed by the requested State is determined by the laws and decisions of that State (article 13, paragraph 1); this could conflict with the modalities and timing of the requesting State's proceedings.<sup>93</sup> Moreover, in the absence of a universal mandatory regime for the execution of confiscation requests, article 13 of the Palermo Convention cannot provide the normative foundation for global "rapprochement" of cooperation practices in the way the experts have indicated that article 18 could for other aspects of mutual legal assistance. The consequence is that:

### LESSON LEARNED

**Even more than in other areas of international cooperation, experience, knowledge of the national legal systems of the relevant countries, bilateral preparatory works prior to issuing a request and practical arrangements on a case-by-case basis are essential success factors for international cooperation for the purpose of confiscation.**

214. In several of the submitted cases (e.g., MEX 4, SPA 1, SPA 6, RSA 1, ITA 6), requests for cooperation from another country related to confiscation were fulfilled in sum or part; these cases also partially illustrate assistance received in investigations to trace property and asset preservation measures initiated abroad. Unfortunately, the cases do not depict whether and how available legal tools permit countries where assets

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<sup>92</sup>In accordance with article 13, paragraph 1 of the Convention, the obligation of the requested State to act upon the request exists "to the greatest extent possible within its domestic legal system".

<sup>93</sup>Under article 13, paragraph 1 of the Palermo Convention, the requested State has the ability to select one of the alternatives prescribed in subparagraphs (a) and (b); if (a) is selected, any of the confiscation procedures available for domestic cases can be utilized.

are found to grant cooperation in relation to the various types of confiscation (e.g., extended and non-conviction-based confiscation). This point is of special importance when confiscation is ordered (or simply pursued) in the requesting State in accordance with a procedure that is unknown in the requested State, or using extended confiscation powers that the domestic law of the requested State does not admit.<sup>94</sup> In-depth research and analysis at a global level of this problematic aspect of international cooperation would be of extreme interest to practitioners who want to know the current chances of securing confiscation abroad; this could also provide a basis for possible future international developments (e.g., model laws or model treaties; soft law instruments).<sup>95</sup>

215. It should be noted that the United Nations Convention against Corruption provides much stronger provisions for confiscation than the Palermo Convention: in addition to an article very similar to article 13 of the Palermo Convention, article 54, paragraph 1(a) of the Convention against Corruption obliges the Parties to introduce a system of recognition (exequatur) and enforcement of foreign orders of confiscation in their legislation (“Each State Party ... shall ... take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party”). The possibility of using a procedure completely separate from domestic confiscation proceedings and purposely designed for international mutual assistance increases the likelihood that foreign requests will be granted because potential discrepancies between two national systems of confiscation are not necessarily obstacles anymore and the threshold for grounds for refusal of assistance will be raised.<sup>96</sup>

216. At the first meeting in Rome, the expert from the United States made a presentation on recently adopted norms that allow United States authorities to enforce foreign “forfeiture or confiscation judgments” requested by a country that is a Party to the 1988 Vienna Convention against drug trafficking or any treaty providing for mutual forfeiture assistance.<sup>97</sup> Reasons to refuse to enforce such judgments are related to the lack of jurisdiction of the requesting country or lack of a fair trial; as already generally noted, minor differences between the legal systems of two countries will not interfere with agreeing to confiscation. A similar recognition system operates in civil law countries. Even though a lack of significant cases does not allow for a more substantive conclusion, the very promising perspective offered by the Convention against Corruption and supported by national laws allows the following:

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<sup>94</sup>The European Union initially regulated extended confiscation by allowing States to choose among various graduated options (Council Framework decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, 2005/21/JHA [24 February 2005]). It subsequently dictated very detailed rules for cooperation among Member States on confiscation (Council Framework Decision on the Application of the Principle of Mutual Recognition to Confiscation Orders, 2006/783/JHA [6 October 2006]). Under article 8 of the latter decision, recognition and execution may be refused if the confiscation order of the requesting State falls outside the option adopted for extended confiscation by the requested State.

<sup>95</sup>INTERPOL’s Global Focal Point Initiative on Asset Recovery programme, initially targeted to corruption cases, provides assistance to national law enforcement agencies in understanding and drafting asset freezing/seizure requests, including by organizing multilateral preparatory technical meetings. The expert from INTERPOL said that the Organization granted assistance within the frame of this initiative in several instances when countries did not respond to requests for execution of pending freezing orders within the limited timeframe in force in the requesting country.

<sup>96</sup>Article 54, paragraph 1(c) of the Palermo Convention obliges the State Parties “to consider taking measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases”.

<sup>97</sup>These norms are incorporated in Title 28 of the United States Code, Section 2467, *Enforcement of foreign judgment*.

### **LESSON LEARNED**

To facilitate international mutual assistance in the execution of foreign orders of confiscation, specific procedures should be studied separate from domestic proceedings of confiscation. Following the example of article 51, paragraph 1(a) of the United Nations Convention against Corruption, such procedures may consist in recognizing and giving effect to the original order of confiscation issued by a court of the requesting State.



## V. FEATURES OF SPECIFIC OFFENCES

217. The previous chapters focus on specific stages of the criminal justice response to organized crime rather than individual categories of offences. However, the cases also provide insights on certain aspects of specific types of crime and this offers an equally useful and interesting perspective on organized crime. This chapter is intended to complement the general approach of the *Digest* and to explore and analyse specific aspects and features of particular categories of offences related to organized crime, including: maritime piracy, trafficking in illicit firearms, environmental crime, trafficking in cultural property and cybercrime. The decision to focus on these particular offences does not imply a greater level of seriousness as compared to other offences; rather, these offences present specific aspects that merit consideration but might have been overlooked if not addressed separately.

### A. MARITIME PIRACY

**Summary:** *Maritime piracy off the coast of Somalia; limited exercise of jurisdiction; development of legal provisions and the potential role of the Palermo Convention; INTERPOL's initiatives.*

218. A total of 18 cases on maritime piracy were submitted for the *Digest*, six from the Seychelles and 12 from Kenya. They all concern the extremely serious phenomenon of piracy on the high seas committed by Somali nationals off the coast of their country and in the Indian Ocean. The main difference between the two groups of cases is that the Courts of the Seychelles passed judgment on offenders who were arrested by the Seychelles Navy or other police agents of the Seychelles, whereas in the Kenyan cases, the individuals tried in Kenya were arrested on the high seas by naval officers from other countries and then surrendered to the Kenyan authorities to exercise criminal jurisdiction, mainly in execution of an international agreement that provides for this.<sup>98</sup>

219. These cases give rise to two observations about the relationship of maritime piracy to the general concept of organized crime. First, the policy of “dismantling the criminal organization” does not seem to concretely

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<sup>98</sup>See also the commentaries on the case KEN 2 in chapter I, section E.

apply to the criminal justice response to maritime piracy. What emerges from an analysis of the criminal proceedings is that the cases are all limited to the “final” offences of piracy committed on the high seas at the time of the arrest, and to the people who materially committed them. In some cases, the proceedings were extended to cover alleged offenders on board a large ship (the mother ship or “whaler”) that the pirates used as a logistical base from which they attacked a targeted ship with smaller, speedboats. In a few cases, “operating a pirate ship” was also successfully charged as an offence distinct from that of the concrete attack on a ship. The overall organizers and leaders of the criminal activity (e.g., financiers, recruiters, commissioners of the pirate ships, managers of the proceeds of the crimes) do not appear in any of the cases. Probably this is due to the fact that these other criminal actors were located in Somalia and the present status of that country does not permit local institutions of justice to carry out appropriate investigations and proceedings (not even for the purpose of mutual assistance to other countries). In addition, the courts of both the Seychelles and Kenya based their criminal jurisdiction over piracy on the high seas on the principle of universal jurisdiction over piracy established under *jure gentium* or on domestic norms providing jurisdiction. However, this broad concept of jurisdiction contrasts to a very narrow prosecutorial practice: it almost seems that the exercise of jurisdiction was necessarily conceived from the outset as limited to offenders who had been arrested and were at the disposal of the courts, and that exercise would have not been justified for people who did not directly participate in the act of piracy that led to the arrest.

220. This restricted perspective in the prosecution of piracy is particularly evident in relation to firearms. In all the cases, the possession of firearms by the pirates was proved, and frequently also their use; moreover, often firearms were seized, examined by experts and referred to court as evidence. However, as the case documents indicate, there seemed to be no attempts to trace the firearms and understand their trafficking background. Again, the reasons for this could be the same as suggested in the previous paragraph.

221. The second general observation is that maritime piracy is typically a form of transnational organized crime and the related proceedings have a markedly international character (usually the offenders, victims and witnesses are foreigners, and often the intervening naval or police officers are as well). However, the Palermo Convention is never mentioned in the documentation for these cases, even when referring to it would have been beneficial to the case. For example, in the case KEN 12, there is no mention of article 18, paragraph 18 of the Convention, which would have supported the court’s decision to allow witness testimony by videoconference from abroad. In general, no reference is made to obligations of mutual assistance as imposed by international binding instruments. Furthermore, some of the submitted judgements demonstrate the persistence of difficulties in substantive criminal law, such as with the exercise of extraterritorial jurisdiction and the construction of the offence of piracy (especially where the old notion of piracy *jure gentium*, the definition of piracy in article 101 of the United Nations Convention on the Law of the Sea and domestic criminal provisions apply concurrently).

222. The circumstances described above raise two theoretical questions. The first is whether the international community, which is already effectively engaged in law enforcement efforts to stop maritime piracy, could reinforce its actions by initiating an international dialogue on the legal issues related to piracy, particularly those of substantive criminal law.

223. The second question is whether the Palermo Convention could be used as the legal basis for international cooperation (principally mutual legal assistance) and as a source of inspiration for the criminalization and charging of offences that typically accompany acts of piracy. In this latter regard, the offence of participation in an organized criminal group (article 5 of the Convention) and the offences of trafficking in firearms (prescribed by the Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the Convention) could be of special relevance.

224. At the fifth session of the Conference of the Parties to the Palermo Convention, resolution 5/6 requested UNODC to provide technical assistance to help States to apply the provisions of the Convention to new and emerging forms of transnational organized crime, including maritime piracy. Considering that maritime piracy is not a new offence and that it has always been a transnational offence committed with organized crime modalities, this resolution should be understood as a call for a comprehensive criminal law response to the recent serious re-emergence of maritime piracy, especially off the coast of Somalia, and the need for international cooperation to establish a comprehensive criminal law response to it.<sup>99</sup>

225. In her important and comprehensive presentation on piracy issues at the final expert meeting, the Kenyan expert emphasized that the prosecutors who deal with piracy offences are mainly concerned with the insufficient development of the national (and international) legal framework on maritime piracy. She praised the United Nations Legal Committee for the work done to facilitate the application of the Law of the Sea Convention, but asserted that much more needed to be done. As a specific example, she mentioned the lack of regulation of police actions from the time of the arrest of the alleged pirates on the high seas to the time of their surrender to the prosecutors of the countries where they were to stand trial. She also stressed the need to study the possible utilization of various legal tools provided by the Palermo Convention, including a broader application of its anti-money-laundering provisions.

226. Finally, and by way of example, in the area of international law enforcement cooperation, a series of projects and initiatives have been developed by international organizations such as INTERPOL and UNODC, often in cooperation with other international partners, to assist Member States in their efforts to deal with maritime piracy. These include, among others: (a) the establishment of a Maritime Piracy Task Force within INTERPOL that assists the investigators of intervening States with the difficult activity of collecting evidence in a maritime environment; (b) the development of a manual of law enforcement guidelines distributed to ship owners to ensure the preservation of evidence on hijacked ships and the integrity of the crime scene; (c) a Global Maritime Piracy Database, created in 2011, that contains more than 4,000 records of information on pirates and attacks, to help in the identification and arrest of individuals involved in maritime piracy, and a digital album containing more than 300 photos of suspected pirates; and (d) several technical assistance initiatives providing specialized investigative training and equipment.

## B. FIREARMS

**Summary:** *Links between firearms offences and organized crime; regulatory provisions of the Protocol related to identifying and tracing firearms; INTERPOL databases; the importance of firearms tracing as a tool for expanded investigations.*

227. Firearms are linked to various forms of organized crime in several ways: as a tool for gaining and maintaining power, as an instrumentality for the commission of a crime, and as a commodity to be trafficked. In addition, firearms are also the object of specific other criminal offences (such as illicit possession or carrying etc.) that relate to the domestic firearms control regime.

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<sup>99</sup>On the actions taken by the international community and the problems to be resolved, see the “Report of the Executive Director of UNODC to the Commission on Crime Prevention and Criminal Justice,” E/CN.15/2011/18. The provisions of the Palermo Convention that would be of particular use are not identified in the Report. One of the specific problems it mentions, however, is also emphasized in the presentation of the Kenyan cases: the non-availability, or unwillingness, of victims/witnesses, who are often foreign seamen or naval officers, to appear in court, which consequently prolongs the trials.

228. Article 5 of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter: the Firearms Protocol), obliges the Parties to establish three specific offences in relation to firearms: illicit manufacturing, illicit trafficking and falsification or modification of the marking(s). None of the submitted cases concerning firearms deal with marking-related offences. In addition to one Colombian case involving guerrilla and paramilitary groups, five cases concern organized criminal groups specifically dedicated to transnational trafficking of firearms; three cases concern organized groups involved in various types of illicit trafficking, including firearms; three cases involve illicit possession of firearms; and one case presents a mixture of trafficking and assembling, and thus includes an element of the manufacturing offence.

229. There are numerous conceptual links between firearms offences and organized crime. First, the cases indicate that the illicit business of firearms trafficking, when conducted on a grand scale, requires complex organization and thus entails the participation of organized criminal groups in the acquisition, transport and delivery of the weapons and in related commercial and financial activities. Therefore, it is not surprising that firearms are often trafficked by well-structured, organized criminal groups (frequently with strong ethnic and mafia-type characteristics) that are usually engaged in trafficking drugs or other lucrative illegal commodities. Examples can be found in the cases BRA 3, SPA 6 and USA 2, in which drug trafficking groups were also engaged in transnational traffic in firearms and other illicit goods. Despite the absence of specific details on the firearms dimensions of the criminal conduct, the cases still illustrate how well-established criminal groups can easily diversify the object of their illicit traffic, taking advantage of their solid structure and system of power, including experienced and reliable associations with networking counterparts.

230. The case USA 2, involving Asian organized criminal groups, is particularly noteworthy, underscoring the enormous variety of illegal items that a group can smuggle. As the American expert stated, “the investigation and prosecution revealed that Asian organized crime groups (like all others around the world) are adept at finding and developing illicit money-making ventures and will stop at nearly nothing to make a profit ... The eight-year investigation began when FBI undercover agents, posing as underworld criminals, helped make sure that shipping containers full of counterfeit cigarettes made it past United States Customs officers undetected. Over time, as undercover agents won the smugglers’ trust, they were asked to facilitate other illegal shipments such as narcotics and millions of dollars in Supernotes. Later, the smugglers offered a variety of Chinese military-grade weapons, including the QW-2 surface-to-air missiles”. This case also demonstrates that the type of criminal organization and the vast scale of the illicit conduct naturally require a holistic investigation of the criminal group rather than separate investigations of the various offences involved.

231. However, some traffickers specialize in firearms, or at least their criminal activity is restricted to firearms. In SER 4, two dozen Kalashnikovs and pistols were smuggled from Bosnia and Herzegovina to the French black market by a group of people managed by an individual resident in Serbia; apparently the guns were smuggled without the traffickers first securing buyers in France. In BRA 8 and BRA 9, firearms of United States and European origin were transported to Paraguay, and from Paraguay to Brazil (directly or via Bolivia) by groups of criminals who appeared to have acquired the specific instrumental role of firearms providers within a broader arena of organized groups involved in other types of offences. This represents a second important conceptual link between firearms offences and organized crime: criminal groups are frequently armed groups, or they arm themselves on specific occasions; consequently, criminal groups are frequently the ultimate destination for arms trafficking. The two Brazilian cases are examples of vast firearms trafficking schemes in which individual organized criminal groups in Brazil ordered the weapons. The case ITA 4 is a similar but not identical case: firearms originating in the territories of the former Yugoslavia were shipped to Italy for sale to Italian organized crime groups, which were regular clients of the traffickers.

232. In COL 14, an older case of transnational firearms trafficking, the traffickers intended to export 50,000 rifles from Europe, via Peru, to the Colombian guerrilla group FARC. The Colombian expert explained that criminal schemes like this one, characterized by illicit commerce of a certain magnitude and importance, often involve corruption at the higher levels of government. In COL 14, the trafficking was organized by the chief of the Intelligence Service of Peru, and the acquisition of the arms was negotiated in Jordan by two officials of the Peruvian Ministry of Defence.

233. Another case, BRA 2, which has not yet concluded with a definitive judgement, involves the discovery of an extensive, well-established illicit market for firearms, ammunition and components and the seizure of more than 300 weapons. The traffickers were individuals with a particular tie to firearms (either professionals such as owners of shooting clubs, or amateurs such as sport shooters and gun collectors); most of them were authorized to perform their professional or amateur arms-related activity; and their clients were not organized criminal groups. The “organized crime” component of the case, if proved, would refer to the organization of the individuals involved, who all participated repeatedly in the illicit commerce in various roles: a network of people that the expert defined as “criminal group” (*quadrilha o bando criminoso*).

234. A third link between firearms and organized crime is that firearms are often used in the commission of organized crime offences, or firearms are found and seized as a result of investigations of organized crime offences and their illicit possession can be an additional criminal charge. Cases of this type include SER 1, in which the main crime was drug trafficking, and ROM 1, in which the investigators discovered 22 firearms in the possession of traffickers in persons. In these cases there was no direct use of the firearms for, during, or in connection with the commission of the investigated offences, so it can be reasonably assumed that the offenders used the arms for general purposes of defence, attack or intimidation.

235. A few of the cases make a fleeting, non-detailed reference to investigations of the arms themselves to better identify their origin and classification. This point merits consideration, not only because a seized firearm can provide evidence of its use in previous crimes, but also because its history and movements can eventually lead to new lines of investigation that can help to construct extensive scenarios of related crimes and criminal organizations.

236. The Firearms Protocol obliges the Parties to establish an effective regulatory regime for firearms (articles 7 to 15) and imposes a series of preventive measures<sup>100</sup> that may be of use to investigations. These measures include: the marking of firearms (article 8); various record-keeping mechanisms concerning their manufacture, trade and disposal (articles 7 and 10); and the obligation to exchange information at the international level (article 12). The Protocol is strongly characterized by the combination of criminal law and regulatory tools as two strictly and functionally related components of a single law enforcement system. In such a system, identification and tracing of firearms are central pillars of both prevention and suppression: e.g., article 7 clearly prescribes the obligation to keep records on markings and international transactions of firearms for both the prevention and detection of illicit manufacturing and trafficking. Tracing a firearm found and identified in the course of an investigation of a single offence may not only help the investigation but also disclose other criminal patterns.

237. Retaining and exchanging information on firearms that are known as lost, stolen, smuggled or trafficked can also be useful. INTERPOL is currently developing a global database for this purpose (INTERPOL Illicit Arms Records and tracing Management System, iARMS). Authorized users could query the system and

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<sup>100</sup>The provisions on prevention measures in the Firearms Protocol range from article 7 to article 13 and apply together with the prevention measures prescribed by the Palermo Convention.

instantly determine whether a firearm that has been seized has been reported to INTERPOL by another member country. The iARMS project will be completed in December 2012 and will supplement existing INTERPOL tools, such as the INTERPOL Firearms Tracing System that allows an investigator to request the ownership history of a firearm from the country of origin or legal import. The INTERPOL Firearms Reference Table (IFRT) enables investigators to correctly identify a firearm—its make, model, calibre and serial number—which significantly increases the chances of identifying its ownership history when submitting a trace request. Finally, there is the INTERPOL Ballistic Information Network (IBIN); since every firearm leaves unique microscopic markings on the surface of fired bullets and cartridges, IBIN can identify links between pairs of spent bullets and cartridge cases within minutes, thereby helping forensic experts to provide police investigators with timely information about crimes and suspects.

238. At the final expert meeting, the Canadian expert presented an example of a successful investigation based on firearms tracing in a case known as CANXXX Triple X Project, which involved arms imported to Canada from the United States. An entire criminal group that had been illegally supplying firearms to a certain Canadian province for years was dismantled (106 people were arrested), which resulted in a substantial reduction in the level of violence in that area. This result was possible thanks to accurate and complete tracing of the weapons conducted with the full cooperation of the United States authorities, which revealed that some of the arms came from a store in Texas; the knowledge of the store allowed the identification of a purchaser who was arrested in the United States when he attempted to cross the border to Canada; through the cooperation of this individual the entire network was subsequently disclosed. The Canadian expert also emphasized the importance of good tracing mechanisms and, given that firearms-related offences are often transnational, the establishment of appropriate, tested procedures for international cooperation in tracing. Based on these observations, we may conclude the following:

#### **LESSON LEARNED**

**In investigations of trafficking in firearms, as well as in any case where firearms are found in the course of an investigation, their identification, ballistic examination and especially their tracing may provide evidence and information useful to the prosecution of the original offence. They may also enable this offence to be connected to a wider set of crimes and link individuals under investigation to a network of other offenders and criminal groups. This is in line with the holistic approach that is particularly valued in dealing with organized crime.**

**The provisions of the Firearms Protocol, which prescribe regulatory measures for the keeping and exchange of information on firearms, should thus be considered an effective basis for firearm tracing. Related international cooperation should be developed to the maximum extent possible.**

239. A final link between firearms and organized crime was pointed out at the last expert meeting: domestic criminal laws may provide that an offence committed with the use of firearms is “upgraded” to a more serious category of crime or considered an aggravated offence, thus allowing investigators to use the reinforced legal tools that the law provides for organized crime and/or serious crime. The Canadian expert cited as an example the Canadian Bill C-2 (1 May 2008), which increases the minimum penalty from four to five years of

imprisonment for certain offences (e.g., extortion, robbery, hostage-taking, kidnapping and attempted murder), when firearms are used in their commission for the benefit of, at the direction of, or in association with a criminal organization.

## C. ENVIRONMENTAL CRIME

*Summary: Transnational organized crime aspects of a Brazilian case of illegal logging; the use of “geo-intelligence”; trade in protected animals; other fields of environmental protection: pollution and waste trafficking; INTERPOL’s projects.*

240. The *Digest* has already introduced in chapter I some Brazilian cases of environmental crimes linked to organized crime. Another Brazilian case, BRA 15, concerning illicit logging in the Amazon Rainforest, though not yet definitively adjudicated, sheds further light on these crimes. This case is particularly interesting because it reveals the complexity of the modus operandi of modern environmental crimes. The offenders allegedly obtained official authorizations to log and to trade timber through fraudulent means, such as misrepresentation of the nature and legal ownership status of properties, use of fictitious “forest credits”, falsification of the Forest Registry (Inventario Florestal) and presentation of fake Projects for Forest Management (Planos de Manejo Florestal). They also bribed public officials to secure a favourable and speedy evaluation of the applications for authorization. In all, 172 persons were accused of various offences, including not only specific timber-related offences, but also corruption (allegedly also committed by high-level officials and a parliamentarian) and participation in a criminal association.

241. In identifying the reasons for the investigation’s success, the Brazilian expert underscored the combination of classical investigative techniques with modern techniques of “geo-intelligence”. In BRA 15, remote-sensing and geoprocessing techniques were used extensively. The expert considered the multi-time analysis of satellite images of the relevant territories a unique, irreplaceable method of gathering evidence. This method is based on an “independent production of information and intelligence data”, and thus suits a proactive approach to investigation. The Brazilian authorities subsequently adopted the investigative methodology used in this case as a model for all cases of illicit exploitation and transnational trafficking of forest and mineral resources.

242. It is also noteworthy that, in the expert’s evaluation, the role of the corrupt officials and the professionals (e.g., engineers, topographic experts and other experts) who conspired in the issuance of the authorizations was not confined to mere facilitators in the fraudulent activities. On the contrary, since they were actively pursuing their own personal interests, they were one of the “motors” of the entire criminal scheme, promoting it just as much as the other participants, including the landowners, sawmill owners, transporters and licensed managers of the Forest Projects. This kind of scenario, where a variety of people or groups of people combine their distinct interests and functions and collaborate with the shared aim of earning illicit profits, characterizes the criminal conduct as organized crime. Thus the expert concluded that in similar cases, efforts to prevent and suppress the crime must be comprehensive, touching upon the various categories of potential criminal actors. This case was also considered important because the investigation enabled the prosecution of 12 high-level public officials.<sup>101</sup>

243. However, the Brazilian expert also stated that, despite the successes of the law enforcement operations in BRA 15, a lack of sufficient resources in law enforcement agencies and public prosecutor offices in all the

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<sup>101</sup>The expert noted that the World Bank estimates the annual global proceeds of illicit logging and trafficking is in the range of US\$ 10-15 billion.

cited areas could be a major obstacle to future investigations. Reliable monitoring and intelligence services and the integration of environmental criminal law into organized crime legislation have been proposed as measures to strengthen the criminal justice response.

244. As to the transnational aspects of this kind of environmental crime, the expert pointed out that 80 per cent of forest products are destined for foreign countries such as the United States, China and European countries. For various reasons, including the lack of proper international criminal law norms, traffickers can easily provide fake documentation for the exported material that “proves” its legal origin and trade, and buyers can easily shield themselves behind the principle of good faith that protects legitimate interest of third parties (“bona fide third party” principle). To overcome these kinds of situations, the expert suggested adopting an approach that corresponds to the international norms applied to money-laundering, and stressed the urgency of studying and adopting international provisions for normative schemes for forest and mineral products similar to those in force for financial proceeds.

245. The Brazilian expert’s repeated references to mineral resources and products in conjunction with forest products allow the observations made in this chapter to extend to the issues the South African expert raised about the lack of international criminalization of trafficking in precious metals in connection to RSA 1.<sup>102</sup>

246. Within the United Nations, the role of criminal law in the protection of the environment and the development of related international criminal law norms was marginally dealt with at the Twelfth United Nations Congress on Crime Prevention and Criminal Justice held in Salvador, Brazil (12-19 April 2010). The Congress, in its final political declaration, the “Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World”, acknowledged the challenge posed by emerging forms of crime that have a significant impact on the environment and encouraged Member States to strengthen their national crime prevention and criminal justice legislation, policies and practices in this area and to enhance international cooperation, technical assistance and the sharing of best practices.<sup>103</sup>

247. The cases SPA 8 and BRA 12 concern trafficking in protected animals. In SPA 8, Spanish investigators discovered a criminal organization (a total of 15 people) clearly divided into two levels: one group captured protected birds of prey or collected their eggs or chicks; the second group received the birds and traded them domestically and internationally. The Spanish expert emphasized that the second group was the driving force, and in some instances it was clear that the traffickers or the final buyers specifically ordered the capture of birds. The traffickers were also charged with forgery because they tried to conceal the illicit origin of the birds with phony documentation (e.g., they attached fake identification rings to the birds). In BRA 12, which involved international trafficking of protected animals from numerous parks and nature reserves in various Brazilian states, the dimensions are notably larger: 102 persons investigated; 72 arrest warrants; 102 seizure warrants and 300,000 animals seized. The Brazilian expert estimated that the annual volume of traffic was 500,000 animals with a value of 20 million Brazilian Reals. In the face of such huge figures, the expert noted that “as to the legislation in force in Brazil to prevent and combat the environmental crimes, the Law 9605/98 has not

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<sup>102</sup>See paragraph 86.

<sup>103</sup>“Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World” doc. A/CONF.213/18, op. para. 14. At the same Congress, the International Institute of Higher Studies in Criminal Sciences and the International Association of Penal Law presented a report (doc. A/CONF.213/NGO/10) on the limited impact on the production of criminal law norms, especially at international level, of existing international legal instruments (conventions et al.) concerning environment protection. The report analyses prospects for the development of a global dialogue on the role of criminal law, as well as of various potential ways that international criminal norms could contribute to the protection of the environment.

established as criminal offence the conduct of international traffic of wild animals, and in the case, taking into account the international nature of the offence, the offence of contraband was charged as provided for by art. 334, par. 3, of the Brazilian Penal Code”.

248. The Spanish and Brazilian cases cover only one area of environmental crime. To draw general conclusions on environmental offences and their relation with organized crime, cases concerning other environmental crimes—at a minimum, pollution and trafficking in waste—must also be studied. The Italian experts noted the existence in their country of extremely serious cases of illicit waste traffic and illicit waste disposal; they emphasized that in some regions (particularly Campania) these offences are unavoidably related to the interests of local mafia-type organized criminal groups, which are wholly involved in their commission.

249. A 2009 report of the Italian National Anti-mafia Directorate<sup>104</sup> intended to provide a general description of this class of crime in Italy stressed the need to promote these offences as falling within the jurisdiction of this specialized prosecutorial office, which would allow it to supervise and coordinate their investigation and prosecution as necessary when dealing with well-established family- and territory-based mafia groups. The specific cases of illicit disposal of hazardous or normal waste briefly mentioned in that report involved fraudulent authorizations, which were frequently issued by corrupt officials. On this point the Italian cases correspond to the criminal nature noted in BRA 12, which may lead to the conclusion that in fighting environmental crimes, a strong regulatory regime and effective prevention mechanisms, including anti-corruption measures, may be just as important as criminal law tools.

250. A wealth of current and future INTERPOL projects offers an interesting perspective on the various areas where criminal law can intervene to protect the environment:

*Project Predator* aims to enhance law enforcement capacity in the 13 countries where wild tigers still live and to improve intelligence sharing to develop a global picture of the criminal activity threatening tigers, and *Project Wisdom* seeks to conserve elephants and rhinoceros through international operations, enhanced communication and training of local police.

*Project Leaf* is an initiative to combat illegal logging and other forest crime led by INTERPOL and the United Nations Environment Programme; it aims to support enforcement operations, provide training and tactical support, and improve intelligence gathering.

*Project Clean Seas* delivers law enforcement training courses and is producing a manual on investigating pollution by sea-going vessels; tools to assist in the investigation of illegal discharge of waste from vessels are also in preparation.

*Pollution Crime Forensics* aims at creating a network of environmental technical and forensic experts, promoting best practices in environmental forensics and compiling them in a manual for distribution.

*Global E-Waste* is intended to design and execute an intelligence-led global analysis of the links between organized crime and the illegal export of e-waste.

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<sup>104</sup>For a description of the nature and functions of this specialized prosecutorial office, see paragraph 96.

## D. CULTURAL PROPERTY

*Summary: Italian cases of exportation of archaeological objects; “laundering” the illicit origin of artworks; proposals on criminal law and civil justice issues; technical tips for mutual legal assistance and fundamental steps for reinforced international cooperation.*

251. Another emerging form of illicit trafficking increasingly linked to organized crime is trafficking in cultural property. As already indicated in chapter I, several Italian experts submitted cases on cultural property offences to the *Digest*. With the exception of ITA 3, which concerns the counterfeiting and marketing of paintings falsely attributed to modern and contemporary masters, all the cases concern archaeological objects illicitly excavated in and illicitly exported from Italy. The organized crime and transnational nature of the offences is an important feature of the criminal conduct in all of these cases. In relation to ITA 1, a massive case of trafficking involving more than 20,000 objects, including some of enormous cultural and economic value (estimated at more than 100 million euros), the Italian expert stated:

... organized crime is a frequent phenomenon in the art market, highly specialized and in need of different abilities and expertise, from “tombaroli” [tomb raiders] or thieves, to mediators, shippers and drivers, customs officials, dealers, experts, restorers, auction house employees, etc. All these people are often working together, either in a network-type or pyramidal-type of organization of transnational dimension, carrying out the acquisition of the cultural goods and their illicit exportation from the country of origin, the production of “expertises” in order to raise the price, the laundering activities in order to credit the items with a false licit provenance. ... Felony offences against cultural heritage is no longer, as before, characteristic of petty offenders, peasants or poor city dwellers, whom fate has placed close to fabulous sites, or of smaller merchants, who collected the results of the plunders or thefts committed by the first ones. The generalised aggression against cultural heritage that is being faced today comes ... from trans-border organizations of criminals who enjoy a powerful trading structure, vast logistical means and, sometimes, also the complicity and support of administrative and political institutions of the State.

252. The offence of participation in a criminal group was charged in most of the Italian cases. Law enforcement and judicial international cooperation was always essential to the success of the Italian prosecutions. The recovery of the objects (often from abroad) and their restitution to the public were always the main aims of investigators and prosecutors, together with the suppression of the illicit activity.

253. In this regard, it should be noted that there is a difference between those situations in which “open” law enforcement operations intervene while the objects are still in the hands of the looters (or the transporters or first receivers) and situations in which the objects have already entered the market of destination. Seizing archaeological artefacts is easier in the first scenario. The case ITA 6 is a representative example: 1,670 items looted from two archaeological sites were recovered; 100 were discovered in the United States where they were still in the possession of the people who had transported them there, and the rest were still in Italy, ready for transport to Switzerland and Austria. The investigation ascertained that the entire criminal scheme was directed by an individual who had established a network of people responsible for exporting the objects. In this particular example, transborder movement was mainly carried out by putting the items in ordinary checked baggage belonging to unsuspecting air travellers. The transporters of objects into the United States were United States citizens of Italian origin who came to Italy for holidays and carried the objects with them when they returned to their residence in Connecticut.

254. The cases in which the traffickers adopted “laundering” procedures to conceal the illicit origin of the objects before putting them on the market paint a different picture. This kind of laundering activity was at

the core of the experts' concerns. In ITA 1, laundering methods to remove or obscure the illicit provenance of the objects or their illicit exportation are described in detail and include: false documentation, intricate legal transfers of property (including with the involvement of art galleries and auction houses), temporary placement in museums, fictitious handling of the pieces themselves, and fraudulent certification obtained from databanks, etc. In this specific case, the artefacts were mainly moved from Italy to Switzerland, deposited first in the Free Ports of Geneva or Basel, then fictitiously attributed as property of certain companies, which acted as "clearing and laundering houses," and finally sent to Australia, England, Germany, Japan and the United States. This kind of intricate trafficking machinery is often reinforced by weak domestic legislation, and given the very real risk (similar to that encountered in environmental crimes) that the final buyers of the artefacts can justifiably claim to be bona fide third parties, the Italian expert recommended that practitioners should explore the possibility of charging the offence of laundering, which can apply to the concealment of the artefacts' illicit origin and, in his experience, makes the buyer's position more difficult to defend.

255. The expert also recommended considering the following general measures when dealing with trafficking in cultural property:

- When introducing the criminal offence of trafficking in cultural property, use a broad definition that can apply to all stolen, looted and illicitly exported or imported cultural items, and make this offence a serious crime in line with the definition of the Palermo Convention to the extent possible (in part to make that Convention applicable).
- Study the possibility of establishing a criminal offence of importation of items that have been unlawfully exported from a foreign country (in light of article 6 of the 1970 UNESCO Convention).<sup>105</sup>
- Describe the conduct in the offences committed by the "launderers" and the final buyers as offences having a permanent nature so as to avoid statutes of limitations. This is necessary because traffickers increasingly "freeze" cultural objects abroad, sometimes waiting for years before selling them.
- Study and possibly expand the power of confiscation of cultural objects even in cases of statute-barred judgement or acquittal due to the absence of the subjective elements of crime.
- Work towards the harmonization of decisions in civil law cases since these cases are usually decided by "domestic Courts who often emphasize national or private interests, rather than the superior value of culture and dignity of peoples". One possible solution is to establish a group of international arbitrators to which the cases should be mandatorily referred for mediation.

256. The cultural property cases present very interesting issues related to all aspects of the criminal justice response. In terms of investigative techniques and law enforcement and judicial international cooperation, although the Italian cases do not present an analysis of shortcomings and good practices that are different from the general ones included in the previous chapters, the lower level of integration in domestic criminal laws of offences involving cultural property makes the usual difficulties more acute and makes the experience illustrated in these cases, especially ITA 1, particularly worthy of study. With regard to letters rogatory, the Italian expert supported the general idea that formal assistance is greatly facilitated if accompanied by informal and direct contacts among the relevant authorities (he called himself a "roving prosecutor"), and also proposed four general tips that, based on his experience, would apply to all requested States:

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<sup>105</sup>Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (14 November 1970).

1. Every legal system has its own terminology. Since a request for assistance is intended for a foreign authority, specific terminology should be avoided. Instead, the request should describe what is sought, rather than referring to a term.
2. In almost every legal system the relevance of the evidence sought has to be established. Therefore, every request for assistance should address that issue: i.e., there should be a clear description of why and how the evidence in question is relevant to the investigation or prosecution. In most legal systems “fishing expeditions” are not permitted. All requests for assistance should be specific, at a minimum identifying the principal theme of the investigation. However, determining whether the requested information is necessary or of use to the proceedings under way must be left to the requesting authorities to assess. Furthermore, at the time of preliminary investigation the evidentiary area is inevitably broader than that of an already developed investigation. Thus a margin of “fishing” should be justified by the requested authority where the fact-finding process is still at an initial stage.
3. In preparing a request, prosecutors should also focus on the form or manner in which the evidence must be provided for it to be admissible at trial. These requirements must be explicitly stated in detail in the request from the very outset.
4. Requests for assistance take time to execute. While urgent situations and emergencies may arise, investigators and prosecutors should try to submit requests on a timely basis, with reasonable deadlines that take into consideration the resource constraints of the requested State.

257. The Italian expert asserted that international cooperation in fighting cultural property crimes still had a long way to go, but at least it was improving. He was confident that in this field “all legal systems are in ferment, and can offer interpretations of the laws that surely foster a cooperation between States, based not only on formal aspects but also on substantial ones,” and that a new public international order or policy has emerged. In his view, it is time to try to definitively affirm fundamental legal principles deriving from this order or policy, such as:

- (a) In civil proceedings, the applicability of imperative legal provisions in force in a foreign country to nullify contracts: for instance, contracts concerning archaeological items exported from a country in violation of its domestic law prohibiting the export;
- (b) In relation to requests for restitution of archaeological objects, a more lenient consideration of the burden of proof charged to the requesting authorities, who are often asked to provide evidence (*probatio diabolica*) of provenance and ownership of the objects and of the time when they have been illicitly excavated: the expert suggested several assumptions that could be taken into consideration by the requested authorities to ascertain the unlawful acquisition and illicit exportation; and
- (c) The establishment of the destruction of cultural heritage as a violation of human rights.

## E. CYBERCRIME

**Summary:** *Complex nature of cybercrime; different approaches to criminalizing and prosecuting cybercrime offences; the complicated modalities of cybercrime and the necessity of specialized investigators; the relationship of cybercrime to organized crime; prevention.*

258. As observed by one of the experts at the first meeting in Rome, “cyber organized crime” poses a growing threat to the international social community. Losses suffered by victims of criminal online schemes such as “phishing” and identity theft are rapidly increasing. Successful prosecutions of these types of cases are

necessary responses to criminals “who think that the cyber world is a place where [they can] commit crime with impunity”. The complexity of cybercrime has already been noted in chapter I, and the 10 cybercrime cases in this *Digest* confirm this initial assumption. Two separate aspects of cybercrime can be analysed: the huge variety of criminal conduct covered by the term “cybercrime” and the extremely complicated technological methods used to commit these offences.

259. As to the first point, some of the cases involve offences that in their general form can be committed using either cyber or other means (e.g., infringement of copyrights in HUN 1, extortion in RUS 13, child pornography in MEX 2, fraud in NIG 1). In these particular cases, the offenders were charged solely on the basis of provisions that describe the general form of the crime with no reference to cyber techniques: in other words, the applicable domestic laws do not consider these traditional offences as separate forms of crime when they are committed using computer technologies. However, this basic method of criminalization and bringing charges does not indicate that the techniques used by the offenders are less intricate or that investigation and prosecution is less difficult. The description of the illicit conduct in HUN 1 and RUS 13 provides an interesting illustration in this regard.

### CYBERCRIME EXAMPLES

In HUN 1, the two principal organizers of a group of about 30 people supplied legal computer server and hosting services for several private individuals and business associations. Through this licit activity they concealed hundreds of “smswarez” (an Internet slang expression that refers to illegal trade in content protected by copyright in return for payment by SMS), “smswebs” (webpages where copyright-protected content can be downloaded in return for payment by SMS) and “torrents” (a system that allows an Internet user to download the desired file or parts of files not from a central server, but from unknown users who already have it). The advantage of the torrent system is that if a file becomes very popular, more and more people download it and its distribution becomes even more widespread. In HUN 1, the organizers and their accomplices used spam to advertise these illicit services, which ultimately led to the seizure of 48 illegal servers with a capacity of 200-250 terabytes and other high-tech supplies from 16 different premises. The Hungarian expert stated that, “an internet based criminal organization with country-wide professional relationship has been liquidated. The seriousness of the illegal activity was confirmed by the fact that, according to available information, the volume of the seized illegal data worldwide amounts to 45 terabytes. After this action the internet data turnover has been reduced (10 per cent) country-wide”.

The case RUS 13 involved extortion on an extremely large scale. Its main victims were British bookmakers. Officials from the United Kingdom National Hi-Tech Crime Unit (NHTCU, which was later integrated into the Serious Organised Crime Agency, or SOCA) and the United States Secret Service were directly involved in the investigation. The criminal group used a network of computers to which they had access and which they had infected with specially written malware without the owners’ knowledge. From these computers they could launch distributed denial of service (DDoS) attacks without the knowledge of the users. The roles assigned to the members of the criminal organization all required specialized cyberknowledge and skills (e.g., how to prepare a special program module running self-replicating programs and exploiting weaknesses in the Windows operating system in order to gain control over remote computers without the user’s knowledge; how to monitor an attack as it strikes the servers and fix failures or malfunctions; how to study new computer viruses for later use by the group). In order to conceal their criminal activities, they used anonymous proxy servers, virtual private network (VPN) services and anonymous mail servers and other techniques. The extorted funds were sent via existing international payment networks to persons resident in Latvia, who arranged for onward transfer to the Russian Federation. The victims of the extortion were bookmaking companies whose business depended entirely on continuous access to the Internet because the bets were placed exclusively online. In one particular instance, a DDoS attack flooded the targeted company’s server with approximately 425 unique IP addresses establishing

over 600,000 simultaneous connections with the company's web server, sending requests for information at over 70 MB per second (under normal conditions the web server would receive requests arriving at 2 MB per second). This attack cut off the company's website from the Internet, and the criminals demanded and obtained US\$ 40,000, threatening that if their demands were not met, they would continue their attack until the company was completely ruined.

260. In other cases of cybercrime, the core criminal conduct could still be considered traditional offences (e.g., fraud, swindling, theft), but the applicable criminal law includes special offences for situations where these crimes are carried out using cybertechnologies. If the criminal conduct and its effects are essentially characterized by the use of cybertechnologies, this justifies the establishment of separate and "specialized" criminalization. This is the case in USA 3, in which the indictment expressly charged the seven defendants with "conspiracy to commit wire fraud". They were charged with participation in a scheme involving the posting of fraudulent advertisements on eBay and other websites offering expensive vehicles and boats for sale that the conspirators did not possess. When the United States victims expressed interest in the merchandise, they were contacted directly by e-mail by a purported seller. According to court documents, the victims were then instructed to send payments by wire transfer using "eBay Secure Traders"—an entity that had no actual affiliation with eBay and was used as a ruse to persuade the victims that they were sending money to a secure escrow account pending delivery and inspection of their purchases. Instead, the victims' funds were wired directly into bank accounts in Hungary, Slovakia, the Czech Republic and Poland that were controlled by the co-conspirators.

261. The cases ROM 2 and ROM 4 respectively involve offenders engaged in auction wire frauds and attempts to commit theft by using forged credit cards. They were prosecuted under both traditional crimes of swindling and forgery as provided for by the Romanian criminal code, and relatively new offences introduced by the Romanian Law No. 161 of 2003 on the prevention and combating of cybercrime. In ROM 2, a group of 36 individuals committed crimes involving swindling and computer-related forgery in the form of fake auctions on eBay. The offenders used the eBay accounts of legitimate users and claimed to be eBay agents. Through these "trustworthy sources" they created the impression that the auctioned items really existed, and persuaded the victims to purchase and pay the cost in accordance with the precise terms they imposed. In reality, the goods did not exist. The funds transferred by the victims were collected in the United States and various European countries (e.g., Hungary, Germany, Spain) by people called "arrows" who withdrew the money from Western Union or MoneyGram and then used these same channels to send it to Romania. The offenders were also charged with the offences of "misuse of devices" (article 46 of Law 161/2003), which criminalizes the unlawful production, sale, distribution and possession of devices or computer programs, passwords, access codes or computer data for the purpose of committing a crime; and with "computer related forgery" (article 48), which punishes the unlawful input, alteration or deletion of computer data or unlawful restriction of the access to such data.

262. In ROM 4, six people constituted an organized criminal group with the purpose of forging electronic means of payment (credit cards) so these credit cards could subsequently be used for computer-related frauds. The Romanian expert described the criminal conduct as follows: "the criminal group was made up in order to clone credit cards and subsequently withdraw money from ATMs. To that end, one of the defendants ordered a skimmer device which he consequently adapted to look like an ATM hole (the space where the credit card is introduced in the ATM). He aimed to travel with the other members of the group to touristic areas in Croatia and Turkey, where a great number of wealthy tourists is supposed to be present, in order to install the skimmer and then transfer the credit card data to blank credit cards. The organized criminal group had

a three layer structure: the coordinators, who acquired and prepared the skimming devices; the second layer, supposed to extract the money and prepare the administrative details for other travels abroad; and the third layer who had as a main task to obtain and verify credit cards data obtained by them ... From the investigation undertaken it emerged that no fraudulent activities took place". The offenders were charged, inter alia, with "misuse of devices" (article 46) and "illegal access" (article 42, which punishes access without rights to a computer system) as provided for by the Romanian cybercrime law, and with the offence of "possession of equipment with a view to forge electronic payment instruments" established by article 25 of the Romanian Law 365/2002.

263. It must be noted that most of the offences charged in the two Romanian cases concern preparatory acts (article 46 of Law 161/2003<sup>106</sup> and article 25 of Law 365/2002<sup>107</sup>) or conduct that cannot be considered preparatory acts or be characterized by the description of any criminal intent or purpose but is merely unlawful conduct (articles 42, 44 and 48 of Law 161/2003). We can conclude that the Romanian legislature considered it necessary to lower the threshold of criminalization for electronic and cybercrime; this was done by recognizing in the protection of individual rights (such as the right to preserve cyberdata and computer systems) a public interest that should be properly defended through criminal law and by including in the criminalized conduct even precursory activities. The rationale for and the results of this approach (as well as its impact on the effectiveness of investigation and prosecution) merit study, including comparative study at the global level. Many countries have no specific criminal provisions for cybercrime; an extreme case is BRA 5, in which an international criminal group that included a Brazilian citizen was trafficking "botnets" (infected computers

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<sup>106</sup>The Romanian Law 161/2003 on the prevention and combating of cybercrime, title III, contains the following provisions: *Article 46 (Misuse of devices)*

1. It is a criminal offence and shall be punished with imprisonment from 1 to 6 years:
  - (a) the production, sale, import, distribution or making available, in any other form, without right, of a device or a computer program designed or adapted for the purpose of committing any of the offences established in accordance with Articles 42-45.
  - (b) the production, sale, import, distribution or making available, in any other form, without right, of a password, access code or other such computer data allowing total or partial access code or other such computer data allowing total or partial access to a computer system for the purpose of committing any of the offences established in accordance with art. 42-45.
2. The same penalty shall sanction the possession without right of a device, computer program, password, access code or computer data referred to at paragraph 1 for the purpose of committing any of the offences established in accordance with art. 42-45.

*Article 48 (Computer-related forgery)*

The input, alteration or deletion, without right, of computer data or the restriction, without right, of the access to such data, resulting in non authentic data, with the intent to be used for legal purposes, is a criminal offence and shall be punished with imprisonment from 3 to 12 years.

*Article 42 (Illegal access)*

1. the access without right to a computer system is a criminal offence and is punished with imprisonment from 6 months to 3 years;
2. where the act provided in paragraph 1 is committed with the intent of obtaining computer data the punishment is imprisonment from 6 months to 5 years;
3. when the act provided in paragraphs 1-2 is committed by infringing the security measures the punishment is imprisonment from 3 to 12 years.

*Article 44 (2)*

The unauthorized data transfer from a computer system is punished with imprisonment from 3 to 12 years.

<sup>107</sup>Romanian Law 365/2002, article 25 (*Possession of equipment with a view to forge electronic payment instruments*) establishes that: "The manufacturing or possession of equipment, including hardware and software, with a view to be used to forge electronic payment instruments shall be punished by imprisonment from 6 months to 5 years".

used for cyberattacks) to the tune of 25 million euro. The Brazilian offender was only charged with tax evasion and currency-related offences.

264. In ITA 22, several fake e-mail messages were randomly sent to employees of the Italian Ministry of Foreign Affairs and other public administrative offices. The sender's address was forged and the messages were constructed in a way that made them appear trustworthy. However, the messages contained hidden software ("Trojan horses") that secretly captured IDs and passwords used to access restricted databases. These credentials were delivered to a server in Malaysia for illicit use or sale. The offenders were charged under the Italian Penal Code, modified by subsequent laws, for the crimes of gaining unlawful access to a cybersystem and possession and distribution of access codes (articles 615-ter and 615-quarter); protection of the integrity of cyberdata and systems (article 615-quinquies); computer fraud (article 640-ter); and interception of information and communications (article 617). This diverse list shows that all the previously mentioned approaches to criminalization are present in Italian criminal law and they were used in this case, as evidenced by the charges of the traditional offence of interception of communication, the traditional offence of fraud reframed in terms of computer fraud to better comprehend the cyberfeatures, and other offences that directly cover new illicit conduct exclusively characterized by cybercontent. Indeed, the Italian criminal law on cybercrime<sup>108</sup> is characterized by a combination of various criminalization approaches.

265. The second aspect of complexity of cybercrime, the "high-tech" modalities used by criminals to commit offences, has already been effectively demonstrated by the above case examples. There is no doubt that the criminal justice response requires an identical level of technological preparation in investigations. The Italian expert pointed out some of the specific actions needed during an investigation: thorough technical analysis of the software that was used to capture the keystrokes of the victims and of the e-mail headers in order to trace the origin of the communication; preservation and examination of the log files related to the activity of the criminals; and inspection of the server system software to exclude possible uncontrolled infection. These kinds of activities require the establishment of specialized units or offices (the cases mention some of these).

266. Timing is also crucial in any cybercrime case. For example, communication records are not always retained by telecommunication operators and might be lost even in a matter of hours. Thus the fight against cybercrime must rely on rapid channels of communication especially when international cooperation is required. The cases do not illustrate other legal aspects of cybercrime that could be considered equally problematic. For example, the experts did not highlight the issue of which country can properly claim criminal jurisdiction over cybercrimes; this issue can be particularly complicated because sometimes the location of the commission of the crime (*locus commissi delicti*) is not easily discerned because cyberspace cannot be defined in terms of geographical territory.

267. Although the cases have no statistical value, they all lead to the solid conclusion that the presence of an organized criminal group is a constant factor in all the cybercrime cases. This substantially diminishes the role of isolated hackers as main actors in cybercrime; in reality, the cases show that the nature and potential of cybercrime offences entail elaborate criminal schemes that are often transnational, which necessarily requires the organization of many means and human resources. Thus, the "organized crime" dimension, and all the implications discussed in the previous chapters, should not be dismissed when dealing with the cybercrime.

268. Finally, while there are situations in which the behaviour of the victims does not contribute to the commission of the offence (such as in cases of "violent" cyberattacks capable of infiltrating even the best-defended

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<sup>108</sup>Most of the criminal law provisions to combat cybercrime, including some of those mentioned in the text, were introduced into the Italian system by Law No. 547 (23 December 1993).

systems), other cases—especially wire fraud—reveal the vulnerability of computer systems when the user does not respect basic security rules and is careless about using the computer. In this connection, the Italian expert emphasized that education about Internet security is also needed at the individual level.

269. A more general conclusion is that the prevention aspect of cybercrime deserves significant attention and adequate development, including at the international level.





## VI. PREVENTION

### A. GENERAL ISSUES

*Summary: Prevention effects of criminal proceedings; the preventive nature of conviction-based ancillary orders; controlling the financial activities of potential offenders; article 31, paragraph 2 of the Palermo Convention; administrative measures of prevention; the prevention function of regulatory regimes; international cooperation in prevention.*

270. The collected cases essentially deal with investigations and criminal proceedings and thus do not expand on prevention issues. However, at the meetings the experts unanimously agreed that the prevention effects of the criminal justice response itself are of special importance in the fight against organized crime, and that specific preventive administrative measures also play a critical role in that fight.<sup>109</sup> In general, law enforcement and prosecutorial authorities recognize prevention measures as an indispensable complement to their efforts. The Palermo Convention not only identifies prevention, along with investigation and prosecution, as one of the areas of intervention to which its provisions apply (article 3), but it also prescribes a series of specific prevention measures (article 31). In addition, the three Protocols to the Convention each prescribe a series of ad hoc prevention measures tailored to the offences they cover.

271. The prevention effects of criminal proceedings exhibit peculiar traits when organized crime is involved. As the previous chapters indicate, a successful prosecution of members of an organized criminal group may not only create a powerful deterrent, but also have a strong negative impact on a complex criminal organization and sometimes on an entire class of crime, at least in a certain country or territory. Even in cases where the destructive impact ultimately is not completely achieved, the suppression of material and human resources brought about by a conviction could have significant repercussions on the criminal potential of an organized group or network.

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<sup>109</sup>The group's discussions were focused on those crime preventive measures that can be directly reconducted to the investigation and prosecution phases, and deliberately did not include broader issues of social crime prevention.

272. At the final meeting, the experts from the United Kingdom and South Africa noted that in some of the cases they presented, the aim from the very beginning of the investigation was liquidating an entire criminal phenomenon rather than prosecuting individual final offences. Those same experts, along with the Hungarian expert, also remarked that an investigation of organized crime offences, which is a very efficient means of learning about the size, methods and modus operandi of criminal organizations, can generate “lessons learned” that apply not only to future investigations but also to prevention efforts. In their cases, concrete measures of a purely preventive nature have been adopted (regulatory or administrative measures, or arrangements with the private sector) as a direct consequence of investigations.<sup>110</sup> The expert from South Africa recalled that in a case of international trafficking in precious metals, prevention measures derived from enhanced knowledge about the buyer side of the international market acquired during the investigation.

273. These observations combine well with certain features of organized crime proceedings, including the policy of “dismantling the criminal group,” a “pro-active and holistic approach” and “extended investigation”. In this way targeting prevention becomes an integral component of the criminal justice response.

274. Similarly, confiscation of the proceeds of crime has already been identified as an extremely important tool of prevention in chapter IV. This is another demonstration that the linkage between prevention and criminal justice is very strong, given that confiscation depends on a conviction or is at least related to the commission of offences.

275. In ROM 4, a case cited in the previous chapter on cybercrime, the Romanian expert emphasized that the concerted action of various law enforcement agencies prevented the planned final offences (stealing money by using cloned electronic means of payment). This was facilitated by the criminalization of preparatory activities provided by the Romanian law on cybercrime. By contrast, in UKG 3, a massive case of trafficking in chemicals used to cut drugs, evidence collection was hindered by the fact that importation and possession of those chemicals were not in themselves illegal, and complicated efforts were required to prove that “those involved had the requisite knowledge and intent from the outset to supply the chemicals to drug dealers”.<sup>111</sup>

276. Conviction-based ancillary measures are also frequently characterized by their prevention purpose. At the final meeting, the expert from United Kingdom presented a list of 68 persons sentenced for offences such as money-laundering, drug related offences, fraud, counterfeiting and smuggling of migrants who were subjected to ancillary orders for a period of 3 to 15 years. These orders are sometimes related to personal movements and communications (e.g., no overseas travel; restriction on vehicles; notification of premises; no more than three mobile phones). The majority concern the financial activity of the individual, the most common being the obligation to report all financial transactions for 15 years, while others set limits on specific types of financial operations or status (e.g., not more than a bank current account; not more than a fixed amount of cash possessed; notification of changes; restriction on money transfers). The connection with organized crime of the listed offenders is not indicated; however, the prevention objective of those measures and their applicability to convicted members of organized criminal groups are evident. The prevalence of ancillary orders concerning financial activities testifies to the importance the United Kingdom judiciary attributes to the offender’s economic means as instrumentalities available for the commission of further crimes.

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<sup>110</sup>See the cases UKG 3, SAF 1 and HUN 3, and in chapter II, paragraph 85, the box “Cases of extended investigation”.

<sup>111</sup>Article 12 (“Substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances”) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances dictates a strict international regulatory regime for the control of chemicals or other substances used in the manufacturing of drugs and focuses particularly on measures to prevent their diversion. The norms contained there on the import/export of those substances seem to have inspired the provisions on import/export of firearms in the Firearms Protocol.

277. At the same time, and as already considered with regard to the purposes and effects of the confiscation of proceeds of crime, controlling the financial activities of organized criminal groups is part of a prevention policy having as one of its main objectives the reduction of the participation of those groups in lawful markets. In this connection, article 31, paragraph 2 of the Palermo Convention shall be considered as a source of well-detailed prescriptions.

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## ■ ARTICLE 31. PREVENTION

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2. *States Parties shall endeavour, in accordance with fundamental principles of their domestic law, to reduce existing or future opportunities for organized criminal groups to participate in lawful markets with proceeds of crime, through appropriate legislative, administrative or other measures. These measures should focus on:*

(a) *The strengthening of cooperation between law enforcement agencies or prosecutors and relevant private entities, including industry;*

(b) *The promotion of the development of standards and procedures designed to safeguard the integrity of public and relevant private entities, as well as codes of conduct for relevant professions, in particular lawyers, notaries public, tax consultants and accountants;*

(c) *The prevention of the misuse by organized criminal groups of tender procedures conducted by public authorities and of subsidies and licences granted by public authorities for commercial activity;*

(d) *The prevention of the misuse of legal persons by organized criminal groups; such measures could include:*

(i) *The establishment of public records on legal and natural persons involved in the establishment, management and funding of legal persons;*

(ii) *The introduction of the possibility of disqualifying by court order or any appropriate means for a reasonable period of time persons convicted of offences covered by this Convention from acting as directors of legal persons incorporated within their jurisdiction;*

(iii) *The establishment of national records of persons disqualified from acting as directors of legal persons; and*

(iv) *The exchange of information contained in the records referred to in subparagraphs (d) (i) and (iii) of this paragraph with the competent authorities of other States Parties.*

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278. As to preventing the misuse of legal persons, the provision in article 31, paragraph 2(d) focuses very much on court orders that disqualify individuals from acting as directors of legal entities. In this way the Convention proposes a measure in line with those of the list of ancillary measures in the United Kingdom

referred to earlier: the prevention effect is equally obtained through a post-conviction judicial intervention. Similarly, a strict interdependence between criminal justice proceedings and prevention is at the basis of section (a) of the same paragraph, which fosters cooperation between law enforcement and prosecutorial authorities and the private sector. The above-mentioned cases UKG 3, HUN 3 and SAF 1, as well the comments of the Italian expert on cultural property (in relation to ITA 1), clearly indicate the significance attached to such cooperation, especially when organized criminal groups engage in illicit trafficking of commodities for which legal trade is also permitted under certain circumstances and within certain limits.

279. Article 31, paragraph 2(b) and (c) (dealing with the protection of the integrity of public and private entities as well as relevant professions such as lawyers, notaries and accountants) prescribe administrative measures (or codes of conduct) independent from criminal proceedings. At the meeting in Cartagena, the Italian experts illustrated a measure of this kind that was in force in Italy for long time: to incorporate a company in Italy, as well as to obtain certain administrative authorizations, including admission to a public tender, a special certificate was requested (*Certificato antimafia*) attesting to the absence of any ties between the individual and organized criminal groups or organized crime offences.

280. In certain areas of legal activities, strong regulatory regimes may have a significant prevention effect. This has already been observed about the international regulatory regime imposed by the Firearms Protocol, which is contained in Part II of the Protocol, which is significantly entitled “Prevention”. It may be appropriate to note here that a measure such as marking firearms (article 8) and rules on export, import and transit licensing or authorization systems (article 10) are relevant to tracing firearms and detecting and investigating offences, but they are primarily prevention tools that can effectively make it more difficult to divert the items into the illicit trade.

281. Another normative example of a regulatory regime with prevention objectives appears in article 7 of the Palermo Convention, “Measures to combat money-laundering,” which mandates that the States Parties institute a comprehensive domestic regime for financial institutions in order to deter and detect all forms of money-laundering.

282. Finally, as evidenced by the above-mentioned provisions of the Palermo Convention and the Firearms Protocol, the adoption of domestic prevention measures should be accompanied by an adequate level of related international cooperation. Although the cases in this *Digest* do not give specific indications in this direction, the matter seems worthy of study at the global level.

## ANNEX I. COUNTRY CASE ABBREVIATIONS

Albania.....	ALB
Argentina.....	ARG
Brazil.....	BRA
Canada.....	CAN
Colombia.....	COL
El Salvador.....	ELS
France.....	FRA
Germany.....	GER
Hungary.....	HUN
Italy.....	ITA
Jamaica.....	JAM
Kenya.....	KEN
Mexico.....	MEX
Morocco.....	MOR
Nigeria.....	NIG
Philippines.....	PHI
Portugal.....	POR
Romania.....	ROM
Russian Federation.....	RUS
Serbia.....	SER
Seychelles.....	SEY
South Africa.....	SAF
Spain.....	SPA
Ukraine.....	UKR
United Kingdom.....	UKG
United States.....	USA
Venezuela.....	VEN

## ANNEX II. LIST OF CASES DIVIDED BY TYPE OF OFFENCES

OFFENCE <sup>a</sup>	CASE	NAME	ASSOCIATED OFFENCES
Corruption	RUS 6	Report.	Participation in an organized criminal group and other serious crimes.
	POR 3	Lawsuit n.º 109/08.2TAETR	Participation in an organized criminal group and other serious crimes.
Counterfeiting	ITA 15	Gomorra Operation.	Participation in an organized criminal group and other serious crimes.
	ITA 16	Milan Operation.	Participation in an organized criminal group and other serious crimes.
	ITA 17	Most Operation.	
	ITA 18	Giotto Operation.	
Cybercrime	BRA 5	Holland Connection Operation	Tax evasion, participation in an organized criminal group.
	HUN 1	Prosecution vs. Baksa Tímea and others.	Participation in an organized criminal group and Money-laundering.
	ITA 22	Stop Intrusion Operation	
	MEX 2	Canadiense-Tijuana Operation.	Money-laundering.
	MOR 3	Police Report.	
	NIG 1	Federal Republic of Nigeria vs. Harrison Odiawa.	Participation in an organized criminal group, counterfeiting and 'black money' scam.
	ROM 2	Not specified – Indictment dating from 2007.	Forgery.
	ROM 4	Not specified – Indictment dating 2010.	Swindling and participation in an organized criminal group.
	RUS 5	Report.	
	USA 3	Pletnyov Operation.	Money-laundering.
Drug trafficking and other drug related offences	ALB 1	Drug Trafficking Case – Not Specified.	Participation in an organized criminal group.
	BRA 1	Diamante Operation	Participation in an organized criminal group.
	BRA 2	Carabelas Operation	Money-laundering.
	BRA 3	Fenix Operation	Firearms trafficking, money-laundering and participation in an organized criminal group.
	BRA 8	Gladio Operation	Firearms trafficking, corruption and participation in an organized criminal group.

<sup>a</sup> The offence does not always correspond to the criminalization of the offence in the domestic legislation. Sometimes (e.g. cyber-crime) the term used identifies a class of conducts characterized by specific modalities.

OFFENCE	CASE	NAME	ASSOCIATED OFFENCES
Drug trafficking and other drug related offences (cont.)	BRA 9	Liquidação Operation	Firearms trafficking and participation in an organized criminal group.
	BRA 14	Farol da Colina Operation.	Money-laundering, firearms trafficking, corruption, crimes against the national financial system and participation in an organized criminal group.
	CAN 2	Terezakis Case.	Participation in an organized criminal group.
	CAN 7	Punko 2010 and 2011 Cases.	Participation in an organized criminal group.
	CAN 8	Meloche Case.	Trafficking of controlled substance (tobacco), participation in an organized criminal group.
	CAN 10	Giles Case.	Participation in an organized criminal group.
	CAN 11	Cedeno Case.	Participation in an organized criminal group.
	CAN 14	Hells Angels Motorcycle Club	Participation in an organized criminal group.
	CAN 19	R. v. Bodenstein	Participation in an organized criminal group.
	CAN 23	R. v. Wagner	Participation in an organized criminal group.
	CAN 25	Chatterjee v. Ontario	
	CAN 26	R. v. Cook	
	CAN 27	R. v. Craig	
	CAN 29	Saskatchewan v. Mihalyko	
	CAN 30	R. v. Nguyen	
	CAN 32	Ontario v. 170 Glenville Road, King	
	CAN 33	Ontario v. Lok	
	CAN 34	R. v. Ouellette	
	CAN 36	R. v. Hells Angels Motorcycle Corp.	Extortion, trafficking of firearms.
	CAN 37	R. v. La	
	CAN 39	R. v. Tran	
	CAN 40	R. v. Wu	
	CAN 41	R. v. Wyatt	Possession of firearms and ammunitions.
	CAN 42	R. v. Bonassin	
	CAN 43	R. v. Darby	
	CAN 44	R. v. Grywacheski	
	CAN 45	R. v. Knight	Conspiracy.
	CAN 47	R. v. Luong	Theft.
	CAN 49	Saskatchewan v. Mihalyko	
	CAN 52	R. v. Ouellette	
	CAN 53	R. v. Brooks	
	CAN 54	Her Majesty the Queen v. Ha	
	CAN 55	Regina v. Lauda	
	CAN 57	R. v. Shafapay	
CAN 58	Scotia Mortgage Corp. v. Leung		

OFFENCE	CASE	NAME	ASSOCIATED OFFENCES
Drug trafficking and other drug related offences (cont.)	COL 1	Vanguardia Operation – FARC Case.	Trafficking in firearms, terrorist offences.
	COL 2	Zeus Operation.	Conspiracy.
	COL 3	Cronos Operation.	Money-laundering.
	COL 4	Beto Renteria Case.	Conspiracy.
	COL 8	Cuchillo Case	Conspiracy, homicide, manufacture and trafficking of firearms or ammunition, extortion, forced displacement, aggravated robbery, disturbance of possession of property, damage to resources, environmental pollution, resource management for terrorism and kidnapping.
	COL 9	Garra Case.	Conspiracy and money-laundering.
	COL 10	Chely Case.	Conspiracy, aggravated murder, extortion, forced displacement, kidnapping, disappearance and escape of prisoners.
	COL 15	Ramón Sanclemente Case.	Participation in an organized criminal group.
	ELS 1	Elena Operation.	Participation in an organized criminal group.
	FRA 1	Stihl Operation.	
	FRA 2	Venture Operation.	
	HUN 2	Prosecution vs. Dénes Güray Dicle and others.	Participation in an organized criminal group.
	ITA 6	Morgan Operation.	Participation in an organized criminal group.
	ITA 8	Accord Operation.	Participation in an organized criminal group.
	ITA 10	Viola Operation.	Participation in an organized criminal group, trafficking in persons and smuggling in migrants.
	ITA 19	Andromeda Operation.	Money-laundering.
	ITA 21	Loptice Operation.	Money-laundering
	JAM 2	Prosecution vs. Norman Ramcharan Etal.	Money-laundering and participation in an organized criminal group.
	JAM 3	Prosecution vs. Robert Fowler	Participation in an organized criminal group.
	MEX 4	Coliseo Operation.	Money-laundering.
	MEX 6	Argentum Operation.	Money-laundering.
	MEX 8	Fiji Operation.	Money-laundering.
	MOR 1	Police Report.	Smuggling of migrants.
	NIG 3	James Nnamdi Operation	Money-laundering
	PHI 10	People of the Philippines vs. Lo Ho Wing and others (Operation: OPLAN SHARON 887).	
	PHI 11	People of the Philippines vs. Lin Zian Tian.	
	PHI 12	People of the Philippines vs. Li Yu Xuan.	
	POR 1	Lawsuit no.1425/02.2JAPRT	
	ROM 5	Not specified – Public Session 2011.	Smuggling of precious metals and organized criminal group.

OFFENCE	CASE	NAME	ASSOCIATED OFFENCES
Drug trafficking and other drug related offences ( <i>cont.</i> )	RUS 1	Report.	
	SER 1	Niva Operation.	Illegal possession of firearms and explosives and participation in an organized criminal group.
	SER 3	Valter Operation.	Participation in an organized criminal group, extortion, illegal possession of firearms and explosives, instigation to a murder, accessory after the fact, counterfeiting documents.
	SAF 3	Project Deer.	
	SAF 4	Simon Prophet v National Director of Public Prosecutions.	
	SPA 1	Guadana Operation.	Participation in an organized criminal group.
	SPA 2	Destello Operation.	Participation in an organized criminal group.
	SPA 5	Chicago Operation.	Participation in an organized criminal group.
	SWI 1	Drug Trafficking Case.	Money-laundering and participation in an organized criminal group.
	SWI 2	Drug Trafficking Case 2.	Money-laundering and participation in an organized criminal group.
	UKG 1	Clostern Operation.	Participation in an organized criminal group.
	UKG 2	Chappel Operation.	Participation in an organized criminal group.
	UKG 3	Operation Junko	Money-laundering and participation in an organized criminal group.
	UKG 4	Operation Tanglewood	Participation in an organized criminal group.
Environmental crime	BRA 11	Nautilus Operation	Participation in an organized criminal group.
	BRA 12	Oxossi Operation	Participation in an organized criminal group.
	BRA 13	Woodstock Operation	Participation in an organized criminal group.
	BRA 15	Jurupari Operation	
	SPAN 8	Rapiña Operation	
Extortion	CAN 1	Lindsay 2004 and 2005 Cases.	Participation in an organized criminal group.
	CAN 20	R. v. Coates	Participation in an organized criminal group.
	COL 5	Apocalipsis Operation.	Homicide, aggravated theft, kidnapping, extortion and personal injury.
	COL 11	Domingo Biohó Case.	Extortion and personal injury.
Financing of terrorism	COL 6	Alberto Martínez Case	Management of resources related to terrorist activities, conspiracy
	COL 7	Fenix II Operation.	Management of resources related to terrorist activities.
Firearms offences (Illicit possession, illicit trafficking, etc.)	BRA 7	Chumbo Grosso Operation	Participation in an organized criminal group.
	CAN 22	R. v. Rodrigue	Participation in an organized criminal group.
	CAN 46	R. v. Lucas	Drug trafficking.
	COL 12	Strawberry Operation.	Drug trafficking, forgery and participation in an organized criminal group.
	COL 13	Sandoval Case.	Drug trafficking and participation in an organized criminal group.
	COL 14	Siberia Operation.	Corruption and forgery.

OFFENCE	CASE	NAME	ASSOCIATED OFFENCES
Firearms offences (Illicit possession, illicit trafficking, etc.) (cont.)	COL 16	Buque Otterloo.	Corruption, forgery, obstruction of justice and participation in an organized criminal group.
	ITA 4	Red Skorpion Operation.	Participation in an organized criminal group.
	SER 5	Victor Operation.	Participation in an organized criminal group.
	USA 4	Victor Bout Case.	
Forgery	CAN 5	Beauchamp Case	Participation in an organized criminal group.
	CAN 50	R. v. National Post	
Fraud	CAN 12	Ellis Case.	Participation in an organized criminal group.
	POR 2	Lawsuit no. 1425/02.2JAPRT	Food alteration. Crime against the quality or composition of food and food additives.
Money-laundering	BRA 10	Curaçao Operation	Crimes against the national financial system and participation in an organized criminal group.
	CAN 28	Lin. V. Ontario	
	ITA 11	Broker Operation.	Participation in an organized criminal group.
	ITA 14	Ultimo Imperatore & Operazione Grande Muraglia.	Participation in an organized criminal group and counterfeiting.
	JAM 1	Prosecution vs. Kerry-Ann Graham.	Participation in an organized criminal group.
	ROM 3	Not specified – Indictment dating from 2008.	
	RUS 4	Report.	
	SER 4	Walker Operation.	Participation in an organized criminal group.
	SAF 1	Project Yield Operation.	Corruption and participation in an organized criminal group.
	USA 1	United States v. Pavel Ivanovich Lazarenko.	Fraud and use stolen property.
	USA 2	Smoking Dragon and Royal Charm Operations.	Participation in an organized criminal group, trafficking of firearms and ammunition and currency counterfeiting.
	VEN 1	Seizure Case.	Participation in an organized criminal group.
	VEN 2	Ana Mercedes Ocanto Case	Participation in an organized criminal group.
Piracy	KEN 2	Hassan M Ahmed & 9 others - vs- Republic.	
	KEN 3	Case no. 72/2011.	
	KEN 4	Case no. 105/2010.	
	KEN 5	Case no. 1184/2009	
	KEN 6	Case no. 840/2009	
	KEN 7	Case no. 1374/2009	
	KEN 8	Case no. 1695/2009	
	KEN 9	Case no. 3486/2008	
	KEN 10	Case no. 434/2006	
	KEN 11	Case no. 1939/2009	
	KEN 12	Case no. 2006/2011	
	SEY 1	Case no. 21/2011.	
	SEY 2	Case no. 14/2010.	

OFFENCE	CASE	NAME	ASSOCIATED OFFENCES
Piracy (cont.)	SEY 3	Case no. 51/2009.	
	SEY 4	Case no. 75/2010. (10 accused)	
	SEY 5	Case no. 75/2010. (5 accused)	
	SEY 6	Case no. 19/2011.	
Smuggling and embezzlement	BRA 4	Columbus Operation	Corruption, crimes against public administration, smuggling, embezzlement and participation in an organized criminal group.
	BRA 6	Diluvio Operation	Corruption, crimes against national financial system and participation in an organized criminal group.
	ITA 7	Alfabeto Operation.	Smuggling of foreign tobacco, illegal assets and participation in an organized criminal group..
Smuggling of migrants	HUN 3	Lotus Operation	
	ITA 12	Not Specified - Smuggling case 2009/2011.	
	ITA 20	Ticket to Ride Operation.	
	ITA23	Ropax	
	MEX 5	Operation: 17-mar-2004.	Money-laundering.
	RUS 3	Report.	
	SER 2	Tisa Operation.	Participation in an organized criminal group.
	SPA 3	Petrolero Operation.	
Trafficking in cultural property	ITA 1	Prosecution vs. Giacomo Medici and Gianfranco Becchina – Italy.	Participation in an organized criminal group.
	ITA 2	Sesterzio Operation.	
	ITA 3	Plotter Operation.	Counterfeiting, money-laundering and participation in an organized criminal group.
	ITA 5	Augusto Imperatore Operation.	
	ITA 9	Boucher Operation.	Money-laundering and participation in an organized criminal group.
	ITA 13	Ulisse Operation.	
Trafficking in persons	ELS 3	Caso Guatemala.	Participation in an organized criminal group.
	HUN 4	THB Operation	
	MEX 1	Asociación religiosa – Colombia Operation.	
	MEX 3	Globeritos – Tapachula Operation.	
	MEX 9	Tenancingo Atlanta.	Participation in an organized criminal group.
	PHI 1	People of Philippines vs. Alice Tongco y Terrado.	
	PHI 2	People of Philippines vs. Nelia Ogalesco y Torio.	
	PHI 3	People of Philippines vs. Glendyl Micabalo and others.	

OFFENCE	CASE	NAME	ASSOCIATED OFFENCES
Trafficking in persons ( <i>cont.</i> )	PHI 4	People of Philippines vs. Flora Cabral y Aldenese.	
	PHI 5	People of Philippines vs. Roselyn Estrada and others.	Participation in an organized criminal group.
	PHI 6	People of Philippines vs. Lito Manalo y Tapiculin and others.	
	PHI 7	People of Philippines vs. Gregorio Garcia y Felix and others.	
	PHI 8	People of Philippines vs. Denis Reci and others.	
	PHI 9	People of Philippines vs. Rosie T. Ociel and others.	Participation in organized criminal group.
	PHI 13	People of the Philippines vs. Hadja Jarma Lalli y Purih.	
	ROM 1	Europa Operation.	Money-laundering, participation in organized criminal group and illegal possession of firearms and ammunitions.
	RUS 2	Report.	
	SAF 2	The Ranch Operation.	Money-laundering, corruption and participation in an organized criminal group.
	SPA 4	Trufas Operation.	
	SPA 7	Clubs Operation.	Smuggling of migrants.

## ANNEX III. LIST OF EXPERTS

- Mr. ALEKSEEV, Yury — Investigative Committee of the Ministry of Interior of the Russian Federation (Russian Federation).
- Ms. ALFANO, Sonia — Member and rapporteur for the European Parliament on organized crime in the European Union.
- Mr. ANDREANI, Alberto — Office of the Special Representative and Coordinator for Combating THB (Organization for Security and Co-operation in Europe).
- Mr. BALDI, Gianni — Drug Control and Criminal Organizations Sub-Directorate, O.I.C.P INTERPOL (Interpol).
- Mr. BALOG, Gábor — National Bureau of Investigation, Counter Illegal Migration Division, Organized Crime Department (Hungary).
- Mr. BEHAN, James — Prevention and Tactical Advice, UK Human Trafficking Centre, Serious Organized Crime Agency (United Kingdom).
- Mr. BEZERRA, Getúlio — Directorate Against Organized Crime, DICOR (Brazil).
- Mr. BISHOP, Peter — Special Investigating Unit, Poised to Strike against Corruption, Head Office Pretoria (South Africa).
- Ms. BORBOLLA, Laura Angelina — Dirección de Análisis Jurídico Internacional, Dirección General de Extradiciones y Asistencia Jurídica, Procuraduría General de la República (Mexico).
- Mr. BURROWS, Thomas N. — Office of International Affairs, U.S. Department of Justice (United States).
- Mr. CAPOLUONGO, Gennaro — International Police Cooperation Service — Central Directorate of the Criminal Police, Ministry of Interior (Italy).
- Mr. CASTILLO, Alejandro — Directorate against Drugs, Public Ministry (Venezuela).
- Mr. CONDE, João — General Office of the Prosecutor (Portugal).
- Mr. CUMING, Andrew — Serious Organised Crime Agency, SOCA (United Kingdom).
- Mr. CURIA, Eugenio María — Permanent Mission of Argentina in Austria, Ministry of Foreign Affairs (Argentina).
- Mr. DISPENZA Filippo, State Police Provincial Headquarters of Alessandria;
- Mr. DELGADO, Rodolfo — Organized Crime Division, General Office of the Prosecution of the Republic (El Salvador).
- Mr. FAIRCLOUGH, David — Crime Directorate, Criminal & Financial Investigations, Criminality and Detention Group, UK Border Agency (United Kingdom).
- Mr. FERRI, Paolo — Public Ministry and Ministry for the Protection of Cultural Goods, (Italy).

Ms. GIANMARINARO, Grazia Maria — Special Representative for Combating Trafficking in Human Beings (Organization for Security and Co-operation in Europe).

Mr. GONZÁLEZ, Mario Manuel — DG Extraditions and Legal Aid, Prosecutor General's Office (Mexico).

Ms. GRISHINA, Yulia — Department of Threats and Challenges, Ministry for Foreign Affairs (Russian Federation).

Ms. HARKIN, Tricia — Judicial co-operation in criminal matters (European Commission).

Ms. HAY, Patricia — Office of the Director of Public Prosecutions, Ministry of Justice (Jamaica).

Mr. HERNÁNDEZ RAMOS, Sergio Leonardo — Directorate of Police Intelligence, DIPOL, National Police of Colombia (Colombia).

Mr. HINDS, Glenmore — Jamaica Constabulary Force (Jamaica).

Mr. IBÁÑEZ CUESTA, Luis — Division Against Drugs, Prosecutor's Office (Spain).

Mr. JAIME, Norberto Mujica — Directorate of Police Intelligence, DIPOL, National Police of Colombia (Colombia).

Ms. JANICIJEVIC, Gordana — International Affairs and Legal Assistance Department in Republic, Public Prosecutor's Office (Serbia).

Mr. JANKOVIC, Lazar — Department for Fighting Organized Crime, Ministry of Interior (Serbia).

Mr. KULICAJ, Agron — State Police of Tirana (Albania).

Mr. LABERCHE, Patrick — Central Narcotics Office, (France).

Mr. LAFÓNT NICUESA, Luis — Immigration Coordination Office, Public Prosecutor's Office (Spain).

Mr LAMORDE, Ibrahim — Economic and Financial Crimes Commission (Nigeria).

Mr. LANZILLOTTI, Giuseppe — Multilateral Affairs Division, Department of Public Security, Ministry of Interior (Italy).

Mr. LAZRAK, Nabil — Direction of Judicial Police, General Direction of the National Surety (DGSN) (Morocco).

Mr. LEIMLEHNER, Erich — Crime Analysis Unit, Federal Criminal Police FEDPOL (Switzerland).

Mr. LETCANU, Răzvan — Division for Combating Trafficking in Persons (Romania).

Ms. LOZANO, Nancy — Inter-Agency Council against Trafficking, Secretariat Department of Justice (Philippines).

Ms. MARCANO, Yemina — Directorate against Drugs, Public Prosecutor's Office (Venezuela).

Mr. MARTINI, Claudio — International Police Cooperation Service — Central Directorate of the Criminal Police, Ministry of Interior (Italy).

Mr. MARTÍNEZ Carlos, International Affairs, Directorate of Police Intelligence, DIPOL, National Police (Colombia).

Mr. MENDOZA COLLOLY, Javier — Legal Analysis Division, Directorate General of Extraditions and Legal Assistance, Prosecutor's General Office (Mexico).

Ms. MIRITA, Emanuela — Division on International Law and Judicial Cooperation, Ministry of Justice (Romania).

Mr. MORENO ORTIZ, José Manuel — Intelligence Centre against Organized Crime, Public Prosecutor's Office (Spain).

Mr. NARDINI, William — Public Prosecutor (United States).

Ms. ODUOR, Dorcas — Directorate of Public Prosecutions and Organized Crime Unit (Kenya).

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