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**THE INTERNATIONAL LEGAL FRAMEWORK
FOR COMBATING TRANSNATIONAL ORGANISED CRIME**

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in
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**Submitted in fulfilment of the requirement for the
Degree of LL.M. by Research**

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ABSTRACT

Since the 1990s, transnational organised crime (TOC) has emerged as a threat to national and international security. As a result, the United Nations implemented the Convention against Transnational Organised Crime (UNTOC) in 2000, which aims to improve international legislation and facilitate cooperation between state parties. This research aims to identify the strengths and weaknesses of the UNTOC and the European Union's framework, as well as take advantage of a comparative analysis so as to determine whether the international legal system may benefit from elements employed at EU level. Moreover, key challenges facing implementation and monitoring on an international level are addressed. Finally, traditional as well as non-traditional measures to combat organised crime are proposed which may be used so as to strengthen the international legal framework and to overcome weaknesses of the current framework. The above mentioned aims were achieved by conducting doctrinal ('black letter law') research, doctrinal research searching secondary authority, socio-legal research ('law in practice') and, finally, comparative cross-jurisdictional research. The research found that the fight against TOC has been characterised by the definitional opaqueness of TOC and the complexity intrinsic to law enforcement and judicial cooperation. Nevertheless, the convention provides a solid basis for mutual legal assistance and law-enforcement cooperation. The UNTOC serves as a framework of international legislation and facilitates cooperation between state parties. It does not constitute an operational treaty, which oversees specific crime-fighting activities. As a whole, state parties remain wary of using the UNTOC as it does not provide a clear, elaborate concept upon which states may rely, legislate and train around. New practices and legal innovations, such as the establishment of joint investigation teams or the integration of other fields of law, need to be considered in order to address all facets of TOC, be it cross-border criminality or economic changes. Consequently, an integrated and comprehensive strategy, which takes into account the fluid, globalised nature of criminal networks, as well as their sophisticated tactics, needs to be developed.

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AUTHOR'S DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature _____

Printed Name _____

ABBREVIATIONS

ANSA – armed non-state actor
ASFJ – area of freedom, security and justice
ATT – Arms Trade Treaty
CIFTA – Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials
COIP – Organic Integral Criminal Code (Ecuador)
COP – Conference of Parties
EAW – European Arrest Warrant
ECHR – European Court of Human Rights
EEW – European Evidence Warrant
EIO – European Investigation Order
EU – European Union
FATF – Financial Action Task Force
FD – Framework Decision
GA – General Assembly
ICC – International Criminal Court
IHL – international humanitarian law
INCB – International Narcotics Control Board
INTERPOL – International Criminal Police Organisation
JA – Joint Action
LTTE – Liberation Tigers of Tamil Eelam
MLA – mutual legal assistance
MLAT – mutual-legal assistance treaty
NCB – non-conviction based
NGO – non-governmental organisation
OGC – organised criminal group
SALW – small arms and light weapons
SIT – special investigative technique
TCL – transnational criminal law
TFEU – Treaty on the Functioning of the European Union
TIP – trafficking in persons
TOC – transnational organised crime
UK – United Kingdom
UN – United Nations

UNCAC – United Nations Convention against Corruption

UNODC – United Nations Office on Drugs and Crime

UNTOC – United Nations Convention against Transnational Organised crime

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I. Table of legislation: international cases

Prosecutor v Rutaganda, Judgement (Judgment) ICTR-96-3-T (6 December 1999)

II. Table of legislation: EU legislation

Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] OL J 300/42

Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39, art 2(1)

European Parliament, European Parliament resolution of 25 October 2011 on organised crime in the European Union, 2010/2309(INI), 25 October 2011

Joint Action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union [1998] OJ L 351

Treaty on the Functioning of the European Union (TFEU)

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Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 (UNCAC)

Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (UNTOC)

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990

Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other related material (adopted 14 November 1997, entered into force 1 July 1998) (CIFTA)

International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2349 UNTS 41

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organised Crime (adopted 31 May 2001, entered into force 3 July 2005) 2326 UNTS 208

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507)

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319

Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (adopted 25 March 1951, entered into force 8 August 1975) 976 UNTS 105

CHAPTER I

INTRODUCTION

Transnational organised crime (TOC) has emerged as a threat to national and international security, with societal, economic and political implications that may result in the destabilisation of states and society. By the 1990s, transnational organised crime had increased in scale and scope in large part due to the increased transnational flow of people, goods, and money, as well as a transition towards free-market economies and democracies and the heightening of civil unrest.¹ As a result, the United Nations implemented the Convention against Transnational Organised Crime (UNTOC) in 2000. The convention became a landmark on the subject, given that it represents a legal instrument designed to improve international legislation and facilitate cooperation between countries.² All states that have signed and ratified this convention attest to adopting various measures against transnational organised crime, such as its criminalisation in national legislation and implementation of law enforcement procedures associated with the accusation, trial, sanctions, jurisdiction, extraditions, as well as forms of mutual legal assistance and joint investigations.³ However, criticism of the UNTOC has been expressed concerning the scope of the convention, as well as the definition of transnational organised crime itself.⁴ Moreover, given the rapidly changing nature of TOC, the ‘UNTOC does not adequately account for the increasingly activity-based, horizontal structure of criminal syndicates or the growing nexus between organized crime and terrorism, corruption, conflict, public health, global finance, and modern technology.’⁵ As such, it is becoming increasingly important to strengthen international norms so as to respond effectively to the ever-growing threat and ‘its ability to exacerbate conflicts, spoil peace processes and undermine state consolidation’.⁶ In this thesis, it is argued that the international legal framework for

¹ Alan Collins, *Contemporary Security Studies* (OUP 2010).

² André Standing, ‘Transnational Organized Crime and the Palermo Convention: A Reality Check’ (International Peace Institute 2010).

³ Paulo Pereira, ‘The UN Convention against Transnational Organized Crime and Its Ambiguities’ (*The International Relations and Security Network*, 8 November 2013) <<http://isnblog.ethz.ch/international-relations/the-un-convention-against-transnational-organized-crime-and-its-ambiguities>> accessed 18 October 2015.

⁴ Petrus van Duyne and Mark Nelemans, ‘Transnational Organized Crime: thinking in and out of Plato’s cave’ in Felia Allum and Stan Gilmour (eds), *Routledge Handbook of Transnational Organized Crime* (Routledge 2011).

⁵ Council on Foreign Relations, ‘The Global Regime for Transnational Crime’ (*Council on Foreign Relations*, 25 June 2013) <<http://www.cfr.org/transnational-crime/global-regime-transnational-crime/p28656#p2>> accessed 18 October 2015.

⁶ The Global Initiative against Transnational Organized Crime, ‘Ignoring or Interfering? Development Approaches to Transnational Organized Crime’ (The Global Initiative against Transnational Organized Crime 2014).

combatting transnational organised crime must be revised so as to improve the capacity of states to adapt to the challenges posed by globalisation, through the promotion of a strategic and coordinated *modus operandi* that goes beyond the focus on criminal justice provisions and approaches, allowing for innovative strategies and a more multi-dimensional understanding. In particular, since a common direction and goals appear to be absent on a global scale.

Analysis of the international legal framework to combat transnational organised crime and recommendations regarding improvements thereof are important because organised crime may be considered a significant threat to development and security, given that TOC has the ability to incessantly adapt to changes at the local and international levels, to establish transnational networks and enlarge operations so as to maximise the possibilities presented by globalisation.

Existing academic research on transnational organised crime extends across various academic areas and covers numerous aspects, including criminal activities, the typologies of organised criminal group's structures and the control exerted by established criminal networks such as the Yakuza or Mafia over territories and illegal markets. The majority of research, however, focuses on one particular type of crime, and is limited to a particular geographical area, or is concerned with specific criminal networks such as those mentioned above. A limited number of scholars, for instance Tom Obokata, Francesco Calderoni, Neil Boister and Pierre Hauck, have focussed on the suppression of TOC through international law.⁷ Research into organised crime on the European level has been limited, research being primarily focused on organised crime within member states or the 'Europeanisation' of criminal law and procedure in general. Hence, research into TOC must be more transnational in nature in order to carry out a comparative perspective and promote international cooperation to develop a comprehensive framework to combat transnational organised crime.

The research conducted here does not merely aim to provide an overview of the international legal framework for fighting transnational organised crime. Especially, since

⁷ See for example Tom Obokata, *Transnational organised crime in international law* (Hart Publishing 2010); Francesco Calderoni, *Organized Crime Legislation in the European Union. Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight Against Organized Crime* (Springer 2010); Neil Boister, *An Introduction to Transnational Criminal Law* (OUP 2012) and Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organised Crime* (OUP 2016).

research on transnational organised crime has primarily focused on a specific type of crime, rather than focusing on international responses. Instead, its aim is to identify the strengths and weaknesses of the United Nations' Convention against Transnational Organised Crime and the European Union's (EU) framework, and to take advantage of a comparative analysis so as to determine whether the international legal system may benefit from elements employed at EU level. Moreover, key challenges facing implementation and monitoring on an international level are addressed. Finally, the researcher intends to propose traditional as well as non-traditional measures to combat organised crime, which may be used so as to strengthen the international legal framework and to overcome weaknesses of the current framework.

In order to achieve the above mentioned aims, the scope of this thesis is limited to the analysis of the UNTOC, and its protocols, as well as EU legislation pertaining to organised crime and to mutual legal assistance in criminal matters. As such, no further legal frameworks or conventions relating to specific organised crimes, such as the United Nations Convention against Corruption (UNCAC), are analysed in detail within this study. These jurisdictions were chosen, as the UNTOC presents the only multilateral treaty against transnational organised crime and the EU's framework may be regarded as supranational rather than merely intergovernmental, allowing it to be classified as 'international'. The UNTOC's key provisions with regards to criminalisation and mutual legal assistance will be analysed, as well as organised crime legislation of the European Union that may be applied to transnational organised crime as a whole. Legislation pertaining to European initiatives in the field of mutual assistance in criminal matters has been carefully selected so as to only include measures aiming to fulfil the Union's objective of becoming an area of freedom, security and justice. Traditional and non-traditional measures to strengthen the international system are limited to examples, considered to be pertinent, innovative and attainable.

The third chapter discusses the historical context of transnational organised crime, its contemporary manifestation and provides an explanation as to why TOC manifests itself as a major security issue. In order to gain insight into the nature of TOC, as well as to illustrate its importance, examples of transnational organised crimes will be presented. The fourth chapter discusses TOC in international law, focusing on its rather problematic definition, the obligations of states under international law and introducing the main international instruments in the fight against TOC, as well as their strengths and weaknesses. The fifth chapter constitutes of an in-depth analysis of the UNTOC as well as

key challenges facing its implementation and issues surrounding the monitoring of implementation. The sixth chapter discusses the European Union's approach to transnational organised crime and provides a rigorous evaluation of key legislation on organised crime, as well as legislation concerning mutual assistance in criminal matters. Furthermore, this chapter will compare and contrast regional and international cooperation to determine each system's strength and weaknesses and whether the international framework may benefit from the approaches taken at the regional level. The seventh chapter explores means to strengthen the international legal system through transnational measures, such as mutual legal assistance, and non-traditional measures, such as peace operations. Finally, the thesis will conclude with an outlook into the strengths and weaknesses of the current system, results of the comparative analysis and suggestions with a view to future developments.

CHAPTER II

METHODOLOGY

In order to investigate the international legal framework for fighting transnational organised crime, with a particular focus on the UNTOC as well as organised crime legislation in the EU, this study employs research methods that are interpretative and analytical in nature. The research was conducted in four distinct core phases: (i) doctrinal ('black letter law') research in order to foster a deeper understanding of various primary sources of law; (ii) doctrinal research searching secondary authority; (iii) socio-legal research ('law in practice') to address the content of legal practice from a variety of perspectives and (iv) comparative cross-jurisdictional research so as to cross-examine issues of context, comparison, interaction and interpretation on an international and regional scale.

Doctrinal research, known as well as 'black letter law', was employed so as to interpret the formulation of legal 'doctrine' through the analysis of legal rules to be found within various sources of law. Materials and methods, out of which the rules and principles regulating the international community are developed, include treaties, international customs, and general principles of law. Treaties and their protocols were found using the online portal of the United Nations Office of Drugs and Crime (UNODC), which provides all crime-related treaties that sustain its operational work. On a regional basis, the special example of European community law was assessed, which is derived, *inter alia*, from treaty provisions, regulations, directives and decisions. Access to the aforementioned sources was gained using EUR-Lex, a service that provides legal texts of the EU online. Moreover, so as to substantiate various arguments, case law was included. As such, doctrinal research was used as a prerequisite for undertaking further research. Nevertheless, it is important to note, that the scope of the thesis has limited the amount of sources used, consequently only those deemed 'most important' were included, albeit others have been referenced.

Further doctrinal research searching secondary authority was utilised in addition to 'black letter law' as the latter may provide a too narrow understanding of law by only referencing primary sources. In addition, law reviews and other scholarly works were used so as to further the researchers understanding of the topic through explanation, analysis and commentary on the law. These sources further allow one to demonstrate in what ways

the research undertaken relates to previous research, as well as underlining gaps in existing research. Moreover, the said secondary sources enable one to synthesise information obtained from 'black letter law' into a coherent legal theory and may present original theories that may be used to propose amendments to existing laws. Secondary authority was primarily found using the University of Glasgow's library and legal databases such as LexisLibrary and HeinOnline. In order to find appropriate material, key words, such as 'transnational organised crime' or 'mutual legal assistance', were used and abstracts evaluated so as to ascertain that the information provided complied with the researcher's needs.

Thereafter, socio-legal research was conducted to assure that the legal research was more detailed, constructive and comprehensive. In particular, within the field of international law, socio-legal research enables one to consider law in the context of broader social and political forces. This is of particular importance when studying transnational organised crime, as the latter constitutes a phenomenon, which takes different forms within and across different types of society. Accordingly, the conceptual and analytical material may be synthesised so as to propose alternatives for legal development. As with the doctrinal research, secondary sources including journal articles were used.

Finally, comparative cross-jurisdictional research was applied so as to study the similarities and differences between two legal systems, namely the international legal system revolving around the United Nations (UN) and the legal system of the European Union. Comparing the aforementioned permits one to gain a more comprehensive understanding and consequently enables new legal ideas and conceptual solutions to be articulated. However, one must bear in mind that as an intergovernmental organisation and subject to international law, the EU is bound by international law, but the same is not applicable to the United Nations. Nevertheless, the international system may benefit from elements of the supranational legal framework established by the EU.

CHAPTER III

TRANSNATIONAL ORGANISED CRIME

The term transnational organised crime may evoke images of cross-border crime or crime associated with criminal groups such as the Italian Mafia, Colombian cartels or the Japanese Yakuza. If one had to name a specific crime, so-called ‘traditional’ organised crimes such as drug trafficking or illicit trading in weapons may come to mind. However, this chapter aims to introduce the reader to key features of transnational organised crime. Included is a description of why transnational organised crime has risen to prominence in recent years, and become a potential security threat, and an outline of the categories of crime that fall within the realm of transnational organised crime.

3.1. The rise of transnational organised crime

Transnational organized crime emerged at the beginning of the 20th century arising in ‘parallel to the development of economic regulation, protection, and social support initiated by the modern Welfare State, and to the development of international law’.⁸ TOC is primarily viewed as an occurrence arising from ‘consumers’ demand for products and services, which are unmet due to criminogenic government prohibitions and exercises’.⁹ Early examples include the illegal sale of alcohol in the United States during the Prohibition Era or the control of territory by the Italian Mafia, which ‘encompasses all facets of the resident social community, with a particular emphasis on the local political powers and economic activity’.¹⁰

Organised crime networks may rapidly take advantage of new developments in society as evident, for example, by the development of the illegal trade in organs and counterfeit medicines. The type of illegal goods and services provided, as well as the extent of the organised criminal groups’ involvement depends, ‘on the trends of the international illegal economy and the group’s capability to position themselves on the new routes’.¹¹ Factors that promote the process by which criminal networks have acquired influence, and under the right circumstances even participated in the exercise of institutional power, have included: (i) the expansion of markets, in the absence of

⁸ Letizia Paoli, ‘The Paradoxes Of Organized Crime’ (2002) 37 *Crime, Law & Social Change* 51, 63.

⁹ Alexander J Blenkinsopp, ‘Transnational Organized Crime, By Frank G. Madsen’ (2010) 11(3) *Global Crime* 366, 367.

¹⁰ Europol, ‘Threat assessment. Italian organised crime’ (Europol 2013) 7.

¹¹ Paoli (n 8) 72.

safeguards and legal protection; (ii) transitions in the political structure of states formerly dominated by protectionism; (iii) the lack of norms and the absence of effective government structures in weak states and (iv) a lack of understanding for legality among the populace.¹² As a result of globalisation, ‘‘criminogenic asymmetries’’ between countries in terms of ‘structural discrepancies, mismatches and inequalities in the realms of the economy, law, politics and culture’’¹³ have expanded, providing new opportunities to organised criminal groups. Hence, in the 1990s, states felt that TOC no longer merely constituted a criminal law or criminological problem, but rather a security threat due to its ability to adapt and transform.¹⁴

3.2. The securitisation of ‘transnational organised crime’

Although the effects of TOC on society may be merely viewed as negative consequences of criminal activity, its repercussions on individuals, the economy and the state can elicit a significant threat, which cannot be adequately dealt with under domestic policy.¹⁵ Under the right circumstances, organised crime may even pose a threat to the regional or international order due to its transnational nature. Consequently, the hitherto existing separation between internal and external security becomes increasingly blurred. TOC may become a matter of national security, resulting in the greater allocation of resources, ‘the creation of specific state entities, the alteration of police operations, and a deeper involvement of intelligence agencies’.¹⁶ The securitisation of transnational organised crime has become particularly apparent in states such as the Republic of Ireland, Mexico and the United States, and has resulted in the adaptation of legal frameworks and the acceptance of more militarised methods of policing.¹⁷ In the Republic of Ireland, securitisation has even culminated in the usage of counterterrorism approaches to address TOC, which have been justified by ‘reference to the rise in drugs and firearms offences, low detection and prosecution rates for gun homicides in particular, and because of the link between paramilitary actors and a burgeoning ‘gun culture’’.¹⁸ Nevertheless, it remains

¹² Alison Jamieson, ‘Transnational Organized Crime: A European Perspective’ (2001) 24(5) *Studies in Conflict & Terrorism* 377.

¹³ Klaus von Lampe, ‘Transnational organized crime challenges for future research’ (2012) 58 *Crime Law Soc Change* 179, 185.

¹⁴ Liz Campbell, ‘Organized Crime and National Security: A Dubious Connection?’ (2014) 17(2) *New Crim L Rev* 220.

¹⁵ Lars J Gerdes, ‘Die Bedrohung durch transnational organisierte Kriminalität’ in Thomas Jäger (ed), *Die Komplexität der Kriege* (VS Verlag für Sozialwissenschaften 2010).

¹⁶ Campbell (n 16) 221.

¹⁷ *ibid* 225.

¹⁸ *ibid* 226.

uncertain whether TOC, in general, may be regarded as an existential threat due to its defiance with the existence of the state, or through the seriousness and magnitude of the threat it presents to the community and to the conducting of a ‘normal life’. Both on domestic and international levels, the violence associated with TOCs, such as human trafficking, which currently is heavily debated within the European Union, is one of the most visible side effects, attracting media and public attention.¹⁹ However, it is important to note that the perception of the problem is not necessarily dependant of the actual overall threat posed by TOC: After all, human trafficking is more prominent in the British media, than drugs and fraud, the most profitable sectors of TOC.²⁰ The securitisation of TOC and the false perception of the threat can initiate a moral panic, diverting political attention from the exercise and application of more coercive legislation. The ‘ultimate legal consequence would be a declaration of a state of emergency by the executive, and associated derogation from certain rights’.²¹ Accordingly, the securitisation of TOC has the ability to affect the capacity of courts to intercede in methods that are problematic in terms of procedural rights. Nevertheless, the rationalisation for legal exceptionalism in relation to national security pertains to state sovereignty, as the state may declare that it is justified in defending itself from the perceived threat.

In the 21st century, transnational organised crime appears increasingly on national and international security agendas. The securitisation of TOC may enhance international cooperation and result in the strengthening of the international legal framework to combat the threat. However, there is the potential risk that the legal measures and rules introduced to counter TOC may be misused to further political objectives and/or may result in individual rights being undermined.

3.3. The contemporary manifestation of transnational organised crime

Nowadays, transnational organised crime is no longer viewed as an internal security threat, but rather as a threat to ‘peace and security, development and human rights, democracy and good governance’.²² TOC is able to endanger the sovereignty and independence of the nation in a particularly rapid and substantial way. This has become

¹⁹ Thomas Pankratz and Hanns Matiasek, ‘Understanding Transnational Organised Crime. A Constructivist Approach Towards A Growing Phenomenon SIAK’ (2012) 2 SIAK-Journal – Journal for Police Science and Practice 41, 45.

²⁰ Home Department, *Serious and Organised Crime Strategy* (Cm 8715, 2013) 15.

²¹ Campbell (n 16) 240.

²² Boister (n 7) 13.

particularly apparent in states like Colombia, where the state appears to have lost the ‘capacity to manage by itself’.²³ Moreover, large-scale financial fraud initiated in one state may rapidly precipitate a chain reaction, affecting various states in different ways and become exacerbated over a long period of time.²⁴ When trying to tackle transnational organised crime, problems are intensified by the capacity of criminal groups to obscure their activities, to act swiftly to capitalise from new opportunities, and to adapt their structures and activities to law enforcement counter-measures. Furthermore, members of TOC groups may infiltrate states, ‘thereby obtaining not only intimate knowledge of their tactics and techniques, but also advance notice of any operations’.²⁵ Criminal groups also may make ‘use of proxies and contractors at the operational level, allowing the proxies to incur the risks of detection and apprehension’.²⁶ This specialisation makes it even more difficult to identify the players within a complex criminal network and hinders law enforcements attempts to break down these complex organisational structures.

While TOC may threaten the security of states, it often is viewed by citizens as a viable alternative as it provides a system of governance, services and products that the state does not, thereby remaining a favourable, albeit suboptimal, proxy.²⁷ It has even been proposed that it is ‘the quintessential expression of the kind of private-sector entrepreneurialism celebrated and encouraged by the neoliberal economic orthodoxy’.²⁸

3.4. Transnational organised crimes

The crimes most commonly associated with TOC, which have received the most attention from politicians and policy-makers on an international level and in terms of law-making are: drug trafficking, human trafficking, smuggling of migrants and the illicit

²³ Mónica Serrano, ‘Transnational Organized Crime and International Security: Business as Usual’ in Mats Berdal and Mónica Serrano (eds), *Transnational Organized Crime & International Security. Business as usual?* (Lynne Rienner Publishing 2002) 29.

²⁴ Stefano Betti, ‘New prospects for inter-state co-operation in criminal matters: The Palermo Convention’ (2003) 3 *Int’l Crim L Rev* 151.

²⁵ Phil Williams and Roy Godson, ‘Anticipating organized and transnational crime’ (2002) 37 *Crime, Law & Social Change* 311, 338.

²⁶ *ibid* 338.

²⁷ The Global Initiative against Transnational Organized Crime, ‘New Frontiers or Old Boundaries? Reconsidering approaches to the Security and Development Nexus in the Context of Responses to Organized Crime, Conflict and Insurgency’ (The Global Initiative against Transnational Organized Crime 2015).

²⁸ Peter Andreas, ‘Transnational Crime and Economic Globalization’ in Mats Berdal and Mónica Serrano (eds), *Transnational Organized Crime & International Security. Business as usual?* (Lynne Rienner Publishing 2002) 37.

trading in firearms.²⁹ However, the crimes associated with TOC have become increasingly transnational and diversified, manifesting themselves in as many as fifty-two forms.³⁰ The following section aims to provide an overview of those traditionally affiliated with TOC as well as emerging crimes of concern.

Drug trafficking is one of the largest global markets, 'estimated at over \$500 billion per year'.³¹ It typically involves the cultivation, manufacture, distribution and sale of substances, which are subject to drug prohibition laws.³² It is commonly agreed upon that drug trafficking remains an evolving and harmful threat, which undermines governance and human security. In recent years, the 'war on drugs' has taken different approaches between those who promote criminal justice and security responses, versus those who pursue a framework that aims at reducing demand and harm.

Human trafficking constitutes not only a serious crime, and a grave violation of human rights, but also represents one of today's largest shadow economies.³³ Every year, thousands of individuals fall victim to exploitation, with the International Labor Organisation estimating that the number of trafficking victims amounts to approximately 20.9 million people worldwide.³⁴ Human trafficking is the only crime to fall under TOCs, which is classified as a crime against humanity. It manifests itself in many forms, with forced labour and sexual exploitation being the primary types. The scale of the problem is ascribed to the various roles states play in the exploitation of the victims, 'whether that be recruiting, harbouring, transporting, or acting as destinations for victims'.³⁵ Despite growing awareness about human trafficking, it remains underreported due to its covert nature, misapprehension about what it entails, and a lack of cognisance about its indicators.

The smuggling of migrants 'occurs when migrants, prevented from entering a state because of heavily enforced restrictive immigration policies, turn to smugglers for

²⁹ International and regional legislation has been dedicated to the above mentioned crimes such as, for example, International Drug Control Treaties, the UNTOC's protocols and European Union legislation.

³⁰ Council on Foreign Relations (n 5).

³¹ Matthew S Jenner, 'Drug Trafficking as a Transnational Crime' in Philip Reichel and Jay Albanese (eds), *Handbook of Transnational Crime and Justice* (SAGE Publications, Inc. 2014) 65.

³² United Nations Office on Drugs and Crime, 'Drug trafficking' (*UNODC*) <<http://www.unodc.org/unodc/de/drug-trafficking/>> accessed 13 June 2016.

³³ Sally Stocker and Louise Shelley 'Introduction' in Anna Jonsson (ed), *Human Trafficking and Human Security* (Routledge 2009) 1.

³⁴ Viorel Coroiu and Marin Ruiu, 'European policies for managing the organised crime' (2015) 8 *Eur J Pub Ord & Nat'l Sec* 15.

³⁵ Exodus Cry, 'What is Human Trafficking?' (*Exodus Cry*, 2016) <<http://exoduscry.com/about/human-trafficking/>> accessed 13 June 2016.

assistance to gain entry'.³⁶ However, unlike with human trafficking, the smugglers' motivations are primarily pecuniary, as they do not, usually, seek exploitation of those smuggled. Both push and pull factors induce individuals to leave their country, either because internal factors such as conflict or poverty require them to resort to smuggling services (push factors) or because destination countries are perceived to have greater economic opportunities or provide political stability (pull factors).³⁷

Illicit trading in firearms kills at least 3,000 individuals daily according to the United Nations and takes place not merely for economic reasons, but may also be attributed to political and social motivations.³⁸ Moreover, firearms' trafficking is associated with armed violence, including 'inter-state conflict, civil wars, terrorism, organised crime and gang warfare'.³⁹ Nonetheless, despite an increase in humanitarian crises affiliated with violence brought about by firearms and an increase in arms trade, there is to date no comprehensive international legal framework governing the illicit trading in firearms.

In addition to the above mentioned crimes, numerous 'new' transnational organised crimes are emerging and were identified by the United Nations during the fifth Conference of Parties to the UNTOC in 2010 as issues to be addressed.⁴⁰ Cybercrime, for example, has been recognised as threatening national and international prosperity, security and stability. Identity-related crime is also on the rise with organised criminal groups using the identification information not only to generate profit, but also to impact individuals, economies and online commerce. Moreover, trafficking in cultural property, such as excavated artefacts, is not only increasingly used to generate profits through the sale in underground illicit markets, but also to launder the proceeds of crime.⁴¹ In addition to the above, organised crime groups have become involved in environmental crime, such as the trafficking of endangered species, piracy and organ trafficking.

³⁶ Boister (n 7) 46.

³⁷ Andrea Di Nicola, 'Trafficking in Persons and Smuggling in Migrants' in Philip Reichel and Jay Albanese (eds), *Handbook of Transnational Crime and Justice* (SAGE Publications, Inc. 2014).

³⁸ Leigh Rome, 'The case of prosecuting arms trafficking in the International Criminal Court' (2014-2015) 36 *Cardozo L Rev* 1149.

³⁹ Institute for Foreign Policy Analysis, 'A comprehensive Approach to Combating Illicit Trafficking' (IFPA 2010) 33.

⁴⁰ United Nations Office on Drugs and Crime, 'Emerging Crimes' (*UNODC*) <<https://www.unodc.org/unodc/organized-crime/emerging-crimes.html>> accessed 13 June 2016.

⁴¹ *ibid.*

New practices and legal innovations need to be implemented in order to address all facets of transnational organised crime. Further, it is important to develop an integrated and comprehensive strategy that takes into account the fluid, globalised nature of criminal networks, as well as their sophisticated tactics.

CHAPTER IV

TRANSNATIONAL ORGANISED CRIME IN INTERNATIONAL LAW

Having shown where the concept of transnational organised crime came from, why it came to dominate official discourse, and what crimes fall within its scope, we shall turn to transnational organised crime in international law. The following chapter will discuss how the complex phenomenon of TOC is defined in international law, what obligations states have under international law when addressing such a threat and what legal instruments have been implemented hitherto to tackle TOC.

4.1. Defining transnational organised crime in international law

Transnational organised crime is a term not easily defined given that it incorporates various crimes and primarily describes a social phenomenon. TOC poses a challenge for almost any attempt at definition and/or regulation and as yet has not been delineated as a legal concept, as a precise judicial meaning is absent.⁴² The words ‘transnational’ and ‘crime’ are more easily defined, however, the word ‘organised’ and how we interpret it poses numerous challenges as it refers to the ‘attributes of the criminal organisations that make the crimes they commit ‘organised’’.⁴³ Notwithstanding, defining ‘transnational organised crime’ facilitates international criminal cooperation, as it tends to increase its effectiveness. Moreover, should the term be too loosely defined, measures to combat TOC may be ineffective or incompatible with the rules and principles of nation states, and might even become derogatory.⁴⁴ ‘They vary from small, loosely connected networks, comprising a handful of persons, to large, hierarchical organisations’,⁴⁵ such as the Colombian ‘drug cartels’ or the Chinese ‘triads’. That being said, if the definition is too restricted, changes in the development of TOC may not be accounted for. So, how is the term ‘organised’ to be understood? Ordinarily, it is either to be recognised as a set of actors, such as a group of three or more persons acting together, or a set of activities, such as drug or human trafficking. Given the various interpretations of the term, the legal treatment of and the affiliation with a criminal group, as well as the activities linked to

⁴² David Felsen and Akis Kalaitzidis, ‘A Historical Overview of Transnational Crime’ in Philip Reichel (ed), *Handbook of Transnational Crime & Justice* (SAGE Publications, Inc. 2005).

⁴³ Felia Allum and Monica Den Boer, ‘United We Stand? Conceptual Diversity in the EU Strategy Against Organized Crime’ (2013) 35 *Journal of European Integration* 135, 137.

⁴⁴ Pierre Hauck and Sven Peterke, ‘Organized Crime And Gang Violence In National And International Law’ (2010) 92(878) *International Review of the Red Cross* 407.

⁴⁵ *ibid* 410.

TOC, vary from state to state. An example of an institution oftentimes associated with TOC is the brothel: Strictly prohibited and punished in France, such establishments are perfectly legal in Belgium or Spain.⁴⁶

The question remains: How is transnational organised crime defined in international law? The first definition of organised crime in international was established in the Joint Action 733 by the European Union in 1998.⁴⁷ As with the majority of definitions to be found in international law, the scale and threat of TOC is highlighted while concomitantly imprecise definitions with no or few strict criteria are acceded to. As the German public prosecutor Peter Korneck once said: ‘If you omit the reference to ‘serious offences’, you are left with the description of an activity that in Germany and in all the Western world is usually described as entrepreneurial activity’.⁴⁸ As a result of the ambiguity surrounding the term, a ‘double track’ approach has been decided upon, which emphasises the scale and threat of TOC, whilst simultaneously endorsing minimum common denominator definitions, with no precise criteria.⁴⁹ Yet, consequently, the term is often used interchangeably with, *inter alia*, professional crime, criminal enterprises, gangs or secret societies.⁵⁰ However, listing all possible criminal activities exclusively associated with TOC is not an option either, as this would prejudice the applicability and effectiveness of the definition and would demand specific responses for each crime.⁵¹

Defining transnational organised in international law is a challenging task, as definitions and interpretations of the term vary considerably, and encompassing all crimes associated with TOC is almost impossible. Hence, presently, the UNTOC has established the most widely accepted definition of TOC (adhering to the ‘double track’ approach) whilst still not being entirely universal and unequivocal.

⁴⁶ Hobivola Andriantsitovianarivelo Rabearivelo, ‘Du groupe criminel domestique à l’organisation criminelle transnationale : Comment la mondialisation a-t-elle restructuré le crime transnational organisé ?’ (Université Laval 2012).

⁴⁷ Calderoni (n 7).

⁴⁸ Paoli (n 8) 61.

⁴⁹ Liz Campbell, *Organised Crime and the Law, A Comparative Analysis* (Hart Publishing 2013).

⁵⁰ Angela Veng Mei Leong, *The Disruption of International Organised Crime. An Analysis of Legal and Non-Legal Strategies* (Ashgate Publishing Limited 2007).

⁵¹ Dimitri Vlassis, ‘The UN Convention Against Transnational Organized Crime’ in Mats Berdal and Mónica Serrano (eds), *Transnational Organized Crime & International Security. Business as usual?* (Lynne Rienner Publishing 2002).

4.2. Obligations of states under international law

International law lays down obligations which states are required to respect by becoming parties to international treaties. However, as Lambert opines: ‘general obligations are based on the premise that ‘international law imposes obligation not of way but of result’’.⁵² General obligations do not require states to legislate in order to perform their international obligations, but rather provide guidelines that state parties ought to follow in order to achieve a given objective and obligation. States are free to choose the ways and means of attaining these objectives and obligations.⁵³ International law is made up of an autonomous set of international treaty norms and various sovereign sets of domestic criminal norms with distinguishing legal authorities. The increasing number and complexity of international treaty norms and their transmutation into domestic laws, enables better assimilation of domestic criminal laws into the international prohibition regime.⁵⁴ Through the ratification of so-called suppression conventions, state parties’ agree to criminalise the unlawful behaviour specified in those conventions and to adopt mutual legal assistance and extradition provisions, which warrant cooperation with other states attempting to establish and exercise jurisdiction over those individuals accused of a crime.⁵⁵ Moreover, conventions such as the UNTOC include the indirect suppression of crimes that have actual or potential transnational effects or transnational moral impacts, since state parties are required to criminalise certain forms of conduct and provide legal assistance to other state parties. Accordingly, the transnational element in the definition of crime may be qualified as substantive and jurisdictional, as it implies that state parties are required to establish jurisdiction over extraterritorial activities.⁵⁶ Suppression conventions, such as the 1999 International Convention for the Suppression of the Financing of Terrorism or the 2003 UN Convention against Corruption,⁵⁷ are said to have a twofold purpose: (i) substantive criminalisation and (ii) international cooperation in criminal

⁵² Joseph J Lambert, *Terrorism and Hostages in International Law. A Commentary on Hostages Convention* 1979 (Cambridge: Grotius Publications Limited 1990) 101.

⁵³ Olympia Beku, ‘A case for the review if article 88 of the ICC statute: Strengthening a forgotten provision’ (2009) 12 *New Criminal Law Review* 475.

⁵⁴ Neil Boister, ‘Further reflections on the concept of transnational criminal law’ (2015) 6(1) *Transnational Legal Theory* 9.

⁵⁵ Neil Boister, ‘The concept and nature of transnational criminal law’ in Neil Boister and Robert J. Curie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).

⁵⁶ Boister (n 54).

⁵⁷ International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2349 UNTS 41; Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41.

matters. Having ratified the international treaty, the state party obliges itself to implement and enforce said treaty on a national level as it is deemed to be the most effective unit to do so. As such, international treaties merely provide a normative outline given that such a large margin of appreciation is left to the state party as to undermine any claim to codification.⁵⁸ There are two forms of transposition available to states: (i) ‘direct transposition’ of the treaty formulations of what ought to be criminalised and (ii) ‘indirect transposition’ of treaty provisions, ‘which involves the decoding of the essence of the norm to fit into the national legal system’s structures, principles and existing criminal laws’.⁵⁹ Contrary to international criminal law there is no individual criminal responsibility under international law, the right to adjudicate remaining with the state.

International law expands beyond treaty law. In international law, law-making authority is the central power to be claimed. This authority is primarily contended by states, ‘international organisations to the extent empowered by their respective mandates, and to a more limited extent, international courts and tribunals’.⁶⁰ That being said, it is important to note that authority is not equal to legality. The former is thought to be the right to rule, whereas the latter is said to be the property of being legal.⁶¹ Although it can be difficult to establish law-making authority, there are various sources of law, some of which are reflected in Article 38 of the Statute of the International Court of Justice, from which international law derives its force: customary law, general principles of law, and so-called hard and soft law⁶². These sources co-exist side-by-side in the international legal system. Consent is the foundation of international law and as such, more implicitly, the cornerstone of customary international law. Customary international law consists of ‘state practice arising out of a sense of legal obligation (*opinio juris*)’.⁶³ However, given its premises, customary international law is said to be backward looking, can be difficult to prove and ‘vague and open to conflicting interpretations’.⁶⁴ That being said, customary international law is the prime example that law can be ‘hard’ without being encapsulated in

⁵⁸ Boister (n 54).

⁵⁹ Boister (n 54) 20.

⁶⁰ Arnold N Pronto, ‘Understanding the Hard/Soft Distinction in International Law’ [2015] 48 Vand. J. Transnat’l L. 941, 945.

⁶¹ Nicole Roughan, ‘Mind the Gaps: Authority and Legality in International Law’ [2016] 27 The European Journal of International Law 329.

⁶² Gregory C Shaffer and Mark A Pollack, ‘Hard versus soft law in international security’ [2011] 52 Boston College Law Review 1147.

⁶³ *ibid* 1153.

⁶⁴ Christoph Schreuer, ‘Sources of International Law: Scope and Application’ (The Emirates Center for Strategic Studies and Research, Emirates Lecture Series 28) 7.

a binding text.⁶⁵ General principles primary function is to close gaps left by customary international law and hard law. These principles manifest themselves by comparing representative national legal systems, examples being the binding nature of agreements or the principles of procedural fairness before a court of law.⁶⁶ Hard law instruments such as treaties and conventions refer to precise legally binding obligations that ‘delegate authority for interpreting and implementing the law’.⁶⁷ Albeit these instruments providing more legal certainty, the pursuit of common endeavours through the usage of sources of ‘hard law’ is said to restrict actors’ behaviour and even their sovereignty. As a result, legal scholarship has been increasingly focusing on quasi-legal instruments that do not have any binding force, so called ‘soft law’ instruments. These instruments, such as the Financial Action Task Force’s (FATF) recommendations on money laundering, are becoming increasingly popular.⁶⁸ Redo and Platzer argue, ‘the nonsignatory and non-ratifiable but binding character of soft law is determined on the basis of its two basis features: (a) objective – administration through state practice – and (b) subjective – a state’s belief (*opinio juris*) that the soft law is binding, as if indeed it were a signed and ratified law’.⁶⁹ Soft law is often viewed as easier to achieve, more flexible, reducing contracting and sovereignty costs, whilst being able to be combined with coercive name and shame tools to ensure implementation. Although these ‘soft law’ instruments do not have any legal binding force and states have no obligations under international law, they ‘allow states to be more ambitious and engage in ‘deeper’ cooperation than they would if they had to worry about enforcement’.⁷⁰ Soft-law, with its greater flexibility, experimentation and deliberate dialogue, has the ability to become accepted and customary over time so as to be universally accepted. On the other hand, it enables hard law to be broadened, detailed and continuously developed. Conclusively, in the words of Shaffer and Pollack, ‘soft law, in this sense, represents a modern variant of ‘the law to be made’, *lex feranda*, which reflects the aspiration of law’s progressive development’.⁷¹

The state parties expressly and voluntarily accept all obligations, comprised within international treaties, unlike with customary international law. A minimum degree of

⁶⁵ Pronto (n 60).

⁶⁶ *ibid.*

⁶⁷ Shaffer and Pollack (n 62) 1160.

⁶⁸ Boister (n 54).

⁶⁹ Slawomir Redo and Michael Platzer, ‘The United Nations’ Role in Crime Control and Prevention’ in Philip Reichel and Jay Albanese (eds), *Handbook of Transnational Crime and Justice* (SAGE Publications, Inc. 2014) 284.

⁷⁰ Shaffer and Pollack (n 62) 1163.

⁷¹ *Ibid* 1158.

harmonisation and approximation of criminal law is induced; nevertheless each jurisdiction holds the right to implement the provisions according to its political, cultural and social traditions. Finally, concluding an international treaty does not prohibit regional and bilateral agreements. ‘Rather, these three levels should operate in a complementary way, creating a global ‘net’ or ‘web’ to obstruct crime.’⁷²

4.3. The main international instruments in the fight against transnational organised crime

‘Just as organised crime could not exist without international cooperation, the only possibility of combating contemporary organised crime is through international cooperation.’⁷³

- Rodrigo Paris-Steffens

The internationalisation of criminal laws and prohibition policies, which oftentimes have been ascribed to the economic and security interests of the dominant world powers, as well as to persuasive moral interests, have brought transnational organised crime to the forefront of international cooperation.⁷⁴ Since its formation in the 1940s, the United Nations has been a leading entity of the so-called ‘internationalisation of rule of law’, *i.e.* the development of international law. Even in its early days, its mandate included the fight against transnational organised crime, with action stemming from article 1 of the UN Charter and articles 28 and 29 of the 1948 Universal Declaration of Human Rights.⁷⁵ The latter prohibits slavery and the slave trade in ‘all their forms’, which is closely linked to the ‘modern-day slave trade’ of human trafficking. In order to promote international cooperation and to ‘harmonise’ national crime legislation in the field of TOC, the United Nations have administered three international legal instruments to counter drug trafficking, transnational organised crime and corruption. ‘Each of these conventions sets forth mandatory obligations for the parties to criminalise offences, establish jurisdiction, provide fair treatment and to implement law enforcement devices of *aut dedere aut judicare* and mutual legal assistance’.⁷⁶

⁷² CarrieLyn Donigan Guymon, ‘International Legal Mechanisms For Combatting Transnational Organized Crime: The Need For A Multilateral Convention’ (2000) 18 Berkeley J Int’l L 53, 99.

⁷³ *ibid* 54.

⁷⁴ Serrano (n 23).

⁷⁵ Frederic Libert, ‘Organised Crime in the 21st Century: Are the States Equipped to Face the Global Crime Threat?’ (Master thesis, Bond University 2010).

⁷⁶ Usman Hameed, ‘Mandatory obligations under the international counter-terrorism and organised crime conventions to facilitate state cooperation in law enforcement’ (DPhil thesis, University of Glasgow 2014) 7.

Three main drug control conventions have been drafted by the United Nations: the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971 and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. The first significant attempt to harmonise drug related offences and provide for procedural cooperation stems from the international rejection of the Indo-Chinese opium trade. Negative reactions to the opium wars in the 19th century and the growing opium trade strengthened support for the anti-opium lobbies in Europe and the United States.⁷⁷ The Single Convention on Narcotic Drugs had three core objectives: (i) to limit the production of raw materials; (ii) to codify the existing conventions into a single multilateral convention and (iii) to simplify the existing drug control machinery.⁷⁸ While codifying various previous regulations into a single convention, the Single Convention marked a shift from a system whose primary interest was ‘restrictive commodity agreements’ to a more stringent and wider ranging multilateral framework which became more prohibitive in nature.⁷⁹ Just 10 years later, the convention was followed by the Convention on Psychotropic Substances, which came about as a result of a growing concern for the diversification and expansion of the spectrum of drugs and the harmful effects of synthetic drugs. With drug trafficking increasing in the 1980s, the 1988 Convention was designed to respond to the growth in trafficking, since the earlier instruments did not deal with the issue in an adequate manner. As a result, the convention does not only criminalise drug-related offences, but makes ‘such offenses the basis for international extradition between party states, and provid[es] for mutual legal assistance in the investigation and prosecution of covered offenses, as well as the seizure and confiscation of proceeds from and instrumentalities used in illicit trafficking activities’.⁸⁰ Moreover, the previous conventions merely required application of criminal policy measures to the supply side, whilst the 1988 devotes article 3(2) to the individual drug user.⁸¹ As such, the 1988 Convention has become one of the most detailed and far-reaching instruments adopted in the field of

⁷⁷ Boister (n 7).

⁷⁸ Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (adopted 25 March 1951, entered into force 8 August 1975) 976 UNTS 105.

⁷⁹ David Bewley-Taylor and Martin Jelsma, ‘Fifty years of the 1961 single convention in narcotic drugs’ (Series on Legislative Reform of Drug Policies Nr. 12, Transnational Institute 2011) 16.

⁸⁰ David P Stewart, ‘Internationalizing The War On Drugs: The UN Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances’ (1989) 18 *Denv J Int’l L & Pol’y* 387, 391.

⁸¹ David Bewley-Taylor, ‘Challenging the UN drug control conventions: problems and possibilities’ (2003) 14 *International Journal of Drug Policy* 171.

international law with its success resulting in a push for a global multilateral treaty to suppress transnational organised crime.

Member states of the United Nations agreed that a more effective international instrument was required in order to suppress transnational organised crime. They identified the need for more effective international cooperation, particularly in relation to four matters: (i) closer alignment of legislative instruments; (ii) strengthening of international cooperation in criminal matters; (iii) establishment of modalities and basic principles for international cooperation and (iv) ‘measures and strategies to prevent and combat money-laundering and to control the use of proceeds of crime’.⁸² In order to address the above mentioned, the United Nations implemented the first comprehensive and legally binding instrument to fight TOC in 2000, the United Nations Convention against Transnational Organised Crime, which is further supplemented by three protocols. The convention focuses on four main areas: criminalisation, international cooperation, technical cooperation and implementation; whilst establishing four offences: participation in an organised criminal group, money laundering, corruption, and obstruction of justice.⁸³ Given that the UNTOC is at the heart of this thesis, the above information merely serves as an introduction and will be further elaborated upon in Chapter V.

The final international legal instrument discussed is the United Nations Convention against Corruption, signed in 2003, which aims to promote and strengthen measures to prevent and combat corruption; to promote, facilitate and support international cooperation and to promote integrity, accountability and proper management of public affairs and property.⁸⁴ In order to achieve the said aims, the UNCAC focuses on preventive measures, criminalisation, international cooperation and asset recovery. The provisions relating to prevention concern themselves with the prevention of corruption in the judiciary and public procurement, as well as the establishment of anti-corruption bodies. Moreover, in addition to criminalising basic forms of corruption, such as bribery and embezzlement, trading in influence and the concealment and laundering of proceeds of crime are also criminalised. Provisions of international cooperation require states to cooperate in the

⁸² David McClean, *Transnational Organized Crime. A Commentary on the UN Convention and its Protocols* (OUP 2007) 4.

⁸³ Vlassis (n 51).

⁸⁴ Ophelie Brunelle-Quraishi, ‘Assessing the relevancy and efficacy of the United Nations Convention against Corruption: A comparative analysis’ [2011] *Notre Dame Journal of International & Comparative Law* 101.

realms of prevention, investigation and prosecution.⁸⁵ The UNCAC is novel in that it criminalises corruption in its wider meaning, including both the supply and demand side, as well as listing numerous offences (albeit one must note that the sanctions attached to each offence are far from exhaustive) and revolutionising the realm of asset recovery.

As can be seen from the above, the United Nations have implemented a series of conventions that have created a system for state parties to deal with transnational organised crime. While these treaties may be seen as important milestones in the fight against TOC, one must not forget that these treaties, with exception of the UNTOC, remain subject specific and therefore have limited applicability. That being said, all of these treaties hinder a concerted response as these attempt to prosecute TOC with, to a large extent, non-binding and vaguely worded obligations, which are not adequately implemented due to the lack of effective implementation mechanisms. State parties to multiple instruments may also find it difficult to adhere to all obligations. Further, these instruments do not necessarily meet the requirements to address new forms of crimes or the interplay between TOC and political power. In addition to the above, efforts are undermined by the principle of state sovereignty and political interference, resulting in a lack of cooperation. Hence, it is important to reflect upon these treaties, evaluate whether they are suited to combat TOC in today's globalised world and suggest ways of strengthening the international system.

⁸⁵ Philippa Webb, 'The United Nations Convention against Corruption. Global achievement or missed opportunity?' (2005) 8(1) *J Int'l Econ L* 191.

CHAPTER V

THE INTERNATIONAL LEGAL FRAMEWORK FOR FIGHTING
TRANSNATIONAL ORGANISED CRIME

5.1. The United Nations' Convention against Transnational Organised Crime

The United Nations' Convention against Transnational Organised Crime, also known as Palermo Convention, was adopted by the General Assembly (GA) in 2000 and came into force in 2003⁸⁶. The convention is further supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children entered into force in December 2003; the Protocol against the Smuggling of Migrants by Land, Sea and Air, entered into force in January 2004; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, entered into force in July 2005.⁸⁷ As of May 2015, the convention has 185 state parties that have agreed to adhere to the forty-one articles that require them to criminalise certain activities, to endorse measures for the prosecution of offenders and for the confiscation and seizure of, *inter alia*, the proceeds of crime.⁸⁸

Much of the scholarly research on the UNTOC is directed to the exploration of the criminalisation dimension, rather than the detailed and elaborate procedural dimension, the latter being 'concerned with the articulation of inter-state cooperation in pursuit of the alleged criminal'.⁸⁹ However, the extensive procedural dimension suggests that international criminal cooperation is the essence of the UNTOC. Interestingly, scholars such as Boister contend that the 'coupling of a highly tractable definition of transnational organised crime to the detailed legal provisions for cooperation in the UNTOC has worked, at least so far, to the convention's disadvantage as an instrument for

⁸⁶ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

⁸⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507; Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organised Crime (adopted 31 May 2001, entered into force 3 July 2005) 2326 UNTS 208.

⁸⁸ Neil Boister, 'The Cooperation Provisions of the UN Convention against Transnational Organised Crime: A 'Toolbox' Rarely Used' (2016) 16 Int'l Crim L Rev 39.

⁸⁹ Neil Boister and Robert J Curie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 1.

cooperation'.⁹⁰ As such, rather than providing an extensive definition of TOC, the convention functions as a 'tool box' to facilitate various types of international cooperation. Other scholars, such as Verbruggen, maintain that there is no need for a comprehensive definition resulting in harmonisation, instead only a certain level of standardisation needs to be achieved to effectively tackle TOC.⁹¹ Indeed, the definition embodied in the convention allows for a broad application, encompassing a majority of cross-border, profit-driven serious offences. The definition takes into account the complexity of TOC and allows for cooperation regarding a variety of common concerns. Further, the UNTOC's broad definition, 'alongside other provisions of the Convention, serves the utilitarian purpose of accommodating the provisions dealing with extradition, mutual legal assistance and police co-operation'.⁹² Hence, the convention serves as a tool box on modes for international cooperation rather than providing a more sophisticated concept of TOC as long as the crimes in question are 'serious' and present a cross-border element.

Much of the UNTOC's content has been derived from existing international instruments, such as the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, from which 15 operative articles are derived in whole or in part.⁹³ Moreover, the convention's content is similar to existing regional texts or bilateral treaties in some cases, which may cause implementation problems as provisions may not have been designed to complement each other. For example, the Firearms Protocol is similar to the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other related material (CIFTA) of 1997, albeit the latter being wider in scope.⁹⁴ Interestingly, rather than incorporating a lot of innovative articles, such as article 10 on criminal liability of legal persons and articles 12 to 14 on asset recovery, the UNTOC seldom engages in issues in which states had different approaches, conspiracy and modes of participation as an accomplice being exceptions.⁹⁵ Further, in order to establish a far-reaching convention, a wide measure of discretion is granted to state parties, rather than mandatory requirements expressed in the words 'a state party shall'.

⁹⁰ Boister (n 88) 41.

⁹¹ *ibid.*

⁹² Alexandra Orlova and James Moore, '“Umbrellas” or “Building Blocks”? Defining International Terrorism and Transnational Organised Crime in International Law' (1005) 27 *Houston Journal of International Law* 267, 285.

⁹³ Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95; McClean (n 82).

⁹⁴ Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other related material (adopted 14 November 1997, entered into force 1 July 1998).

⁹⁵ McClean (n 82).

The aim of the UNTOC is to promote cooperation to prevent and combat transnational organised crime more effectively and ‘fight organised crime as a method or a process for the commission of serious offences, regardless of its concrete manifestations’.⁹⁶ It is a multidisciplinary instrument, which goes beyond the traditional areas of international criminal cooperation, such as law-enforcement cooperation, incorporating, for example, witness protection programmes and envisaging the role of civil society.⁹⁷ The convention sets forth objectives and discusses areas of mutual concern, whilst leaving it to state parties to determine how and to what extent the said objectives should be achieved.

5.1.1. *Defining transnational organised crime*

Defining transnational organised crime constituted a major obstacle during the negotiations of the UNTOC, as ‘there continued to be divergences of a legal nature that made it difficult to reach a comprehensive definition’.⁹⁸ This resulted in the development of a definition of ‘organised criminal group’ (OCG) rather than TOC, as there was a general understanding of the distinguishing features of an OCG. The definition in article 2(a) sets forth that the distinguishing feature of an OCG ‘is not the crime committed, nor the type of criminal, but the process by which it is carried out’.⁹⁹ The convention defines an organised criminal groups as ‘a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or material benefit’.¹⁰⁰ Therefore, as there is no definition of transnational organised crime *per se*, the UNTOC’s subject matter is organised criminal groups that are involved in ‘serious crime’. The latter offence is punishable by a maximum penalty of incarceration for a period of four years or more. Serious crimes are not limited to those criminalised in the UNTOC under articles 5, 6, 8, and 23, member states are free to adopt their own lists subject to the criminal penalty associated with the crime. Jennifer Smith notes that ‘because domestic laws, and not international standards, determine this aspect of the definition, some states may change the penalties in their domestic criminal

⁹⁶ Betti (n 24) 153.

⁹⁷ *ibid* 153.

⁹⁸ Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organised Crime and the Protocols thereto (2006) UN Pub. Sales No. E.96.V.5., xxii.

⁹⁹ Neil Boister, ‘The UN Convention against Transnational Organised Crime 2000’ in Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organised Crime* (OUP 2016) 131.

¹⁰⁰ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

statutes to remove crime from the scope of the Convention',¹⁰¹ leaving room for the possibility of abuse. Further, a "structured group" does not need have formally defined roles for its members, continuity of membership or a developed structure, but it can be randomly formed for the immediate commission of an offence'.¹⁰² In order for the definition not to impede with the definition of conspiracy to be found in common law countries, where two people may be guilty of said act, a larger group is required.¹⁰³ This definition enables the convention to be applied to a variety of networks, including new manifestations of OCGs, ensuring its continued relevance.¹⁰⁴ That being said, as the breadth of the definition does not specifically target high-end, large-scale organisations, it also creates the 'potential for over-condemning low-end, small-scale organisations'.¹⁰⁵ Moreover, any such group must exist for a period of time and as such single, ad hoc operations are excluded. Therefore, 'organised crime is characterised by criminal activities that are carried out on a sustained, repeated basis'.¹⁰⁶ However, the UNTOC does not specify the duration of the 'period of time'. The fact that the criminal activity must serve financial or material gain excludes terrorism (except potentially its financing). Furthermore, the *Travaux Préparatoires* note that 'other material benefit' may also include non-material gratification such as sexual services.¹⁰⁷ On the whole, the definition remains rather superficial, following the 'double track' approach, but its strength is that it can be applied to a diversity of legal systems and reconciles various political interests on TOC.

5.1.2. Offences established in accordance with articles 5, 6, 8, and 23

¹⁰¹ Jennifer M Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity' (2008-2009) 97 Geo LJ 1111, 1119.

¹⁰² Liz Campbell, 'The offence of participating in activities of organised crime group: section 45 of the Serious Crime Act 2015' (*Academia*) <http://www.academia.edu/21092774/The_offence_of_participating_in_activities_of_organised_crime_group_section_45_of_the_Serious_Crime_Act_2015> accessed 15 June 2016.

¹⁰³ McClean (n 82).

¹⁰⁴ Pino Arlacchi, 'After the Palermo Convention: new international prospects in the fight against organised crime', in Stefano Betti (ed), *Symposium: The United Nations Convention against Transnational Organised Crime, Requirements for Effective Implementation* (UNCRI 2002).

¹⁰⁵ Michael Tonry, 'Transnational organised crime – prospects for success of the UN Convention', in Hans-Jörg Albrecht and Cyrille Fijnaut (eds), *The containment of transnational organised crime: comments on the UN convention of December 2000* (Max-Planck-Inst. für ausländisches und internationales Strafrecht 2002) 261.

¹⁰⁶ Andreas Schloenhardt, 'Transnational organised crime' in Felia Allum and Stan Gilmour (eds), *Routledge Handbook of Transnational Organized Crime* (Routledge 2011).

¹⁰⁷ *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organised Crime and the Protocols thereto* (2006) UN Pub. Sales No. E.96.V.5., para 3.

State parties to the convention have committed to establishing the criminal offences of participation in an organised criminal group, the laundering of proceeds, corruption and obstruction of justice within their domestic legislation.

5.1.2.1. Criminalisation of participation in an organised criminal group (Article 5)

Article 5 of the UNTOC criminalises the participation in an organised criminal group and can be seen as ‘the result of a negotiation in which the ways in which different legal systems approach group criminality were brought together, at the same time with the appreciation that it was not a question of choosing one over the others, but of attaining a functional synthesis’.¹⁰⁸ It requires state parties to establish one of two criminal offences: (i) one regarding agreement with other individuals to commit a serious crime to obtain a material benefit involving an organised criminal group, or (ii) taking an active part in criminal activities of the organised criminal group or in other activities of said group in the knowledge that participation, *i.e.* taking an active part, in said activity will contribute to the achievement of the criminal goal. Whether that implies that the accused has knowledge about the broader nature of the group is left to domestic law.¹⁰⁹ The other offence being that of ‘organising, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organised criminal group’.¹¹⁰ These two criminal offences are not to be viewed as mutually exclusive, as state parties may implement both offences concurrently. However, ‘the only problem which might emerge is the situation where State Parties would choose not to incriminate ‘criminal agreement’ [...], leaving agreement of two persons on commitment of serious crime uncovered’,¹¹¹ resulting in the UNTOC being internally inconsistent.

Paragraph 1 highlights the requirement that criminal offences be established in accordance with domestic law, suggesting that if a distinction is inferred in a particular legal system between regulatory infractions and criminal offences, the latter must be used.¹¹² With regard to the *mens rea*, states must prove that the offence was committed intentionally. Nevertheless, it is at the state party’s discretion to decide whether reckless or

¹⁰⁸ Roger S Clark, ‘The United Nations Convention Against Transnational Organized Crime’ (2004) 50 Wayne L Rev 161, 170.

¹⁰⁹ Boister (n 7).

¹¹⁰ Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

¹¹¹ Council of Europe, ‘Provisions of International Legal Instruments on Treating Bribery in Sport as a Crime’ (2011) EPAS(2011)23, 23.

¹¹² McClean (n 82).

negligent behaviour ought to be punishable, or even enforce a ‘strict liability without proof of any fault element’.¹¹³ The offence laid out in paragraph 1(a)(i) is based on the offence of conspiracy which is usually found in common law countries, and must involve the commission of a serious crime, *i.e.* crime penalised by four years or more of deprivation of liberty. Prosecuting conspiracy is beneficial insofar that it serves to prevent TOC, allowing enforcement agencies to intervene in advance and enabling the prosecution of multiple persons, including those ‘who organise and plan crime, rather than execute it’.¹¹⁴ However, in most jurisdictions, conspiracy charges require proof of an overt act, making prosecution of high-ranking members more difficult. Moreover, prosecuting conspiracy fails to account for the specific danger presented by an OCG. ‘The difficulty that civil law states have with the common law principle of conspiracy accounts for the option to proscribe involvement in an organised criminal groups in terms of article 5(1)(a)(ii)’.¹¹⁵ As such it is important that the individual take an active part in the commission of the offence, which raises the question whether a more passive role such as a look-out man would amount to such an active part. Nevertheless, individuals can be held liable under this paragraph for involvement in activities that contribute to the criminal aim, without these activities being criminal in themselves.¹¹⁶ Hence, it enables the prosecution of so-called facilitators of TOC. Paragraph 1(b) requires the criminalisation of different forms of passive participation; the actual contribution and *mens rea* are subject to domestic interpretation. It is important to note that the acts of ‘organising’ and ‘directing’ are not commonly found in national jurisdictions and they are an innovation brought about by the UNTOC allowing for the prosecution of leaders of organised criminal groups. With regards as paragraph 1(b), there is no indication as to whether proof is required that the serious crime in question has been executed or whether it also applies to the planning stage. Paragraph 2 refers to, *inter alia*, the *mens rea* and invokes that it ‘may be inferred from objective factual circumstances’.¹¹⁷ Given that an individual’s mind cannot be subject of direct evidence, unless a confession takes place, the court should be able to infer the knowledge or intent from the facts presented to it. Moreover, proof of negligence is not sufficient for a conviction, since many state parties would be unable to accept a negligence basis for criminal liability as a binding convention obligation.¹¹⁸ Finally, paragraph 3 demonstrates

¹¹³ *ibid* 62.

¹¹⁴ Schloenhardt (n 106) 423.

¹¹⁵ Boister (n 7) 80.

¹¹⁶ Schloenhardt (n 106).

¹¹⁷ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

¹¹⁸ McClean (n 82).

the problem of formulating international rules to concur with differing national laws. Article 5 constitutes an attempt to criminalise organised criminal activity with respect to the various legal traditions, broadening criminal liability beyond preparatory offences and secondary participation. That being said, for many state parties it was not necessary for them to amend their legislation and as such ‘the question whether the concept of an OCG used by the UNTOC is actually suitable for realising the hope that attacks on organisation/logistics through the ‘double strategy’ will produce greater crime reduction’ remains unanswered.¹¹⁹

5.1.2.2. Criminalisation of the laundering of proceeds of crime (Article 6)

Article 6 of the UNTOC requires the criminalisation, in accordance with fundamental principles, of the laundering of proceeds of crime, ‘a special kind of ancillary or derivative offence, distinct from but predicate upon the crime that produces the money, the predicative offence’.¹²⁰ This provision represents the first time that state parties are required ‘to expand the reach of their laundering laws to predicate offences associated with organised criminal activities other than those related to narcotics trafficking’.¹²¹ According to the convention, the terms ‘proceeds of crime’ and ‘money laundering’ are to be used interchangeably. State parties agree to criminalise the following activities when committed intentionally: ‘conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin’,¹²² as well as ‘the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime’.¹²³ Both the individual who does the conversion or transfer may be held criminally responsible, as well as the person who aids the perpetrator of a criminal offence to evade detection by converting, transferring or disguising the property. Interestingly, it does not appear necessary that the accused know exactly what predicate offence had been committed, whereas the *mens rea* of the laundering proceed indicates that the latter cannot be committed by mistake.¹²⁴ This raises the ‘wider issue as to the relationship between the

¹¹⁹ Boister (n 99) 141.

¹²⁰ Boister (n 7) 103.

¹²¹ Colin L Powell, ‘U.N. Convention Against Transnational Organized Crime. Senate Consideration of Treaty Document 108-16’ (Library of Congress 2003-2004) <<https://www.congress.gov/treaty-document/108th-congress/16/document-text?overview=closed>> accessed 18 July 2016.

¹²² Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

¹²³ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

¹²⁴ Boister (n 99).

laundering offence and the predicate offence'.¹²⁵ When referring to the conversion of property, it is important to note that the meaning of said term may vary in different legal systems and may be viewed as broad enough to encompass various acts. Paragraph 1(b) may be understood to serve as a safeguard clause, given that the crime of conspiracy may not be recognised by all state parties, thus a mere agreement to act cannot be criminalising. Further, paragraph 1(b)(ii) protects those individuals who, *e.g.* innocently receive the proceeds of crime as a gift, setting forth that the recipient must know 'at the time of receipt' that the property is the proceeds of crime.¹²⁶ However, one must note that the 'notion of 'receipt' of an intangible has a degree of artificiality, and its meaning may vary with the legal system and the nature of property'.¹²⁷ Paragraph 2(c) imposes a requirement of double criminality, *i.e.* that the conduct in question be considered a criminal offence in both the requesting and the requested state. Moreover, paragraph 2(c) strives to bring forth a 'model for national law reform by requiring parties to take jurisdiction over accessory offences when the predicate offence occurs extraterritorially subject to two conditions'.¹²⁸ Finally, paragraph 2(e) refers to 'fundamental principles of the domestic law of a State Party',¹²⁹ which seemingly alludes to the concept of double jeopardy which prohibits the same act being subject of two different offences.

The provision contained in the convention, allows for a wide degree of variation regarding implementation in national jurisdiction 'through the inclusion of implicit and explicit ambiguous terms and optional clauses'.¹³⁰ Article 6 could be strengthened, resulting in greater convergence and less risk for over criminalisation, if it contained greater detail about the acts associated with laundering, the scope of the predicate offence, the subjective and mental elements of the criminal activities, whilst also taking into account 'self-laundering'.¹³¹ Further, it is worth mentioning that article 7 of the UNTOC sets forth measures to combat money-laundering and closely reflects the FATF's recommendations, which reflect internationally endorsed global standards against the aforementioned crime. That being said, the FATF's 'soft law' recommendations have been

¹²⁵ McClean (n 82) 79.

¹²⁶ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

¹²⁷ McClean (n 82) 81.

¹²⁸ Boister (n 7) 105.

¹²⁹ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

¹³⁰ Roberto Durrieu, *Rethinking Money Laundering & Financing of Terrorism in International Law. Towards a New Global Legal Order* (Martinus Nijhoff Publishers 2013) 175.

¹³¹ *ibid.*

converted into lighter, legally binding obligations in the UNTOC that achieve ‘hard law’ status.¹³²

¹³²Arnold Jose Alves Silveira, ‘The International Standards on Combatting Money Laundering: a Brazilian Perspective’ (The George Washington University 2009)
<<https://www.gwu.edu/~ibi/minerva/Spring2009/Arnaldo.pdf>> accessed 20 July 2016.

5.1.2.3. Criminalisation of corruption (Article 8)

Article 8 criminalises corruption, requiring state parties to establish the offences of active and passive bribery, along with the participation as an accomplice in such an offence. Interestingly, the terms active and passive are not entirely adequate, as an individual may actively solicit bribes, thus ‘supply-side’ and ‘demand-side’ corruption is more appropriate.¹³³ The UNTOC does not introduce a definition of corruption *per se* but criminalises various forms of corruption. Regarding active bribery, the promise of something is enough for the provisions to become applicable and ‘the route by which the advantage is to be passed may be indirect’.¹³⁴ Moreover, bribery involving a foreign public official or international civil servant is also addressed by article 8, however it only requires states to consider criminalising the said offence. Subsequently, article 16(1) of the UNCAC made it mandatory for state parties to criminalise active bribery of the aforementioned individuals,¹³⁵ but passive bribery still remains in the weak ‘consider’ form. Moreover, with regards to ‘public officials’ a large margin of appreciation is left to state parties, whereas the corresponding definition in the UNCAC (article 2(a)) is much more comprehensive, specifying what a public official entails.¹³⁶ Another notable omission is the failure to address bribery in the private sector, which oftentimes falls outside the domain of law enforcement and judicial institutions. In particular in financial, gambling and real estate industries, private sector corruption is playing an increasingly important role as it provides avenues for money laundering.¹³⁷

One may conclude that the UNTOC recognises that corruption has a key role in transnational organised crime, given that criminal groups make use of corruption in order to create or exploit opportunities and to shield operations. Corruption must be dealt with in order to effectively combat crimes falling within the UNTOC’s framework. The UNTOC may be seen as a building block toward a more comprehensive instrument addressing corruption, the UNCAC.

¹³³ Patrick Delaney, ‘Transnational Corruption: Regulation across Borders’ 47 *Virginia Journal of International Law* (2007) 413, 422-3.

¹³⁴ McClean (n 82) 119.

¹³⁵ Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41.

¹³⁶ McClean (n 82).

¹³⁷ Center for the Study of Democracy, *Examining the Links between Organised Crime and Corruption* (European Commission 2010).

5.1.2.4. Criminalisation of obstruction of justice (Article 23)

Article 23 criminalises obstruction of justice, an offence aimed at preventing criminal groups from interfering with the administration of justice and consequently avoiding investigation and prosecution, which has not been included in previous suppression conventions.¹³⁸ This article establishes the following two criminal offences: (i) ‘The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention’;¹³⁹ and (ii) ‘The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention’.¹⁴⁰ Article 23 is not comprehensive. It does not include, for example, the tampering or destruction of evidence. Further, ‘no mode of responsibility other than commission is specified in relation to the offence’.¹⁴¹ Both corrupt means, such as bribery, and coercive means, such as the use of threat or violence, are covered. The term ‘proceedings’ must be widely interpreted as it intends to cover all governmental proceedings, including pre-trial processes.¹⁴² However, it appears as if the article does not apply to private proceedings. Further, there is no definition of the term ‘intimidation’, generally assumed to mean to make fearful or to put into fear, raising the questions as to what conduct constitutes intimidation and whether proof of such a mental state is required? One can argue that article 23 was implemented in order to prevent criminal groups from seeking to undermine systems of justice, complementing the provisions dealing with corruption, protection of witnesses and victims and internal cooperation.

5.1.3. *International criminal cooperation*

The UNTOC provides for obligations on parties to provide each other cooperation in regards to matters such as extradition, mutual legal assistance, law-enforcement

¹³⁸ Obokata (n 7).

¹³⁹ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

¹⁴⁰ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

¹⁴¹ Roger O’Keefe, *International Criminal Law* (OUP 2015) 289.

¹⁴² McClean (n 82).

cooperation and seizure and assets obtained by their commission.¹⁴³ Provisions concerning international criminal cooperation enable or oblige states to establish territorial as well as extraterritorial jurisdiction with the aim of ‘increasing the efficiency of domestic prosecution of these transnational crimes’.¹⁴⁴ The convention expands upon traditional means of international cooperation such as extradition and mutual legal assistance, including in the provisions details which ‘make it possible to establish the involvement of an organised criminal group and the transnationality of its activities – the triggers for the application of this cooperation regime’.¹⁴⁵ Although the key feature of the convention is cooperation in criminal matters, the UNTOC also contains provisions, which aim to facilitate and promote international cooperation in other ways. For instance, the convention lists the ‘kind of assistance to be provided, the rights of the requesting and requested States relative to the scope and manner of cooperation, the rights of alleged offenders and the procedures to be followed in making and executing requests’.¹⁴⁶ Further, the UNTOC has simplified the requirements for international criminal cooperation. Regardless of the improvements implemented, the cooperation regime still heavily relies upon existing systems for cooperation between state parties.

5.1.3.1. Extradition (Article 16)

In a globalised world, offenders may seek safe havens as a way of escaping prosecution and justice. In order to bring them to justice, extradition proceedings are initiated, which are considered ‘a formal and, most frequently, a treaty-based process, leading to the return or delivery of fugitives to the jurisdiction in which they are wanted’.¹⁴⁷ The UNTOC sets minimum standards for extradition and supports the adoption of a variety of mechanisms devised to streamline the extradition process ‘by eliminating the assertion that surrender may not be granted because the requesting and requested states do not have an extradition treaty between them’.¹⁴⁸ In certain situations, state parties rely on the UNTOC as an extradition treaty, as exemplified by the (still ongoing) 2012 case of the United States trying to extradite ‘the alleged cybercriminal Kim Dotcom from New Zealand to the US to face copyright infringement, racketeering and money laundering

¹⁴³ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, art 16, 18, 27 and 12, 13 and 14.

¹⁴⁴ Boister (n 54) 18.

¹⁴⁵ Boister (n 88) 46.

¹⁴⁶ United Nations Office on Drugs and Crime, *Legislative guide for the implementation of the United Nations Convention against Corruption* (United Nations, 2006) para 586.

¹⁴⁷ *ibid* para 533.

¹⁴⁸ Hameed (n 76) 214.

charges, crimes not listed in the 1970 extradition treaty between the two states, but something enabled by the recognition in section 101B(1) of the New Zealand Extradition Act 1999 of participation in an OCG committing serious transnational crimes'.¹⁴⁹ Further, being able to use the international conventions as basis for extradition may reduce 'disguised extradition', which has been rightfully condemned as a violation of international comity and international law.¹⁵⁰

Pursuant to article 16, a state party shall, contingent on relevant conditions, such as double criminality, make extradition arrangements for an individual who is the subject of a request for extradition and is located in its territory for offences covered by the suppression convention that are transnational in nature and involve an organised criminal group. The double criminality requirement ought to be satisfied with regards to articles 6, 8 and 23 of the UNTOC given that state parties are required to criminalise said conduct. Concerning article 5 or serious crime, no obligation to extradite ensues unless the double criminality requirement is satisfied. Paragraph 2 aims to ameliorate extradition procedures, giving the requested state the possibility to deal with all alleged offences under the same procedure. However, the said paragraph does not intend to broaden the scope, but merely serves to facilitate the procedure.¹⁵¹ Provided that no state is required to extradite to another in the absence of an applicable treaty under international law, state parties may agree, under paragraph 4, to use the UNTOC as basis for extradition. According to research conducted by McClean, 21 state parties have asserted that they will use the convention as a basis for extradition.¹⁵² However, states have been reluctant to rely on the UNTOC as a basis for extradition, given that the convention's provisions 'are easily distinguishable [from bilateral agreements] when it comes to the level of detail in extradition treaties'.¹⁵³ Paragraph 7 stresses that extradition rests on the conditions and exceptions in a state's domestic law as well as pertinent extradition treaties. The reference to the minimum penalty required under paragraph 7 was novel. Consequently, extraditable offences are nowadays often considered in terms of severity of punishment. State parties are required to execute more expeditious procedures and to simplify *prima facie* case requirements. Even so, it is important that state parties do not undermine a defendant's fundamental legal

¹⁴⁹ Boister (n 88) 69.

¹⁵⁰ Matti Joutsen, 'International Cooperation Against Transnational Organized Crime: Extradition and Mutual Legal Assistance in Criminal Matters' (paper presented at the 119th International Training Course at UNAFEI 2001) 376.

¹⁵¹ McClean (n 82).

¹⁵² *ibid.*

¹⁵³ Boister (n 7) 216.

rights. Moreover, with regards to the evidentiary requirements, a barrier to effective cooperation, in particular for civil law jurisdictions, is the satisfaction of *prima facie* requirements. Article 16, paragraph 10, provides that the *aut dedere aut judicare* principle be applied should a state be unwilling to extradite the alleged offender. In such cases, the mutual legal assistance mechanisms set out in article 18 of the UNTOC are of particular importance. Optionally, state parties may opt to temporarily surrender the offender subject to conditions determined by the state parties in questions. These could, *inter alia*, include ‘time limits on the commencement of proceedings in the requesting state, the availability of lawyers from the requested state, and the circumstances and conditions of provisional custody’.¹⁵⁴ The only ‘human rights provision’ is to be found in paragraph 13, requiring state parties to provide fair treatment during extradition proceedings. One may assume that said principle is particularly important when it comes to the movement of individuals between jurisdictions.

Extradition, as laid out in article 16 of the UNTOC, obliges state parties to extradite individuals found within the territory for the offences established in accordance with articles 6, 8 and 23. Yet, this suppression convention provides limited guidance on the procedure for extradition. Whilst obstacles to extradition are removed, the pursuit of offenders remains difficult given that extradition remains a form of international relations.

5.1.3.2. Mutual legal assistance (Article 18)

Mutual legal assistance (MLA) in criminal matters sees to the mechanisms for legal assistance in investigations, prosecutions and judicial proceedings, but does not commonly include mutual assistance between administrative authorities.¹⁵⁵ When MLA is sought, as under customary international law, judicial authorities cannot enact investigative acts extraterritorially, as this would constitute a transgression of sovereignty.¹⁵⁶ Article 18 of the UNTOC provides a minimum standard for mutual legal assistance to be applied in the absence of a mutual legal assistance treaty with another state party. However, the said article ‘does not eliminate the material and procedural obstacles that mutual legal assistance faces, because it does not compel major changes in domestic law and

¹⁵⁴ McClean (n 82) 185.

¹⁵⁵ John AE Vervaele, ‘Mutual legal assistance in criminal matters to control (transnational) criminality’ in Neil Boister and Robert J Curie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).

¹⁵⁶ *ibid.*

practice'.¹⁵⁷ This is so, because the UNTOC preserves the diversity of national legal systems, allowing states to refuse MLA under certain conditions, so as to, *inter alia*, obtain a maximum number of states, which have ratified the convention.

According to paragraph 1 of article 18, state parties are obliged to make provisions for the widest measure of MLA with respect to investigations, prosecutions and judicial proceedings. The term 'proceedings' is not defined within the convention. The extent to which state parties will impart assistance is left to their discretion. Moreover, state parties are obliged to award each other assistance 'on a reciprocal basis' with reference to cases that are not self-evident but the 'requesting state party has reasonable grounds to suspect that they exist'.¹⁵⁸ The aim of lowering the evidentiary standards is to facilitate assistance requests which in turn helps to decide whether elements of transnationality and organised crime are present and whether MLA may be sought under the convention. Paragraph 2 extends criminal liability to 'legal persons', a concept to be found within common law countries. Nonetheless, as pointed out by McClean: 'in other countries, criminal liability is thought inappropriate because of the difficulty of applying some of the familiar concepts such as deterrence to a corporate body as distinct from its members'.¹⁵⁹ The provision of various sources of legal authority such as, *inter alia*, 'taking evidence or statements from persons',¹⁶⁰ 'providing information, evidentiary items and expert evaluations'¹⁶¹ and 'providing originals or certified copies of relevant documents and records'¹⁶², are provided for in paragraph 3. The taking of evidence is limited in scope, as it merely applies to testimony as against 'real evidence', meaning objects of evidential value such as weapons used to commit a crime. So far as the latter are concerned, their supplying is unproblematic as long as the competent authorities in the requested state are in possession of said evidence. If they are not, permission from the owner or seizure must be sought, the supply of information being contingent on paragraphs 19 and 29 of article 18. With reference to the provision of relevant documents and records, acquisition may not be possible in some state parties unless criminal proceedings have been initiated.¹⁶³ Article 18, paragraph 8, applies whether or not there is a binding general mutual legal assistance treaty between the

¹⁵⁷ Boister (n 88) 54.

¹⁵⁸ McClean (n 82) 206.

¹⁵⁹ *ibid* 207.

¹⁶⁰ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, art 18 para 2(a).

¹⁶¹ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, art 18 para 2(e).

¹⁶² Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, art 18 para 2(f).

¹⁶³ McClean (n 82).

state parties, contending that mutual legal assistance must not be refused on the grounds of bank secrecy.

Paragraphs 9-29 enumerate certain procedures and mechanisms that must be applied in the absence of a MLA treaty between the state parties concerned. According to paragraph 9, the requested state party has complete discretion in cases where there is no double criminality and is able to refuse, or grant in whole or in part, assistance. With respect to paragraph 10, one must note that the expression ‘being detained or [...] serving a sentence’¹⁶⁴ does not exclusively apply to prisoners, but also those individuals subject to, *inter alia*, community service, or house arrest. Regarding the transfer of detained or convicted persons to another state party (see paragraph 10(b)), ‘state parties may agree that the requested state party may be present at witness testimony conducted in the territory of the requesting state’,¹⁶⁵ presumably to assure no violations of human or procedural rights are committed. Moreover, paragraph 13 of article 18 of the convention ‘requires the designation of a central authority with the power to receive and execute or transmit mutual legal assistance requests to the competent authorities to handle it in each State party’.¹⁶⁶ That being said, the UNTOC does not intend to bring about a limitation to states having a central authority as regards receiving requests or to a different central authority concerning making requests. Using a central authority is preferred; nonetheless, diplomatic channels may be used, which, inevitably, leads to delays. The minimum contents of the request are laid out in paragraph 15, emphasising that the evidence of information provided to the requesting state by the requested state must be admissible or useable for the former. Nevertheless, no prescribed form has been suggested or implemented given that requests are likely to be so manifold that such a form would be disadvantageous. It is important to note that subject to paragraph 19, the requesting state is prohibited from using information or evidence furnished by the requested state unless it has been explicitly stated in the request. However, with the consent of the requested state party the said information or evidence may be used, after all ‘it would be unhelpful to have a convention rule forbidding the wider use of material automatically and in every case’.¹⁶⁷ Flowing on from paragraph 23, paragraph 26 indirectly suggests that a state party unable to provide assistance shall ‘explore with the requesting state party whether the desired result, or some part of it, can

¹⁶⁴ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 20, art 18 para 10(b).

¹⁶⁵ McClean (n 82) 218.

¹⁶⁶ United Nations Office on Drugs and Crime (n 146) para 620.

¹⁶⁷ McClean (n 82) 228.

be achieved in some other way'¹⁶⁸ given that negotiations may bring forth alternative measures. The final paragraph, paragraph 30, encourages the conclusion of new bilateral or multilateral agreements or arrangements in order to aid the article's implementation as well as strengthening its provisions. Article 18 improves mutual legal assistance through the establishment of central authorities, as well as the inclusion of new possibilities for enabling investigations through the transmission of information and evidence. Further, the UNTOC places greater emphasis on liaison and consultation than previous instruments.

5.1.3.3. Law-enforcement cooperation (Article 27)

In comparison with the forms of cooperation established under article 18, article 27 on law-enforcement cooperation is potentially much wider in scope and lays out a number of other mechanisms to facilitate international cooperation. Law-enforcement cooperation is qualified as police-to-police cooperation and does not 'exemplify rule of law, but rather rule with law'.¹⁶⁹ According to Bowling and Sheptycki, legal engineers use legal tools in order to attain specific ends, which preserve the existing global system not merely through 'black letter law' but also law in practice.¹⁷⁰ Jonathan Winer, a former US Deputy Assistant Secretary of State for International Law Enforcement argued that the legal standards set forth in the UNTOC were designed 'to meet the new demands of cross-border enforcement activities, with minimal interference by domestic political constraints',¹⁷¹ which enables TOC to be more effectively combatted. The provisions laid out in article 27 may be viewed as a highly flexible framework, which provides recommendations on how to engage in law enforcement cooperation, whilst being subject to the respective domestic legal and administrative systems.

Paragraph 1(a) urges state parties to strengthen the channels of communication among their respective law enforcement authorities and underlines the need for security in exchange of information. After all, 'the leakage of information may not only prejudice the outcome of a particular case but also destroy trust between agencies so essential to effective cooperation'.¹⁷² Specific forms of cooperation concerning information about persons, the movements of proceeds and instrumentalities of crime are outlined in

¹⁶⁸ McClean (n 82) 233.

¹⁶⁹ Ben Bowling and James Sheptycki, 'Global Policing And Transnational Rule With Law' (2015) 6(1) *Transnational Legal Theory* 14, 142.

¹⁷⁰ *ibid.*

¹⁷¹ *ibid* 150.

¹⁷² McClean (n 82) 278.

paragraph 1(b). However, as the said information is to be used without any immediate intention of using it in evidence or of implementing confiscation proceedings, this demonstrates the limits of this form of cooperation. The exchange of personnel, including the posting of liaison officers, is promoted in paragraph 1(d). One must note that the ‘drafting is careful to avoid any suggestion that the posting of liaison officers need be on a reciprocal basis; such reciprocity is not found in practice, liaison officers being posted to meet operational needs and not on some diplomatic analogy’.¹⁷³ Finally, paragraph 1(f) stresses cooperation for purposes of facilitating early identification of offences, whilst emphasising administrative measures as opposed to other activities. This is so the subparagraph may be widely applied, since various jurisdictions distinguish between the executive, as well as prosecutorial, judicial and other authorities. Finally, the importance of international law-enforcement cooperation is highlighted in paragraph 2, whereas paragraph 3 emphasis the need to respond to TOC executed through the use of modern technology such as cybercrime.

The UNTOC recognises the importance of law-enforcement cooperation and promotes the effective exchange of information and close cooperation between agencies in order to avert and tackle all forms of transnational organised crime.

5.1.3.4. Identification, tracing, freezing or seizure of assets and confiscation of proceeds of crime (Articles 12, 13 and 14)

The criminalisation of conduct from which illicit profits are generated does not sufficiently punish or deter organised criminal groups, given that these means are used for continued activities of said groups. One way of preventing the use of funds and property acquired illicitly is to make provisions for the identification, freezing, seizure and confiscation thereof. In order for a more global regime to be established, the UNTOC devotes three articles to the issue, which describe the basic procedures to be adhered to on a domestic and international level.

Article 12 requires state parties to adopt ‘to the greatest extent possible’ the confiscation of the proceeds and property of crime, ‘whether the proceeds were still in the hands of the offender or had been passed on to another natural or judicial person’.¹⁷⁴ Moreover, paragraph 1(a) refers to two different techniques employed by state parties: (i)

¹⁷³ McClean (n 82) 280.

¹⁷⁴ *ibid* 145.

proceeds of crime and (ii) substitution of assets or value-confiscation. This enables states to choose either one or both of these techniques, allowing a wider application. Regarding the term ‘instrumentalities’ used in paragraph 1(b) no definition is provided, however the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds defines the term as ‘any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences’.¹⁷⁵ Accordingly, ‘a car used to transport prohibited drugs will fall within this provision, but a car which provides the setting for an indecent assault may not’.¹⁷⁶ According to paragraph 4, assets may still be susceptible to confiscation even if they form part of an aggregate, which was subsequently acquired by legitimate sources. Consequently, third party rights may well be affected. With regards to bank secrecy, paragraph 6 demonstrates the importance of combating TOC through the discovery of proceeds of crime, given that it provides an exception to the most rigorous bank secrecy laws. Article 12, paragraph 7 recommends that state parties consider shifting the burden of proof from the prosecutor to the defendant by requiring that an offender demonstrate the lawful origin of proceeds to crime. However, a limited safeguard is built ‘to prevent abuse of the rights of innocent third parties in (what they think is) lawful possession of such property’.¹⁷⁷ Paragraph 8 then goes on to state that the provisions of the article ‘shall not be construed to prejudice the rights of *bona fide* third parties’.¹⁷⁸ This is a problem given that state parties are left to decide how to interpret this text.

Article 13 of the UNTOC mandates procedures for international cooperation in confiscation matters, attending to the situation in which property discussed in Article 12 paragraph 1 is located in another state party from that in which the primary proceedings are or will be executed. This article does not aim to harmonise domestic procedures, merely to simplify cooperation and to facilitate the recovery of the proceeds of crime, rather than assisting in the search for such proceeds as part of the evidence of crime. Article 13 also details the way in which such requests are to be drafted, submitted and executed, examining these issue with regard to article 18.

¹⁷⁵ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990, art 1 para c.

¹⁷⁶ McClean (n 82) 144.

¹⁷⁷ Boister (n 7) 241.

¹⁷⁸ Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, art 12 para 8.

Article 14 is the third and last article associated with the identification, tracing, freezing or seizure of assets and confiscation of proceeds of crime, attending to the last stage of the confiscation process: the disposal of confiscated proceeds of crime. ‘In accordance with the well-established principle of international law that issues relating property are determined by the *lex situs*, this paragraph [paragraph 1] applies to confiscated property the law of the state in which it is seized’,¹⁷⁹ with state parties being asked in paragraph 2 ‘to give priority to requests from other states parties for the return of such assets for use as compensation to crime victims or restoration to legitimate owner’.¹⁸⁰ Given that the costs associated with mutual assistance are of particular concern to states, paragraph 3 recommends that proceeds be forwarded to the United Nations, intergovernmental organisations specialising in TOC or be shared with other state parties that have facilitated their confiscation.

Whereas the UNTOC only outlines the measures to be taken for the identification, tracing, freezing or seizure of assets and confiscation of proceeds of crime, the UNCAC outlines detailed regulations. Therefore, state parties ought to consider ratifying the UNCAC so as to more effectively tackle transnational organised crime through the disruption of sources of funding.

5.1.4. The United Nations’ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The UNTOC’s trafficking protocol ‘represents a ‘symbolic’ achievement for the United Nations’ bodies involved in its drafting, and an advance in reconceptualising trafficking as a human rights concern, as well as a crime and migration control issue’.¹⁸¹ Nevertheless, it is important to note that trafficking is considered, in this context, to be a criminal activity and not a human rights issue. There are other international instruments that address human trafficking, such as those prohibiting slavery, as well as other human rights and humanitarian law instruments. However, previous instruments had two major deficiencies: (i) They did not provide a basic notion of what human trafficking entailed and what its underlying causes were and (ii) The definitions placed too much emphasis on the

¹⁷⁹ McClean (n 82) 161.

¹⁸⁰ United Nations Office on Drugs and Crime, *Legislative guide for the implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto* (United Nations, 2004) para 294.

¹⁸¹ Joan Fitzpatrick, ‘Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking’ (2002) 24 *Mich J Int’l L* 1143, 1165.

transportation and too little on the selling and buying of people.¹⁸² As Ilias Chatzis said: ‘Human trafficking is complicated to investigate, prove or get a solid case to court’,¹⁸³ a factor, which is amplified because the definition of the crime itself is complex. Indeed, various scholars argue that the protocol’s definition cannot appropriately be encompassed into domestic legislation because ‘it has too many elements that would have to be proven by prosecutors, thus making prosecutions more difficult. Also some of the language is ambiguous, which could also lead [to] legal challenges’.¹⁸⁴ The UNTOC’s protocol has introduced preventative and protective measures, which address all aspects of the crime and balances criminal justice concerns without weakening states’ responsibilities. Also, state parties have mandatory obligations to address root problems, which ‘override the less onerous due diligence obligations imposed under human rights law by virtue of the *lex specialis maxim*’.¹⁸⁵ Nevertheless, it has failed to thoroughly identify, prevent and respond to trafficking for labour exploitation, child trafficking and trafficking in organs, as well as address victim support in more detail. Further, state parties should be provided with the necessary expertise to adequately handle cases emanating from transnational organised crime, as well mechanisms required for the harmonisation of certain provisions.¹⁸⁶

Articles 1 and 2 put into perspective the protocol’s relation with the UNTOC, with the latter providing a statement of purpose, underscoring that the protocol is primarily concerned with cooperation in the investigation and prosecution of trafficking in persons. Article 3 provides the applicable definition of ‘trafficking in persons’, subject to fervent discussion during the negotiation process. Paragraph (a) introduces the acts involved, the means used, and the purpose of the actor. Although some combinations of act and means are improbable, such an exhaustive list assures that all scenarios are covered. Paragraph (b) is the outcome of discussion regarding the issues of consent, arguing that ‘the ‘means’ in paragraph (a) are an essential element in the definition of ‘trafficking’, so the effect of paragraph (b) is that the consent of the victim is always irrelevant’.¹⁸⁷ The protocol takes a

¹⁸² Marta Iñiguez de Heredia, ‘People Trafficking: Conceptual Issues With The United Nations Trafficking Protocol 2000’ (2007) 9 Hum Rights Rev 299.

¹⁸³ The Global Initiative against Transnational Organized Crime, ‘The private sector and the future of illicit trade: Next generation smuggling and human trafficking challenges’ (Webinar Series, October 2014) 2.

¹⁸⁴ Laura L Shoaps, ‘Room for improvement: Palermo Protocol and the Trafficking Victims Protection Act’ (2013) 17(3) Lewis & Clark L Rev 931, 950.

¹⁸⁵ Megan Ross, ‘A Diamond in the Rough: The Transnational Duty to Prevent Human Trafficking in the Protocol’ (2013-2014) 21 Duke J Gender L & Pol’y 325, 357.

¹⁸⁶ LeRoy Potts Jr, ‘Global Trafficking In Human Beings: Assessing The Success Of The United Nations Protocol To Prevent Trafficking In Persons’ (2003) 35 Geo Wash Int’l L Rev 227.

¹⁸⁷ McClean (n 82) 328.

novel approach to the ‘consent’ of victim, acknowledging the role of misrepresentations and half-truths.¹⁸⁸

Articles 6-8 focus on the protection of victims of trafficking in persons, albeit the protocol’s emphasis being law enforcement rather than human rights, the first article in this chapter (article 6) addresses assistance to and protection of victims of trafficking. Paragraph 1 obliges state parties to ‘protect the privacy and identity of victims of trafficking in persons’, not limiting its scope to legal proceedings. However, in certain jurisdictions ‘there may be even greater legal obstacles to the prohibition of any reference to the name of a trafficked person’.¹⁸⁹ In many jurisdictions the suppression of names is regarded an exceptional step since the court presumes that it is in the public’s interest to make the names available. Paragraph 3 goes further than the provisions of Article 25(1) of the convention in that it encourages state parties ‘to provide for the physical, psychological and social recovery of victims’. Nevertheless, victim participation in proceedings, housing, and counselling of victims, as well as victim safety and compensation are only addressed in a limited fashion. Moreover, ‘the protocol neither obliges parties to grant victims immunity from criminal liability nor identifies in detail who is a victim, a pre-condition for their protection’.¹⁹⁰ The status of victims of trafficking in persons in receiving states is discussed in Article 7. Nonetheless, given the strained relationship between trafficking and general immigrant law, state parties did not consent to the insertion of a right to remain in the destination country. Finally, article 8 creates obligations for states with regard to the repatriation of victims of trafficking in persons. Paragraph 2 requires that state party returning the victim must have ‘due regard for the safety of that person and for the status of any legal proceedings’. Moreover, paragraph 2 encourages voluntary return, yet ‘does not prohibit compulsory repatriation against the known wishes of the victims’.¹⁹¹ Paragraphs 3 and 4 discuss cooperation procedures for the return of victims, including, *inter alia*, the verification of the victim’s nationality or right of permanent residence and the issuance of documents.

¹⁸⁸ Boister (n 7) 42.

¹⁸⁹ McClean (n 82) 338.

¹⁹⁰ Boister (n 7) 43.

¹⁹¹ Andreas Schloenhardt, ‘Prevented, suppressed, and punished!? Twelve Years of the Trafficking in Persons Protocol’ (The University of Queensland, human trafficking working group 1/2012) <<http://www.law.uq.edu.au/documents/humantrafficking/international-law/UN-TiP-Protocol-2000-Commentary-Analysis.pdf>> accessed 17 June 2016, 16.

The final chapter of the protocol revolves around prevention, cooperation and other measures. Article 9 strives to guide state parties' efforts to prevent trafficking in persons, encouraging states to establish policies, programmes, and other measures to prevent and combat human trafficking as well as protect its victims. Article 10 stresses the need to exchange information and training in order to more effectively identify offenders and victims, as well as the means and methods used for trafficking in persons, including recruitment, transportation and routes. Paragraph 2 encourages state parties to provide training programs to those confronted with human trafficking in order to ensure that victims of trafficking are identified and to prevent investigations from being compromised. Article 11 goes on to touch upon a matter closely associated with state sovereignty, namely border control. Paragraph 1 obliges state parties to reinforce their border controls as to prevent and detect trafficking in persons without impairing the free movement of people. 'However, a possible negative side effect of strengthened border controls is the displacement of traffickers' routes as traffickers change their methods'.¹⁹² Moreover, under paragraphs 2 and 3, states must impose requirements on commercial carriers to check whether or not passengers are in possession of the required travel or identity documents, without unduly restricting the discretion of state parties not to hold carriers liable for transporting undocumented individuals. Finally, articles 12 and 13 address the security and control of documents, as well as their legitimacy and validity setting minimum standards.

The UNTOC's protocol extends the scope of trafficking by recognising its various forms, whilst nevertheless perpetuating a gendered perception of the phenomenon given its objective of protecting women and children. Further, trafficking in persons has been relocated into the realm of international criminal law, thus 'a continued perception of trafficking as a threat to the nation-state and the control of territorial borders such that immigration control and criminal justice measures are prioritised'.¹⁹³ Whilst a majority of criminal justice provisions are mandatory, measures relating to the assistance for trafficked persons are superficial and largely not compulsory.¹⁹⁴ As a result, the protocol establishes minimum standards for victim support and protection, which state parties are encouraged to strengthen through their own domestic law and policy.¹⁹⁵ Finally, the protocol suffers from a lack of enforcement given the lack of consensus as to whether trafficked people

¹⁹² *ibid* 20.

¹⁹³ *ibid* 25.

¹⁹⁴ Marie Segrave *et al*, *Sex Trafficking: International Context and Response* (Willan Publishing, 2009) 18.

¹⁹⁵ Kelly E Hyland, 'The impact of the protocol to prevent, suppress and punish trafficking in persons, especially women and children' (2001) 8 Human Rights Brief 30, 38.

moved across international borders are considered refugees and are entitled to the international protections that come with this status.

5.1.5. The United Nations' Protocol against the Smuggling of Migrants by Land, Sea and Air

As flows of illicit migrants began to steadily increase, states called for the development of an instrument directed toward coordinating efforts to suppress those who facilitate the flow. As a result, the United Nations' Protocol against the Smuggling of Migrants by Land, Sea and Air became the primary legal instrument targeting the suppression of migrant smuggling, whilst fostering cooperation to target smugglers and protect those they smuggle. Nevertheless, with reference to the smuggling by air, additional prevention and suppression measures should be introduced, as there 'does not seem to be a clear articulation of the measures states parties should adopt'.¹⁹⁶ Further, state parties obligations under international law, including international human rights law and international refugees' law ought to be stressed, as well as practical methods to assist state parties who lack the necessary capacity and expertise to address smuggling.

Article 3 of the protocol defines smuggling of migrants as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'. The protocol emphasises the intention to include the activities of organised criminal groups acting for profit, whilst excluding 'the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties'.¹⁹⁷ Yet, by excluding those individuals, the element of benefit may be misused in order to bypass criminal responsibility. Criminal liability of migrants is discussed in article 5, which argues that smuggled migrants do not have immunity from prosecution, but having been the object of smuggling will not be the subject of criminal charges. Article 6 requires state parties to criminalise three forms of conduct: First, 'the procurement...of the illegal entry of a person into a state party of which the person is not a national or a permanent resident'. However, the term procurement remains undefined and it is unclear whether it also includes acts of facilitation. Paragraph 1(b) requires the criminalisation of producing, procuring, providing, or possessing fraudulent travel or identity documents, but excludes

¹⁹⁶ Andreas Schloenhardt and Jessica E Dale, 'Twelve years on: Revisiting the UN Protocol against the Smuggling of Migrants by Land, Sea and Air' (2012) 67 ZÖR 129, 149.

¹⁹⁷ McClean (n 82) 383.

those who possess such a document so as to enable their own smuggling. Paragraph 1(c) ‘is aimed at suppressing the actions of those individuals who facilitate migrants remaining in the host country clandestinely or otherwise illegally’,¹⁹⁸ such as, for example, employers who recruit illegal migrants.

The smuggling of migrants by sea is discussed in articles 7 to 9, with article 7 providing that state parties cooperate ‘to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea’. Hence, the measures set forth ‘cannot be taken in the territorial sea of another state except with the permission or authorisation of the coastal state concerned’.¹⁹⁹ Article 8 provides that a state party may cooperate with other state parties with regards to its own flagged vessels, vessels flying the flag of other states parties, vessels without nationality or a vessel assimilated to a vessel without nationality. Under paragraph 7, a ‘state party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel’ without seeking prior authorisation. Should such cooperation occur, article 9 sets forth the safeguards to be taken by state parties, such as ensuring ‘the safety and humane treatment of the persons on board’.

Articles 10-18 address prevention, cooperation and other measures. Article 10 concerns itself with information exchange, however, as it does not specify how the process ought to be conducted states may encounter difficulties in its implementation. Border measures addressed in article 11 reflect the text as it appears in the migrants’ protocol and were ‘adopted on the understanding that it would not be applied in such a way as to induce commercial carriers to impede unduly the movement of legitimate passengers’.²⁰⁰ Articles 12 and 13 reflect the same content as the trafficking in persons protocol concerning the security and control of documents, as well as their legitimacy and validity and the setting of minimum standards. Article 14 elaborates the nature of training and technical cooperation to be provided regarding migrant smuggling. Paragraph 1 requires state parties to provide or strengthen training on smuggling prevention and in ‘the humane treatment of migrants who have been the object of such conduct’, whilst paragraph 2 emphasises ‘cooperation between state parties and with other bodies including NGOs [non-

¹⁹⁸ Boister (n 7) 47.

¹⁹⁹ McClean (n 82) 401.

²⁰⁰ *ibid* 418.

governmental organisations]’.²⁰¹ Paragraph 3 encourages state parties to ‘consider providing technical assistance to other States that are frequently countries of origin or transit for persons who have been object of conduct set forth in article 6 of this protocol’. According to McClean, this is in the interest of all state parties if the goals of the protocol are to be realised.²⁰² Other prevention measures such as public awareness campaigns and addressing root causes are discussed in article 15. Although paragraph 3 addresses economic migration, it does not instruct state parties to adopt any specific policy in its immigration laws. Article 16 suggests protection and assistance measures, with paragraph 1 aiming at guaranteeing victims their fundamental human rights, right to life and not be subjected to torture or other cruel, inhuman, or degrading treatment or punishment. Nevertheless, this non-exhaustive list should not be understood to exclude or derogate from any other rights. Paragraph 2 obliges state parties to ‘take appropriate measures to afford migrants appropriate protection against violence’, but does not expand on what is meant by ‘appropriate measures’. Article 18 requires state parties to contemplate the return of smuggled migrants to their countries of origin. State parties must ensure that all processes or procedures with regard to return of smuggled migrants comply with international law, in particular human rights, refugee and humanitarian law. Overall, the provisions are comparable with those of article 8 of the trafficking protocol. Finally, article 19 ‘provides that the protocol leaves unaltered the obligations of states and the rights of individuals under the Refugees Convention’.²⁰³

The UNTOC’s protocol on migrant smuggling aims to strengthen ‘underdeveloped legal frameworks, weak law enforcement, and poor prosecutorial and judicial practices’²⁰⁴ which have allowed smugglers to operate without being punished. Further, suppression focuses on the supply rather than the demand side.

5.1.6. The United Nations’ Protocol against the Illicit Manufacturing and Trafficking in Firearms, their Parts and Components, and Ammunition

The firearms protocol comprises a framework for state parties to prevent the illicit manufacturing and trafficking in firearms, their parts and components, and ammunition. The protocol includes provisions on the illicit manufacturing and trafficking in firearms as national criminal offences, the criminalisation of illicit manufacturing of and trafficking in

²⁰¹ *ibid* 423.

²⁰² *ibid* 423.

²⁰³ Boister (n 7) 49.

²⁰⁴ Schloenhardt and Dale (n 196) 132.

firearms, adequate security measures over stored firearms, and establishes a system of authorisation or licensing regarding legitimate manufacturing and commerce, marking, recording and tracing of firearms, and international cooperation. Moreover, ‘under international human rights law, states are required to exercise due diligence to protect people within their territory from abuses, even when they are committed by private persons’²⁰⁵ and are, in addition, obligated to regulate firearms to protect their citizenry. It is largely based on the 1997 Inter-American Convention against the Illicit Manufacturing and Trafficking in Firearms, Ammunition, Explosives, and other related materials.²⁰⁶ However, the protocol’s scope is more restricted since it does not incorporate explosives, such as grenades, and other related materials. The protocol aims to differentiate between licit trade and illicit traffic, suppressing the latter and excluding state-to-state transactions. Scholars like Salton argue that the firearms protocol ‘essentially undercuts its own rigor by ignoring one of the most prevalent forms of SALW [small arms and light weapons] transactions’²⁰⁷: state-to-state transactions. Furthermore, one may contend that the protocol is not specific enough in its provisions, lacks mandatory articles, an effective enforcement mechanism and fails to provide a methodology for information exchange and customs enforcement.²⁰⁸

The firearms protocol is divided into three chapters, the first chapter containing general provisions, the second discussing prevention and the final chapter is composed of final provisions. The scope of application (article 4) sets forth that the protocol does not apply to state-to-state transactions given that including said transfers may broaden the scope too far and risk entering the security realm. State to non-state actor transactions are not directly addressed, leaving it to state parties to decide whether the aforementioned ought to be included or not. Article 5, paragraph 1 requires state parties to criminalise the following: illicit manufacturing, illicit trafficking and falsifying or illicitly obliterating, removing or altering firearms markings. As well as the aforementioned, paragraph 2 criminalises accomplice liability and organising, directing, aiding, abetting, facilitating, or counselling offences. It is important to note that illicit manufacturing comprises, according to article 3(d): ‘(i) manufacturing from illicitly trafficked parts; (ii) manufacturing without a licence or authorisation; and (iii) manufacturing without marking’.²⁰⁹ Article 6 requires state parties to adopt measures that allow them to confiscate, seize and dispose of illicitly

²⁰⁵ Cate Buchanan, ‘Small Arms Control and the United Nations’ (2006) 18 *J on Firearms & Pub Pol’y* 9, 12.

²⁰⁶ Boister (n 7) 112.

²⁰⁷ Daniel M Salton, ‘Starving the Dark Markets: International Injunctions as a Means to Curb Small Arms and Light Weapons Trafficking’ (2013) 46(1) *Conn L Rev* 369, 391.

²⁰⁸ *ibid* 391.

²⁰⁹ Boister (n 7) 113.

manufactured or trafficked firearms, their parts and components, and ammunition. Disposal does not infer their destruction if other means of disposal are authorised and the firearms are marked and their disposal recorded. Articles 7 through 15 address the preventative measures, such as record keeping (article 7). Article 7 obliges states to maintain records of information relating to firearms, leaving it to the state party to decide by whom said records are to be kept and by which method. In today's globalised society, a computerised system is preferable given its easy access and efficiency in tracing firearms. Article 8 concerns itself with the marking of firearms, there being no obvious requirement to have a system of marking parts and ammunition, but states are nevertheless obliged 'to keep records relating to parts and ammunition to enable illicit trafficking to be detected'.²¹⁰ Paragraph 1(a) stipulates that unique markings must be applied at the time of manufacture, with state parties being able to choose from two different systems: (i) geometric and (ii) alphanumeric markings. However, exclusively applying alphanumeric markings would have guaranteed a high degree of transparency, enabling governments to trace weapons back to the manufacturer without the assistance of the original exporting government. Imported firearms must be marked so as to permit identification of the country and year of import, unless a unique identifier has already been used. Interestingly, as firearms for temporary importation do not require markings to be applied, they cannot easily be identified. Finally, paragraph 1(c) requires firearms to be marked at the time of transfer from government stockpiles. Yet, the marking of firearms produced for government use has not been addressed by the protocol, although one may assume that the requirements are applicable to all firearms, regardless of their intended use. Article 9 is intended for state parties that do not recognise deactivated firearms as a 'firearms' under their domestic law. These States are required to take measures to prevent the illicit reactivation of firearms, to avoid them being altered so as to, for example, expel a projectile. General requirements for export, import and transit licensing or authorisation systems are set forth in article 10. Although paragraph 1 permits states to devise and maintain their own system, the remaining article sets 'parameters in terms of the content of documents and the procedures to be followed'²¹¹ so as to achieve a certain standardisation. Moreover, paragraph 2 provides a vague notion of authorisation, as there are no requirements as to what such authorisation includes.²¹² The information to be contained in export and import licences or authorisation and accompanying documentation is set out in paragraph 3. A weakness to be

²¹⁰ McClean (n 82) 475.

²¹¹ McClean (n 82) 482.

²¹² Mike Bourne, 'Transnational Trafficking in Weapons' in Philip Reichel and Jay Albanese (eds), *Handbook of Transnational Crime and Justice* (SAGE Publications, Inc. 2014) 87.

noted is that the information must not be contained in any single document and only the essential information is to be included in one document with others simply alluding to said document. Information exchange is discussed in article 12, compelling states to exchange ‘case-specific’ information, as well as general intelligence and scientific information. It is noteworthy that cooperation in tracing is ‘only’ discussed in paragraph 4 and is not subject of a separate article given its importance in criminal investigations and for record keeping. Finally, article 10 paragraph 1 urges state parties to regulate brokers and brokering by establishing a system that includes one or more measures such as: ‘(a) requiring registration of brokers operating within their territory; (b) requiring licensing or authorisation of brokering; or (c) requiring disclosure on import and export licences, authorisations, or accompanying documents, of the names and locations of brokers involved in the transaction’. Should a state party decide to introduce a registration system, it is free to select its design. Further, unanswered questions, as stipulated by McClean remain: ‘When does a broker ‘operate’ within the territory of a state? Does this mean that he is based there, or has a working base there; or is meeting to negotiate a transaction sufficient to amount to ‘operating’? Does ‘the licensing or authorisation of brokering’ refer to engaging in the activity or to each and every transaction?’²¹³

The firearms protocol focuses on a crime and law-enforcement approach, which limits its scope and content. In order to address the harmful effects of illicit manufacture and trafficking in firearms, the protocol establishes a system of government authorisation and a system of marking and tracing to fulfil its aims. Given the protocol’s weaknesses, the landmark Arms Trade Treaty (ATT), regulating the international trade in conventional arms, entered into force in December 2014. Compared to the firearms protocol, the ATT details when and how to regulate export controls and coordinate state action and obliges states to participate in a reporting and public information system. And ‘while the ATT does not prohibit the transfer of weapons to non-state groups, it provides some language to further regulate their sale’.²¹⁴

5.1.7. Conclusion

The United Nations’ Convention against Transnational Organised Crime definition of organised crime incorporates a range of different crimes and as such can function as

²¹³ McClean (n 82) 500.

²¹⁴ Bourne (n 212) 396.

basis for international criminal cooperation in regards to a wide range of serious crimes when these are transnational in nature. State parties may, nevertheless, be reluctant to use the UNTOC as a framework for cooperation given that it is ‘probably more than most can either legally engage in or politically stomach’.²¹⁵ One must bear in mind that the UNTOC serves as a framework to improve international legislation and enable cooperation between state parties. It does not constitute an operational treaty, which oversees specific crime-fighting activities.²¹⁶ Despite its weaknesses, the UNTOC may be viewed as a major breakthrough in the development of international criminal law, as it brought about unprecedented opportunities for transnational cooperation in criminal justice. Yet, it would constitute a more effective framework had it included further mandatory obligations for state parties rather than function ‘as just another case of soft law codifying international best practices in criminal justice’.²¹⁷

With regards to the UNTOC’s three protocols, they each address complex phenomenon associated with TOC and represent symbolic achievements for the United Nations. Nevertheless, the UNTOC’s protocols have been criticised as, in the words of Antonio Maria Costa:

Two out of three of the UNTOC protocols are inactive. The Firearms Protocol has few state parties, none among the major arms producers: a handgun is cheaper than a cellular phone. The Smuggling of Migrants Protocol is also neglected, despite the daily tragedy of tens of thousands of desperate people who pay a small fortune to cross perilous seas, deserts and mountains – and very often end up paying with their lives.²¹⁸

Moreover, with regards to the trafficking and the migrant smuggling protocol, similarities have been identified, yet on an international level little discussion has taken place on their distinctions and whether there is potential for conflict. Further, the Inter-Agency Group has expressed concern about the possible consequences of a state acceding to one but not both protocols.²¹⁹ Trafficking in persons and migrant smuggling are multidimensional issues, which cannot merely be viewed from a criminal law perspective, and consequently legal instruments must also embrace protective and human rights considerations. The firearms

²¹⁵ Boister (n 88) 70.

²¹⁶ Standing (n 2).

²¹⁷ Jan van Dijk, ‘Transnational organised crime, civil society and victim empowerment’ in R.M. Letschert and Jan van Dijk (eds), *The new faces of victimhood, globalisation, transnational crimes and victim rights* (Springer 2011) 103.

²¹⁸ Libert (n 75) 55.

²¹⁹ Anne Gallagher, ‘Human Rights And The New UN Protocols On Trafficking And Migrant Smuggling: A Preliminary Analysis’ (2001) 23(4) *Hum Rts Q* 975, 1000.

protocol may be limited in scope, but it nevertheless sets forth a control measures and normative provisions embracing various aspects of the illicit manufacture and trafficking in firearms.

5.2. Key challenges facing implementation

In 2010, the United Nations reported that, to its knowledge, only 19 of 157 state parties to the United Nations' Convention against Transnational Organised Crime had utilised it as an instrument 'to facilitate international cooperation, including extradition, to fight organised crime groups'.²²⁰ Therefore, UNTOC is used insufficiently as the basis for international cooperation and legal assistance. What challenges do state parties face when implementing such an instrument?

In order for numerous state parties to ratify any multilateral treaty, given their disparate views and objectives, imaginative and subtle drafting is required, which necessarily produces unclear or ambiguous wording.²²¹ However, such wording is not merely used in order to incorporate competing states interests and legal systems, but also so as to allow for changes in society. Hence, too narrow provisions may exclude unforeseeable events, restricting the convention's scope and creating eventual loopholes. That being said, although the UNTOC appears sufficiently broad, it lacks the framework enabling state parties effectively tackle, *inter alia*, the realities of cybercrime, anonymity or the challenges of international cooperation. Moreover, given the UNTOC's focus on criminal justice provisions, state parties may deem the framework too restricted to include innovative approaches or even to draw conclusions from lessons learned. Finally, the UNTOC's extensive prevention chapter 'contains so many measures, policies and practices that the full and effective implementation [...] is a long-term project'.²²²

Another problem is reflected by the reservations state parties include when ratifying the convention, resulting in implementation remaining discretionary and difficult to measure. The Vienna Convention of the Law of Treaties enables states 'to enter RUDs [reservations, understandings, or declarations] at the time of ratification so long as the text of the treaty in question does not expressly prohibit RUDs and the RUD itself is not

²²⁰ Walter Kemp and Mark Shaw, 'From the Margins to the Mainstream: Toward an Integrated Multilateral Response to Organized Crime' (International Peace Institute 2014) 21.

²²¹ Brunelle-Quraishi (n 84).

²²² Robert C Beckman and J Ashley Road (eds), *Piracy and International Maritime Crimes in ASEAN. Prospects for cooperation* (NUS Centre for International Law 2012) 93.

incompatible with the object and purpose of the treaty'.²²³ However, states may potentially bargain around the object and purpose test, effectively weakening or even repealing the legal obligations that the states accepted upon ratification. Commonly, states enter RUDs for their current conduct to be classified as compliance, so as to avoid 'openly violating international law where such behaviour would impose domestic political costs'²²⁴ or to reduce unintended domestic effects. Furthermore, treaty obligations may also be more stringent than the domestic legal status *quo ante*. Despite that, RUDs can reinforce treaty breadth and depth or introduce flexibility devices that can promote treaty commitments.²²⁵ 'Some scholars have [even] suggested that RUDs may lead to more honest reflections of the positions of reserving states and can provide a starting point for engaging with and eventually internalising particular norms'.²²⁶ Generally speaking, early ratifying states express their will to cooperate on their own terms, whilst late ratifying states tend to be in a more desirable position relative to non-reserving state due to the 'wealth of information about the reactions of existing treaty members to previous reservations'²²⁷ at their disposal. With regards as the UNTOC, a multitude of states, including Bahrain, Lithuania and Vanezuela, have expressed their reservation with regards to article 35 paragraph 2 as they do not recognise the compulsory jurisdiction of the International Court of Justice.²²⁸ Moreover, reservations may become obsolete with time. For instance, the reservation expressed by Ecuador in conjunction with article 10 UNTOC regarding the criminal liability of legal persons. At the time of ratification, since this element was not embodied in Ecuadorian law, Ecuador would have been non compliant with article 10 had it not expressed this reservation. However, in 2014, Ecuador introduced the *Codigo Organico Integral Penal del Ecuador*, also known as the Organic Integral Criminal Code, (COIP), whose articles 49 and 50 concern themselves with corporate liability.²²⁹ It is important that 'declarations and reservations require regular 'maintenance' in order to keep the other

²²³ Daniel W Hill, 'Avoiding Obligation: Reservations to Human Rights Treaties' [2016] 60 *Journal of Conflict Resolution* 1129, 1132.

²²⁴ Hill (n 223) 1133.

²²⁵ Laurence R Helfer, 'Not Fully Committed? Reservations, Risk, and Treaty Design' [2006] 31 *Yale Int'l L* 307.

²²⁶ Eric Chung, 'The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations' [2016] 126 *The Yale Law Journal* 170, 179.

²²⁷ Helfer (n 225) 370.

²²⁸ United Nations Office on Drugs and Crime, 'United Nations Convention against Transnational Organised Crime' (*UNODC* 2006) <http://hukum.unsrat.ac.id/hi/crime_cicp_signatures_convention.htm> accessed 20 July 2016.

²²⁹ Bruce Horowitz, Ernesto Valasco Granda, Sebastian Cordova and David Toscano, 'Corporate crime, fraud and investigations in Ecuador: overview' (*Thomson Reuters* 1 January 2015) <<http://uk.practicallaw.com/1-597-5405?q=&qp=&qo=&qe=#>> accessed 20 July 2016.

parties properly informed about the (im)possibilities of cooperation'.²³⁰ Conclusively, RUDs may be seen as a 'tradeoff between protecting the rights and consent of non-reserving states that anticipate compliance with treaties in their entirety and the rights and consent of reserving states that expect to have their RUDs honoured'.²³¹ The international community ought to take the legal effects of RUDs seriously, as at the very least they can influence perception and at worst mitigate genuine and full treaty participation.

States must commit to investing in the convention, by establishing implementation review mechanisms since the UNTOC was not designed with any kind of review mechanism. States must translate the provisions expressed in the convention into domestic legislation and their law enforcement agencies must implement them. Such a mechanism is of importance given that states ought to provide information on the UNTOC's impact, whether it remains fit for purpose, etc... A more dynamic governing body is emanating through the Conference of Parties (COP), introducing a more structured and comprehensive 'review mechanism', which aims not only to review but also to promote the implementation of this Convention (see section 5.3. for further information). The COP requires state parties to complete questionnaires, unsuitable for addressing complex issues and problems, and to prepare country-reports that remain time-consuming and difficult to analyse due to a lack of good guidelines. Furthermore, these reporting mechanisms have stalled since 2008 due to a lack of consensus and the inability to create a user friendly information gathering software.²³² State parties still remain averse to providing information on their performance, especially when this may bring about criticism.²³³ It may well be that state parties would be more inclined to cooperate if they were provided with further legislative and reform assistance, involving expert analysis, review of legislation and compliance with international standards.²³⁴ An example of a more comprehensive review mechanism is the International Narcotics Control Board (INCB), an independent and quasi-judicial monitoring body, established for the implementation of the United Nations' drug control conventions, may serve as a model of for implementation review mechanisms. The INCB includes multiple features such as self-assessment, review, dialogue, country

²³⁰ Council of Europe, *White Paper on Transnational Organised Crime* (White paper, Fin 11, 2014) 24.

²³¹ Chung (n 226) 180.

²³² Conference of the Parties to the United Nations Convention against Transnational Organised Crime and the Protocols Thereto, 'Meeting to explore all options regarding an appropriate and effective review mechanism for the United Nations Convention against Transnational Organized Crime and the Protocols thereto' (5 August 2015) CTOC/WG.8/2015/CRP.2.

²³³ Standing (n 2).

²³⁴ Organization for Security and Co-operation in Europe, 'Report on OSCE Activities in the Fight Against Organized Crime in 2011' (OSCE 2012).

visits, bench-marking and technical assistance.²³⁵ Furthermore, it draws information and expertise from international governmental organisations and non-governmental organisations.²³⁶

Further key challenges are symbolic compliance by states that accede so as to gain access to continued development assistance or technical support, as well the asymmetry of means and capacity among state parties. Such continued assistance is sought as some states view ratification as a ‘final destination’ rather than a ‘starting point’. Moreover, powerful states may exert pressure upon states, which rely on the former’s assistance in order to ‘persuade’ the latter to ratify a convention. An example, albeit regional, is the Trafficking in Persons (TIP) Report, which the US State Department is required, by law, to issue to the US Congress on a yearly basis. Should states fail to meet the minimum requirements, they can be placed on a watch-list or denied non-trade related assistance.²³⁷ States may also face problems associated with the development of their domestic legal system, which may result in non-compliance. This non-compliance does ‘not reflect a deliberate decision to violate an international undertaking on the basis of a calculation of interests’,²³⁸ but correlates with a state’s bureaucratic, infrastructural and coercive capacities. Changing social or economic conditions may weaken the state, rendering it incapable of abiding by their original commitments. As such, treaty terms may have to be renegotiated or adapted to changed circumstances. Since the implementation of a treaty may be costly, time-consuming and require an extensive review and/or revision of legislation, states may be unwilling or unable to allocate the resources and expertise required, necessitating that treaty implementation occur gradually. Moreover, the convention presupposes that ‘the state parties involved already have a somewhat efficient or even functional criminal justice system’,²³⁹ which is often not the case in developing countries where organised crime poses a considerable threat to development and security. Amongst other things, these states lack harmonisation and cooperation, whilst also facing problems in the prosecution and convictions of offenders.²⁴⁰ The legal avenues through which to pursue claims and the

²³⁵ Conference of the Parties to the United Nations Convention against Transnational Organised Crime and the Protocols Thereto, ‘Methods employed by existing global implementation review mechanisms’ (16 September 2015) CTOC/WG.8/2015/CRP.1.

²³⁶ *ibid.*

²³⁷ Yvon Dandurand and Vivienne Chin, ‘Implementation of transnational criminal law. Issues and challenges’ in Neil Boister and Robert J Curie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 441.

²³⁸ Wade M Cole, ‘Mind the Gap: State Capacity and the Implementation of Human Rights Treaties’ [2015]

69 International Organisation 405, 406.

²³⁹ *ibid.* 445.

²⁴⁰ United Nations Office on Drugs and Crime (n 146).

expertise to prepare and take timely action are often absent.²⁴¹ Moreover, courts may be incapable of interpreting, let alone applying the norms incorporated from a treaty. Domestic legislation will continue to prevail since it cannot be reunited with international law.²⁴² Even if legislative approval is present and the norms can be interpreted, ‘the implementing law requires further action through regulations or more detailed legislation before the provisions can be judicially enforced’,²⁴³ introducing further obstacles. This is so as treaties are often ‘not considered self-executing and thus binding as such in the domestic legal order’.²⁴⁴ Despite that, states with insufficient domestic legal orders have turned toward the so-called international ‘safety net’,²⁴⁵ often demonstrating respect for international law and giving it greater importance on the domestic level.²⁴⁶ These states may require external aid, such as the provision of technical assistance and the setting of benchmarks and standards,²⁴⁷ or have to be ‘invested with the indigenous capacity to comply’,²⁴⁸ so as to enhance their own capability. For example, the development of straightforward, simple and common goals for the rule of law may strengthen national capacities.²⁴⁹ Conclusively, one may argue that ‘failures to comply are not due to the depth and severity of the demands imposed and the resulting domestic opposition, but rather to the capacity to comply and different understandings of what compliance requires’.²⁵⁰ Moreover, the UNTOC’s success relies on attitude changes and ‘whether the convention’s substantive principles and messages are well known to all and converted into a way of life’.²⁵¹

Key challenges facing implementation, include, but are not limited to, ‘state capacity, national concern, institutional constraints on a domestic level and the availability of monitoring mechanism’²⁵² as well as external and internal factors.

²⁴¹ *ibid.*

²⁴² Dina Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011).

²⁴³ *ibid.*

²⁴⁴ Hisashi Owada, ‘Problems of Interaction Between the International and Domestic Legal Orders’ [2015] 5 *Asian Journal of International Law* 246, 271.

²⁴⁵ Shelton (n 242).

²⁴⁶ *ibid.*

²⁴⁷ Anne-Marie Slaughter and William Burke-White, ‘The Future of International Law Is Domestic (or, The European Way of Law)’ [2006] 47 *Harvard Int’l Law Journal* 347.

²⁴⁸ Cole (n 238) 410.

²⁴⁹ United Nations General Assembly, ‘Delivering justice: programme of action to strengthen the rule of law at the national and international levels’ (16 March 2012) A/66/749.

²⁵⁰ Kal Raustiala and Anne-Marie Slaughter, ‘International Law, International Relations and Compliance’ in Walter Carlsnaes, Thomas Risse and Beth A Simmons, *Handbook of International Relations* (SAGE Publications Ltd 2002).

²⁵¹ *ibid.* 444.

²⁵² Brunelle-Quraishi (n 84) 127.

5.3. Monitoring implementation of the UNTOC and its protocols

The basic principle of international law, *pacta sunt servanda*, requires state parties to a suppression convention to act in good faith and enforce the provisions of the treaty, as well as satisfy the further obligations. The United Nations' have, in order to monitor the implementation of its conventions, established more structured and comprehensive review mechanisms.

The United Nations Office on Drugs and Crime has devised a 'software tool that allows individual signatories of UNTOC to upload key information on compliance and implementation of UNTOC'.²⁵³ Furthermore, the Conference of Parties (COP) requisitioned an online directory, a network of central authorities, as well as an index of exemplar cases on international criminal cooperation.²⁵⁴ Despite these apparent improvements in advancing a system of monitoring, the information provided by state parties remains superficial and incomplete. Further, state parties should provide the COP with detailed reports including data on the impact of implementation.²⁵⁵ Given the UNTOC's inadequate implementation review mechanisms, the convention's objectives may be jeopardised, as state parties are unable to achieve the affirmed purposes. To effectively combat transnational organised crime, it is essential that the provisions be enforced in a consistent, transparent and accountable manner. Furthermore, as the number of state parties participating in a convention increases, monitoring and finding consensus becomes increasingly more difficult. That being said, review mechanisms aim to promote suppression conventions and encourage state parties to put the former into effect. With increasing ratification of the UNTOC by state parties, the pressure on non-member states to become a member increases. Nevertheless, the former only occurs if the monitoring system is viewed as not infringing upon a state's sovereignty. With regards to the UNTOC, 'other proposals suggesting a subsidiary monitoring body, a regional evaluation process, and a peer review system including sanctions for non-compliance'²⁵⁶ were dismissed as member states viewed such a system as a loss of sovereignty. Moreover, such stringent monitoring systems would not only expose non-compliance, but also weaknesses in a state's judiciary, executive, legislative branches. According to Bilder, emphasising

²⁵³ Standing (n 2) 9.

²⁵⁴ Obokata (n 7).

²⁵⁵ Angus Senior, 'Organised Crime. Combating an Elusive Transnational Threat' (Master thesis, University of Waikato 2010).

²⁵⁶ Brunelle-Quraishi (n 84) 135.

‘compliance may point towards a backwards- looking and essentially legalistic approach focusing on state ‘misbehaviour,’ rather than towards a productive enquiry into devising and deploying better normative techniques and arrangements that facilitate more effective international dealings and cooperation’.²⁵⁷ Focusing on such ‘misbehaviour’ has not proven effective, as no sanctions have been imposed on non-complying members. In the opinion of Krisch ‘the role of treaties as ‘transmission belts’, ensuring accountability to states and through the ratification process also to the public within states, has become weaker and weaker, just as demands for stronger accountability have risen in the face of ever more intrusive global regulation of formerly domestic affairs’.²⁵⁸ It is becoming ever more important that civil society, government agencies and further stakeholders are included in the monitoring process in order to increase accountability and to promote comprehensive and transparent reporting. A system of peer review would present an alternative, as it fosters a space for mutual learning. An example of such a monitoring system is the Financial Action Task Force’s ‘peer-review-style ‘mutual evaluations’, in which one country’s experts work with the mechanisms backed up by hefty sticks such as denial of access to international financial flows, which have combined international legitimacy with effective sanctions mechanisms’.²⁵⁹

In order to improve the UNTOC and its implementation, states ought to support the implementation of a monitoring mechanism so as to effectively tackle transnational organised crime. Rather than establishing a new mechanism, existing instruments should be strengthened with support of the international community. The strengthened mechanisms should not simply replicate the monitoring system of the United Nations Convention against Corruption, but rather be adapted to the needs of state parties of the UNTOC. It is important that all state parties concerned participate in a more dynamic monitoring mechanism, intended to cultivate a more constructive dialogue. Gaps and priorities toward the implementation of the convention must be identified. That being said, the review mechanism must remain efficient and agile. Ideally, a system incorporating both expert and peer review ought to be brought in place, which also involves civil society. Moreover, a wide range of data sources should be consulted when reviewing state parties’ contributions to the UNOCD and the UNTOC and its protocols and recommendations

²⁵⁷ Richard Bilder, ‘Beyond Compliance: Helping Nations Cooperate’, in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP 2003) 72.

²⁵⁸ Nico Krisch, ‘The Pluralism of Global Administrative Law’ (2006) 17(1) *Eur J Int’l L* 247, 277.

²⁵⁹ James Cockayne, ‘Transnational Organized Crime: Multilateral Responses to a Rising Threat’ (International Peace Academy 2007) 13.

advanced. Finally, it is important that the review mechanism is ‘transparent, efficient, non-intrusive, inclusive and impartial’.²⁶⁰

²⁶⁰ Conference of the Parties to the United Nations Convention against Transnational Organised Crime and the Protocols Thereto, ‘Food for thought on the establishment of a mechanism to review the implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto’ (26 September 2014) CTOC/COP/2014/CRP.3, 4.

CHAPTER VI

REGIONAL VERSUS INTERNATIONAL COOPERATION

6.1. The European Union's approach to transnational organised crime

Since the 1970s and the establishment of the Trevi group,²⁶¹ organised crime has been on the agenda of European states.²⁶² It wasn't until the 1990s and the growing influence of the Mafia and Russian organised crime that the Ad Hoc Group on International Organised Crime was established and the European Union 'started to respond and counter the emergence of organised crime as a general security threat in parallel with its 'Single Market' integration project'.²⁶³ The Ad Hoc Group on International Crime dealt with serious crime such as drug trafficking, bank robbery and arms trafficking.²⁶⁴ Moreover, it produced an analysis of organised criminal groups active within the European Union and issued recommendations regarding more effective cooperation.²⁶⁵ A new dimension was added to the economic concerns following the introduction of the Schengen Agreement (1985-1990) and the removal of barriers to illicit trade and other criminal activities.²⁶⁶ Member states started to shift their decision-making to a supranational level and committed 'to common ways of working and agreed rules'.²⁶⁷

The European Union has addressed the threat posed by organised crime in the context of the 'area of freedom, security and justice' (ASFJ), introduced by the Amsterdam Treaty.²⁶⁸ The Treaty of Amsterdam enabled member states to better cooperate in matters of visas, asylum, immigration and other policies related to the free movement of persons. The Treaty of Lisbon (TFEU) then established EU competence in approximating criminal

²⁶¹ TREVI group stands for the Terrorism, Radicalism, Extremism and International Violence Group, established in 1975, so as to exchange information and provide mutual legal assistance in matters of terrorism and organised crime. In 1992, the TREVI group was replaced by the provisions of the third pillar of the Treaty of Maastricht, see Davide Casale, 'EU Institutional and Legal Counter-Terrorism Framework' (2008) 1 *Defence Against Terrorism Review* 49.

²⁶² Monica den Boer, 'Law-Enforcement Cooperation and Transnational Organized Crime in Europe' in Mats Berdal and Mónica Serrano (eds), *Transnational Organized Crime & International Security. Business as usual?* (Lynne Rienner Publishing 2002).

²⁶³ Allum and Den Boer (n 43) 139.

²⁶⁴ Karen E Smith, *European Union Foreign Policy in a Changing World* (2nd edn, Polity Press 2008) 33.

²⁶⁵ John Benyon, 'Policing the European Union: The Changing Basis of Cooperation on Law Enforcement' (1994) 70 *International Affairs* 497.

²⁶⁶ Laura Ferola, 'The Fight Against Organized Crime in Europe Building an Area of Freedom, Security and Justice in the E.U.' (2002) 30 *Int'l J Legal Info* 53; and Christopher Harding, 'European Regimes Of Crime Control: Objectives, Legal Bases And Accountability' (2000) 7 *Maastricht J Eur & Comp L* 224.

²⁶⁷ Daniela Irrera, 'The EU Strategy in Tackling Organized Crime in the Framework of Multilateralism' (2011) 12 *Perspectives on European Politics and Society* 407, 415.

²⁶⁸ Thomas Renard, 'Partners in crime? The EU, its strategic partners and international organised crime' (Working Paper No 5 Fundación para las Relaciones Internacionales y el Diálogo Exterior 2014).

law in up to 10 areas of ‘particularly serious crime with cross border dimension (art. 83(1)(1) TFEU)’²⁶⁹ and allows for the possibility of expanding the scope to crimes not explicitly listed in article 83(1)(1).²⁷⁰ Further, with regards to criminal procedure, the TFEU enables the adoption of minimum rules regarding, *inter alia*, mutual admissibility of evidence, and facilitates mutual recognition and law enforcement cooperation.²⁷¹ In substantive criminal law, approximation takes place as to the definition of offences and sanctions for serious crime with a cross-border dimension. Moreover, article 83(2) of the TFEU ‘enables approximation of criminal law if it is ‘essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures’’.²⁷² This approximation is said to support the functioning of judicial cooperation in criminal matters as well as the effective functioning of European bodies in the field of criminal policy. Nevertheless, as Lord has argued, ‘the Union uses a fragmented governance structure to handle security questions’ because ‘EU security might be conceptualised as a problem of co-ordination between actors with significant autonomy of one another’’.²⁷³

6.2. Organised crime legislation in the European Union

On an international level, various international institutions have sought to address the threat posed by transnational organised crime. *Inter alia*, the United Nations and the European Union have introduced measures aimed at harmonising criminal legislation dealing with TOC. The first international legal instrument was introduced by the EU in 1998 with the Joint Action (JA) on making it a criminal offence to participate in a criminal organisation which also provided the first agreed upon definition of organised crime and contained criminalisation requirements.²⁷⁴ The UNTOC then followed the JA in 2000, introducing a global legal definition of an organised criminal group. In 2008, the European Union then introduced the Framework Decision (FD) on the Fight against Organised crime

²⁶⁹ Vincenzo Militello, ‘Transnational Organized Crime and European Union: Aspects and Problems’ in Stefano Ruggeri (ed), *Human Rights in European Criminal Law* (Springer International Publishing Switzerland 2015) 203.

²⁷⁰ *ibid.*

²⁷¹ Valsamis Mitsilegas, *EU Criminal Law* (Hart Publishing 2009).

²⁷² Treaty on the Functioning of the European Union (TFEU) art 83 para 2.

²⁷³ Allum and Den Boer (n 43) 2.

²⁷⁴ Joint Action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union [1998] OJ L 351.

aiming to update and reformat the Joint Action (98/733/JHA) so as to ensure its compatibility with the UNTOC.²⁷⁵

The United Nations Convention against Transnational Organised Crime definition of organised crime echoes the Joint Action's definition, remaining rather broad. Moreover, the UNTOC 'infers the illicit nature of a group from the commission of "one or more serious crimes" or offences established by the Convention, just as provided by the JA'.²⁷⁶ As in the JA, the UNTOC follows a quantitative selection of the notion of 'serious crime', which creates a 'proportionality between criminal acts and respective penalties [which] is not an absolute concept but only a relative one measuring the scale of reaction of a particular legal order'.²⁷⁷ Contrary to the JA, the UNTOC broadens the scope of the provision, as an organised criminal group may exist solely for the commission of a single offence, which makes it more difficult to distinguish it from simple participation in a crime involving more than two persons.²⁷⁸ With regards to the criminalisation provisions, both the UNTOC and the JA adopt a double model offence approach. Interestingly, the civil law model offence of the UNTOC criminalises the participation in any criminal act committed by the group. Thus, contrary to the JA, which criminalises also the participation in the non-criminal activities of the group, provided the apparent legal activity is conducive to the achievement of the illegal aims of the group. Regarding penalties, the UNTOC requires that state parties consider the gravity of the offences and leaves greater autonomy to states concerning the penalties for participation in a criminal organisation as does the JA. The UNTOC does not follow the approach of the JA to the jurisdiction of criminal organisation offences. It imposes a minimum standard (territorial jurisdiction) with some possible supplementary norms. To conclude, the UNTOC follows the approach laid out by the JA, having made few improvements regarding criticisms made about the latter.

In 2008, the third international law instrument providing a definition of organised crime was introduced by the European Union: The Framework Decision (2008/841/JHA). The legislative instrument of framework decision, was adopted by the Treaty of Amsterdam in order to achieve greater approximation of criminal law in the EU. The 2008

²⁷⁵ European Commission, Proposal for a council framework decision on the fight against organized crime [2005] COM(2005) 6.

²⁷⁶ Calderoni (n 7) 33.

²⁷⁷ Vincenzo Militello, 'Participation in a criminal organization as a model of European criminal offence' in Vincenzo Militello and Barbara Huber (eds), *Towards a European Criminal Law Against Organised Crime: Proposals and Summaries of the Joint European Project to Counter Organised Crime* (iuscrim 2001).

²⁷⁸ Orlova and Moore (n 92).

framework decision was introduced following the growing convergence between terrorism and organised crime brought about by the events of 9/11. Although organised criminal activities have been used to fund terror operations, it remains difficult to distinguish these phenomena due to a possible overlap in activities, resulting in greater difficulty when combating them.²⁷⁹ Finally, following the entry into force of the UNTOC, the JA had to be adapted so as to assure the compatibility between the EU's law and the suppression convention.²⁸⁰

The framework decision introduced a new definition of criminal organisation, retaining the term 'criminal organisation' developed in the JA, whilst adopting the ultimate objectives ('to obtain, directly or indirectly, a financial or other material benefit') of the organised criminal group as laid out by the UNTOC.²⁸¹ Further, the 'structured association' is defined, as in the Palermo Convention, in a negative way in order to exclude randomly formed groups. Positive elements, which would enable a criminal organisation and its *modus operandi* to be distinguished, remain absent, resulting in a broad definition. Moreover, the quantitative threshold of 4 years of maximum deprivation of liberty is retained. Hence, criticisms already mentioned in relation to the Joint Action and the UNTOC have not been overcome. That being said, providing a list of all recognised crimes would prove problematic, as any such list may become obsolete as transnational organised crime changes and adapts to external factors. The double model offence approach is retained in the framework decision, instead introducing a conspiracy-type paragraph.²⁸² Therefore, the civil law model differs from the UNTOC, with criminal conduct comprising the active taking part in the organisation's criminal activities and non-criminal conduct, such as financing, being set out in a list. Interestingly, the FD introduced the requirement of minimum sanctions for the participation in a criminal organisation, sanctioning the 'minimum maximum' technique.²⁸³ The introduction of said 'minimum maximum' range of 2 to 5 years aims to render the FD more flexible and reduce the likelihood of too severe penalties.²⁸⁴ Furthermore, for any crime committed within the framework of a criminal

²⁷⁹ Francesco Calderoni, 'A Definition that Could not Work: the EU Framework Decision on the Fight against Organised Crime' (2008) 16(3) *European Journal of Crime, Criminal Law and Criminal Justice* 265.

²⁸⁰ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] OL J 300/42.

²⁸¹ Calderoni (n 7).

²⁸² *ibid* 38.

²⁸³ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] OL L300/42.

²⁸⁴ Gert Vermeulen, 'Where do we currently stand with harmonization in Europe?' in Andre Klip and Harmen van der Wilt (eds), *Harmonisation and harmonising measures in criminal law* (Royal Netherlands Academy of Science 2002).

organisation, an aggravating circumstance has been inserted. The liability of legal persons has been introduced as previously within the JA and the UNTOC. However, contrary to the previous instruments, the FD requires that the liability is established (i) ‘legal persons may be held liable for any of the offences referred to in Article 2 [if] committed [...] [by someone holding a] leading position within the legal person’²⁸⁵ and (ii) ‘where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission’.²⁸⁶ The FD promotes cooperation between member states and helps avoid conflicts between the different jurisdictions of European member states, and provides for recourse to various European bodies or mechanisms (for example Eurojust).

The framework decision has brought about few improvements compared to previous international instruments. The FD has, *inter alia*, introduced a minimum sanction and has rejected the unclear distinction between ‘criminal activities’ and ‘other activities’. Nevertheless, the framework decision ends up being at odds with itself, leaving a wide margin of discretion to national legislator in the interpretation and implementation of the FD’s provisions, which may appear imprecise and misleading to the national legislator. In 2011, the European Parliament, with the adoption of the Resolution on organised crime in the European Union, recognized the ‘extremely limited impact on the legislative systems of the member States of Framework Decision 2008/841/JHA on organised crime, which has not made any significant improvement to national laws or to operational cooperation to counter organised crime’.²⁸⁷

Despite significant improvements over the years, the European Union’s legislative instruments have not attained the expected harmonisation. That being said, the European Union has taken steps to strengthen its legislation ‘to enhance the effectiveness of EU law in the field of organised crime, by justifying the transition from an EU instrument of uncertain legal force (a Joint Action) to a clearly legally-binding Framework Decision’.²⁸⁸ Nevertheless, the EU has the possibility to further strengthen organised crime legislation, since the entry into force of the Treaty of Lisbon has established a specific legal basis for

²⁸⁵ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] OL L300/42, art 5 para 1.

²⁸⁶ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] OL L300/42, art 5 para 2.

²⁸⁷ European Parliament, European Parliament resolution of 25 October 2011 on organised crime in the European Union, 2010/2309(INI), 25 October 2011.

²⁸⁸ Valsamis Mitsilegas, ‘The European Union and the Global Governance of Crime’ in Valsamis Mitsilegas (ed), *Globalisation, Criminal Law and Criminal Justice: Theoretical, Comparative and Transnational Perspectives* (Hart Publishing 2015) 163.

the harmonisation of criminal provisions relating to transnational organised crime through the introduction of directives.²⁸⁹ The introduction of a directive would provide the fundamental rules of a common strategy, which ought to be transferred into national law and afford the opportunity to overcome the three international legal instruments' weaknesses.

6.2.1. *The freezing and confiscation of instrumentalities and proceeds of crime*

Organised criminal groups employ criminal activities as a mean to gain proceeds, which are, subsequently, used to reinforce the organisation itself and to pursue further criminal activities, such as money laundering and corruption. An efficient strategy against organised crime ought to target the organised criminal group's proceeds in order to suppress its criminal activities and impede the commission of further ones. The confiscation of proceeds of crime constitutes an efficient sanction in order to weaken the criminal organisations' activities.²⁹⁰ In order to address the aforementioned, the European Union introduced Directive (2014/42/EU) on the freezing and confiscation of instrumentalities and proceeds of crime.

The directive defines the proceeds of crime as 'any economic advantage derived directly or indirectly from a criminal offence'.²⁹¹ These include any property 'whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property'²⁹² or any instrumentalities used or useful to perpetration of criminal activities.²⁹³ The directive provides for direct confiscation and value confiscation, leaving it to member states to choose which measures to implement. Moreover, the directive proposes the use of extended confiscation for serious offences, such as the crime of participation to a criminal organisation set forth in the 2008 framework decision. It is important to note that confiscation may only take place following

²⁸⁹ Treaty on the Functioning of the European Union (TFEU) art 83.

²⁹⁰ Marina Castellaneta, 'Introduzione a 'Confisca, Blocco e Sequestro degli strumenti e Proventi di reato' in Gabriella Carella *et al.* (eds), *Codice di diritto penale e processuale penale dell'Unione Europea* (G. Giappichelli Editor 2009).

²⁹¹ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39, art 2 para 1.

²⁹² Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39, para 11 and art 2 para 2.

²⁹³ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39, art 2 para 3.

a final judgment. In exceptional circumstances, there is the possibility of non-conviction based confiscation because the suspect or accused is ill or has fled. However, the FD does not address other grounds such as immunity and is limited to offences that are liable to result in pecuniary benefit. Finally, as does the UNTOC, the directive enables the confiscation of properties belonging to third parties provided that it is based on ‘concrete facts and circumstances’.²⁹⁴ The term third parties, is broad enough to include relatives, but specifically excludes *bona fide* persons.²⁹⁵

The new directive requires the adoption of measures enabling the freezing of assets and covering both prohibitions on use and the temporary seizure of property, as well as measures aimed at ensuring the management of frozen property. Such freezing orders may be issued by any competent authorities and remain in force as long as required, but any property must be returned if no confiscation order is adopted.²⁹⁶ Further, ‘the new Directive includes an express obligation for member states to ensure the execution of confiscation orders and to enable the detection and tracing of property even after the conviction or the criminal NCB [non-conviction based] proceedings’.²⁹⁷ Finally, various procedural safeguards are introduced which include the right of the accused to be informed of any freezing or confiscation orders and the right of third parties to claim ownership or other property rights.²⁹⁸

The directive sets forth minimum rules that member states of the European Union must apply based on the principle of mutual recognition of domestic decisions regarding confiscation. With regards to investigative power and access to financial information, the directive stipulates the relevant requirements in greater detail than the UNTOC. Member states may, for example, carry out financial investigations once the investigation for the underlying criminal activities has already been completed. Non-conviction based confiscation is advocated within international standards, but is not expressly required by

²⁹⁴ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39, art 6 para 1.

²⁹⁵ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39, art 6 para 2.

²⁹⁶ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39, art 8 para 3 and 5.

²⁹⁷ Dia Anagnostou and Evangelia Psychogiopoulou (eds), ‘Report on the implementation, monitoring and enforcement. D10.2.3.: Preparatory study on confiscation and recovery of criminal assets in the EU Member States’ (Hellenic Foundation for European & Foreign Policy 2015) 116.

²⁹⁸ *ibid* 117.

the directive. The directive also addresses the proper management of seized assets, which the UNTOC does not, likely because asset management is subject to domestic variances. Interestingly, the directive does not address the disposal of confiscated proceeds of crime or property. The issue is only referenced once in article 10 paragraph 3 which requires states to ‘consider taking measures allowing confiscated property to be used for a public interest or social purposes’.²⁹⁹ As a whole, the directive does not substantially differentiate from the UNTOC’s provisions on the freezing and confiscation of instrumentalities and proceeds of crime.

6.3. Cooperation in criminal matters: Towards the creation of a single area of justice?

Article 18 of the UNTOC provides minimum standards for mutual legal assistance to be applied in the absence of a mutual legal assistance treaty with another state party. On a European Level cooperation in criminal matters has been enhanced since the adoption of the Treaty of Maastricht with transnational organised crime forming a fundamental field within the area of freedom, security and justice.³⁰⁰ However, it was not until the Treaty of Amsterdam that more binding measures were introduced, such as the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, the European Arrest Warrant (EAW), the European Evidence Warrant (EEW) and the European Investigation Order (EIO).

The EU convention on mutual assistance in criminal matters was introduced so as to supplement to provisions and to facilitate the application of the 1959 Council of Europe Convention on Mutual Assistance. The EU convention aims to strengthen cooperation between judicial, police and customs authorities. Its scope goes beyond the 1959 Council of Europe convention and the UNTOC, as policing and law enforcement issues are beyond these international instruments scope. That being said, for the most part the Council of Europe Conventions has contributed to the evolution of judicial cooperation in criminal matters. Moreover, there are various bilateral agreements in place between member states regarding mutual legal assistance. We shall now turn to more innovative instruments concerning mutual legal assistance, such as the European Arrest Warrant, the European Evidence Warrant and the European Investigation Order.

²⁹⁹ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39, art 10 para 3.

³⁰⁰ Mark Bromley, ‘The review of the EU Common Position on arms exports: Prospects for strengthened controls’ (Non-Proliferation Papers No. 7, EU Non-Proliferation Consortium 2012).

The framework decision, which introduced the European Arrest Warrant, was adopted in 2002 with the aim of implementing the principle of mutual recognition of judicial decisions and eliminating the formal extradition procedure among member states. The principle of dual criminality has been removed and the principle of non-surrender of nationals no longer constitutes an impediment to extradition.³⁰¹ The EAW has been viewed as an effective tool for the prosecution and conviction of criminals. Extradition times have reduced from an average 9 months to 43 days,³⁰² and formalities have decreased due to the removal of political checks and the establishment of direct contact between member states' judicial authorities. However, the EAW displays numerous weaknesses such as the lack of an adequate framework of protection of human rights or the fact that dual criminality and nationality are still operative in various member states. Within the European Union, the standards of protection of human rights are not uniform, and so it is important that 'a judicial scrutiny is devised which goes beyond a 'ticking boxes exercise''.³⁰³ The framework decision ought to, for example, introduce explicit grounds for refusal based on the infringement, or risk of infringement, on human rights so as to guarantee the same level of protection for all citizens. Further, where the EAW has been used as an alternative to more appropriate mutual legal assistant instruments it may fail to comply with the rule of law. In particular, since numerous 'EAWs are being issued with no proper regard to proportionality'³⁰⁴ by judicial authorities, resulting in EAWs being issued for petty crimes. To sum up, while the EAW is certainly a success since it speeds up cooperation, it is an instrument, which may inhibit individual freedoms and liberties as no protective dimension is added.

The European Evidence Warrant was introduced so as to standardise evidence requests, expedite procedures and limit the grounds for refusal of requests.³⁰⁵ Unlike the aforementioned EAW, the EEW does not aim to replace existing transfer rules and procedures. The EEW defines evidence as 'objects, documents and data', thereby permitting the collection and transfer of a wide range of materials. However, certain

³⁰¹ Emmanouela Mylonaki and Tim Burton, 'Extradition As A Tool In The Fight Against Transnational Crime: A Holistic Evaluation' [2011] JURA 117.

³⁰² *ibid.*

³⁰³ Luisa Marin, 'Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant' (2014) 5 *New Journal of European Criminal Law* 327, 347.

³⁰⁴ Ilias Anagnostopoulos, 'Criminal Justice Cooperation In The European Union After The First Few "Steps": A Defence View' (2014) 15 *ERA Forum* 9, 15.

³⁰⁵ European Commission, Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters [2003] COM(2003) 688.

evidence, such as the interviewing or taking of statements from suspects, witnesses or victims, is excluded. Whereas the EAW resulted in the partial abolition of dual criminality, the 'EEW uses more stringent language to afford less discretion to national legislatures when implementing the legislation'.³⁰⁶ Furthermore, with regards as the judicial control of evidence transfer, the EEW affords greater procedural safeguards and also introduces grounds for refusing to recognise or execute a request. The European Evidence Warrant is a more complex instrument than the European Arrest Warrant, which is aligned with the existing MLA framework and attempts 'to draw fine jurisdictional lines on coercive powers and judicial safeguards'.³⁰⁷

The European Investigation Order was introduced with the adoption of directive 2014/41/EU and represents a milestone for judicial cooperation in criminal matters following the entry into force of the Lisbon Treaty. The EIO replaces a majority of existing legal instruments in the area of judicial cooperation with a single instrument, which aims to expedite and facilitate the gathering and transfer of evidence in cross-border investigations. The EIO replaces the rules on evidence gathering of the EEW and those provided for within the EU convention on mutual assistance in criminal matters. The EIO applies to various investigative measures directed at the gathering of evidence, except joint investigation teams and evidence collected by the former. The EIO constitutes a single instrument for the requesting of cross-border evidence and for securing it. Thus, it aims to make judicial cooperation more agile and expedient. That being said, the protection of fundamental rights has not significantly improved, especially those of the defendant and victims. Moreover, certain provisions on investigative measures lack clarity, 'the impact of the DEIO on the rules contained in the FD EAW on the temporal transfer of detained persons, or also the important issue of the data protection of information transmitted in execution of an EIO'³⁰⁸ have not been adequately addressed. Nevertheless, in comparison to the European Arrest Warrant, the EIO approaches the principle of mutual recognition in a more reserved manner. Yet, when compared to the system of evidence gathering through MLA, the EIO symbolises an improvement towards the implementation of the mutual recognition principles.

³⁰⁶ Cian C Murphy, 'The European Evidence Warrant: mutual recognition and mutual (dis)trust?' in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice. A European Public Order* (Cambridge University Press 2011) 234.

³⁰⁷ *ibid* 236.

³⁰⁸ Lorena Bachmaier, 'Transnational Evidence. Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters' (2015) 2 *Eurcrim* 47, 57.

The European Union's approach to mutual legal assistance is shifting towards the principle of mutual recognition. However, instruments such as the European Arrest Warrant and the European Investigation Order display similar weaknesses to previous instruments, which must be overcome to create improved opportunities to combat transnational organised crime and to achieve a European area of justice.

6.4. Conclusion

The European Unions' framework for combatting transnational organised crime does not substantially differ from the United Nations' framework, albeit introducing more detailed provisions. The added value of the framework decision introduced in 2008 in approximating member states' legislation in the field of organised crime appears rather low. Especially, since implementation and failure to comply cannot be brought before the European Court of Justice. That being said, the Treaty of Lisbon provides the opportunity for more sustainable and consistent policy-making in the field of organised crime.³⁰⁹ The 'fundamental difference between traditional legal assistance and 'the European way' lies in the principle of mutual recognition applied within the Area of Freedom, Security and Justice'.³¹⁰ Thus, the European Union may be better equipped to combat transnational crime by reinforcing EU integration in this area,³¹¹ whilst the international legal framework strongly relies on state parties transposition of international norms.

³⁰⁹ Allum and Den Boer (n 43).

³¹⁰ Peter Rackow and Cornelius Birr, 'Recent developments in legal assistance in criminal matters' (2010) 2 *Goettingen J Int'l L* 1087, 1096.

³¹¹ Matilde Ventrella, *The Control of People Smuggling and Trafficking in the EU* (Routledge 2010).

CHAPTER VII

STRENGTHENING THE INTERNATIONAL SYSTEM

Transnational organised crime poses a growing threat to national and international security.³¹² Organised criminal groups are expanding, diversifying their activities, resulting in the convergence of once distinct threats. The international legal framework for combatting transnational organised crime is no longer equipped to deal with these ever expanding threats. Accordingly, coordinated action at the international level must be reinforced through the strengthening of the international legal framework using traditional and non-traditional measures. Traditional measures are measures, which are currently already encompassed within the international legal framework to combat transnational organised crime, such as international cooperation or law enforcement cooperation. Non-traditional measures include such measures as the establishment of transnational criminal law or the use of peace operations to curb TOC.

7.1. Traditional measures to combat transnational organised crime

7.1.1. *International cooperation*

International cooperation has an essential role in combating transnational organised crime. However, Gerber observed that there is a ‘growing divergence between the jurisdictional needs of the international system and the conceptual structures provided for this purpose by international law’.³¹³ Consequently, international cooperation must be reconceptualised in order to increase its effectiveness. Although state parties are wary with regards to mandatory obligations brought about by international law and suppression conventions, the incorporation of the former into domestic law enables states to satisfy collective interest, effectively tackle domestic and international problems and improve their national systems.

In today’s globalised society, soft law’ instruments ought to be used in addition to ‘hard’ law enforcement tools so as to encourage socially responsible behaviour.³¹⁴ ‘Soft

³¹² National Security Council, ‘Transnational Organized Crime: A Growing Threat to National and International Security’ (*The White House*, 2011)

<<https://www.whitehouse.gov/administration/eop/nsc/transnational-crime/threat>> accessed 21 July 2016.

³¹³ Danielle Ireland-Piper, ‘Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?’ (2012) 13 *Melb J Int’l L* 122, 126.

³¹⁴ Cockayne (n 259).

law' instruments may be particularly valuable to combat TOC, given the difficulty of finding consensus on its the legal framing and the need to adapt to the ever-changing nature of this multifaceted crime. Furthermore, incentive schemes including positive incentives, such as developmental assistance, and negative incentives, for example the imposition of financial sanctions, have been introduced to induce state parties' to adhere to the international prohibition regime. However, as stated by the International Peace Institute, these have to be imparted cautiously because such incentives are often 'closely linked to the interests of those states that control such incentive structures, rather than to considerations of the long-term need for a recipient state to fight TOC'.³¹⁵ States must ensure that they develop long-term strategies aimed at strategically defeating transnational organised crime through normative harmonisation of 'common terminology, definition, and conceptions of the conduct to be controlled'³¹⁶, whilst introducing appropriate sanctioning and regulatory mechanisms. Examples of such strategies included the United Nations' Counter-Terrorism Strategy or the UN Millennium Development Goals. It is important that such strategies be developed in cooperation with various stakeholders, such as member states, international organisations, civil society and the private sector.³¹⁷

Cooperation must transcend borders, as it is essential for 'successful domestic prosecutions as well as to eliminate safe havens'³¹⁸ for organised criminal groups and ought to be reviewed regularly in order to keep pace with evolving practices so as to allow broad and expeditious cooperation.³¹⁹

7.1.2. Mutual legal assistance

Mutual legal assistance agreements between states are of paramount importance for obtaining assistance in the investigation or prosecution of transnational organised crime. For instance, mini-mutual legal assistance treaties (MLAT) have been integrated into suppression conventions, such as the UNTOC. These mini-MLATs tend to rely on existing mutual legal assistance arrangement and are to be applied 'without prejudice to existing or

³¹⁵ International Peace Institute, 'Transnational Organized Crime. Task Forces on Strengthening Multilateral Security Capacity' (International Peace Institute 2009) 5.

³¹⁶ Cockayne (n 259) 23.

³¹⁷ ECOSOC, 'Report on the twenty-fourth session (5 December 2014 and 18-22 May 2015)' (2015) UN Doc E/2015/30.

³¹⁸ Association of Southeast Asian Nations (ASEAN), 'ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases' (Public Affairs Office, ASEAN 2010) 1.

³¹⁹ Robert J Currie, 'Human Rights And International Mutual Legal Assistance: Resolving The Tension' (2000) 11 Criminal Law Forum 143.

future legal assistance agreements between the parties, and their procedural provisions only operate if the requested and requesting state are not already bound by an existing legal assistance agreement, unless they decide to use mini-MLATs³²⁰ instead. This chapter will focus on the importance of human rights implications, as well as further improvements to be made to MLA agreements.

Mutual legal assistance agreements have been widely criticised as they raise important human rights implications, such as the lack of grounds of refusal based on said implications or limited defence rights. Although MLA is not considered such a ‘direct and far-reaching intrusion into the personal liberty of the individual’³²¹, it nevertheless raises human rights issues, as there is no substantive line of division between judicial cooperation, administrative and mutual legal assistance.³²² An example of such a human rights violation is the landmark European Court of Human Rights (ECHR) decision in *Soering v. United Kingdom*. Soering was charged with murder in the United States, subsequently arrested in the United Kingdom following an extradition request by the United States. The ECHR subsequently pronounced that extradition to the United States would constitute ‘inhuman treatment’ and violate article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, because Soering would face the death penalty and the UK would actively facilitate a treatment that was territorially prohibited.³²³ Currie opines that ‘logic and the Soering principle suggest that to deny that a co-operating state is complicit, and thereby responsible, in a human rights violation resulting from the conduct of a criminal prosecution is to deny legal effect to the rights themselves’.³²⁴ Hence, grounds for refusal of MLA requests ought to be introduced. However, by imposing such grounds for refusal, the very flexibility of mutual legal assistance may be restricted. That being said, state parties ought to adopt a human-rights oriented approach with regards to the development of the law of international criminal cooperation. The International Law Association supports such an approach, provided that ‘there are substantial grounds for believing that the rendering of such assistance would result in a serious violation of the rights of any person [...] under customary international

³²⁰ Boister (n 7) 199.

³²¹ J Sheedy, ‘International legal obligations under human rights instruments’ (Oxford Conference Papers 1998) 11.

³²² Vervaele (n 155).

³²³ Christopher L Blakesley and Otto Lagodny, ‘Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, The Role Of Human Rights, And Issues Of Extraterritoriality Under International Criminal Law’ (1991) 24 *Vand J Transnat’l L* 1.

³²⁴ Currie (n 319) 158.

law, or the domestic law of the requested state'.³²⁵ Lastly, the United Nations approach to MLA 'means also that the persons concerned (suspects and victims in particular) remain objects of MLA and cannot derive from MLA scheme rights to gather evidence',³²⁶ for example.

Mutual legal assistance is still primarily a model of sovereign state-to-state cooperation, subject to the discretionary power of the executive.³²⁷ Further, MLAT's rarely include coercive measures and special investigative techniques, and should the aforementioned be included, they are subject to rigorous rules and procedures of the domestic law of the executing state.³²⁸ A majority of MLATs do not include new digital investigatory techniques, such as cross-border surveillance. In these cases, law enforcement authorities may use alternative investigatory techniques that do not comply with the existing MLA framework. Furthermore, in order to overcome practical and procedural problems, state parties should obtain assistance in building capacity to address frequently occurring problems through, for instance, the 'development and use of checklists of evidentiary requirements to be satisfied for a request to be accepted'³²⁹ and the 'use of standardized forms and guidebooks'.³³⁰ The use of such aids will facilitate the capacity of institutions and agencies to deal with requests for MLA and information, and may be used to train personnel with regards to the legal requirements for MLA. Finally, so as to strengthen and improve mutual legal assistance, states ought to consider widening the scope to include the transfer of proceedings, mutual recognition of judgments, and the transfer of prisoners, as the latter provisions remain infrequent.³³¹

Mutual legal assistance treaties ought to be modified so as to take into account human rights implications and the interests of the defence. Further, MLATs should address changes in society, as well as practical and procedural problems.

7.1.3. Law enforcement cooperation

³²⁵ *ibid* 166.

³²⁶ Vervaele (n 155) 1359.

³²⁷ *ibid*.

³²⁸ *ibid*.

³²⁹ Yvon Dandurand, Gherardo Colombo and Nikos Passas, 'Measures And Mechanisms To Strengthen International Cooperation Among Prosecution Services' (2007) 47 *Crime Law Soc Change* 261, 271.

³³⁰ *ibid* 271.

³³¹ Matti Joutsen, 'International Instruments on Cooperation in Responding to Transnational Crime' in Philip Reichel and Jay Albanese (eds), *Handbook of Transnational Crime and Justice* (SAGE Publications, Inc. 2014).

International law enforcement cooperation has been promoted given the important role that effective information exchange and cooperation between law enforcement agencies has played in combatting transnational organised crime. The investigation of criminal activities requires international police cooperation ‘to display the same ingenuity and innovation, organisational flexibility and cooperation that characterise the criminal organisations themselves’.³³² Law enforcement ought to become more proactive and intelligence-led so as to effectively tackle TOC, especially since it is currently often characterised as being antiquated and reactive in nature.³³³ However, since the terrorist attacks of 9/11, law enforcement cooperation has increased as crime detection and deterrence has risen on the agendas.³³⁴ International law enforcement cooperation has primarily manifested itself through the establishment of international organisations, the development of common legislative frameworks, and regional or bilateral cooperation between states.

There is currently only one international platform for law enforcement cooperation, the International Criminal Police Organisation (INTERPOL), and, unfortunately, it primarily concerns itself with standardised communication.³³⁵ Nevertheless, it provides valuable law enforcement experience, resources and provides limited assistance in training and operations. Despite its reach, its constitution remains non-binding and the agreement of police forces to cooperate is not mandatory and characterised by ‘diverse policing structures, practices and standards’.³³⁶ Further, states often prefer to conduct international activities unilaterally rather than turning to INTERPOL as they may ‘face a number of obstacles namely, incompatible legal and judicial procedures, differences in law enforcement style, culture, technological capability and policies which can hinder cooperative policing efforts against TOC’.³³⁷ States may also use such an international organisation unjustly and for political ends to further their own objectives. INTERPOL

³³² Mark Findlay and Nafis Hanif, ‘International Conventions And The Failure Of A Transnational Approach To Controlling Crime Business’ (2013) 13 Int’L Crim L Rev 697, 703.

³³³ Ian Davis, Chrissie Hirst and Bernardo Mariani, ‘Organised crime, corruption and illicit arms trafficking in an enlarged EU’ (Saferworld 2001).

³³⁴ Saskia Hufnagel and Carole McCartney, ‘Police cooperation against transnational criminals’ in Neil Boister and Robert J Curie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).

³³⁵ Kevin O’Connell, ‘Keeping in context: meaning what you say’ in Steven David Brown (ed), *Combating International Crime. The longer arm of the law* (Routledge-Cavendish 2008).

³³⁶ Hufnagel and McCartney (n 334) 108.

³³⁷ Peter Bell and Mark Lauchs, ‘Elements of Best Practice in Policing Transnational Organized Crime: Critical Success Factors for International Cooperation’ (2013) 2 International Journal of Management and Administrative Sciences 24, 28.

provides a system for international police cooperation, which is increasingly necessary in today's world.

Effectively combating TOC requires the development of a supranational legislative framework to enable constructive coordination and cooperation and to strengthen international efforts.³³⁸ Any such framework would have to account for the divergences in procedural legislation and law enforcement methods and to provide for mutual recognition, the latter reducing the need to substantially modify states' legislative and law enforcement frameworks.³³⁹ Notwithstanding, such an instrument would have to allow for differences in national policing, strategy and legislation.³⁴⁰ Moreover, such an instrument would have to facilitate the exchange of information to assist, for example, the United Nations in developing an assessment of TOC, which allows for tactical developments and proactive strategies to be devised.³⁴¹ Given that international police cooperation is expensive, the pooling of resources could alleviate the financial burden on states and would permit skills, experience and expertise to be exchanged. Besides, powers ought to be given to law enforcement agencies, seen that 'in many cases legal requirements for prosecution of criminals are seen as inhibiting police and other law enforcement bodies attempting to apprehend criminals'.³⁴² These powers could include, for example, the extension of law enforcement powers of surveillance or data retention to obtain elusive evidence.³⁴³ Provisions for direct bilateral contacts, police liaison officers and joint investigation teams ought to be included, seen that these constitute effective forms to investigate and prosecute TOC. These provisions must however include common standards and accepted practices and ensure that a basic legal framework be provided.

To this day, the capacities of international law enforcement agencies to identify and curb transnational organised crime remain fragmented. Whilst international organisations such as INTERPOL and existing international instruments play a critical role, further collaborative arrangements ought to be drafted so as to establish a solid global framework and in order to remove any loopholes that criminal organised groups could exploit.

³³⁸ Obokata (n 7).

³³⁹ Ugljesa Zvekic, 'International cooperation and transnational organized crime' (1996) 90 *Am Soc'y Int'l L Proc* 533.

³⁴⁰ Steven David Brown, 'The longer arm of the law: an introduction' in Steven David Brown (ed), *Combating International Crime. The longer arm of the law* (Routledge-Cavendish 2008).

³⁴¹ Roger Gaspar, 'Tackling international crime: forward into the third era' in Steven David Brown (ed), *Combating International Crime. The longer arm of the law* (Routledge-Cavendish 2008).

³⁴² Davis, Hirst and Mariani (n 333) 58.

³⁴³ *ibid.*

7.1.4. *Special investigative techniques*

The UNTOC address special investigative techniques (SITs) in article 20, introducing the use of informants, surveillance and undercover operations. Such techniques are of particular importance to proactive law enforcement and complex investigations, but are often hindered by the varying domestic laws regulating the use of these techniques. With regards to transnational organised crime, these techniques ‘can be used to reduce the impact of strategic surprise from evolving criminal threats and environmental change’.³⁴⁴

Special investigative techniques are numerous, diverse and constantly evolving. Nevertheless, what they all have in common is that they tend to be disguised and that their use may interfere with fundamental rights and freedoms. Therefore, it is important that these techniques be used ‘in accordance with respect for fundamental principles, namely the principle of legality, the principle of respect for human rights, the principle of utility and proportionality of these means.’³⁴⁵ Common standards must be established to assure their proper use and improve international criminal cooperation in matters concerning SITs. Furthermore, given the risk posed to victims of such techniques, ‘there must be an intervention plan in the event that evidence emerges that a victim is being harmed or is likely to be harmed’³⁴⁶ guided not only by domestic legislation, but also by international instruments in the field of international cooperation. The European Court, for example, favours a system of external review with regards to SITs so as to assure that the limits of legality are not breached.³⁴⁷ Introducing such a mechanism of review as well as applying the principle of proportionality will enable states to ‘define the right balance between the interests of a criminal investigation and the protection of the rights of citizens’.³⁴⁸

Special investigative techniques are useful when dealing with organised criminal groups ‘because of the inherent difficulties and dangers involved in gaining access to

³⁴⁴ John W Coyne and Peter Bell, ‘The Role Of Strategic Intelligence In Anticipating Transnational Organised Crime: A Literary Review’ (2011) 39 *International Journal of Law, Crime and Justice* 60, 61.

³⁴⁵ Laurentiu Giurea, ‘Special methods and techniques for investigating drug trafficking’ (2012) 3 *International Journal of Criminal Investigation* 137, 137.

³⁴⁶ United Nations Office on Drugs and Crime, ‘Special Investigative Techniques’ (*UNODC* 2008) <https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_5-8.pdf> accessed 20 June 2016, 206.

³⁴⁷ Campbell (n 49).

³⁴⁸ Council of Europe (n 230) 31.

information and gathering intelligence on their operations'.³⁴⁹ Legislation and standards associated with SITs must be reassessed to reflect technological advances, taking account of fundamental rights and freedoms, and to enable international cooperation.

7.2. Non-traditional measures to combat transnational organised crime

7.2.1. *Transnational criminal law?*

Transnational criminal law (TCL) emerged as a distinct branch of transnational law appertaining to transnational criminal cases, which 'rests on the assumption that states may exercise power across borders in the field of criminal law'.³⁵⁰ To date, an agreed definition of transnational criminal law does not exist.

The so-called classic definition, brought forth by Jessup in the 1950s, argues that transnational law regulates actions or events that transcend domestic borders.³⁵¹ Boister, however, has adapted this definition for the criminal law context, as 'crimes established through treaty obligations in multilateral crime suppression conventions such as the 1988 Vienna Convention – the so-called 'treaty crimes' or 'crimes of international concern'.³⁵² As such, it may be seen as an area within transnational legal pluralism, which 'brings together insights from legal sociology and legal theory with research on global justice, ethics and regulatory governance to illustrate the transnational nature of law and regulation'.³⁵³ Transnational criminal law only becomes apparent when analysing domestic legal systems so as to discern their transnational features.³⁵⁴ Boister's definition appears to centre on a law enforcement approach that encompasses emerging transnational crimes such as human trafficking through the 'governance of transnational criminal actions' by way of suppression conventions.³⁵⁵ However, this definition may be viewed as too narrow and exclusive, given that Boister takes a top-down approach and excludes other fields of law. It appears contradictory for the scholar to promote interdisciplinary discussions, whilst simultaneously limiting the term TCL to domestic penal law. Further, not only are other fields of law excluded, but by emphasising the use of suppression

³⁴⁹ United Nations Office on Drugs and Crime, 'Cross-cutting issues. International cooperation' (*UNODC* 2006) 17.

³⁵⁰ Sabine Gless, 'Bird's-Eye View And Worm's-Eye View: Towards A Defendant-Based Approach In Transnational Criminal Law' (2015) 6(1) *Transnational Legal Theory* 117, 118.

³⁵¹ Philip Jessup, *Transnational Law* (Yale University Press, 1956) 2.

³⁵² Boister (n 54) 9.

³⁵³ Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1 *Transnational Legal Theory* 141.

³⁵⁴ Boister (n 54).

³⁵⁵ Annika Suominen, 'What Role for Legal Certainty in Criminal Law within the Area of Freedom, Security and Justice in the EU?' (2014) 2(1) *Bergen Journal of Criminal Law and Criminal Justice* 1, 3–6.

conventions, Boister also disregards potentially influential ‘soft law’ instruments. That being said, Boister argues that transnational crimes are rapidly evolving and a growing number of suppression treaties, such as the UNTOC, have been implemented, instituting TCL as ‘probably the most significant existing mechanism for the globalization of substantive criminal norms’.³⁵⁶ Transnational criminal law’s importance is also highlighted by the fact that it draws a clear distinction between the core crimes under international law and those crimes that may cater to fewer universal values and interests, but are of fundamental importance nonetheless.

Another issue arises when multiple legal systems coexist, as ‘they may offer a flexible solution to newly emerging problems in cross-border situations, but this eventually leads to a minefield for the individual who must abide by such (possibly conflicting) laws’.³⁵⁷ An individual’s interests may be pushed to the background as international treaty norms and many autonomous sets of domestic criminal norms dominate TCL, bearing in mind that the latter should be seen ‘as an agglomeration of all these rules, procedures and practices’.³⁵⁸ Moreover, the defendant’s rights may be obstructed, since TCL does, as of yet, not constitute a coherent legal framework but a conglomeration of laws, devised from multiple subsystems of national *ius puniendi*.³⁵⁹

Boister argues that the system of transnational criminal law is growing in importance. However, it is not apparent to what extent the system substantially differs from treaty law, such as the UNTOC, although TCL encompasses the rules of national jurisdiction. Its fundamental strength lies in the fact that it provides a guideline for international cooperation to combat transnational organised crime in the sphere of international criminal law. Individual interests must go hand in hand with the reinforcement of legal frameworks that transcend domestic borders for alleged criminal to become ‘members of multiple normative communities, local, territorial, extraterritorial, and non-territorial in nature’.³⁶⁰

³⁵⁶ Neil Boister, ‘Transnational Criminal Law?’ (2003) 14 *European Journal of International Law* 953, 956.

³⁵⁷ Gless (n 350) 122.

³⁵⁸ Boister (n 54) 30.

³⁵⁹ Wolfgang Schomburg, Otto Lagodny, Sabine Gless and Thomas Hackner, ‘Einleitung’ in Wolfgang Schomburg, Otto Lagodny, Sabine Gless and Thomas Hackner (eds), *Internationale Rechtshilfe in Strafsachen, Mutual Legal Assistance in Criminal Matters* (CH Beck, 5th edn 2012) 11.

³⁶⁰ Neil Boister in Sabine Gless, ‘Bird’s-Eye View And Worm’s-Eye View: Towards A Defendant-Based Approach In Transnational Criminal Law’ (2015) 6(1) *Transnational Legal Theory* 117, 140.

7.2.2. *Establishment of a transnational criminal court*

International courts do not currently deal with transnational organised crime, as the Rome Statute currently limits the jurisdiction of the International Criminal Court (ICC) to the core crimes, such as genocide and crimes against humanity, due to the different character of TOC.³⁶¹ It was argued that national courts are equipped to adequately prosecute TOC crimes since an effective system of international criminal cooperation was already in place. In general, the role of international courts may be said to be threefold: (i) to counterbalance institutional deficiencies; (ii) to protect subjective rights and ensure compliance with international law and (iii) to reinforce domestic capacities.³⁶² Moreover, decisions of international courts such as the ICC do not merely affect individuals, but the general public. That being said, the principle of complementarity is of paramount importance since it legitimises ‘the exercise of authority in which the relationship between domestic and international courts is at play’ and ‘serves as a normative yardstick to guide and evaluate the jurisprudence of international courts’.³⁶³ Given the growing importance of transnational organised crime and their impact on the world at large, we shall now discuss whether the ICC’s jurisdiction ought to be broadened to include TOC or whether a separate ‘transnational criminal court’ ought to be established.

The International Criminal Court was established to suppress crimes already established in customary international law and to put an end to impunity, uphold the rule of law and work as a deterrent. Moreover, the principle of complementarity makes the ICC a court of ‘last resort’, which only becomes active when national jurisdictions have failed to address the core crimes. Despite its limited jurisdiction, allowing the ICC to prosecute, ‘especially in instances when national agencies do not have the ability, capacity, or political will to prosecute or extradite alleged offenders’³⁶⁴, could strengthen universal criminalisation of TOC. Allowing prosecution by the ICC would allow states to focus on prevention and minimise the impact TOC has on society.³⁶⁵ Scholars have argued that

³⁶¹ See *e.g.* 1995 Ad Hoc Committee Report, para 55; 1996 PrepCom Report Vol. I, para 103; Von Hebel & Robinson 1999, 81.

³⁶² Simon Hentrei, ‘Generalising The Principle Of Complementarity: Framing International Judicial Authority’ (2013) 4(3) *Transnational Legal Theory* 419.

³⁶³ *ibid* 421.

³⁶⁴ Andreas Schloenhardt, ‘Transnational organised crime and the International Criminal Court’ (Crime in Australia: International Connections, Melbourne, 29-30 November 2004) <http://www.aic.gov.au/media_library/conferences/2004/schloenhardt.pdf> accessed 20 June 2016, 2.

³⁶⁵ Regina Menachery Paulose, ‘Beyond the Core: Incorporating Transnational Crimes into the Rome Statute’ (2012-2013) 21 *Cardozo J Int'l & Comp L* 77.

TOCs could be prosecuted under the existing mandate of the International Criminal Court given that, for example, the trial chamber in *Prosecutor v. Kayishema* found that the ICTR statute also applied to non-state actors and the ICTY Appeals Chamber in *Prosecutor v. Kunarac* ‘explicitly held that a policy or plan is not even an element of crimes against humanity under customary international law’.³⁶⁶ That being said, it is rather unlikely that transnational crimes will be brought before the ICC given the high thresholds for satisfying the requirements of the Rome Statute. Moreover, states will probably not regard TOC grave enough to solicit intervention by the ICC. Another possibility would be to add further crimes to the ICC statute. However, inclusion may prove difficult ‘in light of the lack consensus among state parties with regards to the definitions of certain crimes, the ICC caseload, and the political influence over treaty crimes from powerful state parties’.³⁶⁷ The ICC ought to prosecute those transnational organised crimes that agree with its statute, but should refrain from adding further crimes to its statute. Instead, a separate court to prosecute TOC should be established.

An alternative would be the establishment of a transnational criminal court (TCC) as proposed by Boister. US senator Arlen Specter proposed the development of a court ‘that would have provided institutional support to states in their domestic prosecutions of transnational crimes or to which the state could refer the case for trial if it so wished’.³⁶⁸ In this case, states would retain sovereign control of criminal law whilst having the option to externalise their adjudicative jurisdiction without facing the obstacle of proving that the crime in question is a customary crime.³⁶⁹ Contrary to the ICC, a TCC would be a prosecutor’s court that states could take advantage of ‘if they felt that it would be a breach of their reciprocal obligations to other injured states to do nothing’.³⁷⁰ In Boister’s opinion, a TCC would have to be permanently available and would have to review their admissibility of cases ‘based on criteria of gravity of the crime, transnationality of effect of the conduct, the involvement of an organized criminal group, and so forth’³⁷¹ as laid out by the UNTOC. A transnational criminal court may be seen as a further tool to be used by states to combat TOC established by, and based upon the provisions laid out in suppression conventions.

³⁶⁶ Smith (n 101) 1127.

³⁶⁷ Menachery Paulose (n 365) 85.

³⁶⁸ Neil Boister, ‘International Tribunals For Transnational Crimes: Towards A Transnational Criminal Court?’ (2012) 23 Criminal Law Forum 295, 312.

³⁶⁹ *ibid.*

³⁷⁰ *ibid* 314.

³⁷¹ *ibid* 315.

Transnational organised crime cannot currently be effectively tackled given the limitations of the current system to investigate, prosecute and convict organised criminal groups. These groups exploit the differences between states' criminal justice systems and legal loopholes to their advantage. International prosecution would create an opportunity to overcome the systems deficiencies, complement domestic enforcement efforts and 'would illustrate that no one is above the law. [It] would serve as stabilising reference points for floundering national criminal justice systems'.³⁷²

7.2.3. *The role of non-state actors*

Organised criminal groups are non-state actors, whose legal obligations ought to be recognised under international human rights law and humanitarian law in order for these actors to be held accountable.³⁷³ It is ever more so relevant since today's conflicts are deemed to be of non-international character. That being said, 'While it is largely uncontested that international humanitarian law imposes certain obligations on ANSAs [armed non-state actors], the application of other bodies of international law, in particular human rights law, is controversial'.³⁷⁴ Nonetheless, scholars argue that contemporary international human rights law has evolved to a point where one can contend that non-state actors bear legal obligations and the 'horizontal application of international human rights law at the international level must be established'.³⁷⁵

International Human Rights Law (IHL) presupposes the existence of an armed conflict under article 1 of the 1977 Additional Protocol I to the Geneva Conventions.³⁷⁶ For IHL to apply to an armed non-state actor, such as the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka or potentially the Mexican cartels, an armed conflict as defined by IHL must be present and the group in question must have a sufficiently developed structure. Organised criminal groups, in exceptional circumstances, may evolve into an organisation 'possessing powers and/or structures similar to those of states'.³⁷⁷

³⁷² Neil Boister, 'The Exclusion of Treaty Crimes From the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics' (1998) 3 *Journal of Armed Conflict Law* 27, 37.

³⁷³ Tom Obokata, 'Smuggling Of Human Beings From A Human Rights Perspective: Obligations Of Non-State And State Actors Under International Human Rights Law' (2005) 17 *Int'l J Refugee L* 394.

³⁷⁴ Annyssa Bellal and Stuart Casey-Maslen, 'Enhancing Compliance with International Law by Armed Non-State Actors' (2011) 3 *Goettingen J Int'l L* 175, 176.

³⁷⁵ Obokata (n 373) 405.

³⁷⁶ Bellal and Casey-Maslen (n 374).

³⁷⁷ Findlay and Hanif (n 332) 723.

Nevertheless, the question remains as to whether for instance the situation in cities and regions strongly affected by TOC, such as Rio de Janeiro or parts of Mexico, ‘suffice to trigger the applicability of the law of non-international armed conflict’.³⁷⁸ In order to determine whether IHL ought to be applied to the above-mentioned conflicts depends on a comprehensive factual assessment as advanced by the International Criminal Tribunal for Rwanda in *Prosecutor v. Rutaganga*.³⁷⁹ To better demonstrate the possibility that IHL may be applied to organised criminal groups, the intensity and organisational requirement will be discussed. The intensity criterion is ‘primarily meant to identify situations amounting to a severe public emergency, which in turn justifies the application of a legal regime that profoundly changes the rules and principles governing the modern constitutional state in peacetime.’³⁸⁰ It is argued that it is unlikely that organised criminal groups may destabilise a country in such a way that a public emergency manifests itself; the vagueness of the intensity requirement, which qualifies attacks as ‘armed’, may be broadly interpreted as ‘the threshold [that] can be reached by the cumulative effect of various low-intensity acts that have resulted in a high number of victims and that disrupt the functioning of the state’.³⁸¹ Although it may be difficult to show that organised criminal groups possess a sufficiently developed structure to define a military strategy and co-ordinate and carry out military operations,³⁸² organised criminal groups ‘should not be considered to be ‘civilians’ during armed conflict’³⁸³ given their level of involvement in conflict. This is particularly the case in countries such as Mali, where the cooperation between terrorists and organised criminal groups indicated that those who held the power were accountable for the actions of these non-state actors.³⁸⁴ Moreover, organised criminal groups may not merely be qualified as ‘civilians’ if they field the *de facto* power to contest the legitimacy of the state, ‘such as had almost been the situation in the prisons of Colombia, Honduras and El Salvador’.³⁸⁵

Transnational organised crime benefits from the instability created by war and weak governance, as it is a source of cash flow (for example, the Sahel region). Although organised criminal groups violence is not usually driven by an ideology or by legitimate

³⁷⁸ Hauck and Peterke (n 44) 430.

³⁷⁹ *Prosecutor v Rutaganda, Judgement* (Judgment) ICTR-96-3-T (6 December 1999) para 91.

³⁸⁰ Hauck and Peterke (n 44) 431.

³⁸¹ *ibid* 429.

³⁸² *ibid* 407.

³⁸³ Regina Menachery Paulose, ‘Towards A New Framework In The Law Of War: Incorporating Transnational Organised Crime’ (2013) 17 UW Sydney L Rev 66, 79.

³⁸⁴ *ibid*.

³⁸⁵ Nora Szeles, ‘The relation between international humanitarian law and organised crime’ (2009) 2 International Law Yearbook 53, 63.

political intentions, the provisions of the Geneva Conventions could nonetheless be applicable ‘since the groups appear to undertake an armed conflict against the State, participating directly in hostilities and therefore perhaps benefit[ing] from the minimal provisions of international humanitarian law’.³⁸⁶ Should international humanitarian law be applicable to these non-state actors, they may furthermore be bound by *jus cogens* norms.

7.2.4. Peace Operations

Transnational organised crime poses a significant and growing threat to peace and security. In 2012, the Security Council recognised in a presidential statement on peace building that transnational organised crime may ‘negatively impact the consolidation of peace in countries emerging from conflict’.³⁸⁷ Consequently, the implications of TOC for stabilisation processes and peace operations ought to be considered, since these have largely been absent from mandates, strategic guidance and competence bestowed upon peace operations. TOC has only been referenced a few times, as in the 2008 Capstone Doctrine or the New Horizon process that unfolded from the 2009 New Partnership Agenda.³⁸⁸ Conflict affected and fragile regions, such as Afghanistan that has a substantial narco-economy, would benefit from planning and operational support to tackle TOC.

Peace operations by the United Nations have so far rarely included active measures to combat TOC within their mandates. Instead measures have been implemented and developed on an *ad-hoc* basis. That being said, the mere presence of peace operations may act as a deterrent for organised criminal groups. In order to effectively address TOC, peace operations require specific capabilities for information gathering and analysis so as to gain insight into the organised criminal groups and their activities. Importantly, the United Nations would have to integrate a variety of international and national experts so as ‘to develop adequate, integrated policy responses on strategic, operational, and tactical levels’.³⁸⁹ The threats posed by TOC would have to be integrated in mission mandates and planning, with experts supporting assessment and planning to reinforce capacities for analysis and response. Mandates ought to also clearly state long-term and short-term goals, such as building state capacity or the enforcement of human rights and international law, to ensure that peace operations can effectively tackle TOC. As multiple actors are involved in

³⁸⁶ *ibid* 63.

³⁸⁷ Walter Kemp, Mark Shaw and Arthur Boutellis, ‘The Elephant in the Room: How Can Peace Operations Deal with Organized Crime?’ (International Peace Institute 2013) 7.

³⁸⁸ *ibid*.

³⁸⁹ *ibid* 57.

TOC, from organised criminal groups to government elites, it may be advisable to develop national justice capacity by, for example, ‘placing particularly vulnerable sectors under international oversight for an interim period’.³⁹⁰ Peace operations must also be given the opportunity to cooperate with other actors, such as other affected states and IGOs, since they are limited to their area of operation while organised criminal groups act transnationally. As a result, peace operations may ‘(i) serve as delivery vehicles (for governmental functions such as border control and fighting organised crime), (ii) serve as a coordination mechanism between other actors [...] or (iii) more simply act as a clearinghouse and analytical focal-point’.³⁹¹

Peace operations have also influenced or even reinforced transnational organised crime, as they may provide stability and predictability that allows TOC to flourish. Moreover, international sanctions or embargoes have inadvertently rewarded political and military structures affiliated with organised criminal groups, ‘altering economic opportunity structures in a manner that favours those who are already connected to illicit commerce’.³⁹² An example is the so called ‘Arizona Market’ in Bosnia, an open-air black market that set-up in close proximity to thousands of peacekeepers and brothels that catered for the commercial sex demand that these peacekeepers generated.³⁹³

Nowadays, peace operations ought to be empowered to more effectively combat TOC, since they may prove effective with their security, peace-building and state-building tasks. A more proactive approach should be adopted so as to create a multidisciplinary strategy for stabilising societies, including measures to address and eradicate TOC, since peace operations and TOC converge in regions riddled by conflict.

7.3. Conclusion

In order to protect human rights and the rule of law, a more efficient approach is needed to combat transnational organised crime. Organised criminal groups currently benefit from legal loopholes, taking advantage of globalisation and as a result prevent states to efficiently suppress TOC on their own. Hence, a targeted and comprehensive approach is required on an international level. Traditional measures, such as international

³⁹⁰ Wibke Hansen, ‘The Organized Crime – Peace Operations Nexus’ (2014) 5 Prism 63, 74.

³⁹¹ James Cockayne and Daniel Pfister, ‘Peace Operations and Organised Crime’ (2008) Geneva Papers 2 <https://www.ipinst.org/wp-content/uploads/publications/geneva_paper_2.pdf> accessed 20 June 2016, 43.

³⁹² *ibid* 6.

³⁹³ *ibid*.

cooperation, must be regularly reviewed and more coordinated action promoted. A human rights approach ought to be included within mutual legal assistance treaties and must provide an adequate legal framework so as to ensure efficient international cooperation in criminal matters. International law enforcement agencies must possess the resources and expertise to identify and curb transnational organised crime, further cooperating to prevent criminals from benefiting from any legal loopholes. So as to keep up with technological advances, special investigative techniques ought to be used to detect and prosecute TOC. However, it is important that SITs are adequately regulated and measures are in place that guarantee the protection of human rights and prevent abuse. With regards as non-traditional measures, it is worth considering the system of transnational criminal law as it provides a solid foundation for international cooperation in the sphere of criminal law. Moreover, the existence of such a field of law would enable to establishment of an international prosecution mechanism to overcome the limitations of the current system to investigate, prosecute and convict organised criminal groups. Since transnational organised crime has risen to the ranks of a security problem, it is worth considering whether the organised criminal groups associated with these crimes ought to be liable under international humanitarian law as armed non-state actors. And finally, the mandate of peace operations ought to be expanded to include measures to counter TOC, in addition to their security, peace-building and state-building tasks.

CHAPTER VIII

CONCLUSION

There are no easy solutions to the fight against transnational organised crime. Until now, international cooperation in the fight against transnational organised crime has been characterised by the definitional opaqueness of TOC and the complexity intrinsic to law enforcement and judicial cooperation on an international level. That being said, the 2000 Convention against Transnational Organised Crime (UNTOC) marks a major development in international cooperation in criminal matters. Its flexibility, namely the fact that it is broad in scope and provides a ‘tool-box’ for international cooperation, allows it to address a variety of transnational organised crime while fulfilling relatively straightforward conditions, *i.e.* transnationality and involvement of an organised criminal group. However, its flexibility is also its weakness, since the UNTOC imposes few specific obligations upon states parties. Moreover, mandatory obligations are often formulated in such a way so as to accommodate the means and needs of state parties as is the case with Article 11(6), which ‘reserves the description of offences and applicable defences ‘to the domestic law of the State Party’’,³⁹⁴ and as such ‘the impact of the principle of legality and *lex certa* is more difficult to assess’.³⁹⁵ New practices and legal innovations, such as the establishment of joint investigation teams or the integration of other fields of law, need to be considered in order to address all facets of TOC, be it cross-border criminality or economic changes. An integrated and comprehensive strategy, which takes into account the fluid, globalised nature of criminal networks, as well as their sophisticated tactics, needs to be developed. As such, the research conducted aimed to identify the strengths and weaknesses of the United Nations’ Convention against Transnational Organised Crime (UNTOC) and the European Union’s (EU) framework, as well as take advantage of a comparative analysis so as to determine whether the international legal system may benefit from elements employed at EU level.

The analysis has shown that the strengths of the UNTOC lie in the fact that the convention is not subject specific, broad in scope and its definition of transnational organised crime may be applied to a wide array of crimes. Furthermore, the convention provides a solid basis for mutual legal assistance and law-enforcement cooperation. Unlike a majority of crime suppression conventions, such as the UNCAC or the 1988 UN Drug

³⁹⁴ Boister (n 99) 146.

³⁹⁵ *ibid* 146.

Convention, the UNTOC may be used so as to prosecute and punish a wide range of criminal activities, from drug trafficking to identity-related crime, provided that these activities are committed by an organised criminal group and are ‘serious’ in nature. The convention is broad in scope as it potentially incorporates all transnational serious crime, including, for example, wildlife and forest crime. Moreover, the UNTOC’s scope is broadened as it ‘pursued a double strategy of prevention – one strategy against the basic crimes (those proscribed in the Protocols and as serious crimes by the parties) and one against the logistical/organizational crimes ([...] participation in an OCG, corruption, money laundering, and obstruction)’.³⁹⁶ With regards as mutual legal assistance, article 18 provides a broad basis for assistance sought for offences, which are transnational in nature and involve an organised criminal group. Article 18 improves MLA through the establishment of central authorities, as well as the inclusion of new possibilities for enabling investigations through the transmission of information and evidence. Further, the UNTOC places greater emphasis on liaison and consultation than previous instruments. The convention also recognises the importance of law-enforcement cooperation and promotes the effective exchange of information and close cooperation between agencies in order to avert and tackle all forms of transnational organised crime. Finally, the ‘specific offences in the UNTOC to which it applies in terms of article 3(1)(a) also contain within their elements OCG, serious crime, and transnationality concepts, showing how all-pervading these concepts are as triggers to enable international cooperation within the UNTOC’.³⁹⁷

Conversely the UNTOC’s weaknesses stem, in part, from its strengths. The convention’s flexibility means that it cannot be used to prescribe to state parties what to criminalise and when to apply its provisions, as the convention may be applied to a variety of criminal activities and discretion remains with state parties. Furthermore, the definition breadth of TOC means that it may be seen as a principle rather than a specific crime. As such, state parties’ complicity relies on non-specified serious crimes. As such, it appears beneficial had specific crimes been enumerated or elements included that describe organised criminal groups, provided that the former are regularly updated. In addition to the above, the UNTOC does not address single, *ad hoc* operations, which are increasingly responsible for TOC today. The UNTOC also disregards the increasingly horizontal based structure of organised criminal groups, as well as the growing nexus between TOC and, for

³⁹⁶ *ibid* 137.

³⁹⁷ *ibid* 136.

example, terrorism or global finance. Moreover, mutual legal assistance and, in particular, law-enforcement cooperation must be further developed and adapted to TOC so as to enable, among others, effective intelligence sharing and cross-border police cooperation. That being said, law-enforcement cooperation remains controversial, with joint investigation teams being undermined and judicial and policing authorities being viewed by state parties as exclusively sovereign authorities. As a whole, the state parties remain wary of using the UNTOC as it does not provide a clear, elaborate concept upon which states may rely, legislate and train around. Finally, with regards to implementation, key challenges include, but are not limited to, 'state capacity, national concern, institutional constraints on a domestic level and the availability of monitoring mechanism'³⁹⁸ as well as external and internal factors. In order to improve the UNTOC's effectiveness and assure its implementation, state parties ought to support the implementation of an effective monitoring mechanism. Rather than establishing a new mechanism, existing instruments should be strengthened with support of the international community. All state parties concerned ought to participate in a more dynamic monitoring mechanism, intended to cultivate constructive dialogue.

The United Nations' Convention against Transnational Organised Crime definition of organised crime incorporates various transnational organised crimes, which can function as basis for international criminal cooperation. Although it enables broad suppression, precise denunciation is almost impossible. The UNTOC merely serves as a framework of international legislation and facilitates cooperation between state parties. It does not constitute an operational treaty, which oversees specific crime-fighting activities.³⁹⁹ That being said, the convention symbolises a milestone with regards to international criminal law, as it brought about unprecedented opportunities for transnational cooperation in criminal justice. Yet, its framework could have been strengthened through the inclusion of further mandatory obligations for state parties rather than merely functioning 'as just another case of soft law codifying international best practices in criminal justice'.⁴⁰⁰

The comparative analysis has shown that weaknesses remain and regional frameworks are not necessarily more effective, although regional cooperation in the field of transnational organised crime is said to be more effective as it takes advantage of

³⁹⁸ Brunelle-Quraishi (n 84) 127.

³⁹⁹ Standing (n 2).

⁴⁰⁰ van Dijk (n 217) no page.

opportunities offered by a politico-economic union, such as the European Union. That being said, regional cooperation may subvert common global standards or lead to criminal activities spreading into more vulnerable regions. The EU's framework for combatting transnational organised crime does not substantially differ from the United Nations' framework, albeit introducing more detailed and mandatory provisions. Approximation of member states' legislation in the field of organised crime remains rather low, albeit the introduction of framework decisions. Especially, since implementation and failure to comply cannot be brought before the European Court of Justice. Nevertheless, the Treaty of Lisbon provides the opportunity for more sustainable and consistent policy-making in the field of organised crime.⁴⁰¹ The 'fundamental difference between traditional legal assistance and "the European way" lies in the principle of mutual recognition applied within the Area of Freedom, Security and Justice'.⁴⁰² Thus, the European Union may be better equipped to combat transnational crime by reinforcing EU integration in this area,⁴⁰³ whilst the international legal framework strongly relies on state parties' transposition of international norms.

Against this backdrop, the following is suggested with a view to future developments. A more efficient approach is needed to combat transnational organised crime. Organised criminal groups currently benefit from legal loopholes, taking advantage of globalisation and as a result prevent states from efficiently suppressing transnational organised crime. Hence, a targeted and comprehensive approach is required on an international level. Traditional measures, such as international cooperation, must be regularly reviewed and more coordinated action promoted. A human rights approach ought to be included within mutual legal assistance treaties and international law enforcement agencies must be provided with the resources and expertise to identify and curb TOC. With regards to non-traditional measures, it is worth considering the system of transnational criminal law as it provides a solid foundation for international cooperation in the sphere of criminal law. Since transnational organised crime has risen to the ranks of a security problem, it is worth considering whether the organised criminal groups associated with these crimes ought to be liable under international humanitarian law as armed non-state actors. And finally, the mandate of peace operations ought to be expanded to include TOC, as they may prove effective with their security, peace-building and state-building tasks.

⁴⁰¹ Allum and den Boer (n 43).

⁴⁰² Rackow and Birr (n 310) 1096.

⁴⁰³ Ventrella (n 311).

Yet, in order to effectively tackle TOC, measures and aspects beyond the realm of this thesis, must also be considered. After all, cooperating with the private sector and enhancing international cooperation through networks could be alternative routes to success.

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