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CRIMINAL JUSTICE**

**Papers in celebration of 25 years of HEUNI**

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## Address to Twenty-Fifth Anniversary Festschrift of HEUNI

Congratulations on the Silver Jubilee of the European Institute for Crime Prevention and Control (HEUNI).

Since 1981 – when HEUNI was established by an agreement between Finland and the United Nations – the Institute has worked closely with the UN, enriching its work on crime prevention and control.

The Institute's work on restorative justice, alternatives to imprisonment, juvenile justice, persons in custody as well as norms and standards is a big support to the United Nations Office on Drugs and Crime (UNODC), and the work of the UN Member States.

HEUNI has been a regular supporter and contributor to the work of the UN Congresses on Crime Prevention and Criminal Justice and sessions of the Commission on Crime Prevention and Criminal Justice.

Its analysis of questionnaires and surveys contributes to an evidence based approach to crime prevention. This work is in increasing demand as the world tries to come to grips with the threat of trans-national organized crime.

In 2003, for the first time, a global instrument came into force to counter the threat posed by organized crime: the UN Convention Against Transnational Organized Crime. It, along with its three Protocols, is the first global attempt to deal with dangerous trans-national threats posed by organized crime, for example trafficking in persons, smuggling of migrants and the illegal manufacturing and trafficking of firearms.

In order to effectively implement this Convention, we need more information on “best practices”, more training of national experts, and more information on crime trends. HEUNI's expertise and support in these areas are vital.

I hope that in years to come there will be even closer co-operation between UNODC and HEUNI as well as other Institutes of the UN Crime Prevention and Criminal Justice Programme Network. Your ideas and initiatives are vital for stimulating the inter-governmental process.

Congratulations, and good luck for your next quarter century.

Antonio Maria Costa  
Executive Director  
United Nations Office on Drugs and Crime



## Introduction

When something new gets established, it is not only the idea that counts but also the dedication and active contribution of the people involved. Over a quarter of a century ago, the European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), was created. The story began in 1972, on an airplane en route from Cairo to Geneva, when the Finnish professor of criminal law Inkeri Anttila and the Director of the (then) Crime Prevention and Criminal Justice Branch (CPCJB) of the United Nations, Mr William Clifford, came up with the idea of establishing a European regional institute for the UN in Helsinki, Finland. At that time, the United Nations already had one interregional institute (UNICRI), established in 1968 on the basis of an ECOSOC resolution, and a regional institute for Asia and the Far East (UNAFEI), established in 1962 on the basis of an agreement between the Government of Japan and the United Nations.

It took some years before this plan finally started to become a reality. (In the meantime, another regional institute, ILANUD, was created in Costa Rica in 1975 for the Latin American and Caribbean region.) On 23 December 1981, an Agreement on the establishment of HEUNI was signed between the United Nations and the Government of Finland. The active promoters of the Agreement were, again, Professor Anttila, and Mr Clifford's successor as Director of the CPCJB, Professor Gerhard O.W. Mueller.

Why Helsinki, why the far northern edge of Europe? There were some good reasons for this. Almost thirty years ago, there was still a clear political divide between East and West Europe, and Finland had a recognized geopolitical status between the two. From the political and practical point of view, Helsinki was easily accessible from east and west. Indeed, one of the principal reasons for establishing the Institute in Helsinki was in order to build bridges between countries with different socio-economic systems. However, perhaps the main reason for choosing Helsinki was Professor Inkeri Anttila herself. She was a nationally and internationally recognized expert in crime policy matters, she had established useful contacts around the world among academics and decision-makers, and she was well known also within the United Nations: she had served as the President of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Geneva 1975) and she had just been elected a member of the UN Committee on Crime Prevention and Criminal Justice, which was the predecessor of the present Commission on Crime Prevention and Criminal Justice. Moreover, she had previous experience in establishing and leading research institutions, such as the Finnish National Institute of Criminology, and the Finnish National Research Institute of Legal Policy.

HEUNI was established in December 1981 as an independent unit under the aegis of the Finnish Ministry of Justice. The institute became operational in 1982. Professor Anttila became the self-evident Director of HEUNI. The other staff members were a senior researcher, two programme officers and an administrative assistant. HEUNI had a separate budget provided by the Ministry of Justice and, as encouraged by the Agreement, other governments participated in the operations either through a standing annual contribution (as with the case of Sweden), or in the form of ad-hoc contributions.

There was no clear model on the basis of which the new institute would operate. The Agreement solemnly stated that the objective of the Institute shall be to provide for the regular exchange of information and expertise in crime prevention and control among various countries of Europe with different socio-economic systems, to promote the training of experts in the field and to undertake studies and research on crime prevention and criminal justice policies. Consequently, this made it possible for HEUNI to exchange information and expertise in practically any question related to crime prevention and control – but somehow the template for HEUNI's work, HEUNI's *raison d'être* had to be discovered.

When HEUNI started its work, Europe was clearly divided into two, not only politically, but also in respect of crime prevention and criminal policy questions. At that time the Council of Europe brought within its framework the Western European countries, whereas the approach in the Eastern European countries to many questions was quite different from that taken in the West. Nevertheless, all the European countries had to find solutions for the same kind of problems, such as how to deal with juvenile delinquents, how to prevent burglaries, how the work of the police and courts could be made more effective and how the penal system should be developed. HEUNI found its role when the decision was made to concentrate on those problems which would most likely benefit from an exchange of information and experiences among all European countries.

For the first time, large pan-European research projects and conferences were being planned in order to discuss topical matters in crime prevention and criminal justice on a high level. At that time many felt that such exercises were too bold: it would not be possible to get experts in many countries to answer questionnaires, it would not be possible to identify themes for discussion that would be interesting enough for all countries, and in no way was it obvious that busy experts and overburdened civil servants would sacrifice their time and come to distant Finland just in order to participate in meetings organized by some unknown institute. And yet, again thanks to Director Anttila's reputation and many contacts, it turned out in fact to be easy to find experts for each theme. One weakness in large organizations and other bureaucratic



establishments is the obligation to form contacts primarily through official channels. The modus operandi of little HEUNI was different: Director Anttila just sent a letter to her good friends, be they university professors, Presidents of a Supreme Court or Ministers. It was in keeping with this that the first International Advisory Board of HEUNI counted among its members three Supreme Court judges and a director of the international relations department of the Ministry of Justice of one country. In addition, the very first HEUNI seminar was attended by, among others, the Director of the Legal Division of the Council of Europe and a high representative of the Academy of Sciences of the Soviet Union. With this proof, any lingering doubts about HEUNI's ability to arrange high-level discussions evaporated, and HEUNI could properly start its operations.

What then were the activities and functions of HEUNI? According to the Agreement, these were to organize seminars (for policy-makers, administrators, experts and researchers); to collect information and to provide interested Governments with relevant information and to publish and disseminate such materials and information; to conduct research and to hold conferences and meetings serving the objectives of the institute.

The topics of the seminars, meetings of experts and the research projects are selected on the basis of two primary criteria. They should be based on the UN crime prevention and criminal justice programme as defined by the Crime Commission, and they should deal with issues of priority for the European region. Special emphasis has always been given to the need of the countries in Central and Eastern Europe. The topics have ranged from victim policy to prison health, from computerization to crime prevention strategies, from the analysis of crime trends to trafficking in persons, and many other topics in between.

Throughout the years, HEUNI has fulfilled its mandated functions, with slight changes in priority, depending on the person of the Director at different times. HEUNI has had three directors, and the forms of activities have been a reflection of each of them in turn: establishing HEUNI and laying its groundwork, policy-making, and research.

During Professor Anttila's tenure (1981-1987), the focus was on the broad picture, on holding major European conferences, on creating visibility, credibility and stability, and on finding common ground between the different political systems. Dr Matti Joutsen's term as Director (1987-2000) saw the period of perestroika and the collapse of the Soviet Union. That was the time of smaller expert meetings, leading to large seminars and conferences with many European countries. It was also a period of rapid growth in international technical assistance and the provision of expertise upon request to the newly emerging democracies. At that time

HEUNI also took an active part in the development of the United Nations Crime and Criminal Justice Programme. Indeed, it has been said that the first draft of the new UN Programme was sketched out on the HEUNI kitchen table at a meeting which brought together senior officials from, among other countries, France, Germany, the United Kingdom, the USSR and the United States, as well as the United Nations. Thanks to the efforts of many dedicated “friends of the UN crime programme” from various member states, the Programme was renewed and strengthened at the Ministerial Conference held in Versailles in 1991. The reform resulted, among other things, in the replacement of the Crime Committee with the politically strong Commission. HEUNI was also active in providing the secretariat with various background documentation, both for sessions of the Commission and for the Crime Congresses. –The cooperation between the various UN network institutes was extensive, and the stabilization of the network was strongly on HEUNI’s agenda.

With Mr Kauko Aromaa as director (2000 -), research has come to play a greater role on the HEUNI agenda. HEUNI staff members themselves take active part in the research projects which are often carried out jointly with different partners from the European countries. Occasionally HEUNI acts as a silent partner, by identifying experts and facilitating access to various authorities and offices. The large projects cannot be paid on the basis of the regular budget and so, following the contemporary trend, more and more extra-budgetary funds are being sought – and received from various sources. The research themes are related to transnational organized crime issues, such as corruption and cross-border crime, but also to crime prevention, corrections and victimisation, especially violence against women, and statistical analyses of crime trends. Meetings organized by HEUNI are primarily small expert group meetings and workshops at various conferences and congresses regarding on-going research projects. They usually result in reports in the HEUNI publication series or in articles and papers elsewhere. HEUNI’s visibility in scientific professional organizations has grown remarkably. Also, HEUNI’s participation in promoting UN standards and norms has grown significantly as HEUNI has played an important role in re-designing the information gathering instruments for the application of various standards and the need for, and provision of possibilities of technical assistance to the UN member states.

One of HEUNI’s activities is the granting of scholarships. This involves a fairly modest programme but it has enabled some 170 post graduate students, junior academics and practitioners in the field of crime and crime control to come to HEUNI for a short period of time to do her or his own research, to become acquainted with the Finnish legal system, or to acquire knowledge of the UN programme. Especially during the first ten years of HEUNI’s

operations, this was rather attractive for young persons from Central and Eastern European, since there were not so many other possibilities available, and the modern Western literature at that time was rather inaccessible in those countries. Later, many of these “children“ of HEUNI have moved on to brilliant careers, serving as professors, high-level civil servants, advisors and members of parliament and even ministers.

When speaking about HEUNI, mention has to be made of the United Nations Crime Prevention and Criminal Justice Programme network, an entity which has mostly developed during HEUNI’s time and to which HEUNI has been a keen contributor. (The network is also known by a number of other terms, such as the “institutes, “the PNI” and “the Network Institutes.”) The story of the Institutes began already during the late 1960s, with the creation of the United Nations Social Development Research Institute (UNSDRI; later called the United Nations Interregional Crime and Justice Research Institute, UNICRI). That was gradually followed by the establishment of regional institutes in Asia, Latin America and the Caribbean region, the Arab countries, Europe and Africa, the latest newcomers having joined in 2004. Today, the PNI consists of sixteen interregional and regional institutes as well as specialized centres around the world, including the UNODC. The network was developed in recognition of the importance of international cooperation and in response to various legislative mandates of the United Nations to assist the international community in strengthening international cooperation in crime prevention and criminal justice at the global, regional and subregional levels. Specific criteria have been approved for the creation and affiliation of new institutes to the network.

The scope of HEUNI’s activities is broad. Today’s challenges are very different from those for twenty-five years ago. Nowadays Europe is practically united: the European Union covers half of the countries in the region, and most countries are members of the Council of Europe. Resources and possibilities are widely available, to a degree also for institutions like HEUNI. The present-day spirit is to look for extra-budgetary funding for research purposes and HEUNI is not behind this trend. The fact that HEUNI’s host country Finland is an EU member is not without significance to HEUNI either. More and more, HEUNI is servicing the European countries, and the United Nations Crime Prevention and Criminal Justice Programme, by providing timely information on various aspects of crime, both on traditional and emerging issues. Looking back, it can be said that HEUNI’s strength lies in its ability to respond to the demands of each time. This is also a good point to look ahead.

On the occasion of the 25<sup>th</sup> anniversary of the establishment of HEUNI, the entire HEUNI staff wishes to express their heartfelt thanks and respects to everyone who have made our work so meaningful and rewarding. Two persons in particular stand out: Professor Gerhard Mueller, who passed away in April 2006, and Professor Inkeri Anttila, who celebrates her 90<sup>th</sup> birthday today.

Helsinki, 29 November 2006

Terhi Viljanen  
Senior Programme Officer

# European Experiences in Preventing Organised Crime: Field studies of best practices by a Council of Europe expert group<sup>1</sup>

Kauko Aromaa  
Director  
HEUNI  
Finland

## Introduction

Europe and South America: dissimilar organised crime problems,  
similar control approaches

From organised crime studies in Europe and South America, obvious differences between the two regions emerge. Organised crime, including its transnational dimension, has a different history, a different opportunity structure, and a different profile in both of these two regions. However, organised crime, in general terms, also seems to have many commonalities across the two regions. This becomes clear when Oliveira distinguishes five different types of organised crime in the MERCOSUL region (Oliveira 2005<sup>2</sup>). The first type comprises groups with clear lines of authority, involved in all kinds of serious professional crime. The second type of groups have a weak organisational structure, and are busy with assaults, fuel adulteration, kidnappings and hijacking. The third group are those involved in a range of financial crimes which involves tax evasion and environmental crime. In the fourth group, organised crime is evident by criminal activity within the State. This suggests that some public officials are corrupt or dishonest, co-operating with organised crime. In the fifth group are the terrorist networks and organisations.

The types of organised criminal groups as presented by professor Oliveira are strikingly familiar to the European observer. Many of the concrete actions of the groups are probably different in

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<sup>1</sup> The paper was presented in the First International Co-operation Forum for the Control of Organized Crime in the Relations of Productions and Investments of Mercosul, Foz de Iguacu, 23-25 November 2005

<sup>2</sup> Edmundo Oliveira (2005). Co-operation and Law Enforcement to Counter Organised Crime in the Common Market Countries of South America (MERCOSUL). In Kauko Aromaa & Terhi Viljanen (eds.): Enhancing International Law Enforcement Co-operation, including Extradition Measures. Proceedings of the workshop held at the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand, 18-25 April 2005. European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), Publication Series No. 46, pp. 33-39.

South America, whereas this kind of generalised typology is easily recognised also in descriptions of the European situation.

Consequently, it should not be a surprise when I maintain that many of the instruments found useful in preventing organised crime in Europe are likely to be useful in South America too, beginning from the universal United Nations Convention on Transnational Organised Crime and its three protocols<sup>3</sup>. Similarly, even if the practical, legal and scientific definitions of (transnational) organised crime have been difficult to reach, it has proven to be possible to develop pragmatic approaches to countering this elusive phenomenon. This is what the present paper intends to demonstrate.

### The Council of Europe expert group 1997-2003

A Council of Europe expert group worked, among other tasks, on the issue of best practices in combating organised crime in the region from the late 1990s to the end of the year 2003<sup>4</sup>. The work was done by making brief field visits to selected European countries to interview central experts and authority representatives on a number of organised crime prevention issues.

The purpose of these "best practice surveys" (BPS) was fairly simple: as certain European countries had developed innovative solutions to the problem of organised crime, it seemed appropriate and important to ensure that these be shared with other countries. The aim of the surveys was thus to document such experience in a limited number of countries and to disseminate the results in order to encourage and motivate the relevant authorities throughout Europe.

Each field survey comprised three European countries that were selected according to previous information about their particular experience in the relevant survey topic. A total of eight field surveys were carried out. The field survey topics were

- 1 Witness protection

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<sup>3</sup> The Palermo Convention (The United Nations Convention against Transnational Organized Crime) has three supplementary protocols: The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; The Protocol against the Smuggling of Migrants by Land, Sea and Air; the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

<sup>4</sup> The outcome was published in 2004 as "Combating Organised Crime. Best practice surveys of the Council of Europe." Reports by the Committee of Experts on Criminal Law and Criminological Aspects of Organised Crime (PC-CO)(1997-2000) and the Group of Specialists on Criminal Law and Criminological Aspects of Organised Crime (PC-S-CO)(2000-2003). Council of Europe, Octopus Programme. Strasbourg: Council of Europe Publishing.

- 2 Reversing the burden of proof in confiscating the proceeds of crime
- 3 Interception of communication and intrusive surveillance
- 4 Crime analysis
- 5 Cross-border co-operation
- 6 Provisions on membership of criminal organisations
- 7 Co-operation against trafficking in human beings
- 8 Preventive legal measures

These topics comprise approaches intended to facilitate the investigation of organised crime (1, 3, 5, 6), making it easier to sentence actors in organised crime or increasing the risk of punishment (2, 5, 6, 7), enhancing the prevention and investigation of organised crime (4, 5, 6, 7), or making the criminal activity more difficult (8).

Whether additional best practice topics could have been studied, remains an open question, as the mandate of the group of experts ran out. However, the eight topics just listed do represent quite a broad range of instruments that can be contemplated when developing an anti-organised-crime strategy. The eight topics have a close connection to Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on the fight against organised crime, adopted on 19 September 2001. The Recommendation comprises 28 guiding principles ranging from general preventive measures (such as prevention of money laundering and corruption), issues related to the criminal justice system (including criminalising membership in organised crime groups, the confiscation of crime proceeds, witness protection, the interception of communications, and crime analysis), to international co-operation, data collection, research and training.

The topics, as can be seen, deal with several different aspects and levels: there are a number of dimensions to countering organised crime, dealing with either the crime definitions and legal measures intended to prevent organised crime, including issues of proof/evidence; with the crime environment; with the criminal motivation (profit); with taking away obstacles to practical investigations, including cross-border co-operation of relevant authorities; with providing police with special powers required for improved organised crime prevention and control.

In short, the measures/dimensions analysed in this case fall under several well-known categories acknowledged in crime prevention theory, including

- increasing the effort
- increasing the risks
- reducing the rewards
- reducing the provocations

- removing excuses

It should be noted that there are also other relevant developments on the European scene that have to do with enhancing international co-operation at authority-level. These would deserve a full treatment separately. They comprise developments such as Europol, Eurojust, the European Arrest Warrant, the Baltic Sea Task Force, all of them relevant innovations the potentials of which have not yet been tested very far but where useful lessons could likely be learned as well.

The best practice surveys

### *Witness protection*

Witnesses (and victims) to organised crime are often subject to intimidation and violence, and are thus often prevented from providing information or testifying in court. In a number of countries, procedural and non-procedural measures have therefore been introduced to protect such witnesses or "collaborators of justice". Studying the experiences of Germany, Italy and the Netherlands in late 1998, the BPS concludes that witness-protection programmes in these countries are highly effective in that witnesses who co-operate fully with the programme have not become victims of violence, and in that their testimonies have contributed to the conviction of leaders and key figures of organised crime groups.

**Alternative ways to protect witnesses.** The European countries selected for a closer look at their experiences ("good practices") proved to have found alternative ways to protect witnesses. Witness-protection programmes may go as far as changing the identity of the witness, or they may have other ways of protecting the witness. Both aim at avoiding to endanger the witness by making it impossible to recognise them or to trace them. In most cases this is done by granting partial or full anonymity to a witness.

**Why is witness protection needed?** It may be possible to use statements of anonymous witnesses as evidence in court, although convictions may not be based on anonymous testimony alone. According to this approach, the justified interests of an endangered witness can lead to a reduction of the right of the defence to question the witness. This may be achieved by different technical solutions, including hearing a witness in the absence of the defendant, or making eye-contact between witness and accused impossible, or allowing the questioning of a witness through an audio-link with a voice transformer. Questions may also be put to the investigating judge who may act as an intermediary, also in



order to prevent questions/answers that might help to reveal the identity of the witness.

The advantage of hearing a witness in the absence of the defendant is that it prevents both direct verbal or physical threats to the witness and more subtle intimidation by the defendant. In addition, the court may exclude the public from the hearing, or part thereof. This means that endangered witnesses may be heard at a court sitting not open to the public, for their protection against public disclosure of their existence and their appearance.

**Legal basis.** The argument in support of such practices is that authorities who compel (or ask) an endangered witness to testify should take appropriate measures in order to protect the life of the witness. This does not mean that the state is obliged to rule out all possible violence to witnesses. However, it does mean that a state should organise their criminal proceedings in such a way that the interests of witnesses are not unjustifiably imperilled.

In ethical terms, witness protection should not be seen as a kind of reward for co-operation by the witness with the law enforcement authorities. Instead, it should be viewed as a way of safeguarding the criminal trial and securing the life and limb of the witness (and their relatives). In practice, it is however not uncommon for a witness to be rewarded for co-operation with the law enforcement authorities, for instance by a reduction of their sentence or other benefits.

**Types of crime.** Entering a witness protection programme usually leads to a total disruption of the normal life of the witness and their relatives. For that reason and for reasons of the high cost involved, it is advisable to restrict witness protection programmes to cases of (very) serious crime, in particular for combating organised criminal groups and terrorist groups.

This can be explained by the closed character of the groups involved, which makes it very difficult to use traditional investigative methods successfully. Considerable significance is attached to the testimony of witnesses who, by virtue of their personal proximity to the planning and commission of crime, are in a position to make statements leading to the identification of the organisers and beneficiaries of the crimes in question. In such cases, material evidence is often insufficient, and therefore the protection of individuals who are prepared to testify takes on even greater importance.

Another category of crime for which witness protection is frequently used is that of capital and other violent crimes, especially in cases where the suspect already knew the victims and the witnesses. If the risk of retaliatory measures against witnesses by the perpetrator or their "friends" is such that witnesses are not willing to testify in court, a witness protection programme can offer a solution.

**Admission; who is eligible.** Procedures by which witnesses may be admitted to a protection programme are variable. It is usual that the decision goes to a rather high level of authority, often acting as some kind of central assessment boards.

The most common type of eligible witnesses is the co-defendant who has decided to co-operate with the justice authorities and who is prepared to give testimony in court against their former associates. In the second place, the programme is meant for witnesses who are not suspected of a crime. This category mainly comprises innocent bystanders who happened to be present when something happened that was relevant from a criminal investigative viewpoint. This may also include relatives (wives and girlfriends) of members of organised criminal groups who were murdered. Overall, it is only a small percentage of the participants in the witness protection programme who do not have a criminal background.

**Volume and costs.** In the three example countries, the annual number of applications to witness protection programmes has fluctuated roughly around 2 and 7 per million inhabitants, reflecting the exceptional character of the measure. However, as this measure is of a rather permanent character - the average duration being several years - the number of people in the programme is constantly increasing, the volume of participants having accumulated over time from ten to ninety people per million inhabitants.

Witness protection is expensive. Depending of the duration and the number of family members involved, the cost per witness may vary - very roughly - between 80,000 and 400,000 USD. The costs are mainly caused by the protection service (salaries), removals and temporary residences, economic subsistence, housing, medical costs, and legal assistance.

Although witness protection is not cheap, the costs may be considered to be reasonable compared to labour-intensive investigative measures such as infiltration or long-term surveillance. The strong impression also is that witness-protection is more effective and efficient than those other methods, especially in the case of organised crime.

**International co-operation.** International co-operation between countries will make witness protection for every single country more effective, because the more countries the protected witnesses can reside in, the more difficult it will be for offenders to trace them. Furthermore, if countries share a common method of protecting endangered witnesses, this will enhance the ease with which witnesses can be moved abroad. For this purpose, international agreements should be promoted.

## *Reversing the burden of proof in confiscating the proceeds of crime*

**The difficulty of proving the criminal origin of wealth.** The generation of substantial profits is at the heart of organised crime. Thus depriving criminals from these profits is a key element of any anti-organised-crime strategy. Financial investigations, and the search, seizure and confiscation of proceeds are hence considered to be among the most powerful tools against organised crime. Major problems in this connection include situations where suspects are inexplicably rich but where there is no conviction for a predicate offence to which this wealth can be attributed or situations where there is a conviction for an offence but it may be difficult to prove that the wealth in question does in fact stem from the proceeds of that particular crime. Similarly the level of proof required may be too high, namely criminal (beyond reasonable doubt) rather than civil (balance of probability). Under such circumstances the question arises whether the burden to prove that suspected crime proceeds are in fact of lawful origin could be placed on the defendant. The BPS assessed the experiences of Denmark, Ireland and Switzerland. In this context, it discusses a number of human rights concerns related to this question, and concludes that a "refutable reversal of the burden of proof in confiscation cases seems likely to be upheld as lawful" by the European Court of Human Rights. However, it also states that the effectiveness of this approach remains limited, at least as long as criminal proceeds are not systematically targeted in the first place through financial investigations.

**Profits and proceeds.** It is essential to differentiate between profits and proceeds. Profit is the amount obtained, net of financial disbursements by the offender(s) including legal and laundering costs. Proceeds denote the gross amount obtained by criminals, which may have to be distributed among different levels of offenders and among third parties to pay for sometimes legitimate, innocent third-party costs such as transport, housing and financial services. If the confiscation measure is expected to provide significant funding for financial investigation, there is an obvious risk that, unless the targets are wealthy anyway, only the profits from crime can normally be recovered and even many of the profits from crime will have been spent on conspicuous consumption. In practice, often only offenders' gifts, investments, property and savings are available for confiscation, and even these typically provided that they are in the offender's own name rather than somebody else's.

Particular difficulties have been experienced in proving, beyond reasonable doubt, the criminal origin of assets owned (or apparently owned) by legal persons (corporations, trusts etc.) that are domiciled in offshore finance centres, and conventional criminal procedures are unlikely to penetrate these major cases.

**The "take".** The financial "take" (let alone the profit to local or central government net of enforcement costs) from asset forfeiture/confiscation has been modest in every country except the United States, where a significant amount of the income from forfeiture comes from:

- the liability (including corporate criminal liability) of third parties such as financial intermediaries, rather than from the "primary" offenders such as narcotics traders, and
- the civil and criminal forfeiture provisions attached to the particular form of conspiracy law known as the Racketeer Influenced Corrupt Organization law of 1970 (which has later on, in 2000, again been watered down).

**What gets seized?** One conclusion would be that the financial investigation picks up, at best, the layering and usually the placement stage. It is very rare for physical objects or current businesses to be seized. What gets seized - or frozen - is real property (land, houses, apartments, cars, businesses), followed by cash in accounts or investments in shares and bonds.

Overall, confiscation has been confronted with serious problems. In financial terms, the successes have at best been only modest.

**Modest results.** The final observation is that not only legal changes but also cultural and organisational changes are essential prerequisites of successful confiscation of the proceeds of crime. Unless appropriate resources and training to enhance the competence levels of key decision makers - investigators, prosecutors, defence lawyers and judges - are provided, legislative changes to the burden of proof will make only the most modest difference.

**Alternatives.** Finally, it should be remarked that confiscation is not the only way of depriving offenders of their proceeds: taxation authorities too can become actively involved in that role with good results. This issue would probably deserve special attention, in particular when considering the modest successes recorded for the confiscation option. No separate study has been carried out on this option in the present context.

### *Interception of communication and intrusive surveillance*

The possibility of penetrating the closed world of organised crime in order to gain information of criminal activities, to collect evidence for use in court and to prevent further crimes is considered to be of critical importance to law enforcement and criminal justice agencies. However, the interception of telephone and other communications, the audio- or video-recording of conversations and other covert, intrusive investigative means may be technically

feasible, but can also be seen as threats to human rights, democracy and the rule of law. Analysing the experiences of Hungary, Turkey and the United Kingdom, the BPS concludes that the interception of communications and intrusive surveillance are effective tools against organised crime. However, at the time of the visits in 1999, there were still uncertainties and differing interpretations of the then relatively new legislation, which - together with financial and technical limitations - led to certain restrictions as to the use of these means. The BPS also underlines the need to maintain high standards of control and procedural checks, as well as the principles of proportionality and subsidiarity when applying covert methods.

**Highly relevant for organised crime.** The topic is highly relevant in organised crime control for several reasons:

1) The very nature of organised crime - the fact that criminal activities are planned and conducted within a closed group of actors, often taking various special precautions against detection of such activities - implies that traditional means of collecting evidence as used in cases of other criminal offences, such as witnesses, expert testimonies or material evidence, are very often of less or even no value.

2) To penetrate this closed world, it is essential for the police - and other law enforcement agencies aiming to disrupt the activities of criminal groups and collect evidence that could lead to conviction in the courts - to obtain "insider knowledge" about the activities of such groups. This is often a very difficult task, which may be achieved only using special investigative techniques and equipment, making possible interception of telephone, fax or Internet messages (interception of communications), or the making of audio- or video-recordings of conversations or events in particular places or rooms, or tracing movements of persons, cars and the like (intrusive surveillance).

3) Although modern technology seems to offer almost unlimited possibilities, it is not primarily the technical, but foremost the ethical and legal (including constitutional) barriers to such activities that are the subject of very intensive discussion, controversy and sometimes strong objections, in many contemporary democratic societies.

**Requirements: serious crime only.** The admissibility of intercepting communications and of intrusive surveillance is often regulated by additional safeguards, for instance such measures can only be applied if it would be impossible to achieve tasks of the investigation by other means. Also, the police is typically not allowed to decide on such measures on its own but have to apply in such cases to some other authority and so have to substantiate their application with evidentiary grounds.

**Regulated duration.** The use of interception of communications and of intrusive surveillance are typically also regulated by time limits, for example with two-, three- or six-month maximum duration, and with certain possibilities for renewal. Normally, the use of such methods must cease immediately if the goals for which they were applied have been achieved.

**Only information related to identified target admissible.** These methods allow the investigating officials to obtain information not only on the subject but a non-defined number of other persons from family members to random outsiders. The use of such information is usually regulated by restricting it to the target of the measure as identified beforehand. All other information must be deleted.

**Private vs. public space.** The differentiation between public and private spheres is crucial. Restrictions thus usually apply to interceptions of communications and intrusive surveillance on private premises. This, of course, requires that private and public premises are legally clearly defined.

**Evidentiary value of the information.** The evidentiary value of information gathered with methods discussed here is a highly important issue. The crucial difference is whether they must be treated only as intelligence, or may be used as evidence in court as well. A related question is whether such information can be accepted as the only evidence or whether also other evidence is required in support of this. A further related question is whether information gained in this fashion may be used for other purposes than for the one for which the permission was granted. In each of these issues, different solutions are found across countries.

**Related investigative methods.** Since interception of communication and surveillance in private places are very intrusive methods of investigation, law enforcement officials consider the application of *less intrusive methods first*. The two related methods that are used frequently are the gathering of *information on communications traffic* in which the target person (telephone number, e-mail address) is involved, and systematic *"round-the-clock" surveillance* of public places. These methods are particularly useful in getting a comprehensive insight into the movements, lifestyle and personal network of a target person who is suspected of involvement in organised crime.

A further frequently applied method is the use of *informers*. Sometimes intelligence or evidence is gathered by police officers who are working *undercover*, either "wired up" with a recording or transmitting device or filmed during conversations with a suspect. Another investigative method to be discussed in this regard is the use of *"front" organisations* by law enforcement. Such firms can offer facilities for criminal groups, such as assistance in the laundering of criminal proceeds, the fencing of stolen goods or the

transport or storage of illicit drugs. The difference between this method and the ones discussed before is that front businesses need not be set up in the course of a specific investigation but can offer facilities to the criminal fraternity in general.

**International harmonisation.** The legal framework is very variable across countries. This is a clear indication that international harmonisation of the regulation of the methods discussed here would be called for, in particular as organised crime investigations often may be targeted at operations that reach across national borders. In such cases, different legislation and application of unusual investigation methods lose potential if regulations differ greatly. This is relevant not only in regards of gathering intelligence but also where the acceptability of the gathered evidence in court is concerned. Countries sharing organised criminals would fare better if they also shared common principles concerning the interception of communication, intrusive surveillance, and related investigative methods.

### *Crime analysis*

**Studying crime patterns and trends.** Crime analysis is about the study of crime patterns and trends in an attempt to solve crimes or prevent their recurrence. It involves the collection, collation, analysis and dissemination of data related to crime. Debates from the mid-1990s onwards centring on strategies against crime underlined the need to develop capacities not only for operational and strategic analyses, but also for the use of intelligence for proactive policing. Such methods may lead to conflicts with data protection and human rights provisions and thus require controls and safeguards. The BPS traces the development and the different cultures of crime analysis in Belgium, the Russian Federation and the United Kingdom. It shows how crime analysis can be developed to become an autonomous discipline, and points to the strengths and weaknesses of the various possible approaches. It concludes, among other things, that crime analysis can be a powerful tool in preventing and fighting organised crime, and in handling the absence of the unity of time, place, perpetrator and activity which is a characteristic of organised crime. The prediction is that crime analysis will gain in significance and that the demand for its products will increase.

**Organised crimes are not random, isolated and unique events.** Crime analysis rests on the assumption that crimes are not totally random, isolated and unique events, but can be combined into sets sharing common features and showing distinct patterns. Basically, crime analysis represents a system utilising regularly collected information on criminal incidents and individuals involved, in order to prevent and suppress crime and to apprehend criminal

perpetrators. The information obtained by systematically analysing the data can be used to support management and operations.

**Operational/strategic analysis.** According to standard definitions, a distinction is made between operational (tactical) analysis and strategic analysis. Operational analysis is directed towards a short-term law enforcement goal with an immediate impact in mind, such as arrest, seizure and forfeiture/confiscation. The goal of strategic crime analysis is to develop, implement or evaluate a policy, based on insights into the nature of a particular type of crime or criminal, and the scope and projections of growth in types of criminal activities.

**Gain insight into complex relationships.** Crime analysis is applied as a means to combat organised crime more effectively. It is a powerful instrument in the fight against organised criminal groups, because it provides a number of methods and techniques to gain insight into complex relationships between suspects, criminal activities and associated factors. Crime analysis can also be used (and is so used in practice) for the prevention and repression of other types of crime, both complex ones (such as fraud) and mass crime.

**Integration.** There is no single best way to organise crime analysis, but integration of *operational analysis into the investigative process* and of *strategic analysis into the policy-making cycle* is very important. Especially for operational analysis, it is highly relevant that crime analysts are involved in an (complex) investigation from the very start or as soon as its complexity becomes apparent. For strategic analysis it is vital that the purpose of the analysis is clear. When is what reported, by whom, how is it done and why? - these are some of the important issues to be addressed in order to enhance the quality of a strategic analysis report.

**Example.** In the following, a concrete British example of successful crime analysis is presented in order to illustrate the potential of the approach.

During a 21-month period, a series of daytime sneak-in burglaries took place on commercial premises, where company cheque books were stolen and individual cheques from these books were cashed for small amounts before the victims noticed their absence. When the separate offences were linked together, a pattern emerged which indicated that a substantial organised crime operation was involved. It was at this point that the matter was passed to a crime analyst.

The starting point for the analyst was to examine the information available about the basic crime pattern. The victims were commercial organisations who generally had multiple company cheque books and bank accounts, together with complex account checking procedures. Their premises were also very accessible



during business hours, with comparatively low security for office areas.

The analyst reasoned that, for the offenders, targeting these victims had the advantages that they were relatively vulnerable in two key areas - firstly in identifying intruders, and secondly in noticing missing cheques or monies in the short term. The plot also had certain disadvantages: monies had to be transferred quickly after the cheques were obtained, and the transfer of funds into bank accounts gave a potential link to the offenders.

Such reasoning encouraged theorising about how the offenders had approached the operation as a whole, including planning, preparation and resourcing: 1) a system for quickly diverting funds to accounts needed to be established before the thefts took place, and 2) they needed a system which masked their identities as well as the link between their funds and the stolen funds.

Using analytical computer software, the initial review of the data identified monies obtained using stolen company cheque books and tracked them moving between some 206 separate accounts, belonging to 85 different people, using 32 addresses. The analysis focused on the criminals' need to break the link between the stolen funds and the offenders. This could be achieved by two ways: 1) by "bouncing" funds around several accounts, and 2) by concealing the offenders' real identities behind false identities or aliases.

A computer analysis showed that of the 85 individuals whose accounts were known to have received stolen funds, four were in fact using other names as aliases. These four between them controlled 23 names (a quarter of those known); they were also linked to 13 addresses (over a third of the total). These four also had control of 55 accounts (over half of those known).

The next step was to identify transactional links between the accounts themselves, looking at how money was moved between all the accounts that had received stolen funds. The analysis eventually illustrated how the monies were accumulated to the accounts of the four key players and could be used in the police investigation and in court.

### *Cross-border co-operation*

**Law enforcement is trailing far behind organised crime.** Almost any study on organised crime, whether European or South-American, will point to the fact that the level of cross-border co-operation between law enforcement authorities is trailing far behind the efficiency by which organised crime groups operate transnationally. A BPS was therefore launched to study problems and solutions, in particular at local levels, in Finland, France and Slovenia. Bottlenecks included the absence of legal frameworks or

diverging legislation, but also the lack of knowledge as to what is possible under existing regulations. At the same time the BPS identifies "good practice" and a number of opportunities which may complement the informal network of personal relationships across borders. The channels of communication have been multiplied. In addition to Interpol and the Schengen Information System an extended network of liaison officers is available. E-mail and in some cases direct communication links can be used, and multi-level frameworks of co-operation have been created. The French-German centre in Offenburg, comprising police and customs officers, may also serve as an example for combining cross-border and interagency co-operation.

**European co-operation is increasing.** Back in the 1980s, a debate opened up in the European Communities about facilitating the free movement of persons across national borders. Since it was not possible at that time to reach general consensus, five member states decided in 1985 to create a territory without internal borders, the so-called Schengen area. Little by little, the Schengen area has been extended to include a growing number of the EU countries. According to present provisions, this comprises, i.a., common action in the field of police co-operation including operational co-operation between police, customs and border control authorities in relation to the prevention, detection and investigation of criminal offences. It also includes co-operation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment and forensic research.

The Convention on Mutual Assistance in Criminal Matters between the member states of the European Union lays down the conditions under which mutual assistance is granted. As a general rule, requests for mutual assistance and communications are made directly between judicial authorities with territorial competence. But spontaneous exchange of information may also take place between member states regarding criminal offences, as long as the handling falls within the competence of the receiving authority. The convention also offers options for two or more member states to set up joint investigation teams, and to carry out controlled deliveries and covert investigations on the territory of another member state. - For non-EU member states, the Council of Europe's 1959 European Convention on Mutual Assistance in Criminal Matters - and its additional protocols - are the most important multilateral instruments for cross-border co-operation.

**Problems.** Although mutual legal assistance in criminal matters has a long tradition, there is still a *lack of legal instruments* in the area of cross-border co-operation. Until recently, formal international co-operation was heavily focused on judicial co-operation, including extradition, transfer of proceedings, or transfer of the execution of sentence.

The growth of cross-border traffic of both persons and goods over the years has had a significant impact on transnational crime. Therefore, the need for cross-border police co-operation has increased very much.

The majority of member states of the European Union participate in the Schengen Agreement, which offers opportunities for co-operation between law enforcement agencies of neighbouring countries. For other European countries, it is much more difficult to reach a satisfactory level of cross-border co-operation. Countries should therefore urgently ratify those international instruments facilitating direct police and judicial co-operation across borders and supplement them with bilateral agreements.

The internationalisation of investigations can lead to situations in which detectives or other law enforcement officers carry out investigative actions in the sovereign territory of a neighbouring country. At the moment, it is not always clear how far they can go in the use of their authority.

The basic principle is that foreign officers can never exercise powers exceeding those of the national investigating officers in the country in question. But they are also bound by the legislation of their own country. This means that the strictest rules apply, resulting in a minimal arsenal of authorised actions.

In practice, failure to properly respect national sovereignty in the course of cross-border investigations may be caused by a *lack of time* - as when immediate action is called for in cases of hot pursuit - or by *lack of knowledge*. The latter is the more important factor. Officers may not know the rules of the neighbouring country that apply in a particular situation and/or the correct channels for requesting necessary authorisations for specific actions

A third factor is the *lack of trust*. At the very least, if any laurels are to be awarded for clear and visible successes in the fight against crime, law enforcement officers do not want to see them stolen by the authorities of a neighbouring country. Furthermore, and perhaps more important, in some cases there is the *risk of leaks and corruption*.

For this reason, information is not shared with counterparts across the border or it is shared at the last possible moment and only if it cannot be avoided. Moreover, necessary notifications of competent authorities sometimes take place only at the last possible moment.

In some cases local investigating officers of the neighbouring country are informed, but not the judicial authorities. It is quite clear that this behaviour does not help build up trust or establish a co-operative attitude between parties either side of the border.

*Diverging legislation* in the countries concerned are understood as a major obstacle to improved cross-border co-operation. For

instance, some European countries have very strict rules on the application of special investigative means, whereas others are much more flexible and tolerant in this respect.

Another area in which there are important differences between countries is *criminal procedural law*. What is generally regarded as acceptable evidence in a criminal trial in one country is not necessarily accepted by the judge in a neighbouring country. It is obvious that these differences have an obstructive effect on cross-border co-operation.

**Recommendations.** In cross-border co-operation, the study recommends improvements on five separate dimensions:

- 1) more systematic, efficient and reliable channels for cross-border information exchange need to be developed;
- 2) formal agreements and informal personal networks should both be improved;
- 3) multi-level co-operation should be enhanced;
- 4) cross-border and interagency co-operation needs to be combined;
- 5) the competencies of liaison officers should be extended.

Each dimension deserves like attention, as each addresses partly different problems of enhancing cross-border co-operation of law enforcement authorities.

### ***Provisions on membership of criminal organisations***

**Organised crime is a complex target.** Traditional "one man - one crime" approaches do not correspond to the realities of organised crime where different persons, possibly based in different countries, organise themselves to commit crimes, but where only the person caught in the execution of an offence is brought to justice. The criminalisation of membership of an organised crime group as such is therefore a potentially powerful tool. The BPS studies the experiences of Germany, Italy and Poland. While this tool has become an international standard, the BPS pinpoints certain limitations which are mainly due to the problem of clearly identifying an organised crime group as a firm structure, and determining the point at which a form of participation becomes punishable. While this may be possible with regard to "classical", hierarchical mafia-type organisations, difficulties exist with regard to fluid, network-type [or marketing chain-type] enterprises. Nevertheless, suspicion of participation in an organised crime group constitutes a "golden key" [or universal key] for law enforcement and prosecutorial bodies as it may permit the use of covert and intrusive investigative techniques. Thus, the provisions on criminalising membership of organised crime groups may

complement witness protection and other anti-organised-crime tools.

**Membership suspicion opens the door to other evidence.**

The study of European practices concluded that it was rare for the offence of membership to be the sole offence for which organised criminals were prosecuted and sentenced. Instead, it turned out that provisions criminalising the membership in criminal groups or organisations often offer investigative advantages, which makes them a powerful tool: the investigation of this particular offence opens the door to such evidence which eventually may be used in court proceedings concerning the crimes committed by such groups. It thus appears that the concept of membership of criminal organisations fulfils a very practical function: it eases the applicability of special investigative means, the use of which is normally limited to the most serious offences for reasons of proportionality. The suspicion that the investigation is facing an organised crime group or targeting a person suspected of being a member of a criminal organisation facilitates the use of the most powerful and intrusive investigative techniques. These, in turn, allow the crime investigation to come closer to the concealed criminal activities that otherwise risk to remain beyond the reach of law enforcement authorities.

At the same time, judicial bodies called upon to authorise the application of such techniques may require a reasonably high (or low) level of suspicion. If weak evidence is gathered as to membership, the prosecutorial authorities may then swap to other substantive, underlying offences as a basis for the criminal proceedings.

It is remarkable that a substantive criminal-law provision could mainly serve for investigative purposes rather than for obtaining conviction. Normally, this function is devoted to procedural penal law.

***Co-operation against trafficking in human beings***

**An issue of both human rights and organised crime.** As trafficking in human beings is an issue of both human rights and organised crime, it is only natural that combating it has become a high priority for the Council of Europe and in the realm of the United Nations and the European Union. Measures against trafficking need to address the strong role of organised crime and the requirement of protecting and assisting victims of trafficking. If the conviction of criminals is to be achieved, the co-operation of victims as witnesses in the criminal justice process is essential. At the same time, the needs of victims can often best be served by involving non-governmental anti-trafficking organisations. The BPS studies the experiences gained in Austria, Belgium and Bulgaria,

where "co-operative approaches" have been developed between law enforcement and anti-trafficking organisations. These approaches are aimed at the dual objective of assisting and protecting victims on the one hand, and at facilitating their co-operation as witnesses in the criminal justice system on the other.

The concept of trafficking in human beings implies a strong role of organised crime groups, in that it includes the threat or use of force, coercion, fraud, deception or other means, in that trafficking involves several distinct but interrelated acts, and in that exploitation is not a one-off event but is carried out over a certain period of time. These features imply that effective measures against trafficking in human beings require co-operation at all levels.

**Co-operation of victims as witnesses essential for conviction.** The subject of co-operation in itself is rather broad and covers a large range of issues. However, keeping in mind the need to assist and protect victims of trafficking on the one hand, and the crucial role of victims as witnesses in the criminal justice process on the other, the co-operation between non-governmental organisations providing services to victims of trafficking and police and criminal justice institutions would seem to be of particular importance.

It was found that

- Measures against trafficking in human beings require co-operation not only among criminal justice bodies, but also with other public institutions and in particular NGOs.
- Such a co-operative approach can provide a sufficient level of assistance and protection to victims, subject of course to an appropriate legal framework and adequate funding.
- In contrast, the usual police witness-protection programmes do not seem of much relevance. Such programmes do not appear to be equipped to address the specific needs of victims of trafficking. However, procedural witness protection measures also benefit victim-witnesses of trafficking.
- The co-operation of victims as witnesses is said to be crucial for the criminal justice process. Police, prosecutors and judges suggest that if victims co-operate as witnesses they can obtain convictions; otherwise, prosecutions are unlikely to succeed. The co-operative approach described here seems to be successful in ensuring such co-operation by victims. A major precondition in this context appears to be clear regulations regarding the residence status of co-operating foreign victim-witnesses (in the case of transnational organised crime-related trafficking, the key victim-witness is typically a foreigner).
- From the perspective of police officers, trafficking in human beings is closely related to organised crime. At the same time, there are few investigations and prosecutions in connection with

trafficking aimed at criminal organisations. Some argue that the evidence provided by the police and the testimony of victim-witnesses are insufficient. Others suggest that it is rather a question of the “economics” of the criminal justice procedure. Whatever the reasons, it would seem that, while the co-operative approach is successful in protecting victims and ensuring their co-operation against individual traffickers, either the opportunities it offers have not been fully exploited or other strategies would have to be pursued in order to dismantle transnational trafficking networks and organisations.

### *Preventive legal measures*

**Crime groups infiltrate legal markets.** With organised crime groups functioning more and more like criminal enterprises, it is a real and substantial risk that they participate in legal markets to invest criminal proceeds, to diversify business interests, to build up legal cover or to control markets. In some countries, legal measures have therefore been taken to exclude criminals from public procurement and construction contracts or from obtaining permits and licences. Such preventive measures are now also reflected in international standards. The BPS assesses the measures taken in Estonia, the Netherlands and Sweden. The experience of the three countries underlines that prevention is as important as law enforcement. While all three countries make use of their existing legislation to prevent the infiltration of legal markets by organised crime, the example of the Netherlands shows that very comprehensive approaches can be developed in this respect.

**Bureaucratisation may encourage corruption.** A problem with this approach is, for instance, that bureaucratisation in the prevention of economic and/or organised crime may, in some societies, lead to over-inhibition of precisely the small- and medium-sized local private enterprise most needed for the development of a flourishing indigenous private sector. As an understandable side-effect, multi-layered stages of controls can also be used as an instrument to extort bribes from large and small businesses for permits and licences, in other words create new potentials for corruption.

Privacy and data protection issues, and the EU requirement to ensure a level playing-field and open competition for business, do inhibit the development of preventive approaches. Although crime prevention is a valid legal reason for data sharing, policy differences between enterprise ministries and crime-control ministries can inhibit preventive action.

In the example of the Netherlands, prevention has become embedded in a systematic, considered analytical framework, whose preconditions are administrative integrity, good data protection, and

the willingness of all parties to include information in databases and act co-operatively.

The basis of this scheme is that the two most important tasks attributed to the public administration in this context were as follows:

- Firstly, every possible means should be devoted to ensuring the *integrity of the civil service apparatus* as a prerequisite for effectively combating organised crime. Integrity means greater awareness, transparent allocation of tasks, tighter procedures for the award of grants, enhanced controllability of action, and prevention of conflicts of interest.

- Secondly, the public administration must be *more aware* of the fact that criminal networks increasingly use legal enterprises which, at certain points, are dependent on the government, in particular to obtain and exploit permits, in the outsourcing of work and the awarding of projects.

**Set up special agency.** A central recommendation in the problem analysis in the Netherlands was that it would be desirable to set up a special agency, with legal status and powers to vet applications for permits, tender proposals and suchlike, utilising all types of database, and with the power to require companies to co-operate with the agency's investigations.

Despite the complexity of the issue, including problems of data protection and the requirement that suspicions of involvement in (organised) crime must be substantiated or backed up with reliable evidence, the approaches discussed here do offer greater potential than criminal justice measures for crime prevention, by reducing the situational opportunities for organised crime groups and serious offenders. Although there has been no long-term evaluation as yet on the effects of these strategies on either levels of crime or the organisation of crime, these illustrations can be recommended to member states as food for thought beyond largely tactical, repressive criminal justice measures.

## Conclusions

Organised crime is hard to define in statistical or other accurate terms. This dilemma is reflected in much of the scientific and policy-related work with the objective of gaining increased insight into the phenomenon and enhancing its control, prevention and repression. Sometimes, or even quite often, effective countermeasures seem to be seriously hampered by the lack of unanimity concerning the definition of the target. Similarly, scientific research of the topic also suffers from this dilemma, sometimes becoming diverted for



instance to esoteric considerations of a constructivist or post-modern nature.

Pragmatically speaking, the experiences presented here have illustrated that this real dilemma need not paralyse constructive action. The best practice surveys of the Council of Europe group of experts show a possible solution of finding a way beyond - or around - the apparent definitional cul-de-sac. The exercise could be continued indefinitely, refining, updating and complementing the present findings. Furthermore, the scope of possible anti-organised crime measures and approaches could be enlarged and widened indefinitely, since the group of experts only analysed eight innovative approaches, the main objectives of which are summarised below:

- |   |  |
|---|--|
| 1 Witness protection  | - break into organised crime through witnesses                                 |
| 2 Reversing the burden of proof in confiscating the proceeds of crime | - depriving criminals from the profits   |
| 3 Interception of communication and intrusive surveillance            | - to penetrate the closed world of organised crime to gain information         |
| 4 Crime analysis  | - to understand the patterns and trends: investigation and prevention          |
| 5 Cross-border co-operation   | - enhance cross-border and inter-agency co-operation to improve investigations |
| 6 Provisions on membership of criminal organisations                  | - to enhance investigations, increase the risk of apprehension                 |
| 7 Co-operation against trafficking in human beings                    | - help victims, break into organised crime through victim-witnesses            |
| 8 Preventive legal measures (administrative prevention)               | - make organised crime operations more difficult by exclusion                  |

However, any country contemplating its anti-organised-crime policy could benefit already from these initial considerations and investigations on how some European countries have developed their policies in this regard. The field is vast and the challenges are many, and furthermore, the characteristics of the target phenomenon are elusive, as well as constantly changing and developing. Consequently, whichever approach is selected to be promoted, it must also involve a central dynamic element: an anti-organised-crime policy programme can by definition never be final but must be regularly reconsidered and revised as the surrounding realities change.

# The Role of the ECHR in Shaping the European Model of the Criminal Process

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Developments in the European Union (EU) clearly indicate a trend of national substantive criminal laws becoming more and more uniform. As a result of conventions<sup>1</sup> concluded within the EU, as well as of decisions of the European Council<sup>2</sup>, member states have adopted provisions similar in content making, for instance, corruption of EU or foreign officials, corruption in the private sector or money laundering a criminal offense, providing for liability of legal persons or for the confiscation of the proceeds of crime, etc. Also, the framework decision on the European arrest warrant, though addressing issues of international cooperation, is likely to contribute to bringing substantive criminal law provisions of member states closer to each other. For certain conduct defined as criminal offenses in the issuing state, the executing state may not refuse surrender of suspected offenders, claiming the lack of dual criminality. States will therefore certainly take steps, provided that they wish to maintain at least the appearance of their sovereignty, to make conduct enumerated in the framework decision a criminal offense under their national law as well.

The trend towards bringing national substantive criminal laws closer to each other is not limited to the EU. Numerous international treaties concluded in the past have had a harmonizing impact on the member states' criminal laws within the Council of

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<sup>1</sup> See Protocol [OJ 96/C 313/01 23.10.96] to the Convention on the Protection of the European Communities' Financial Interests [OJ 95/C 316/03 27.11.95] adopted on 27 September 1996 for criminalization of both active and passive corruption of national and Community officials; The Convention on the Fight against Corruption involving officials of the European Communities or officials of Member States of the European Union [OJ 97/C 195/01 25.6.97]; The second protocol [OJ 97/C 221/02 19.7.97] to the PIF Convention (OJ - C 316/1995/49), which has provisions for criminalisation of money laundering of proceeds generated by corruption.

<sup>2</sup> Framework decision criminalising corruption in the private sector [OJ L 192/54 31.7.2003]; Framework decision on money laundering, dealing with the identification, tracing, freezing and confiscation of criminal assets and the proceeds of crime 2001/500/JHA; Framework Decision on combating the sexual exploitation of children and child pornography 2004/68/JHA; Framework Decision on combating trafficking in human beings 2002/629/JHA; Some are still at the stage of proposal such as the Proposal for a Council Framework Decision to strengthen the criminal law framework to combat intellectual property offences {SEC(2005)848} or Proposal for Council Framework decision on combating racism and xenophobia (COM/2001/0664 final - CNS 2001/0270).

Europe. While the primary aim of some of these treaties - such as the European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular at Football Matches<sup>3</sup>, European Convention on Offences relating to Cultural Property<sup>4</sup> and others<sup>5</sup> - is to make international cooperation smoother, a direct effect of this has certainly been a degree of harmonization of national laws. Also, the soft instruments of the Council of Europe on the suppression of particular types of antisocial behaviour have contributed to bringing national criminal laws in Europe closer to each other.<sup>6</sup>

Furthermore, on the global level, harmonization of national criminal laws has become a priority target over the last two decades. Clearly, the conventions on drug crime<sup>7</sup>, transnational organized crime<sup>8</sup> or corruption<sup>9</sup> are reflections of the trend.<sup>10</sup> Mention should also be made of the Statute of the International Criminal Court adopted in 1998 which, though in a limited area, has made a substantial contribution to harmonizing and even unifying national laws. Due to the complementary jurisdiction of the permanent international criminal court, State Parties to the treaty have been prompted to define war crimes and crimes against humanity in a uniform manner by following the wording of the Statute.<sup>11</sup>

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<sup>3</sup> European Treaty Series, No. 120, 1985.

<sup>4</sup> European Treaty Series No. 119, 1985.

<sup>5</sup> Convention for the protection of individuals with regard to automatic processing of personal data (ETS No.108, 1981); Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No.141, 1990).

<sup>6</sup> Recommendation on the prevention of racism, xenophobia and racial intolerance in sport (2001/6) 2001; Recommendation on guidelines to the Parties for the implementation to Article 5 of the Convention: identification and treatment of offenders (90/1) 1990; Recommendation on comprehensive report on measures to counter hooliganism (89/2) 1989; Recommendation of the Committee of Ministers to Member States on the Reduction of Spectator Violence at Sporting Events and in particular at Football Matches (84/8) 1984; Recommendation on the protection of the cultural heritage against unlawful acts (96/6) 1996.

<sup>7</sup> 1961 Single Convention on Narcotic drugs; 1971 Convention on Psychotropic Substances; 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

<sup>8</sup> United Nations Convention against Transnational Organized Crime and its protocols (2000): Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Protocol against the Smuggling of Migrants by Land, Air and Sea, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

<sup>9</sup> United Nations Convention against Corruption (2003).

<sup>10</sup> It should be added that facilitating cooperation is also among the aims of these conventions.

<sup>11</sup> The definition of genocide in the Statute (see Article 6 and also Article 25 for incitement to commit genocide) in essence follows the wording of the definition of genocide (see Article 2) of the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

Whereas the tendency of harmonizing substantive criminal laws is clearly evident, much less has been achieved so far in the area of criminal procedure.<sup>12</sup> Even within the EU differences in criminal procedural law are still considerable in areas of such significance as the legal preconditions for employing coercive measures, the rules of collecting and assessing evidence, the role of the preparatory stage of the process, the rights of suspects or whether prosecution is mandatory or can be made dependant on expediency considerations.<sup>13</sup> The envisaged measures in the direction of harmonization within the Union are rather modest.<sup>14</sup> The explanation may lie in that the rules of the criminal process are dependant to a considerable extent on the organizational structure of the criminal justice system, the extent to which the court system is based on the so called hierarchical or the coordinate model<sup>15</sup>, the role of lay decision-makers, etc. This again is influenced by the cultural background, i.e. historical and political experience of a given people, the “*Zeitgeist*” in a particular society and socio-psychological factors.<sup>16</sup> The criminal process is not only a reflection of the cultural values; by giving them expression in the course of its operation it will further strengthen these values.<sup>17</sup>

Thus it appears that harmonization is a difficult undertaking in the area of criminal procedure. One can of course ask if there is a need at all for harmonization. Do potential benefits of making national criminal justice systems resemble each other outweigh the value of diversity? And assuming that harmonization is given priority over heterogeneity then which model will the harmonized European criminal process follow?

Let us put these dilemmas aside for the moment and simply acknowledge that in spite of the difficulties and the meager results, the international community does not consider harmonization or approximation a hopeless endeavor since steps have already been taken in the direction of harmonization on both the global and

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<sup>12</sup> This seems to be surprising in the light of the frequently voiced assumption that changes in substantive law will inevitably have their impact on the rules of the criminal process which, it is held, primarily serves the enforcement of substantive penal law.

<sup>13</sup> See: Robert Esser: *Auf dem Weg zu einem europäischen Strafverfahrensrecht*, De Gruyter Recht, Berlin 2002. p.5.

<sup>14</sup> Proposal of the Commission for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union 2004/0113 (CNS)

<sup>15</sup> Mirjan R. Damaska: *The faces of justice and state authority: a comparative approach to the legal process*, New Haven: Yale University Press, 1986.

<sup>16</sup> On the cultural factors explaining differences of systems of criminal procedure see Tatjana Hörnle: *Unterschiede zwischen Verfahrensordnungen und ihre kulturellen Hintergründe*, ZStW, Band 117. 2005/4, p.801-838.

<sup>17</sup> By this we assume that the goal of the criminal process is not limited to the enforcement of substantive law provisions. The autonomous function of the process is to express and demonstrate its link to the cultural background. See Hörnle op. cit p.834.

regional level. First, increased intensity in cooperation among states and international instruments on extradition and other forms of assistance, though not directly aimed at harmonization of national criminal procedures, have had an indirect harmonizing effect. Intensive cooperation, which leads to subsequent recognition of mutual dependence, will induce empathy for each other's problems and to making concessions to national sovereignty considerations. This is clearly reflected in that states are more and more prepared to provide assistance according to the procedural provisions of their partners (requesting states), not insisting that letters rogatory be executed exclusively in line with their own law.<sup>18</sup> It is hardly surprising that it is the EU Convention<sup>19</sup> that goes the furthest in this respect: the requested party, as per general rule, is under the obligation to comply with the formalities and procedures expressly indicated by the requesting State.<sup>20</sup>

Executing letters rogatory according to foreign laws may also give ideas to legislators in the requested state when it comes to reforming their own law on criminal procedure. Certain forms of cooperation, such as the mutual recognition of foreign judgments or transfer of proceedings presuppose that there exist no fundamental dissimilarities in the cooperating states' criminal procedures. Therefore states determined to cooperate will do their best to remove institutions unacceptable to their partners.<sup>21</sup> It can therefore

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<sup>18</sup> According to the traditional doctrine which stressed respect for national sovereignty the collection of evidence and other procedural measures had to be performed in line with the law of the requested state. Thus the 1959 Council of Europe Convention on mutual assistance in criminal matters in article 3 proclaims that "the requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents". The Council of Europe Convention certainly set out from the then prevailing practice of Member States to permit the use of evidence collected abroad irrespective of whether the mode of collection was in line with their own law. As a general rule the only precondition of their use in domestic proceedings was the observance of the law of the requested state. It is primarily increased sensitiveness for equality concerns in the sense that also in cases with a "foreign component" defendants should enjoy the guarantees of the domestic criminal justice system that may explain the change in attitude.

<sup>19</sup> Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union. *Official Journal* 197,12/07/2000 p.0003 – 0023.

<sup>20</sup> According to article 4 "Where mutual assistance is afforded, the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State".

<sup>21</sup> The fiasco of the Council of Europe Convention on the Transfer of Proceedings in criminal matters in comparison to the European Convention on Extradition or the Council of Europe Convention on Mutual Assistance in criminal matters is probably due to the fact that the required harmonization of criminal proceedings in European states has not yet taken place.

be seen that institutions of international cooperation in criminal matters have the indirect effect of bringing criminal justice systems closer to each other.

International human rights treaties aim directly at harmonization. The International Covenant on Civil and Political Rights<sup>22</sup>, for instance, enumerates the procedural guarantees that shall be observed in all states<sup>23</sup>. Also the “softer” instruments adopted within the framework of the United Nations focusing primarily on vulnerable groups of defendants, such as juveniles<sup>24</sup> or pretrial detainees<sup>25</sup>, set standards to be observed by national laws.

On the European level it is obviously the European Convention on Human Rights and Individual Freedoms (thereafter: Convention) which defines the basic standards all State Parties have to comply with. It is rightly claimed that whereas European community law has an impact rather on the substantive law of member states, the ECHR has made substantial contribution to shaping the criminal procedural law of members of the Council of Europe.<sup>26</sup> The impact exerted by the ECHR on national criminal justice systems proves that the objective of the criminal process is, besides enforcing substantive criminal law, to arrive at accurate factual findings in a manner by which basic human rights are observed.<sup>27</sup> In the remaining part of the paper I will explore the extent to which the Convention and the jurisprudence of the European Court of Human Rights (thereafter: ECtHR or Court) may contribute to further harmonizing criminal procedure in Europe.

There is no doubt as to the legitimacy of the endeavor on the part of the Court to strive at harmonization of European legal systems. The Statute of the Council of Europe states that the aim of the Council is to achieve a greater unity between its members.<sup>28</sup> The preamble of the Convention adds that one of the methods through which this aim is to be pursued “is the maintenance and further realization of human rights.” Thus it is clear that the Convention

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<sup>22</sup> Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.

<sup>23</sup> However it is argued that the list contains only the minimum standards and since granting the right to individual application is still optional the case law of the UN Human Rights Committee gives little guidance to national decision-makers. See Esser op.cit p.31.

<sup>24</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (General Assembly Resolution 40/33 (1985)); Economic and Social Council resolution (1989/66); United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) (General Assembly resolution 45/112 (1990)); United Nations Rules for the Protection of Juvenile Deprived of their Liberty (General Assembly resolution 45/113 (1990)).

<sup>25</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173 (1988))

<sup>26</sup> Raimo Lahti: Towards an International and European Criminal Policy? In: Liber Amicorum, Bengt Broms, Helsinki 1999, p.238.

<sup>27</sup> Andrew Ashworth, Mike Redmayne: The criminal process, Oxford University Press 2005, p.45.

<sup>28</sup> Article 1

was drafted and the Court (together with the Commission)<sup>29</sup> were established with the aim of also contributing to harmonizing legislation affecting human rights in the State Parties.

No doubt the Court has already contributed to bringing European legislation, and within that criminal justice systems, closer to each other. However, in the first phase of its operation it took a rather cautious approach and demonstrated considerable self-constraint. The Convention was adopted with the consent of the then members of the Council of Europe and its operation presupposes the preservation of that consensus. Decisions of the Court that are perceived to go too far, in that they go beyond what the state parties agreed upon or are willing to accept at a given moment, may threaten the very existence of the Convention and the level of protection of human rights reached through the Court's earlier judgments. The United Kingdom, after the *Tyrer* judgment<sup>30</sup>, for instance, decided not to renew its declaration by which the Convention was extended to the Isle of Man.<sup>31</sup> There have also been other judgments of the Court, which for a period of time shook the confidence of the states in the jurisprudence of the ECtHR.<sup>32</sup>

A further argument against too much judicial activism that limits the Court's potential for harmonizing laws in Europe is that an international judicial body lacking adequate legitimacy can hardly be given the power to amend or annul legislation adopted by democratically elected parliaments. Nor should it touch upon consequences of decisions of domestic courts and other decision-making bodies. That is why the drafters of the Convention shaped the rules on its competence in such a manner as to avoid any

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<sup>29</sup> Prior to Protocol 11 a two-tier system existed: the cases were initially processed by the European Commission of Human Rights, through first an admissibility stage and secondly if it found it admissible a merits stage. Only then would cases referred to the European Court or to the Committee of Ministers for the final determination by the Commission or by the State concerned. Individual applicants could refer a case to the Court only where the respondent State ratified Protocol No.9.

<sup>30</sup> *Tyrer v. The United Kingdom*, 5856/72 (25/04/1978), A 026.

<sup>31</sup> In this case the question arose whether judicial corporal punishment of juvenile offenders on the Isle of Man amounted to degrading punishment within the meaning of Article 3. According to the British Government's submission in this regard corporal punishment on the Isle of Man was justified as a preventive measure, based on public opinion on the island, which amounts to a local requirement under Article 63(3). The Court did not accept this argument and held that the punishment concerned was degrading within the meaning of Article 3 of the Convention.

<sup>32</sup> See for instance *Öztürk v. Federal Republic of Germany* 8544/79 (21/02/1984), A 073, which invoked severe critics of the Court (See Esser op.cit p.63-64.) In this case an offence was involved which under German law was not qualified as a criminal offence but as a 'regulatory' offence. The issue arose whether Article 6(3) e, right to the free assistance of an interpreter in judicial proceedings, is applicable to a charge concerning such a petty offence. According to the Court any proceeding which involves the question of determination of a criminal charge should fall under the guarantees of Article 6 irrespective of its less serious nature.

resemblance with that of the highest national courts. The ECtHR was not to be seen either as a European constitutional court or as a supreme court. While the competence of constitutional courts extends to ruling on the compatibility of legislation with the national constitution, the Court took the view that the drafters of the Convention had confined its competence to the examination of the facts of the particular case brought before it without making an assessment on the quality of domestic legislation, i.e. on whether the law itself was in line with the Convention and therefore should be repealed or changed. In the Court's interpretation it is not its task to undertake an examination *in abstracto* of the legislative provisions of respondent states<sup>33</sup>, nor is it empowered to order them to alter their legislation.<sup>34</sup>

Whereas supreme courts have the power to amend or quash decisions of lower courts, the ECtHR's competence has been restricted to declaring a breach of the Convention and eventually awarding compensation to the applicant without ruling on the validity of the decision in question or giving instruction on how the violation should be remedied. Upon first consideration the binding effect of the Court's judgment simply means that the State found in breach of the Convention has to accept the finding, i.e. it may not contest the occurrence of the violation.<sup>35</sup> We should add that also *ratione personae* is the binding effect of the judgment of the Court limited in that it has no legal effect on states other than the one party to the case.<sup>36</sup>

In brief, for the sake of state sovereignty and because of the Court's limited legitimacy, the drafters of the Convention envisaged a modest, self-restraining international judicial body. The Court accepted the role assigned to it and this is evidenced among other

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<sup>33</sup> Marckx v. Belgium 6833/74 (13/06/1979) A31, par. 58: "The Court is not required to undertake an examination in abstracto of the legislative provisions complained of..."

<sup>34</sup> Belilos v. Switzerland 10328/83 (29/04/1988) A132, par. 78: "The Court notes that the Convention does not empower it to order Switzerland to alter its legislation; the Court's judgment leaves to the State the choice of the means to be used in its domestic legal system to give effect to its obligation under Article 53 (art. 53) (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A no. 31, p. 25, § 58, and the F v. Switzerland judgment of 18 December 1987, Series A no. 128, p. 19, § 43)."

<sup>35</sup> Eckart Klein: Should the binding effect of the judgment of the European Court of Human Rights be extended? In: Protection des droits de l'homme: la perspective européenne/ Protecting Human Rights: The European Perspective. Mélanges à la mémoire de/ Studies in memory of Rolv Ryssdal. Édité par/edited by Paul Mahoney-Franz Matscher-Herbert Petzold-Luzius Wildhaber, Carl Heymanns Verlag KG, Köln-Berlin-Bonn München 2000, p.707.

<sup>36</sup> Klein op. cit. P.706.



ways in its adopting the margin of appreciation doctrine.<sup>37</sup> The margin of appreciation, on the one hand, is a methodological tool by which the appropriate depth of the review to be exercised by the Court is defined, and which varies according to the right and the question involved. But in addition to serving as a technical device, the margin of appreciation is a substantive concept linked closely to the subsidiarity principle and the doctrine according to which the Court is not a "fourth instance": it is primarily national authorities which are to establish the facts of the case and assess them under their national law. It is not for the Court to review the fact-finding activity of national agencies, nor is it authorized to rule on alleged errors of law. But what is even more important for our purposes is that the margin of appreciation has been interpreted to also say that "national authorities are generally in a better position than the supervisory bodies to strike the right balance between the sometimes conflicting interests of the community and the protection of the fundamental rights of the individual".<sup>38</sup> Accordingly, it is primarily the parties to the Convention who are competent to assess whether interference with human rights is justified in the light of the particular conditions of their societies. There is an area of discretion open to Contracting States<sup>39</sup> and unless the practice of a certain State is against a clearly established widely accepted European standard, the doctrine suggests that the Court should abstain from finding a breach of the Convention. Due to the extensive interpretation of the margin of appreciation the Court's role in raising the level of the protection of human rights is modest. It rather confines itself to extending the level of protection already achieved in the majority of states to those who are lagging far behind the average.

In this respect the doctrine of evolutive interpretation also used by the Court is of no relevance in that it does not make the Court's functioning more dynamic and activist. The Convention as a "living instrument" doctrine simply enables the Court to go above the level of protection envisaged by the drafters and what was foreseen by the Parties at the time they made the decision to accede to the

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<sup>37</sup> "...the margin of appreciation doctrine was invented and evolved by the Court itself: it was in no way forced on it by member States" Lord Mackay of Clashfern: The margin of appreciation and the need for balance. In: Protection des droits de l'homme: la perspective européenne/ Protecting Human Rights: The European Perspective. Mélanges à la mémoire de/ Studies in memory of Rolv Ryssdal. Édité par/edited by Paul Mahoney-Franz Matscher-Herbert Petzold-Luzius Wildhaber, Carl Heymanns Verlag KG, Köln-Berlin-Bonn München, 2000 p.840.

<sup>38</sup> Lord Mackay op.cit. p.840. It should be added that in matters of criminal procedure, due to the relatively detailed rules of the Convention there is little or no room for assessment, for a balancing of interests, and therefore "the margin of appreciation plays hardly any role" See P. van Dijk and G.J.H van Hoof: Theory and Practice of the European Convention on Human Rights. Third Edition, Kluwer Law International, The Hague/London/Boston 1998 p.86.

<sup>39</sup> J.G Merrills: The development of international law by the European Court of Human Rights, Manchester University Press, Manchester, 1990 p.151.

treaty. The evolutive interpretation doctrine permits the Court to adjust the Convention to “present day conditions” but what constitutes present day conditions is determined again by what the majority of State Parties agree upon and find therefore acceptable at a given moment.

In summary, the doctrine of margin appreciation and of evolutive interpretation leave the task of taking the initiative to extend the scope of human rights and raising the level of their protection to the State Parties. The Court’s role under these doctrines is rather to care for the preservation of the standard achieved by the autonomous decisions of Contracting Parties and the extension of these standards to the minority of States in which at a given moment the level of human rights protection is below the standard. This function of the Court should not be underestimated, since this may prevent States from lowering the standards claiming changes in conditions. The maintenance of what has already been achieved is guaranteed by the Court’s general practice to follow its earlier case-law<sup>40</sup> and to depart normally from its precedents only if societal changes justify a higher level of protection of human rights. Thus by observing its precedents the Court may set limits to a downward evolution and the lowering of already achieved standards.<sup>41</sup>

There is a tension on the one hand between what a human rights treaty should aspire to and, on the other hand, the modest role assigned to and the imposed and self-imposed constraint on the Court. Of course there is no tension if the Convention is nothing more than a festive declaration without much practical significance.

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<sup>40</sup> “The European Court of Human Rights has stated that it would depart from earlier decisions for “cogent reasons” for instance “to ensure that the interpretation of the Convention reflects societal changes and remains in line with present day conditions”. With the citation of cases see Luzius Wildhaber: Precedent in the European Court of Human Rights. In: Protection des droits de l’homme: la perspective européenne/ Protecting Human Rights: The European Perspective. Mélanges à la mémoire de/Studies in memory of Rolv Ryssdal. Édité par/edited by Paul Mahoney-Franz Matscher-Herbert Petzold-Luzius Wildhaber. Carl Heymanns Verlag KG, Köln-Berlin-Bonn München 2000, p.1530-1532.

<sup>41</sup> The evolutive interpretation doctrine would, in principle, allow an “evolution downward”. Some commentators actually claim that in deciding on terrorist cases the Court has been prepared to accept lower standards as compared to what had been set by its earlier jurisprudence. Others, on the other hand, argue that the watering down of certain guarantees in fact raises the level of human rights protection since this is needed for oppressing activities that threaten democracy and the enjoyment of the Convention rights. This leads us to the problem of “militant democracy”(see Karl Loewenstein: Militant Democracy and Fundamental Rights, American Political Science Review 31 (1937) p. 417-432 and 638-658), which should not be discussed in this paper. See Søren C. Prebensen: Evolutive interpretation of the European Convention on Human Rights. In Protection des droits de l’homme: la perspective européenne/ Protecting Human Rights: The European Perspective. Mélanges à la mémoire de/ Studies in memory of Rolv Ryssdal. Édité par/edited by Paul Mahoney-Franz Matscher-Herbert Petzold-Luzius Wildhaber. Carl Heymanns Verlag KG, Köln-Berlin-Bonn München 2000 p.1136-1137

This tension is reflected in the text of the Convention as well. The preamble makes a covert reference to the subsidiarity principle (“governments .... take the first steps for the *collective enforcement* of certain rights....[emphasis added]) but at the same time a more ambitious objective of the Convention is envisaged, i.e. “the further realisation of human rights and fundamental freedoms” and article 32 makes it clear that in the end it is for the Court to interpret and apply the Convention .<sup>42</sup>

In the first years following its adoption the signatory states actually viewed the Convention as a document without much practical significance, in that it simply proclaimed minimum standards that Western democracies have by far accomplished. The statement of the Council of State of the Netherlands is illustrative of this. In its advice on whether to ratify the Convention it was of the opinion that although there was not much need for the Convention, there was no objection to ratification either, since “Dutch legislation already tallied altogether with the treaty’s spirit.”<sup>43</sup>

The operation of the European Commission for Human Rights<sup>44</sup> in the first decades after its being established confirmed the assessment of the State Parties: it showed “wise self-constraint”<sup>45</sup> and little sympathy for applicants declaring the overwhelming majority of individual complaints ill-founded. The Commission’s approach had the beneficial effect of dispelling fears of Governments and inducing those who had not done so before to accept the right of private petition. At the same time the Commission started to be more applicant friendly, declaring more and more complaints admissible (although improvement in the quality of petitions reflecting a better understanding of Strasbourg jurisprudence may have contributed to a significant extent to the increase in the number of complaints being accepted for further consideration as well).<sup>46</sup> The jurisprudence of

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<sup>42</sup> “The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto...”

<sup>43</sup> Cited by Egbert Myjer: *The European dimension: More than a non-committal ornament. Notes on the consequences of the ECHR for the administration of Dutch criminal justice.* In: *The Domestic Implementation of the European Convention on Human Rights in Eastern and Western Europe.* Edited by Evert A. Alkema-Theo L. Bellekom-Andrew Z. Drzemczewski-Jeroen G.C. Schokkenbroek, Engel Publisher, Kehl-Strasbourg-Arlington 1993, p.197.

<sup>44</sup> The European Court of Human Rights was set up in 1959, however in the 1960s it produced only 10 judgements, 26 in the 1970s and 169 in the 1980s. There is a significant increase in this number starting from the early 1990s, the number of cases shows steady increase since then. See further: Philip Leach: *Taking a case to the European Court of Human Rights*, Oxford 2<sup>nd</sup> edition, 2005 p.6.

<sup>45</sup> Cited by Myjer (op.cit. p.198) from an internal document of the Dutch Ministry of Foreign Affairs.

<sup>46</sup> In the four decades after 1955 the Commission accepted eight per cent of the applications only, whereas the ratio has grown to twenty five per cent by 1994. For further figures showing the increase in the number of individual applications and the ratio of complaints held admissible see David P. Forsythe: *Human Rights in International Relations*, Second Edition, Cambridge University Press 2006 p.124-125.

the Commission and the Court has shown that even in old liberal democracies there might be problems with the observance of human rights and the Convention bodies have demonstrated that there is a genuine need for a regional human rights instrument with its monitoring mechanism which is not simply a decoration without any practical value.

As indicated earlier, both the drafters of the Convention and members of the Court were aware of the State Parties' sovereignty concerns and the Court's own "democracy deficit". That is why, as a general rule, the Court has avoided to make any straightforward assessment of the legislation adopted by democratically elected parliaments of respondent states and confined itself to ruling on individual decisions made or measures taken by national authorities in the particular case.

However, there have been exceptions to the general rule right from the time the Convention organs started to operate. In principle, individual applicants are not entitled to lodge a complaint alleging the mere existence of legal provisions they believe to be in conflict with the Convention, unless they can prove that they have been affected by it through a particular individual measure. But under certain conditions the mere existence of a law may constitute an unacceptable interference with the individual's right even if no implementing measure is applied.<sup>47</sup> In the case of inter-state applications there is no restriction at all; any State Party may lodge an application against another alleging the violation of the Convention through legislation even if the law in question has never been applied.<sup>48</sup>

Evidently, violations of the Convention may occur even if national law itself is in line with the ECHR. In such cases, the individual decision or measure taken violates both the Convention and national law. There is no reason for the Court to make a negative assessment of national law in cases when the state party's law is open to interpretation both in line with and contrary to the Convention. However there might be national laws which simply cannot be applied in conformity with the Convention, accordingly the

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<sup>47</sup> See *Dudgeon v. The United Kingdom*, 7525/76 (22/10/1981) A45, par.41: "...the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life (see, *mutatis mutandis*, the *Marckx* judgment of 13 June 1979, Series A no. 31, p. 13, par. 27): either he respects the law and refrains from engaging – even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution. It cannot be said that the law in question is a dead letter in this sphere...there is no stated policy on the part of the authorities not to enforce the law in this respect.

<sup>48</sup> See *P. Van Dijk* op. cit p.40.

cause for the breach is that national authorities follow domestic law. If the Court finds a violation it declares, even if not explicitly, not only the individual measure but also the legal provision to be contrary to the Convention.<sup>49</sup>

Under certain conditions, however, overt criticism of national legislation is simply unavoidable. In the case of the so-called qualified rights<sup>50</sup>, as well as of the right to liberty (article 5), interference is permissible only if it is provided by national law. It is not sufficient, however, that the State Party qualifies a law to be as such; it also has to meet certain requirements in order to be considered as law under the Court's autonomous standard: it must be accessible and has to be formulated with sufficient clarity and precision.<sup>51</sup> Should the Court come to the conclusion that the domestic provision fails to qualify as law for its failure to be precise enough, for instance, the ruling also includes the statement that the national law is in violation of the Convention.

Furthermore, when it comes to the enforcement of the Court's judgment, the incompatibility of national law with the Convention becomes manifest. The Convention provides that the Contracting Parties "undertake to abide by the final judgment of the Court in any case to which they are parties."<sup>52</sup> From what has been outlined earlier about the respect of national sovereignty of State Parties, a rather narrow interpretation of the provision would follow: respondent States are not permitted to deny and contest the occurrence of a violation if so established by the Court. However, from the general obligation of State Parties "to secure to everyone within their

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<sup>49</sup> In some cases judges may render decisions by disregarding (not applying) national laws they find to be contrary to the Convention. In these cases there is no need to openly admit the non-conformity of national law with the Convention. However, this applies only if the Convention provision is "self-executing" and may therefore be applied in lieu of the national norm and only in countries where the Convention has a higher status than "ordinary law". Following the Marckx judgment Belgian courts started to disregard the discriminatory provisions of the Civil Code and instead applied the provisions on "legitimate children" to children born out of wedlock. On the conflicting views of the Belgian high courts and the ECtHR on the legitimacy of this practice see. Henry G. Schermers: *A European Supreme Court In: Protection des droits de l'homme: la perspective européenne/ Protecting Human Rights: The European Perspective. Mélanges à la mémoire de/ Studies in memory of Rolv Ryssdal. Édité par/edited by Paul Mahoney-Franz Matscher-Herbert Petzold-Luzius Wildhaber*, Carl Heymanns Verlag KG, Köln-Berlin-Bonn München 2000, p.1274-1275.

<sup>50</sup> Qualified rights or *prima facie* rights – the right is declared, but it is also declared that it may be interfered with on certain grounds, to the minimum extent possible. Examples of this are the right to respect for private life, the right of freedom of thought and religion, the right to freedom of expression, and the right of freedom of assembly and association. All these qualified rights are subject to interference, if it can be established that this is "necessary in a democratic society" on one of the stated grounds. See Andrew Ashworth Q.C.: *Human rights, Serious crime and Criminal procedure*, Sweet & Maxwell, London 2002, p.76.

<sup>51</sup> See for examples: *Hashman and Harrup v. the United Kingdom* [GC], 25594/94 (25/11/1999) par.31; *Maestri v. Italy*, 39748/98 (17/02/2004) par.30.

<sup>52</sup> Article 46

jurisdiction the rights and freedoms defined [.....] in the Convention one could rather conclude that “abiding by the Court’s judgment” has a broader meaning, i.e. States are under the obligation to terminate the “offence”. If the breach of the Convention is caused directly by the existence of legislation found in violation of the Convention (as in the case outlined above, if the mere existence of legislation, even without implementing measure, constitutes interference with the individual’s right), terminating the “offense” evidently presupposes the amendment or the abolition of that law. But also, in cases where the legal norm that may not be applied in line with the Convention has served as the basis of the individual measure found in breach of the Convention, ‘securing the enjoyment of rights” and terminating the offence implies the annulment or modification of the legislation in question. Thus we see that the effect of the Court’s judgments may go beyond the particular case and will have an impact “on the legal situation” in the respondent State.<sup>53</sup>

Under article 46 of the Convention the execution of the judgments is supervised by the Committee of Ministers. The recently adopted Rules<sup>54</sup> make it clear that by now the restrictive interpretation of the judgment’s binding effect, which extends solely to the payment of compensation and the prohibition of denying the finding of a breach of the Convention<sup>55</sup>, is not valid. In addition to determining whether just satisfaction awarded by the Court has been paid, the Committee of Ministers will also examine whether the State Party has taken the appropriate individual and general measures, legislative changes among them, in order to remedy the applicant’s individual situation and to prevent further violations. It should be added that the Court itself prior to the adoption of the Rules made it clear “that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects”.<sup>56</sup>

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<sup>53</sup> Peter Leuprecht: The Execution of Judgments and Decisions. In: Macdonald-F. Matscher-H.Petzold (Eds.) The European System for the Protection of Human Rights. Martinus Nijhoff Publishers, Dordrecht-Boston-London, 1993. p. 791.

<sup>54</sup> Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (Adopted by the Committee of Ministers on 10 May 2006 at the 94<sup>th</sup> meeting of the Ministers’ Deputies, thereafter: CM Rules)

<sup>55</sup> See Frowein, Jochen Abraham - Peukert, Wolfgang: Europäische Menschenrechtskonvention-EMRK Kommentar, Engel Verlag, Kehl-Straßburg-Arlington, 1996. P.725-726.

<sup>56</sup> Scozzari and Giunta v. Italy 39221/98 and 41963/98 (13/07/2000) par. 249. See also the Papamichalopoulos and Others v. Greece (Article 50) 14556/89 (31/10/1995) A -330-B par. 34: “a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and

The Committee of Ministers, in order to properly accomplish its function, may need the support of the Court. The Rules in their present form permit the Committee to request the Court for clarification if the execution of the “judgment is hindered by a problem of interpretation.”<sup>57</sup> Not only for practical reasons, (why not encourage the Court to make its judgments clear right from the outset?), but also for transparency considerations is the Parliamentary Assembly’s recommendation legitimate in that the Court should indicate in the judgment itself the manner in which national authorities should execute it.<sup>58</sup>

In fact, the Court, in some of its judgments, has already indicated the way the breach of the Convention should be remedied. By doing so it has gone beyond the wording of article 41, which seems to suggest that just satisfaction is the only consequence that may be attached to a finding of a violation.<sup>59</sup> The decisions indicating the manner in which the breach should be remedied also weaken the subsidiarity principle according to which the Court’s “judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used” in order to comply with its obligation of abiding with the Court’s judgment.<sup>60</sup> In some judgements, upon finding a violation of Article 1 of Protocol No. 1, the Court ordered the respondent State to return the applicants’ property<sup>61</sup>; in another case it suggested that carrying out a thorough investigation could

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make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.”

<sup>57</sup> CM Rule 10.1. Prior to the adoption of the new version of the CM Rules the Committee was not entitled to ask the Court for interpretation, only the respondent State and, subject to considerable restrictions, the applicant had this right. See the explanatory memorandum prepared by rapporteur Mr. Erik Jurgens to the Parliamentary Assembly report on the execution of judgments of the European Court of Human Rights (Doc. 8808, 12 July 2000. par. 59.)

<sup>58</sup> “The Court should oblige itself to indicate in its judgment to the national authorities concerned how they should execute the judgment so that they can comply with the decisions and take the individual and general measures required.”(Parliamentary Assembly Resolution 1226 (2000) 11.B ii.)

<sup>59</sup> Article 41 – Just satisfaction: If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

<sup>60</sup> See among others *Assanidze v. Georgia* 71503/01 (08/04/2004) par. 202. In *Papamichalopoulos and others v. Greece* 14556/89 (31/10/1995) A-330-B the Court indicated that the respondent States’ discretion is not absolute: “Contracting States that are parties to a case are in principle [emphasis added] free to choose the means whereby they will comply with a judgment in which the Court has found a breach.” (par. 34.)

<sup>61</sup> See *Papamichalopoulos and others v. Greece* 14556/89 (31/10/1995) A-330-B; *Brumarescu v. Romania*. (28342/ 95, 23/01/ 2001) For a detailed discussion of the relevant judgments see Philip Leach: *Taking a case to the European Court of Human Rights*, Second Edition Oxford University Press, Oxford 2005 p. 405 and 406.

constitute adequate means of complying with its judgment.<sup>62</sup> In *Assanidze*<sup>63</sup> the Court ruled that the unlawfully detained applicant should immediately be released. It did not question the State's freedom to choose the means whereby it executes the Court's judgment but because of the nature of the violation found it considered that the particularities of the violation do "not leave any real choice as to the measures required to remedy it."<sup>64</sup>

For the purposes of this paper, (i.e. the ECtHR's potential to shape the rules on criminal procedure in member states), it is of course the "general measures" and, among them, instructions to amend legislation that are of relevance.<sup>65</sup> It should be added that individual measures formulated by the Court may also result in changes in legislation when their implementation so requires. In other words, formulated from the Court's perspective, instructions to take general and individual measures may appear in the same judgment. In *Sejdovic*<sup>66</sup>, the Court stressed that in the case before it, where the violation of the right to a fair trial was caused by the applicant's conviction, "despite an infringement of his right to participate in his trial, the most appropriate form of redress would, in principle, be trial de novo or the reopening of the proceedings, in due course and in accordance with the requirements of Article 6 of the Convention."<sup>67</sup> But due to the lack of adequate provisions in Italian law, the Court identified the structural or systemic problem and also formulated "general measures", notably a recommendation for a change in legislation: "It is inherent in the Court's findings that the violation of the applicant's right as guaranteed by Article 6 § 1 originated in a problem which results from the Italian legislation on trial in absentia and which remains capable of affecting others in future. The unjustified hindrance of the applicant's right to a fresh determination by a court of the merits of the charge against him was not prompted by an isolated incident ....but was rather the consequence of the wording of provisions of the CCP ...The facts of the case disclose the existence... of a shortcoming as a consequence of which anyone convicted in absentia who has not been effectively informed of the proceedings against him may be denied a retrial. It also finds that the deficiencies in national law and practice identified in the applicant's particular case may subsequently give rise to numerous well-founded applications..."<sup>68</sup> "The Court considers that the respondent State must remove every legal obstacle that might prevent anyone

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<sup>62</sup> *Acar v. Turkey* (GC) 26307/95 (06/05/2003). On the issue see Leach op.cit p.99 and 100.

<sup>63</sup> *Assanidze v. Georgia* 71503/01 (08/04/2004)

<sup>64</sup> par. 202.

<sup>65</sup> Also "individual measures" formulated by the Court may result in changes of legislation, when for instance their carrying out requires so.

<sup>66</sup> *Sejdovic v. Italy* 56581/00 (10/11/2004)

<sup>67</sup> *Sejdovic* judgment par. 55.

<sup>68</sup> *Sejdovic* judgment par. 44.



convicted in absentia who, having not been effectively informed of the proceedings against him, has not unequivocally waived the right to appear at his trial from obtaining either an extension of the time allowed for appealing or a new trial, so as to guarantee the right of those concerned to obtain a fresh determination of the merits of the charge against them..... The respondent State must therefore make provision, by means of appropriate regulations, for a new procedure capable of securing the effective realisation of the entitlement in question while ensuring respect for the rights guaranteed by Article 6 of the Convention<sup>69</sup>

The Sejdovic judgment was rendered subsequent to the adoption of the Committee of Ministers Resolution inviting the Court "... to identify, in its judgment finding a violation of the Convention, what it considers to be an underlying systemic problem ..."<sup>70</sup> By this the Court was called upon by the Contracting States themselves represented in the Committee to abandon its earlier cautious approach and encouraged to give an explicit assessment on whether the law of the respondent state was in line with the Convention or not and by identifying "the source of the problem" to give guidance to national legislation. Obviously, the resolution is the reflection of member States' more limited understanding of the concept of sovereignty in that they are now prepared to accept the explicit critiques of the Court over the laws adopted by their democratically elected parliaments.

It should be added that, even in the past when the Court strictly constrained itself to the analysis of the facts of the particular case, refraining from making any assessment of the relevant national laws, the reasoning of many of its judgments gave state parties sufficient insight into the deficiencies of their laws and the manner in which they could be remedied. The judgments in the majority of cases were clear enough to enable states to transform the findings of the Court in the individual case into generalized legal norms. Subsequent to Court decisions, several modifications of the provisions on pre-trial detention and those affecting the individuals' right to a fair trial were adopted in a number of jurisdictions.<sup>71</sup> Countries preparing for accession to the Convention used the Court's case-law to check if their legal system was in compliance with the Convention and made the necessary changes accordingly.<sup>72</sup> Also the Committee of Ministers was able to draw generalized conclusions from the Court's individual judgments in its

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<sup>69</sup> Sejdovic judgment par. 47.

<sup>70</sup> Resolution Res(2004)3 of the Committee of Ministers on Judgments Revealing and Underlying Systemic Problem, par I.

<sup>71</sup> For an overview of the impact on the substantive criminal law and the criminal procedure of Austria, Germany, Italy, Switzerland and the Swiss cantons respectively and the United Kingdom see the papers published in issues 2 and 3 of 1988 in the Zeitschrift für die gesamte Strafrechtswissenschaft.

<sup>72</sup> See compatibility reports at <http://www.coe.int/t/e/human%5Frights/awareness/4.%5Four%5Factivities/Compatibility%5FReports/>

recommendations addressed to member states on how to reform their criminal procedural laws in several areas. Thus the recommendation on the simplification of criminal justice<sup>73</sup> made reference at several points to the Court's jurisprudence; similarly the recommendation attempting to draw the right balance between the interests of witnesses and the defendant's rights to a fair trial relied heavily on the judgments of the ECtHR.<sup>74</sup>

In some judgments, the Court, prior to being encouraged by the Committee of Ministers, went beyond the boundaries of the particular case and commented on the quality of national legislation, giving also guidance on how to amend it narrowing by this the States' freedom of selecting the means of implementation. The Tyrer judgment,<sup>75</sup> though without explicitly proclaiming it left practically no choice for legislation: the only way by which compliance could be ensured was to abolish corporal punishment as a criminal sanction. The X and Y judgment left no doubt that States, in order to comply with their obligation to effectively protect private life, must adopt provisions criminalizing sexual abuse of vulnerable individuals.<sup>76</sup> In *Poitrimol*<sup>77</sup> the Court made it clear that restrictions on defendants' right of being represented by counsel in the appeal stage of the criminal process had to be removed in order to guarantee compliance with the right to a fair trial.

The Court's more straightforward position has, no doubt, weakened the subsidiarity principle that leaves States broad discretion to choose the means by which to implement its judgments. But what has prompted (made) the Committee of Ministers to encourage the Court to explicitly instruct State Parties on how to execute its judgments, to identify systemic deficiencies in their legislation and to give them guidance on how to remedy the shortcomings? The text of the Resolution seems to indicate that the reason for the adoption was rather pragmatic, notably the intention to reduce the number of applications and ease by this the Court's workload. However the Parliamentary Assembly resolution, which must have provoked the Committee of Ministers' action lists further reasons, such as the lack of clarity of some of the judgments and most importantly, the continuous reluctance of certain States to execute the Court's decisions. One may, of course argue that it is

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<sup>73</sup> Recommendation No. R (87) 18 adopted by the Committee of Ministers of the Council of Europe on 17 September 1987. See also the Explanatory Memorandum published by the Council of Europe in 1988.

<sup>74</sup> Recommendation No. R (97) 13 of the Committee of Ministers to member States Concerning Intimidation of Witnesses and the Rights of the Defence adopted by the Committee of Ministers on 10 September 1997 at the 600<sup>th</sup> meeting of the Ministers' Deputies. See, for example par. 11 of the recommendation and also examples for cases *Kostovski v. the Netherlands* 11454/85 (20/11/1989) A166; *Windisch v. Austria* 12489/86 (27/09/1990) A186.

<sup>75</sup> *Tyrer v. the United Kingdom* 5856/72 (25/04/1978) A26.

<sup>76</sup> *X and Y v. the Netherlands* 8978/80 (26/03/1985)

<sup>77</sup> *Poitrimol v. France* 14032/88 (23/11/1993)

primarily for political reasons that judgments of the court are systematically ignored and that the Committee of Ministers, instead of taking firm measures against states which fail to comply with their obligation under the Convention<sup>78</sup>, took the easier way. As the case may be the Committee of Ministers' resolution fits into the general trend of Member States' readiness to renounce part of their sovereignty claims evidenced by the development of the Convention control mechanism. By Protocol 9 individual petitioners were granted the right to invoke the Court subsequent to the decision of the Commission and later by adopting Protocol 11. Contracting parties obliged themselves to accept the jurisdiction of the Court and to recognize the right of individual application of any person under their jurisdiction.

In spite of the development outlined the subsidiarity principle, though limited in validity, has been maintained. As noted in the Parliamentary Assembly resolution the principle still applies in that "the primary responsibility for ensuring the rights and freedoms laid down in the Convention rests with the national authorities."<sup>79</sup> However, in the resolution appears the complementary principle of solidarity, which suggests the extension of the *ratione personae* binding effect of the Court's judgments: "the principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties). This means that the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice."<sup>80</sup> The Parliamentary Assembly is not a decision-making body and its resolutions do not necessarily reflect what all member states are willing to accept in practice. Therefore one can rightly doubt if States are in fact sharing the above quoted conclusion drawn from articles 1<sup>81</sup> and 19 of the Convention<sup>82</sup> and from the undisputed principle that the interpretation of the ECHR

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<sup>78</sup> As stated in par. 4. of the Parliamentary Assembly Resolution 1226 (2000) there are no special sanctions envisaged in the Convention in cases where states do not execute the Court's judgments. The Committee of Ministers may only use the rather drastic measures listed in article 8 of the Statute of the Council of Europe notably to suspend the State, which fails to accept the rule of law and to respect human rights and fundamental freedoms and to request it to withdraw. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.

<sup>79</sup> par.2.

<sup>80</sup> par.3.

<sup>81</sup> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

<sup>82</sup> Article 19 provides for the establishment of the ECtHR "to ensure the observance of the engagements undertaken by the Contracting Parties."

ultimately rests with the European Court of Human Rights.<sup>83</sup> But no doubt, the resolution indicates that the earlier widely shared restrictive interpretation of the *ratione personae* binding effect of the Court's judgments based on article 46 of the Convention (States "undertake to abide by the final judgment of the Court in any case to which they are parties") has by now become problematic.

In summary, recent developments indicate that the ECtHR has acquired certain tasks that bring it closer to a kind of a European Constitutional Court and a European Supreme Court. Though it does not have the power to invalidate or amend decisions of national authorities it has been authorized by the State Parties to indicate the measures by which breaches of the Convention could be remedied. In addition it has acquired the competence to identify systemic deficiencies resulting in the violation of human rights and formulate general measures, among them legislative changes, to prevent future breaches of the Convention. One may wonder if the extended competence of the Court will, in fact, raise the level of the protection of human rights in Europe but there is no denying that it will permit the Court to contribute more actively to forming the European model of the criminal process in the future.

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<sup>83</sup> For the reasoning see paragraphs 4 and 5 of the Explanatory Memorandum to the Draft resolution (Doc. 8808, 12 July 2000) prepared by Mr. Erik Jurgens.

# Assessment of Activity Effectiveness of Anti-Corruption Bodies<sup>1</sup>

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## Introduction

Effective anti-corruption activity is hardly feasible without specific law enforcement bodies, which are assigned to play a special role in the field of corruption prevention and control. At present the following four basic institutional models of anti-corruption activity are established and applied in Europe:

- law enforcement,
- preventive,
- educational, and
- multi-purpose.

Of these, the fourth model has recently been given particular attention. It is defined as “an independent and well-resourced multi-purpose service – free from political interference with broad authority to investigate corruption allegations and freeze assets, to request public institutions to reform procedures and reduce risks of corruption, to cooperate with the business community to change attitudes and to educate the public and mobilise public support”<sup>2</sup>. It is no secret that interest in this model is primarily related to the Hong Kong-based Independent Commission Against Corruption (hereinafter referred to as “ICAC”) that is high-rated among experts in the fields of corruption control and prevention. According to B. de Speville, former Commissioner of the ICAC and a current advocator of its activities, ICAC has “established a balanced strategy of prosecution, prevention, education and community involvement... for a long-term campaign to change public attitudes and make corruption a high-risk and odious crime.”<sup>3</sup> Hong Kong, which used to be characterized as a typical, thoroughly corrupt South Asian city, is today one of the forerunners of anti-corruption and

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<sup>1</sup> This article is based on a study that was made by the author by commission of the Special Investigation Service of the Republic of Lithuania and the Rambøll Management A/S in the framework of the Project “Strengthening of Administrative Capacities in the Fight against Corruption”.

<sup>2</sup> Anti-corruption services – good practice in Europe: Results of the Octopus Interface meeting Strasbourg, 5 – 7 November 2003. Octopus Interface 2003. Council of Europe. Strasbourg, 14 June, p. 9.

<sup>3</sup> OECD Symposium on Corruption and Good Governance. Paris: OECD, 1996. P. 36

according to the Transparency International Corruption Perception Index (CPI) among the 20 most transparent regions of the world.<sup>4</sup>

It is noteworthy that the multi-purpose model is not widespread in Europe: it has been adopted – entirely or partially – only in Germany, Croatia, Latvia and Lithuania. Is such a model effective in preventing corruption? Does it meet expectations of the community? These questions are difficult to answer without explicit and well-reasoned assessment criteria. This publication attempts to discuss such criteria based on a sample of the Special Investigation Service of the Republic of Lithuania (SIS).

The SIS is an independent law enforcement body, “which detects and investigates corruption-related criminal acts, develops and implements corruption prevention measures”<sup>5</sup>. In 2000-2002 SIS together with international and national experts developed the National Anti-Corruption Programme of the Republic of Lithuania, whose main objective is “to reduce the level of corruption in Lithuania and aspire it to become a smaller hindrance to building economy, promoting democracy, encouraging welfare development and strengthening national security”<sup>6</sup>.

Despite the obvious differences in political, legal and cultural frameworks, there are certain programme-based similarities between the SIS and the ICAC. The National Anti-Corruption Programme adopted and approved by the Seimas (Parliament) of the Republic of Lithuania in 2002 is actually a multi-purpose complex programme for corruption control and prevention. One of its key principles establishes that “the fight against corruption may be effective when the long-term Programme is based on the components now universally recognised as essential. Those include corruption prevention, investigation of law violations, public education and support. In order to be successful, these components should be implemented as a whole.”<sup>7</sup>

The central role in the implementation process of this Programme was assigned to the Special Investigation Service. Pursuant to this Programme, the SIS, jointly with the Government, monitors implementation of the preventive, investigative and educational components of the National Anticorruption Programme,

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<sup>4</sup> In 2003 and 2004, the CPI of Hong Kong was 8.0 on a 10-point scale, while in 2005 it was 8.3.

<sup>5</sup> Law on Special Investigation Service of the Republic of Lithuania No. VIII-1649 adopted on 2 May 2000, Vilnius. A new version of the Law adopted on 1 May 2003. (Official Gazette, No. 38-1657, 2003).

<sup>6</sup> National Anti-Corruption Programme of the Republic of Lithuania approved by the Seimas (Parliament of the Republic of Lithuania) Resolution No. IX-711 on 17 January 2002.

<sup>7</sup> National Anti-Corruption Programme of the Republic of Lithuania. (Official Gazette, No. 25-764, 2004, (2004-02-14)).

provides methodological assistance to other bodies implementing the Programme, and is directly involved in its implementation.<sup>8</sup>

It would be misleading to think that the authors of the National Anti-Corruption Programme of Lithuania have attempted to adopt the Hong Kongese anti-corruption experiences *per se*. The Anti-Corruption Strategy and its implementation mechanism contain a number of components approved in other Western states such as Great Britain and Canada. Nevertheless, the core idea with respect to the organisation and implementation method is the same. The SIS, like the ICAC, has unrestricted powers to investigate any corruption related case within the framework of the current legislation; it supports various state and business establishments in the implementation of recommendations that forestall corruption practices, submits proposals to improve standards of ethics in both public and business sectors (e.g., by drafting the Codes of Ethics), develops educational methods to improve awareness of school children and students about the adverse effect of corruption on society, and conducts public anti-corruption education campaigns.<sup>9</sup>

International experts in the field of anti-corruption programmes and activity have examined the National Anti-Corruption Programme of the Republic of Lithuania with overt interest. Its development and implementation method through involvement of both governmental and non-governmental organizational and intellectual resources has been regarded as a “good experience in the region”, if not the “best”<sup>10</sup>. Furthermore, the work of the SIS has received a positive assessment from Lithuanian residents<sup>11</sup>.

However, the SIS has been a target of ongoing criticism, too. The top concern in respect of its work has been ineffectiveness: the costs it generates are too high, it does not investigate major corruption related crimes, it is politically committed, it lacks professional skills, etc.<sup>12</sup>. Naturally, such criticism does not encourage confidence in the activities of an anti-corruption institution. It should be noted that the criticism is to a great extent caused by insufficient or false information, lack of accountability to

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<sup>8</sup> Ibid.

<sup>9</sup> The cultural, legal, and political aspects of SIS activity are discussed in: Dobryninas, A. Lithuania’s Anti-corruption Policy: Between the “West” and the “East”. *European Journal on Criminal Policy and Research*. Vol. 11. Nr. 1. January 2005, p. 77-95.

<sup>10</sup> Steves, F., and Rousso, A. Anti-corruption programmes in post-communist transition countries and changes in the business environment, 1999-2002. EBRD Working paper No. 85, p. 15-16.

<sup>11</sup> E.g., based on the results of the victimological survey conducted in 2003, the SIS received the highest evaluation among the law enforcement institutions (see: Dobryninas, A., Gaidys, V. *Is the Lithuanian Society Safe?* 2003, p. 27-32.).

<sup>12</sup> Accusations have been made in national newspapers and magazines (*Lietuvos rytas*, *Lietuvos žinios*, *Kauno diena*, *Veidas*, etc.) and in public TV or radio discussions.

the community and the absence of well-defined criteria for assessing the anti-corruption activity.

The well-defined criteria are of special significance as they enable the institution not only to present objective assessments of its activity to the public, but also to demonstrate, with regular presentations of such assessments, progress of its activity. Public assessment presentations and the consequent community-wide discussions enhance for their part confidence in the SIS and may also provide ideas on how to improve the work of the anti-corruption institution.

### Specific features of the assessment of the SIS activity effectiveness

As mentioned earlier, the strategic SIS activity goals are as follows:

- pre-trial investigation,
- prevention,
- education.

These directions are multi-faceted. Investigation belongs to the sphere of criminal justice, thus, criminal legislation (Criminal Code, Criminal Procedure Code and other laws, regulations and administrative provisions) determines primarily the character of this kind of activity. It is noteworthy that a part of pre-trial investigation material and respective activities are not public (classified), as provided for by the respective national laws of the Republic of Lithuania. Such activity should be attributed to the control of corruption related offences.

Prevention is generally perceived as a kind of activity outside the realm of criminal justice. Although the preventive character of criminal laws is discussed in the legal discourse, it is by nature very specific, limited and related to the deterrence of a potential offender, i.e. an individual refrains from committing a crime in fear of punishment. In criminological discourse the concept of prevention is wider. It is associated with general prevention (change of socio-psychological conditions in order to mitigate the impact of respective factors on criminal activity), situational prevention (creation of situational conditions impeding commission of a crime) and communal prevention (involvement of community members in the process of order enforcement)<sup>13</sup>.

Education can be seen as a distinct component of general prevention, where the development and encouragement of proper value systems and standards of conduct are given particular attention. Those who have received proper education are

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<sup>13</sup> See: Graham, J. and Bennett, T. *Crime Prevention Strategies in Europe and North America*. HEUNI Publication Series No. 28. Helsinki: European Institute for Crime Prevention and Control, affiliated with the United Nations. February 1995.



considered more resistant to different corruption temptations and less tolerable to public manifestations of that kind.

In reality, however, the effectiveness of the SIS activity cannot be assessed through these three strategic goals, because there are no uniform criteria with which to discern them – the principles and the results of the activities are too different. Internal goals of the main SIS units in charge of pursuing these goals may even be inconsistent.

For instance, politicians and the general public tend to judge the effectiveness of law enforcement bodies by the number of recorded and disclosed crime incidents. Such quantitative criteria are particularly popular if the number of such crime incidents is considered “really high”. Consequently, it is quite natural that the relevant institutions wish to improve the statistical data of recorded and disclosed crime incidents, and thus demonstrate that they make effective use of taxpayers’ money.

However, constant increase in recorded crime incidents should not gratify representatives of the prevention unit. Their effectiveness criteria are in fact reverse: the lower the occurrence rate of similar crime incidents, the better. This paradox manifests itself in the ICAC activity in Hong Kong. This institution, which is not without reason considered one of the most effective actors in the global fight against corruption, reports annually about the increasing number of disclosed corruption cases, notwithstanding the fact that effective preventive and educational activity of this agency should have reduced the number long ago.

Quantitative criteria based on the statistical data of disclosed corruption related crimes or offences can take still more refined forms. In this context the so-called “cost/benefit” criterion seems to be particularly attractive. It is based on the assumption that one is able to calculate or measure the amount of money returned or saved when a crime is discovered or prevented, and then to compare it with the costs of crime control and prevention. The ideal cost/benefit ratio is below 1, i.e. the costs are lower than the benefit gained. The effectiveness of the service is then calculated on the basis of this ratio. For example, the performance of the Counter Fraud and Security Management Service of the national health system of Great Britain seems very efficient: according to the report from 1999 – 2005, the benefit gained from its activity was 13 times higher than the costs.<sup>14</sup>

Unfortunately, this criterion is plausible only in those cases where crimes are of a clearly-defined financial nature (in the provided example, these are financial crimes and offences). In the event of corruption manifestation, such estimation of financial costs

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<sup>14</sup> Countering Fraud in the NHS: Protecting Resources for Patients. 1999-2005 Performance Statistics. NHS CFSMS. 2005, p. 4.

is not always possible and often bears a macroeconomic character<sup>15</sup>. In such a case, the cost/benefit calculation is in practice unfeasible.

When analyzing the SIS effectiveness criteria, yet another problem is worth considering: the fundamental goals pursued (curbing corruption) are not very consistent with the institutional possibilities of the service. Within the sphere of corruption control, the SIS activity is limited to the prosecution of corruption related criminal acts (crimes involving corruption are investigated by other law enforcement bodies, too, such as the Financial Crime Investigation Service and the Economic Crime Investigation Service). Quite a number of actions where traces of corruption can be detected (e.g. nepotism) are non-criminalized or are not considered as law violations *per se*. Thus, it would not be correct to maintain that the SIS is responsible for investigating all corruption related crimes. Also, it is worth noting that the SIS is a law enforcement body in charge of a certain segment of the criminal process, i.e. operational activity and pre-trial investigation, and cannot be responsible for the outcome of the entire process.

Similar comments can be provided also with respect to the other two strategic goals within the SIS's scope of competence, i.e. prevention and education. Although the anti-corruption body is free to submit proposals on how to improve preventive activities within the public institutions and to coordinate the execution of this task, the effectiveness of such work depends not only on the agency itself but also on the overall political and administrative climate. The SIS is a law enforcement body, not a national public administration centre, and cannot, therefore, be solely responsible for nation-wide corruption prevention.

Nor is the SIS an educational body, which could assume responsibility for instilling civic values in the youth or for the quality and implementation of curriculum programmes in educational institutions. The only thing it can do is the promotion and coordination of anti-corruption education programmes (provided that the decision-making bodies see the need for such programmes).

In summary, the SIS does not devise "anti-corruption products", which might be established on the national level and attributed solely to this institution. The SIS plays a special role in the fields of corruption control and prevention; however, this is not an absolute role. Thus, the SIS must not be assessed as an institution responsible for the situation in terms of corruption in the state, but rather as a body that provides – within the scope of its competence

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<sup>15</sup> Such financial assessments can be found in publications by anti-corruption experts, Gray, Ch., Hellman, J, Ryterman, R. *Anticorruption in Transition 2: Corruption in Enterprise-State Interactions in Europe and Central Asia 1999 – 2002*. Washington: The World Bank. 2004.

– corruption control and prevention services for other judicial bodies, public institutions and the general public. Hence, in order to assess the SIS activity in the context of corruption curbing, one should not look solely at whether the SIS has managed to reduce the overall corruption proliferation rate (which would be difficult in technical terms, too), but rather at how these specific anti-corruption services provided by the SIS are viewed in the public sphere. Thus, when such assessments are made, one must take into account both the distinctiveness of the services and the potential consumers.

In view of the unique character of the SIS as a multi-purpose anti-corruption body, one must take into consideration how the activities of other similar institutions are assessed. It is noteworthy, for instance, that the ICAC does not only give reports on its activity, but is also assessed by three Advisory Committees: Investigation Supervision, Corruption Prevention and Public Relations. Members of these Committees are both executive ICAC officers and influential community representatives. Their task is twofold: to form a channel through which involvement of the public in the ICAC activities is ensured and to assess the said activities. Such external assessment could also be employed with the SIS.

The advice of B. de Speville regarding the assessment of progress made in the anti-corruption strategy should also be taken into account. He maintains that in order to assess the progress one must identify the relevant qualitative and quantitative criteria. The public must be kept informed by means of both statistical data and special surveys conducted by independent and reliable public opinion research companies commissioned by anti-corruption institutions<sup>16</sup>.

Such provision of information should emphasize the abovementioned three functions performed by the SIS – prosecution, corruption prevention and anti-corruption education (a horizontal assessment dimension) – along with the target groups to whom this information will be addressed (a vertical assessment dimension).

In social sciences this specific character of information provision is conventionally associated with three groups of social awareness: experts, “well-informed citizens” and “people in the street”<sup>17</sup>. The first group is in disposition of accurate and justified information on the subject of assessment, while the second, the non-

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<sup>16</sup> B. de Speville, B. Specialised anti-corruption services – good practice in Europe. In: Specialised anti-corruption services. Presentations by experts. Background document. Octopus Council of Europe. Programme against corruption and organised crime in Europe. 27 October 2003. Strasbourg PC-TC-022-Interface-03. Octopus Interface 2003. Specialised anti-corruption services. Presentations by experts. Background document.

<sup>17</sup> See: Schutz, A. The well-informed citizen. In: Schutz, A. Collected Papers. II: Studies in Social Theory. Marinus Huijhoff/The Hague. 1976, p. 122.

professionals, is interested in the said issues because of some specific aims it wishes to pursue (for instance, political or civic). The third group is guided by stereotypes, and awareness of this group usually pertains to a certain opinion.

The application of this methodological scheme to assess an anti-corruption institution reveals that each group possesses different information regarding the corruption proliferation rate in society, anti-corruption institutions, programmes and their implementation. The groups will accordingly make different assessments of the institutions and the processes. The general public, for instance, influenced by the mass media, probably feels that the country is sinking in the slough of corruption while the special services do nothing to put the corrupt officials behind bars. The experts, on the other hand, have developed a different attitude towards the same problems: they probably emphasize the potential of the legal system, the resources available to the anti-corruption institutions, the benchmarks and the possibilities of the prevention strategy. Naturally, the weight and the value of these two groups cannot be the same, and when drafting the assessment methodology it is important that the level of social awareness is taken into consideration.

Another methodological remark relates to the form of assessment. It is a frequent practice to judge anti-corruption attempts on the basis of the Corruption Perception Index (CPI), introduced 10 years ago by Transparency International, the leading international anti-corruption organization. The CPI is an integrated indicator defined on the grounds of surveys reflecting the views of business sector representatives and other expertise-based research. It is very popular world-wide not only because it follows reliable expert assessments but also because it is very easily perceived: every state is assessed on a 10-point scale allowing easy comparison with other states as well as the recording of changes in corruption perception over time.

Due to the abovementioned reasons it is not advisable to link the assessment of the SIS activities with annual CPI changes (even though in the case of Hong Kong the high CPI value is definitely related to the ICAC activities). Yet the CPI qualitative (assessment of research and valuations of the leading international institutions) and quantitative (assessment based on a 10-point scale) assessment principles may also be used to assess the effectiveness of the activities.

## Effectiveness assessment principles of anti-corruption activities

Assessment of the corruption activities has to begin with an internal analysis at the institutional level. B. de Speville suggests<sup>18</sup> that statistical indicators characterizing activity aspects in terms of the institution's prosecution (corruption control), corruption prevention and anti-corruption education are included in the institution's anti-corruption report to the public. He further suggests that the report should include the public opinion indicators that assess the effectiveness of corruption control and prevention. Sociological indicators along with other indicators<sup>19</sup> for assessment of the corruption situation may also be a subject-matter of the SIS public report.

Such a report on anti-corruption activities based on statistical and sociological indicators may constitute important information to society. Yet, it is not advisable to link the institution assessment criteria with just the said indicators. Direct relation between effectiveness assessment and quantitative activity parameters may result (depending on the established criteria) in unspecified findings. For instance, the demand to improve the proportion between the number of completed pre-trial investigations and the registered applications to investigate corruption manifestations may result in an increased number of non-registered applications, and consequently make citizens disappointed with the SIS ("unwilling to investigate corruption cases"). Or, for instance, increasing the number of anti-corruption lectures may affect their quality and consequently reduce their impact on the audience.

For this reason the assessment weight needs to be "transposed" from quantitative to qualitative activity parameters. To this aim, the assessments of the SIS anti-corruption activities and complex strategic goals, such as prosecution, prevention and education, should be linked to expert surveys and public opinion polls.

Following this scheme each of the anti-corruption strategic goals should be assessed with a complex indicator based on expert knowledge, evaluations given by "well-informed citizens" as well as the public opinion. The evaluations are gathered by interviewing three independent expert groups, 10 persons in each, and by carrying out a representative public opinion survey.

The first group should consist of specialists having theoretical and practical knowledge of operational activities and pre-trial investigation (representatives from courts, prosecutor's offices, relevant research institutions, etc). They would provide an expert assessment of the corruption control units on the basis of a

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<sup>18</sup> See: de Speville, B. Ibid.

<sup>19</sup> Such indicators are present in sociological surveys on the corruption proliferation rate. See, for example: Alisauskiene, R., Dobryninas, A., and Zilinskiene, L. Lithuanian Map of Corruption: 2001-2004. Vilnius: Eugrimas, 2005.

prepared questionnaire. General corruption prevention and anti-corruption education assessment would also be performed by the same group, but here they would be treated as “well informed citizens”, not experts, and their assessments as “informative”, not “expert”.

The second group should include specialists having theoretical and practical knowledge of the prevention of crime and various forms of deviation. They could be policy makers and public officials involved in anti-corruption activities, municipal representatives experienced in corruption prevention, scholars, and representatives of non-governmental institutions. This group would carry out an expert assessment of corruption prevention on the basis of a prepared questionnaire. An informative assessment of the strategic goals of corruption control and anti-corruption education would also be performed (as “well informed citizens”).

The composition of the third group could be congruent with the second; yet, specialists with educational and organizational experience in public awareness campaigns would be preferred. Representatives of educational establishments, business, youth and mass media organizations could also be incorporated. This group would carry out an expert assessment of anti-corruption education on the basis of a prepared questionnaire. An informative assessment of strategic goals of corruption control and corruption prevention would be performed, too (as “well informed citizens”).

All the abovementioned strategic goals also need to be assessed in a representative public opinion survey based on a prepared questionnaire.

Each expert or informative assessment could consist of three parts:

1. Assessment of the functions performed (F),
2. Social impact assessment (I),
3. Assessment of inter-agency coordination and cooperation (C).

Questions for structural interview with experts and “well informed citizens” need to be agreed upon by the relevant top level administration of the SIS units as well as the experts in anti-corruption activities. The following assessment indicators could be recommended to be included in the questionnaire:

Corruption control (criminal prosecution) *F*-assessment<sup>20</sup>:

- multi-focus activity assessment (are all the potentially corrupt public life areas subject to investigation within the scope of the SIS competence?),
- professional performance assessment (are the investigation processes unbiased and independent of other sources?),

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<sup>20</sup> The list of indicators is developed following the recommendations in Countering Fraud in the NHS: Aims, Objectives, Principles, and Purpose. Department of Health. 10734 CFS XXk XP May 01 (XXX).

- quality assessment (are the performed investigations precise and reliable?),
- legitimacy assessment (are the pre-trial investigations in full conformity with the punitive justice criterion, i.e., the Criminal Code and the Criminal Process Code, as well as with other relevant legislation and legal acts; are human rights respected, etc.),
- accuracy assessment (how accurately does the Service define the priorities for fighting corruption, i.e., how does this conform to the corruption proliferation rate in the society?).

Corruption control (punitive prosecution) *I*-assessment:

- assessment of deterrent effect (does the prosecution of corrupt persons deter potential offenders?),
- accountability, transparency and responsibility assessment (is sufficient information on the SIS corruption control activities provided to the society members, policy-makers, business sector and the civic establishments?),
- integrity assessment (are the officials involved in corruption control fair?),
- assessment of public involvement in corruption control (attitude towards the reporters of corruption manifestations? How are the reports responded to?).

Corruption control (criminal prosecution) *C*-assessment:

- assessment of cooperation with the prevention unit (is there close cooperation developed, what are the benefits of this type of cooperation, etc.),
- assessment of cooperation with the anti-corruption education unit (similar questions plus one regarding participation in collective events).

Assessment of the corruption control by residents:

- assessment of corruption proliferation rate,
- awareness of the functioning unit,
- efficiency assessment in terms of prosecuting corrupt persons and preventing corruption manifestations in the public life,
- assessment of confidence in criminal prosecution service (do the society members, policy-makers, business sector and the civic society organizations have confidence in the Service?).

Corruption prevention *F*-assessment:

- assessment of the analysis regarding the corruption situation in the public,
- assessment of the priorities of anticorruption activities,

- assessment of anti-corruption legislation and other standard documents initiated by the SIS,
- assessment of anti-corruption expertise in legislation and other standard documents,
- assessment of the drafted anti-corruption recommendations;
- assessment of consultancy provision in corruption prevention in the public service,
- assessment of encouragement of investigative journalism.

Corruption prevention *I*- assessment:

- assessment of impact of the SIS Code of Ethics implementation programmes (on policy-makers, public officials and the business sector),
- assessment of impact of the SIS corruption prevention programmes on encouraging transparency, accountability and responsibility at the governmental and self-governance organizational level,
- assessment of impact of the SIS on mass media.

Corruption prevention *C*-assessment:

- assessment of cooperation with the corruption control unit (is there close cooperation developed, what are the benefits of this type of cooperation, etc.),
- assessment of cooperation with the anti-corruption education unit (similar questions plus one regarding participation in collective events).

Corruption prevention assessment by residents:

- effectiveness assessment of corruption prevention programme carried out by the SIS (on how such a programme contributes to curbing corruption in the society),
- assessment of the SIS initiated changes in the areas most affected by corruption (such as health care, public procurement, etc.).

Anti-corruption education *F*-assessment:

- assessment of dissemination of anticorruption information,
- quality assessment of general methodological literature,
- value and ethics-based assessment of the devised educational programmes,
- assessment of anti-corruption campaigns intended for the youth,
- assessment of educational anti-corruption projects disseminated via mass media,
- assessment of lectures delivered to the public,
- assessment of assistance and consultancy provided to the governmental and non-governmental organizations.



Anti-corruption education I-assessment:

- assessment of awareness of the National Anti-Corruption Programme,
- assessment of impact of the devised anti-corruption educational programmes on students and schoolchildren,
- assessment of change in public attitudes towards corruption generated by the SIS anti-corruption public awareness campaigns.

Anti-corruption education C-assessment:

- assessment of cooperation with the prevention unit (is there close cooperation developed, what are the benefits of this type of cooperation, etc.),
- assessment of cooperation with the corruption control unit (similar questions).

Assessment of anti-corruption education by residents:

- recollections of general public awareness campaigns,
- effectiveness of public awareness campaigns in promoting anti-corruption attitudes in the general public,
- the SIS role in fostering anti-corruption values among the young people,
- assessment of the SIS activities by mass media.

It is advisable that prior to delivering the assessments, the SIS annual performance report which covers the aforesaid strategic targets - criminal prosecution, prevention and education – is brought to the attention of the experts and “well informed citizens”.

Moreover, the structured interview could be replaced by 3 discussion groups (each with 8 to 10 members) where the participants would provide individual assessments of the various strategic goals of the SIS activities and simultaneously consider the presented assessments. The advantage of this method lies in better reasoning and justification of the assessment. From the technical point of view, however, conducting of such group discussions is more complicated (the discussion may take several hours). In addition, in this type of assessment process there is no anonymity.

A pilot study of the presented principles of assessment was organized by SIS together with Transparency International Lithuanian Chapter (TILC) in December 2005 – January 2006. The study included four focus groups (the first group was organized in order to clarify and improve questionnaires for experts and general public, the other three were devoted to the evaluation of SIS activity in accordance with the presented principles of assessment) and a national representative survey. The results of the pilot study

showed that the presented principles of assessment are practically implementable, and provided the anticorruption institution with important and helpful information for increasing the effectiveness of its activity. In addition, the results gave new ideas for improving the criteria and procedure of the assessment.

## Conclusions

Two fundamental aspects have been taken into consideration in the proposed principles of effectiveness assessment of anti-corruption activities: the specific character of the Special Investigation Service as a multipurpose anti-corruption institution, and the need for public accountability resulting from this specific character.

These principles do not constitute thorough and all-purpose assessment criteria of the SIS activity and, therefore, cannot replace the detailed activity auditing of the institution. They rather emphasize the public perception and assessment of prosecution, prevention and education functions declared by the SIS, the credentials granted to this institution by the society, and its role in acting as the state's instrument in the anti-corruption activities.

The methodology emphasizes both "horizontal" (strategic goals of anticorruption activities) and the "vertical" (specific activity perception aspects) levels. On one hand, this allows assessment differentiation between anti-corruption activity and competence evaluation, and, on the other hand, enables the presentation of integral general assessments in a simple quantitative form.

Potential qualitative criteria for assessing the SIS and other similar anti-corruption institutions have been presented, yet, undoubtedly, they need to be specified during the assessment process. Therefore, prior to implementation of this methodology it is necessary to carry out a "pilot" test. Following the final determination in expert and empirical terms of qualitative parameters of these assessment principles as well as the corresponding weight multipliers, they may turn into a long-term effectiveness assessment instrument for the anti-corruption institution, which, in a clear and simple form, allows to inform the general public about the progress made by the Service in forestalling corruption manifestations in society.

# The Evolution of Cooperation in Criminal Matters within the European Union: the Record so far

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## An Overview of Progress in EU Cooperation in Criminal Justice

What is the EU doing in respect of cooperation in criminal matters? A very common view of the European Union is that it is a massive intergovernmental bureaucracy that churns out directives and regulations that have little, if any, impact on practice.

But is, in fact, EU cooperation in criminal justice ineffective? If we take into consideration the fact that this cooperation did not really get underway until the 1992 Treaty of Maastricht gave the EU competence in justice and home affairs, quite a lot of work has been done in the dozen years since then. This can be illustrated by comparing present EU cooperation with the “status quo” of ordinary international cooperation, among the police, prosecutors and the judiciary. The purpose of this paper is to do just that: see how far the EU has gone over the past ten years, when compared to cooperation in other parts of the world. The paper will look at the main areas of cooperation: the police, prosecution and the judiciary. The paper will also look at mutual evaluation, and finally at the drafting of criminal law and the formulation of criminal policy.

## Police cooperation

The global status quo:

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

The European Union reality:

- an international body, Europol, co-ordinates cross-border investigations, and seeks to provide support to domestic law enforcement services in specialist fields.

- a network of liaison officers has been developed.
- joint investigative teams (with members from the law enforcement agencies of different countries) can be set up.
- Europol produces threat assessments on organized crime, bringing together data from all Member States.
- within the framework of the Schengen conventions, which are in force in over one half of the EU Member States,
- the Schengen information system allows national law enforcement agencies to share data on many key issues almost instantaneously with their colleagues in other countries. The system encompasses some 50,000 terminals in the Member States.
- law enforcement authorities are allowed hot pursuit across borders (under certain conditions).
- law enforcement authorities are allowed to engage in surveillance in the territory of other countries (under certain conditions).
- law enforcement authorities are allowed to engage in controlled delivery.

## Europol

Europol was established in October 1998, when the Europol Convention entered into force among the (then) fifteen European Union countries. Europol is an international organization that has its headquarters in The Hague, in the Netherlands.

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

The principal tasks of Europol consist of

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

5) developing a computerized system of collected information.

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

*Work in progress.* In October 1999, soon after the Europol Convention entered into force, a special European Union Council was held in Tampere, Finland, to discuss the strengthening of the work of the EU in justice and home affairs. In respect of Europol, the Tampere meeting concluded, *inter alia*, that “Europol’s role should be strengthened by allowing it to receive operational data from Member States and authorising it to ask Member States to initiate, conduct or coordinate investigations or to create joint investigative teams in certain areas of crime, while respecting systems of judicial control in Member States”. This was an important goal, since it would allow Europol a considerably more active role in investigations.

## Schengen

The need for the “Schengen arrangements” arose with one of the primary goals of economic integration, the elimination of border controls on the transit of persons, goods, capital and services. Quite simply, the Schengen area has become a “passport-free zone.” Although this elimination of border control undoubtedly promotes trade and commerce, at the same time it makes more difficult the task of controlling the entry and exit of offenders and suspects.

Due in part to the slowness with which police cooperation was being developed and to political differences of opinions over the extent of this cooperation (the 1992 Maastricht Treaty creating the third pillar was still in the future), some European Union countries (originally, Belgium, France, Germany, Luxembourg and the Netherlands) decided to move among themselves to a “fast-track” alternative. The result was the Schengen Agreement of 1985 and the Schengen Convention of 1990, which were designed to eliminate internal frontier controls, provide for more intensive police cooperation, and establish a shared data system.

The “Schengen group” currently consists of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg,

the Netherlands, Portugal, Spain and Sweden, as well as, from outside the EU, Iceland, Norway and Switzerland.<sup>1</sup> The United Kingdom and Ireland have not joined, since they wish to retain separate passport controls. The ten new Member States that joined on 1 May 2004 have not yet been approved as “Schengen-ready,” but some may join already during 2007.

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

As a trade-off to ending checks on internal borders, the Schengen countries agreed on the establishment of the Schengen Information System (SIS). This consists of a central computer (in Strasbourg, France) linked to a national computer in each country, and to a total of some 50,000 terminals. When fully operational, data entered into any one computer (for example data on wanted persons, undesirable aliens, persons to be expelled or extradited, persons under surveillance, and some stolen goods) would immediately be copied to the other national information systems. An electronic mail system (SIRENE; short for Supplementary Information Request at the National Entry) allows for the transfer of additional information, such as extradition requests and fingerprints. Yet another data-connected acronym is VISION, which refers to the “Visa Inquiry System in an Open-Border Network”.

## Information gathering and analysis

Law enforcement authorities world-wide would be among the first to agree that a more proactive, intelligence-led approach is needed to detect and interrupt organised criminal activities, apprehend the offenders, demolish the criminal networks, and seize and confiscate the proceeds of crime. Information is needed on the profile, motives and *modus operandi* of the offenders, the scope of and trends in organised crime, the impact of organised crime on society, and the effectiveness of the response to organised crime. This information includes operational data (data related to

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<sup>1</sup> The principal reason for the inclusion of Norway and Iceland is that these two countries are part of the passport-free zone formed among the Nordic countries. The other three Nordic countries, Denmark, Finland and Sweden, are members of the Schengen group. Switzerland, in turn, is surrounded by EU Member States.

suspected individuals and to detected cases) and empirical data (qualitative and quantitative criminological data).

On the global level the arrangements for the exchange of operational and empirical data continue to be *ad hoc*, between individual law enforcement agencies or even individuals. Such *ad hoc* arrangements also raise concerns over whether or not domestic legislation on data protection is being followed. Implementation of the United Nations Convention against Transnational Organized Crime (in particular articles 27 and 28) should provide a firmer foundation for this exchange of data, but national practice will undoubtedly be slow in aligning itself with the soft requirements of the Convention.

The Schengen information system has already been mentioned. Within the broader European Union framework, several arrangements are already in place for gathering and analysing data:

- a joint action adopted in 1996 deals with the role of liaison officers. Their function is specifically to focus on information gathering. They are to “facilitate and expedite the collection and exchange of information through direct contacts with law enforcement agencies and other competent authorities in the host State”, and “contribute to the collection and exchange of information, particularly of a strategic nature, which may be used for the improved adjustment of measures” to combat international crime, including organized crime. So far, over 300 liaison officers have been posted by EU countries, and they work in close cooperation with one another.
- Europol already produces annual reports on organised crime based on data provided by Member States. These annual reports are being used in an attempt to define strategies. Over the years, the quality and utility of these annual reports have improved, even though continued work is being done to improve the validity, reliability and international comparability of the data. One particular feature of the annual reports is that they contain recommendations based on an analysis of the data. (As of 2006, these reports have been presented in the form of threat assessment reports.)
- various decisions have been taken on the exchange of information on specific subjects. For example, a decision adopted in 1997 requires the exchange of information between law enforcement agencies when potentially dangerous groups are travelling from one Member State to another in order to participate in events.
- the European Union has created a number of financial programmes to encourage the closer involvement of the academic and scientific world in the analysis of organised crime.
- a European police research network is being established to act as an information source on research results, other documented experiences and good practice in crime control.

- on 20 December 2002, Europol and the United States signed an agreement on the exchange of personal data. This allows the United States to benefit from the operational and strategic analyses carried out by Europol on the basis of data from all European Union Member States.

## Work in progress in police cooperation

At the end of 2004, the European Council adopted a new programme (the “Hague Programme”) that calls for a number of new measures. A key one is the adoption of what has become known as the “principle of availability.” This is defined to mean that a law enforcement officer in one Member State who needs information in order to perform his or her duties can obtain this from another Member State, and that the law enforcement agency in the other Member State which holds this information should make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State. The first instruments implementing the principle are now being drafted. The provision of information would be hedged by some conditions, including data protection.

A second initiative, taken by a smaller group of countries, is going in the same direction. Austria, Belgium, Germany, Luxembourg and the Netherlands are setting up what is known as “Schengen III,” a system where the authorities of the different countries have direct access to some of the key law enforcement related data banks in the other countries.

Three initiatives are related to criminal records. The one that is furthest along (as of the spring of 2006) calls for the expedited transfer of criminal records information on request. A second initiative derives from a proposal that central European criminal records be set up. This encountered such resistance (for a variety of legal, practical and technical reasons) that the proposal has been scaled down to a model where a centralised data bank would contain information only on whether or not criminal records exist regarding a specified individual in one of the EU countries; if so, the authority requesting the information would turn to the EU countries in question. The third initiative deals with the extent to which criminal records should be taken into consideration in criminal proceedings being conducted in another EU Member State.



## Prosecutorial cooperation

The global status quo:

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

The European Union reality:

- a special structure, the European Judicial Network, has been set up to promote direct contacts between prosecutors. The system involves computerized links between the Member States, and in time will probably allow automatic and direct translation and transmission of requests.
- several European Union Member States have posted liaison magistrates abroad, with a specific mandate to facilitate responses to requests for extradition and mutual legal assistance, and a more general mandate to promote international cooperation.
- prosecutorial and judicial co-operation is promoted also by direct contacts through the Schengen structures.
- an international structure, Eurojust, has been set up to assist in the coordination of the prosecution of cross-border cases.

## The European Judicial Network and the strengthening of informal contacts

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

In those (rare) cases where the practitioner personally knows his or her counterpart in the other country, informal channels can be used. The European Union has created a structure for fostering direct contacts between practitioners, the “European Judicial Network” (EJN).<sup>2</sup> This network consists primarily of the central authorities responsible for international judicial cooperation in criminal matters, and of the judicial or other competent authorities with specific responsibilities within the context of international cooperation. The EJN focuses on promoting cooperation in respect of serious crime such as organized crime, corruption, drug trafficking and terrorism.

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<sup>2</sup> Joint Action of 29 June 1998. A similar structure has been set up for cooperation in civil matters.

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

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

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

## Liaison magistrates

The concept of the liaison magistrate is based on the positive experiences with the growing network of liaison officers used to promote cooperation between law enforcement agencies. In law enforcement, the liaison officer uses direct contacts to facilitate and expedite the international collection and exchange of information, in particular information of a strategic nature.<sup>3</sup>

The liaison magistrate is an official with special expertise in judicial co-operation who has been posted in another State, on the

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<sup>3</sup> The Treaty of Amsterdam of the European Union (article 30(2)(d)) called on the European Council to "promote liaison arrangements between prosecuting / investigating officials specialising in the fight against organised crime in close cooperation with Europol". In order to create a basis for the development of this work, on 22 April 1996 the European Council adopted a Joint Action on a framework for the exchange of liaison magistrates to improve judicial cooperation.

basis of bilateral or multilateral arrangements, in order to increase the speed and effectiveness of judicial cooperation and facilitate better mutual understanding between the legal and judicial systems of the States in question.<sup>4</sup>

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

Liaison magistrates are - so far - used almost solely by the European Union countries. In general, liaison magistrates are sent to countries with which there is a high number of requests for mutual assistance, and where differences in legal systems have caused delays. France has been the most active in sending out liaison magistrates, and has sent them not only to the Czech Republic, Germany, Italy, the Netherlands, Spain and the United Kingdom, but also outside the European Union, to the United States.

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

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

Eurojust: A formal structure for prosecutorial coordination

Even the direct contacts and expertise provided by the EJM and the liaison magistrates cannot always provide the type of coordination needed in investigating transnational organized crime. Over recent years, the idea gradually evolved of setting up a separate entity,

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<sup>4</sup> A related concept is that of the legal attaché, who is posted in the mission of the sending State to look after legal issues in general that concern the host State and the sending State. Reference can also be made to temporary exchanges of personnel, which are designed to increase familiarity with one another's legal system and foster direct, informal contacts. Neither legal attachés or personnel on temporary exchange, however, have the same expertise and job profile as the liaison magistrate.

somewhat comparable to Europol in the law enforcement field, to coordinate national prosecuting authorities and support investigations of serious organised crime extending into two or more Member States.<sup>5</sup>

The idea for the establishment of such an entity received a considerable push at the special European Union Council held in Tampere, Finland in October 1999. A temporary unit, called “Pro Eurojust” (short for “Provisional Eurojust”) started work in Brussels in March 2001, and Eurojust itself began its work one year later. As of 1 January 2003, it has been located in The Hague, near its police “cousin”, Europol.

Each Member State has sent a senior prosecutor or magistrate on permanent assignment to Eurojust. These representatives meet every week to discuss both individual cases and general policy for coordinating investigations. Plenary meetings tend to be devoted to policy issues, while most cases will be dealt with in smaller meetings, among representatives of only the individual countries involved.

Eurojust itself does not have any operational powers. Instead, the national representatives, having agreed on what needs to be done, contact the competent authorities in their own Member State for the required action. In addition, individual members of Eurojust may have operational powers according to their national legislation. One of the topics now being debated is what type of operational powers Eurojust itself should be given in the future. One example is that Eurojust might be empowered to ask a Member State to initiate criminal proceedings or to provide Eurojust with data regarding the case.<sup>6</sup>

## Judicial cooperation

The global status quo:

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

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<sup>5</sup> See Hans G. Nilsson, Eurojust – the Beginning or the End of the European Public Prosecutor? in *Europarättslig Tidskrift*, vol. 4, 2000.

<sup>6</sup> In order for Eurojust to have the power to ask for data, considerable attention will have to be paid to data protection, for example, to how data are to be transmitted, who has access to the data, confidentiality, and the maintenance of personal records. In this respect, the laws of the different Member States remain quite different.

The European Union reality:

- all European Union Member States are parties to broad multilateral treaties on mutual legal assistance and extradition.
- the European Union has decided on standards of good practice in mutual legal assistance, and regularly reviews compliance with these standards.
- separate European Union treaties on mutual legal assistance and on extradition have been drafted in order to update and supplement the existing multilateral treaties prepared within the framework of the Council of Europe.
- the European Union has begun moving towards a system of mutual recognition of decisions and judgments in criminal matters. Such mutual recognition speeds up cooperation considerably: a judicial decision or judgment issued in any Member State can be enforced as such in any other Member State.
- the first steps in mutual recognition have been taken with the adoption of the framework decisions on, respectively, the EU arrest warrant, the freezing of assets and property, and the enforcement of fines.
- a mutual evaluation system has been established, in which experts from different countries assess the practical conduct of international cooperation in the target country.

## Mutual legal assistance

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

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

In 1998, the European Union adopted a set of standards on good practice in mutual legal assistance.<sup>7</sup> Each Member State prepared a national statement of good practice. These were then circulated among all the Member States. The idea here was that

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<sup>7</sup> Joint Action of 29 June 1998 on good practice in mutual legal assistance in criminal matters.

the Member States publicly commit themselves to upholding these standards, and can be held accountable.

The set of standards calls upon practitioners, for example, to acknowledge urgent requests and written enquiries (unless a substantive reply is sent quickly), provide the name and contact details of the authority (and, if possible, the person) responsible for executing the request, give priority to requests which have been marked “urgent”, and where the assistance requested cannot be provided in whole or in part, provide an explanation and, where possible, offer to discuss how the difficulties might be overcome. Although such points may seem trivial and mundane, they all have an immediate impact on the day-to-day work of judicial authorities involved in international cases.

The European Union countries have prepared their own Mutual Assistance Convention (adopted on 29 May 2000). This is not intended to be an independent treaty, but instead supplements the 1959 Council of Europe convention and its protocol. It brings these earlier treaties up to date by reflecting not only the emergence of the “good practice” referred to above, but also the development of investigative techniques and arrangements.

Perhaps the most interesting innovation brought in by the new Convention is that it reverses one fundamental principle in mutual legal assistance. Today, the almost universal rule is that the law applicable to the execution of the request is that of the requested State. The new Convention provides that the requested State must comply with the formalities and procedures expressly indicated by the requesting Member State. The requested Member State may refuse to do so only if compliance would be contrary to the fundamental principles of law of the requested State.

## Extradition

Prior to 2004, extradition among the Member States of the European Union was based largely on the 1957 Council of Europe Convention on Extradition. (In addition, the five Nordic countries of Denmark, Finland, Iceland, Norway and Sweden have adopted identical legislation that greatly simplifies extradition among these countries.)

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

In October 1999, the European Union agreed on the importance of mutual recognition of decisions and judgments which, in its view, “should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union.” The argument was that already today, the Member States of the European Union share fundamental values and legal principles. The authorities of a Member State should have full faith and confidence in the operation of the legal system of the other states. Accordingly, it should be made possible for a decision or judgment handed down in one Member State to be immediately enforced as such in any of the other states. The European Union further identified “fast-track extradition” as one priority area where the principle of mutual recognition should be applied.

Work proceeded slowly. For a time, it seemed as if work on mutual recognition would be buried by the many legal, technical and practical problems involved. The terrorist attacks on 11 September 2001 changed the situation dramatically, in that the European Union decided that the draft “EU arrest warrant” should be completed by December 2001. This political imperative galvanized those officials responsible for hammering out the details and reaching the necessary compromises. Agreement on the EU arrest warrant was indeed reached in December 2001.

Prior to 9/11, work on the EU arrest warrant had been slowed by the fact that it represented a paradigm shift in extradition. Simply put, the new decision (which entered into force on 1 January 2004) replaces extradition among the EU Member States with a new system, whereby suspects and convicted offenders are “surrendered” to the requesting state. The process no longer needs to go through the central authorities. An arrest warrant issued by a court in one state will be recognized as valid throughout the EU, and is to be enforced by any and all national courts.

The decision on the EU arrest warrant has brought about a significant change in both extradition law and practice. It closely resembles the “fast-track extradition” process that had been used between Ireland and the United Kingdom, and (in an experimental manner) between Italy and Spain. It has considerable potential for speeding up the process, in particular since it will eliminate or reduce a number of traditional grounds for refusal. Early data for 2005 suggest that the average time from request to extradition / surrender has in fact been cut from about nine months to three months.

## Mutual recognition of decisions and judgments

As was noted above in connection with the presentation of the EU arrest warrant, mutual recognition of decisions and judgments has traditionally been almost non-existent in international cooperation.

Because of jurisdictional limits (and undoubtedly also because of a deep-rooted lack of confidence in the criminal justice systems of other countries), the almost iron-clad rule is that court decisions and judgments cannot be directly enforced abroad. For example, if a court in one country orders that a suspect be arrested, that his or her assets be frozen, or that his or her house be searched for evidence, the authorities of that country have to use mutual legal assistance in order to request that the decision be carried out abroad. The process inevitably takes some time – time during which the suspect can empty out his or her bank accounts and move on to a third country, escaping the administration of justice.

So far, relatively little attention has been paid to recognising the validity of a decision taken by a foreign authority or court, and enforcing it as such. This principle of mutual recognition would enable competent authorities to quickly secure evidence, seize assets and immobilize offenders. This would, of course, also be in the interests of the victim.<sup>8</sup>

There are few bilateral or multilateral treaties on this topic. One of the few is the European Convention on the International Validity of Criminal Judgments, prepared within the framework of the Council of Europe in 1970. Even this treaty has very few signatories, and even fewer ratifications.<sup>9</sup> Indeed, even most EU Member States have not ratified it, and so it has very little practical importance. Furthermore, the Convention only applies to legally final judgments, and not for example to decisions made in the course of an investigation.<sup>10</sup>

With the increasing integration of Europe, and as shown with the example of the EU arrest warrant, the EU Member States are now moving towards mutual recognition of decisions and judgments. It is widely regarded as an effective and indeed almost unavoidable tool in cooperation. Furthermore, proponents argue that the close ties among the EU countries, and the fact that they are all signatories to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, has led to a situation in which all

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<sup>8</sup> Protecting the interests of the victim is one of the priorities of the European Union. On 15 March 2001, a framework decision was adopted in order to ensure uniform minimum legal protections for victims in criminal proceedings. A Council Directive was adopted on 24 April 2004 on unification of compensation to victims from the State.

<sup>9</sup> Of the 25 EU Member States, only Austria, Cyprus, Denmark, Estonia, Latvia, Lithuania, the Netherlands, Spain and Sweden have ratified the 1970 Convention as of the spring of 2006. The other countries that have ratified it are Albania, Bulgaria, Georgia, Iceland, Norway, Romania, San Marino, Turkey and Ukraine. An additional seven EU countries and one other country have signed, but not yet ratified, the Convention.

<sup>10</sup> There is one further exception to the lack of mutual recognition internationally. The five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) recognize one another's decisions and judgments, and refusals are almost unheard of. This system is based on the fact that the Nordic countries share very much the same legal system, and also otherwise have long-standing cooperation with one another.



Member States should have full faith and confidence in the operation of the criminal justice system in one another's country. To give an example, if a judge in one country orders that a suspect should be arrested, courts in all other European Union countries should have confidence that the decision was made according to law and with due respect to human rights.<sup>11</sup>

In the view of the Tampere European Council in October 1999, mutual recognition should become the cornerstone of judicial co-operation in both civil and criminal matters within the European Union.

The EU arrest warrant, described above, is the prime example that can be given of mutual recognition. A second framework decision was adopted soon afterwards (on 28 February 2002), on the mutual recognition of decisions on the freezing of assets and property. The framework decision makes it possible, for example, for the decision of a court in one Member State on the freezing of the accounts of a suspect to be enforced immediately in any and all of the other Member States. On 14 February 2005, a third decision on mutual recognition was adopted, this time on financial penalties.

#### Work in progress on judicial cooperation

In November 2004, the heads of State of the EU countries adopted an updated programme on progress in justice and home affairs. In respect of mutual recognition, they ordered that work should proceed on instruments related, respectively, to the gathering and admissibility of evidence, conflicts of jurisdiction and the *ne bis in idem* principle, and the execution of final sentences of imprisonment or other (alternative) sanctions. In addition, work is underway on an instrument dealing with pre-trial release and supervision. As of the spring of 2006, work is proceeding on such new instruments, but the pace of work appears to be slowing.

#### Mutual evaluations

Over the years, the Member States of the European Union have made a number of commitments to improving their response to organized crime, and to improving international cooperation. These commitments were undoubtedly made in good faith, and with all intention to implement them in full. However, the practical reality of investigation, prosecution and adjudication (for example, lack of resources, and differences in priorities in different sectors and on

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<sup>11</sup> As noted earlier, an analogy can be made with the "full faith and credit" doctrine contained in article IV, section 1 of the Constitution of the United States. According to this section, "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

different levels) can mean that the work that is actually carried out remains at odds with the commitments.

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

Following the OECD model, small international teams of experts visit the target country, interview practitioners, report on their assessment and make recommendations. The assessment is confidential,<sup>12</sup> and the target country is given every opportunity to correct any errors that may have been made.

So far, two rounds of evaluations have been carried out in all Member States. The first round dealt with mutual legal assistance and urgent requests for the tracing and restraint of property, and the second round dealt with law enforcement and its role in the fight against drug trafficking. A third and fourth round, dealing respectively with the exchange of information between Member States and Europol, and the European Arrest Warrant, are nearing completion during the spring of 2006.

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

In October 2002, the European Union adopted a more streamlined mutual evaluation mechanism to be used in respect of anti-terrorism measures. This mechanism relies primarily on written responses from the Member States to specific questions, to be followed up if necessary by on-site visits by experts.

At the meeting of the heads of State in November 2004, it was decided to develop further evaluation measures. A proposal from the Commission is expected to this effect during the summer of 2006.

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<sup>12</sup> With the permission of the country in question, the report can be published. Indeed, all of the reports so far have in fact been published.

## Cooperation in the formulation of domestic law and policy

The global status quo:

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

The European Union reality:

- the European Union has adopted decisions calling for criminalization of a number of offences. The definitions are generally rather tightly drawn, and have forced countries to amend their legislation accordingly.
- the European Union has begun cooperation in the prevention of crime, including organized crime.
- the European Union has adopted a number of action plans and programmes that have had a clear effect on policy and practice in all the Member States.
- there are signs that the European Union may be moving towards “communizing” criminal law, in other words to a situation where, instead of each individual Member State determining the contents of its criminal law and criminal procedure, the decision *is taken by all twenty-five Member States working together*.

## Criminal law and criminal procedure

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

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

The question of how far the criminal law and procedural law of the Member States should be harmonised is a subject of considerable controversy. Everyone appears to agree that some degree of harmonisation is necessary in order to ensure smooth international cooperation, as long as by “harmonisation” one means the *approximation* or co-ordination of different legal provisions or systems by eliminating major differences and creating minimum

requirements or standards. To use a musical analogy, we can continue to play our national music, as long as it is in harmony with the music of the other twenty-four Member States.

Everyone also appears to agree that at this stage at least we are not talking about the *unification* of criminal and procedural law within the European Union, in the sense that the twenty-five distinct legal systems would be replaced by one system. To use the musical analogy, no one supports the idea of replacing the orchestra with a single synthesizer, no matter how technically advanced.

The process so far has involved a focus on certain key issues, where the Member States have agreed that harmonised legislation is necessary. Among the offences that have already been dealt with are fraud and counterfeiting, drug trafficking, trafficking in persons and illegal immigration, corruption, racism and xenophobia, football hooliganism, money laundering, arms trafficking, participation in a criminal organization, terrorism, and environmental offences.

## Work in progress

With the current focus on mutual recognition in the European Union, there are fewer initiatives on further harmonisation of criminal and procedural law. Work continues to be underway on the minimum provisions on the constituent elements of offences and penalties relating to racism and xenophobia. This project had ground to a halt during the spring of 2003, largely over the concerns of some countries over the freedom of speech. An attempt to resuscitate the work was made at the beginning of 2005, but with little more success.

A major project has to do with the procedural rights of suspects and defendants in criminal proceedings. Essentially, this project has sought to define what the minimum rights of the defence are. The discussions have revealed that, although all EU Member States are signatories to the European Human Rights Convention, there are still considerable areas of disagreement as to specific rights. As of the spring of 2006, the future of the project is very much in doubt.

The Commission has advanced various proposals for further harmonisation, for example in respect of tax offences; violation of intellectual property rights; and the penalties for counterfeiting offences. A considerable amount of attention has also been focused on money laundering, and on the freezing of the assets of offenders. For example, a framework decision on money laundering and on the identification, tracing, freezing or seizure, and confiscation of the instrumentalities and proceeds of crime was

adopted on 26 June 2001, and the Commission is preparing a further proposal on cash payments and money laundering.

One general priority area is the protection of the financial interests of the European Union, for example against subsidy fraud, embezzlement and corruption. Here, there is a much further-reaching proposal, originally in the form of a so-called “Corpus Juris” project,<sup>13</sup> which was subsequently replaced by a Commission “Green Paper” on a European Public Prosecutor. Briefly, this proposal seeks not only to harmonise the definition of offences against the financial interests of the European Union, but also to set up a European Public Prosecutor system, using identical procedural law provisions in each Member State. Proponents have said that this degree of uniformity is necessary to prevent organized criminal groups from utilising differences between the Member States. Critics, in turn, see this as an attempt to create a supranational criminal law and procedural law, which in time may lead to the unification referred to above.

This disagreement emerged once again when the new Constitutional Treaty was being drafted in 2002 and 2003. The proponents of the European Public Prosecutor concept succeeded in getting reference made to it in the Constitution, but only as an idea that is to be reconsidered when the Constitutional Treaty enters into force.

The European Public Prosecutor project raises broader issues of how far the harmonisation of criminalisations can go, and who can make the decisions. Questions of criminal law have so far always been reserved to the Member States themselves to decide, on the basis of consensus. Article 31(e) of the Treaty of Amsterdam gave the Commission a right of initiative in these matters. The exact implication of article 31(e), however, has been questioned. Most Member States have been of the view that the Commission is limited to the right of initiative, and only the Member States themselves may make any decision on criminalization. However, a minority – and the Commission – have been of the view that article 31(e) in effect gives the Commission the right to *oblige* Member States to adopt criminalisations on certain issues, if criminal law sanctions are the only way to protect Community interests.

For several years, an uneasy working compromise had been used: decisions under article 31(e) were made in tandem, with the Commission taking a decision on matters within its power, and the Member States (through the Council) taking a decision at the same time on matters within their powers.<sup>14</sup>

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<sup>13</sup> See <http://www.law.uu.nl/wiarda/corpus/engelsdx.html>. The project was first presented on 17-18 April 1997.

<sup>14</sup> To complicate measures, the Constitutional Treaty – when and if it enters into force – gives the Commission greater powers of initiative, and in practice puts an

The basis for this working compromise came to a jolting end on 13 September 2005, when the Court of the European Communities issued a long-awaited ruling. On 19 December 2002, the Council had adopted a framework decision on the protection of the environment through criminal law. The Commission has argued that the Council had no right to take such a decision, since environmental matters clearly belong under the first pillar, where the Commission has the right of initiative and (to some degree together with Parliament) the right of decision. The Council, in turn, unanimously decided that criminal law matters – even when related to what would otherwise be a first pillar matter – belong under the third pillar and are thus in the competence of the Council. When the Council took this decision, the Commission brought the case to the Court of the European Communities.

In its decision C-176/03, the Court of the European Communities essentially ruled that under certain conditions, provisions relevant to the protection of the environment through criminal law could and indeed should be taken under the first pillar. The reasoning of the Court, however, was narrow enough to lead to considerable disagreement between the Commission and the Council as to what, exactly, the Court had determined. While there was agreement that the original framework decision on the protection of the environment through criminal law had to be revisited, there was no agreement as to whether this was true of Council decisions taken in other areas. Apparently, conclusions will have to await further decisions of the Court on parallel cases.

## The prevention of organized crime

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

Also the Tampere European Council stressed the importance of crime prevention. It suggested that common crime prevention priorities should be developed and identified. Elements for an emerging crime prevention policy are contained in the Council resolution of 21 December 1998 on the prevention of organised

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end to the requirement that Council decisions on home and justice affairs must always be made by consensus.

crime. In March 2001, the Commission and Europol presented a report on a European strategy on the prevention of organised crime.

One further step in developing and identifying priorities was made on 15 March 2001, when the European Union decided on the establishment of a crime prevention network. This network consists of contact points in each Member State, representing not only the authorities but also civil society, the business community and researchers. The network functions by organizing meetings, compiling a database and otherwise by seeking to gather and analyse data on effective crime prevention measures on the local and regional level in order to disseminate information on "good practices." At the summit held in November 2004, the heads of State agreed that the European Union Crime Prevention Network should be further strengthened and professionalised.

## European Union policies and programmes

On 16-17 June 1997, the European Union adopted a Plan of Action to combat organised crime. Instead of the resolutions, recommendations and declarations that have so often been adopted in other fora - regrettably often with little practical impact - the European Union decided, for the first time anywhere, on specific action, with a clear division of responsibilities, a clear timetable and a mechanism for implementing the action plan. The strong consensus reached by Member States on the 1997 Plan of Action helped to create the political and professional climate required on both the EU level and the national level to take and implement the necessary decisions.

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

The period allotted for the 1997 Plan of Action ended on 31 December 1999. A follow-up plan was adopted in March 2000. Specific forms of crime that are the focus include economic crime, money laundering and off-shore centres, terrorism, computer crime, and urban crime and youth crime.

At the same time, broader strategies for dealing with justice and home affairs were being developed. When Finland held the Presidency of the European Union during the second half of 1999, the Tampere European Council (15-16 October 1999), adopted a set of priorities not only in the response to cross-border crime, but also in respect of migration and asylum issues.

Five years down the road, these various priorities – known in the European Union as the “Tampere milestones” – have been replaced by an updated and quite ambitious programme adopted by the heads of State in November 2004 (the “Hague Programme”).

Among the points stressed in the Hague Programme are the following:

- the sharing of information among law enforcement and judicial authorities (while maintaining the proper balance between privacy and security);
- establishment of a coherent overall approach to combat terrorism;
- strengthening the prevention of organised crime;
- strengthening the tools to address the financial aspects of organised crime;
- improving general crime prevention;
- creating a “European judicial culture”; and
- promoting the principle of mutual recognition of judicial decisions.

## Cooperation with candidate countries and other third countries

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

One particular focus within the EU is cooperation with the so-called candidate countries. For several years in advance of the mammoth enlargement of the European Union in May 2004, the EU negotiated actively with the then ten “candidate countries.” The infusion of extensive technical assistance and millions of euros, combined with the strong political pressure exerted from within and from without these countries, resulted in the ten countries being able to carry out an extensive reform process in a remarkably short time.

This same process is now underway with Bulgaria, Croatia, Macedonia, Romania and Turkey. Other countries, including Albania, Moldova, Serbia and Ukraine, have already indicated their



interest in becoming members, and may thus soon be brought within the scope of this cooperation.

In this process, considerable attention is being paid to the prevention and control of organized crime. The European Union has already adopted a large number of measures (referred to as the *acquis communautaire*), and the Member States have implemented them in their domestic legislation and practice. In order to avoid a situation where organized criminal groups take advantage of a sudden expansion of the European Union, also the candidate countries must fully accept and implement the *acquis*.

A second focus for the EU is the Russian Federation. In 1999, a special European Union Action Plan was prepared on common action with the Russian Federation on combating organized crime. This in essence sets up a structure and process for continuous consultations and cooperation between the European Union and the Russian Federation. In addition, there is a broader “partnership” agreement with the Russian Federation (and with Ukraine) that provides a basis for cooperation.

Other geographical areas with which the European Union is seeking to strengthen co-operation include the Mediterranean, South Eastern Europe, China, North America, Latin America and the Caribbean. In December 2005, the Council decided to take a more proactive approach to its external relations in justice and home affairs. The decision identified a number of ways in which the EU would work with partners on a range of issues. At the same time, it was decided that the EU should from time to time focus on certain regions and certain issues. To start with, these points of focus would include Afghanistan and drugs, the Western Balkans and organized crime, and Northern Africa and illegal immigration. Russia is also to be given a special focus in this manner.

Following the terrorist attacks of 9/11, the United States (and the response to the threat of terrorism) understandably enough became a top priority. This could be seen in the broad range of co-operative measures put into place, ranging from cooperation between the US authorities and Europol, to the very rapid negotiation of agreements on extradition and mutual legal assistance between the EU and the US. These agreements were significant in several respects. They were specifically between the United States and the European Union, and not between the United States and the (then) fifteen Member States of the EU. To a large extent, they brought up to date the bilateral agreements that the US had with the European countries.

The European Union is also active in working through intergovernmental organizations such as the Council of Europe and the United Nations. For example, throughout the negotiations on the United Nations Convention against Transnational Organized Crime and on the United Nations Convention on Corruption, the

European Union countries worked very closely together in seeking to ensure that the resulting Convention was as effective and broad as possible.

Concluding comments: Can the EU keep up the pace?

In 1992, cooperation among the EU countries in criminal justice did not have very many special features, besides from informal and, often, ad hoc meetings looking at such special issues as terrorism and radical groups. More formal cooperation was based primarily on the conventions worked out within the framework of the Council of Europe.

In the dozen or so years since then, so much has changed. The establishment of Europol and Eurojust, networks of liaison officers and liaison magistrates, decisions on the approximation of legislation, the first decisions on mutual recognition of judicial decisions, a system of mutual evaluation ... the list of innovations has become quite lengthy.

Can the pace of change remain the same? The Hague Programme is very ambitious, and contains a large number of measures. Even so, there are several reasons to suggest that the pace will slow down, perhaps even considerably.

One reason has to do with the working methods of the EU. Decisions on police cooperation and on cooperation in criminal matters have to be adopted by consensus. Getting the Ministers of fifteen countries to agree on at times highly technical legislative measures was difficult; following the enlargement in 2004, it has proven to be even more difficult to get twenty-five ministers to agree. It is possible that towards the end of 2006 the EU will begin to discuss replacing the requirement for consensus with a requirement for a qualified majority, but this discussion can be expected to last for some time.

Another, somewhat related, reason is that there are too many areas requiring attention, and the EU can only deal with a few matters at a time. It is likely that the EU will decide, towards the end of 2006, on a few priority areas in which it should work.

But there is also a fundamental reason why the pace of change will in all likelihood slow down. From 1992 on, the European Union has been developing a unique degree of international cooperation in criminal matters, and the groundwork has already been laid. The main structures are in place (such as Europol and Eurojust, the EJM and the networks of liaison officers and liaison magistrates), the most important cross-border crimes have been covered by EU decisions, and much of the basic forms of cooperation (surrender of fugitives, the freezing of assets) have been covered. Certainly more

work is needed on, for example, improving the exchange of information, but the broad outlines are in place.

Even with a slower pace, however, the European Union will continue exploring new ways to strengthen cooperation in order to achieve the basic goal: ensure that the EU becomes an area of “freedom, security and justice,” where persons can freely move from one edge of the EU to the other, but offenders can still be brought to justice even when they or their offences cross national borders. The EU will thus continue to be a laboratory for the testing of new forms of cooperation.

# The Preventative Control of Organised Crime in Europe: The Emerging Global Paradigm?

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As Justice, Liberty and Security has become a key component of EU 'Third Pillar' activities, and organised crime has ascended in importance as a political issue for the EU and the G-8 most powerful industrialised countries, it is no longer possible to see 'serious crime' policy in purely national or in purely law enforcement terms (Fijnaut and Paoli, 2005; Harfield, 2006; Levi and Maguire, 2004). Notwithstanding the creation of the UK Serious Organised Crime Agency in 2006, which specifically is mandated as a 'harm reduction' rather than 'law enforcement' agency – though with law enforcement powers – there are undercurrents of opposition among the British police to claims about how serious and widespread 'organised crime' is: many provincial police in many countries see the subject as a political (with both small and large 'p') mechanism for reallocating glamour and resources away from local policing by 'top slicing' their budgets in favour of 'high policing'.

In the wider European arena, there has been a flurry of anti-organised crime activity in the European Union and the Council of Europe, based around 'threat assessments' of variable quality (for recent examples, see Council of Europe, 2006; Europol, 2006; for a general critique, see van Duyne and van Dijk, 2007). This has accelerated since the 1996 EU Dublin Summit (itself stimulated by the Irish government's response to the high-profile contract killing of crime journalist Veronica Guerin) and the 1999 Tampere Summit, with high level multi-disciplinary groups seeking areas of co-operation, implementing a High-Level Joint Action Plan and finally getting Europol off the ground constitutionally by 1999. Both the EU and the Council of Europe have extended their activities into EU applicant countries and others, training them in anti-laundering implementation and ensuring as part of the acquis communautaire that legislation and some implementation machinery is in place before accession to the EU. Part of the 1998 Joint Action was a commitment to criminalise membership of criminal organisations – influenced by the Italian legislation but harder to apply in less regimented settings – and tough action against criminal offshore finance centres. In the still wider international arena, the Financial Action Task Force (started only in 1989) and the UN have vied for activism and prestige in anti-laundering and crime prevention, especially in the drugs issue but later on all-crime anti-laundering measures, as the boundaries

between proceeds of different types of crime become increasingly blurred. The arrival in the top UN Drug Control and Crime Prevention post in Vienna of Pino Arlacchi, a sociologist-turned-politician Mafia expert<sup>1</sup>, placed organised crime at the top of the 1998 UN criminological agenda. This great political confluence has led to international pressure to harmonise or, in EU terminology, 'approximate' the fight against organised crime, even if people do not always have a clear understanding of what 'it' is, and there has been pressure to harmonise (i.e. increase) powers to cooperate over organised crime and terrorism, as in the European Arrest Warrant and European Evidence Warrant.

### Criminal justice and prevention approaches

There are two dimensions of shifts in approach to the control of organised crime in the UK and other European countries. The first relates to traditional criminal justice approaches, including:

1. substantive legislation, relating especially to money-laundering and proceeds of crime legislation;
2. procedural laws involving mutual legal assistance (including the establishment of Eurojust, whose detached national prosecutors and investigative judges seek to facilitate urgent cases, and – in the aftermath of the terrorism attacks of 11 September 2001 – the European Arrest Warrant that will free EU member states from the formalities of extradition, and the European Evidence Warrant, agreed in 2006); and
3. investigative resources, including the formation of specialist organisations culminating in the Serious Organised Crime Agency (though not a national fraud squad, since fraud other than Value-Added Tax and excise fraud – which hits government coffers directly – does not appear to be a policing priority – see Doig, 2006; Fraud Review, 2006; Levi and Pithouse, forthcoming).

There has been ongoing reform of anti-laundering and crime proceeds legislation around the world (Gilmore, 2004; Stessens, 2000), and greater policing (including customs & excise) involvement in financial investigation, still mainly in the drugs field but increasingly in excise tax fraud and, post-11 September 2001, terrorism. There has been the development of an Egmont Group of Financial Intelligence Units world-wide, whose aim (not always realised in practice) is to facilitate inter-FIU enquiries across borders. Despite some inhibiting effect from the European Court of Human Rights and Data Protection Commissioners in some member states, the exchange of intelligence internationally and the depth of proactive

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<sup>1</sup> Signor Arlacchi left at the end of 2001.

surveillance – with the UK at the permissive extreme and Germany, because of its federal structure and data protection laws, at the other – have transformed the potential for intelligence-led policing (and disruption) of organised crime activity across borders. However, apart from questions of demand for illegal goods and services, one factor blocking the view of this Panopticon is limited resources. The historic tension between the local and the central has bedevilled policing since its inception in England and Wales, and since the great majority of police chiefs expect to lose resources from any centralisation, this gives them motivation to be sceptical about organised crime. Although the concrete histories are different, this also applies to other European countries.

The other major plank of emerging activity is measures to prevent organised crime. The unpopularity of bankers and of drugs traffickers has enabled the State to regulate for the interests of the State rather than the banks themselves certain areas of financial services activity that otherwise might have been very difficult, and in this sense, the demonology of ‘organised crime’ has been very ‘useful’. Likewise, in attempts to cut down on ‘people trafficking’, truck drivers were fined heavily and their trucks impounded for carrying illegal migrants across the Channel: this led large firms to introduce new technology for checking (by carbon dioxide levels) whether their trucks were stowaway-free. There has also been a focus on taking out drugs manufacturers and distributors in countries of origin, rather than waiting till they were close to the shores of the UK or other European countries.

There is no absolute demarcation between the above and criminal justice interventions: as countless European police officers have asserted to this author (not always based on evidence), repressive measures are preventative. Controls on money laundering and asset confiscation/recovery, for instance, are intended to increase the probability of identification/conviction of organised criminals, to deprive them of the fruits of crime and to prevent their future harm by administrative and financial incapacitation (Levi and Reuter, 2006). But there are other ways in which situational opportunity and designing out crime concepts are utilised to deal with crimes that are ‘organised’.

Table 1 represents the three main ‘non-traditional’ approaches to the prevention of organised crime that can be found at present. Like situational prevention techniques, this is a kind of ‘natural history’ classification of broad intervention methods, each of which may work by several mechanisms.

**Table 1 Non-traditional approaches to organised crime prevention**

|   |  |
|---|--|
| <b>Community approaches</b>                                     | <ol style="list-style-type: none"> <li>1. Community crime prevention</li> <li>2. Passive citizen participation: giving information about harms and risks, hotlines</li> <li>3. Active citizen participation: civic action groups</li> </ol>  |
| <b>Regulatory, disruption and non-justice system approaches</b> | <ol style="list-style-type: none"> <li>4. Regulatory policies, programmes and agencies (domestic and foreign, including non-governmental organisations and IGOs such as the IMF, OECD/FATF and World Bank)</li> <li>5. Routine and suspicious activity reporting by financial institutions and other bodies</li> <li>6. Tax policy and programmes</li> <li>7. Civil injunctions and other sanctions</li> <li>8. Military interventions</li> <li>9. Security and secret intelligence services</li> <li>10. Foreign policy and aid programmes (US 'certification' of countries as adequate/inadequate in their anti-drugs measures)</li> </ol> |
| <b>Private sector involvement</b>                               | <ol style="list-style-type: none"> <li>11. Individual companies</li> <li>12. Professional and industry associations</li> <li>13. Special private sector committees</li> <li>14. Anti-fraud and money laundering software</li> <li>15. Private policing and forensic accounting</li> </ol>  |

**(a) Community approaches**

Traditional situational crime prevention neglects the area of community action, considering it as being too far from the proximal 'causes' of crime. Nevertheless, in the arena of organised crime, community action has an impact on the pool of willing offenders, whether they are positively involved in crime or are simply unwilling testifiers against offenders or passive assistants in the components of crime. Williams and Godson (2002) discuss as an example of criminality prevention some social experiments in Palermo, where 25,000 children annually attend an educational program designed to change the cultural norms that allow the Mafia to flourish<sup>2</sup>. In Sicily, there have also developed local active citizen groups, though such anti-Mafia activism remains dangerous to those advocating it openly, and anger is hard to turn to constructive, long-term use.

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<sup>2</sup> Whilst this would seem to be a good thing in itself, its effects in practice remain to be evaluated: these effects might take the form of greater willingness to pass information to the authorities (a shorter-term effect) or lesser willingness to assist or join Mafia-type associations in future (a much longer term effect).

Hicks (1998), in exploring the potential for a greater role of crime prevention strategies in tackling organised crime, stresses the linkages between unorganised property crime and more organised criminality because – especially when unemployed – drug users require cash and crime is an important source of it.<sup>3</sup> Moreover, one of the most recent trends in urban property crime has been the organisation of young offenders by adults to commit burglaries and car thefts (though one might counter that this phenomenon is hardly new: it goes back at least to the criminal careers of Jonathan Wilde and also Ikey Solomons - who was the model for Dickens' Fagin - and the Victorian rookeries). According to Hicks (1998: 334) the connection between unorganised and organised crime demands that preventative approaches, traditionally applied to the former, also be conceptualised to support local intervention to address the substructure of organised crime. However, it is worth noting that when applied to crop substitution for drugs and to employment alternatives to money-laundering, for example, the economic dimensions cannot sensibly be ignored by focussing simply on changing 'hearts and minds': ignoring the legal sanctions, crime is often more profitable than the alternative.

Nevertheless, as a total concept in attacking organised crime, community crime prevention approaches are limited because at some stage of the organised crime process – from financing through to laundering – other jurisdictions are likely to be involved which have less interest in crime suppression, unless they can be persuaded or forced to assist by some international action, including shaming and the threat of economic sanctions (see Blum et al., 1998; Gilmore, 2004; Levi and Reuter, 2006; Williams and Godson, 2002).

### **(b) Regulatory, disruption and non-criminal justice approaches**

The second category in Table 1 covers a wide range of activities, which have in common the use of the powers of state agencies other than those whose main responsibility concerns law enforcement or criminal justice. One important aspect of this is the use of powers in the financial and tax areas, where in essence the focus of the attack is upon the financial assets of organised criminals rather than on criminal prosecution as such. (Tax evasion was the only charge feasible against Al Capone, but the use of tax prosecutions against gangsters has never been a feature of British criminal justice.) Thus, in the Irish Republic (Criminal Assets Bureau Act 1996) and the UK (Proceeds of Crime Act 2002), as well as in the United States, civil law means and standards of proof

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<sup>3</sup> In our view, there is a risk factor also not just in the need for cash but also the susceptibility to blackmail of drug or 'hard porn' users working in the financial services industry should they fail to assist fraudsters and money launderers. There are plausible anecdotes about such cases, but we have been unable to unearth any concrete examples. Such internal co-operation may also occur voluntarily.



are used to 'recover' for the State the assets deemed to be derived from crime, irrespective of whether or not anyone is ever convicted or even prosecuted for those crimes. The aim here is to undermine both the motivation of criminals to become 'top organisers' and their resources to be able to do so. This can be reinforced by extended powers to confiscate large (in the UK, in 2006, as low as £1,000) cash sums inland that do not have a legitimate explanation, as contained in the Proceeds of Crime Act 2002. A second, rather different, aspect is the use of the regulatory powers of local authorities, environmental and licensing agencies and the like, to disrupt the 'businesses' of organised criminals by making it more difficult for them to obtain necessary licenses, find suitable premises, and so on. This can be seen in experiments commencing in the Wallen 'red light' district of Amsterdam and then extending throughout the Netherlands, where tight controls are exercised over property ownership, with intensive reviews of intending and existing owners and their associates to 'keep organised crime out' (van de Bunt and van der Scoot, 2003; Levi and Maguire, 2004). Civil injunctions have been used under US Federal and State RICO laws to place corrupt unions and businesses under court-approved management, and quite apart from high-profile arrests that may accompany the civil measures, this appears to have had an impact on this highly visible form of structured organised crime, measured for example by garbage disposal and fish market prices (Jacobs, 1999; Levi and Smith, 2002), though there is less evidence of impact on other crime phenomena in the US.

## Regulating the money trail

A major component of the regulatory efforts to prevent and detect organised crime relates to money laundering. This term evokes images of sophisticated multi-national financial operations that transform proceeds of drugs trafficking into clean money. What was formerly a genteel sovereign right of any nation to assure 'customer confidentiality' has become redefined pejoratively as unacceptable 'bank secrecy' that facilitates the drugs trade (Levi, 1991). In this global risk management process, 'modern' areas of law enforcement have sought to combine targeting the suspected person (Maguire, 2000) with targeting (or seeking to target) activities that might give rise to organised crime opportunities, such as international financial transfers, and/or the conversion of large sums into foreign currencies. They have also tried to create an 'audit trail' for proceeds of crime by requiring all financial institutions to identify their customers. (Though this does not prevent gangsters and fraudsters from employing 'front men' to lend their names to accounts.)

The logic of controlling the crime proceeds money trail is that profit motivates crime, and because drugs and vice sales – certainly at street level - are (or are believed to be) in cash, the

'organisers' (to the extent that they exist) have to find some way of converting these funds into financial resources that appear to have legitimate origins. If they are prevented from doing so, their incentives to become major criminals are diminished, so there is both a general and a specific threshold preventative effect from anti-laundering efforts. These preventative effects can be reinforced by (i) requirements on financial and other 'risk-prone' institutions to report large cash and/or 'suspicious' transactions to specialized police or administrative financial intelligence units – the sort of 'responsibilisation' process noted by commentators on 'governance-at-a-distance' as a feature of late modern society; and (ii) proceeds of crime confiscation or forfeiture laws that are intended to incapacitate both individuals and criminal organizations from accumulating substantial criminal capital and the socio-economic power that accrues from this. When Pablo Escobar offered to pay off the Colombian National Debt in exchange for not extraditing him to the US, we can safely say (if his offer was credible) that such socio-economic power exists: though the Colombian government, perhaps worried about US counter-measures, turned him down. Whether such socio-economic power is possessed by any 'organised criminal' in the UK or in any other EU country remains more doubtful, however (unless one takes the flexible if legally hazardous approach to labelling corporations as 'organised criminals' recommended by Ruggiero, 1996).

An anti-laundering strategy requires a major global infrastructure of compatible legislation and mutual legal assistance both for financial investigation and for proceeds of crime restraint and confiscation. However, the reason why this is in section (b) of the table rather than sections (a) or (c) is that these anti-laundering activities have become grafted onto the more conventional apparatuses of financial regulation administered by the Basle Committee of Banking Supervision and by the International Monetary Fund, not always comfortably. The mode of governance selected for the spread of anti-laundering performance monitoring has been primarily mutual evaluation by peer countries within regional bodies and within the 39-member Financial Action Task Force (FATF), set up in 1989 by the G-7 most industrialised countries to give practical effect to the 1988 UN Vienna Drugs Convention. However in 2000, powerful FATF countries decided to penalise financially those (actually, non-member) countries who did not co-operate to their satisfaction, requiring financial institutions to take greater care (and slow down) when transacting business with countries that are publicly 'named and shamed': if the countries did not change, further sanctions were threatened and, at the end of 2001, the tiny Pacific island of Nauru became the first to suffer these sanctions; yet of the 23 countries judged in 2000 and 2001 to be 'non-cooperating', only Myanmar (Burma) remained on the list by 2006. This is an example of attempts to control globalisation processes that facilitate crime, especially 'organised crime' and,

latterly, terrorism. Insofar as some preventative measures involve imposing costs on private sector interests or even eliminating major chunks of profitability, there may be substantial political resistance, depending on the relative power of such interest groups in the localities concerned<sup>4</sup>. Without these pressures to conformity, there would remain a global (non)system of regulatory arbitrage – the ability to locate key operations where regulation is lightest, whether this lightness is based on lack of legal powers to invade banking or corporate secrecy or is based on charisma, corruption or economic power - of which criminals can take advantage if they have the discipline, knowledge and contacts.

### **(c) Private sector involvement**

Some of the private sector involvement has been discussed above, as it has been compelled by legal requirements placed on private sector institutions to play their part in crime opportunity reduction. An increasing number of banks have spent large sums – especially after the September 11 attacks - on fancy software to try to identify patterns of laundering electronically, mainly to avoid reputational risk and huge fines from regulators as well as possible jail sentences for designated Money-Laundering Reporting Officers. However the choice of electronic methods results also from an awareness that systems based on human awareness of customers cannot readily cope with the billions of transactions whizzing daily around the world without any staff seeing them. Furthermore, electronic systems offer some alternative intelligence to reduce the risks of corrupt staff turning a blind eye to particular customers' activities.

Except for the sense that the world's economic system and their economic welfare is harmed by terrorist finance, few of these measures would be undertaken to enhance profitability, but there are other areas in which the private sector has invested in measures against organised crime because these threaten its core interests. Thus, the telecommunications industry, the payment card industry, the record & film industry, and the clothing industry have paid for small groups of investigators to carry out undercover operations and disrupt factories and key crime networks attacking their core interests. Much of this work is transnational because factories in Bulgaria, China, Malaysia, Rumania, Russia, Taiwan

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<sup>4</sup> In a Small Island Economy, an entrepreneur can exercise almost total domination, through charisma, corruption or prospective economic damage should s/he withdraw. Where leading politicians personally have a large (declared or undeclared) stake in the interests affected, the difficulties of engineering change are most acute. In such cases, there may have to be incapacitation at the international level, as in the economic sanctions imposed by the US in their kingpins and other legislation which makes it an offence to transact business for particular individuals or even nation states such as Iraq or Libya.

and Turkey may be churning out millions of CDs and DVDs or fake Levis that cut into their profits and branding, even if many of the poorer cut-price purchasers would not have been able to buy the goods at full price. Moreover, quality counterfeit credit cards can be used to generate duplicate identities, leading to hundreds of millions of pounds in real losses to banks and merchants. Visa, MasterCard and American Express also try to ensure that corrupt merchants are not allowed to open new accounts, at least within the same country. The reason why these measures are taken against organised crime rather than simply 'crime' is that well-organised operations (whether networks or hierarchical gangs) can do an enormous amount of economic damage very quickly. In a world of competitive profit-seeking, some individual companies will do more than the collective industry bodies, especially if they have advanced software. (For a detailed review of these issues, see Levi and Pithouse, forthcoming.)

#### Effectiveness of organised crime prevention

The impact of anti-organised crime measures on outcomes remains insufficiently analysed, since there are little reliable data on the 'before' or 'after' (a) levels or (b) organisation of drugs and people trafficking, European Union fraud, etcetera (Black et al., 2000; Levi and Maguire, 2004; van de Bunt and van der Schoot, 2003). For example, the law enforcement agencies in EU and Council of Europe member countries are required to return annual counts of the number of organised crime groups, but quite apart from quality monitoring issues, it is not obvious whether a reduction in the number is a good thing (less harm has been caused or there is a lesser threat to society) or is a bad thing – it is an indicator of monopoly or oligopoly rather than of looser networking, and therefore a greater threat to society. Some approximations for illicit use can be made from self-report studies or from sophisticated techniques for estimating prevalence, but these do not explain or enable inferences to be made about how offending is organised. Very few countries or institutions will now accept strangers or even established clients bringing in briefcases full of cash - 500 Euro notes offer the biggest amount of currency-per-square metre - without some plausible legitimate explanation, so there is a commonsense effect on ease of cash laundering. (Though there is a corresponding negative effect on the ease with which overseas workers can send money quickly and easily back to their families.) However, there is no evidence that fewer drugs or trafficked women have become available as a result of the sorts of measures discussed above. In the private sector sphere, industry and public sector fraud data suggest some impact from data matching and from the coordination of data at an industry-wide level (Levi, 2006; Levi and Pithouse, forthcoming).

Furthermore, despite exhortations, it is not always obvious how much policing has changed: despite some direct resource increase to SOCA and institutional changes in the UK for example, there has been little general police support for radical shifts in staff to financial investigation from equally prized and media-supported areas of crime and disorder. On the other hand, one of the advantages of moving away from a traditional criminal justice approach is that once established, bureaucracies can become entrenched in 'law and order solutions' which obstruct alternative problem-solving approaches to complex social issues. Quite apart from the huge federal economic and privacy costs of the War on Drugs, many US state and local forces have become highly dependant on income from drugs-related Federal 'equitable sharing' and 'adoptive forfeiture', and there is some evidence of goal displacement there as enforcement agencies target forfeitable assets rather than just serious offenders (Blumensen and Nilsen, 1998). This has not yet happened outside the US, partly because post-conviction reversal of the burden of proof typically yields modest results and crime proceeds income is not redirected *fully* towards the police (van Duyne and Levi, 2005; Kilchling, 2002; Levi and Reuter, 2006). The measurement of changes in organised crime and the assessment of whether these are beneficial or not are in their infancy, quite apart from any ideological viewpoints about the desirability of policing the leisure habits of poor and rich alike. Nor is sufficiently known about the organisation of the upper reaches of the drugs trade in Europe (Dorn et al., 2005), though the middle market is better analysed (Pearson and Hobbs, 2001).

### Organised crime: natural Evolution or responses to control?

The explanation of how and why crime groups develop in the way that they do is important, but the argument here has been that a focus on what 'organised crime' is or is not doing is unilluminating because it imposes a false coherence on a diverse subject matter of people and activities. The organisation of crimes results from the interaction of crime opportunities, offender and prospective offender skills and networks, and formal control efforts (whether through the criminal law, administrative law or disruption). It is thus a dynamic process that evolves as offenders adapt (or fail to adapt) to their changing environment, including facilities offered by the legal commercial environment, such as container trucks and ships, car repair firms (Tremblay et al., 2001), payment card issuers and merchants (Levi, 2006), and financial institutions. There are many cases where crime networks adapt to police preventative tactics even in the course of one series of frauds; and the losses of drugs or excise-evaded shipments constitute mainly opportunity costs from which higher members of crime groups develop counter-intelligence strategies or just accept risks and losses of (often

female) 'mules'. If criminals fail to develop their technical skills or find people they need to add to their networks to commit crimes effectively, then evolution in crime prevention – stimulated by private and public sector cost-saving – and in technology may force them to desist from crime or to resort to those crimes such as street robberies and thefts which cannot be eliminated by the spread of surveillance technology (though the technology may enable them to be identified more easily and reliably subsequently). In other words, there may be crime type displacement rather than geographical displacement of the same criminal activity.

Aggregate changes in routine activities, fashion, decriminalisation and prevention technology – as well as in criminal networks - may produce changes or apparent changes in modes of 'organised criminality'. As with national 'defence' systems, this can easily escalate into more general rises in gun possession which – fuelled by the use as well as the economic value of crack cocaine – can generate higher rates of actual violent shootings. Yet though there is much in this as a general trend – all the ethnographic, policing and survey data point to the dramatic rise in the size of illegal drug markets in Europe - we should not be seduced by this periodisation. Several armed robbers turned to bankruptcy frauds as early as the late 1960s, and later to credit card fraud, social security fraud, and even to fraud against the European Union - either alongside or subsequent to drug dealing - but this move into the moderately upmarket areas of fraud has hardly dented those other types of crime, so arguably it is expansion rather than displacement. Some Russian crime syndicates (including wealthy businesspeople in the US) have shown the capacity to engage in vast international frauds (van Duyne and Block, 1994; Williams, 2001), but so too have long-term Caribbean and Swiss residents operating businesses globally for decades without being defined as part of the 'organised crime problem' (Block and Weaver, 2004).

McIntosh (1975) more usefully and analytically distinguishes methods of organising crime in terms of the technological and policing barriers the particular crime confronts: where prevention precautions are high, organisation shifts from routinised craft groups - pickpockets, and even safecrackers - to looser, perhaps even one-off, alliances between project criminals. But this does not by itself tell us how the pre-existing social organisation of criminals in its wider context shapes those factors, nor how the organisational arrangements develop as a result of the efficiency and trust judgements made by criminal actors in a dynamic model.

An interview-based study of bankruptcy fraudsters found substantial variations in the organisation of that form of crime during the 1960s and 1970s, but since the sixteenth century, fraudsters in particular have found cross-border crime attractive because it creates problems of legal jurisdiction, investigative cost, and practical interest by police, prosecutors, and even creditors

themselves (Levi, 1981). European Union harmonisation and expansion does not itself make any difference to this, except (1) in providing new pretexts or 'storylines' for fraudsters to use to get credit or investment, and (2) inasmuch as it changes the structures of control, e.g. reducing customs paperwork makes VAT evasion easier, or the UK's ratification of the European Convention on Mutual Assistance makes co-operation and conviction easier (see Passas and Nelken, 1993).

Despite some advances (see Coles, 2001), the lack of more than the most rudimentary research base on patterns of criminal relationships in most European countries - including the UK - means that academics and most enforcement agencies have little systematic information about how domestic criminals meet and decide what to do, let alone how and to what effect/lack of effect Euro-criminals meet. In the global sphere, the analytical poverty is more extreme still (though see UNODC, 2002, for an interesting attempt to improve analysis). Major offenders do not advertise their services in the media, and apart from common holidays in Spain, marinas, and casinos, such contacts may often be tentative, hedged around with the problem of negotiating trust in an ambience in which betrayal (perhaps by an undercover agent, especially an American or British one) can have very serious consequence not just for freedom but for retention of proceeds of crime. (Though clever regulatory arbitrage can put knowledge of variations in legal rules in European countries to good effect in frustrating successful prosecutions.) Most plausible is the notion that Euro-criminals are either crime entrepreneurs who already exploit international trade for the purposes of fraud and/or smuggling, or money-launderers who put their clients in touch with each other. Ruggiero (1996) has argued that both corporate and organised crime can be understood as variations on the same theme, but though there are cigarette companies that may (at best) 'fail' to clamp down on the smuggling levels of their products in order to avoid other companies increasing their own market share at their expense, the Ruggiero view risks over-homogenising both upperworld and underworld.

The role of fences, criminal professionals (accountants, lawyers), money-launderers and transportation firms may be important in facilitating networks, though they themselves may have to be 'brokered'. Such an intelligence methodology may bring increased risks for those upperworld members whose connections with the underworld may not previously have been noticed: but if neither the person nor the activity is part of the police and intelligence surveillance set, they may still remain safe from intervention (see Gill, 2000).

Gradually, criminologists have begun to see 'the causes of crime' as including an analysis of how crime is organised socially and technically. To understand how this is possible, we need to examine crime as a business process, requiring funding, technical

skills, distribution mechanisms, and money-handling facilities. The larger the criminal business, the more likely all these elements will be required, with the special business problem that what they are doing is illegal and, if caught and convicted, they – and their bankers or lawyers – could all go to jail for very long times as ‘organised criminals’.

There are international groupings engaged in the commission of very serious social harms, though not all of them are labelled ‘organised criminals’. There may be more such groupings than there were 25 years ago, but despite the apocalyptic visions not only of the political right but of sociologists such as Castells (1998), however, it seems far less likely that non-European crime ‘cartels’ will dominate the West with their economic power than that there will be an increasing number of financial attacks on economic targets and a continuing devolved and networked supply of illegal goods and services, with some larger operators in countries where the evidential rules or the inefficiency/corruption of officials make proof of involvement too difficult. Though judgements of incidence and prevalence of threats may differ, there is general agreement that networked crime is more efficient than hierarchical ‘planned centralism’ for long-term criminal survival, at both national and transnational levels (Levi and Naylor, 2000; Williams, 2001). For criminals intending to stay in business for a long time, unless they are extraordinarily gifted and/or live in an extraordinarily corrupt haven, ‘small is beautiful’.

Furthermore, it appears that non-economic ties are the bedrock upon which is founded the longer-term stability and security of crime networks, only some of whose participants are full-time criminals. As the legal economy demonstrates, the mere fact that global markets exist does not mean that multinational conglomerates are the only or even best suited organisations able to supply criminal consumer needs. When the illegality of the activities imposes severe constraints on financing, recruitment, advertising, sales and the collection and consolidation of funds, criminal growth may be inhibited. For all but those who simply want to develop a moral panic to get more powers and resources, what is important (for crime control as well as academic understanding) is to appreciate the subtlety, complexity and depth of field of the organisation of crimes. In doing so, we should bear in mind that many different forms of organisation can co-exist in parallel, and that to be an ‘organised criminal’ does not mean that one has to be a member of an ‘organised crime syndicate’. There are layers of different forms of enterprise criminal, some undertaking wholly illegal activities and others mixing the legal and illegal depending on contacts, trust and assessment of risks from enforcement in particular national markets (Levi, 2007; Naylor, 2004). Which of these we choose to call ‘organised criminals’ is a matter of judgment (and libel laws), and we need to be clearer about which



segments of the criminal market we are referring to before we can be sure we are discussing the same thing when we use the term 'organised crime'. As for the future of organised crime prevention strategies, the Netherlands and the UK have been probably the highest profile countries to develop such an approach, but long-term rolling out and sustaining of such prevention strategies is about quality of implementation rather than just the presence or absence of a formal process. Moreover, it is important to consider carefully what we mean by 'prevention', since the review by Levi and Maguire (2004) found that in Europe, this can vary from normal law enforcement actions (arrests and seizures) to much wider ranging efforts to disrupt criminal markets and opportunities. Such efforts require periodic evaluation, and whether the broader approach takes off and 'works' may need to be reconsidered before the end of the next 25 years of HEUNI!

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# The Advantages and Pitfalls of International Co-operation in Law Enforcement

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## Introduction

The process of co-operation between law enforcement agencies is considered to be an integral element of post nine-eleven policing. The setting up of European Union wide law enforcement agencies, EUROPOL and FRONTEX for example, demonstrate the focus on building co-operative agreements between law enforcement agencies within and external to the European Union. For example, EUROPOL is defined as:

*“... the European Law Enforcement Organisation which aims at improving the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international organised crime.”*

(Europol 2006)

The concerns of EUROPOL are those issues upon which international co-operation is focused and resourced to address. At the inauguration of FRONTEX the EU commissioner responsible for Freedom and Security, Franco Frattini, defined the relevant threats in the following terms:

*“The spectre of international terrorism, the human tragedies of victims of trafficking and the equally sad and grave consequences of illegal immigration into the EU, are constant reminders that we need to do even more to combat the many and diverse threats facing this area. The European citizens rightly expect us to find efficient solutions to these security problems. But these solutions must always fully respect human rights and preserve the integrity of the common, free travel area provided by the Schengen cooperation.”*

(FRONTEX 2006)

The areas of concern for EUROPOL and FRONTEX provide the first area of co-operation in policing. This level can be defined as *cross-border co-operation in defining the problem*. The second level is one that has a focus on policy development and in some cases 'capacity building' in order to strengthen international responses to crime. The level of activity in this area is one that is concerned with harmonising legal and procedural processes, for example extradition; this area can be defined as *procedural forms of co-operation*. The final area of co-operation is varied but very much located at the level of law enforcement practice; that is how do practitioners exchange information and co-operate with each other across borders; this can be defined as '*practical co-operation*'. Each of these various forms of co-operation will be discussed. This paper will then address the issues and dilemmas in international co-operation and conclude with some policy recommendations in this area.

## Defining the problems

The process by which the areas of international co-operation are identified is a lengthy one and subject to a number of varied interpretations. For example in relation to the Estonian experience the definition of the problems that required international co-operation in law enforcement was different according to the perspective of the person defining the problem. In research conducted by Heberton and Spencer in the late 1990s (Heberton and Spencer 2001) it is apparent that the definition of the areas of co-operation are highly contested, especially when the process of co-operation is focused on the provision of assistance in law enforcement policy and practice. The process of the provision of assistance is an interactive one. Donor countries establish funding streams in order to initiate certain forms of co-operation and development in the recipient countries. The focus of these assistance programmes is usually enveloped in the language of 'democratic development'. In the early 1990s in relation to the Baltic States of the former Soviet Union a number of countries established programmes that were involved in the promotion of democratic processes and institutions and the building of capacity in the area of democratic procedures. So, for example Canada in the early 1990s established the 'International Centre for Human Rights and Democratic Development' and the European Union and Council of Europe established dedicated assistance funds for the promotion of democracy in the countries of the former Soviet Union. There were a large number of other countries also making assistance available under the banner of promoting democratic institutions (see Heberton and Spencer 2001).

The provision of assistance by the donors may not be unconditional and not as altruistic as is portrayed. There is a process by which the recipient country has to negotiate with donor countries to be viewed as eligible or deserving of assistance. This is the initial phase in the identifying and defining the problem. The recipient will, in most cases, be in the position of having little influence on how the problems are defined. So, the donor countries establish the ideological framework within which the problem and issues to be addressed are to be framed. Furthermore, the focus of the problems will be ones that have a direct connection to the problems identified within the donor country. So, in order to be seen as eligible for assistance the recipient country will have to agree to the range of problems identified by the donor country. The motivation for many donor countries in relation to assistance in relation to law enforcement is focused on the growth of 'transnational criminality' and its associated problems, especially those related to the undermining of 'legitimate' economic growth and activity. Therefore, many donor countries made assistance conditional on legislative developments in relation to transnational and cross-border crime and focused assistance programmes to tackle the issues of cross-border crime. In many respects this concentration on cross-border crime provided another layer of protection for the donor countries by allowing them access in terms of personnel to the new state's law enforcement structures and the provision of 'experts' from the donor country through co-operation agreements; this can be seen as a means for donors to extend their areas of influence and their mode of law enforcement practice.

The second area of concentration by donor countries was to encourage and assist new states to establish the 'rule of law'. This was viewed as crucial to democratic development, and because many new states were perceived as vulnerable to corrupt and illegal practices in law enforcement due to the 'weakness' of their law enforcement procedures and structures. Consequently, if effective, efficient and productive market economies were to be developed it was perceived that the rule of law and 'good governance' were pre-requisites. The donor countries had a number of interests in promoting this democratisation agenda; the protection of their own domestic interests in relation to combating different forms of cross-border crime, the development of effective and stable markets in the new states, and the development of the 'European Project' with the inclusion of the new states of the former Soviet Union. In relation to the donors the provision of assistance had to be constructed so that it met some if not all of the needs they identified in relation to either cross-border crime reduction, the reduction of criminal activities in their country or opportunities for the growth of their economies. These are all areas of negotiation between the donor and recipient country. However, it is not simply as easy as the recipient country agreeing to the conditions set out

by the donor. The donor also has to beware because there are problems and pitfalls in establishing relationships of co-operation.

It is clear that the recipient countries are in the main ones that the donor selects because of strategic reasons. These reasons may be related to a criminal justice strategy of crime reduction or combating cross-border and 'organised' crime. However, a recipient country presents the donor with a number of dilemmas and problems. First, to establish co-operation a high level of trust is required in order to share information and on occasions practical decision making. There has been evidence in many recipient countries of corruption within the criminal justice sector. Such corruption is more often than not systemic so that forming relationships of trust that are deep enough to allow for the sharing of intelligence is difficult. Heberton and Spencer summarise the problems associated with corruption and its effects very succinctly:

*"...in some cases, endemic corruption and mismanagement have sapped much investment in development, endangering the success of international assistance generally, including the provision of aid and economic opportunities. Thus, the selected focus of international cooperation on strengthening the economic and technical infrastructure of society, while ignoring law enforcement (police) functions, has proved too narrow in two respects: first, the increasing burden of crime control in the recipient countries detracts in general from the success of broader assistance. Secondly, crime, through corruption, has directly and indirectly siphoned off some of the development assistance."*

(Heberton and Spencer 2001, 2)

So, donors are faced with a number of problems in providing assistance and these are exacerbated if corruption is present throughout the political, economic and legal systems. Such systemic forms of corruption not only result in there being a loss of development assistance but, perhaps, more importantly there is no basis for trust relationships to develop between the parties. The failure by the recipient state to tackle corruption at all levels will usually result in the donor deciding that there is no benefit to be gained from the provision of assistance.

The second problem for the donor is that the provision of assistance is by no means a transparent process. For example; a donor country offers assistance in the area of money laundering. The donor country identifies this as an important area of assistance as there are concerns that the recipient country is being used to launder the proceeds of crime. The money laundering laws in the recipient country are either very vague or non-existent and so the donor decides to build capacity in this area of the criminal law and in relation to the practice of law enforcement officials. The donor country not only provides direct training courses but also study visits for law enforcement professional and policy makers from the

recipient country to the donor country. At a similar point in time another donor country identifies a problem with the regulation of the banking industry and the potential for money laundering. It offers assistance to the recipient country in forms of visits and training. The recipient country is in a position of being offered assistance from two different donor countries on essentially the same area of law enforcement practice. They accept both forms of assistance for a range of reasons; the recipients do not want to appear to be ungrateful to one donor, they want to establish and maintain contacts, there is a need to maintain and foster 'good relationships' and the recipient country can estimate the benefits from the assistance in financial terms. Both forms of assistance are accepted; however, it may be in the best interests of the recipient to not publicise the two forms of assistance as if each of the donors found out they may be concerned that their own influence has been diluted. Second, the donors may also wish to keep their assistance discreet and so appreciate the low profile of their assistance. From an arrangement such as this the recipient has a problem in that the assistance may well be delivered from two very different policing traditions and perspectives. For example, if one of the donor countries is North American and the other European there will be a difference in the legal structure, the methods of policing and even the underlying values of law enforcement.

So, defining the areas of assistance is fraught with difficulty, for the donor countries it is important to ensure that assistance delivered meets their needs as well as those of the recipient country. Consequently, the problems identified as requiring the provision of assistance may have an 'international' dimension, for example money laundering, cross-border crime, whereas the problems identified by the recipient have a domestic focus, youth crime, acquisitive crime or the rise in violent crime. Second, the donor country has to develop relationships of trust between individuals and at the institutional level. This is difficult if there is systemic corruption throughout the criminal justice system. It is difficult, if not impossible, to build trust relationships where the motivation and values of the law enforcement professional is called into question. Finally, the lack of transparency in relation to what assistance is being provided is also a hindrance to the development of trust relationships and for the recipient country can lead to confusion in the development of the most appropriate style of policing as the different forms of assistance bring with them different policing traditions and values.



## Procedural forms of international assistance

*“Without law enforcement and judicial cooperation that results in investigation, prosecutions, and crime prevention, international agreements lack meaning in practice. Therefore, it is the implementation of the agreements that is the real measure of success of international cooperation.”*

(Albanese 2005)

This form of co-operation is mainly concerned with ensuring a consistency of approach to defined areas of law enforcement. For example, the workshop organized by HEUNI at the recent Eleventh United Nations Congress on Crime Prevention and Criminal Justice focused on the issue of extradition (Aromaa and Viljanen 2005). This is an important area of international co-operation and there have been a number of international agreements and protocols in relation to extradition. However, these co-operative relationships are fraught with difficulties as well as positive aspects. In relation to the latter there are a number of benefits; first, working to internationally agreed protocols and procedures ensures a framework to ensure a consistency of approach to specific problems, for example extradition. Second, internationally agreed protocols and procedures can apply a subtle political pressure to those countries which may be more lax in meeting the conditions of the agreement or may not wish to implement it in its entirety. Thirdly, it provides an agreed set of working practices that enable practitioners to ensure ‘good practice’ and finally provides a series of formalised links between practitioners across borders; so there are a number of very real advantages to this form of international co-operation. This procedural level of international assistance is very different to the type of assistance that defines a series of problems and then provides assistance to aid ‘developing’ or ‘transitional’ states to tackle such problems. However, the procedural form of assistance is not without its difficulties.

First, it relies upon a commitment by the countries involved in being transparent and open, and in some cases may require legislative changes in order for the co-operation to be effective. This openness is not necessarily forthcoming especially in countries where there are high levels of corruption as the transparency may either threaten to expose the corrupt practices or disrupt them. Second, the need to develop systems and approaches to the area of co-operation may require investment in the countries’ infrastructure at a number of levels. For example, it may be necessary for investment in technological equipment and for developing and transitional countries such equipment can be expensive and will need to be prioritised above a number of domestic demands in health care and education for example. Politically, there may be very few visible benefits to co-operation and therefore it requires the richer countries to be supportive of the

infrastructure needs of developing and transitional states. Third, there will be a significant need in some countries for training. These needs may be various with the requirement to train law enforcement staff in the use of new technology and understanding how to analyse and use the data such equipment provides effectively. It may also be necessary to develop a 'culture' of co-operation; that is developing procedures and systems to aid co-operation and to encourage the sharing of relevant information. In many cases it is important that the formal procedures are adhered to by law enforcement personnel because to circumvent procedures can result in evidence being compromised or certain key actions not being undertaken at the correct stage of a process. Consequently, there are costs in terms of time and money associated to co-operation. There is a need to plan co-operation effectively in order to ensure that the systems and procedures are developed and allow for the training needs of law enforcement professionals to be met.

Forms of international co-operation are also vulnerable to the rapidly changing dynamics of crime. As forms of co-operation are agreed and implemented it may be that the criminal activity that the co-operation is designed to combat develops strategies that circumvent the agreements and processes implemented through international co-operation. In many situations international co-operation is a reactive form of law enforcement. International co-operation can only be seen to be proactive where it relies on legislation to proscribe certain activities. For example, extradition arrangements rely on international co-operation to ensure that the correct procedures are followed in extradition proceedings; however, what is required initially is for countries to put in place the legislative arrangements that permit extradition. The final problem, as identified by Albanese (2005), is that of too many procedures and protocols:

*"...too many global instruments might become burdensome or difficult to implement. Therefore, an approach to working agreements based on mutual interest by type of crime, or by region, appears to be the best approach."*

(Albanese 2005,7)

As forms of assistance develop so the international instruments required to make it work are also developed; however, as these begin to increase in number and complexity, it becomes more difficult for each country to meet all the requirements placed upon them. This is particularly so for developing and transitional states where the capacity required to meet the requirements of internationally agreed instruments may not exist due to changes in personnel and the need to recruit and educate the right people to do the job. As mentioned above the forms of co-operation required may also be a high priority for developed countries, for example a

tight framework for extradition, yet for developing and transitional states the maintenance of order may be a much higher priority. Once again we find ourselves having to address the thorny issue of defining the problem. It has to be noted that the definition of a problem of substance in one country may not be a problem of particular merit in another. For example, in the early 1990s in the Baltic States there was an emphasis on co-operation in relation to illicit drugs. This was because the Baltic States were seen as a corridor for the movement of drugs into the EU. However, for the Baltic States of Latvia, Estonia and Lithuania drugs were not a problem of significance; there was little disposable income and so there was no significant market for illicit drugs. So, the fact that Estonia, for example, might be a transit route was not a high priority for Estonian law enforcement as the drugs being moved could be argued have no significant effect on Estonian society whereas youth crime was viewed as a problem of significance (Hebenton and Spencer 2001).

Albanese (2005) is right to urge caution in developing procedures that become burdensome and overly bureaucratic; however, the strategy of working on ‘...agreements based on mutual interest by type of crime, or by region...’ is also bedeviled by the problem of agreeing what the mutual interest actually is and which is the region of most concern.

## Practical co-operation

Co-operation in law enforcement requires law enforcement practitioners to establish relationships of trust and mutual respect. These relationships are forged in a number of settings that include international conferences, exchanges between different countries, shared training programmes and the day to day working relationships that are based on favours and the sharing of information and intelligence. An example of such a form of co-operation is that of the Finnish PCB coop:

*“In Finland, a model referred to as Police-Customs-Border Guard-Cooperation (PCB-coop) was developed to meet the needs of improved authority cooperation within the country. This model was then extended to incorporate also the Russian counterparts who participate in regular cross-border meetings which amount annually to hundreds at local level, about 100 at regional level, and 2-4 at executive level.”*

(Spencer et al 2006)

The example above demonstrates that there are a number of ‘cross-border’ meetings; the most numerous of these are at the local level. These would essentially be small scale meetings only involving a few police officers and border guards from the different

countries. The official process of co-operation would be the exchange of information and agreement on certain forms of action in relation to specific cases. However, such forms of co-operation also establish working relationships which are based on a shared understanding of the task and a sense of being part of a wider law enforcement community. This sense of belonging to a wider law enforcement community is important to many practitioners. The idea of being accepted by the wider community confers status for individuals in relation to how they do the job. The concept that the day to day working methods can be shared is important in legitimating what is being done and at the same time being one of the means of acceptance into the wider law enforcement community.

While such day to day contacts, as described above, contribute to co-operation there are other forms of practical co-operation that are valued by practitioners. Research into international co-operation in the transitional Baltic States in the late 1990s (see Heberton and Spencer 2001) indicates that there are various forms of co-operation. First, the provision of training courses, such courses may be provided by a single country, for example Finland to Estonia. These courses establish links between the practitioners providing the training and the recipients. In the case of the driving skills course provided by Finland to the transitional Baltic States it was apparent that one of the objectives was to provide a 'European model of policing', so the donors recognised that the provision of courses in the spirit of co-operation provided opportunities to develop an overall policing culture that had similarities to their own. Co-operation provides the opportunity for the development of shared cultures in relation to law enforcement practice. The exchange of ideas between practitioners provides the opportunity for old practices to be challenged and new shared practices instigated. The sharing of a 'culture' or ethical approach to law enforcement can also result in a lower level of tolerance of corruption.

International co-operation at the practice level also brings with it a number of problematics. First, it requires an agreement at the practice level of who is doing what and this requires clear lines of accountability and responsibility. On paper this may appear relatively straightforward but as Albanese (2005) has noted there may be difficulties in relation to the standardisation of legislative frameworks. There is an additional problem of ensuring a continuity of practice; that is ensuring that law enforcement personnel in different countries undertake their tasks with a similar approach. This can be crucial in relation to evidence gathering for example or interrogation where evidence presented may be inadmissible in one jurisdiction and not in another. This indicates that there is a level of management above the working relationships forged at the practitioner level, and the Finnish PCB coop is an example of

placing a management layer on top of the practitioner co-operation meetings. Second, there is a need to develop policy frameworks to guide managers and practitioners. In some cases such developments are placed with an external agency in order to ensure that procedures are followed and to eliminate duplication. EUROPOL is an example of attempting to implement systems and aid communication. However, for many law enforcement officers systems appear to be a hindrance rather than an aid and so they will attempt to circumvent the systems in order to attain their goal. The usual reason given for such tactics is that the demands of law enforcement are ones that require quick reactions and the wider systems are usually unresponsive and by the time the requested information has been received the situation has developed and moved on. Consequently officers tend to rely on the informal contacts they have established to get the information or intelligence they need.

These individual relationships are both an asset and a potential problem. In many respects it is these personal contacts between law enforcement officers that allow for the sharing of information and intelligence. It is clear that these relationships are highly valued and are protected and respected; however, if international co-operation were to rely solely on such relationships then the development of formal procedures that allow all officers to engage in the information sharing process would be lost and so the system would become reliant on personal relationships of trust rather than integrity of the law enforcement institutions involved in the co-operation. It also provides the potential for the informal means of sharing to be less than complete, it might be that the law enforcement personnel do not have all the required information and, finally, such relationships may jeopardise an enquiry or the integrity of the evidence.

## Conclusion

International co-operation in law enforcement is viewed by all participants as a positive and necessary element of the law enforcement task (see for example Heberton and Spencer 2001, Aromaa and Viljanen 2005). In many respects the United Nations Congress on Crime Prevention and Criminal Justice which takes place every five years is where international agreements are made and the strategic frameworks required to implement international co-operation are put in place. However, this process is also highly problematic (see Spencer 2005) but for all of its potential problems it demonstrates the value attached to international law enforcement co-operative arrangements and relationships. At a more localised level recent work by Spencer *et al* (2006) demonstrates how countries involved in combating the illegal movement of people

develop co-operative relationships at the heart of their strategic responses:

*“There is some evidence that EUROPOL has been a successful agency in the countering of illegal immigration with shared operations and the apprehension of organised crime members involved in facilitation. The setting up of FRONTEX, similar to the Finnish model of “PCB-coop” indicates a development in the EU strategy to protect borders by collaboration with external countries.”*  
(Spencer et al 2006, 14)

However, all of the various forms of co-operation come with associated costs. In relation to co-operation and the provision of assistance there are difficulties with defining the problems to be addressed and issues of how recipient countries can prioritise the needs for legislative change and a shift of focus from the domestic agenda to the international agenda when domestic issues appear most pressing and there is a scarcity of resources, both staff and finances.

The forms of assistance that are based on procedural issues also have issues of defining the problem and the ordering of priorities and furthermore there are issues of ensuring that the development of strategic co-operation between countries does not result in the burden of bureaucracy which only results in practitioners attempting to circumvent the demands of systems and protocols. The form of co-operation at the local level also requires monitoring to ensure that practitioners practice effectively. Whilst positive individual relationships oil the wheels of co-operation they may also short cut the processes that are there to ensure a full search of available databases is undertaken. However, the over formalisation of co-operation results in higher levels of scepticism in relation to issues of trust between parties and so a tendency to guard and protect information.

In 2001 Heberton and Spencer (2001) set out a model for the provision of international assistance, and it is appropriate some five years later to see such a model having an application in the field of co-operation. It is important that when international co-operation is established between a number of partners there is a bringing together of relevant professionals to define the terms and boundaries of the proposed co-operation. This should also include an audit of the costs and benefits of co-operation to each of the parties. This would take account of the legislative requirements and also the difficulties in developing standardised forms of procedures and practices (Albanese 2005). This process of consultation would also define the *dynamics and territory* (Heberton and Spencer 2001) of the proposed co-operation and would establish the co-operative relationship on a firm basis. Second, it is necessary to include professionals at all levels as they are keepers of different types of knowledge; practitioners may have an intimate knowledge

of what is happening on the ground whereas managers understand the broader policy context and the constraints placed upon the co-operative relationships. Failure to include all parties will ultimately result in a breakdown of the system of co-operation and in communication. It is also important to establish clear methods of implementation. All parties will need to know what has to be done and what the timescale is to achieve the framework for the co-operative relationship. This should provide a clear set of aims for the co-operative relationships and it is against these that the relationship should be evaluated. Many law enforcement professionals are adamant that these co-operative relationships work but rarely is there any independent evaluation of such forms of co-operation.

The concept of co-operation appears to be a good one, yet this paper has indicated that to make it work requires commitment from the parties involved, transparency to ensure best practice and an acknowledgment that unless the problems and pitfalls are recognised the ideal of co-operation will probably not be achieved.

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# The ICVS and Beyond: Developing a Comprehensive Set of Crime Indicators

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## The international crime victims survey

One of the most important and most frequently cited shortcomings of the UN Crime Survey is that figures of crimes recorded by the police cannot be reliably used as a measure of the level of crime, especially not for comparative purposes across countries (Newman, 1999). Rates of crimes recorded in police administrations are determined by domestic criminal legislation, public reporting of crimes and the capacity and willingness of the police to officially recognize such reports. As a general rule, rates of crimes recorded per 100 000 inhabitants tend to be higher in the more affluent countries, e.g. Sweden and Denmark. These rates do not reflect the volume of crime as experienced by the public. They should rather be seen as indicators of the effectiveness of law enforcement rather than of levels of crime.

Over the past three decades more and more countries have started to conduct sample surveys among the general population on experiences with crime as an alternative source of information about crime to what the police themselves record. Such victimization surveys provide important additional information on crime as experienced by the public, rates of reporting crimes to the police, experiences of victims with the police, fear of crime and the use of crime prevention measures. If the research methodology used is standardised, the surveys also offer a new opportunity for the collection of crime statistics, which can be used for comparative purposes (Alvazzi del Frate, Zvekic, van Dijk, 1993).

In 1987 the initiative was taken by a group of European criminologists chaired by the author to launch a fully standardized survey, called the International Crime Victims Survey. In 1989 the first ICVS was carried out in thirteen countries, mainly from Western Europe and North America (van Dijk, Mayhew, Killias, 1990). At the UN Crime Congress in Cuba in 1990, staff members of UNICRI proposed expansion of the survey to developing countries through a series of pilot studies in capital cities across the world. In collaboration with UNICRI, the ICVS was conducted in capital cities of ten or more developing countries in 1992 (Zvekic, Alvazzi del Frate, 1995). The subsequent sweeps of 1996 and



2000 were executed in a selection of countries from all world regions (Alvazzi del Frate, Hatalak, Zvekic, 2000). Execution in developing countries was promoted by UNICRI through a system of grants and the provision of technical assistance. Most of this pioneering work was funded by the Dutch Ministries of Justice and of Development Aid.

The fifth survey was carried out in 2005 in forty countries, including Argentina, Brazil, Mexico, Peru, South Africa, Mozambique, Cambodia and Hong Kong. Altogether surveys have been carried out in around 30 industrialized countries and in 50 cities in developing countries and countries in transition (van Kesteren, Mayhew, and Nieuwbeerta 2000; van Dijk, 2006). Over 300,000 citizens have to date been interviewed in the course of the ICVS. This process has resulted in a body of victim survey data across a variety of countries, unmatched by any other criminological data set (Kury, 2001). All historical data sets of the ICVS can be consulted at the websites of UNICRI and of Gallup/Europe ([www.unicri.it](http://www.unicri.it); [gallup-europe.be/EUICS](http://gallup-europe.be/EUICS)).

The results of the ICVS have been published in several monographs. Key results were also included in the UN's Global Report on Crime and Criminal Justice of 2000 (Newman, 1999). In the secondary analyses of European and North American data carried out by HEUNI composite indices were used which combine police data with results of the ICVS (Kangaspunta, Joutsen, Ollus, 1998; Aromaa, 2003).

In April 2005 UNODC and UNICRI presented a joint working paper for the UN Crime Congress in Bangkok on Trends in Crime and Justice. This report, subtitled Work in Progress, combined results of the UN Crime Survey with those of the ICVS. In addition new data were presented on non-conventional types of crime such as corruption and organized crime drawn from surveys among business executives about perceived risks for their companies. The report was subsequently also distributed among attendants of the 14<sup>th</sup> Crime Commission in Vienna in 2005. An extended and revised version was later prepared by van Dijk (2006; forthcoming). This paper will highlight some of the key results.

## Levels of volume crime

The ICVS interviews samples of households about their recent experiences with the most frequently occurring types of conventional crime (volume crime). National samples include at least 2,000 respondents who are generally interviewed with the CATI (Computer Assisted Telephone Interview) technique. In the countries where this method is not applicable because of insufficient distribution of telephones, face-to-face interviews are

conducted in the main cities, generally with samples of 1,000-1,500 respondents<sup>1</sup>.

The ICVS provides an overall measure of victimisation in the previous year by any of the eleven “conventional” crimes included in the questionnaire. Among the eleven “conventional” crimes, some are “household crimes”, i.e. those which can be seen as affecting the household at large, and respondents report on all incidents known to them. A first group of crimes deals with the vehicles owned by the respondent or his/her household: A second group refers to break and enter (burglaries): and a third group of crimes refers to victimization experienced by the respondent personally, including robbery, pickpocketing, assault and sexual offences.

The results of the ICVS 1996 and 2000 show that on average 31% of citizens living in urban areas suffered at least one form of victimization over the twelve months preceding the interview. Victimization rates are highest for city dwellers in Latin America (39%) and Africa (36%). Victimization rates are moderately high in Oceania (Australia only) and Western and Central Europe. Victimization rates below the global average are found in North America, Eastern Europe and Asia.

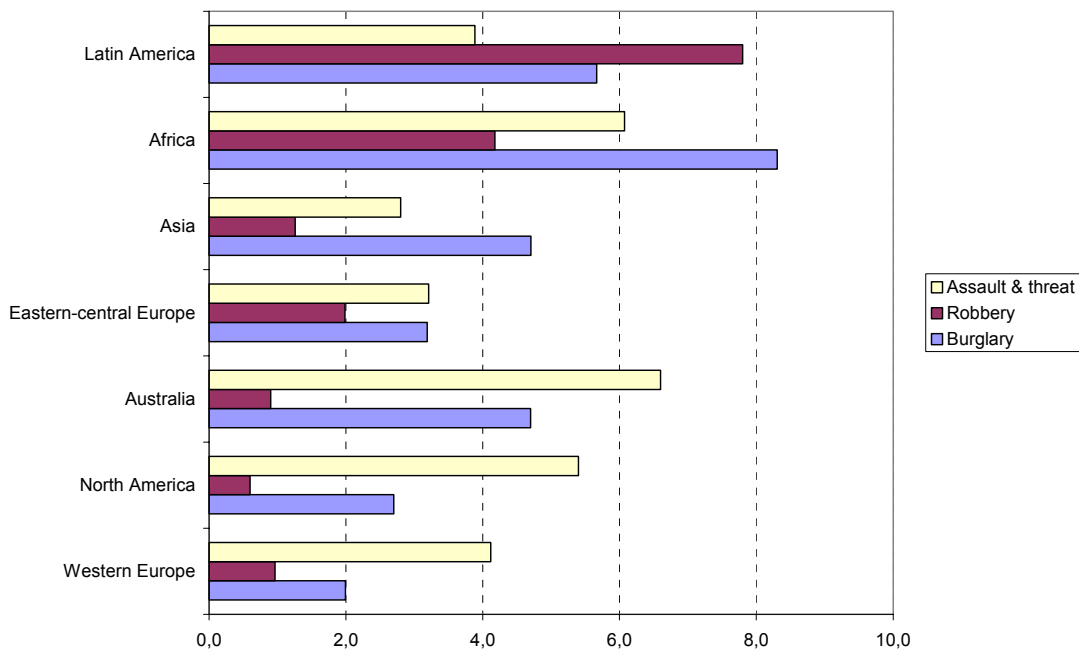
It is noteworthy that the variation in regional rates does not fully conform to the commonly held notion that levels of crime are driven by poverty. The low crime rate of Asia is clearly at odds with this notion. The rate of the Eastern European countries below that of Central and Western Europe also belies easy generalizations about the relationships between poverty and crime.

**Figure 1** shows the regional distribution of one year victimisation rates for burglaries, robberies and assaults and threats as observed in the ICVS. The ICVS defines burglary as house-breaking for purposes of theft. Robbery is defined as theft from the person by use of force, thus involving direct contact between victim and offender (“contact” crime). Rates for all types of crimes refer to percentages of persons victimized at least once by such crime in the course of the last year.

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<sup>1</sup> The cost of data collection was much reduced by the use of random digit dialling and CATI techniques. In recent years the increase of the proportion of mobile only users in several countries has raised concerns about the representativeness of samples limited to landline phone numbers. Results of pilot studies conducted in the framework of the ICVS and elsewhere suggest that mobile only users differ in many respects from the general population but not necessarily to the extent that results of crime victimisation surveys cannot be reliably approached through sophisticated reweighting of landline based data.

**Figure 1** – Victimization rates by burglary, robbery and assault/threat in the course of one year (percentages of persons victimized during last year)



The differences among the regions were larger for the two crimes involving property, which were by far the highest in Africa and Latin America. Burglary in Africa was four times more frequent than in Western Europe. Robbery in Latin America was eight times higher than in Western Europe, North America and Australia. Contrary to a common perception, rates of burglary as well as of robbery and assault/threats are not higher in the USA than in most parts of Western Europe. In fact USA rates are significantly lower than those of, for example, England and Wales and The Netherlands (van Kesteren et al., 2002).

The data in respect of robbery confirm the validity of the concern about urban violence in several main cities in Latin America and Africa, including in some of the newly established democracies such as South Africa (Shaw, van Dijk, Rhomberg, 2003).

The crime category of assault and threat is defined in the ICVS as personal attacks or threats, either by a stranger or a relative or friend, without the purpose of stealing. It is another “contact” crime and although physical consequences may be minor in most cases, it may well have important emotional repercussions for victims. Assaults on women are more likely to be domestic in nature than assaults on men. In a third of the cases of violence against women, the offender was known at least by name to the victim. In one of five of the cases the crime was committed in the victim’s own house. The level of violence against women is inversely related to the position of women in society, with developing countries showing much higher rates (Alvazzi del Frate, Patrignani, 1995).

**Table 1** shows the ranking of countries on the basis of one-year overall victimization rates, based on results of ICVS surveys carried out in the period 1996-2000. For a few countries which did not participate in these two rounds of the ICVS, rates from the 1992 survey were added (their country names are printed in italics).

In interpreting country rates, it must be borne in mind that they are based on relatively small samples with an average size of 1,000 respondents. The actual rates among the population may deviate from the ones given here. As a general rule there is a less than 10 % chance that the overall victimization rates of the population deviate more than three percent points from the rates of the samples. Individual country rates, then, cannot be seen as exactly right but certainly provide a reliable indicator of which countries have relatively high, moderately high, or relatively low rates of victimization.

**Table 1** World ranking of countries according to victimization of public by any crime in the course of one year rank number and percentage victims per year (source : ICVS 1996-2000 mainly)

Fifteen countries with highest rates

|          |            |        |           |            |        |           |                 |        |
|----------|------------|--------|-----------|------------|--------|-----------|-----------------|--------|
| <b>1</b> | Colombia   | 50.7 % | <b>6</b>  | Mongolia   | 41.8 % | <b>11</b> | <i>Tanzania</i> | 37.6 % |
| <b>2</b> | Brazil     | 48.1 % | <b>7</b>  | Cambodia   | 41.5 % | <b>12</b> | Uganda          | 37.3 % |
| <b>3</b> | Zimbabwe   | 47.5 % | <b>8</b>  | Estonia    | 41.2 % | <b>13</b> | Namibia         | 36.4 % |
| <b>4</b> | Costa Rica | 45.5 % | <b>9</b>  | Bolivia    | 40.1 % | <b>14</b> | South Africa    | 36.4 % |
| <b>5</b> | Swaziland  | 44.6 % | <b>10</b> | Mozambique | 38.0 % | <b>15</b> | Paraguay        | 36.3 % |

Selected countries with medium high rates

|           |              |        |           |               |        |           |                |        |
|-----------|--------------|--------|-----------|---------------|--------|-----------|----------------|--------|
| <b>20</b> | France       | 34.5 % | <b>29</b> | Australia     | 32.1 % | <b>38</b> | Sweden         | 30.4 % |
| <b>21</b> | UK           | 34.4 % | <b>31</b> | Poland        | 31.7 % | <b>39</b> | Netherlands    | 30.3 % |
| <b>23</b> | Argentina    | 33.7 % | <b>33</b> | <i>Italy</i>  | 31.4 % | <b>40</b> | <i>Germany</i> | 29.3 % |
| <b>24</b> | <i>Spain</i> | 33.1 % | <b>36</b> | United States | 30.7 % | <b>48</b> | Canada         | 26.9 % |
| <b>27</b> | Nigeria      | 32.2 % | <b>37</b> | India         | 30.5 % | <b>51</b> | Russian Fed    | 26.3 % |

Fifteen countries with the lowest rates

|           |             |        |           |               |        |           |               |        |
|-----------|-------------|--------|-----------|---------------|--------|-----------|---------------|--------|
| <b>52</b> | Romania     | 24.5 % | <b>57</b> | Macedonia FYR | 21.6 % | <b>62</b> | <i>Norway</i> | 16.4 % |
| <b>53</b> | Belarus     | 23.6 % | <b>58</b> | <i>China</i>  | 21.6 % | <b>62</b> | Japan         | 15.3 % |
| <b>54</b> | Georgia     | 23.5 % | <b>59</b> | Indonesia     | 21.4 % | <b>63</b> | Croatia       | 14.3 % |
| <b>55</b> | Malta       | 23.3 % | <b>60</b> | Korea, Rep.   | 20.9 % | <b>64</b> | Philippines   | 9.1 %  |
| <b>56</b> | Switzerland | 22.6 % | <b>61</b> | Panama        | 20.3 % | <b>65</b> | Azerbaijan    | 8.3 %  |

*Rates of countries in italics based on ICVS 1992*

The countries with the highest prevalence rates for conventional crime are mainly from Latin America or sub-Saharan Africa, with the exception of Mongolia, Cambodia and Estonia. A high prevalence rate was also found in Papua New Guinea (not included).

Countries of Europe and North America are almost without exception situated in the middle category. Contrary to common perception, overall rates of volume crime – such as burglary, robbery and assault/threats– are not higher in the USA than in most parts of Western Europe. In fact USA rates are significantly lower than those of, for example, England and Wales and France (see also van Kesteren, Mayhew, Nieuwbeerta, 2000). The overall rate of Canada is somewhat below the mean of the European Union and that of the United States of America.

Countries with the lowest rates form a fairly mixed group with a strong representation of Eastern European and of both affluent Asian countries (Japan, South Korea), middle-income ones (China) and poor ones (Philippines, Indonesia). Switzerland, although less so than in the first round of the ICVS, is still qualified as one of the countries with the safest cities in Western Europe.

The preliminary results of the ICVS 2005 allow a comparison of the 2004/2005 rates with rates recorded in previous rounds of the ICVS for some developed countries (EU countries, Australia, Canada and the USA). Available trend data point to a continued downward trend in victimization by common crime across these developed countries since 2000 (van Dijk, Manchin, van Kesteren, 2006).

## Homicide rates

For obvious reasons, data on completed homicide are not available through victim surveys. Fortunately homicide represents one of the few types of crime for which data from police and health administrations are available which can be used for tentative comparisons at the international level. This is due to a relatively uniform definition and to relatively high reporting and recording rates across all countries (Zimring, Hawkins, 1997). As pointed out by Altbeker (2005) police recorded homicide rates to some extent suffer from the same flaws of underreporting and poor recording as other police recorded crime statistics. In countries where security forces are among the main perpetrators of violent crimes reporting will be low. In many developing countries administrative systems and communication infrastructures of police services preclude proper recording of even the most serious types of crime.

Statistics on police-recorded homicides are recorded through the United Nations Crime Survey, the latest covering 2000 up to 2002. The other main source of information are the health statistics collected by the World Health Organization through hospital surveys (WHO, 2002). The WHO statistics reflect the views of medical doctors on the causes of death of hospitalized patients and are independent from police administrations. Comparisons of the

country rates according to the UN Surveys and the WHO revealed a reasonable degree of agreement (Rubin, Walker, 2004).

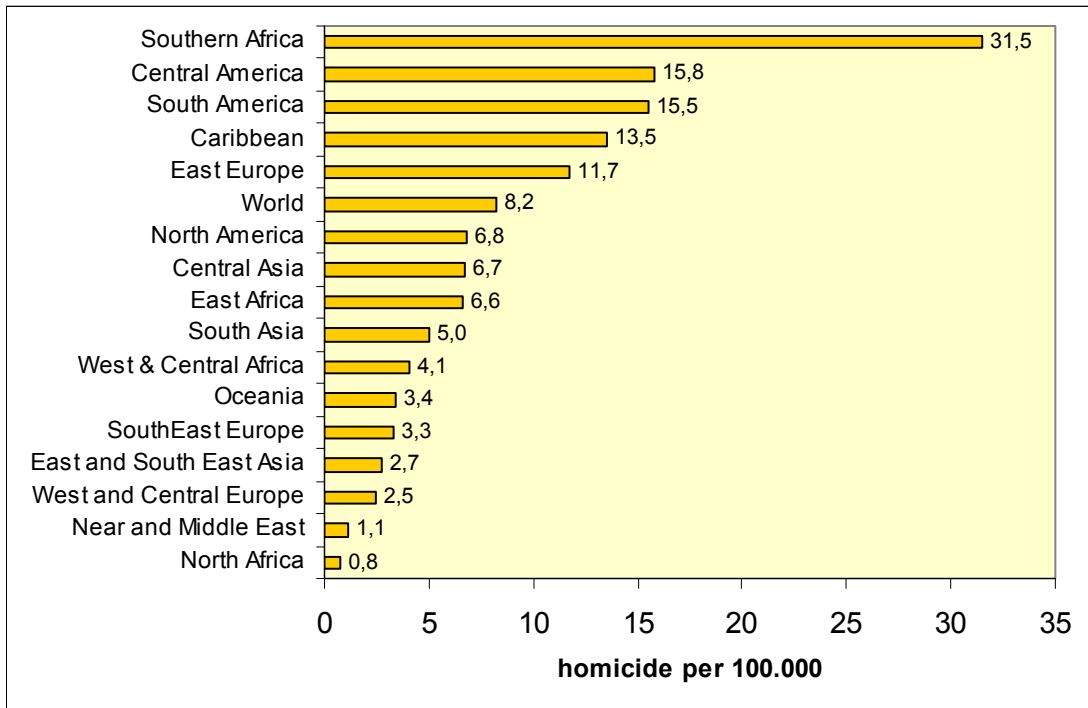
However, an analysis of rates over a 16-year period, showed WHO rates to be on average 15 percent higher (Shaw, van Dijk Rhomberg, 2003). The explanation for this higher count of the WHO might be that hospitals classify as homicides cases of assault resulting in death - whereby the perpetrator did not intend to apply lethal force. Further analysis revealed that the higher counts of WHO do not occur in developed countries. The discrepancies are limited to middle-income countries (WHO 19 % higher) and developing countries (WHO 45 % higher). The latter finding suggests that the main reason for the differences is that in developing countries even for as serious a crime as homicide a significant proportion of crimes committed is never reported to the police or never recorded.

The United Nations surveys show a global average of 7 homicides per 100,000 inhabitants per year in recent years. The WHO counted for the year 2000 over half a million homicide-related deaths or 8.8 per 100,000. Males account for 77% of all homicides and have rates that are three times those of females (13.6 and 4 respectively). The highest rates are found among males aged 15-29 years (19.4 per 100.000).

For the purpose of this publication, the latest available national homicide rates were taken from the sixth, seventh and eighth UN surveys, covering the period 1990 to 2002 (most rates relate to 1998 to 2002). To increase coverage of countries, data were added from the WHO dataset for twelve countries not participating in any of the UN surveys. In the cases where these were rates of middle income and developing countries, statistical adjustments were made to achieve better comparability with the UN rates. Through this procedure homicide rates could be calculated for 111 countries.

**Figure 2** shows regional rates for completed homicides.

**Figure 2** Homicides per 100,000 population in 2002 or latest year available, per world subregion; sources: UN, WHO.



Homicide rates are highest in Southern Africa, which in this respect is in a category of its own with rates above 30 per 100,000 population or three times the world average.

Southern Africa is followed by Central America, South America, the Caribbean and Eastern Europe, while other regions show much lower rates.

The lowest levels reported were in North Africa, Middle-East/South-West Asia, West and Central Europe and East and South East Asia. Homicide rates in North Africa appear to be the lowest on earth with many countries maintaining rates below 1 per 100,000 inhabitants (see for details below). Apart from North Africa, such low rates can only be found in some parts of Western Europe.

The differences between different parts of the Western world are particularly noteworthy. North America, here represented by the USA and Canada, stands out with higher rates than both Western Europe and Oceania (Australia and New Zealand). In terms of homicides Canada is more similar to Western Europe than to its southern neighbours. If Mexico were included in the rates for North America the regional rate would be even higher.

Eastern Europe contrasts starkly with Western Europe, with countries such as Russia (19,8) showing extremely high rates. High homicide rates in the former Soviet countries have also been observed in previous statistical overviews (Aromaa et al., 2003).

Previous analyses of data from Europe and North America have shown that the levels of various forms of violence are correlated, although not strongly (van Dijk, 1999). The high homicide rates observed in (sub-Saharan) Africa and the Americas are accompanied by high levels of robberies, assaults and sexual assaults (see hereunder).

## National homicide rates

Country rates for homicides are collected through the UN survey, supplemented by data from the WHO report on Health and Violence (WHO, 2002). **Table 2** shows results.

**Table 2** World ranking of countries according to rates of homicide per 100,000 population in 2002 or latest available year (110 countries); sources: UN and WHO

### *Fifteen countries with highest homicide rates:*

|   |               |      |    |              |      |    |            |      |
|---|---------------|------|----|--------------|------|----|------------|------|
| 1 | Swaziland     | 88.6 | 6  | El Salvador  | 31.5 | 11 | Bahamas    | 14.9 |
| 2 | Colombia      | 62.7 | 7  | Guatemala    | 25.5 | 12 | Kazakhstan | 14.5 |
| 3 | South Africa  | 47.5 | 8  | Puerto Rico  | 20.6 | 13 | Mexico     | 13.0 |
| 4 | Jamaica       | 33.7 | 9  | Russian Fed. | 19.8 | 14 | Ecuador    | 13.0 |
| 5 | Venezuela, RB | 33.1 | 10 | Brazil       | 19.5 | 15 | Paraguay   | 12.0 |

### Selected countries with medium high homicide rates

|    |               |      |    |                |     |    |             |     |
|----|---------------|------|----|----------------|-----|----|-------------|-----|
| 16 | Estonia       | 10.4 | 56 | Turkey         | 3.3 | 80 | Canada      | 1.7 |
| 26 | Thailand      | 8.5  | 56 | Switzerland    | 2.9 | 89 | Italy       | 1.1 |
| 44 | United States | 5.6  | 59 | Australia      | 2.8 | 90 | Germany     | 1.1 |
| 46 | Cuba          | 5.3  | 67 | Sweden         | 2.5 | 92 | Indonesia   | 1.0 |
| 53 | India         | 3.7  | 73 | United Kingdom | 2.0 | 96 | Netherlands | 1.0 |

### Fifteen countries with lowest homicide rates

|     |              |     |     |           |     |     |         |     |
|-----|--------------|-----|-----|-----------|-----|-----|---------|-----|
| 97  | Bahrain      | 1.0 | 102 | Austria   | 0.8 | 107 | Israel  | 0.5 |
| 98  | Jordan       | 1.0 | 103 | Greece    | 0.8 | 108 | Morocco | 0.5 |
| 99  | Saudi Arabia | 0.9 | 104 | Oman      | 0.6 | 109 | Cyprus  | 0.3 |
| 100 | Singapore    | 0.9 | 105 | Hong Kong | 0.6 | 110 | Myanmar | 0.2 |
| 101 | Luxembourg   | 0.9 | 106 | Japan     | 0.5 | 111 |         |     |

Source:

Black= UN Survey on Crime Trends and the Operation of Criminal Justice Systems, 8<sup>th</sup> survey, 2002 data

Blue= UN Survey on Crime Trends and the Operation of Criminal Justice Systems, 7<sup>th</sup> survey, 2000/1999 data

Red= UN Survey on Crime Trends and the Operation of Criminal Justice Systems, 6<sup>th</sup> survey, 1997 data

Green= WHO data from World Report on Violence and Health 2002<sup>2</sup>.

<sup>2</sup> In middle and low income countries the data show significantly more cases of homicide than the UN Crime Surveys, 18 and 45 percent respectively. (See: Shaw,



## Diagnosing organised crime with the use of statistical “markers”

According to common definitions of organized crime in criminological literature (Kenney, Finckenauer, 1995; Levi, 2002) defining traits of organized crime are the use of extreme violence, corruption of public officials, including law enforcement and judicial officers, penetration of the legitimate economy (eg through money-laundering) and interference in the political process. These elements are not only incorporated in national anti-mafia laws in some countries, including the USA and Italy (Fijnaut, Paoli, 2004) but also used as operational definitions by the European police community through the so called Falcone checklist (Levi, 2002).

If comparing official police-based information on garden variety crimes as burglary or street robbery seems no longer feasible, there is little hope for optimism regarding the comparison of police-based information on more complex crimes. At the global level it is to be expected that the number of police-recorded cases of organized crime correlates *inversely* with the seriousness of the problem. Where organized crime rules, few of such cases will ever be investigated, let alone brought before a court. Statistics on drug seizures can illustrate the point. Seizures of drugs by police or custom authorities of a country are likely to reflect law enforcement priorities and professional capacities rather than the global flow of drugs. In the field of complex crimes, statistics of police-recorded or court-recorded crimes are a source of misinformation.

As discussed above, the level of conventional crime can be successfully estimated through the administering of standardized victimization surveys among the public or samples of business executives. Through direct contacting of key groups of the public, bypassing the domestic legal institutions, at least some of the methodological problems can be avoided. There seems to be no a priori reason why the same approach could not be followed to estimate the extent of organized crime in a country, for example by interviewing business executives, the key target group of racketeering and extortion, one of the most important manifestations of local organized crime in many countries.

Since 1997 the World Economic Forum has carried out surveys among CEO's of larger companies to identify obstacles to businesses in an increasing number of countries, reaching a total of 102 in 2003. From the onset, one of the questions in these 'executives opinion surveys' asked about the prevalence in the country of '*mafia-oriented racketeering, extortion (imposes or not serious costs on businesses)*'.

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M., van Dijk, J. and Rhomberg, W., 2003). Therefore these data have been adjusted in order to match the UN data.

An analysis was conducted of the patterns of answers given to this question on perceived mafia prevalence from the seven annual rounds of WEF surveys conducted since 1997. To further reduce sampling error, the scores of the surveys were averaged. The resulting mean scores are based on sample sizes of 500 and over. They reflect the perceived prevalence of organized crime in the period 1997 to 2003 according to business executives.

In order to facilitate further statistical exploration, a composite index was constructed based on the averaged rankings of countries on the WEF surveys of 1997 to 2003 and the assessments of organized crime prevalence of an international risk assessment group (MIG), covering a total of 156 countries.<sup>3</sup> This so called Organized Crime Perception Index (OCPI) refers to the level of different types of organized crime activities such as extortion and drugs, arms and people trafficking as perceived by potential victim groups and experts. The widespread perception among key persons that such activities are rampant in a country provides by itself no proof that this is actually the case, but it provides ground for further enquiries. It can be regarded as a statistical “marker” of organised crime presence.

As mentioned above, instrumental violence, corruption of public officials and money-laundering are regarded as universal secondary characteristics of organized crime. It is hard to imagine a high level of organized crime in a country without a significant amount of these three systemic mafia-related phenomena. Lethal violence, for example, is not by itself a unique characteristic of organized crime. Nor is the absence of such violence hard evidence that organized crime is non-existent on the territory. However, a high prevalence of ‘killings’ in a country can be used as a ‘marker’ of mafia-type criminal activity. Where homicide rates are high, organised crime activity is likely to be significant and vice versa.

Statistical indicators were selected for the prevalence of each of these three defining systemic characteristics or “markers” of organized crime activity in countries: instrumental violence, high-level corruption and money-laundering. In an attempt to develop a proxy measure of ‘mob-related violence’, rates were calculated of the number of police-recorded homicides per country minus the number of convictions for homicide. Both types of data were drawn from the latest UN crime and criminal justice surveys. The resulting rate of ‘unsolved homicides’ was used as proxy indicator of ‘mob-related homicide’. Similarly a proxy indicator of ‘high level corruption’ was derived from studies of the World Bank Institute. Indicators of money-laundering and the extent of the black economy were taken from the World Economic Forum reports.

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<sup>3</sup> For an explanation of the methodology of the index, please consult Kangaspunta, Joutsen and Ollus (1998) or van Dijk (2006).

The strong statistical relationships between the organized crime perception index and four other indicators of secondary manifestations of organized crime activity justify the construction of a composite organized crime index combining the five interrelated indicators. An important strategic advantage of the composite index is the incorporation of at least one *objective* measure of organized crime activity, the rate of unsolved homicides according to official administrations. Scores on this composite index cannot be dismissed by governments as being based on 'just perceptions'. The scores are corroborated by the official 'dead body counts' of their own police authorities as reported to the United Nations through the Crime Survey.

**Table 2** depicts the regional distribution on the Composite Organized Crime Index, based on data from world regions. For diagnostic purposes, the table presents both the exact scores and rank number on the composite index and the rank numbers for the five source indicators used.

| <b>Table 2 Regional mean scores on composite organized crime index (COCI) and data on source indicators: perceived organized crime prevalence, grand corruption, money-laundering, extent of shadow economy and the rates of unsolved murders per 100,000 population</b> |  |                                   |                        |                           |                              |                         |
|--|--|-----------------------------------|------------------------|---------------------------|------------------------------|-------------------------|
|  | Average of the composite organized crime index | Organized crime perception (rank) | Informal sector (rank) | Unsolved homicides (rank) | high level corruption (rank) | money laundering (rank) |
| Oceania  | <b>33</b>                                      | 1                                 | 1                      | 1                         | 2                            | 1                       |
| West and Central Europe  | <b>35</b>                                      | 2                                 | 2                      | 2                         | 4                            | 3                       |
| North America  | <b>44</b>                                      | 4                                 | 4                      | 4                         | 6                            | 4                       |
| East and South East Asia   | <b>45</b>                                      | 5                                 | 3                      | 7                         | 3                            | 6                       |
| Central America  | <b>50</b>                                      | 4                                 | 13                     | 3                         | 8                            | 13                      |
| Near and Middle East   | <b>50</b>                                      | 7                                 | 6                      | 11                        | 1                            | 2                       |
| <b>World</b>   | <b>54</b>                                      |                                   |                        |                           |                              |                         |
| South Asia   | <b>54</b>                                      | 14                                | 8                      | 8                         | 7                            | 11                      |
| North Africa   | <b>55</b>                                      | 6                                 | 5                      | 6                         |                              | 5                       |
| East Africa  | <b>55</b>                                      | 12                                | 9                      |                           | 11                           | 9                       |
| Southern Africa  | <b>56</b>                                      | 10                                | 12                     | 5                         | 12                           | 10                      |
| South America  | <b>58</b>                                      | 11                                | 14                     | 10                        | 13                           | 12                      |
| SouthEast Europe   | <b>58</b>                                      | 15                                | 10                     | 12                        | 9                            | 14                      |
| West & Central Africa  | <b>60</b>                                      | 13                                | 11                     | 15                        | 5                            | 8                       |
| East Europe  | <b>70</b>                                      | 17                                | 16                     | 14                        | 14                           | 16                      |
| Central Asia and Transcaucasian  | <b>70</b>                                      | 16                                |                        | 13                        | 15                           |                         |
| Caribbean  | <b>70</b>                                      | 9                                 | 15                     |                           | 16                           | 15                      |

The regional scores and rank numbers of the composite index and those on its five constituting indicators show a high degree of consistency. Deviations from the overall pattern are relatively high rank numbers on informal sector and money-laundering of the low crime region of Central America. Among the high crime regions, West and Central Africa shows a relatively low rank number on homicides. This result could point to a shortcoming in the available statistics - homicide statistics for Nigeria are for example missing - or to the different nature of organized crime in the region. Such blatant deviations at any rate suggest the need of focussed further research.

### Country scores

The combination of data from different sources allows the calculation of scores for a large number of countries (see **table 3**). To facilitate assessments of the organized crime situation of countries both the absolute scores and rank numbers on the Composite Organized Crime Index and the rank numbers for each of the constituting indicators/markers are included. The rank numbers for different indicators are mostly in the same range as the COCI rank but many deviations can be found. Deviations of single indicators from the COCI rank can point to specific features of organized crime in the country or to deficiencies in some of the measures<sup>4</sup>. In both cases further research is indicated. In some cases the diagnosis can only be very tentative due to lack of sufficient information on the source indicators. At this stage of development, the utility of the index lies in the possibility to carry out analyses of the macro correlates of organized crime rather than in the benchmarking of individual countries (van Dijk, 2006).

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<sup>4</sup> It should also be noted that the total number of observations for indicators is somewhat smaller than for the COCI index. Especially the number of observations for unsolved homicides is available for significantly fewer countries (62). The formula used to calculate the index takes this into account.

**Table 3** World ranking of countries according to scores on the Composite Organized Crime Index and source indicators (156 countries)<sup>5</sup>

Fifteen countries with the highest scores

| Country      | Composite organized crime index | COCI rank | Organized crime perception index rank | Informal sector rank | High level corruption rank | Unsolved homicide rank | Money laundering rank |
|--------------|---------------------------------|-----------|---------------------------------------|----------------------|----------------------------|------------------------|-----------------------|
| Haiti        | <b>100.00</b>                   | 1         |                                       | 1                    |                            |                        | 10                    |
| Paraguay     | <b>95.74</b>                    | 2         | 20                                    | 2                    |                            |                        | 4                     |
| Albania      | <b>93.90</b>                    | 3         | 1                                     |                      | 19                         | 2                      |                       |
| Nigeria      | <b>91.93</b>                    | 4         | 7                                     | 7                    | 4                          |                        | 11                    |
| Guatemala    | <b>91.57</b>                    | 5         | 21                                    | 10                   |                            |                        | 1                     |
| Venezuela    | <b>89.57</b>                    | 6         | 6                                     | 8                    | 12                         |                        | 7                     |
| Russian Fed. | <b>88.20</b>                    | 7         | 14                                    | 17                   | 3                          | 4                      | 16                    |
| Angola       | <b>87.90</b>                    | 8         | 25                                    | 4                    |                            |                        | 9                     |
| Ukraine      | <b>87.40</b>                    | 9         | 9                                     | 6                    | 2                          | 16                     | 2                     |
| Colombia     | <b>86.81</b>                    | 10        | 3                                     | 41                   | 26                         | 1                      | 5                     |
| Mozambique   | <b>86.54</b>                    | 11        | 42                                    | 5                    |                            |                        | 3                     |
| Bangladesh   | <b>84.69</b>                    | 12        | 11                                    | 24                   |                            |                        | 15                    |
| Kazakhstan   | <b>83.78</b>                    | 13        | 49                                    |                      | 7                          | 3                      |                       |
| Pakistan     | <b>83.71</b>                    | 14        | 8                                     | 9                    | 6                          |                        | 52                    |
| Jamaica      | <b>83.42</b>                    | 15        | 17                                    | 16                   |                            |                        | 22                    |

Fifteen countries with moderately high scores

| Country       | Composite organized crime index | COCI rank | Organized Crime Perception rank | Informal Sector rank | High level corruption rank | Unsolved homicide rank | Money laundering rank |
|---------------|---------------------------------|-----------|---------------------------------|----------------------|----------------------------|------------------------|-----------------------|
| Bolivia       | <b>79.79</b>                    | 18        | 41                              | 3                    | 20                         |                        | 19                    |
| Mexico        | <b>75.03</b>                    | 22        | 26                              | 31                   | 17                         |                        | 23                    |
| Indonesia     | <b>74.51</b>                    | 25        | 13                              | 60                   | 5                          |                        | 42                    |
| Peru          | <b>72.64</b>                    | 28        | 32                              | 11                   | 33                         | 5                      | 28                    |
| Turkey        | <b>72.08</b>                    | 30        | 55                              | 15                   | 22                         |                        | 26                    |
| Brazil        | <b>69.24</b>                    | 33        | 27                              | 37                   | 25                         |                        | 41                    |
| South Africa  | <b>66.07</b>                    | 38        | 16                              | 39                   | 38                         | 8                      | 54                    |
| Argentina     | <b>59.39</b>                    | 48        | 34                              | 21                   | 30                         | 59                     | 14                    |
| Egypt         | <b>56.17</b>                    | 56        | 58                              | 46                   | 36                         |                        | 59                    |
| China         | <b>55.48</b>                    | 59        | 35                              | 54                   | 10                         | 46                     | 51                    |
| India         | <b>53.79</b>                    | 64        | 56                              | 38                   | 29                         | 33                     | 43                    |
| Italy         | <b>46.81</b>                    | 69        | 57                              | 59                   | 35                         | 52                     | 49                    |
| United States | <b>36.36</b>                    | 81        | 85                              | 85                   | 45                         | 15                     | 84                    |
| Japan         | <b>32.67</b>                    | 86        | 70                              | 94                   | 27                         | 56                     | 90                    |
| Chile         | <b>30.59</b>                    | 90        | 90                              | 74                   | 57                         | 21                     | 85                    |
| Canada        | <b>25.06</b>                    | 97        | 93                              | 73                   | 51                         | 62                     | 88                    |

<sup>5</sup> In the calculation of the composite OC index only the figures which are based on at least 2 values are showed. According to the GAD survey however, perception of crime is very high in Iraq, Congo, West Bank and Gaza (all in top 5)

Fifteen countries with the lowest scores

| Country     | Composite organized crime index | COCI rank | Organized Crime Perception rank | Informal Sector rank | High level corruption rank | Unsolved homicide rank | Money laundering rank |
|-------------|---------------------------------|-----------|---------------------------------|----------------------|----------------------------|------------------------|-----------------------|
| UK          | <b>23.90</b>                    | 99        | 99                              | 84                   | 62                         |                        | 94                    |
| Norway      | <b>22.08</b>                    | 100       | 104                             | 90                   | 58                         | 53                     | 82                    |
| Luxembourg  | <b>21.11</b>                    | 101       | 107                             | 102                  |                            |                        | 81                    |
| Germany     | <b>20.21</b>                    | 102       | 101                             | 89                   | 56                         | 57                     | 92                    |
| Switzerland | <b>19.98</b>                    | 103       | 105                             | 97                   | 65                         | 54                     | 66                    |
| Jordan      | <b>19.38</b>                    | 104       | 97                              | 77                   |                            | 51                     | 96                    |
| Netherlands | <b>18.91</b>                    | 105       | 95                              | 92                   | 66                         | 41                     | 93                    |
| Denmark     | <b>18.41</b>                    | 106       | 112                             | 86                   | 64                         | 42                     | 89                    |
| Sweden      | <b>18.30</b>                    | 107       | 111                             | 80                   | 60                         | 44                     | 98                    |
| Australia   | <b>16.79</b>                    | 108       | 106                             | 101                  | 54                         | 37                     | 99                    |
| Bahrain     | <b>15.28</b>                    | 109       | 89                              |                      |                            | 49                     |                       |
| Singapore   | <b>14.10</b>                    | 110       | 110                             | 99                   | 61                         | 58                     | 97                    |
| New Zealand | <b>12.83</b>                    | 111       | 109                             | 93                   | 63                         | 48                     | 100                   |
| Iceland     | <b>12.46</b>                    | 112       | 114                             | 95                   |                            |                        | 102                   |
| Finland     | <b>10.41</b>                    | 113       | 113                             | 98                   | 67                         | 34                     | 101                   |

Within Europe organized crime prevalence increases diagonally from the North West to the South East, with levels being low in England and Germany, higher in Spain and Italy and by far the highest in Russia, Albania and Ukraine.

As said, the country rates should not be taken at face value but be used as a basis for further enquiries. In Asia rates are the worst in parts of South Asia (Pakistan, Bangladesh). But also the emerging superpowers, China and India are rated above Italy on this composite index. In the international literature on organized crime India is rarely the focus of attention. Perhaps this is a serious oversight. Research on Chinese organized crime is mainly focussed on Chinese expatriates. Limited available research findings on homeland China point to collusion between corrupt communist party members and local gangs in remote areas (Zhang, 2002). More research on the role of the organized crime-corruption in these two countries seems warranted.

In Africa, Nigeria, Angola and Mozambique stand out with the highest scores. Nigerian organized crime activity in both the country and the region has been well-documented (Shaw, 2002, UNODC, 2005). A detailed account of how organized crime threatens to penetrate state and businesses in Southern Africa, notably in Mozambique, is given in Gastrow (2003). In Latin America Haiti, Paragua, Guatemala, Venezuela and Colombia show the highest scores. High scores are also observed in Jamaica. None of these scores will come as a surprise to informed readers.

The world map of organized crime emerging from this index differs fundamentally from that of conventional crimes. The perceived prevalence of organized crime and the overall ICVS rates of victimization by volume crime was found to be unrelated ( $r = 0.15$ , n.s.).

The level of volume crime in a country says very little about the level of organized crime. This result suggests that levels of volume crime and of organized crime are determined by different factors at the macro level (van Dijk, Nevala, 2002).

### Towards a comprehensive index of lawfulness

In this paragraph the various indices of crime and justice discussed will be integrated into one composite index of 'lawfulness'. This lawfulness index allows a rapid identification of countries where the degree of 'lawfulness' is comparatively high and of those where it leaves something, or much, to be desired. We will also highlight the close links between rule of law and economic performance by showing the relative positions of countries on both 'lawfulness' and the Human Development Index. The results will illustrate the universality of the lawfulness development link across world regions, regardless of average levels of wealth. In each and every region countries with poor economic performance can seek inspiration for reform in the judicial infrastructures and related economic successes of neighbouring countries.

As just said, we have called our 'catch-all' index of security and crime: the index of lawfulness. For a society to be lawful, it is not sufficient if the State plays by the rules and addresses crime problems effectively, civil society must also be part of the solution<sup>6</sup>. This notion has inspired Italian scholars to develop the concept of a '*culture of legality*' or '*culture of lawfulness*'. The concept of 'lawfulness' refers to both the quality of formal institutions upholding the rule of law and the normative orientation of the public. The state and the citizens must mutually reinforce each other in their efforts to ensure a safe and just society<sup>7</sup>.

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<sup>6</sup> The concept 'rule of law' - or 'Etat de droit' in French refers to the institutional and legal capacity of governments to uphold the law, including basic human rights. The concept refers to the relationships between the state and its citizens rather than to the relationships between citizens.

<sup>7</sup> A culture of lawfulness is described as a culture supportive of the rule of law : 'Without such a culture, there would almost certainly be more crime. Most people act in a manner consistent with the law because of their expectations that others will behave similarly and that this is best for everyone. In the absence of a culture of lawfulness, many will be freer to satisfy their immediate needs and preferences, even in the presence of elaborate laws. On the other hand, without laws and law enforcement, the culture of lawfulness is, on its own, unlikely to provide for the rule of law. There must be specific processes for rulemaking and rule enforcing. The culture needs enforcement, but the enforcers need the culture' (Godson, 2000).

In the previous paragraphs we presented a series of indicators which capture different aspects of the 'culture of lawfulness'. Statistical indicators were presented of several aspects of the state of crime in countries. In our opinion the most reliable, comparative measure of conventional crime is the percentage of the public victimized by conventional crime as measured by a standardized victimization survey (the ICVS). A new indicator of perceived prevalence of organized crime was constructed, based on surveys among business people and security experts. This indicator was found to be closely related to the rates of unsolved homicides, grand corruption, money-laundering and the size of the informal economy (see **Tables 3** and **4**). Another new indicator of street level corruption was constructed, using ICVS data and data from other sources (Buscaglia, van Dijk, 2000). This indicator was closely correlated with the well known Corruption Perception Index, annually published by Transparency International, covering a very large number of countries (Transparency International, 2003).

In order to include as many countries as possible, we decided to use the ICVS overall victimization rate, the organized crime perception index and the corruption perception index of TI of 2002 as constituting components of a comprehensive index of lawfulness.

Elsewhere several performance measures were presented of the functioning of the security and justice sector in countries (van Dijk, 2006). One of the key indicators is a newly designed composite police performance index, based on subjective and objective measures. Widely used is a composite measure of the rule of law, designed by the World Bank Institute (Kaufmann, Kraay, Mastruzzi, 2003). We decided to include these two criminal justice performance indicators in the new index of lawfulness as well.

Our statistical analyses have shown that indicators of organized crime, corruption, police performance and rule of law are closely related to each other. They are also, though less strongly, related to the indicator of conventional crime, the ICVS victimization rate. Using the scores on these five main indicators of the state of crime and justice, a composite index of lawfulness was constructed, covering 158 countries.

This comprehensive index reflects both the quality of domestic legislation and legal institutions (the indicators of police performance and the rule of law) as the extent to which nationals are exposed to the three main types of crime (conventional crimes, organized crime and corruption). It captures in one single index the main dimensions of the statistical data on levels of crime and justice currently available.



The index was constructed in such a way that high scores reflect comparatively high levels of justice and low levels of crime. Countries were included in the ranking only if three or more sources were available.<sup>8</sup>

**Table 4** presents country scores according to this new index.

**Table 4** World ranking of countries according to scores on the index of lawfulness, combining indicators of police performance, rule of law and of the prevalence of various types of crime

Twenty-five countries with highest country scores:

|          |             |       |           |                |      |           |             |      |
|----------|-------------|-------|-----------|----------------|------|-----------|-------------|------|
| <b>1</b> | Iceland     | 100.0 | <b>10</b> | Netherlands    | 91.2 | <b>19</b> | Barbados    | 83.5 |
| <b>2</b> | Switzerland | 99.1  | <b>11</b> | Norway         | 91.0 | <b>20</b> | Chile       | 83.5 |
| <b>3</b> | Denmark     | 98.0  | <b>12</b> | Austria        | 90.6 | <b>21</b> | Jordan      | 83.2 |
| <b>4</b> | Finland     | 97.3  | <b>13</b> | Canada         | 89.8 | <b>22</b> | Hong Kong   | 82.5 |
| <b>5</b> | Luxembourg  | 97.1  | <b>14</b> | United Kingdom | 89.8 | <b>23</b> | Belgium     | 82.1 |
| <b>6</b> | Australia   | 95.5  | <b>15</b> | Ireland        | 85.7 | <b>24</b> | Puerto Rico | 81.4 |
| <b>7</b> | Sweden      | 94.3  | <b>16</b> | United States  | 84.7 | <b>25</b> | Israel      | 81.4 |
| <b>8</b> | New Zealand | 92.2  | <b>17</b> | Malta          | 84.5 |           |             |      |
| <b>9</b> | Singapore   | 92.2  | <b>18</b> | Germany        | 84.1 |           |             |      |

Twenty-five countries with moderately high scores

|           |          |      |            |              |      |            |           |      |
|-----------|----------|------|------------|--------------|------|------------|-----------|------|
| <b>26</b> | Japan    | 81.0 | <b>73</b>  | Poland       | 56.4 | <b>112</b> | Cuba      | 42.2 |
| <b>27</b> | France   | 80.9 | <b>80</b>  | Turkey       | 52.9 | <b>123</b> | Iran      | 40.3 |
| <b>33</b> | Tunisia  | 77.7 | <b>85</b>  | Bulgaria     | 51.4 | <b>125</b> | Nigeria   | 39.7 |
| <b>34</b> | Botswana | 76.9 | <b>87</b>  | Argentina    | 50.8 | <b>129</b> | Albania   | 38.9 |
| <b>39</b> | Spain    | 71.7 | <b>88</b>  | South Africa | 50.8 | <b>130</b> | Mexico    | 37.5 |
| <b>47</b> | Italy    | 68.5 | <b>98</b>  | Indonesia    | 46.3 | <b>132</b> | Guatemala | 36.3 |
| <b>63</b> | Thailand | 59.7 | <b>104</b> | Russian Fed  | 44.7 | <b>133</b> | Colombia  | 36.2 |
| <b>65</b> | India    | 58.8 | <b>107</b> | Brazil       | 43.3 |            |           |      |
| <b>68</b> | China    | 58.2 | <b>109</b> | Algeria      | 43.2 |            |           |      |

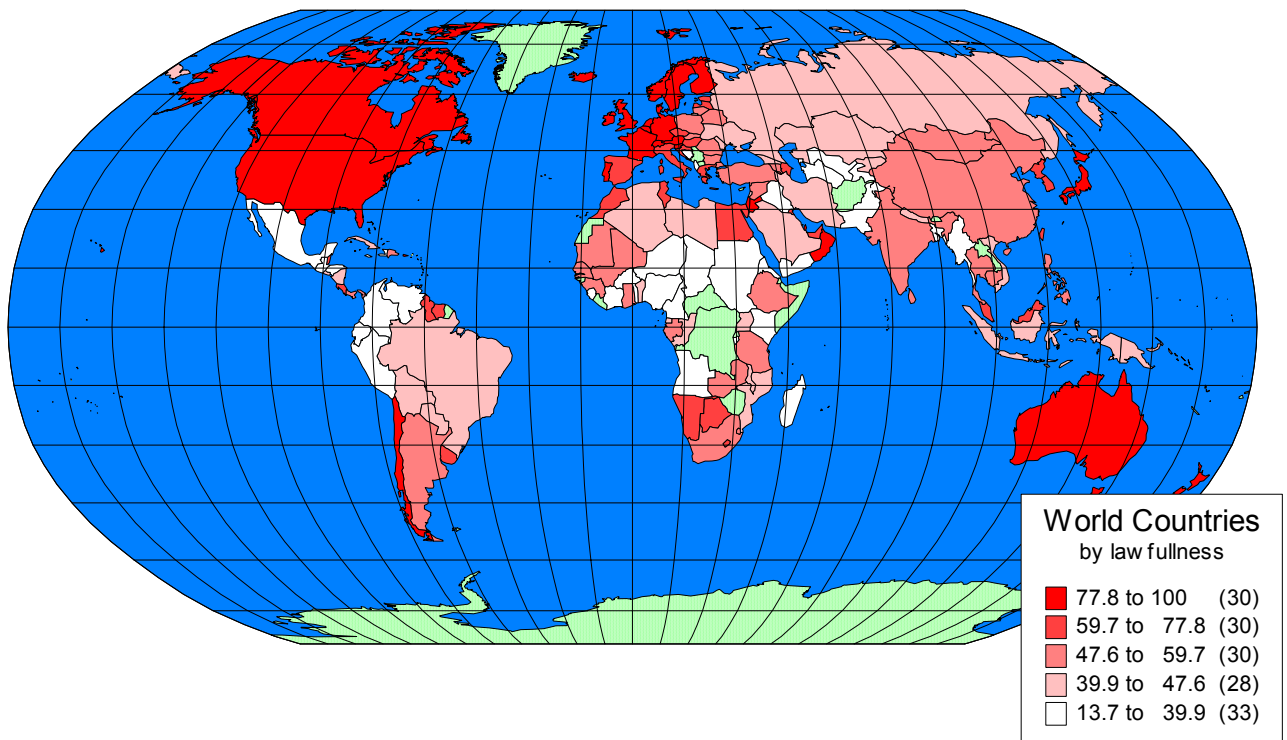
<sup>8</sup> One of the indicators of perceived organized crime prevalence is based on the ratings of an international network of security experts working for one of the major security consultancy firms (MIG). Similarly based on the opinions of locally-based experts the USA-based PRS Group offers country ratings on a variety of risk dimensions to the international business community ([www.countrydata.com](http://www.countrydata.com)). One of their risk dimensions is a measure of the degree of law and order in a country, assessing 'the strength and impartiality of the legal system' and 'popular observance of the law'. With these two components the measure captures both the quality of criminal justice responses and the general state of crime. As a check on the soundness of our own comprehensive index of lawfulness, we looked at the relationship between the country scores on this index and on the law and order ratings of the PRS Group. The two measures were found to be highly correlated ( $r = .79$ ;  $N = 156$ ).

Twenty-five countries with the lowest scores

|            |               |      |            |               |      |            |                |      |
|------------|---------------|------|------------|---------------|------|------------|----------------|------|
| <b>134</b> | Sierra Leone  | 35.0 | <b>143</b> | Honduras      | 32.2 | <b>152</b> | Sudan          | 24.7 |
| <b>135</b> | Cote d'Ivoire | 34.2 | <b>144</b> | Tajikistan    | 31.8 | <b>153</b> | Kenya          | 23.8 |
| <b>136</b> | Jamaica       | 34.1 | <b>145</b> | Turkmenistan  | 29.2 | <b>154</b> | Pakistan       | 23.7 |
| <b>137</b> | Eritrea       | 33.8 | <b>146</b> | Venezuela, RB | 29.1 | <b>155</b> | Bangladesh     | 20.6 |
| <b>138</b> | Cameroon      | 33.7 | <b>147</b> | Congo, Rep.   | 28.9 | <b>156</b> | Iraq           | 15.9 |
| <b>139</b> | Angola        | 33.6 | <b>148</b> | Burundi       | 26.1 | <b>157</b> | Congo, Dem rep | 14.5 |
| <b>140</b> | Niger         | 33.1 | <b>149</b> | Myanmar       | 25.8 | <b>158</b> | Haiti          | 13.7 |
| <b>141</b> | Ecuador       | 32.5 | <b>150</b> | Yemen, Rep.   | 25.8 |            |                |      |
| <b>142</b> | Bosnia&Herz.  | 32.5 | <b>151</b> | Chad          | 25.7 |            |                |      |

The country scores are also presented in the form of a global map.

**Figure 2** World map of the degree of lawfulness of countries, reflecting the state of security and crime across the world



As discussed in chapters seven and fifteen, organized crime, police performance and rule of law are linked to the level of terrorism: where governance and criminal justice are weak, organized crime is more prevalent and more terrorist attacks are launched. Our index of lawfulness was, as expected on the basis of these previous findings, correlated with the index of terrorism ( $r = .37$ ). Although the terrorism index was not itself included in the measure of lawfulness, high scores on lawfulness indicate low levels of all types of crime, including terrorism. It can rightly be

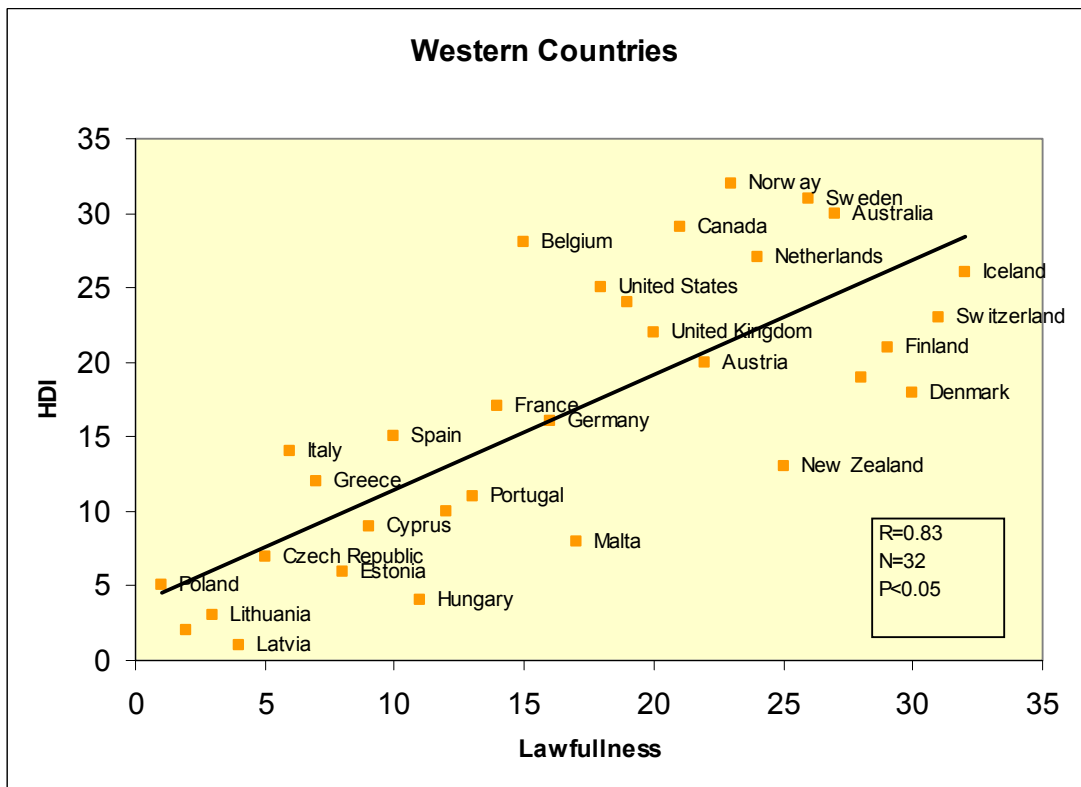
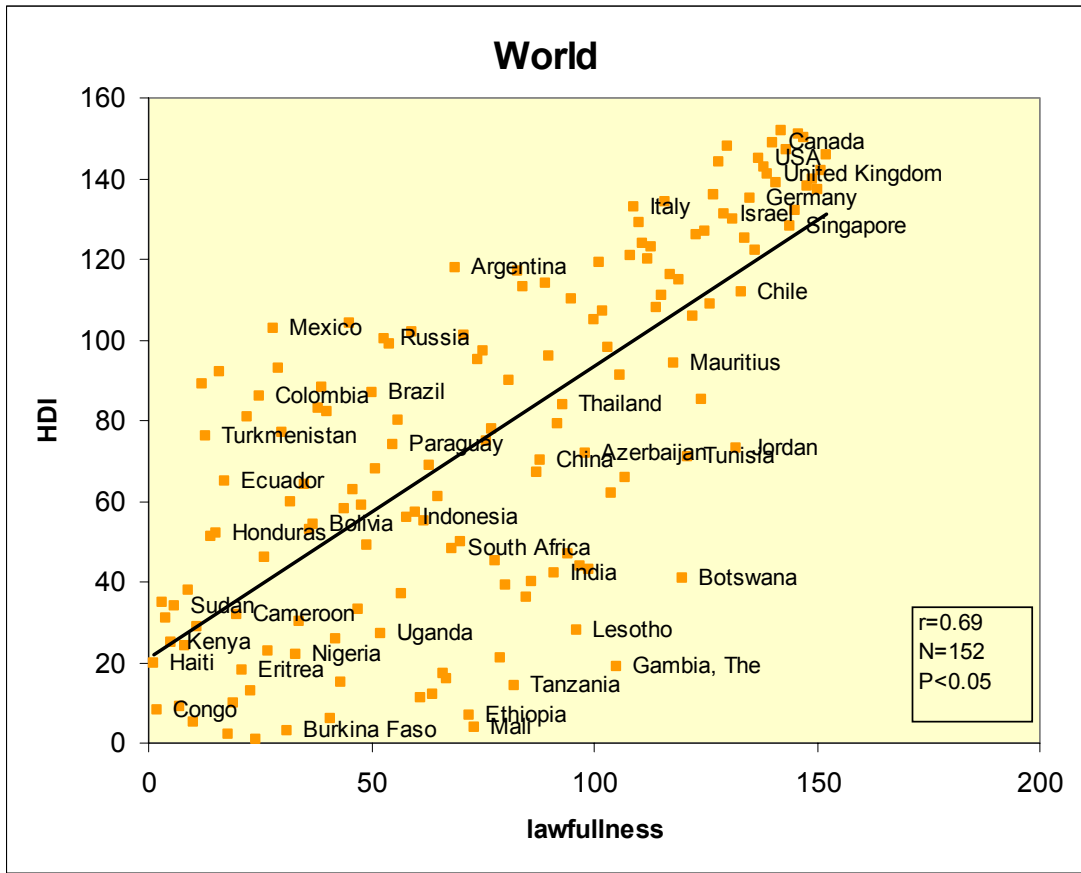
seen as a comprehensive measure of the state of security and justice in countries.

## Lawfulness and human development

The governance-economic performance link is well-established in recent work of the World Bank Institute and others (Kaufmann, Kraay, Mastruzzi, 2003). As was to be expected, our index of lawfulness is strongly related to indices of Human Development ( $r = .69$ ,  $n = 158$ ,  $p < 0.000$ ). The correlation between lawfulness is strongest for the group of Western countries ( $r = .83$ ). Within Europe the correlation is almost perfect ( $r = .91$ ). On the basis of the lawfulness index, the level of human development of individual European countries can be estimated within very small margins. In other world regions the correlations between lawfulness and human development are also strong.

In **Figure 3** we present a final overview of our analytic results in the form of scatter plots depicting the degree of lawfulness of countries and their level of human development worldwide and for the Western countries respectively. The scatter plots visualize once again how closely human development and lawfulness are linked. Although the precise causal mechanisms at play are not yet fully understood, improvements on the vertical axis depicting human development seem hard to obtain without concurrent improvements in lawfulness.

**Figure 3** Country scores on the comprehensive index of lawfulness



## Conclusion

Those convinced of the utility of collecting and analyzing comparative crime statistics for political and academic reasons, find themselves in a quandary. Because of the intrinsic opposition of many governments, the production of international crime and justice statistics is chronically underfunded. As a result, the case for such statistics must be made on the basis of fragmentary, dated and in some respects flawed statistics. In this situation, many experts are inclined to stay on the scientifically safe side: if international crime statistics are presented it is to illustrate their methodological weakness rather than their potential to inform policy making and advance grounded theories of crime at the macro level.

From a scientific perspective such a cautious approach might be commendable. But as Aebi, Killias, and Tavares (2003) as well as Kaufmann et al. (2003) have pointed out, it plays in the hands of those who prefer such information not to be, or ever become, available for self serving, political reasons. It means capitulating to political forces that would prefer comparative criminology to remain 'statistically challenged' for ever. In our opinion, the time has come to break the politically imposed *omerta* of criminologists on comparative crime and justice. The new generation of criminologists is well-travelled and increasingly internationally oriented in its interests. They will hopefully revolt against the conspicuous absence of credible international statistics in their chosen field of study. The time has come to fully exploit the potential of survey research among general and special populations to arrive at sound indicators of crime and perceived performance of criminal justice and to combine these with improved statistics on manpower and performance. With the help of such comprehensive sets of metrics on crime and justice, macro criminology will finally get out of its slumber and increase the scope and policy impact of the discipline.

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# International Standards for Victims: What Norms? What Achievements? What Next?

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*Everything has been said already, but as no one listens, we must always begin again* quoted in Malimath Committee on Reforms of Criminal Justice System for India, 2003

Stronger than the tread of armies is an idea whose time has come. Nowhere is this more true than in relation to implementing basic guarantees to ensure that victims of crime, terrorism and abuse of power are treated in line with fundamental principles of justice. Nowhere is this more true than ensuring that governments use what is known to reduce victimization.

HEUNI has played a critical role in bringing reason to criminal policy but it also has done more to make crime policy across Europe and the world balanced. It has stood for efforts to prevent crime and enforce laws. It has fought with the pen to remind governments that human rights are not just for the accused but for the public and victims of crime. Tremendous progress has been made in identifying what needs to be done. Almost every aspect of crime policy involves issues of victims. Yet much work still remains to get a strategic vision in place that reduces the numbers of victims of crime, saves taxpayers money and treats youth at risk as troubled instead of just trouble.

The shift is difficult from internationally recognized standards to international implementation of those standards. No government can afford to throw more and more of taxpayers' funds to policies that are exclusively geared to reaction and repression. It is time to get smarter with how law enforcement and criminal justice are used. It is time to balance the expenditures on reactive and repressive enforcement with investment in pre-emptive and preventive strategies. It is time to guarantee support and justice for victims of crime, terrorism and abuse of power. HEUNI must stay the course.

It is time for all professionals who interact with victims to be trained and follow guidelines to provide aid and respect for victims. The future for victims depends on the support of lawyers, law professors, citizens and so on to help governments to take action to pass legislation that:



- addresses victim rights
- promotes programs to provide victim assistance
- institutes policies that prevent and reduce victimization.

Canada is just one country where policies and programs lag a long way behind public opinion and internationally recognized human rights standards for victims of crime and abuse of power. It was CAVEAT a grass roots victim lobby group in Canada that organized a petition that got two and half million signatures – more than any other in Canadian history on any issue.

Treating victims fairly and effectively does not take rocket science. It takes firm decisions to act. Yet the federal, provincial and territorial governments still confuse punishment of offenders with support and justice for victims. Action to bring support and justice for victims of crime in Canada up to international standards is long overdue. Canada's parliamentary committee on *Victims: A voice not a veto* set out some minimal actions to bring support and justice for victims up to international standards but the actions fall far short. Canada is an inventor of world famous innovations to meet the needs of victims but these remain isolated successes in a patchwork of services and support.

As we will see below, governments across western Europe now are supposed to meet universal standards for support services, mediation and so on. The USA has radically transformed support and justice for victims of crime. Following the murder of the spouse of a distinguished senior lawyer and a petition of 500,000 signatures, the Prime Minister of Japan intervened to pass legislation to establish fundamental principles of justice for victims of crime including a high level committee to implement the required programs. Countries such as South Korea, Thailand and Mexico have all modified their constitution to include a set of rights for victims. Yet victims of crime in most countries in the world remain orphans of justice policy.

In *Less Law, More Order* (Waller, 2006), I argue that governments should take the following percentages from their expenditures on law enforcement and criminal justice and reallocate them

- five per cent for effective prevention of victimization
- three percent for the services, compensation and legal assistance that is needed for victims of crime
- two percent to fund the reform process that is needed to make support and justice for victims as well as effective prevention of victimization a reality.

Governments cannot hide behind the excuse that they do not have the funds when so much progress can be made through such a small percentage of what they currently spend. Using a percentage rather than absolute sums make the effort proportionate to the means of the country. So why not act?

Now it is time to move towards a convention on support and justice for victims of crime, abuse of power, and terrorism with the support of governments, academics and non-governmental organizations. Like the petitions in Canada and Japan, we must organize petitions to demonstrate the interest of voters in fair treatment for victims.

## Challenge

One in four adults will be a victim of some type of common theft, assault or other crime each year in almost every country in the world according to the International Crime Victim Survey. Children and youth will be bullied and abused. Many more will be the victims of offenses committed by drivers of cars.

They will all suffer loss, injury and trauma as a result of crime. The rights of these victims still have not been adequately recognized. In addition, the decreasing proportion who contact law enforcement or criminal justice will suffer hardship when assisting in the prosecution of offenders.

It is not more police, prisoners or judges that will reduce crime but real investment in tackling the risk factors that cause crime and victimization. Without this investment in what is known to reduce victimization, countries will stand by for a rapidly rising number of victims who deserve attention and assistance when the economic momentum slows.

Victims are a silent and forgotten majority in our midst. Not all of those victims will suffer death but the rates of violence against women alone should make our political elite rethink their strategic plans in line with recommendations such as those of the World Health Organization (2004, 2004, 2002) or the National Research Council of the US (see Waller, 2006). The World Health Organization can add statistic after depressing statistic on violence against women and children, violence between young persons and so on.

Someone once said "The death of one man is a tragedy, but the death of millions is but a statistic." We often fail to see the tragedies behind the statistics. The names, faces and voices of those tragedies should be seen and heard. But the political elites must do the simple things that will make a difference.

If you become a victim of a crime, you need to be treated decently, caringly and justly even if law enforcement and criminal justice systems do not give much of their time. If you are robbed walking down the street, it should be your right to expect other citizens to come to your help. If you call the police or walk miles to a police station, it should be your right to expect the officer to listen to you and assist you in getting social or medical assistance, information on what he will do, and what services can support you. If you are a victim of sexual assault, it should be your right to get an officer or counsellor of the same gender. It should be your right to get medical attention and counselling to recover.

It should be your right to get reliable information on how to avoid being attacked again. It should be your right to be able to seek restitution from the offender expeditiously and be paid before the offender pays money to the State. If you are injured and the offender cannot pay reparation, it should be your right to get compensation from the State. It should be your right to participate in the criminal court process with legal representation to protect your safety, your search for the truth and your need for restitution. But more than anything, you want recognition of what has happened.

## International standards

Criminal justice in today's world falls far short of addressing victim needs even in the best of systems.

In 1985, the governments of all the nations of the world adopted the resolution of the UN General Assembly which called upon Member States to take the necessary steps to give effect to the provisions contained in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, inter alia* by:

a) implementing social, health, including mental health, educational, economic and specific crime prevention policies to reduce victimization and encourage assistance to victims in distress;

b) sponsoring collaborative action-research on ways in which victimization can be reduced and victims aided, and to promote information exchanges on the most effective means of so doing;

c) rendering direct aid to requesting governments designed to help them curtail victimization and alleviate the plight of victims;

The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* defines who are victims of crime and abuse of power, and clarifies that the principles of justice include:

1. Access to justice and information
2. Reparation

3. Compensation from the State
4. Services

Since then, considerable progress has been made internationally, including:

- UN General Assembly adoption of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* in 2005.
- Establishment of the *UN Convention Against Transnational Organized Crime* in 2000 and its optional protocol in 2002 on trafficking that include specific sections for victims;
- UN Economic and Social Council (ECOSOC) interest in 2002 in the *Basic Principles for the Implementation of Restorative Justice in the context of Criminal Law*; ECOSOC adoption in 2005 of the *Guidelines on Justice in Matters Involving Child Victims and Witnesses*;
- ECOSOC acceptance in 2002 of the UN Guidelines for the Prevention of Crime;
- Adoption of the *Statute of Rome* in 1999 (and later the Rules of Procedure and Evidence) to establish the International Criminal Court;

Also some implementation initiatives have included:

- Courses by the UN Institutes such as those recently organized by UNAFEI on violence against women and children, another on prevention of victimization and a third on victim support and justice.
- UN Commission funding in 2003 for 19 pilot projects to implement the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power from 1985;
- UN Commission approval of the *Guide for Policy Makers on Implementation of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, and the *Handbook on Justice for Victims on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* in 1999;
- UN Commission endorsement of the website [www.Victimology.nl](http://www.Victimology.nl) in 1998;

When governments ratify the *Convention Against Transnational Organized Crime* and the optional protocol on trafficking, they commit to action for victims. They have agreed norms on crime prevention and also on restorative justice. The majority of nations ratified the *Statute of Rome* which gives effect to the principles in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. Indeed several of the operative paragraphs are taken verbatim from that declaration. Also, they have recently adopted the *Guidelines on Justice in Matters Involving Child*

*Victims and Witnesses*, inspired by the *UN Convention on the Rights of the Child*.

Victims are the central reason for the work of the World Health Organization to prevent violence. Why not make the prevention and support of victims the central focus for the strategic plan of the UN Commission on Crime Prevention and Criminal Justice? Why not a commission on outcomes rather than processes? Why not rename it, the UN Commission on Safety and Justice?

In December 2005, the World Society of Victimology WSV and the International Victimology Institute (INTERVICT) at the University of Tilburg in The Netherlands brought together experts from across the world for an informal meeting on ways to promote the use and application of existing international standards and norms on victims of crime and similar violations. This meeting prepared a draft resolution for the meeting of the UN Commission on Crime Prevention and Criminal Justice in Vienna in April, 2006. This resolution was adopted in a modified form that encouraged the organization of an inter-governmental meeting of experts on the implementation of the UN standards and norms on victims of crime.

This meeting identified the need to be clear about the scope of action, rights and duties, and implementation and monitoring. It saw a need to find a way of assisting governments to be accountable for their commitments to prevention as well as support and justice for victims, including access to justice, protection, information, assistance, restitution, restorative justice and compensation. It also prepared a draft convention to achieve this.

There is a special opportunity to mobilize public opinion throughout the world to encourage governments to act in conjunction with global lobbying campaigns, including petitions.

## National achievements

Laudable progress has been made by affluent governments to implement the principles of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. Progress has been greatest in Western Europe, North America, Australia and New Zealand. Yet even for these countries, much work remains. In particular, the WSV has called attention to the exemplary progress achieved by some Member States in:

- enacting legislation that puts the basic principles of justice into domestic laws so that a high level office will implement policies and programs to provide comprehensive measures for victims of crime – Canada has not done this
- providing victims of crime with better information, support services, reparation from offenders, compensation from the state

and a role in criminal proceedings – Canada still only has a patchwork,

- establishing programs to protect victims of crime who are vulnerable because of gender or age such as all-women police stations and measures to protect child victims – Canada has talked much but done little
- appointing permanent boards and enacting legislation to promote the use of effective and proven crime prevention measures at all levels of government – Canada has reached first base but no Province has got close.

Some rich governments have acted to assist some victims some of the time. They have some victim services; they provide for reparation to victims from offenders, which is paid occasionally; they have some compensation available from the State for the most injured victims; and they allow some input from victims to the criminal justice process. They undertake victimization surveys on large samples of adult members of the population that show how frequently adults are victims, how few report to the police and how many suffer loss, injury and trauma.

In the USA, the *Victims of Crime Act* (1984; Waller, 2004) provides an inspiring example for the world. It raises over one billion US dollars from fines on federal offenders who are often rich corporations and individuals, to stimulate action by US States to multiply victim services, state compensation and bills of rights. Much of these funds are focused on women who are victims of sexual assault and domestic violence but other victims should also benefit. Even so, their federal Office for Victims of Crime continues to call for action to go from a patchwork system to universal services and programs to educate lawyers, judges and others on victim rights.

In the European Union ('EU'), a mandatory standard (Framework Decision) has been established so that every government in the EU will provide basic services for victims, reparation and mediation (See Waller, 2003, 25-27 and 60-64 for discussion and text). They have forced each government to report on progress. Other affluent countries have similar provisions but without the requirement for monitoring. The EU decision must be adapted to countries in the world.

In the 1980s, Brazil launched police stations where victims of violence against women and children could go. These stations had only women officers. Today these stations have spread across the developing world. Just one example in the world is the State of Tamil Nadu with a population of 65 million, where the woman Chief Minister has established 200 all-women police stations. That same Chief Minister is hiring thousands of female police officers in part to staff these stations.

Since the 1960s in France, victims of crime have had a right to be represented by a lawyer funded by the State if necessary – just like offenders in other countries have a right to a defence lawyer. This makes justice in France inclusive of victims, offenders and the State. This obvious procedure is missing in other countries. It provides some guarantee that victims can get at the truth, protect their personal safety, seek and get restitution, avoid senseless and inconvenient judicial hearings, and so on.

In 2000, Rwanda established a system of community justice – Gaçaça (pronounced gachacha). Today in every part of Rwanda, village communities get together in the shade of a tree to listen to surviving victims and suspected offenders. The rules of procedure are few. Those victims and offenders were neighbors who killed, raped and often infected victims with AIDS. When the community justice is finished, the offender will often apologise, express shame and make some reparation. The offender will also receive a prison sanction but likely less and sooner than if he had waited for the classic system of justice.

In 2004, Japan put the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* into their national legislation. The Prime Minister established a powerful cabinet level committee to ensure that the principles would be imitated. The principles include services for victims, reparation from the offender, information about criminal justice, and a right to participate in the criminal justice process to protect their interests.

Technical assistance, training and funds must be provided to multiply these successes across the world. Many examples of the best practices that could be adapted to countries across the world are set out in my text for the Soros Foundation (Waller, 2003). Governments must re-examine these international norms and invest in programs that will treat victims with dignity, whether children, women or whatever.

## Next steps

Action must be taken to advance research, services and awareness for victims across the world. This requires persons committed to these ideals, better services, more research, innovative education and training, and continued advocacy and rights. It requires a process of assessing progress and acting to make the necessary improvements. It requires permanent victimology institutes. It requires a convention with teeth.

The WSV has called on States to take concrete steps now to overcome the lack of recognition for the plight and justice for victims in the 21<sup>st</sup> century, including:

- a) victims of transnational organized crime, corruption, terrorism, and economic crime,
- b) making standards work for victims,
- c) reforming criminal justice, including restorative justice, to assist victims and provide justice for all including victims,
- d) prevention of victimisation,
- e) women and children who are victimised, particularly within their families.

The concrete steps for victims of crime should include:

1. **Legislation** that puts the basic principles of justice for victims into national laws with an office to implement the programs comprehensively,
2. **Training and guidelines** for police, lawyers, health professionals and others to ensure proper and prompt aid and respect for victims,
3. **Projects** to provide services to assist and support victims,
4. **National policies** to prevent and reduce victimisation, particularly based on the *UN Guidelines for the Prevention of Crime* (2002),
5. **Actions** to implement guidelines to overcome the particular lack of recognition for victims who are women and children,
6. **Research and surveys** to monitor victimisation, services and justice for victims and implement effective countermeasures,
7. **Institutes** to sustain the reforms that are needed to prevent victimisation, assist victims and provide justice for all, including the victim.

The mission of the WSV is advancing research, services and awareness for victims. It achieves this through four purposes:

#### 1. To promote research in victimology and on victim needs

WSV organizes research workshops on victimological issues and victim needs at its international symposia, including national and international surveys on victims, analysis of the consequences of victimisation and evaluations of the effectiveness of services and processes for victims. It fosters the publication of the proceedings from its international symposia. It makes available on its website an international bibliography of documents on victimology and victim issues. Its research committee was created to advance victimological research throughout the world and encourage interdisciplinary and comparative work in this field. It is a partner with the Ministry of Justice of the Netherlands and the UN Office on Drugs and Crime in the website [www.victimology.nl](http://www.victimology.nl), which provides extensive documentation on victim issues on the web.

Aims:

- foster more research on the implementation of the *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of*



*Power*, including the extent to which countries have implemented the *Declaration* and the barriers that must be overcome for greater implementation

- create the capacity to evaluate practices for victims according to recognised international standards
- foster research that compares the consequences and responses to victims of crime, abuse of power and other stark misfortunes
- be recognized internationally as the leader for advancing research on victim issues and theory
- foster research on the extent to which the International Criminal Court has implemented services that meet the legislated needs of victims.

## **2. To provide services for victim service providers and victimologists**

WSV organizes workshops on services for victims at its international symposia. Its committee on victim services was established to provide a network of victim services around the globe and to develop a knowledge basis for training and technical assistance based on the *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power*.

Aims:

- support a database of victim service agencies across the world in order to facilitate the referral of victims for services in countries where needed
- encourage list-serves for service providers in major languages in addition to English
- bring together information on model practices so that reforms can benefit from best practices
- assist the International Criminal Court with its mandate to assist, protect and respect rights for victims
- determine the potential WSV role to facilitate financial and political leadership, and bring together crisis intervention and other services for victims in extraordinary crises such as catastrophic incidents
- encourage relevant institutions and agencies – e.g. Human Rights Commissions – to monitor the availability and standards of services for victims.

## **3. To provide education and training**

WSV organizes international courses on victimology and victim assistance. The two week course on victimology, victim assistance and criminal justice has been organized annually since 1984 in Dubrovnik. Similar courses on victimology and victim assistance have been organized for the world in Mito, Japan since 1998, for Central America in San Salvador since 2001, for South America in

Caracas since 2002, and a course was organised in South Africa in 2003. It worked with the UN to develop the *Guide for Policy Makers on the Implementation of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and *Handbook on Justice for Victims on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. It has fostered the translation of these books into other languages including French and Spanish.

Aims:

- convince law schools and others involved in the training of criminal justice professionals to include courses on victimology, victim rights and issues, and convince those who certify qualifications, such as bar associations, law enforcement and judicial bodies, to require this knowledge
- encourage university courses and degree programs on victimology, including victim assistance, victim rights, crisis response, restorative justice and victimisation prevention
- promote a system of credentials for victim service professionals (staff and volunteers) and establish international standards
- establish a program to mentor and develop leaders able to influence action on behalf of victims
- establish international courses in regions where they do not yet exist
- encourage reciprocal training of victim service practitioners from different countries
- host an annual training course for international victim service providers
- develop standards for curricula and disseminate training materials
- develop a mechanism for authorizing the use of the WSV logo and mission statements for courses and other activities

#### **4. To advance advocacy and rights**

WSV played a leadership role in promoting the adoption by the UN General Assembly of the *Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power* in 1985. It continues to lobby governments on the importance of legislative and program reforms to meet those basic principles, particularly through its UN Liaison Committee at the UN Commission on Crime Prevention and Criminal Justice and at quinquennial UN Congresses on Crime Prevention and Criminal Justice. It has encouraged the adoption of the UN norm based on the International Bureau of Children's Rights' *Guidelines on Child Victims and Witnesses*. It has advocated project grants for pilot projects to implement the *Declaration* as provided by the UN Office on Drugs and Crime.

#### Aims:

- advocate increased funding for research and services for victims to accelerate implementation of the *Declaration*
- promote a convention on the implementation of the *Declaration*
- raise political and public awareness of victim issues and rights
- encourage organisations and others committed to reducing the number of victims of all types
- organise events to interest government officials in making greater progress in the implementation of the *Declaration*
- establish a WSV representative in each country to assist with information on victim issues and rights and advocate for improvements
- foster national societies for victimology to pursue national missions and activities similar to the WSV
- encourage mechanisms to provide an early warning system to prevent abuses of power and protect potential victims from stark misfortunes.

At the WSV's 12<sup>th</sup> International Symposium in Orlando, Florida, USA, in 2006, the draft *Convention on Rights for Victims of Crime, Abuse of Power and Terrorism* will be discussed. Much more needs to be done at international and regional levels.

#### Conclusion

The governments, academics and non-governmental organizations of the world must face the challenge of millions of children, women and men who suffer loss, injury and trauma when they are victimized by crime, abuse of power and terrorism every year.

International standards and norms on victims call for investment in strategies that will tackle the risk factors that cause this victimization rather than only spend more on police, prisoners and judges. These focus on the importance of national and municipal offices that will spearhead the investment in programs to tackle the reasons why youth are at risk, the availability of handguns and more intelligent use of police.

Those UN standards and norms call for support and justice for victims of crime, abuse of power and terrorism such as those set out in the draft convention. Already many examples exist of inspiring practices as to how victims could and should be treated better. Governments must not only legislate and revise their constitutions but allocate a percentage – I recommend 10% – of their expenditures to the reforms and implementation that is needed.

The time for action was more than ten years ago. Ten years from now we will realize that the time for action was now. So stronger than the tread of armies, prevention of victimization, support and justice for victims are practical actions whose time has come.

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## European Imprisonment Levels 1995-2005

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Imprisonment levels throughout the world are growing. Early in 2005 there were over 9 million people held in penal institutions, either as pre-trial detainees or having been convicted, compared with 8 million some six years earlier. In that time increases were recorded in 73% of countries, and in a similar percentage of countries in each of the five continents<sup>1</sup>.

The following paragraphs set out the situation in European countries over the last ten years, comparing figures for 2005 with those for 2000 and 1995<sup>2</sup>. To some extent they update material in HEUNI Paper No.10 (1997), which described European prison population levels from 1985 to 1995<sup>3</sup>.

### Changes in prison population levels 1995-2005

The main feature of European imprisonment levels between 1995 and 2005 has indeed been their growth. More than three quarters of prison administrations (32 out of 42) had more prisoners in 2005 than in 1995, and in one half (16) of those that registered growth the increase was more than 30%. In another nine countries the increase was over 20%. (Table 1)

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<sup>1</sup> These are the estimated totals in the 1st and 6th editions of the World Prison Population List. Walmsley, R. (1999). World Prison Population List, Research Findings 88, Home Office, London. Walmsley, R. (2005). World Prison Population List (sixth edition), International Centre for Prison Studies, King's College, London.

<sup>2</sup> A table showing the full figures used in this analysis is at the end of the article.

<sup>3</sup> Walmsley, R. (1997). Prison Populations in Europe and North America. HEUNI Paper No.10, Helsinki.

**Table 1** Increases in European prison population levels 1995-2005

|                          |         |
|--------------------------|---------|
| Cyprus                   | +241.2% |
| Bosnia & H. – Federation | +167.8% |
| Netherlands              | +102.4% |
| Macedonia (FYROM)        | +99.3%  |
| Ireland                  | +66.4%  |
| Spain                    | +52.5%  |
| Malta                    | +52.0%  |
| Serbia & M. – Serbia     | +50.0%  |
| U.K. – England & Wales   | +49.5%  |
| Greece                   | +48.8%  |
| Austria                  | +43.7%  |
| Luxembourg               | +39.2%  |
| Slovenia                 | +36.8%  |
| Norway                   | +32.1%  |
| Finland                  | +31.0%  |
| Hungary                  | +30.2%  |
| Poland                   | +28.1%  |
| Bulgaria                 | +27.5%  |
| Croatia                  | +26.5%  |
| Slovakia                 | +26.3%  |
| Belgium                  | +24.0%  |
| Sweden                   | +22.3%  |
| Denmark                  | +22.1%  |
| Germany                  | +21.6%  |
| U.K. – Scotland          | +20.1%  |
| Italy                    | +13.9%  |
| Turkey                   | +8.8%   |
| Switzerland              | +8.1%   |
| Georgia                  | +7.4%   |
| Portugal                 | +4.7%   |
| Estonia                  | +3.7%   |
| France                   | +2.5%   |

It is to be noted that the countries that have registered large increases are not confined to a particular part of the European continent. Those with traditionally low levels, such as the Netherlands, Scandinavian/Nordic countries and countries from former Yugoslavia (Bosnia & Herzegovina, Croatia, Macedonia, Serbia, Slovenia) have registered increases as much as countries from other parts of Europe.

Ten countries registered a decrease in their prison population between 1995 and 2005, of which six were formerly members of the former Soviet Union. (Table 2)

**Table 2** Decreases in European prison population levels 1995-2005

|                    |         |
|--------------------|---------|
| Lithuania          | - 36.4% |
| U.K. –             |         |
| Northern Ireland   | - 25.3% |
| Belarus            | - 24.3% |
| Latvia             | - 20.6% |
| Russian Federation | - 17.1% |
| Romania            | - 11.3% |
| Ukraine            | - 7.7%  |
| Moldova            | - 4.1%  |
| Iceland            | - 3.4%  |
| Czech Republic     | - 2.2%  |

These ex-Soviet countries include those with the highest prison population rates (per head of the national population) in Europe in 1995; the decreases thus represent moves towards the level elsewhere in Europe. However, the scale of the decreases has been insufficient to change the overall picture: in 2005 they remain six of the seven countries with the highest European levels. The seventh, Estonia, is of course another ex-Soviet country. (Table 3)

**Table 3** Countries with highest European prison population rates (per 100,000 of national population), 2005

|                    | Prison population rate,<br>2005 per 100,000 of<br>national population) |
|--------------------|--|
| Russian Federation | 532  |
| Belarus            | 426  |
| Ukraine            | 398  |
| Estonia            | 339  |
| Latvia             | 331  |
| Moldova            | 260  |
| Lithuania          | 237  |

Over the ten-year period 1995-2005 prison populations in a number of countries have fluctuated. While, as has been noted, the overall picture is one of growth in most countries, the growth has not always been steady throughout the period. In five of the countries that had the highest rises over the ten-year period (Bosnia & Herzegovina: Federation, Cyprus, Greece, Ireland and UK: England & Wales) growth was much greater in 1995-2000 than in 2000-2005. In some other countries (for example Belarus, the Czech Republic, Lithuania, Romania, Russian Federation, Turkey and Ukraine) the prison population rose in the period 1995-2000 but has since fallen. In yet another group of countries (for example Croatia, Finland, France, Luxembourg, Poland, Slovakia and UK: Northern Ireland) the population fell between 1995 and 2000 but has risen in more recent years.



## Changes in prison population levels 1995-2005

Focusing on the most recent period - the last five years - the main feature of European imprisonment levels between 2000 and 2005 has again been their growth. More than 70% of prison administrations (33 out of 47) had more prisoners in 2005 than in 2000, and in over a half (17) of those that registered growth the increase was more than 25%. (Table 4)

**Table 4** Increases in European prison population levels 2000-2005

|                           |        |
|---------------------------|--------|
| Luxembourg                | +65.7% |
| Macedonia (FYROM)         | +61.8% |
| Cyprus                    | +57.2% |
| Netherlands               | +49.8% |
| Croatia                   | +49.1% |
| Finland                   | +46.3% |
| Poland                    | +41.6% |
| Iceland                   | +40.2% |
| Bosnia & H. – Federation  | +37.8% |
| Albania                   | +37.2% |
| Slovakia                  | +36.5% |
| Spain                     | +36.0% |
| U.K. – Northern Ireland   | +32.7% |
| Austria                   | +28.8% |
| Denmark                   | +28.0% |
| Andorra                   | +27.1% |
| Serbia & M. – Serbia      | +25.4% |
| Sweden                    | +24.2% |
| Norway                    | +19.8% |
| France                    | +18.6% |
| Ireland                   | +18.4% |
| U.K. – England & Wales    | +17.9% |
| Malta                     | +16.0% |
| U.K. – Scotland           | +16.0% |
| Slovenia                  | +15.2% |
| Bosnia & H. – Rep. Srpska | +12.5% |
| Hungary                   | +9.5%  |
| Greece                    | +9.0%  |
| Belgium                   | +8.1%  |
| Bulgaria                  | +7.2%  |
| Italy                     | +5.7%  |
| Georgia                   | +3.5%  |
| Germany                   | +2.2%  |

The countries that registered decreases over this five-year period are again dominated by former members of the Soviet Union (nine out of fourteen).

**Table 5** Decreases in European prison population levels 2000-2005

|                    |         |
|--------------------|---------|
| Armenia            | - 61.2% |
| Lithuania          | - 43.6% |
| Russian Federation | - 28.0% |
| Belarus            | - 26.6% |
| Turkey             | - 24.4% |
| Azerbaijan         | - 22.3% |
| Romania            | - 21.6% |
| Czech Republic     | - 20.5% |
| Ukraine            | - 15.1% |
| Latvia             | - 13.3% |
| Switzerland        | - 4.4%  |
| Estonia            | - 3.1%  |
| Portugal           | - 1.4%  |
| Moldova            | - 0.8%  |

This then is the overall situation in respect of European imprisonment levels over the last ten years.

#### The need for detailed analysis of prison population changes

What is needed is detailed analysis of the changes in each country, examining their causes, whether these be linked to changes in crime patterns, police practice, sentencing policy or legislation, or to political pressures, initiatives by individual politicians or other factors. Such issues have been addressed by scholars in many countries and some comparative work has also been done. But there is scope for a broad comparative study focused on ways of avoiding the growth in prison populations and reducing the high levels in parts of the continent. As is well known, imprisonment is an expensive option that can be used more sparingly without compromising its value in protecting citizens from serious crime.

The following are some examples of factors that have influenced recent trends in countries that are among those that have shown the largest increases or decreases since 2000. But in each of these countries more detail is needed as to the interplay of these and other causal factors. For instance, new or amended legislation that has led to increases in the prison population may have been the result of political pressures, which may have developed as a result of changes in crime patterns. By contrast, legislative change leading to reductions in the prison population may have occurred as a result of a wish to bring numbers down to levels in other European countries.

Criminal justice experts in individual countries, some of whom may have already published on the subject, are likely to be able to shed light on the reasons for the changes in their countries and to

offer documentary and statistical evidence to support their conclusions. They may also be able to indicate some of the measures that would be necessary in order to avoid prison population growth in their country and to reduce high levels where these currently obtain.

## Countries that have seen increases in prison population levels since 2000

**Austria:** The main reason for the increase in the Austrian prison population is the rising number of foreign prisoners from Eastern Europe and South Eastern Europe, mainly Georgia, Russia, Ukraine and the Balkans. Having been involved in organized crime they receive long sentences. There is also a very large increase in the number of black African drug dealers in prison. These are fairly young people, often without any documents.

**Bosnia & Herzegovina – Federation:** More than 80% of the increase between the end of 2000 and the end of 2005 occurred in the first of these five years. It represented a continuation of the period of normalisation of the prison population following the artificially low figure when the Bosnian war finished at the end of 1995. (During the war the prison population was greatly reduced since combatants sometimes freed prisoners who agreed to fight for their particular national group.)

**Finland:** The increase in the prison population in the last few years is associated with an increase in the number of foreign prisoners (mainly from Russia and the Baltic countries), an increase in drug trafficking (often linked with the former groups), an increase in the number of fine defaulters, in the number of prisoners on remand and in the number of persons imprisoned for offences of violence<sup>4</sup>.

**Luxembourg:** The sharp increase in the prison population in the last few years (65.7% between 2000 and 2005) is associated with an increase in the number of foreign prisoners, especially foreign prisoners who are not resident in the country. There was an increase of 259 prisoners between 2000 and 2005; over the same period the number of foreign prisoners increased by 243 (94%).

**Macedonia:** Most of the sharp rise between 2000 and 2005 occurred in the last three years: the increase between September 2002 and November 2005 was over 80%. Although there has been no noticeable shift in the pattern of the offences of newly admitted prisoners, the prison administration has noticed a rise in the number of prisoners who have been involved with drugs and who need medical treatment.

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<sup>4</sup> Lappi-Seppälä T. (forthcoming). 'Penal Policy in Scandinavia', in Crime and Justice, 37.

Netherlands: The 50% rise in the prison population between 2000 and 2005 is seen as a result of more severe criminality and, as a consequence, more severe sentences. Prior to 2000 a life sentence (which in the Netherlands actually means lifetime imprisonment) was hardly applied; in 2004 six life sentences were imposed and in 2005 nine such sentences. Overall prison sentences have become harsher. In recent years legislators have increased statutory prison sentences for a number of offences.

Poland: In the year 2000, which had started with a prison population of less than 57,000, the Minister of Justice called for more restrictive use of bail and the deputy head of the lower house of Parliament called for heavier sentences for manslaughter, aggravated assault, armed robbery, rape and trafficking in women. These and other developments, notably a tightening up of the circumstances in which conditional release is granted, led to a sharp increase in the prison population. It passed 70,000 before the end of 2000 and reached 80,000 at the end of August 2001.

Spain: Legislation was introduced in 2003 in order to ensure that prisoners serve the entire length of their sentence. A major revision of the penal code in that year is also believed to have contributed to the increase in the prison population, as is legislation of 2004 concerning violence against women.

UK - Northern Ireland: During the time of the political troubles, the political activists on both sides of the divide kept a very tight grip on 'ordinary' criminal activity. Most low-level local crime resulted in firm action by the activists, who regarded part of their remit as keeping their own communities safe. This has changed considerably since the Belfast Agreement: there has been a loosening of this control and it is reported that many of those previously involved in low level political violence have now turned to crime. This has resulted in a steady rise in the prison population since 2001.

#### Countries that have seen decreases in prison population levels since 2000

Armenia: A large amnesty in 2001 reduced the prison population by over 40%. A new criminal code introduced in 2003 is also believed to have contributed to the further reduction in the prison population.

Latvia: The decrease in the prison population has not been associated with any reduction in crime levels. An amendment to the criminal law in 2001 limited the time that can be spent in pre-trial detention and a probation service was established in January 2004. These two factors, especially the former, have contributed to the recent fall in the prison population.

Lithuania: A large amnesty in mid-2000 reduced the prison population by almost 40%. As a result of new legislation (Criminal

Code, Criminal Procedural Code and Penal Executive Code), which came into force in 2003, a first time offender sentenced for a minor crime is usually sentenced to a non-custodial penalty, a broader range of alternatives to imprisonment became available and the use of conditional release was increased.

Romania: Legislative changes in 2002 and 2003 made it less likely that convicted offenders would receive sentences of imprisonment. Changes to the Criminal Procedural Code in 2004 removed from prosecutors the power to order pre-trial imprisonment and remand in custody was limited to 180 days.

Russian Federation: The Ministry of Justice instituted substantial changes in legislation affecting the prison system. The Federal Law of March 2001 aimed to achieve a significant liberalisation and refocusing of criminal policy and to reduce the use of imprisonment, so that those who commit minor offences or those of medium gravity are only imprisoned in exceptional cases. At the same time more opportunities were provided for bail and sureties to be used instead of pre-trial detention. These measures made a large impact on the Russian prison population.

Turkey: An amnesty law reduced the prison population by more than 40% (about 30,000 prisoners) between 2004 and 2005. An amnesty in 2000 reduced the numbers by about 10,000. Overcrowding has been causing significant problems in Turkish prisons and amnesties are seen as an appropriate way of tackling this situation.

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## EUROPEAN IMPRISONMENT LEVELS

### Prison populations and prison population rates (per 100,000 of national population) 1995-2005

|   | Total prison population<br>(and prison population rate)1995 | Total prison population<br>(and prison population rate)<br>2000 | Total prison population<br>(and prison population rate)<br>2005 | Variation in prison population<br>1995-2005 | Variation in prison population<br>2000-2005 |
|---|---|---|---|---|---|
| Albania   |   | 2,544 (75)  | 3,491 (111)   |   | +37.2%                                      |
| Andorra   |   | 48 (72)*  | 61 (90)*  |   | +27.1%                                      |
| Armenia   |   | 7,428 (195)   | 2,879 (89)  |   | -61.2%                                      |
| Austria   | 6,180 (77)  | 6,896 (86)  | 8,883 (108)   | +43.7%                                      | +28.8%                                      |
| Azerbaijan  |   | 23,504 (291)  | 18,259 (219)*   |   | -22.3%                                      |
| Belarus   | 54,869 (535)  | 56,590 (566)  | 41,538 (426)  | -24.3%                                      | -26.6%                                      |
| Belgium   | 7,561 (75)  | 8,671 (85)  | 9,375 (90)  | +24.0%                                      | +8.1%                                       |
| Bosnia&Herzegovina-<br>Federation                 | 536 (21)  | 1,041 (42)  | 1,435 (55)  | +167.8%                                     | +37.8%                                      |
| Bosnia&Herzegovina<br>- Republika Srpska          |   | 849 (65)*   | 955 (68)  |   | +12.5%                                      |
| Bulgaria  | 8,529 (101)   | 10,147 (124)  | 10,871 (140)  | +27.5%                                      | +7.2%                                       |
| Croatia   | 2,388 (51)  | 2,027 (44)  | 3,022 (65)  | +26.5%                                      | +49.1%                                      |
| Cyprus  | 170 (26)  | 369 (56)*   | 580 (76)*   | +241.2%                                     | +57.2%                                      |
| Czech Republic                                    | 18,753 (181)  | 23,060 (224)  | 18,343 (179)  | -2.2%                                       | -20.5%                                      |
| Denmark   | 3,438 (66)  | 3,279 (61)  | 4,198 (77)  | +22.1%                                      | +28.0%                                      |
| Estonia   | 4,401 (304)   | 4,712 (343)   | 4,565 (339)   | +3.7%                                       | -3.1%                                       |
| Finland   | 3,018 (59)  | 2,703 (52)  | 3,954 (75)*   | +31.0%                                      | +46.3%                                      |
| France  | 51,623 (89)   | 44,618 (77)   | 52,908 (88)   | +2.5%                                       | +18.6%                                      |
| Georgia   | 8,048 (179)   | 8,349 (213)   | 8,644 (202)   | +7.4%                                       | +3.5%                                       |
| Germany   | 66,146 (81)   | 78,707 (96)   | 80,413 (97)   | +21.6%                                      | +2.2%                                       |
| Greece  | 5,887 (56)  | 8,038 (74)  | 8,760 (82)*   | +48.8%                                      | +9.0%                                       |
| Hungary   | 12,703 (124)  | 15,110 (148)  | 16,543 (164)  | +30.2%                                      | +9.5%                                       |
| Iceland   | 119 (44)  | 82 (29)   | 115 (39)*   | -3.4%                                       | +40.2%                                      |
| Ireland   | 2,054 (57)  | 2,887 (75)  | 3,417 (85)*   | +66.4%                                      | +18.4%                                      |
| Italy   | 49,642 (87)   | 53,481 (94)   | 56,530 (97)   | +13.9%                                      | +5.7%                                       |
| Latvia  | 9,633 (381)   | 8,815 (364)   | 7,646 (331)   | -20.6%                                      | -13.3%                                      |
| Lithuania   | 12,782 (351)  | 14,412 (411)  | 8,125 (237)   | -36.4%                                      | -43.6%                                      |
| Luxembourg  | 469 (114)   | 394 (90)  | 653 (143)   | +39.2%                                      | +65.7%                                      |
| Macedonia (the<br>former Yugoslav<br>republic of) | 1,132 (58)  | 1,394 (69)  | 2,256 (111)   | +99.3%                                      | +61.8%                                      |
| Malta   | 196 (53)  | 257 (65)*   | 298 (74)*   | +52.0%                                      | +16.0%                                      |
| Moldova   | 9,781 (263)   | 9,449 (259)   | 9,377 (260)   | -4.1%                                       | -0.8%                                       |
| Netherlands                                       | 10,249 (66)   | 13,847 (87)   | 20,747 (127)  | +102.4%                                     | +49.8%                                      |
| Norway  | 2,398 (55)  | 2,643 (59)  | 3,167 (68)  | +32.1%                                      | +19.8%                                      |
| Poland  | 62,719 (163)  | 56,765 (147)  | 80,368 (211)  | +28.1%                                      | +41.6%                                      |
| Portugal  | 12,343 (124)  | 13,106 (128)*   | 12,929 (122)  | +4.7%                                       | -1.4%                                       |
| Romania   | 43,990 (194)  | 49,790 (222)  | 39,015 (180)  | -11.3%                                      | -21.6%                                      |
| Russian Federation                                | 920,685 (622)   | 1,060,401(729)  | 763,054 (532)   | -17.1%                                      | -28.0%                                      |
| Serbia & Montenegro<br>- Montenegro               |   |   | 734 (108)*  |   |   |

|                                      |               |               |               |               |               |
|--------------------------------------|---------------|---------------|---------------|---------------|---------------|
| Serbia & Montenegro<br>- Serbia      | 5,150 (52)*   | 6,160 (76)    | 7,724 (93)    | <b>+50.0%</b> | <b>+25.4%</b> |
| Slovakia                             | 7,412 (138)   | 6,858 (127)   | 9,363 (174)   | <b>+26.3%</b> | <b>+36.5%</b> |
| Slovenia                             | 825 (41)      | 980 (49)      | 1,129 (56)    | <b>+36.8%</b> | +15.2%        |
| Spain                                | 40,157 (102)  | 45,044 (112)  | 61,246 (142)  | <b>+52.5%</b> | <b>+36.0%</b> |
| Sweden                               | 5,767 (65)    | 5,678 (64)    | 7,054 (78)    | <b>+22.3%</b> | <b>+24.2%</b> |
| Switzerland                          | 5,655 (80)    | 6,390 (89)    | 6,111 (83)    | <b>+8.1%</b>  | <b>-4.4%</b>  |
| Turkey                               | 49,895 (82)   | 71,860 (106)  | 54,296 (76)   | <b>+8.8%</b>  | <b>-24.4%</b> |
| Ukraine                              | 202,590 (395) | 220,306 (448) | 187,075 (398) | <b>-7.7%</b>  | <b>-15.1%</b> |
| United Kingdom:<br>England and Wales | 50,962 (99)   | 64,602 (124)  | 76,190 (143)  | <b>+49.5%</b> | <b>+17.9%</b> |
| United Kingdom:<br>Northern Ireland  | 1,740 (105)   | 980 (58)      | 1,300 (76)    | <b>-25.3%</b> | <b>+32.7%</b> |
| United Kingdom:<br>Scotland          | 5,657 (111)   | 5,855 (116)   | 6,794 (134)   | <b>+20.1%</b> | <b>+16.0%</b> |

- \* Andorra - the figures are for 1/9/01 and 1/9/03
- \* Azerbaijan – the figure is for 1/9/04
- \* Bosnia & Herzegovina (Republika Srpska) – the figure is for November 2001
- \* Cyprus – the figures are for 1/9/01 and 1/4/06
- \* Finland – the figure is for 1/4/06
- \* Greece – the figure is for 16/12/04
- \* Iceland – the figure is for 1/9/04
- \* Ireland – the figure is for 30/9/04
- \* Malta – the figures are for 1/9/01 and 30/9/04
- \* Portugal – the figure is for 15/8/01
- \* Serbia & Montenegro (Montenegro) – the figure is for 1/9/03

Sources:

National prison administrations, mainly as a result of direct communications or via the Council of Europe Annual Penal Statistics.

# Judicial Cooperation in a Borderless Nordic Area <sup>1</sup>

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## The importance of Nordic co-operation

On an international scale, the Nordic countries have an almost unique potential for close co-operation in the legal area. In addition to our geographical proximity, we have open borders with very heavy travel flows. We have a common labour market and an increasingly intertwined business sector. We also have very pronounced cultural similarities. There is a fundamental sense of trust between the Nordic countries. In the legal area, this trust has expressed itself in both extensive legislative co-operation as well as close co-operation between the authorities at all levels.

For many years, we have also had an extremely efficient and well-functioning co-operation between public prosecutors and the police in our Nordic countries. One important feature of this co-operation is that our prosecutors and police have for many years been able to collaborate with and contact each other directly across borders without the involvement of central authorities.

The Nordic co-operation is described in various international contexts as a model of well-functioning regional co-operation. Nordic extradition legislation, for example, was a source of inspiration when the framework decision on the European arrest warrant was drawn up within the EU.

## The EU has taken the lead

Over the past ten years, European co-operation in criminal matters has undergone extensive development, above all within the EU. For example, the EU has adopted methods involving direct communication that allow the crime investigation authorities to make direct cross-border contact. In addition, a large number of legal instruments have been adopted in order to increase the efficiency and effectiveness of co-operation within the EU. This applies not only to the new provisions for surrender based on a European arrest warrant, which within the EU has replaced the traditional extradition procedure, but also the preconditions and procedure applied for providing different forms of legal assistance

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<sup>1</sup> This contribution is based on an article that was published in *Nordisk Tidsskrift for Kriminalvidenskab* in June 2006



across borders and the forms for setting up joint investigation groups. The European public prosecution office, Eurojust, has also created entirely new preconditions for co-ordinating cross-border criminal investigations within the EU.

There has been no corresponding development of the Nordic co-operation. The result is that co-operation within the EU has just about managed to catch up with the Nordic co-operation, and that the preconditions for co-operation across the Nordic borders are nowadays more or less on a par with what apply for co-operation with other EU countries. I presume that the European development has required all available energy during recent years. This has in part been at the expense of Nordic co-operation.

What has been done?

However, a certain amount of development is taking place. In December 2005, the Ministers of Justice of the Nordic countries signed a convention on surrender between the Nordic states (Nordic arrest warrant). The background to the Convention is one of the conclusions at the meeting between the Nordic Ministers of Justice in Svalbard in 2002 – that the extradition procedure within the Nordic area shall be made more simple and more effective. The Convention is based on the EU framework decision on the European arrest warrant. However, in several respects it goes further, for example in that no double criminality requirement and no penalty thresholds shall apply and in that the Nordic convention contains fewer grounds for refusals and shorter deadlines than the EU framework decision.

This is all well and good, of course, and I think that the final result is sound and offers tangible improvements compared with the situation we have today, with two parallel systems for extradition/surrender of persons within the Nordic countries. At the same time, I regret that the EU framework decision was adopted as the starting point for the negotiations. In my opinion, the starting point should have been to simplify and streamline the joint Nordic extradition legislation, not to work out a Nordic variant of the EU regulations for the surrender of persons, which is based on entirely different preconditions for co-operation.

The Nordic solidarity, the confidence in the legal systems of the neighbouring Nordic countries and, above all, the legal similarities in the Nordic countries and the many years of close co-operation between our law enforcement authorities pave the way for a considerably more ambitious and advanced co-operation than is possible to achieve within the EU. This is something we must take advantage of. I know that I am in good company with the Swedish Minister of Justice, who ever since the Meeting of Nordic Ministers of Justice in Visby in 1998 has been promoting the further

development of criminal law co-operation under the motto of “a borderless Nordic area”.

The results to date are unfortunately fairly meagre.

Where is that sense of daring that was demonstrated by the Nordic Ministers of Justice in the middle of the last century, when they were prepared to allow public prosecutors and the police to co-operate directly across borders? The Nordic countries decided as early as in the 1950s to adopt a trusting attitude to extradition co-operation, with low penalty thresholds, the extradition of own citizens and a waiving of double criminality and – in the mid-1970s – a diluted rule of speciality. All this has now been transferred to the European instruments.

Another example is the 1948 Convention between Sweden, Denmark and Norway, which contained provisions on the recognition and enforcement of, inter alia, fines and forfeiture. The Convention also contained provisions to the effect that orders relating to sequestration and seizure that have been issued in order to safeguard claims on forfeiture should be recognised and enforced in the other countries. The Swedish provisions stating that such decisions should be enforced were introduced in 1948 and were in 1963 transferred to the Nordic Enforcement Act <sup>2</sup> at the same time as the other Nordic countries passed similar laws.

Admittedly, I do not believe that these provisions have been used to any major extent. The police and public prosecutors have chosen to apply for legal assistance in another Nordic country in order to bring about coercive measures in that other country rather than to request the immediate enforcement of domestic coercive measures. But the fact remains: as early as in 1948 we were prepared in the Nordic countries to apply the principle of mutual recognition that was launched within the EU at the summit meeting held in Tampere in 1999.

The reasons which during the last century justified effective and far-reaching Nordic criminal law co-operation have today grown even stronger. International criminality continues to increase. Criminals pay no attention to national borders. The authorities responsible for investigating crimes must also be able to disregard national borders when crimes are to be investigated and put to trial within the Nordic area.

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<sup>2</sup> Section 1, second paragraph of the Act (1963:193) on co-operation with Denmark, Finland, Iceland and Norway on the enforcement of punishment.

## Vision – a borderless Nordic area

In the vision of a borderless Nordic area is included *full implementation of the principle of mutual recognition and enforcement of orders that are issued in the course of criminal investigations and legal proceedings*. An order that has been issued in a Nordic country during a criminal investigation or trial shall be recognised, and shall be possible to enforce in other Nordic countries without any form of review whatsoever.

Included in such a vision is that it shall be possible to transfer individuals by force across the national borders in the Nordic area as easily as it is today possible to move them by force in one and the same country in the course of a criminal investigation or trial.

This means that it shall be possible for a detention order that has been passed by a court of law in a Nordic country to be quite easily executed by the police in another Nordic country if the person is found there, without further review. In my opinion, an order of this type does not create any misapprehensions whatsoever from the point of view of legal security. The guarantees relating to legal security that the wanted person shall enjoy can and should be provided by the authorities in the country in which the investigation or trial takes place and not by the authorities in the country in which the person in question is found. For example, an objection regarding *ne bis in idem* could equally well, or perhaps even better, be examined where the investigation or trial is taking place. I very much doubt that anyone will contradict me if I say that legal security is served just as well in all of our five Nordic countries. Why should there need to be any form of extradition or surrender procedure within the Nordic area? Why should it be more complicated for a Swedish public prosecutor in Malmö to get a wanted person who is found in Copenhagen than if he or she had been found in the northern parts of Sweden?

Furthermore, I see no reason why a system along these lines should not also be applied vis-à-vis a country's own citizens who are the subject of a criminal investigation or legal proceedings in another Nordic country. Our confidence in the legal systems of other Nordic countries is so firmly founded that there is no reason in this context to demand that our own citizens be treated any differently. Finnish authorities can represent the interests of Swedish citizens just as well as Swedish authorities can.

I also feel that Swedish police should be able to put into immediate effect an order by a Norwegian court regarding the handing over of a Swedish witness who failed to appear at a court hearing in Oslo. Similarly, it should be possible to transfer a witness who is deprived of his or her freedom in Sweden to another Nordic country for questioning during a criminal investigation or trial without the review that today has to be conducted in accordance

with the provisions governing legal assistance in criminal matters. In my opinion, it should be possible for this kind of appearance to be made as simply and formlessly as when a witness who is deprived of his/her freedom is to be heard in the course of a Swedish criminal investigation or trial in another part of Sweden.

Also decisions on sequestration and seizure that are issued in one Nordic country should be recognised and enforced immediately in other Nordic countries without further review in the country of enforcement. The provisions on the recognition and enforcement of coercive measures for the purpose of securing the enforcement of forfeiture that already apply within the Nordic area<sup>3</sup> should be revived and re-applied in practice. In the same way, it should be possible for decisions to search premises and decisions to carry out secret wire-tapping that have been issued in another Nordic country, and which is enforceable in that country, to be recognised and enforced in other Nordic countries without any need for further review in the country in which they are to be enforced. It is enough for the question to be considered and for a decision to be issued once – in the country in which the investigation is in progress or the trial is being held.

Fully implemented, the vision of a borderless Nordic area would mean that the Nordic countries would accept *the exercise of public authority by other countries' authorities on their own territory*. I am not averse to the thought, even though the question, of course, contains numerous complications and also requires changes in the Constitution. But it is high time for the question to be taken up for discussion. For example, to my way of thinking there is every reason to allow police and public prosecutors from one Nordic country to question suspects and witnesses who are in another Nordic country without the need for domestic police or public prosecutors to be involved and formally be responsible for the questioning. It should be enough for the authorities in the country in question to be informed of the fact that the officials from the other country intend to come to the country and conduct a questioning. Another example where there could be some justification in allowing foreign exercise of public authority on one's own territory is if Finnish police have strong indications to the effect that a person wanted in Finland is in a certain place on the Swedish side of the border. In such a situation, it should in my opinion be perfectly possible for the Finnish police to inform the Swedish police of what is taking place and then make the arrest themselves without needing to ask Swedish authorities for assistance.

To my way of thinking, a reform like this would not need to create too much of a sensation. I regard it rather as being a perfectly natural development of, among other things, the provisions concerning cross-border surveillance and hot pursuit

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<sup>3</sup> See above

that have been brought into force as a consequence of the Schengen co-operation and the regulations for co-operation between the police in the Baltic Sea region that were introduced when the Öresund Bridge was completed. In point of fact, it is more remarkable that the Nordic countries did not dare – long before the Schengen co-operation and the Öresund Bridge made it necessary – to introduce provisions that are better adapted to suit the reality with which our police and public prosecutors have for many years been confronted, not least in connection with daily border co-operation.

It is therefore in my opinion high time that the visionary development work in the area of criminal law be revived within the Nordic countries. With this kind of initiative, I also believe that the Nordic area could serve to an even greater extent as a model and take on even more of a leading role in the corresponding work within the European Union.